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Submission to Justice Canada on the Criminalization of Coercive Control

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Thank you for this opportunity to provide our input on the creation of a potential coercive control offence in the context of intimate relationships. Three of the authors – Jennifer Koshan, Janet Mosher and Wanda Wiegers – are professors of law at the universities of Calgary, York, and Saskatchewan respectively. Through a joint SSHRC-funded research project, they have explored in depth the broad array of legislative provisions addressing intimate partner violence in all Canadian jurisdictions,[1] examined the intersections of different legal domains,[2] and identified best practices.[3] The fourth author, Shushanna Harris, is a lawyer and doctoral candidate at Osgoode Hall Law School whose research is focused on the experiences with the criminal law system (CLS) of Black women survivors of intimate partner violence. She is also a spoken word poet, and we begin our submission with her poem, honouring Daniella Mallia, a 23-year-old Black woman who was murdered by her former boyfriend on August 18, 2022.[4]

Daniella Mallia contacted the police to report the harassing and threatening communications she was receiving from her ex-boyfriend, Dylan Dowman, a Black man. She provided police with the evidence demonstrating the threatening behaviour by Dowman and communicated her fears for her safety. She also advised the police that she did not want him charged for fear of retaliation and did not want to see "another Black man go to jail." Officers Alfonso and Lee spoke with Daniella Mallia for 39 minutes and with Dowman for only 3 minutes. They failed to exercise their duty, pursuant to mandatory arrest/charging policies, to arrest Dowman as there were reasonable grounds to believe that an offence had occurred. Instead, they cautioned Daniella Mallia and dismissed the case as "he said, she said," one of "mutual harassment." Three days later, she was found dead in an underground parking garage in Toronto. The cause of death was multiple gunshot wounds. Dowman was subsequently arrested and is currently in custody facing first-degree murder charges. It appears that no risk assessment was conducted, nor a proper investigation undertaken (which would have uncovered Dowman's firearms prohibition). Among

[1] Jennifer Koshan, Janet Mosher, and Wanda Wiegers, *Domestic Violence and Access to Justice: A Mapping of Relevant Laws, Policies and Justice System Components Across Canada* (2020 CanLIIDocs 3160), online: <https://canlii.ca/t/szxl> (updated August 2022).

[2] Wendy Chan, Michaela Keet, Jennifer Koshan, Janet Mosher, and Wanda Wiegers, "Domestic Violence and Access to Justice Within and Across Intersecting Legal Systems" (2023) 35:1 Can J Fam L 1, online: <https://commons.allard.ubc.ca/can-j-fam-l/vol35/iss1/>.

[3] Jennifer Koshan, Janet Mosher, and Wanda Wiegers, "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" (April 30, 2021, updated August 1, 2023); online: <https://ssrn.com/abstract=3995519>.

[4] The account we provide here of the circumstances of Daniella Mallia's murder are drawn from news reports: Adam Carter files, "Toronto Cop Who Allegedly Ignored Domestic Violence Report Charged After Woman's Death," *CBC News* (29 March 2023), online: <www.cbc.ca/news/canada/toronto/toronto-police-misconduct-charge-1.6794594>; and Adam Carter, "Toronto Cop Who Allegedly Ignored Domestic Violence Report Charged After Woman's Death," *CBC News* (29 March 2023), online: <www.cbc.ca/news/canada/toronto/toronto-police-misconduct-charge-1.6794594>.

the factors leading the adjudicator in Constable Lee's misconduct hearing to reject the Toronto Police Services' argument that Constable Lee should be dismissed was that his training had been cut short by the COVID-19 pandemic and he had never taken specialized courses in intimate partner violence. As we detail more fully below, the sobering circumstances surrounding the murder of Daniella Mallia poignantly reveal many concerns about how the CLS currently responds to intimate partner violence in general, and more specifically to racialized women. These concerns caution against adding a new offence of coercive control.

Ode To Her

They thought her life was a joke

Or a folk tale

Or just another story told around the water cooler in passing as the day unfolds

Bypassing her truth

Narrating her hurt

Brushing it under the rug as mere phone calls and text messages

Nothing to sound the alarm – no need to worry!

Dismissing her claim as "he said, she said"

Not penetrating what she said

Her fear for her life

Until she ended up dead

Dead

Shot multiple times in a parking garage

Is this a mirage – some form of illusion?

A young Black woman dead searching for solutions?

Life just beginning

Yet, cut short by racist underpinnings

She turned to the police for a chance to be free

Reporting her ex-boyfriend's threats and harassment

She pleas

Only to have the police cease the investigation

Deeming it not worthy of further examination

Police spoke to him for 3 minutes

That was enough

This inquiry was limited as she wasn't enough

Enough to be believed

Enough to experience pain

Enough to lay charges

Until she was slain

Police are there to protect you

Which you, Might I ask

Someone with pigment much lighter than mine

A Blonde, a brunette, those with hair unlike mine

Truth is, we live in a two-tiered system of police protection

One stands behind white bodies, though not without its flaws

Another for the racialized "other"- Black and indigenous people – ignoring their cause

This young Black woman paid the ultimate price of what Black protection cost

Being a Black woman is hard

Wearing an armour for our own protection

As we are the constant recipients of rejection

We stand alone

Always on guard

Even when battered, bruised, and threatened by those who profess love

Securing help, is a tenuous call

Intimate partner violence leaves Black women at the intersection of lonely and survival

Discussion in our circles is already shunned

And no one comes until its all said and done

We are often blamed for the abuse

Worse, criminalized for resisting the abuse

39 minutes the officer spoke to her

From her lips to his deaf ears

Her fear was neglected

But not without a caution signalling what he accepted

He had the proof, yet concluded she was wasting his time

So he lied, she died, and I stand here wondering why

I did not know her, but I know she was brave

She threw herself at the mercy of the system hoping to be saved

Not realizing the next step was her grave

The system showed its true colours, failing her for what she lacked

She was Black, take it in – that's a lot to unpack

(Written by Shushanna Harris
In memory of Daniella Mallia – "I did not know her, but I know she was brave!")

A. Overview

It is imperative, in our submission, that actors in all legal domains acquire a nuanced and contextual understanding of coercive control derived from an intersectional analysis that attends to how multiple systems of oppression interact to shape the tactics of coercion and control. However, we do not support the criminalization of coercive control, either as a standalone offence or within a broader offence of domestic abuse/violence. In our view, it is the former – the acquisition of deep and contextualized knowledge – and not criminalization that holds promise in enhancing safety for women and children. In Part B, we provide a brief overview of coercive control, highlighting three areas of contestation. We do so with a view to illuminating both the many challenges of translating the theory of coercive control into a criminal prohibition and the complex intersectional understanding of coercive control that legal system actors need to acquire.

In Part C, we examine lessons learned from past and current criminalization initiatives. Here we address the differential impacts of criminalization, focusing on the experiences of Black women. These lessons, we argue, underscore not only the lack of efficacy of criminalization in enhancing safety, but its infliction of harm. In Parts D and E, we continue the theme of lessons learned, but here considering what can be learned from recent family law reforms regarding the translation of coercive control into the legal realm, and from our ongoing research on intersecting legal domains. In Part F we sum up the reasons why we do not support the creation of a new criminal offence, explain why Bill C-332 is particularly problematic, and offer suggestions of what needs to be done to address coercive control and gender-based violence.

B. Coercive Control

Coercive control captures the reality that through tactics of isolation, manipulation, humiliation, surveillance, micro-regulation of gender performance, economic abuse, intimidation, and threats, abusive partners instill fear, control, and entrap their victims. The metaphor of a cage is often used to describe coercive control, with the various tactics used by perpetrators forming the bars that entrap the target, denying her liberty and autonomy. These tactics cause deep psychological, emotional, spiritual, and economic harm.[5] While there are multiple and varied definitions of coercive control in the literature, Hamberger et al (who document 22 different conceptualizations) suggest that they share three common characteristics: (1) intention or motivation of the perpetrator to control the target; (2) the perception of the behaviour as negative by the target; and (3) the perpetrator's ability to make credible threats.[6] Barlow and Walklate conclude that common across all definitions is a focus on a course of conduct; a pattern of behaviour that undermines the autonomy of another.[7] Importantly, there is mounting evidence that the degree of coercive control in a relationship is more predictive of severe, and indeed lethal violence, than discrete acts of prior physical violence.[8] Coercive control is more likely to persist after separation, and the prior level of control is also predictive of post-separation physical/sexual assault.[9]

There remain however, sharp disagreements about coercive control, including (1) whether physical violence is an essential element; (2) whether it is experienced primarily by women; and (3) how many acts, of what sort, and over what period of time equate with coercive control. Although coercive control is now explicitly encompassed within the definition of family or intimate partner violence in many statutes in Canada, as we explore more fully later in our submission it tends to be undefined and susceptible to misunderstanding in relation to these and other issues.[10] Without a clear and shared understanding of the meaning of coercive control, the offence proposed by Bill C-322 is likely to be misunderstood, misused, resisted, and/or applied differently by different judges, with negative results, especially for marginalized women.

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[5] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007); Evan Stark and Marianne Hester, "Coercive Control: Update and Review" (2019) 25:1 Violence Against Women 81. See also Emma Williamson, "Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control" (2010) 16:12 Violence Against Women 1412; Andy Myhill and Katrin Hohl, "The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence" (2019) 34:21–22 J of Interpersonal Violence 4477; and Bridget A Harris and Delanie Woodlock, "Digital Coercive Control: Insights from Two Landmark Domestic Violence Studies" (2019) 59:3 Brit J of Criminol 530.

[6] L Kevin Hamberger et al, "Coercive Control in Intimate Partner Violence" (2017) 37 Aggression and Violent Behavior 1.

[7] Charlotte Barlow and Sandra Walklate, *Coercive Control* (Routledge, London, 2022). The introductory chapter, "What is 'coercive control'" provides an excellent overview of the literature on coercive control.

[8] See Stark and Hester, *supra* note 5; and Holly Johnson et al, "Intimate Femicide: The Role of Coercive Control" (2019) 14:1 Feminist Criminology 3.

[9] See Stark and Hester, *supra* note 5 at 89–91. See also Statistics Canada, *Spousal violence in Canada, 2019,* by Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00016-eng.htm>, (45% of victims of who self-reported domestic violence experienced violence after leaving their partners).

[10] See e.g. *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1); *Family Law Act*, SBC 2011, c 25, s 38(d); *The Disclosure to Protect Against Intimate Partner Violence Act*, SM 2022, c 44, s 1(1); and *Intimate Partner Violence Intervention Act*, SNB 2017, c 5, s 2(1)(a).

i) Whether Physical Violence is a Necessary Element of Coercive Control

A persistent disagreement in the literature is whether a pattern of coercive control, by definition, requires the presence of some degree of physical violence.[11] That a regime of terror can be created without physical violence is well illustrated, for example, by the case of *R v Craig*.[12] There is an abundance of research documenting consistent reports from survivors that the harms of physical violence are overshadowed by the scars left by isolation, humiliation, gaslighting, and threats.[13] Research also establishes the harm to children, including adverse impacts on brain development, of exposure to the stressful and toxic environment created by a coercive and controlling parent.[14] Research is just beginning to document the ways in which coercive control is exercised directly against children, including post-separation.[15] In sum, in our view it is clear that the tactics of coercive control need not include physical or sexual violence directed at the target in order to produce serious and lasting harm and to warrant resources and supports. Given the focus of the CLS on incidents of physical aggression in which seriousness is tied to the severity of physical injury (e.g. assault causing bodily harm), embedding this understanding of coercive control poses significant challenges.

ii) Gender and Coercive Control

Much of research in the field proceeds on the assumption of a rigid gender binary and the debates centre on whether women and men are equally as likely to be perpetrators of coercive control. Statistics are available for both police-reported[16] and self-reported[17] rates of intimate partner violence. While the research instrument often used to capture self-reported intimate partner

[11] See Stark, *supra* note 5 for the view that physical violence is not a requisite element and Michael Johnson whose view it is: Michael P Johnson, "Gender and types of intimate partner violence: A response to an anti-feminist literature review" (2011) 16:4 Aggression and Violent Behavior 289. See also Barlow and Walklate, *supra* note 7.

[12] 2011 ONCA 142 (CanLII) (involving a woman who killed her abusive partner. Evan Stark testified as an expert witness and found that the deceased had exercised coercive control over the accused, including tactics of "emotional and psychological abuse, economic and social isolation, "low level" physical abuse and intimidation and, … the threat of taking the [accused's] son from her" (at para 27). She was charged with first degree murder but convicted of manslaughter, and her sentence was reduced on appeal).

[13] See e.g. Diane R Follingstad, "The role of emotional abuse in physically abusive relationships" (1990) 5:2 Journal of Family Violence 107; and Deborah Epstein and Lisa Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167 U Penn L Rev 399 at 418.

[14] See Sibylle Artz et al, "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014) 5:4 International J of Child, Youth and Family Studies 493, cited by Karakatsanis J in *Barendregt v Grebliunas,* 2022 SCC 22. See Linda C Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed (2017 CanLIIDocs 2: Canadian Legal Information Institute, 2020), at 6.2.5.1, online (ebook): *Canlii* <canlii.ca/t/ng>; and Center on the Developing Child, "Toxic Stress" (2023), online: *Harvard University* <developingchild.harvard.edu/science /key concepts/toxic-stress/>.

[15] See Emma Katz, Anna Nikupeteri, and Merja Laitinen, "When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence" (2020) 29:4 Child Abuse Review 310; and Emma Katz, *Coercive Control in Children's and Mothers' Lives* (Oxford University Press, 2022).

[16] Statistics Canada, *Family violence in Canada: A statistical profile*, *2019* by Shana Conroy, Catalogue No 85-002-X (Ottawa: Minister of Industry, 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00001/03-eng.htm>.

[17] See *ibid*, reporting on the 2019 General Social Survey on Canadians' Safety (Victimization).

violence (the General Social Survey – Canadians' Safety) includes questions that align with many of the common tactics of coercive control, the reports on the data generated through the survey include only those acts/tactics that would constitute a criminal offence. Police data confirms that approximately 80% of those who report crimes in relation to their intimate relationships identify as women.[18] Similarly, data show that approximately 80% of the victims of intimate partner killings are women.[19] In the most recent General Social Survey (2019), 4.2% of women and 2.7% of men self-reported experiencing spousal violence in the preceding 5 years; by contrast, in 2014, 3.5% of women and 4.2% of men reported being victims of spousal violence in the preceding 5 years.[20]

Stark, Johnson, and others have attempted to explain the discrepancy between police-reported and self-reported intimate partner violence by arguing that police-reported data capture primarily relationships characterized by coercive control (of which men are overwhelmingly the perpetrators), while self-reported data capture primarily situational couple violence (which is, so the argument goes, perpetrated in roughly equal numbers by men and women).[21] This explanation has been critiqued on many grounds, as have the typologies on which it is based, but we need not address these here.[22] Rather we wish to highlight two points.

First, while we believe there is ample evidence to support the view that women are the primary victims of coercive control, we also agree with scholars who have argued that the relationship between "gender" and coercive control needs to be explored well beyond the question of whether men and women are equally likely to engage in coercive control. Important is consideration of how the performance of "gender" is regulated through tactics of coercive control.[23] Much of the micro-regulation by coercive controllers centres upon the rigid enforcement of the highly gendered scripts associated with "traditional relationships," with punishments attached to deviations. As has been pointed out by many scholars, coercive control is often hard to "see" because its tactics mirror – though frequently in more extreme forms – many of the elements of the script of romantic, heterosexual relationships (he's jealous,

[18] *Ibid*. 79% of victims of police-reported intimate partner violence were women, and 45% of all female victims of police-reported violence were victimized by an intimate partner).

[19] Canadian Centre for Justice and Community Safety Statistics, Statistics Canada, "Brief: Statistical profile of intimate partner violence in Canada" submitted to the House of Commons Standing Committee on the Status of Women, (February 15, 2022) online: <www.ourcommons.ca/Content/Committee/441/FEWO/Brief/BR11575288/br-external/StatisticsCanada-Brief-e.pdf> at 10.

[20] *Ibid* at 3; and Statistics Canada, *Family violence in Canada: A statistical profile, 2014*, Catalogue No 85-002-X, 7 December 2021 correction (Ottawa: Statistics Canada, 2016), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14303-eng.htm>.

[21] See, for example, Michael Johnson, Janel Leone, and Yili Xu, "Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required" (2014) 20:2 Violence Against Women 186.

[22] See e.g. Molly Dragiewicz and Walter S DeKeseredy, "Claims about Women's Use of Non-fatal Force in Intimate Relationships: A Contextual Review of Canadian Research" (2012) 18:9 Violence Against Women 1008 at 1011–13 (noting that these surveys are flawed and acontextual, e.g. by failing to distinguish between offensive/controlling violence typically used by men and defensive violence typically used by women). Moreover, survey data show that women report more severe forms of violence and are more likely to fear for their lives.

[23] See e.g. Kristin Anderson, "Gendering Coercive Control" (2009) 15:12 Violence Against Women 444.

possessive, passionate, wants to spend all his time with her, is concerned about how she looks and who she sees, etc.).[24] Of course, when coercive control is obscured, so too are its harms.

Additionally, that the concept of coercive control has, to date, been developed largely in the context of heterosexual relationships has rendered it particularly difficult to "see" in relationships that are not heterosexual and not between cisgendered partners. More broadly, because gender inequality has been theorized as central to the enablement of coercive control (see Evan Stark, for example[25]), the role that colonialism, racism, heterosexism, transphobia, ableism, and other structures of oppression play in shaping the tactics and effects of coercive control is often erased.[26]

For example, for many Black women who experience intimate partner violence, their experiences are shaped by the multiplicity of their identities, including, but not limited to, race, gender, class, and immigration status.[27] These identities are not mutually exclusive but intertwined, defining Black women's existence and positioning in society and the mechanisms they employ to survive. As such,

> an intersectional analysis is essential to any attempt to address gender-based violence. Such an analysis contextualizes women's experiences by paying attention to the social and economic forces that produce structural inequalities, such as poverty and racism, that marginalize identifiable groups of women and make them more vulnerable to violence.[28]

For Black and other marginalized women, it is not only gender inequality that enables the repertoire of controlling and coercive tactics of their abusive intimate partners, but racism, homophobia, ableism, colonialism, and classism.[29] As such, a fulsome understanding of coercive control requires deep engagement with various communities of women to understand how coercive control manifests, how its targets are impacted, and how these multiple structures of oppression shape survivors' access to supports and resources, including the CLS.

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[24] See e.g. Kate Fitz-Gibbon and Elizabeth Sheehy, "The Merits of Restricting Provocation to Indictable Offences: A Critical Analysis of Provocation Law Reform in Canada and New South Wales, Australia" (2019) 31 Can J Women & L 197 at 218 (noting that when men's revenge results in intimate partner femicide, this violence is often romanticised as a 'crime of passion.')

[25] Stark, *supra* note 5.

[26] See e.g. Janice Ristock et al, "Impacts of colonization on Indigenous Two-Spirit/LGBTQ Canadians' experiences of migration, mobility and relationship violence" (2019) 22:5–6 Sexualities 767; Beth E Richie and Erin Eife, "Black Bodies at the Dangerous Intersection of Gender Violence and Mass Criminalization" (2021) 30:7 J of Aggression, Maltreatment & Trauma 877; and Courtney K Cross, "Coercive Control and the Limits of Criminal Law" (2022) 56 UC Davis Law Review 195.

[27] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford Law Rev 1241 at 1242.

[28] Honourable J Michael MacDonald, Leanne J Fitch, and Dr. Kim Stanton, *Turning the Tides: Final Report of the Mass Casualty Commissioner, Vol. 3* (March 2023), online: <https://masscasualtycommission.ca/updates/turning-the-tide-together-the-final-report-of-the-mass-casualty-commission/#:~:text=Turning%20the%20Tide%20Together%20is,to%20read%20at%20masscasualtycommission.ca> [NS Mass Casualty Commission].

[29] As Richie and Eife, *supra* note 26 explain, gender violence is a system of interlocking spheres.

While statistics on the experiences of women who are socially marginalized are more limited, recent survey data of self-reported violence reveal that the interplay of multiple structures of oppression results in higher rates of being victimized by criminal offences in their intimate relationships, including Indigenous women,[30] racialized women,[31] young women,[32] women with disabilities,[33] sexual minority women,[34] and women living in rural and remote areas.[35] As such, unless a nuanced and intersectional understanding of coercive control is shared among actors in the CLS, the experiences of those who are most deeply impacted by gender-based violence will be rendered invisible.

iii) How Many Behaviours, What Behaviours and Over What Period of Time?

A further challenge arises in discerning the quality, quantity, and character of actions/behaviours and the relevant time period that give rise to coercive control. These questions have arisen in debates about how best to conceptualize coercive control, in critiques of various typologies of intimate partner violence (can we, for example, really distinguish between coercive control and

[30] See e.g. Statistics Canada, *Violent victimization and perceptions of safety: Experiences of First Nations, Métis, and Inuit women in Canada, 2022*, by Loanna Heidinger, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2022).

[31] See e.g. Statistics Canada, *Intimate partner violence: Experiences of visible minority women in Canada, 2018,* by Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) (noting that while racialized women overall experience domestic violence at similar rates to non-racialized women, the numbers differ for different ethno-cultural groups). Racialized women may be more susceptible to abuse associated with migration status.

[32] See Statistics Canada, *Intimate partner violence: Experiences of young women in Canada, 2018*, by Laura Savage, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021).

[33] See Statistics Canada, *Intimate Partner Violence: Experiences of women with disabilities in Canada, 2018*, by Laura Savage, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021).

[34] See Statistics Canada, *Intimate partner violence: Experiences of sexual minority women in Canada, 2018*, by Brianna Jaffray, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) (including lesbians and bisexual women, who reported domestic violence from both same and different sex partners). See Statistics Canada, *Sexual minority people almost three times more likely to experience violent victimization than heterosexual* people (Ottawa: Statistics Canada, 2020) online: *The Daily* <www150.stat can.gc.ca/n1/daily-quotidien/200909/dq200909a-eng.htm> (excluding domestic violence, which is to be reported at a later date). Until recently, data has been collected in a manner that presupposes a gender binary and that is grounded in heteronormative assumptions. This limited and problematic framing tends to obscure the violence in many relationships and is addressed by, among many others, KellyAnne Malinen, "'This was a Sexual Assault': A Social Worlds Analysis of Paradigm Change in the Interpersonal Violence World" (2014) 37:3 Symbolic Interactions 353; Valérie Grand'Maison and Edelweiss Murillo Lafuente, "Dys-Feminicide: Conceptualizing the Feminicides of Women and Girls with Disabilities" (2022) 21:1 Sociation 129; Michaela Rogers, "Challenging cisgenderism through trans people's narratives of domestic violence and abuse" (2019) 22:5-6 Sexualities 803; and Emily M Lund, "Interpersonal Violence Against Sexual and Gender Minority Individuals with Disabilities" in Emily M Lund, Claire Burgess, and Andy J Johnson, eds, *Violence Against LGBTQ+ Persons: Research, Practice, and Advocacy* (Springer, 2020) 726.

[35] Canadian Centre for Justice and Community Safety Statistics, Brief, *supra* note 19.

situational couple violence?),[36] and in the development of risk assessment and screening tools.[37] In the family law realm what many of us would characterize as "coercive control" is frequently minimized as mutual "high conflict" and/or communication difficulties. Moreover, as noted above, coercive control can be difficult to see because it resembles in so many ways heteronormative scripts of romantic love and gendered roles. In their research, Walklate and Fitz-Gibbon have probed the complex relationship between autonomy and intimacy that exists in all intimate relationships and queried how compromise can be clearly distinguished from control, when does control become coercive, and when does a "normal" relationship become criminal?[38]

These challenges are evident in the language of Bill C-332 (for our summary of the Bill, see Appendix B). For example, how many repetitions of behaviour are required to satisfy the requirement of having "repeatedly or continuously" engaged in coercive control? Controlling or coercive conduct is itself not defined, but rather identified by its impact, an approach that, as we canvass in our conclusion, is highly problematic from a constitutional standpoint.

iv) Coercive Control and the Legal System

The above review of coercive control makes plain that settling on a definition of coercive control is not a simple matter, nor is establishing/proving it in a legal context.[39] Our prior research, drawing on interviews with service providers and lawyers representing survivors in the family law, child protection, civil protection order, and immigration law realms, underscores the challenges of establishing coercive control.[40] Survivors of coercive control often experience profound fear around disclosure; many have been threatened with death, deportation, the loss of their children, and other harms should they disclose. Survivors do not know who, if anyone, they can trust.[41] As the service providers and lawyers we interviewed pointed out, establishing trust takes time and a deep understanding of trauma. Only once trust is established is it possible to learn the details of a relationship that will reveal a pattern of coercive control. Moreover, survivors who are

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[36] See e.g. Jane Wangmann, "Different Types of Intimate Partner Violence – An Exploration of the Literature," 2011, online: <https://pdfs.semanticscholar.org/d831/56262b2c2d757bbe25e42c20d33d91ac78f6.pdf?_ga=2.219244377.1323706134.1598824146-365917392.1598824146>; and Joan S Meier, "Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation" (2017) 70 Rutgers Univ L Rev 115.

[37] See Viktoria Pokman et al, "Mediator's Assessment of Safety issues and Concerns (MASIC): Reliability and Validity of a New Intimate Partner Violence Screen" (2014) 21:5 Assessment 529; and Amy Holtzworth-Munroe et al, "The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48:4 Fam Court Rev 646.

[38] Sandra Walklate and Kate Fitz-Gibbon, "The Criminalisation of Coercive Control: The Power of Law?" (2019) 8:4 Intern J for Crime, Justice and Social Democracy 94 [Walklate and Fitz-Gibbon, "The Power of Law"] at 95 and 108.

[39] *Ibid,* and see Iain Brennan and Andy Myhill, (2022) 62:2 Brit J Crim 468; Barlow and Walklate, *supra* note 7; and Cross, *supra* note 26. More generally, the Supreme Court of Canada has noted that "domestic violence allegations are notoriously difficult to prove": *Barendregt v Grebliunas*, *supra* note 14 at para 144.

[40] See Wendy Chan and Rebecca Lennox, "'This Isn't Justice': Abused Women Navigate Family Law in Greater Vancouver (2023) 35:1 Can J Fam L 81; Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Fam L 297; and Wanda Wiegers, "The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence" (2023) 35 Can J Fam L 183.

[41] NS Mass Casualty Commission, *supra* note 28; Walklate and Fitz-Gibbon, "The Power of Law," *supra* note 38 at 101.

marginalized as a result of colonialism, systemic racism, and other forms of oppression will have good reason not to trust the police or other legal system actors. As was revealed so poignantly to the NS Mass Casualty Commission, "members of marginalized communities, including African Nova Scotian and Indigenous communities, lack safe spaces where they can come forward and talk about their experiences of gender-based violence."[42]

Gathering the evidence to prove coercive control takes skill, time, resources, and appropriate and thoughtful training. In the family law context, where many survivors rely on legal aid funding, it is abundantly clear that the hours funded in no way come close to what is required to establish coercive control.[43] Self-represented litigants who fall outside legal aid eligibility requirements face challenges in understanding that what happened to them was coercive control, in understanding the legal relevance of coercive control, and in adducing the evidence to establish coercive control.

Experience in the criminal law context points to similar concerns. Mandatory charging/arrest policies in Canada direct officers to charge the dominant or primary aggressor. Translating this policy directive into practice has been fraught, with many survivors being charged.[44] For those abused women who are charged, they face a higher risk of wrongful convictions and false guilty pleas.[45] We have noted the complexities of coercive control, the importance of trust to disclosures, the limited education on intimate partner violence that police officers receive (recall here, for example, that Constable Lee had no training whatsoever), and the abusers' ability to manipulate legal systems (claims that a survivor has fabricated evidence of abuse and that the alleged perpetrator is the real victim are pervasive in both family and criminal law, a point we discuss in more detail later in our submission). Therefore, it comes as no surprise that police and/or prosecutors struggle to identify the actual and/or dominant aggressor. Indeed, Barlow and Walklate question the capacity of criminal law professionals to listen and hear women's voices given time constraints, limited understandings, and the "conceptual assumptions embedded in the kinds of tools in use."[46] In the family law context, many judges struggle to decide as between competing claims of intimate partner violence (often declining to decide as between them or, as

[42] Kristina Fifield, Kat Owens, and Kienna Shkopich-Hunter for the Avalon Sexual Assault Centre and LEAF, "We Matter and Our Voices Must be Heard," Mass Casualty Commission Exhibit COMM0065667 at 9 [Avalon and LEAF].
[43] See e.g. Chan and Lennox, *supra* note 40; and Mosher, *supra* note 40.
[44] See e.g. Patrina Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2021) Violence Against Women 1; Cheryl Fraehlich and Jane Ursel, "Arresting Women: Pro-Arrest Policies, Debates and Development" (2014) 29 J Fam Viol 507; Anita Grace, "They just don't care": Women charged with domestic violence in Ottawa" (2019) 42:3 MLJ 153; and Shoshana Pollack, Vivien Green, and Anke Allspach, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (Toronto: Woman Abuse Council of Toronto, March 2005).
[45] See e.g. *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions (2018) at 227-228; Pollack et al, *ibid* at 13 (noting that mothers and women trying to protect others are especially at risk of false guilty pleas); Senator Kim Pate, *Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women* (2022), online: <https://sencanada.ca/media/joph5la2/en_report_injustices-and-miscarriages-of-justice-experienced-by-12-indigenous-women_may-16-2022.pdf> (noting that Indigenous women with histories of violence and abuse are likely to falsely accept responsibility and punishment even where they have a valid defence).
[46] Charlotte Barlow and Sandra Walklate, "Gender, Risk Assessment and Coercive Control: Contradictions in Terms?" (2021) 61 Brit J Criminol 887 at 889-90.

noted, characterizing the circumstances as "high conflict" or mutual) even though they normally have a great deal more time and evidence than police officers or prosecutors have when deciding whether and whom to charge.

These challenges are also borne out by data from England and Wales where coercive control has been criminalized. Problems for frontline police officers in "seeing" coercive control emerged in early evaluations of the English legislation, as did practitioner misunderstandings of coercive control.[47] A more recent study by Brennan and Myhill found that rates of charges for coercive control were considerably lower than for other domestic abuse offences and that rates of discontinuance were 50% higher, with 6 of 7 cases of coercive control being discontinued due to evidentiary challenges.[48] Earlier research involving interviews with police found that they were unprepared to conceptualize domestic violence as a pattern of behaviour. As Brennan and Myhill point out, "seeing" coercive control requires:

> an appreciation of the wider context of the relationship, as well as an understanding of the gender norms through which the abuse may operate … its interpretation is warped by subjective gender norms and structural inequalities and it is not a discrete incident in a way that lends itself to being evidenced in court through a collection of physical artefacts.[49]

Similarly, Cross questions the criminal law's ability to make sense of domestic violence dynamics, and notes that establishing coercive control will be time-consuming and expensive, often requiring expert evidence.[50]

C. Lessons Learned from Past Criminalization Reforms

The pull of adding a new offence of coercive control lies in the possibility that it would serve to enhance the safety and well-being of women and children. In assessing this potential, we believe that it is critical that the current workings of the CLS in relation to intimate partner violence be closely examined for lessons learned.[51] Brennan and Myhill put this bluntly:

> Any legislature that chooses to criminalize coercive control cannot plead ignorance to the possible abuses and failings of such law. The myriad ways in which legal systems abuse is perpetrated have been clearly demonstrated.[52]

A close examination reveals that:

- past criminal law reforms such as mandatory charging/arrest policies have done little to make survivors safer (theories of general and specific deterrence have not been

[47] Walklate and Fitz-Gibbon, "The Power of Law," *supra* note 38 at 99.
[48] Brennan and Myhill, *supra* note 39 at 471.
[49] *Ibid*.
[50] Cross, *supra* note 26. For an example, see our discussion of *R v Craig, supra* note 12.
[51] *Ibid;* and see Richie and Eife, *supra* note 26. See also the Moment of Truth Letter, (2022) online: <https://njcedv.org/wp-content/uploads/2020/07/Moment-of-Truth-final-002.pdf>.
[52] Brennan and Myhill, *supra* note 39 at 480.

demonstrated in practice, and while some survivors have been made safer, criminal law intervention has aggravated rather than mitigated violence for others[53]);

- criminalization has had differential and harmful impacts, especially for marginalized women and communities;
- most survivors do not turn to the CLS for a host of good reasons including chief among them fear[54] (of retaliation, of child welfare involvement, of poverty and homelessness, of deportation, or racist responses, etc.);
- the legal system is frequently manipulated by coercive controllers; and
- those who do turn to the CLS often experience institutional betrayal.[55]

i) Differential Impacts

It is critically important that attention be paid to the differential impacts of criminalization: the differences in who accesses the CLS, who risks criminalization when they do, who faces credibility discounts, and who experiences institutional betrayal.[56] In our submission, we focus on the experiences of Black women, given the expertise of co-author Shushanna Harris. Many of the points made below hold true for other marginalized women, and we would urge Justice Canada to closely attend to the knowledge and insights shared by Indigenous women,[57] low-income women, racialized women, sexual minority women and gender diverse persons, women with disabilities, women living in rural communities, and women without citizenship, among others. As we noted earlier, attention to how intersecting systems of oppression shape women's lived experiences of intimate partner violence is essential: essential not only in identifying the tactics

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[53] Richie and Eife, *supra* note 26 at 883. See also Cross, *supra* note 26; Leigh Goodmark, "Should domestic violence be decriminalized?" (2017) 40 Harv J Law and Gender 54; Aya Gruber, "The Feminist War on Crime" (2007) 92 Iowa Law Review 741; Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland, University of California Press, 2020); Sandra Walklate and Kate Fitz-Gibbon, "Why Criminalise Coercive Control: The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State" (2021) 10:4 Intern J Crime, Justice and Social Democracy 1 [Walklate and Fitz-Gibbon "Why Criminalise?"]; Sandra Walklate, Kate Fitz-Gibbon, and Jude McCulloch, "Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories" (2018) 18:1 Criminology & Criminal Justice 115 [Walklate et al, "Is more the answer?"].

[54] NS Mass Casualty Commission, *supra* note 28; Walklate and Fitz-Gibbon, "The Power of Law," *supra* note 38 at 101.

[55] Avalon and LEAF, *supra* note 42. As explained in the report, institutional betrayal occurs "when a survivor trusts an institution and turns to it for help or protection" and the institution fails to provide assistance or support (at 8).

[56] *Ibid*; and see Walklate and Fitz-Gibbons, "Why Criminalise?" note that prior law reforms such as mandatory charging improved safety for some women, but resulted in greater state control over others, especially racialized women, Aboriginal women, and women living with disabilities, *supra* note 53 at 4.

[57] For a perspective from Australia, see Emma Buxton-Namisnyk, Althea Gibson, and Peta MacGillivray, "Unintended, but not unanticipated: coercive control laws will disadvantage First Nations women" (August 26, 2022), The Conversation, online: <https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285>. See also Pate, *supra* note 45, on the overcriminalization of Indigenous women in Canada related to factors such as victimization, hyper-responsibilization, and survival of violence. The National Inquiry into Missing and Murdered Indigenous Women and Girls found that the CLS is "failing to protect Indigenous women, girls, and 2SLGBTQQIA people" from sexualized and intimate partner violence (see *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a at 690, online: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>).

of coercive control as we argued earlier, but in understanding how state structures – including the CLS – operate as forms of violence in the lives of many women and hence, their reticence to invoke it.

The reality is that many Black women are loath to invite state intervention into their homes.[58] To invite such scrutiny is to open a pandora's box of potential complications and consequent injustices. These complications manifest in a myriad of ways, including:

- stereotypes rendering Black women unworthy of protection from a system sworn to "protect" all people;
- the real possibility of being arrested themselves when the police are contacted;
- the introduction of other governmental agencies, such as children's aid societies (CAS) and border control officials into an already precarious situation; and
- the possibility of becoming an accomplice to a Black man's demise at the hands of the CLS.[59]

As Walklate and Fitz-Gibbon have observed, the "coercive and controlling behaviours of a partner may be seen as more tolerable to the coercive and controlling responses of the state and its authorities."[60]

ii) Stereotypes

Racist notions and stereotypes of Black women greatly influence Black women's reliance (or lack there of) on the CLS. Stereotypes of Black women are created and emphasized by the dominant group to solidify Black women's place as inferior beings and white women as superior.[61] White women come to represent the epitome of true womanhood. They are clean, domesticated, submissive, and demonstrate piety.[62] The Black woman, on the other hand, is dirty, masculine, promiscuous, and aggressive – she is everything a white woman is not and thus, the antithesis to white women, but more profoundly, womanhood.[63]

Stereotypes are embedded in the CLS's notion of what constitutes a woman deserving of protection, usually excluding Black and other racialized women. Historically, a "good victim" is a "passive, middle-class white woman cowering in the corner."[64] Black women do not fit this

[58] Cross, *supra* note 26 at 204.
[59] See Avalon and LEAF, *supra* note 42.
[60] Walklate and Fitz-Gibbon, "Why Criminalise?," *supra* note 53 at 9.
[61] Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge, 2000, 2009) at 77.
[62] *Ibid,* at 79.
[63] See Diane Roberts, *The Myth of Aunt Jemima: Representations of Race and Region* (New York: Routledge, 1994) at 4, bell hooks, *Ain't I A Woman: Black Women and Feminism*. (Boston: South End Press, 1981) at 22; Angela Mae Kupenda, "Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How laws of Domestic Violence, Race, and Class Bind Black Women Based on Alice Cooper's Book 'The Third Life of Grange Copeland'" (1998) 42 How L J 1 at 8.
[64] Cross, *supra* note 26 at 240.

characterization, as they are deemed too strong, too sexual, "too powerful or too uncontrollable to be dominated by anyone. Therefore, they cannot be victims."[65]

The advent of mandatory arrest/charging policies demonstrated how profound this dichotomy truly is. For example, in some cases, those who require protection do not receive it. This was demonstrated with the tragic ending of Daniella Mallia's life. The police decided to *caution her* (implying that she was the problem) and neglected to carry out their duties to "protect" her by failing to arrest the perpetrator, Dylan Dowman. In many other cases, Black, Indigenous, and other racialized women are arrested, dually with the perpetrator or solely, because they were acting in self-defence or engaging in resistive violence, and/or because their intimate partner skilfully manipulated the CLS. [66]

Canadian studies regarding Black women arrested solely or dually for intimate partner violence are limited. However, in a study conducted by Dr. Patrina Duhaney of 25 Black women who experienced intimate partner violence, in either a common law or marital relationship, 15 were subjected to charges – 13 were solely charged and 2 were dually charged with the dominant aggressor. Ten of the women from the study were in a relationship with a Black man, while 4 were in a relationship with a white man, and one with a mixed raced male.[67]

Studies in the United States not only confirm that many Black and other racialized women are being arrested for acting in self-defence or engaging in resistive violence, but reveal that responding officers are unable to discern when abusers manipulate the CLS by, for example, claiming to be victims.[68] A New York City study regarding intimate partner violence and dual arrests reported that 66 percent of its participants who were arrested as a result of dual arrest, or their abuser contacting the police, were Black and Hispanic women.[69] The study also determined that 43 percent of these women were poverty stricken, and 19 percent were in receipt of social assistance.[70]

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[65] *Ibid* at 240-241. The Supreme Court of Canada has recognized that women of colour are amongst the groups who are "unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman." See *R v Malott*, [1998] 1 SCR 123 at para 40. See also Avalon and LEAF, *supra* note 42 at 9, 11.

[66] See Duhaney, *supra* note 44 at 6 and 7; Grace, *supra* note 44. Dr. Linda Neilson's submission notes too that the "problem is particularly acute in First Nations, minority, and economically disadvantaged communities": "Coercive Control Crime: Family violence considerations for Legislators" (September 2023) at 3 [Neilson, "Submission"]. The pernicious and tragic invocation of stereotypes is also evident in the killing of Tanner Brass by his father. Tanner's Indigenous mother, Kyla Frenchman, escaped the house and contacted Prince Albert police, alleged abuse and warned them of lethal risks posed to her young son. Believing her to be intoxicated she was arrested and placed in a holding cell where she continued to plead with police to check on her son. See Yasmine Ghania & Jason Warick, "New details emerge in homicide of Sask. 13-month old Tanner Brass" (12 June 2022), online: CBC <www.cbc.ca/news/canada/saskatoon/baby-tanner-new-details-emerge-1.6484733>.

[67] Duhaney, *ibid* at 6 and 7.

[68] Richie and Eife, *supra* note 26; Andrea Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color,* (Boston: Beacon Press, 2017) at 197.

[69] Ritchie, *ibid.*

[70] *Ibid.*

Many scholars have pointed to concerns that an offence of coercive control will lead to greater manipulation of the legal system by abusers[71] and an increase in charges against survivors. It is also likely to be the case that because of the stereotypes attached to Black and other racialized women, they are more likely to be seen as perpetrators than victims. As Courtney Cross points out:

> The crux of coercive control law lies in criminalizing behavior that is hard to corroborate and thus ripe for bias to creep into decision-making by judges and juries. Absent sufficient expertise, coercive control may be a label attributed to behavior that is seen as nagging, bossy, and domineering. As such, women and femmes – particularly women and femmes of color – may be most at risk of having these accusations levied against them by abusive partners.[72]

iii) Race Treason

In addition to the racial stigma and consequences that occur through stereotypes, many Black women, when deciding whether to contact the police, must grapple with the prospect of becoming accomplices to the discriminatory treatment that Black men encounter in the CLS. Essentially, the security of their bodily integrity and autonomy is challenged by the notion of betraying their race and committing what Charmaine Crawford and Karen Flynn refer to as "race treason."[73] This is not an illusive notion. It is a reality that Black women know all too well – Daniella Mallia expressed this concern to the police when she did not want to see "another Black man go to jail."

Race treason is directly connected to the demarcation of Black men as inherently dangerous. This demarcation manifests in the overrepresentation of Black men in provincial jails[74] and federal penitentiaries,[75] in their subjugation to constant scrutiny, ridicule, and surveillance by law enforcement, and in their heightened risk of experiencing excessive force by the police.[76] Furthermore, courts have acknowledged, commented on, and now take judicial notice of the pervasive presence of anti-Black racism in Canada and its inimical ramifications for Black people.[77] However, this has done little to change the trajectory of Black men's treatment by the CLS. The

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[71] See e.g. Cross, *supra* note 26; Walklate et al, "Is more law the answer?," *supra* note 53 at 123.

[72] Cross, *ibid* at 239.

[73] See Karen Flynn and Charmaine Crawford, "Committing "Race Treason": Battered Women and Mandatory Arrest in Toronto's Caribbean Community" in Kevin Bonnycastle and George Rigakos, ed, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) at 93-102; see also Rachel Zellars, ""As if we were all struggling together": Black Intellectual Traditions and Legacies of Gendered Violence" (2019) 77 Women's Stud Int Forum 1.

[74] See Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional facilities in Ontario, Canada" (2021) 20:10 Race and Justice 1.

[75] Ivan Zinger, *Annual Report of the Office of The Correctional Investigator*, The Correctional Investigator (48th Annal Report) (Ottawa: Office of the Correctional Investigator, 2020-2021), online: <www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx> at 15.

[76] Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force and Strip Searches in 2020, Detailed Report*, Toronto Police Force (Toronto: Toronto Police Force, 2022), online: <www.tps.ca/race-identity-based-data-collection/2020-rbdc-findings/>.

[77] See e.g. *R v Le*, [2019] 2 SCR 692; *R v Borde*, 2003 CanLII 4187 (ON CA); and *R v Morris*, 2021 ONCA 680.

incarceration of Black men continues to increase and violence against Black men's bodies in the CLS continues to prevail.

As a result of the stereotypes affixed to Black men, Black communities – and especially Black women – are compelled to protect Black men.[78] Black mothers, through a practice known as "the talk," educate their sons about being a Black man in Canada and how to "behave" when stopped by the police.[79] Many Black women prioritize the protection of Black men by attempting to insulate them from further state violence and other outside threats while, at times, sacrificing their own bodily and psychological integrity.

Race treason has the very real potential of causing not only internalized friction for Black women experiencing abuse, but also intracommunity tension should the police be involved, as she may be regarded as not only having betrayed a Black man, but the community. A stark example of this is the murder-suicide of Shanna and Lionel Desmond, their ten-year-old daughter, Aaliyah, and Mr. Desmond's mother. On January 3, 2017, in Guysborough County, Nova Scotia, Lionel Desmond, a veteran suffering from PTSD, killed his wife Shanna, daughter, Aaliyah, and his mother before turning the gun on himself. Prior to her death, Shanna Desmond confided in her sister as she was afraid her husband was going to kill her. Instead of advising her to contact the police, her sister "encouraged her to stand by her husband."[80] Further, although Ms. Desmond contacted the Naomi Society in Antigonish in Nova Scotia to inquire about a restraining order, according to Nicole Mann, the director of the Society, Ms. Desmond did not speak of experiencing domestic violence and when Ms. Mann inquired about whether the RCMP should be involved, Ms. Desmond advised, "no".[81]

iv) Child Protection Intervention

Another concern that many Black women survivors encounter should the police become involved is interference from other governmental bodies, such as children's aid societies (CAS).[82] This concern interplays with the stereotypes discussed above, and others depicting Black mothers as

[78] Zellars, *supra* note 73 at 4. The Avalon and LEAF report for the NS Mass Casualty Commission found that in rural Nova Scotia, African Nova Scotians expressed negative perceptions of the police that derived from the experiences of the Black men and boys in their lives. They did not feel the police protected them, and they did not trust police; *supra* note 42 at 10. They also expressed concern that they did not want to reinforce negative stereotypes about their community and risked being shunned if they engaged with formal authorities (at 11). The report importantly notes that "the 'code of silence' surrounding violence is a legacy of historic and ongoing racism, the failure of legal systems to protect African Nova Scotian communities, and police violence" (at 11-12).

[79] Jessica Bundy, "We'll Deal with it Later": African Nova Scotian Women's Perceptions and Experiences of the Police" (2019) 44:4 Can J Sociol 319 at 330.

[80] Ardath Whynacht, *Insurgent Love: Abolition and Domestic Homicide* (Halifax: Fernwood Publishing, 2021) at 90.

[81] Michael MacDonald, "Desmond Inquiry: Focus of the Hearing Shifts to Examination of Domestic Violence," *The Daily Courier* (14 September 2021), online: <www.kelownadailycourier.ca/atlantic/article_481e8979-05e8-50f9-963e-b5bf88156dca.html>.

[82] This is a pressing concern for Indigenous women as well; see, for example, Wanda Wiegers, *supra* note 40. For women without citizenship, the potential involvement of border control is also of tremendous concern; see Mosher, *supra* note 40. Avalon and LEAF, *supra* note 42 note the risk members of marginalized communities face in engaging with formal institutions, at 12.

incapable parents. Donna Coker, recognizing the economic, social, and legal disparities faced by Black women, notes:

> Being poor, but particularly being African American and poor and female increases one's risk of child welfare involvement … the intersection of punitive approaches to child welfare with punitive approaches to domestic violence results in the removal of children from mothers who are abused.[83]

The intrusion of CAS is a real fear for many Black women in Canada. In 2015, the Ontario Children's Aid Society of Toronto released the first report sharing race-based data regarding children in the care of Ontario CAS. The report began by stating, "[t]here is an acknowledged disproportionality, disparity and discrimination in services provided to Black families by child welfare agencies across North America."[84] This is an overdue, but welcomed, acknowledgement. The Ontario CAS provide services to approximately 150,000 children yearly; twelve percent of the youths under their care are Black, yet they only comprise 5 percent of the population.[85] Additionally, Black children remain in care longer than children from other groups.[86]

Given that current understandings of mothering are racist, sexist, and classist, it is not difficult to imagine how this, together with the (un)conscious fear of Blackness embedded in the CAS, come to occupy a significant space in the mental gymnastics that occur in the decision-making process of some Black women when determining whether to involve the police in situations of intimate partner violence.[87]

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[83] Donna Coker, "Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills' Insult to Injury: Rethinking Our Response to Intimate Abuse" (2004) 10 Violence Against Women 1331 at 1333.

[84] Children's Aid Society of Toronto, *Addressing Disproportionately, Disparity and Discrimination in Child Welfare: Data on Services Provided to Black African Caribbean Canadian Families and Children* (July 2015) online: <www.torontocas.ca/sites/torontocas/files/baccc-final-website-posting.pdf>. See also the Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare*, April 12, 2018, online: <www.ohrc.on.ca/en/interrupted-childhoods>.

[85] Jennifer Clarke et al, "Imaging a Community-Led. Multi-Service Delivery Model for Ontario Child Welfare: A Framework for the collaboration Among African Canadian Community Partners" (2018) 28:2 J L & Social Pol'y 42 at 45.

[86] Doret Philips and Gordon Pon, "Anti-Black Racism, Bio-Power, and Governmentality: Deconstructing the Suffering of Black Families Involved with Child Welfare" (2018) 28:1 J L & Social Pol'y 81 at 82.

[87] Similar concerns exist for Indigenous mothers: the most recent Canadian statistics establish that, compared to non-Indigenous children in 2019, First Nation children were 3.6 times as likely to be subject to child welfare investigations and were also more likely to be placed in out-of-home care. Investigations were more likely to involve younger First Nations children and families reliant on government benefits who were facing "multiple structural challenges." See Barbara Fallon et al, *Denouncing the Continued Overrepresentation of First Nations Children in Canadian Child Welfare: Findings from the First Nations/Canadian Incidence Study of Reported Child Abuse and Neglect – 2019* (Ontario: Assembly of First Nations, 2021) at 38 and see Ashley Quinn, Barbara Fallon, Nicolette Joh-Carnella and Marie Saint-Girons, "The overrepresentation of First Nations children in the Ontario child welfare system: A Call for systemic change" (2022) 139 *Children and Youth Services Review,* online: <https://doi.org/10.1016/j.childyouth.2022.106558>. First Nations children also stay longer in the child welfare system and have been placed in homes that do not sustain their cultural identity; see V Sinha et al (2011), *Kiskisik Awasisak: remember the children. Understanding the Overrepresentation of First Nations Children in the Child*

These concerns provide a glimpse of the structures of oppression Black and other racialized women contend with when deciding whether to invoke the CLS. As Cross concludes, criminalizing coercive control will "do far more harm than good" and the deleterious effects will be felt most strongly by survivors who "do not embody the archetypal straight, white, scared femme victim."[88] As Cross so effectively summarizes, what we learn from past reforms – mandatory charging and no-drop prosecutorial policies – is that while some women have benefitted, the measures have been "dangerous and alienating for many survivors."[89]

D. Learnings from the *Divorce Act* Reforms

In assessing the risks of criminalizing coercive control, it seems prudent, in our view, to gain an understanding of what has been happening in the family law context since the amendments to the *Divorce Act* came into effect in March 1, 2021 (and several provinces have since followed suit).[90] These amendments require that courts, in identifying the best interests of a child, are "to give primary consideration to the child's physical, emotional and psychological safety, security

Welfare System (Ontario: Assembly of First Nations), online <https://cwrp.ca/publications/kiskisik-awasisak-remember-children-understanding-overrepresentation-first-nations>; and see Factor-Inwentash Faculty of Social Work & the Association of Native Child and Family Services Agencies of Ontario, *The Outcomes of Indigenous Youth Aging Out of Care and Exiting Care in Canada: Environmental Scan,* online: <https://cwrp.ca/publications/outcomes-indigenous-youth-aging-out-care-and-exiting-care-canada>.

[88] Cross, *supra* note 26 at 239; and see Richie and Eife, *supra* note 26.

[89] Cross, *supra* note 26 at 196, 227, 239; reaching a similar conclusion see Richie and Eife, *supra* note 26; Walklate and Fitz-Gibbons, "Why Criminalise?," *supra* note 53.

[90] Five jurisdictions—Saskatchewan, Manitoba, Ontario, New Brunswick, and Prince Edward Island—include definitions in their parenting legislation that substantially replicate the definition in the amended *Divorce Act.* See *The Children's Law Act*, *2020*, SS 2020, c 2 , ss 2(1), 10(2), 10(3)(j); *The Family Law Act,* SM 2022 c 15, ss 1, 35(3)(j), 35(4); *Children's Law Reform Act,* RSO 1990, c C.12, ss 18(1),(2), 24(3)(j), 24(4); *Family Law Act*, SNB 2020, c 23, ss 1, 50(2)(j), 50(4); *Children's Law Act*, RSPEI 1988, c C-6.1, ss 1(1)(o), 33(1)(l), 33(2) (referencing the *Victims of Family Violence Act*, RSPEI 1998, c V-3.2, s 2 [PEI *VFVA*] in defining family violence to include emotional abuse and the deprivation of necessities). British Columbia has required a broad consideration of family violence since 2013 and defines family violence to include "psychological or emotional abuse of a family member" such as "intimidation, harassment, coercion or threat" or "unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy," see *Family Law Act*, SBC 2011, c 25, ss 1, 38, 37(2). In Nova Scotia, courts must consider "family violence, abuse and intimidation" including "causing or attempting to cause psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour" and "unreasonable restrictions on…financial or personal autonomy," see *Parenting and Support Act,* RSNS 1989, c 160, ss 2(da), 18(6)(j), 18(6)(ia), 18(7). Five jurisdictions require that family violence be considered but do not define it, or define it in terms that do not explicitly include coercive control. See *Family Law Act,* SA 2003 c FA-4.5, s 18(3) (conduct that causes or attempts to cause physical harm, including forced confinement and sexual abuse or causes reasonable fear for safety excluding acts of protection of self or others and corrective force applied to a child if within reasonable limits); *Children's Law Act,* RSNL 1990, c C-13, s 31(3) (acting "in a violent manner"); *Children's Law Act,* SNWT 1997, c 14, s 17(3) ("an act of violence"); *Children's Law Act,* CSNu, c C-70, s 17(3) ("an act of violence"); *Civil Code of Québec,* CQLR c CCQ-1991, arts 33 (all decisions concerning a child and their interests must consider the presence of family violence including spousal violence), 603.1, 606. The Yukon *Children's Law Act,* RSY 2002, c 31 does not expressly reference family violence.

and well-being."[91] Judges are now also required to consider "family violence" and its impact on the willingness and ability of the party responsible for the violence to care for and meet the needs of the child, along with the appropriateness of requiring cooperation between the parties.[92] Family violence is defined broadly as follows:

> …any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes *a pattern of coercive and controlling behaviour* or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes
> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
> (b) sexual abuse;
> (c) threats to kill or cause bodily harm to any person;
> (d) harassment, including stalking;
> (e) the failure to provide the necessaries of life;
> (f) psychological abuse;
> (g) financial abuse;
> (h) threats to kill or harm an animal or damage property; and
> (i) the killing or harming of an animal or the damaging of property.[93] (emphasis added)

In assessing the impact of family violence, judges must also consider a number of factors, including: the nature, seriousness, frequency of the violence, and when it occurred; whether the violence was coercive and controlling; whether it was directed at a child or a child was exposed directly or indirectly; the physical, emotional, and psychological harm or risk of harm to children; whether the violence has compromised, or causes fear for, safety; steps taken to address the behaviour; and any other relevant factor.[94]

We are in the early stages of reviewing parenting cases decided under the *Divorce Act*, post March 2021 where an allegation of coercive control has been made, with a view to understanding how "coercive and controlling behaviour" is being addressed by courts. To date, we have completed a review of decisions rendered by provincial and territorial appellate courts in this time period, and by lower courts in 2023. Below we set out our preliminary observations regarding the lower court decisions (n=16) (the appellate decisions are not particularly useful for our purposes). As outlined in our conclusion, we recommend that Justice Canada undertake a more thorough review than time has allowed us to complete by the submission deadline.

i) Denials, Counter-allegations, and Stereotypes

[91] *Divorce Act*, *supra* note 10, s 16(2).
[92] See *ibid,* s 16(3)(j).
[93] *Ibid,* s 2(1).
[94] *Ibid*, s 16(4).

In the cases reviewed to date, allegations of coercive and controlling behaviour are made in the first instance by mothers and, in almost all instances, they are made together with allegations of physical violence and other forms of family violence as defined by the *Divorce Act*.[95] As was common pre-amendments, fathers responded with blanket denials (in four cases fathers denied family violence even though there had been a criminal conviction and, in one of them, also a finding of civil liability[96]). In addition to denying that they had engaged in family violence, fathers commonly alleged that they were the real victims of family violence and mothers, the real perpetrators.[97] In three of the cases, fathers asserted that the mothers' violence manifested in control, particularly of the fathers' relationships with their children,[98] and in two cases, fathers expressly claimed that mothers had fabricated allegations of family violence to gain the upper hand in the litigation.[99]

As briefly noted earlier, denials of intimate partner violence by fathers and assertions that mothers have fabricated allegations are pervasive.[100] In an earlier 10-year review we undertook of family law decisions involving allegations of family violence in Alberta, Saskatchewan, and Ontario, assertions by fathers that mothers were fabricating allegations of family violence to gain an advantage in the family law proceeding (and often adding that the mother was the actual perpetrator) were routinely made.[101] Our research also shows the ubiquity of fathers' claims of false allegations by mothers in the protection order context, often connected to the presence of family law proceedings.[102] Similarly, a review of Ontario criminal law cases involving domestic violence charges revealed this assertion to be consistently raised as a defence.

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[95] A table of cases reviewed is included as Appendix A. There are only two decisions where it seems the only allegation of family violence related to coercive and controlling behaviour. In one of these decisions, the evidence to support the allegation is not reviewed and the judge summarily concludes that it has not been established, see *AB v MM,* 2023 ABKB 377 (Can LII) at para 87. The other decision, *Hoffman v Tytlandsvik,* 2023 SKKB 146 (CanLII) reflects a nuanced understanding of coercive control, as discussed *infra* at note 107.

[96] *PMZ v DJT,* 2023 BCSC 1444 (CanLII); *KAG v KGG,* 2023 PESC 33 (CanLII); *MP v PP,* 2023 BCSC (CanLII); *KSP v JTP,* 2023 BCSC 1188 (CanLII). In *KSP v JTP* there had also been a finding of civil liability against the father; significantly the family court holds that it would constitute an abuse of process to permit the father to relitigate findings of fact made in the civil trial (see also the discussion of this case in Rise Women's Legal Centre and West Coast LEAF, Joint Submission on the criminalisation of coercive control (October 20, 2023), online: <https://westcoastleaf.org/wp-content/uploads/2023/10/2023-10-20-FINAL-Coercive-Controlling-Behaviour-written-subs-signed.pdf>). In *Fernandes v Fernandes,* 2023 ONSC 564 (CanLII) the father denied the violence although after having been charged criminally, he entered into a peace bond.

[97] *KAG v KGG*, *ibid; MP v PP, ibid*; *KSP v JTP, ibid*; *KRW v PMM,* 2023 BCSC 981 (CanLII); *SVG v VG,* 2023 ONSC 3206 (CanLII); *Fernandes v Fernandes*, *ibid*; *DF v TF,* 2023 ONSC 115 (CanLII).

[98] *KAG v KGG, ibid; Fernandes v Fernandes, ibid; Ghiyas v Khan,* 2023 ABKB 274 (CanLII). In *SVG v VG, ibid,* while it appears that the father did not specifically allege the mother to be controlling, the court found the mother to have engaged in coercive controlling behaviour. In other cases, while not explicitly alleging control by mothers, fathers took the position that mothers were alienating the children: see, e.g. *RL v MF,* 2023 ONSC 2885 (CanLII); *KSP v JTP, supra* note 96.

[99] *SVG v VG, supra* note 97 at para 167; *Ghiyas v Khan, ibid* at para 55.

[100] See Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35:1 Can J Fam L 33 [Koshan, "Myths and Stereotypes"].

[101] Unpublished, on file with authors.

[102] See Jennifer Koshan, "Preventive Justice? Domestic Violence Protection Orders and their Intersections with Family and Other Laws and Legal Systems" (2023) 35:1 Can J Fam L 241 [Koshan, "Preventive Justice"].

Troublingly, in *R v RMD*, a recent criminal law case involving an allegation of intimate partner sexual violence, Justice Graesser held as follows in response to the Crown's argument that the assertion of false claims is grounded in myth and stereotype:

> I can take judicial notice that it is not unheard of for a party involved in family law litigation to lie or exaggerate about violence having been committed against them to gain an advantage in parenting matters or property matters.[103]

Justice Graesser went on to state that a complainant's motive to lie is engaged simply by the accused's denial of violence and by evidence of any type of family dispute, reinforcing the myth of the lying and vengeful wife. His decision validates the strategy of making this type of credibility challenge in virtually any proceedings involving intimate partner violence where there are related family disputes. That this type of reasoning continues to occur despite decades of judicial education and appellate court guidance on myths and stereotypes about sexual assault is deeply concerning and does not bode well for how judges in criminal cases would handle charges of coercive control that intersect with family proceedings.

In our case sample of post-amendment *Divorce Act* decisions, judges in two cases cautioned against assessing the credibility of allegations based on stereotypes. In *Johnston v Da Silva* the court characterized the father's affidavit (in particular his statements that the mother's delay in reporting proved that the allegations were false) as based upon "some of the common myths and stereotypes about Applicant's[sic] who make false claims of family violence to gain an advantage in family court."[104] In *SVG v VG*, the court cautioned against making credibility assessments based on "stereotypical notions of what a victim should have done in similar circumstances," and noted the impact of trauma. However, Justice Chappel went on to note that,

> … courts must remain cognizant of the reality that some allegations are in fact fabricated or exaggerated. Being closed-minded to these possibilities poses an equally serious threat to the furtherance of justice in cases where family violence claims are advanced, and the courts must therefore meticulously assess the evidence in its totality to ensure that family violence claims are credible and not being maliciously advanced to obtain a litigation advantage.[105]

Research shows that false allegations of intimate partner violence are rare, contrary to what some lawyers argue, and some courts assume.[106] The heightened suspicion and skepticism that legal

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[103] *R v RMD*, 2022 ABKB 851 (Can LII) at para 45 (involving an application to introduce sexual history evidence under s 276 of the *Criminal Code*). See also para 49 regarding the minimal evidence relied on by the court to ground the application. The myth that women are vengeful towards ex-partners was first recognized in *R v Seaboyer*, [1991] 2 SCR 577 at para 141 (L'Heureux Dubé J).

[104] 2023 ONSC 2710 (Can LII) at para 12.

[105] *Supra* note 97 at paras 103, 105.

[106] See Department of Justice, *Family Violence: Relevance in family law* (Ottawa: Research in Brief, 2018) at 5, online: <https://www.justice.gc.ca/eng/rp-pr/jr/rgrco/2018/sept01.pdf> (noting that intentionally false allegations of family violence in family law disputes "are generally understood to be rare"); National Domestic and Family Violence Bench Book (Australia, 2023), section 4.1, online: <https://dfvbenchbook.aija.org.au/> (noting "false denials of true allegations are more common" than false allegations of family violence); Michael Flood, "False allegations of sexual

actors so frequently attach to allegations of intimate partner violence are concerning. It seems entirely likely that allegations of coercive control in the criminal context (were an offence to be enacted) would meet with similar denials, counter-allegations, and stereotypical assumptions, impacting criminal and family proceedings alike. Moreover, drawing upon our earlier discussion, it is also reasonable to predict that the stereotypes attached to Black and other marginalized women may well mean that they are even less likely to be believed when they allege coercive control.

ii) (Mis)understandings of Coercive and Controlling Behaviour

In our sample of cases, discussion of the meaning of "a pattern of coercive and controlling behaviour" was slim or non-existent in most decisions (note that from our brief review of the appellate decisions, none provided guidance on the meaning of this concept). Very few of the decisions revealed an understanding of coercive control as it has been developed within the intimate partner violence field.[107] Significantly, while a central element in the understanding of coercive control has been its attention to the multiplicity of tactics that form patterns of behaviour over time, several of the decisions – even those that allude to the importance of a pattern – fail to consider the array of behaviours that together evidence a "pattern of coercive and controlling behaviour." Rather, judges tend to label a particular behaviour or incident as "controlling" and consider this behaviour abstracted from the overall context.[108] In some

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and domestic violence: the facts" (2022) online: <https://xyonline.net/content/false-allegations-sexual-and-domestic-violence-facts> (finding in the UK context that false allegations of domestic violence are rare; see also Metropolitan Police (UK), "False Allegations in Domestic Violent Cases from 2018 to 2021", online: <https://www.met.police.uk/foi-ai/metropolitan-police/d/february-2022/false-allegations-in-domestic-violent-cases-from-2018-to-2021/> (domestic abuse files flagged as false allegations in only 0.01% of all complaints to police).

[107] The decision in *Hoffman v Tytlandsvik, supra* note 95 reflects a good understanding and application of coercive control. The Court emphasizes the importance of looking to the "entirety of the behaviours" (para 24) and rejects the father's assertion that these are isolated incidents. Rather, the court finds that the father's behaviours, "taken in their entirety, constitute coercive and controlling behaviour in the form of both psychological and financial abuse. Those behaviours constituted a pattern in the form of being recurring and occurring at those times when the mother was vulnerable. They caused her to fear for her own safety at times. They cause her to feel anxiety." (at para 50). Among the father's behaviours relied upon: the use of derogatory and degrading language about the mother in the presence of the children; humiliation of the mother; the use of the threat of court proceedings to cause the mother to adjust her actions; the refusal to provide information to the mother about the children; inappropriate text messages; and financial abuse. However, while the mother obtained sole decision-making responsibility and the father's parenting time was not increased as he desired, the mother's request to reduce the father's parenting time was rejected and the arrangement in place as a result of an interim order giving the father 43% of parenting time was maintained. Moreover, the father was not required to obtain counselling to address his behaviour. See also *Johnston v Da Silva, supra* note 104, where the court describes coercive control as including "neglect, financial insecurity, food insecurity, and physical and emotional/psychological abuse" (at para 9). The court also observed that the father's attempts in his affidavit to minimize, deflect, and deny supported the conclusion that the father had engaged in coercive control (at para 27).

[108] For example, in *PMZ v DJT, supra* note 96, the court finds the father's "relentless" text messages to constitute a "pattern of coercive and controlling behaviour," but other behaviour that could be understood to be among the

instances, judges entirely fail to "see" coercive and controlling behaviour.[109] This may be due to a lack of education and understanding, and/or to the way in which the definition of "family violence" in the *Divorce Act* is framed. The *Divorce Act* does not define "patterns of coercive and controlling behaviour" and as noted above, lists several behaviours that are forms of family violence, including threats, stalking, financial abuse, and psychological abuse. In the literature on coercive control these various behaviours are understood to be among the tactics that create the "cage" or "web" and that entrap women, deny their autonomy, and/or instill fear. As such, they are understood as constitutive elements of a pattern of coercive and controlling behaviour. In several decisions the various allegations of family violence are presented in a manner that resembles the list of behaviours set out in the *Divorce Act.* That is, the court finds, for example, that there are incidents of financial abuse, others of psychological abuse, and one or more incidents of controlling behaviours. The focus remains incident-based rather than woven together to reveal the patterns that constitute coercive control. As with the debates in the literature reviewed earlier, there is simply no consensus in the case law on the types of behaviour and the number of such behaviours that constitute coercive control.

Moreover, scattered throughout many of these decisions are statements that reveal a lack of understanding of coercive and controlling behaviour, of family violence more broadly, and of the harms to mothers and children, notwithstanding the recognition by the Supreme Court of Canada in *Barendregt v Grebliunas* of the harms to children of direct or indirect exposure to family violence.[110] Rather, in some of the decisions, the harms of the father's coercive control are minimized or ignored altogether. While certainly it is too early in our review of decisions to draw

tactics establishing an overall pattern are treated separately as particulars of family violence or not addressed: his frustration about the division of labour; his insistence the mother do his laundry post-separation; his upsettedness that dinner was not ready; shaming the mother; verbally berating the mother in front of children; refusing to provide financial statements; and asserting that the mother lied about the allegations of family violence (at para 170-171). Note that while the court finds the father tried to wrongfully influence the children about their mother, this behaviour is not labelled as coercive control or alienation (see by contrast the cases discussed in the body of the text where this finding is made against mothers). In *KRW v PMM, supra* note 97 the court finds a pattern of coercive and controlling behaviour in relation to the father's litigation conduct, communications with the mother, and his reports to third parties to embarrass, harass, or cause harm to the mother, but does not include the isolation he imposed (isolation is often a key element in coercive control), that he threw objects at the mother, prevented the mother from leaving the property, engaged in harassment, made demeaning remarks in front of the children, and encouraged the children to give the mother highly inappropriate gifts (at para 66, 68, 84). See also *KSP v JTP, supra* note 96; the court finds a pattern of coercive control in relation to the mother and others, pointing only to the father's manipulation of a medical doctor. The court finds other forms of family violence including emotional and psychological abuse, financial abuse, manipulation, and angry and aggressive behaviour (including in the legal proceedings), at para 402-408.

[109] In *DF v TF, supra* note 97, despite the father's unrealistic expectations regarding household chores, his manipulation of various professionals, disregard for court orders, and the court's conclusion that the mother had reason to fear for her psychological safety, the court makes no finding in relation to the mother's allegation of coercive and controlling behaviour.

[110] *Supra* note 14 at 143.

firm conclusions, these observations may suggest that coercive and controlling behaviour, on its own, is accorded relatively little weight in assessing harms to mothers and children.

Our preliminary review of these decisions reveals that much like the experience of British Columbia when similar reforms were introduced well over a decade ago, a change in legislative language will not, alone, prompt a shift from an incident-based conception of family violence and ensure an understanding of the harms of coercive control.[111] As others have pointed out, particularly given the incident-based focus of criminal law in general, educating actors in the CLS to see and understand patterns of coercive control in all their complexity would be a significant challenge.[112] Our preliminary review of *Divorce Act* decisions also underscores the variability in approaches and outcomes in the absence of a legislative definition of "coercive and controlling behaviour." The offence provision set out in Bill C-332 is even more ambiguous: it references controlling OR coercive conduct (this differs from the construct of "coercive control"); the provision is unmoored from any connection to family violence; and as noted earlier, the prohibited conduct is not itself defined but rather is to be determined by the impact it has on the complainant.

iii) Control as Alienation

A further and related concern is the labelling of mothers' conduct as "coercive and controlling behaviour" if the court finds the conduct to be overly restrictive (not realistically protective) in relation to fathers' contact with the child(ren).

The most fulsome discussion of the concept of "coercive and controlling behaviour" is found in *SVG v VG*.[113] This is also one of two decisions in the sample where a mother was found to have engaged in coercive and controlling behaviour (see also *Begum v Klippenstein,* discussed below*)*. Noting the need for a broad and purposive interpretation that maximizes the protective scope of the legislation, Justice Chappel underscores the multi-tiered nature of family violence and the importance of "counsel and courts [explaining] precisely the various ways in which each type of conduct complained of meets the definition of "family violence.""[114] In relation to coercive control, Justice Chappel stresses the importance of considering behaviours that alone may seem

[111] BC's FLA has since 2013 had a broad definition of family violence that includes coercive control; see Susan B Boyd and Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (2015) 35:2 Can Fam LQ 101; see also Haley Hrymak and Kim Hawkins, "Why Can't Everyone Just Get Along: How BC's Family Law System Puts Survivors in Danger" (2021), online: <womenslegalcentre.ca/wp-content/uploads/2021/01/Why-CantEveryone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf>; Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96 (noting that expanding the view of legal system actors beyond the incident-based physical violence paradigm has been a struggle in British Columbia family law cases, and that women and children have not been made safer as a result of legislative change alone).

[112] See e.g. Walklate et al, "Is more law the answer?," *supra* note 53; Charlotte Barlow et al, "Putting Coercive Control into Practice: Problems and Possibilities" (2020) 60 Brit J Criminol 160.

[113] *Supra* note 97.

[114] *Ibid* at para 99.

innocuous but over time "paint a picture of a very destructive relationship."[115] Drawing from her decision in *MAB v MGC*, she defines "coercive" as "conduct that is threatening, intimidating, or exerts inappropriate pressure on the other person" and controlling, if "its intent or effect is to inappropriately manage, direct, restrict, interfere with, undermine or manipulate any important aspect of the other person's life."[116] She notes examples from other cases: numerous unsubstantiated allegations, inappropriate litigation tactics, undermining the "other parent's authority or influence and alienating the child from that parent."[117] While some elements of her definition align with common conceptions of coercive control in the literature, others do not, nor do all of the case examples. It is particularly concerning here that taken alone and out of context, undermining the other parent's authority or "alienating" a child are characterized as coercive and controlling behaviour. On the facts, the court finds that while the father had difficulty in "managing his anger," the mother had not established the various allegations of physical violence, harassment and stalking, and abuse of the child, that were set out in her application (but given little attention at trial). The only allegation of coercive and controlling behaviour made by the mother related to compulsion by the father and paternal grandparents to relocate. The court does not accept that the mother was "inappropriately coerced into relocating."[118] However, the mother's conduct from July 2018 until mid-December 2018 was found to constitute psychological abuse of the father and the children, and a pattern of coercive control, including unsubstantiated allegations to gain a supposed litigation advantage, and her resistance to meaningful parenting time for the father.[119]

In *Begum v Klippenstein,* the court finds that the father committed family violence: "He was often angry, demanding, and threatening. He withheld sex to try to coerce her to change behaviour. He pushed her with his elbows and was charged criminally. He violated his bail condition."[120] Relying on an expert's report, the court concludes this was "situational violence,"[121] that both parents contributed to the conflict, and despite finding that the father could lash out in anger, that there had been no verified concern that the father is likely to be violent with the child.[122] Finding that the mother made a false complaint of child sexual abuse against his new partner, who she dehumanized, the court holds that the father was victimized and that the mother's "negative

[115] *Ibid* at para 100 (also noting that coercive control "is easier to inflict in its various forms post-separation than other types of family violence").
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid* at paras 151, 177. The mother reported several incidents of physical and sexual assault to the police, and child abuse to CAS, but police did not lay charges due to "insufficient evidence" (at paras 22, 24).
[119] *Ibid a*t paras 168-170 and 257. This stands in contrast to the decision in *KAG v GGG,* discussed in footnote 124, where the father's post-separation conduct is attributed to the frustration and acrimony common post-separation and is not characterized as coercive and controlling behaviour.
[120] 2023 ONSC 2970 (CanLII) at para 103.
[121] The court holds that "based on the information provided by both parents, this situation appears to be one of 'situational violence' as part of the Association of Family and Conciliation Courts (AFCC) typology of intimate partner violence or domestic violence," *ibid* at para 85.
[122] *Ibid* at para 85 and 106.

gatekeeping is posing a clear and present risk to the child."[123] The court concludes that both have exercised elements of coercive control over the other, a finding that is at odds with the earlier characterization of the father's violence as situational.[124] The Court says little about what behaviour constitutes coercive control on the part of either parent.

In *Ghiyas v Khan,* the court finds the father's behaviour to be coercive-controlling intimate partner violence, observing that the father "was used to having control and has used conduct such as leaving the threatening note, the feigned suicide attempt [that was witnessed by the child], sharp words and some physical contact to try to regain that control by intimidation and manipulation."[125] The father's false report to a regulatory board designed to "sabotage" the mother's career as an audiologist and his stalking at her workplace are also noted as instances of coercive and controlling behaviour.[126] Troublingly, notwithstanding that instances of family violence were observed by their young daughter, as in *Begum*, the court finds "no evidence" that the child was affected by the father's violence.[127] Although acknowledging the "safety risk if the father does not take ownership of his conduct and modify it" and noting the father's resistance to doing so, nonetheless the court orders that the father's access no longer be supervised and that his parenting time be gradually increased to equal time.[128] The mother's insistence that the father needed to first demonstrate change in his behaviour is characterized by the court as seeking a guarantee that is simply not possible in the circumstances of the case.[129] This is especially concerning given that the court finds it necessary, in order to manage the father's conduct, to preclude him for a five-year period from making complaints to any governing board of a professional involved with the child without first seeking leave of the court.[130] Troublingly as

[123] *Ibid* at para 109.

[124] *Ibid* at para 118. See also *KAG v GGG, supra* note 96, where the court found there were numerous instances of physical and verbal abuse by the father that were witnessed by the children. While the father alleged that the mother engaged in controlling behaviours to preclude him from seeing the children, the court held that this was not a case "where the Mother has set about to implement reduced parenting opportunities for the father" but rather took reasonable measures in light of his conduct (at para 22). The court notes that the mother's evidence of numerous instances of physical and verbal abuse is "strongly suggestive of a pattern of coercive control" but goes on to note that the evidence of family violence "largely ceases, not surprisingly, with the separation of the parties. Whether the father's post-separation conduct amounts to efforts at ongoing coercive control or is more closely related to the frustration and acrimony that regrettably plagues some separated couples, is not entirely clear. While I am suspicious that it is the former, I am not satisfied on a balance of probabilities that that it is the case" (at para 32-33). In *RL v MF*, *supra* note 98, the mother alleged that the father was abusive, controlling, and dangerous. The judge, using the term "interpersonal violence," focuses on two incidents of alleged physical violence, and finds they lack credibility. He notes, however, that there are reasons to be critical of the mother for not supporting the children's relationship with the father, although not constituting "alienation."

[125] *Supra* note 98 at para 50. The mother's allegations included the father slapping her in the face, throwing hot milk at her, grabbing her so that her glasses broke, and attempting to choke her (at para 38-40).

[126] *Ibid* at para 15 (e), 46, 53, 98.

[127] *Ibid* at para 52.

[128] *Ibid* at para 52-53, 68-69, 72.

[129] *Ibid* at para 62.

[130] *Ibid* at para 98. The court notes that the father had also made a complaint about the psychologist who saw the child and had threatened legal action against the Iman and religious organization that had granted the religious divorce. These are instances of coercive controlling behaviour that are not identified as such in the decision.

well, in response to the father's allegations that the mother was alienating him from the child, while the court does not label her conduct as coercive control, it concludes that the mother was overly restrictive and exposed the child to "alienating behaviour."[131]

Although a small sample of cases, what we are seeing post-March 2021 is consistent with the well-documented concern that allegations of intimate partner violence in the family law realm are countered by claims of parental alienation (now with the additional characterization of the mother's conduct as "control" and itself a form of family violence).[132] As Linda Neilson has compellingly pointed out, experience in the family law realm shows how "quickly and widely injustice to women and children can spread when behaviours such as coercive control are considered outside of the family violence context."[133] If coercive control were to be criminalized, there is a very real risk that it will be used against survivors, with allegations made by perpetrators that they are the targets of coercive control deployed by alienating mothers.

The language of Bill C-332 reinforces our concerns about an offence of coercive control being weaponized against mothers in parenting disputes.[134] The language of the offence provision in s 264.01(1), with no definition of "controlling or coercive conduct," and lack of clarity as to what constitutes "repeatedly or continuously" engaging in such conduct, is subject to manipulation and misinterpretation. The "best interests" defence in s 264.01(5) is also open to abuse by fathers who are charged with "controlling or coercive conduct" and falsely claim that they were protecting their children from alienation. As argued by the National Association of Women and

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[131] *Ibid* at para 64. As noted in the decision, the father filed a complaint with the College of Audiologists and Speech-Language Pathologists of Ontario. In his complaint he alleged that the mother had misled the College by fabricating work experience and inflating her clinical hours. The complaint was dismissed, as was his further attempt to have the decision reviewed by the Health Professions Appeal and Review Board; see *Khan v Ghiyas* 2023 CanLII 72248 (ON HPAPB).

[132] Case law from BC prior to 2021 also revealed this problem. As noted earlier, BC's FLA has since 2013 had a broad definition of family violence that includes coercive control. That this definition could be used against mothers seeking to protect their children was identified in Susan B Boyd and Ruben Lindy, *supra* note 111; see also *CLM v MJS*, 2017 BCSC 799 (Can LII). Regarding concerns related to domestic violence cases and perpetrators' claims of parental alienation, see Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018), online:
<www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf>; Elizabeth Sheehy and Susan B Boyd, "Penalizing women's fear: Intimate partner violence and parental alienation in Canadian child custody cases" (2020) 42:1 Journal of Social Welfare and Family Law 80; Joan S Meier, "US child custody outcomes in cases involving parental alienation and abuse allegations: what do the data show?" (2020) 42:1 J of Social Work & Family Law 92; Suzanne Zaccour, "Does Domestic Violence Disappear from Parental Alienation cases? Five Lessons from Quebec for Judges, Scholars, and Policymakers" (2020) 33 Can J Fam L 301. The United Nations Special Rapporteur on violence against women and girls issued a report in April 2023 that found parental alienation to be a "pseudo-concept" that "ignor[es] histories of domestic violence, which may lead to the double victimization of victims of such violence." See *Custody, violence against women and violence against children,* Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem (A/HRC/53/36) at para 2, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/070/18/PDF/G2307018.pdf>.

[133] Neilson, "Submission," *supra* note 66 at 5.

[134] See also Canadian Women's Foundation, *Criminalizing Coercive Control: Unintended Consequences & Alternative Approaches* (2023), online: <https://canadianwomen.org/wp-content/uploads/2023/10/Policy-Brief-on-Coercive-Control_09_2023.pdf> at 5 (written by Roxana Parsa, Staff Lawyer, Women's Legal Education and Action Fund (LEAF) and Emily Murray, Legal Director, Luke's Place).

the Law, this defence is also capable of reinforcing myths and stereotypes about "supposedly benevolent domestic violence," which may adversely impact disabled survivors in particular.[135]

E. Learnings From Interactions Across Legal Domains

Here we draw from our research on the access to justice issues that arise at the intersections of different legal domains in cases of intimate partner violence and what we might draw from this that is relevant to the question of whether to criminalize coercive control.

i) Family law

As noted earlier, in both the criminal and family law context abusers routinely deny the abuse, including in the face of a criminal charge (and in some instances, a conviction) – arguing that the allegations were fabricated to get the upper hand in a custody dispute. And as noted earlier, experience from other jurisdictions indicates that the offence of coercive control is very hard to prove; Canadian experience bears this out in the family law context. This may then have implications in family law matters where criminal charges have been laid but did not result in convictions. While an acquittal is not conclusive in the family law context given the different burdens of proof, judges may in some instances draw an adverse inference of false allegations, perpetuating that myth. Similar concerns arise if a report to police of coercive controlling violence does not result in a charge.

A catch-22 for survivors arises because the "failure" to report the violence to police, or to do so in a timely way, is commonly invoked as a reason to question the validity of women's disclosures in family court proceedings. Although the Supreme Court has now recognized – in both family and criminal law contexts – the challenges faced by survivors in reporting violence, misassumptions continue to be inappropriately made about survivors who do not report violence at the first opportunity.[136] The addition of an offence of coercive control would widen the scope for questioning the validity and/or seriousness of a survivor's account of violence if she has not reported it to the police. The consequences for parenting proceedings can be serious: of 27 women surveyed in a British Columbia study, 44% indicated that they were advised by their lawyers not to raise family violence in such matters, given the potential that they would be found to have fabricated the allegations.[137]

Additionally, reflected in some of the family court decisions is a view that as a result of mandatory arrest/charging policies, charges are laid all too readily and result in convictions for minor

[135] National Association of Women and the Law (NAWL), "The Criminalization of Coercive Control: Position Paper" (2023, on file with authors) at 6. Three of the authors of this submission (Mosher, Koshan, and Wiegers) are members of NAWL's violence against women working group and provided input on this submission.

[136] For a discussion of these cases see Koshan, "Myths and Stereotypes," *supra* note 100.

[137] Hrymak and Hawkins, *supra* note 111 at 14, 52. Some lawyers share the misperception of false allegations. See Nadine Badets and Bianca Stumpf, *Identifying and responding to family violence in family law cases: Results from the 2019 Survey of Lawyers and Quebec Notaries on Family Law and Family Violence in Canada* (Ottawa: Department of Justice, 2023) at 6, online: <https://www.justice.gc.ca/eng/rp-pr/jr/irfvflc-rrvfardf/pdf/RSD2023_RIB_2019_Family_Violence_Survey_EN.pdf> (a survey where 19% of lawyers stated they had concerns that asking their clients about family violence "may result in some parties making false allegations in an attempt to gain an advantage in litigation").

transgressions that are inconsequential for parenting. Unless coercive control and its harms are thoroughly understood, there is a risk that convictions for coercive control may be regarded as largely inconsequential in the family law realm.

A further concern relates to the scope for cross-examination of women in relation to a pattern of coercive control that has occurred over a period of time. Others have underscored how heavily the England and Wales model for the offence of coercive control relies upon women's testimony and survivor's exposure to gruelling cross-examination.[138] This concern is relevant to Bill C-332 as well, in light of the "significant impact" component of the offence in s 264.01(1) and (2). There is an additional risk that a survivor's testimony in the criminal context will be used to impeach their evidence in a family law proceeding. This occurs now, but the addition of an offence that opens women up to extensive cross-examination on actions, behaviours, and responses over a potentially lengthy period of time greatly heightens this risk.

The differences in statutory language in the *Divorce Act* (and several provincial family law statutes) and the offence proposed in Bill C-332 also raise concerns. Neither the *Divorce Act* nor the Bill uses the term "coercive control"; the former refers to "a pattern of coercive and controlling behaviour" and the latter, "controlling or coercive conduct." The *Divorce Act* embeds the language within a broader framing of "family violence," and the Bill does not. Whether the behaviour was directed at a child or exposed a child, resulted in physical, emotional, and psychological harm or risk of harm to children, and whether it has compromised or causes fear for safety are central considerations in the *Divorce Act* context. By contrast, the Bill is focused on the direct target of the conduct, and "significant impact" is defined in s 264.01(2) as causing the target to fear (on reasonable grounds) that violence will be used against them, causing their physical or mental health to decline; or causing alarm or distress that substantially limits day-to-day activities. Unlike the *Divorce Act*, the Bill also contains a *mens rea* requirement that the accused knew, or ought to have known, that their conduct could reasonably be expected to have this significant impact on the complainant. The challenges experienced by family law courts in seeing coercive control even without an intent requirement raises questions about how this element of the offence will be interpreted and applied.[139]

In England and Wales, a cross-sectoral definition of coercion and control was developed prior to the introduction of a criminal offence.[140] In Australia, the New South Wales government has decided it is premature to create such an offence, citing among other factors the need to first develop a common cross-sectoral definition.[141] In Canada, if an offence of coercive control is adopted – which we do not support – there should be a delay of the coming into force of the law

[138] Walklate et al, "Is more the answer?," *supra* note 53.

[139] See e.g. BC's *Family Law Act*, s 1, which was amended in 2021 to confirm that intent was not a requirement for finding family violence. However, courts continue to struggle to see coercive control under the BC FLA. See Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96.

[140] Brennan and Mayhill, *supra* note 39 at 469-70.

[141] Parliament of New South Wales, *Joint Select Committee on Coercive Control, Report 1/57* (June 2021), online: <https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Report%20-%20coercive%20control%20in%20domestic%20relationships.pdf> at 25. For a discussion of reform efforts across Australia, see Jane Wangmann, "Law Reform Processes and Criminalising Coercive Control" (2022) 48:1 Australian Feminist Law Journal 57.

so that cross-sectoral definitional work can be done prior to the implementation of the offence. The problems arising from the lack of harmonized definitions in intimate partner violence-related laws means that these laws are open to misunderstanding and manipulation.[142]

ii) Child Protection Law

All survivors may be reluctant to report to the police for fear of child welfare involvement but, as indicated above, Black and Indigenous survivors may be especially reluctant to do so. Survivors run the real risk of being seen as having failed to protect their children from exposure to violence, even in the face of a lack of affordable alternative housing and inadequate income and social supports, systemic racism, a fear of retaliation, or other impediments to leaving.

A child is generally identified in child protection statutes as being in need of protection or intervention where they have been, or are likely to be, harmed physically, sexually or emotionally by their parent or caregiver.[143] Emotional harm or injury may be expressly defined to include living in a situation where there is domestic violence by or towards a person who the child lives with,[144] or may be interpreted as such by child welfare agencies.[145] Several statutes expressly identify "exposure" to family or domestic violence or "severe domestic disharmony" as a ground for intervention or as relevant to best interests.[146] The federal *An Act Respecting First Nation, Métis*

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[142] See our discussion of the need for harmonized definitions in "A Comparison of Gender-Based Violence Laws in Canada," *supra* note 3.

[143] *Child, Family and Community Services Act*, RSBC 1996, c 46, s 13(1)(e) (BC CFCSA); *The Child and Family Services Act,* CCSM c C80, s 17 (MB CFSA) (where a child's "life, health or emotional well-being" is "endangered by the act or omission of a person" or is abused or likely to suffer harm or injury due to the "behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;" *Child Youth and Family Services Act*, SO 2017, c 14, s 74(2) (ON CYFSA) (the child has suffered or there is a risk the child is likely to suffer physical harm, sexual abuse or exploitation or emotional harm (shown by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour or delayed development, where reasonable grounds to believe the emotional harm results from the conduct of the parent); *Child, Youth and Families Act,* SNL 2018 c C-12.3, s 10(1)(c),(f), 10(3)(h) (NL CYFA) ("is being, or is at risk of being emotionally harmed" by a parent or "by a person and the child's parent does not protect the child").

[144] E.g. BC CFCSA, *ibid,* s 13(1)(e)(ii); 13(1.2); NL CYFA, *ibid*, s 10(3)(h) (includes "living in a situation where there is violence"); *Child and Family Services Act,* SY 2008, c 1, s 21(4)(b) (YK CFSA) (exposure to domestic violence or severe domestic disharmony if a cause of emotional harm); *Child, Youth and Family Enhancement Act,* RSA 2000 c C-12, s 1(3)(a)(ii)(C) (AB CYFEA) (emotional injury through "exposure to family violence or severe domestic disharmony").

[145] In Ontario and Manitoba, emotional harm has been interpreted to include exposure to domestic violence; see e.g. *Child and Family Services of Western Manitoba v NRM,* 2019 MBQB 127 and the *Ontario Child Protection Standards (2016),* online: <https://www.ontario.ca/document/ontario-child-protection-standards-2016>.

[146] *The Child and Family Services Act,* SS 1989-90, c C-7.2, s 11 (SK CFSA) (includes a child who is or likely to be exposed to "interpersonal violence or severe domestic disharmony that is likely to result In physical or emotional harm to the child"); MB CFSA, *supra* note 143, s 2.1(5)(i) now includes direct or indirect exposure to family violence as relevant to best interests; *Youth Protection Act,* CQLR c P-34.1, s 38 (c.1) (QB YPA) (exposure to domestic violence refers to direct or indirect exposure to violence between a child's parents or between a parent and an intimate partner "including in a post-separation context, among other things, if the child witnesses such violence or develops in an atmosphere of fear or tension and where such exposure could cause harm to the child" and see s 38.2.2 for a list of relevant factors, and s 38.3 whereby justification of any such situation by way of ideology or "other consideration," including the concept of honour, is expressly prohibited); *Family Services Act,* SNB 1980 c F-2.2, s 31(1)(f) (NB FSA) (living in a situation where there is domestic violence) and *Child and Youth Well-Being Act,* SNB 2022 c 35, s 34 (i) (living in a situation where violence exists that is likely to result in physical or emotional harm); *Children and Family*

and Inuit children, youth and families (FNMICYFA) also mandates consideration of direct or indirect exposure to "family violence" and other civil or criminal proceedings as relevant to the safety and well-being of Indigenous children involved in family service proceeding,[147] and Indigenous governing bodies that are assuming jurisdiction over child welfare may include exposure to family violence as emotional injury.[148] However, domestic or family violence or emotional harm is not specifically or only vaguely defined in many statutes,[149] may not expressly include coercive or controlling violence,[150] or may not be interpreted in practice as inclusive of coercive control.[151]

When child protection agencies began to investigate situations involving exposure to domestic violence in the early 2000s through a broader interpretation of emotional harm or explicit statutory authorization, the number of investigations increased dramatically.[152] As of 2018, the Ontario Incidence Study of Reported Child Abuse and Neglect revealed that 45% of substantiated maltreatment investigations arose from reports of exposure to intimate partner violence.[153] To the extent that criminalization of coercive control will increase police involvement (through

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Services Act, SNS 1990 c 5 (NS CFSA), s 22(2)(i) (child has been exposed to or made aware of violence by or towards a parent or co-resident and the parent or guardian fails or refuses to obtain services or treatment or take other measures to remedy the violence); *Child Protection Act,* RSPEI 1988, c C-5.1, s 9(m)(n) (PEI CPA) (child has suffered or is at substantial risk of suffering physical or emotional harm caused by exposure to domestic violence); NL CYFA, *supra* note 143, s 10(1)(l), (m), (n) (living with parents whose conduct shows a propensity to violence or where there is violence or a risk of violence); *Child and Family Services Act,* SNWT 1997, c 13, s 7(3)(j)(k) (NWT CFSA) (exposure to domestic violence and child has suffered or is at substantial risk of suffering physical or emotional harm from that exposure and the "parent fails or refuses to obtain services, treatment or healing processes to remedy or alleviate the harm"); *Child and Family Services Act,* SNWT (Nu) 1997, c 13, s 7(3)(p) (NU CFSA) ("child "is repeatedly exposed to family violence and the child's parent is unwilling or unable to stop such exposure"); YK CFSA, *supra* note 144, s 21(1), (3), 4(b) (emotional harm by exposure to "domestic violence or severe domestic disharmony").

[147] SC 2019, c 24, s 10(3)(g),(h). See also *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

[148] See e.g. *Cowessess First Nation Miyo Pimatisowin Act,* ss 6.2(g), 8.3(a)(ii)D (defining emotional injury to include exposure to family violence), enacted March 2020.

[149] See e.g. BC CFCSA, *supra* note 143, s 13; NL CYFA, *supra* note 143, s 10(1); MB CFSA, *supra* note 143, s 2.1(5). While we have not reviewed the regulations in all jurisdictions, those in British Columbia, Saskatchewan, Nova Scotia, Newfoundland and Labrador, the Northwest Territories and Nunavut do not appear to further define such terms.

[150] For example, "interpersonal violence" is not defined in the SK CFSA*, supra* note 146 but in *The Victims of Interpersonal Violence Act,* SS 1994, c V-6.02, s 2(e.1) is defined to include intentionally or recklessly causing bodily harm or property damage or a reasonable fear thereof or forced confinement, sexual abuse, harassment, and deprivation of necessities, but not emotional abuse.

[151] What occurs on the ground may be shaped more by policy manuals, general understandings of domestic violence, and workload pressures. In Saskatchewan, Wiegers found through interviews with both lawyers and social services personnel that in practice exposure to domestic violence was commonly interpreted to denote exposure to threats or actual incidence of physical violence and not patterns of coercive control, Wiegers, *supra* note 40 at 210.

[152] See Tara Black et al, "The Canadian child welfare system response to exposure to domestic violence investigations" (2008) 32:3 Child Abuse & Neglect 393, finding that the number of substantiated investigations increased 259% between Canadian Incidence studies of reported child abuse and neglect in 1998 and 2003 but that most did not result in the removal of children from both parents.

[153] Barbara Fallon et al (2020). Ontario Incidence Study of Reported Child Abuse and Neglect-2018 (OIS-2018). Toronto, ON: Child Welfare Research Portal.

reports to the police by abusive partners or third parties if not survivors), it will also likely trigger more child welfare investigations. Criminalization of coercive control would likely increase the willingness of child protection agencies to consider exposure to coercive control a form of domestic violence, but given a lack of statutory or regulatory guidance, how such agencies would define it remains open to question.

Child welfare investigations can provide an opportunity to provide services to survivors and stem the harmful impacts of coercive control if workers are adequately trained in the dynamics of domestic violence, are sensitive to the intersecting and complex systemic inequalities affecting survivors, and if they are able to provide meaningful supports, particularly safe housing if needed. In the absence of adequate training, understandings, and preventative supports, an increase in investigations could merely increase the surveillance and control that survivors experience, as well as heighten the risk of out-of-home placements for children and related trauma. Child welfare involvement can also shape how parenting arrangements in the family law system unfold to the detriment of survivors' claims. The engagement of both systems can end up placing contradictory expectations upon survivors, i.e. to both protect children and facilitate contact with abusive partners.[154]

iii) Civil Protection Orders

Family violence protection orders – whether available under stand-alone legislation or as family law restraining orders – are another legal regime that intersects with the criminal and family law systems.[155] When it was first implemented in the 1990s in Canada, protection order legislation was seen as a means of supplementing CLS responses to domestic violence, but in some provinces and territories, these orders are sought by survivors as an alternative to engaging with the CLS – although sometimes, police apply for protection orders on behalf of survivors. Not all jurisdictions with protection order laws include coercive control in their definitions of family violence, however. It seems a logical first step before considering criminalization of coercive control that all protection order laws should include this form of violence, so that survivors have access to protective remedies without relying on the CLS.[156] This is not to say that the protection order

[154] Judy Hughes and Shirley Chau, "Children's best interests and intimate partner violence in the Canadian family law and child protection systems" (2012) 32:4 Critical Soc Policy 677; Wiegers, *supra* note 40.

[155] The arguments in this section are based on a study published by Jennifer Koshan focused on Alberta that involved a review of protection order legislation, evaluations, and case law, interviews with legal professionals and service providers, and observations of court proceedings. See "Preventive Justice," *supra* note 101.

[156] This would require reforms by provincial and territorial governments to protection order legislation. Currently, only BC and New Brunswick include coercive control in their definitions of family violence. See *Family Law Act*, SBC 2011, c 25, ss 1, 184(1)(c) (including coercion and control within the categories of psychological or emotional abuse); *Intimate Partner Violence Intervention Act*, SNB 2017, c 5, ss 2(a), 4(3)(d). Some other jurisdictions include coercive control in the list of factors relevant to granting protection orders, while not in the definition of family violence per se. For a discussion, see "A Comparison of Gender-Based Violence Laws in Canada," *supra* note 3 at 4-5. The National Action Plan to End Gender-Based Violence includes Pillar 3– Responsive justice system, which provides impetus for provinces and territories to reform their laws. See Women and Gender Equality Canada, online: <https://femmes-egalite-genres.canada.ca/en/gender-based-violence/intergovernmental-collaboration/national-action-plan-end-gender-based-violence.html>.

system is without its own serious problems. Protection orders do not necessarily provide safety to survivors, as they can be very short-term, and breaches may not be reported to or enforced by police, which in turn reinforces concerns about how police would respond to allegations of coercive control if it were criminalized.[157] Proceedings involving protection orders are also a site where claims of false allegations by women are often raised by men against whom protection orders are sought, and are sometimes accepted by courts, reinforcing the need for education of legal professionals. There is also evidence from Alberta that respondents may use protection order review hearings as a way of testing witness credibility for related criminal matters, which could impact the CLS if coercive control was criminalized.

iv) Immigration

As with other women who experience social marginalization, women with precarious immigration status experience tactics of coercive control specific to the intersecting oppressive structures they encounter. For example, threats to contact border control and to ensure their deportation are among the tactics deployed by perpetrators. Complex intersections between immigration, criminal, and family law create situations of tremendous precarity and make it highly unlikely that survivors will seek police assistance. Current legislative provisions that preclude a spousal sponsorship for permanent resident status if convicted of an offence involving bodily harm (or threat thereof) against an intimate partner or other family member[158] are no doubt intended to act as a deterrent, but the reality is that they operate to silence survivors who fear the loss of a sponsorship. Expanding the circumstances through which a spousal sponsorship would be lost creates less – not more – safety for women with precarious immigration status.

Additionally, the risk that a coercive control offence could be manipulated by perpetrators has particularly egregious consequences for women without citizenship status. If survivors are charged and convicted, their removal from Canada is a very real possibility, even for permanent residents. Bill C-332 would create a hybrid offence.[159] The *Immigration and Refugee Protection Act* deems all hybrid offences to be indictable for the purposes of its criminality provisions. A "foreign national" (a person without permanent resident status) is admissible and subject to removal if convicted of an indictable offence. As such, a conviction for coercive control could well lead to removal from Canada of a survivor who is a foreign national. Depending upon the outcome of any related family law proceeding, it is also possible that she would be removed without her children. For permanent residents, if convicted and sentenced to a term of imprisonment of six months or more, they too are inadmissible, and subject to potential removal.

v) Manipulation of Legal Systems

We have earlier referenced the manipulation of the CLS by abusers, and noted how frequently they claim – in family, civil protection, and criminal law systems -- to be the "real" victims of

[157] For similar concerns about protection orders in BC, see Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96 at 5 (noting as well that "women are sometimes asked to bargain away protection orders to secure orders about parenting, support, or property division").
[158] *Immigration and Refugee Protection Regulations,* SOR/2002-227, s 133(1)(e).
[159] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 36(1)-(3).

intimate partner violence.[160] But the use of the legal system as part of a pattern of coercive control extends well beyond these pernicious actions.[161] In the family law cases we reviewed for this submission and in prior research, it is not uncommon to see instances where abusers have made multiple false reports to child welfare authorities, to social assistance, housing and subsidized daycare providers, and to border control agents with a view to shoring up their power and control.[162] This persistent manipulation within legal arenas is rarely ever called out and stopped, although in the family law realm there appears to be a growing recognition that the manner in which litigation is conducted can itself constitute family violence.[163] As many others have noted, the creation of an offence of coercive control risks enlarging the stage on which abusers can continue to engage in manipulation.[164]

F. What Steps Should Be Taken?

For the many reasons outlined above, we agree with the conclusion of others that more law is not the answer,[165] and with the conclusion of the NS Mass Casualty Commission that a community-based and not a carceral approach should be emphasized.[166] In coming to this conclusion we have also taken into account that early studies of the England and Wales legislation criminalizing coercive control have concluded that it is not clear that safety for women and children has been improved.[167]

As we noted at the outset of our submission, while we conclude that a new offence of coercive control should not be implemented, we strongly believe that all legal system actors need to acquire the knowledge, skill, and sensibilities to effectively identify coercive control. We also want to emphasize that in our view, the absence of an offence of coercive control does not mean that

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[160] Mosher, *supra* note 40.

[161] See Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96; Linda Neilson, "Failure to Protect: Social & Institutional Factors That Prevent Access to Justice in Family Violence/Family Law Cases," (2023) Family Violence & Family Law Brief, Muriel McQueen Fergusson Center for Family Violence Research [Neilson, "Failure to Protect"]; Hrymak and Hawkins, *supra* note 111; Heather Douglas, "Legal systems abuse and coercive control" (2018) 18:1 Criminology & Criminal Justice 84; Kate Mazzuocco, "Unable to Relinquish Control: Legal Abuse in Family Court" (2017, Luke's Place Support & Resource Centre for Women & Children), online: <https://lukesplace.ca/wp-content/uploads/2022/03/Unable-to-Relinquish-Control_-Legal-Abuse-in-Family-Court.pdf>; Robert Nonomura et al, "When the Family Court Becomes the Continuation of Family Violence After Separation: Understanding Litigation Abuse" (2023) 15:4 Family & Intimate Partner Violence Quarterly 59; David Mandel, Anna Mitchell, and R Stearns Mandel, "How Domestic Violence Perpetrators Manipulate Systems" (2021), online: <https://sfv.org.au/wp-content/uploads/2022/02/How-DV-Perpetrators-Manipulate-Systems.pdf>. From our case sample, see *Ghiyas v Khan*, *supra* note 98; *KSP v JTP, supra* note 96; *KRW v PMM*, *supra* note 97; and *Fernandes v Fernandes*, *supra* note 96.

[162] Neilson, "Failure to Protect," *supra* note 152; Mosher, *supra* note 40.

[163] See, e.g. *KSP v JTP, supra* note 96; *KRW v PMM, supra* note 97; and *Fernandes v Fernandes*, *supra* note 96.

[164] Brennan and Myhill, *supra* note 39; Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96; Walklate and Fitz-Gibbon, "Why Criminalise?," *supra* note 53 at 8.

[165] Walklate and Fitz-Gibbon, "Why Criminalise?," *ibid*. They also make the important observation that the increased use of law does not necessarily equate with its efficacy and point to the challenges of establishing that safety has been improved (at 3).

[166] NS Mass Casualty Commission, *supra* note 28.

[167] Walklate and Fitz-Gibbon, "Why Criminalise?," *supra* note 53 at 3.

police are powerless to assist survivors. Any and every contact that police have with a survivor is an opportunity to mitigate risk. Risk mitigation requires that effective risk assessment tools be in place, as well as the knowledge and skill to use them appropriately. The important work of the Barbra Schlifer Commemorative Clinic to build risk assessment tools and training that attend to intersecting identity factors for Indigenous women, Black women, racialized women, immigrant and refugee women, women with precarious immigration status, women with disabilities, 2SLGBTQIA+ people, and gender-diverse survivors who are disproportionately impacted by GBV should be consulted.[168] Moreover, risk mitigation requires that safety plans be created and that the supports and resources – access to safe housing, income support, and counselling for example – are in place to implement them.[169]

While we are highly skeptical about the wisdom of adding a new offence of coercive control or a broader offence of domestic abuse that includes coercive control, at the very least, its introduction is premature as the education, understanding, resources (including trust, time), and accountability mechanisms for CLS actors such as police, prosecutors, and judges are simply not in place. As Neilson has argued, "unless the educational, social, institutional and structural factors that deny women and children genuine access to justice are addressed, criminal law is likely to continue to fail to offer safety to many women and children."[170] Additionally, as discussed earlier, there is a need for cross-sectoral discussions to develop a common definition of coercive control so that legal actors are operating under a common framework. We would also recommend that Justice Canada undertake a thorough review of how coercive control is being interpreted and applied under the *Divorce Act* to see what lessons can be learned there. We also endorse the recommendation made by the NS Mass Casualty Commission that an expert advisory group be established to "examine whether and how criminal law could better address the context of persistent patterns of controlling behaviour at the core of gender based, intimate partner, and family violence."[171] Although the current engagement process led by the Department of Justice is a welcome first step, this process falls short of a full consultation with a full range of experts that is publicly accessible.

If criminalization does proceed, we have many concerns about the particular offence provision set out in Bill C-322. As noted earlier, it is difficult to discern precisely the conduct that is prohibited. This ambiguity arises both because of the lack of clarity related to the number of repetitions of conduct required and because the conduct is itself undefined – rather particular acts become proscribed by virtue of their impact. In our view, such a provision is constitutionally vulnerable given its vagueness and potential overbreadth, as well as its adverse impact on marginalized groups.[172]

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[168] "Risk Identification and Safety Assessment (RISA) Tool," online: <www.schliferclinic.com/guiding-systemic-responses/>.

[169] For detailed and excellent recommendations see, Amanda Dale et al, *A Report to the Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence* (April 30, 2021), online: <https://nationalactionplan.ca/wp-content/uploads/2021/06/NAP-Final-Report.pdf.

[170] Neilson, "Submission," *supra* note 66 at 10. See also NAWL, Position Paper, *supra* note 135.

[171] NS Mass Casualty Commission, *supra* note 28, recommendation V12 (vol 3 at 391).

[172] In the American context, Erin Sheley has argued that a clause similar to that of England and Wales would not pass constitutional muster on vagueness grounds given the failure to define coercive or controlling behaviour and the

A full constitutional analysis is beyond the scope of this submission. However, our concerns about the vague wording of Bill C-332 – both in terms of the offence provision and the "best interests" defence – may result in an overbroad application of s 264.01, contrary to s 7 of the *Charter*. An offence of controlling or coercive conduct, with the potential for imprisonment (see s 264.01(7)), would clearly engage the liberty interest in s 7. Overbroad criminal offences, defined as those that interfere with some conduct that bears no connection to the law's objective, are contrary to the principles of fundamental justice.[173] Assuming that the objective of Bill C-332 is to protect survivors of violence, the real possibilities of misusing the offence against survivors of violence – including those trying to protect their children – show the potential for the overbroad application of Bill C-332. Furthermore, our concerns about the adverse impacts of the offence on members of marginalized groups such as Black and Indigenous women engage the equality rights protections in s 15 of the *Charter*. Courts have acknowledged the systemic racism and colonialism in the CLS but have been slower to recognize that the resulting adverse impacts amount to a violation of s 15.[174] Nevertheless, it is incumbent on Parliament to attend to these potential adverse impacts when considering a new offence of coercive control, in light of the evidence we and others have cited in our submissions.

Should criminalization proceed, we strongly urge consideration of the creation of a defence related to resistance to coercive control, and that the defence of "best interests" in s 264.01(5) of Bill C-332 be eliminated. We also recommend that Justice Canada heed the advice of Brennan and Myhill and implement not only mechanisms to track the effective use of any new law, but also its failings, perversions, and absences.[175]

We further recommend the availability of independent legal advice for survivors of coercive control and domestic violence more broadly, similar to that available for survivors of sexual violence, so that they are aware of their legal and non-legal options and provided with access to supports and services.

Lastly, we want to emphasize that the ability of even a well-functioning, responsive CLS (and we are far from having such a system) to ensure safety for women and children experiencing family violence is limited. There is a crucial need for a broad range of coordinated services and supports – housing, income supports, counselling, etc. – that are responsive to women's diverse identities and needs.

Returning to the tragic loss of Daniella Mallia's life, let us sit with these facts again: she feared retaliation (she had good reason to), she was reluctant to turn a Black man over to the CLS, she was cautioned, he was not charged, no risk assessment was done, a proper investigation was not completed, and Constable Lee had never taken a specialized course on intimate partner violence. While certainly not every case of intimate partner violence exhibits all of these profound failures

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open-ended nature of "serious effect" and "substantial adverse effect," and would also fail on overbreadth grounds; "Criminalizing Coercive Control Within the Limits of Due Process" (2021) 70 Duke LJ 1321.

[173] See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101.

[174] See e.g. *R v Sharma*, 2022 SCC 39.

[175] Brennan and Myhill, *supra* note 39 at 480. See also Rise Women's Legal Centre and West Coast LEAF, "Submission," *supra* note 96 at 10.

in state protection, far too many contain similar elements. Until we have confidence that existing failures have been addressed, expanding the role of the CLS threatens to create, as Cross has warned, far more harm than good. [176]

[176] Cross, *supra* note 26.

Appendix A – Table of *Divorce Act* Cases

AB v MM, 2023 ABKB 377 (CanLII)

Abaza v Adam, 2023 ONSC 1776 (CanLII)

Bakker v Bakker, 2023 ONSC 3025 (CanLII)

Begum v Klippenstein, 2023 ONSC 2970 (CanLII)

DF v TF, 2023 ONSC 115 (CanLII)

Fernandes v Fernandes, 2023 ONSC 564 (CanLII)

Ghiyas v Khan, 2023 ABKB 274 (CanLII)

Hoffman v Tytlandsvik, 2023 SKKB 146 (CanLII)

Johnston v Da Silva, 2023 ONSC 2710 (CanLII)

KAG v KGG, 2023 PESC 33 (CanLII)

KRW v PMM, 2023 BCSC 981 (CanLII)

KSP v JTP, 2023 BCSC 1188 (CanLII)

MP v PP, 2023 BCSC 1530 (CanLII)

PMZ v DJT, 2023 BCSC 1444 (CanLII)

RL v MF, 2023 ONSC 2885 (CanLII)

SVG v VG, 2023 ONSC 3206 (CanLII)

Appendix B – Summary of Bill C-332[177]

Section 264.01(1): Would establish the offence of **"controlling or coercive conduct"** where a person:

- repeatedly or continuously engages in controlling or coercive conduct,
- towards a person with whom they are connected,
- that they know or ought to know could, in all the circumstances, reasonably be expected to have a significant impact on that person,
- and that does have such an impact on that person.

Section 264.01(2): An interpretative provision indicating that controlling or coercive conduct has a **"significant impact"** on a person if it:

- causes them to fear, on reasonable grounds, on more than one occasion, that violence will be used against them,
- causes their physical or mental health to decline, or
- causes them alarm or distress that has a substantial adverse effect on their day-to-day activities, including:
    - limits on their ability to safeguard their well-being or that of their children,
    - changes in, or restrictions on, their social activities or their communication with others,
    - absences from work, education or training programs, or changes in their routines or status in relation to their employment or education, and
    - changes of address.

Section 264.01(3): An interpretative provision indicating that two persons are **"connected"** if:

- they are current spouses, common-law partners or dating partners,
- they are members of the same household, and
    - are former spouses, common-law partners or dating partners.
    - are relatives, or
    - carry out, or have carried out, parental responsibilities in respect of the same child under the age of 18 years; or
- less than two years has passed since they ceased to be connected as defined.

Section 264.01(4): An interpretative provision indicating that **"dating partners"** includes two persons who have agreed to marry each other.

Section 264.01(5): An **exemption** provision indicating that if an accused is charged with an offence of controlling or coercive conduct, and the "significant impact" that they are alleged to have caused is either a decline in the connected person's physical or mental health, or causing

[177] *An Act to amend the Criminal Code (controlling or coercive conduct)*, First Session, Forty-fourth Parliament, 2023, online: <https://www.parl.ca/Content/Bills/441/Private/C-332/C-332_1/C-332_1.PDF>.

the connected person alarm or distress that has a substantial adverse effect on their day-to-day activities, it is a defence if:

- the accused was acting in the best interests of the person towards whom the conduct was directed; and
- the conduct was reasonable in all the circumstances.

Section 264.01(6): An **evidentiary provision** in relation to s 264.01(5), providing that evidence that the accused was acting in the best interests of the person towards whom the conduct was directed, and that the conduct was reasonable in all the circumstances, is, in the absence of evidence proving the contrary beyond a reasonable doubt, proof of those facts.

Section 264.01(7): A provision indicating that the offence of controlling or coercive conduct is hybrid, and:

- if prosecuted as an indictable offence, the maximum punishment is five years imprisonment;
- if prosecuted as a summary conviction offence, the usual range of punishment for such offences will apply.