Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases

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FAMILY VIOLENCE AND EVOLVING JUDICIAL ROLES: JUDGES AS EQUALITY GUARDIANS IN FAMILY LAW CASES

The Honourable Donna Martinson *
and Professor Emerita Margaret Jackson**

PART I. FAMILY LAW AND JUDICIAL ACCOUNTABILITY: A CONTEMPORARY CONTEXT

Access-to-justice studies¹ initiated by Canadian lawyers and judges in the past four years have described the urgent need for family law

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reform. Reports from the studies discuss the need for a cultural shift—a fresh approach and a new way of thinking—in the reform process. A *Roadmap for Change*, the final report of the National Action Committee on Access to Justice, emphasizes the importance of providing justice, not just access: "Providing justice—not just in the form of fair and just process, but also in the form of fair and just outcomes—must be our primary concern." This article deals with the need to take a fresh look at the roles and responsibilities of judges in family law cases to ensure fair and just outcomes. Applying an equality-based analysis, this article emphasizes the importance to all family law cases of identifying family violence when it exists, and assessing its impact on the outcome at all stages of the judicial process—including judicial dispute resolution conferences. All justice system professionals, including lawyers, have a role to play in achieving fair and just outcomes; the responsibility does not just fall at the feet of judges. However, as guardians of Canada's justice system and its constitutional values, judges are accountable to the people courts serve. Because of this they have a particularly important and unique leadership role to play.

**AN EQUALITY-BASED ANALYSIS**

Taking such a fresh approach involves more than just a few adjustments to the ways in which judges now deal with family law cases. It requires a careful examination of the process of judging used by many judges, and the kinds of qualifications considered sufficient to judge, to see if they continue to meet the needs of the users of the modern family justice system. We have two central


2 *A Roadmap to Change*, supra note 1 at 9.
themes, both relating to the responsibility of judges to enforce and enhance the equality guarantees found in Canada’s *Charter of Rights and Freedoms*\(^3\) (the *Charter*), as well as Canadian and international human rights instruments. Substantive equality is a fundamental constitutional value that is relevant to every area of law and practice. Achieving fair and just outcomes requires an equality-based analysis.

The first theme is that Canadian judges may be assuming the passive role of a neutral arbiter, only deciding cases based on the evidence and arguments presented, even if the evidence and arguments are deficient. Decisions about family violence and its impact can therefore be made without all the relevant information needed to protect the safety, security, and well-being of those alleging family violence. The second theme, directly related to the first, is a concern about the use of "generalist" judges—those who have backgrounds in all areas of the law and hear all cases, not just family law and related cases—in many places in Canada, including British Columbia. This approach raises systemic concerns about judicial competence; judges assigned to deal with family law cases may not have, nor be in a position to acquire, knowledge about substantive family law principles. They may not have the professional experience and expertise required to deal with the multi-faceted nature of family violence and its complexities, using an equality-based analysis. They also may not have the interest in, or aptitude for, dealing with family law cases.

\(^3\) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
MOVING AWAY FROM THE JUDGE AS NEUTRAL ARBITER

These views about how judges do their work, and what qualifications they need, were developed before the *Charter* came into effect, and when the roles judges played were very different. They operated within what can be called the traditional adversary system. In it, judges made decisions based only on the evidence and legal arguments presented, almost always by lawyers. They were not involved in assisting people to settle their cases, so did not have to make recommendations about what a fair and just outcome would be in that context. They did not become involved in managing how the case would proceed through the court process but instead decided issues if lawyers brought them before the court. The "generalist" judges not only dealt with all cases, ranging from all aspects of business law, to personal injury claims, wills and estates, and criminal law, but their legal experience and interests varied widely; a lawyer who chose to deal with corporate mergers throughout a long career could be assigned family law cases upon becoming a judge. In this traditional approach to the adversary system, judges were considered competent based on their general professional experience, their reputations as lawyers, and their other life experiences.

Law Professor Richard Devlin, the Honourable Justice C. Adèle Kent, now the Executive Director of the National Judicial Institute, and Judicial Advisor Susan Lightstone consider the traditional adversary system in their article, *The Past, Present . . . and Future(?) of Judicial Ethics Education in Canada.*[^4] They say it is premised on three constituent elements; “a set of procedural rules that determine the collection and presentation of evidence, the

articulation of arguments by partisan adversaries, and the determination of the truth by a passive neutral arbiter.” 5 It is their sense that most judges still subscribe to this traditional view of judging.6 This neutral arbiter role is founded in traditional views about the meaning of the principles of judicial independence and impartiality. The Canadian Judicial Council, in a recent document called Why is Judicial Independence Important to You?, describes judicial independence as being important to people because it “guarantees that judges are free to decide honestly and impartially, in accordance with the law and the evidence, without concern or fear of interference, control or improper influence by anyone.”7 That continues to be an essential guarantee.

However, there have been fundamental changes that challenge the appropriateness of that neutral arbiter model and of the approach to judicial competence founded in the traditional adversary system. In addition to the fact that the Charter has made major changes to the legal analysis required for fair and just outcomes, there have been: 1) significant changes in what judges are required to do in their day-to-day work that now requires specialized knowledge and skill; 2) new, modern approaches to the principles of judicial independence and impartiality based on the equality guarantee in the Charter, which include an increased emphasis on the equally important principle of judicial accountability; 3) many advances in our understanding of how equality principles apply to family law; and 4) a critical shift in our understanding of the nature of family violence, its impact, and its frequency.

5 Ibid at 31.
6 Ibid at 31.
7 Canadian Judicial Council, Why is Judicial Independence Important to You? (Canada: Canadian Judicial Council, May 2016) at 2, online: <https://www.cjccem.gc.ca>.
Specialist or Generalist Judges

There have also been significant developments in the field of judicial education. Canada's National Judicial Institute has an international reputation for developing effective programs for judges, including programs on family law in general and family violence in particular. However, those programs are, in reality, much more accessible to specialized family court judges, including those who work in Unified Family Courts, than they are to generalist judges. Generalist judges will need to attend programs on all other areas of the law as well. Experience has shown that most of the judges who attend family law programs at the national level are those from specialized courts; family law programs for generalist judges at their individual courts must be interspersed with programs on all other areas of law, thus limiting the judges’ exposure to education on family law. Further, there is a lingering view on the part of some judges that the principles of judicial independence and impartiality dictate that judges do not have to participate in judicial education programming. In our respectful view, principles of judicial accountability require that judges have the core competencies necessary to do the work they are assigned to do; it is a matter of professional responsibility for both individual judges and courts as institutions.

JUDGES’ RESPONSIBILITIES UNDER THE FAMILY LAW ACT

The authors' interest in the topic of taking a fresh approach to judicial roles and responsibilities in family law cases arose as a

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8 Unified Family Courts are those in which the judges, who are appointed by the federal government, deal only with family law cases, and sometimes related cases, such as those involving child protection. They exist in some places in Canada, but not in others. Most Canadian families do not have access to these courts.
result of their own research in British Columbia on family violence and B.C.’s *Family Law Act*\(^9\) (the FLA), within the context of the analyses of many reports and articles. In our view, the FLA gives judges a number of important legal responsibilities that focus on the best interests of children and that require the judge, by the use of the word “must,” to examine the particular circumstances of the child or children at issue, using a specific legal framework.\(^10\) That framework includes numerous factors designed to determine whether family violence, broadly defined, is an issue, and if it is, what its impact might be. It requires parents who are guardians to also consider all of the best interest factors when making an agreement, with the result that those advising such parents, including judges and lawyers, must ensure that they do so.\(^11\) It requires “family dispute resolution professionals” including lawyers, to assess whether family violence may be present.\(^12\) If it appears that family violence is present, they must also assess the extent to which it may adversely affect both the safety of the party or a family member and the ability of the party to negotiate a fair deal.\(^13\) These requirements apply to all family law cases, not just those involving parenting.

The FLA came into effect in 2013 after extensive research and consultations by the B.C. Ministry of Justice. That research and

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9 SBC 2011, c 25 *[FLA]*.

10 *Ibid*. Section 37(1) states that “the parties and the court must consider the best interests of the child only, and s. 37(2) states that to determine the best interests of the child, all the child’s needs and circumstances must be considered” including the 10 factors found in (a)–(j). Section 38 states that, in dealing with the factors in s. 37 specific to family violence, “a court must consider” 8 specific factors: (a)–(h) and any other relevant factor, (i) [emphasis added].

11 *FLA*, *supra* note 9, s 8(3).

12 *Ibid*, s 8(1).

13 *Ibid*. 
those consultations identified challenges in the way family violence was dealt with under the existing legislation, and the new legislation aims to address those challenges. The FLA provides not just an effective approach to the analysis of family violence, using equality-based principles, but also a consistent approach to the identification and assessment of family violence; it provides everyone with a framework for analysis. When it was enacted, the Ministry described it as modernizing the existing legislation to better reflect current social values and research.\textsuperscript{14} We agree.

\textbf{THE FLA AND THE AUTHORS’ QUALITATIVE RESEARCH}


\textsuperscript{15} Canada, National Judicial Institute, Domestic Violence Program Development for Judges, \textit{British Columbia Community Consultation Report}, by The Honourable Donna Martinson (online: National Justice Institute, April 2012), online: <http://fredacentre.com> [NJI Community Consultation].
Consultation). Though those consulted raised a number of concerns, all of the participants were optimistic that the new FLA family violence provisions would make a real difference. We too were optimistic, as indicated by our article prepared for the programs, *Judicial Leadership and Domestic Violence Cases: Judges Can Make a Difference*.16

Yet our exploratory, qualitative research on the actual operation of the FLA, called *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts*17 (the *Risk of Future Harm* Report), concluded in 2016, suggests that in spite of the provisions in it, at least some judges in British Columbia may not be getting the relevant family violence information they need, and "must" consider, either in judicial dispute resolution conferences or trials. When they do not, they—following the traditional neutral arbiter role—do not ask for that information, stating that it is necessary to put blinders on. There is also a concern about whether all judges have the necessary specialized knowledge and skill needed to deal with family law cases generally and to identify relevant family violence factors and determine their impact.


We emphasize that our concerns are not with the work and the competence of individual judges; Canadian judges have a well-deserved positive reputation. Our focus in on systemic reforms that can improve the administration of justice.

A MAP OF THIS ARTICLE

In the rest of this article, we develop our two themes: the need for judicial oversight and the competency required to provide effective oversight. Part II discusses what judicial accountability means in a constitutionally enhanced adversary system with substantive equality at its core, how substantive equality applies to family law cases, and how it relates to the central themes. Part III uses the BC based NJI Community Consultation and the Risk of Future Harm research as one measure of whether information about family violence and risk of future harm is in fact being provided to judges and whether judges have the specialized knowledge and skills required. Part IV, our concluding section, discusses the place of equality values in reform processes themselves.

Our focus throughout, including in our research, is on equality for women in the family justice system, with an emphasis on violence by men against women. Men can be victims of violence by women and other men, and women can be victims of violence by other women, and violence occurs in gender non-conforming relationships. These are all important issues. However, our work is specifically done through the Simon Fraser University FREDA Centre on Research on Violence Against Women and Children; we have chosen this work because the existing evidence shows that violence in heterosexual relationships remains the most prevalent problem and significantly and disproportionately impacts women and children. We therefore use equality for women as an exemplar of how equality analysis should be applied in all intimate relationships.
PART II: JUDICIAL ACCOUNTABILITY IN A CONSTITUTIONALLY ENHANCED ADVERSARY SYSTEM

Here we begin by considering the modern role of judges in family law cases. We then turn to substantive equality as a fundamental constitutional value, considering its nature, how it is applied using contextual analysis, and the important link between substantive equality and judicial independence and impartiality. Next we discuss how applying substantive equality with what has been referred to as informed impartiality addresses the potential for judicial bias. We then consider how these substantive equality principles apply in family law cases. We conclude this part by specifically relating our discussion to our central themes, judicial competence and judicial oversight, arguing that the analysis informs both the knowledge and skill needed and the type of oversight required, to achieve judicial accountability. Judges are of course accountable to all people, not just women; we do not suggest that any particular outcome is required. It is the fairness of the process of analysis that matters.

THE MODERN ROLE OF JUDGES IN FAMILY LAW CASES

Judges are now significantly involved in assisting people to reach an agreement (settlement) in informal judicial dispute resolution processes, unlike the approach in the traditional adversary system where formal decisions are made in hearings or trials. In doing so, judges can mediate disputes and often provide non-binding opinions about substantive outcomes, and what a fair and just result would look like. Judges frequently "manage" cases—guiding parties through the process—making temporary orders such as those relating to parenting arrangements, child and spousal support, and who should reside in the family home. Case management judges may be asked to make temporary "protection from family violence" orders and to enforce those and other orders. They may continue to try to facilitate a settlement. Judges are also involved in pre-trial conferencing—making sure that cases are ready for trial by
discussing, in advance, what the issues are and what the evidence and arguments might be. It is well known that many court users in family law cases do not have lawyers representing them, or access to other forms of legal advice; these people often rely on judges to either recommend or make decisions about outcomes that are fair and just.

Judges are engaged in this dispute resolution and trial preparation work at a time when there is an increased focus on resolving family law cases before they get to court, including through the use of mediation, arbitration, parenting coordinators, and a process known as collaborative law. In British Columbia, for example, the FLA is designed to create a negotiation model rather than a litigation model of dispute resolution, specifically making out-of-court resolution the preferred procedures.18 Making courts a last resort has an impact on the nature of the judicial role; the cases which do end up in court will more likely be cases which raise challenging issues, including family violence issues, that can have the most adverse impact on safety, security, and well-being. A careful analysis of the facts of each case is required at every stage of the judicial process; there is no place for informal starting presumptions about what a fair and just outcome is.

THE LEGAL FRAMEWORK: SUBSTANTIVE EQUALITY AS A FUNDAMENTAL CONSTITUTIONAL VALUE

A major change in the rationale for the work judges do took place with the advent of the Charter. Substantive equality became a fundamental constitutional value. It provides an over-arching framework which shapes the work judges do, creating what we suggest can be called a “constitutionally enhanced adversary

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18 FLA, supra note 9: Division 1 of Part 2 (Resolution of Family Law Disputes) is called Resolution Out of Court Preferred.
system.” The Canadian Judicial Council has developed decision-making advisory guidelines for judges that discuss the importance of equality-based analysis: see Ethical Principles for Judges. The guidelines emphasize the importance of an equality-based analysis, saying that “judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.” The Commentary to the ethical principles states that “the Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination.” This marks a significant change in the legal landscape in Canada.

The Nature of Substantive Equality

What is meant by substantive equality? The Commentary emphasizes that the constitutionally protected right to equality is not a commitment to identical treatment, but rather to the equal worth and human dignity of all persons. This includes a desire to rectify and prevent discrimination against particular groups suffering social, political, and legal disadvantage in our society. Hence the expression “substantive equality” rather than “formal equality.” Understanding historical discrimination provides a backdrop for understanding and addressing such discrimination. With this Charter-based view of equality came new judicial responsibilities.

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19 Martinson & Jackson, Risk of Future Harm, supra note 17 at 58.
21 Ibid at 23, Equality Principle 2.
22 Ibid at 24.
23 Ibid at 25.
As retired British Columbia Supreme Court Justice the Honourable C. Lynn Smith has succinctly put it, judges now have a legal obligation to both enforce and enhance the equality guarantees in the Charter writ large.²⁴

Professor Rosemary Cairns Way, a professor of law at the University of Ottawa, speaks about what she refers to as the constitutionally entrenched equality value for the process of judging, writing:

I use the term “equality value” to describe a normative, systemic, and institutionalized commitment to the ideal of substantive equality as a fundamental constitutional value. In my view, the equality value must be understood to underpin every aspect of law and legal practice, in the same way as a commitment to individual liberty undergirds our understanding of the rule of law.²⁵

We agree with her that the equality value underpins every aspect of law and legal practice.

**Contextual Analysis: Understanding People’s Lived Reality**

Contextual analysis has developed to accommodate these legal changes. It can be described as the way in which these equality


rights and values are incorporated into legal analysis. It requires an understanding of the context—the lived reality—of those being judged. Retired Supreme Court of Canada Justice Frank Iacobucci has emphasized the importance of contextual analysis, explaining that “[u]nderstanding the Canadian social context and incorporating this into the process of adjudication requires that we always bear in mind the moral underpinnings of our Constitution and in particular the fundamental principle of equality.”\textsuperscript{26} Chief Justice Beverley McLachlin, when speaking about judging in a diverse society,\textsuperscript{27} explained the importance of a contextual analysis, stating that “the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose.”\textsuperscript{28} She expanded upon the words “social reality,” explaining that:

> Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions.\textsuperscript{29}

In underpinning every aspect of law and practice, contextual legal analysis ensures that \textit{Charter} and other human rights values: 1) inform proposed laws and policies; 2) inform the common law as it develops, including principles of evidence; 3) apply to the way that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} The Honourable Justice Frank Iacobucci, “The Broader Context of Social Context” (Remarks to NJI Seminar, delivered at Victoria, BC, 2001) at 6–7.
\item \textsuperscript{27} The Right Honourable Beverley McLachlin, “Judging: The Challenges of Diversity” (Inaugural Annual Lecture delivered for the Judicial Studies Committee, Scotland, 7 June 2012), online: <http://www.scotland-judiciary.org.uk>.
\item \textsuperscript{28} \textit{Ibid} at 13.
\item \textsuperscript{29} \textit{Ibid} at 14.
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existing laws are interpreted and applied; and 4) apply to practices and procedures that exist and are developed.\(^{30}\)

**Equality Principles and Informed Impartiality: Addressing Subjective Elements in Judging**

The principles of judicial independence and impartiality continue to play a central role in the traditional adversary system; however, an equality-based view of those principles has also developed. Judicial independence has long been recognized as not being a right on its own, but rather a means of achieving impartiality: “It is trite to say, but always worth remembering, that judicial independence is not an end in itself; rather, it is crucial to the rule of law and the ability of judges to be impartial.”\(^{31}\) Impartiality is directly linked to equality, informing the way it is interpreted and applied. The Commentary to the Equality discussion in *Ethical Principles for Judges*, links equality to impartiality, saying that equality “is strongly linked to judicial impartiality.”\(^{32}\)

Chief Justice Beverley McLachlin has spoken about this important connection.\(^{33}\) After explaining the need for judges to understand not just the legal problem, but the social reality out of which the dispute before the court arose, she added that judges must make decisions with what she describes as “informed impartiality.” This, she states, requires an understanding that there are subjective elements to judging, making the point that judges have biases:

\(^{30}\) See also “Changing Judicial Roles: Contextual Analysis” in Martinson & Jackson, *Judicial Leadership*, *supra* note 16 at 9–11.


\(^{32}\) *Ethical Principles*, *supra* note 20 at 24.

\(^{33}\) McLachlin, *supra* note 27.
Like everyone else, judges possess preferences, convictions and—yes—prejudices. Judges are not social or political eunuchs. They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these “leanings of the mind” to the act of judging. In short, judging is not an exercise of cold reason, uncontaminated by personal views and preconceptions.\footnote{34}

Informed impartiality, she says, requires that decision-makers have the ability to identify their own preferences, convictions, and prejudices and to address them by being introspective, open, and empathetic.\footnote{35}

**APPLYING SUBSTANTIVE EQUALITY PRINCIPLES WITH INFORMED IMPARTIALITY IN FAMILY LAW CASES**

**Equality Values Relevant to Women in Family Law Cases**

Here we refer to the equality values in family law cases that judges have a responsibility to both enforce and enhance. While all Charter values apply to women, some are particularly relevant to the question of women and family law. Section 15(1) states that:

\[
\text{[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,}
\]

\footnote{34}{*Ibid* at 7 [footnote omitted].}

\footnote{35}{*Ibid* at 11.}
national or ethnic origin, colour, religion, sex, age or mental or physical disability.\textsuperscript{36}

Section 28 emphasizes that the rights and freedoms are guaranteed equally to male and female persons.\textsuperscript{37} Section 7 provides to everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”\textsuperscript{38}

Canada has ratified several international instruments which are relevant to the equality rights of women in Canada.\textsuperscript{39} The \textit{Charter} must be presumed to provide protection at least as great as found in these international human rights instruments; in this sense they are binding.\textsuperscript{40} With respect to statutory interpretation, there is a

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\textsuperscript{36} \textit{Charter, supra} note 3, s 15(1).

\textsuperscript{37} \textit{Ibid}, s 28.

\textsuperscript{38} \textit{Ibid}, s 7.


\textsuperscript{40} See e.g. \textit{Devote v Canada (Public Safety and Emergency Preparedness)}, 2013 SCC 47; [2013] 3 SCR 157 at paras 23–25.
rebuttable presumption of conformity to international law on the basis that courts must interpret statutes in a way that would not leave Canada in violation of its international obligations.41

The thrust of the international instruments is that discrimination against women violates the principles of equality of rights and respect for human dignity. Violence against women is an example of a violation of the rights and freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms. Such violence is a manifestation of historical power imbalances in relations between men and women, which have led to domination over and discrimination against women by men; it is one of the social mechanisms by which women are forced into a subordinate position by men.

Equality principles apply to all areas involved in family law, including substantive law principles relating to parenting issues, child and spousal support, and the division of property. They inform the nature of dispute resolution processes. They require an equality-based examination of the conceptual underpinning of fundamental societal values, raising questions such as these: What is a family? What significance should be attached to roles with the family? Who can be a parent? What kind of parenting is and is not in a child’s best interests? Under what circumstances should the state intervene between a child and the child’s parents? In what circumstances should the state govern the financial relationship between adults? When should the state intervene when adults enter into contracts? What is the nature of personal autonomy and how is it impacted by decisions about parenting arrangements?

41 See e.g. R v Hape, 2007 SCC 26; [2007] 2 SCR 292.
Equality Rights of Children

Though our focus is on equality for women, we would be remiss if we did not raise the importance of the equality rights of children, and their relevance to both the judicial oversight role and judicial competence. A child-focused approach to decision-making in family law matters requires a child-rights analysis. Children have the same Charter rights as adults and international instruments which Canada has ratified apply to them. The most prominent is the United Nations Convention on the Rights of the Child.\(^{42}\) Children's right to be heard is said to be inextricably linked to their best interests.\(^{43}\) Children have specific rights to be protected from violence; they also have rights to education, health, and a reasonable standard of living. Judges are guardians of those rights and as such are accountable to children to enforce and enhance them so as to improve their lived realities.\(^{44}\)

Understanding Historic Discrimination

Fully appreciating women’s current lived reality requires understanding historic systemic patterns of discrimination against women. Though an in-depth look at such patterns is beyond the scope of this article, we highlight some that are particularly relevant.


\(^{43}\) UN Committee on the Rights of the Child (CRC), General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14 (2013) 11 at para 43.

\(^{44}\) For more information about how a child-rights analysis supports children’s well-being, see the comprehensive *Child Rights Toolkit*, a project of the Canadian Bar Association’s National Children’s Law Committee, forthcoming, spring 2017, online: <www.cba.org>.
to our themes. Taking the early 1970s as a starting point for this purpose, many laws were highly discriminatory against women. Women had almost no rights to property or pensions, most of which were in the man's name, and a very limited right to support for themselves and the children. Violence was viewed as a private matter; those cases which did end up in court were not dealt with in criminal courts but in family courts, which were not viewed as dealing with "real" crime. There were also discriminatory laws relating to women's credibility. For example, in the family violence context, it was not a crime for a husband to force his wife to have sexual intercourse; a man could not be convicted of the crime of sexual assault on the testimony of a woman without supporting evidence, as it was said by the male lawmakers that it was dangerous to do so.

**Women’s Lived Reality Today**

When the *Charter* came into effect in the 1980s, many laws were changed, often to be gender neutral. However, deeply engrained views about women, their roles, and their credibility, which had informed the law so pervasively and for so long, did not change overnight. Systemic discrimination against women continues.\(^{45}\)

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\(^{45}\) For further discussion on this issue in the family law context, see Justice Donna Martinson, “Post-Separation Parenting: Submerged Gender Issues” (Paper delivered at the National Judicial Institute Conference: Emerging Gender Issues: Why Gender Equality Still Matters, Toronto, 28–30 November 2007). See also West Coast LEAF, “Submission of West Coast Women’s Legal Education and Action Fund” (West Coast LEAF) to the Ministry of Attorney General Justice Services Branch Civil and Family Law Policy Office” Family Relations Act Review, Phase III Discussion Papers” (December 2007), online: <westcoastleaf.org>.
Economic Disadvantages

Women, and especially those in families in which there are children, continue to face economic disadvantages which relate directly to family law issues. In *Putting justice back on the map: The route to equal and accessible family justice*, the author, Laura Track, working in collaboration with Shahnaz Rahman and Kasari Govender, points to the profound impact that marital breakdown can have on many women's economic security. Women continue to earn less than men in the workforce, in part because of the gender-based divisions in the workforce, and care-giving responsibilities for children and the elderly continue to disproportionately fall to women and often conflict with promotion in the paid work force and reduce earning ability.46

Multiple Disadvantages

Many women face combinations of disadvantage—such as living in poverty, with all its consequences. These disadvantages disproportionately impact women coming under one or more of the following categories: an Indigenous woman; a racialized woman; a woman with disabilities; a senior woman; an immigrant/refugee woman; and a sexual minority, including people who identify as women and those who are gender non-conforming. Many women also deal with other social and economic challenges such as obtaining an adequate standard of living, which includes access to accessible, adequate day care; social assistance when required; appropriate affordable housing; adequate health care; access to education; and access to mental health services concerning challenges caused or contributed to violence.47


47 NJI Community Consultation, *supra* note 15.
**Violence against Women in Relationships**

Violence against women in relationships remains a significant societal issue. As the Honourable Justice Bonnie Croll of the Ontario Superior Court of Justice wrote in her 2015 judicial study leave report, family violence is pervasive in Canada. She describes it as a “scourge that harms families from all backgrounds regardless of socioeconomic, educational, cultural or religious background, and is a sad reality for many Canadians.” More recently, in the spring of 2016, Status of Women Canada released its report *Setting the Stage for a Federal Strategy Against Gender-based Violence: Vision, Outcomes and Principles*. The report states that while violence affects people of all genders, ages, cultures, ethnicities, religions, and geographic locations, as well as individuals from a range of socioeconomic backgrounds, women and girls are more at risk of many forms of violence. It notes that some women are more vulnerable than others and emphasizes the particular challenges of Indigenous women.

Such violence against women continues to create barriers to women’s equality. This is so at a time when we know much more about the complexity and multifaceted nature of family violence itself and its impact on victims. Understanding the lived reality of women and children involves an in-depth, comprehensive, and on-

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going look at matters such as: its complex multi-faceted nature, going far beyond physical violence; its widespread nature; its frequency and severity; why women do and do not report violence; what is required to provide a trusting environment in which women may report; and what is a trauma-informed practice.

Much has been learned about the impact on children of exposure to family violence and the consequences are significant. In short, the stakes are very high. Well-informed decisions can help address the concerns about the risk of harm. Ill-informed decisions have the potential to increase the likelihood of future harm.

**Myths about Women’s Credibility**

Women continue to raise concerns about their credibility being assessed based on myths and stereotypes in the justice system.\(^5^1\) Family law is an area in which such unfounded/unproven assumptions are more likely to arise than in some other areas of the law as many people are in intimate relationships, have children, and have developed their own views and preferences based on their own experiences. Among unfounded/unproven assumptions are these: a credible woman would disclose violence early; a credible women would report the assault to the police; a credible women would leave the relationship; violence against a woman by a man does not have an impact on the children and has nothing to do with his parenting ability; there is now family violence symmetry—women are just as "guilty" as men; and abuse will likely stop once the relationship ends so there is no risk of future harm.\(^5^2\)

Dr. Peter Jaffe, who is a Canadian expert on issues relating to violence against women and children with many years’ experience,
agrees that unfounded/unproven assumptions continue to exist. He has stated that mothers reporting a history of domestic abuse in family court usually have to struggle through four stages:

first, not being believed; then being believed, but having the violence minimized; then being told that the violence is an adult issue and not relevant for the children; and, finally, recognition of the impact of the violence but being told to get over it and become a co-parent and put the past behind them.53

Credibility concerns have been raised with respect to professionals who conduct parenting assessments. In Troubling Assessments: Custody and Access Reports and their Equality Implications for B.C. Women, the authors, Laura Track and Shahnaz Rahman, say that, "[w]omen's experiences of violence and abuse have been ignored by assessors and, in some cases, used to paint women as ‘hysterical’ or ‘vindictive.”54

**Barriers to Enforcing and Enhancing Women's Equality Rights through the Courts**

The ability to access the courts in family law cases to enforce and enhance women's equality rights is essential to address this continuing systemic discrimination. The Supreme Court of Canada's Justice Gonthier made this point succinctly in 1999 when he said that the "history of family law is, in many ways, the history of the


gradual emancipation of women from legal impediments.” Yet there remain significant barriers to women's ability to access courts for this purpose.

**Inaccessibility of Legal Representation for Women**

The first is the lack of availability of legal representation for women in family law cases. A central message in *A Roadmap for Change* is that most people in Canada cannot afford the very high cost of legal services; women, because of the disadvantages we have described, find it even harder. Generally, only those women with very low incomes are eligible for family law legal aid, and, using B.C. as an example, they must show that they are in a serious family situation, one that can include situations created by family violence. If they are eligible, there may be caps on the number of hours that can be provided early on in the process. Alison Brewin and Kasari Govender have discussed the women’s equality challenges created by these legal aid caps in *Rights-Based Legal Aid: Rebuilding BC’s Broken System.*

That report was followed by the comprehensive report, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia.* It concluded that “women are disproportionately affected by inadequate legal aid in family law because they are frequently in a situation of relative economic

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56 Supra note 1.
57 Alison Brewin & Kasari Govender, *Rights-Based Legal Aid: Rebuilding BC’s Broken System* (Vancouver: West Coast Legal Education and Action Fund, 2010), online: <www.policyalternatives.ca>.
disadvantage and they often bear the lion’s share of both the short-term and long-term consequences of our failures in this regard.”\(^{59}\) The challenges are greatest for low-income women. The report also stated that the need for adequate legal aid is “very compelling in situations where a woman is attempting to leave an abusive relationship, and her life and her physical and emotional security are at risk, as is the safety of her children.”\(^{60}\)

Making legal aid available only for serious family law matters does not advance women's equality. Requiring women to determine whether family violence exists and whether it is serious before they have personalized legal advice puts the cart before the horse. Family violence, because of its complexity, may be difficult to identify, not only for professionals, but for women themselves. Understanding, through an equality-based analysis, what impact family violence might have on both fair and just processes and outcomes is what lawyers are educated to do by attending law school. How to do so has been difficult to grapple with for lawyers themselves, let alone for women for whom family violence is a part of their lived reality. Instead, women need effective legal representation at the outset to help them navigate the complexities involved.

**Advantaging Men: Legal Aid Accessibility in Criminal Cases**

While the lack of legal aid for family law has been a barrier to the advancement of women's equality rights under the *Charter*, legal aid policies have advantaged the *Charter* rights of people accused of crimes by providing legal aid to them. This primarily benefits men, including those who are charged with crimes involving violence against women. *Charter* arguments have routinely been advanced on their behalf for many years, with significant success in enhancing

\(^{59}\) *Ibid* at 16.

\(^{60}\) *Ibid.*
their equality guarantees. People charged with crimes have, and should have, constitutionally protected rights not to be wrongfully convicted; important liberty interests are at stake. However, women and children also have constitutionally entrenched rights to be safe and secure and not to have their lives adversely impacted, and sometimes ended, because of family violence.

**The Legal Profession's Devaluing of Family Law**

Family law, which disproportionately and negatively impacts women, has been marginalized by some within the legal profession as not being a serious area of law and legal practice. The National Action Committee, in *Meaningful Change for Family Justice: Beyond Wise Words [Beyond Wise Words]*, described it as the "poor cousin" in the justice system, one that is "regarded as an undesirable area of practice by some lawyers and law students;" that Committee notes that family law has lost its way in most Canadian law schools, stating that is has "been de-emphasized in favour of subjects more attractive to large law firms and global practice." This de-valuing, poor-cousin approach means fewer lawyers are interested in family law. It can also lead to the view that dealing with family law is not as challenging as dealing with other areas of law—which are seen as more sophisticated—and the related idea that particular specialized knowledge and skill is not required. Further, it can influence the discriminatory view that legal representation, and especially legal aid, are not required in most family law cases or that just providing general legal information will suffice.

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61 *(Beyond Wise Words, supra note 1 at 13)*.

62 *(Ibid at 28)*.
Mandatory Mediation before Accessing Justice through the Courts

Yet another women’s equality issue arises in dispute resolution forums such as mediation. Family violence issues can place women in an unfair negotiation position and can increase the risk of harm during such processes. There is a difference of opinion about whether dispute resolution forums, particularly mediation, are appropriate when family violence is an issue. Some would argue that they should never be used, others that they can work effectively with the proper protections, including having mediators who are knowledgeable about family violence and its dynamics. In Beyond Wise Words, the National Action Committee Working Group on Family Law supports the latter view. It recommends one mandatory out-of-court mediation session, once a claim is filed in court, before the case can proceed, and states that any family violence concerns can be addressed by creating an exemption for family violence cases.

We respectfully disagree. While there may be reasonable differences of opinion about whether mediation can be effective, from a women’s equality perspective, making it mandatory is a barrier to women’s access to the courts. Instead, participating in mediation should be a matter of choice, informed by effective legal representation and an understanding of the disadvantages and advantages in their particular circumstances. An exemption does not address the core problem, the complexity of family violence and its impact, and the need for effective legal representation to help women navigate the complexities of the legal processes involved.

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63 Ibid at 34.
64 Ibid at 34–35.
CONNECTING WOMEN’S EQUALITY RIGHTS TO JUDICIAL COMPETENCE AND JUDICIAL OVERSIGHT

Judicial competence and judicial oversight are important to everyone involved in family law proceedings. In this section we address further why they are important generally and why they are important to a women’s equality analysis.

JUDICIAL COMPETENCE

Specialized Judges for Family Law Cases

The National Action Committee on Access to Justice recommends specialized judges for family law—those who either have, or are willing to acquire, the necessary expertise and are ideally judging in a unified family court or a version of it with the features of a unified family court. The recommendation comes from A Roadmap for Change, which states:

The judges presiding over proceedings in the court should be specialized. They should have or be willing to acquire substantive and procedural expertise in family law; the ability to bring strong dispute resolution skills to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and an awareness of the range of family justice services available to the families appearing before them.65

65 A Roadmap for Change, supra note 1 at 19
Knowledge of Social Context

Current knowledge of social context, including the lived reality of women, discussed in the previous section, together with up-to-date knowledge about equality principles applicable to family law, are essential components of that specialization. The Canadian Judicial Council, in 2005, reinforced its support, by way of a resolution in 1994, for credible, in-depth and comprehensive social context education for judges, by its recognition that such education must be an ongoing part of judicial education. The kind of education required must be credible from the perspective of both the judiciary and the public. It requires a professional commitment to continually be informed and updated. A one-time course or program is completely inadequate to meet these competency requirements. We agree with retired B.C. Supreme Court Justice C. Lynn Smith when, as Dean of Law at the University of British Columbia, she described social context education as a life-style change rather than a one-time “inoculation.” We support the conclusions of Professor Richard Devlin, the Honourable Justice C. Adèle Kent, and Susan Lightstone

66 Canadian Judicial Council resolutions of this sort are not part of the public record. However, the nature of this programming, how it has developed in a way that is consistent with the concepts of judicial independence, impartiality, and accountability, and the resolutions supporting it, are described in detail by Professor Cairns Way, supra note 25. Professor Cairns Way was the initial academic advisor to the National Judicial Institute with respect to the social context education initiative. The first author of this paper was the initial judicial co-chair of the initiative (with Ontario’s Justice John McGarry).

that judges have ethical obligations to do their work competently, and that social context responsiveness is an ethical obligation.⁶⁸

Judges who hear family law cases have a responsibility to attend social context education programming relevant to family law, and courts, as institutions, have a responsibility to provide that opportunity. As we said at the outset, generalist judges do not have the same opportunities to attend family-law-related programs that specialized judges do. Yet doing so is an aspect of judicial accountability.

**Dispute Resolution**

This kind of specialized knowledge and skill is necessary not only to make decisions at hearings or trials, but to participate effectively in judicial dispute resolution activities. We have referred to particular challenges women face in dispute resolution forums such as mediation. Important work has been done on the special challenges for women when judges are involved in dispute resolution. Canadian legal academic Dr. Linda Neilson’s article, *At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases* addresses women’s equality concerns in this respect.⁶⁹ While setting out many of the concerns raised about dispute resolution processes generally in domestic violence cases, she focuses on what is required to ensure just outcomes for women if a judge does engage in such a process.

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⁶⁸ Devlin, Kent & Lightstone, *supra* note 4 at 12. An in-depth discussion of this article is beyond the scope of our article. It contains an important discussion of the evolving nature of judging in a pluralist society, emphasizing the concept of ethical judging by judges as ethical beings. It looks closely at the nature of judicial ethics education in Canada and suggests ways of enhancing that education to capture the evolving challenges faced by judges in the 21st century.

⁶⁹ Linda Neilson, “At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases” (2014) 52:3 Fam Ct Rev at 529–563.
Among the many suggestions she makes is the need for preliminary screening to determine the suitability of the process.\textsuperscript{70}

Dr. Neilson notes that it “goes without saying that accurate assessments of family violence and its impact depend on the scope and quality of the information on which they are based.”\textsuperscript{71} She sets out many of the challenges that exist when trying to obtain accurate information and makes suggestions to overcome them. In her section titled “Considering Judicial (or Mediator) Specialized Knowledge,” she notes that assessing the impact of family violence on a person’s ability to participate equally in a settlement process requires “considerable knowledge of the complexity and impact of domestic violence.”\textsuperscript{72} She makes the important point that:

In the absence of specialized knowledge, problems with screening, mistaken assumptions about parenting and child safety, erroneous conclusions based on the demeanour and behaviour of targeted adults, or potentially misleading public demeanour and behaviour of violators can produce erroneous assumptions and conclusions.\textsuperscript{73}

“\textit{Invisible Strings – Considerations for Judicial Case Conference and Settlement Conferences}” also addresses challenges women can face in judicially led dispute resolution.\textsuperscript{74} It was written by the

\textsuperscript{70} \textit{Ibid} at 533.

\textsuperscript{71} \textit{Ibid}.

\textsuperscript{72} \textit{Ibid} at 542.

\textsuperscript{73} \textit{Ibid} [footnotes omitted].

\textsuperscript{74} The Honourable Judge Patricia Bond, Megan Ellis & Zara Suleman, (written for the British Columbia Supreme Court Conference on High Conflict Cases, May 2009) in Martinson & Jackson, \textit{Judicial Leadership}, \textit{supra} note 16 at 39.
Honourable Judge Patricia Bond of the Provincial Court of British Columbia, when she was a family law lawyer, and two other experienced British Columbia family law lawyers, Megan Ellis Q.C. and Zara Suleman, for a National Judicial Institute judicial education program in 2009. They emphasize not only how violence against women is prevalent and is under-disclosed and under-reported to the police, but also how it can be missed by judges in settlement discussions because it plays out in so many subtle ways.

Judges, of course, do not have to accept all of the information and suggestions provided in education programming. Such information forms a part of the total information judges have accumulated, based on their educations and life experiences. Judges will evaluate it in the same way that they evaluate other information they receive. Understanding social context generally, and that relating to family violence in particular, is an important aid to decision making, but it can never take the place of an actual analysis of the facts of a case.

JUDICIAL OVERSIGHT

To be accountable to the public as guardians of our constitutional values, we suggest that judges, whether there are lawyers involved in a case or not, must use their specialized knowledge and skill at all stages of the judicial process to ask questions in a neutral, non-adversarial way to ensure that they have the relevant information and arguments they need. This can be done in a way that conforms to the modern views of judicial independence and impartiality we have described. This role of judicial oversight is not meant as a substitute for effective legal representation; judges are not advocates for a particular party. We explain why we think legal representation is critical in our report, Risk of Future Harm.75

75 Martinson & Jackson, Risk of Future Harm, supra note 17 at 63–64 and 72–75.
Protecting People without Lawyers

The Canadian Judicial Council captured the need for such oversight in its guidelines for people who are self-represented.76 Under the heading “Promoting Equal Justice,” the Council states that “[j]udges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.”77

There are four principles explaining that statement. Principle 3 states that, “[w]here appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.”78 Principle 4 states that “[w]here one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants’ equal right to be heard.”79 Depending on the circumstances and nature of the case, the presiding judge may, among other things: (d) provide information about the law and evidentiary requirements; and (f) question witnesses.80

76 “Statement of Principles on Self-represented Litigants and Accused Persons”, adopted by the Canadian Judicial Council, September 2006, online: <https://www.cjc-ccm.gc.ca> [Self-represented Litigants and Accused Persons]. An Electronic Bench Book for Judges has also been created, based on these principles: Self-Represented Litigants and Self-Represented Accused (Ottawa: National Judicial Institute, 2015).

77 Ibid at 4.

78 Ibid.

79 Ibid.

80 Ibid.
The Commentary to the Promoting Equal Justice heading calls these steps “affirmative and non-prejudicial” and says taking those steps is consistent with the requirements of judicial neutrality and impartiality.\textsuperscript{81} It notes that a careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behavior. The Council points out that its \textit{Ethical Principles for Judges} has already established the principle of equality in principles governing judicial conduct, stating that “[j]udges should conduct themselves and proceedings before them so as to ensure equality according to law.”\textsuperscript{82}

\textbf{And People with Lawyers}

Judicial responsibility to enforce and enhance equality guarantees by taking affirmative and non-prejudicial steps must apply to all people, not just those who do not have lawyers. The role of a lawyer is very different from the judicial role as guardian of our constitutional values; justice for all must include justice for those with lawyers. Richard Devlin and David Layton support the view that judges have an oversight role when lawyers are involved, even if the case is a criminal case.\textsuperscript{83} In \textit{Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis}, they consider the Ethical Principles for Judges we have discussed and their relationship to impartiality.\textsuperscript{84} They conclude that the ethical principles suggest that impartiality is not synonymous with disengagement, but to the contrary, requires engagement when the need arises.\textsuperscript{85}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} \textit{Ibid} at 5.
\item \textsuperscript{82} \textit{Ibid}.
\item \textsuperscript{83} Richard Devlin & David Layton, “Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis” (2014) 60:3 Crim LQ 324.
\item \textsuperscript{84} \textit{Ibid} at 370–74.
\item \textsuperscript{85} \textit{Ibid} at 372.
\end{itemize}
\end{footnotesize}
Honourable Justice Bonnie Croll also thinks that judges have an oversight role, making no distinction between cases with lawyers and those with self-represented people. 86

**Characteristics of Judicial Oversight**

Justice Croll dealt with the topic of family violence and multiple court proceedings in her judicial study leave report. 87 She specifically suggests that in both family law proceedings and criminal law proceedings judges should ask specific questions so as to have what she describes as the critical information judges need to know. 88 In family law proceedings, she suggests that before making an order for custody or access the judge should ask questions such as these: Is this a case where there may be family violence? Are there criminal charges? Are there any bail or probation conditions relating to access to the child or the other parent? How will the family court be kept apprised of the criminal proceedings? Is this a case where it might be useful to hear from the police or the Crown? 89

The first author of this article has provided more specific suggestions as to what the judicial oversight role might look like in family law cases, in *Evolving Professional Roles: Lawyers, Judges and the FLA*. 90 The thrust of the article, in this respect, is that the issues judges and parents are required to consider should be

86 *Croll et al, supra* note 49 at 11.
88 *Ibid at 27–29.*
canvassed initially at judicial dispute resolution conferences, and then, if necessary, through judicial management conferences and pre-trial conferences. Doing so not only focuses the real issues, but means that, for the most part, the trial judge, if there is a trial, will be dealing with the relevant issues, won’t be taken by surprise, and should not have to ask many or any questions.

PART III: BC RESEARCH REPORTS ADDRESSING JUDICIAL OVERSIGHT AND JUDICIAL SPECIALIZATION

We have suggested what an equality-based approach to both judicial oversight and judicial competence requires. Our research reports, the NJI Consultation, and the Risk of Future Harm Report raise a concern that the kind of oversight we suggest is needed may not always be taking place, and that the use of generalist judges, rather than specialist judges, to hear family law cases may result in some judges not having the specialized knowledge and skill needed to be competent.

We hope that the exploratory research we conducted will be of value to the reform process because it is unique, timely, and comprehensive in its obtaining of relevant opinion and thinking. It includes the opinions and perceptions of both community and justice system personnel (including judges from both the Provincial Court and the Supreme Court who deal with family law and criminal proceedings, as well as family law lawyers, defence lawyers and Crown counsel). The results were heard, analyzed, and compared within the same time frame (around the release of the Family Law Act) about the same issue of obtaining and sharing risk information in individual and multiple proceedings involving family violence cases. Finally, it is also securely embedded within and compared with the extant relevant literature emerging from both government and academic sources.

91 Ibid.
NATIONAL JUDICIAL INSTITUTE COMMUNITY CONSULTATION

Methodology

One of the key aspects of the National Judicial Institute’s programming is known as the three pillars approach: programming is led by judges and informed by (1) judges; (2) academics and legal professionals; and (3) other community members. This NJI Community Consultation was based on the three pillars approach and was conducted by the first author of this article in collaboration with the second author and Dr. Catherine Murray, Chair of the Department of Gender, Sexuality, and Women’s Studies at Simon Fraser University.

Dr. Jackson and Dr. Murray assisted in identifying the people and organizations involved. There were a total of 42 people comprised of a variety of community group members and justice personnel. They represented most organizations in Vancouver who have an interest in addressing violence against women and children: BC Society of Transition Houses; Vancouver Lower Mainland Multicultural Family Support Services Society; Pivot Legal Society; Battered Women's Support Services; Ending Violence Association of BC; Vancouver Rape Relief and Women’s Shelter; Westcoast Legal Education Action Fund; Pacific DAWN (DisAbled Women’s Network); Human Resources, Work Place BC; the Justice Education Society of BC; We Can End Violence Coalition of BC; Sexual Assault Service, BC Women's Hospital and Health Centre; Women Against Violence Against Women; BC’s Community Coordination for Women’s Safety committee; and the YWCA.

The first author of this article met with participants individually. Both authors attended a meeting of a group of frontline service providers from most of the organizations identified above, who meet monthly to discuss common issues and concerns.
Additionally, the authors met separately with the president and members from DAWN. The consultation culminated in a Formal Round Table Discussion involving all of the people listed above. It was observed by another retired Justice of the British Columbia Supreme Court.

**Responses**

The NJI Community Consultation\(^92\) raised issues about both judicial oversight and specialized knowledge.

**Judicial Oversight**

There was consensus on a number of points:

1. There is often either no or a limited assessment of either the nature and extent of the violence or the risk of future harm both in dispute resolution processes such as judicial case conferences and in trials or other court hearings.
2. It is very difficult for women when more than one judge deals with a case. In particular, there can be gaps in the information needed to effectively assess risk and this problem is exacerbated when several different judges deal with a particular case.
3. Enforcement of court orders that are breached is a significant problem which can compromise women’s safety.
4. There are challenges women face when attending judicial dispute resolution proceedings. Among the concerns raised are these:

\(^{92}\) NJI Community Consultation, *supra* note 15.
a. Many women “don’t even know or fully understand what a judicial case/settlement conference is and can end up agreeing to things out of intimidation”;
b. Many women go through the process because they have no other options; they cannot afford a lawyer and cannot get legal aid; there is a strong emphasis (a starting presumption) that joint parenting is best, without any information about the family dynamics generally and the existence of family violence in particular;
c. Many women do not raise the issue of violence because they are afraid that they will be accused of trying to alienate the father from the children and end up losing custody.
d. There is often no “screening” for violence; this should be a requirement;
e. Judges would benefit from more information about risk assessment. There are serious risk considerations at judicial case conferences (as well as other dispute resolution options). Some women cannot be in the same room as their abuser. No risk assessment is conducted. There is a potential for re-traumatization;
f. There is often inadequate translation for people for whom English is a second language;
g. Some judges do not try to assist the people who attend, but rather just send them out and tell them to settle;
h. Some judges “threaten” people that if they do not do what is being recommended, that judge will hear the court application that will determine the issue; and,
i. Women feel isolated in case conferences and yet are often not allowed to bring a support person into the conferences.
The consultation participants also identified multiple court proceedings—those taking place at the same time involving the same family, operating in silos—as a “dangerous disconnect” and a significant justice system problem, particularly for women and children. They pointed to such concerns as the dangers caused by conflicting court orders, the need to repeatedly provide information, the increase in litigation harassment, the delay in resolution, adding to stress, especially for children, increasing conflict, and possibly increasing the risk of harm.

Another significant concern was what was called the use and misuse of expert reports. The suggestion was that some experts bring a biased approach to the credibility of women when they allege violence and that judges too easily defer to those experts, without assessing the reliability of their conclusions.

Specialized Knowledge

There was broad consensus that judges would benefit from more knowledge about the dynamics of domestic violence, including knowledge about:

- a) why, when, where, and how domestic violence occurs;
- b) the impact of domestic violence on victims, including children;
- c) the critical link between domestic violence and the ability to parent;
- d) an understanding of the complex issues relating to whether, when, and how family violence is disclosed generally or reported to the police;
- e) legitimate reasons why abuse may be reported after separation but not before;
- f) information suggesting that a man is more likely to falsely deny abuse than a woman will falsely report it; and,
- g) cultural considerations and their impact.
They also thought that judges would benefit from more knowledge about the nature and continued existence of gender inequality and its historical roots; some of the approaches taken by judges were viewed as a continuation of the historical and inaccurate view that all women’s allegations of violence must be viewed with suspicion.

**RISK OF FUTURE HARM REPORT**

**Research Methodology**

This research was exploratory and qualitative in nature. We began by preparing a Discussion Paper called *Risk of Future Harm: Family Violence and Information Sharing between Family and Criminal Courts*, which all of the research participants, including the judge participants, read before meeting with the researchers. As well as setting out the specific requirements in the FLA for decision making, this step assured that those participating in the project were well-informed about the work that had been done already.

**Development of the Research Questions**

We designed our research questions on the basis of our own knowledge of the British Columbia/Federal context, with a particular focus on our NJI Consultation. The judges and lawyers participating in this exploratory study were asked to consider these five questions:

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1. Is information about risk of future harm generally provided to judges hearing family law cases involving family violence? Criminal law cases?
2. If risk information is being provided, what form, generally, would it take (e.g., risk instruments, experts)?
3. Generally, when there are both family proceedings and criminal proceedings relating to the same family, is information about future risk of harm shared between courts in any way?
4. Are there (a) any benefits that exist for the sharing of such risk information? (b) Any barriers, concerns?
5. What recommendations if any could be made to ensure that courts have relevant information about risk in legally permissible ways?

The questions refer to all family law proceedings in the province and would include those under the federal Divorce Act. The responses, however, tended to focus on the family violence proceedings under the FLA relating to family violence and its relevance to the best interests of children and, more broadly, to the granting of Protection from Family Violence Orders aimed at protecting “at risk” family members, including children.

This is likely due, at least in part, to the fact that the specific FLA provisions have informed the interpretation of the much broader “best interests” test under the Divorce Act.

We decided to consider the issues relating to family violence and risk in individual family and criminal court proceedings and to consider them first. We did so on the basis that it is important to have a process in each individual case that leads to obtaining relevant information concerning risk of future harm. Without that, the sharing of information would not be effective. Though questions

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94 Divorce Act, RSC 1985 c 3 (2nd Supp).
about judicial oversight and judicial specialization were not specifically included, they naturally arose in the responses to the questions we did ask.

**Selection of the Research Participants**

Our focus was specifically on the legal profession—lawyers and judges. Having received information through the NJI Community Consultation with representatives from community agencies (including a few justice personnel) working in the area, the researchers felt that a similar process should occur using a separate sample of only justice system personnel. Lawyers and judges are the people who operationalize required policy and legislative directions in their judicial settlement work, their case management work, and their decisions after hearings and trials.

With respect to judges, we made a written request to both the Provincial Court and the Supreme Court asking for the participation of judges from each Court in a roundtable discussion. The judges who attended were selected by the Office of the Chief Judge of each Court. The nine judges who attended included both men and women and were judges who had extensive experience in family law, criminal law, or both. The judges agreed in advance that they would meet with the first author as a group and respond to the five research questions. She would then prepare a summary of the responses which would then be approved by all of the judges who attended. They quite understandably wanted it made clear that their responses represented the views of a small group of judges only and do not purport to represent the general views of each court. Nor do all of the comments contained in the summary necessarily represent the views of all of the judges attending the meeting. The report, called *Summary: Meeting with BC Provincial Court and Supreme Court*
Judges, was prepared by the first author and all of the judges who attended agreed to it.95

The five family law lawyers and defense lawyers were selected for participation because they all had courtroom experience with domestic violence cases, had demonstrated interest in family violence issues, and regularly attended in court (defence and family court lawyers were interviewed by both authors).

Research Responses Connected to Judicial Oversight

Need for More Information

The family judges who participated in our research project agreed that there is a need to ensure that decisions about family violence and its impact are made with all relevant information about the nature of family violence and the risk of future harm in order to make fair and just decisions. At the same time, there was agreement that there is a significant and concerning disconnect between that goal and what is actually happening. It is not common for judges to get the relevant information from lawyers and if they do not, they are not asking for it. There was also agreement that the relevant information they are not getting or asking for includes information about, at a minimum, other related court proceedings and court orders. The lack of that relevant information can be an issue at all stages of the judicial process in family law proceedings: settlement discussions, interim hearings, case management, pre-trial management conferences, and trials. If the question of the risk of future harm is raised, it is usually by way of arguments made to the judge (submissions), not through expert or other evidence.

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95 Risk of Future Harm, supra note 17 at 83.
Need for Accurate Assessment of Risk

The lawyers said the exception may be when there is an application for a Protection from Family Violence Order. The judges said such information may be found in a Parenting Assessment, but it focuses more on parenting capacity generally. The judges said that with respect to family law cases they rely on their own knowledge and experience. Particular comments about the information they did receive included these two:

- It can be a challenge to muster even a basic case; and
- Rarely, if ever, is accurate information provided about the risk of harm; lawyers stay away from this topic and provide a sanitized version.

The family law lawyers discussed the importance of a holistic, comprehensive approach about actual risk, capturing multiple factors which influence behaviour and events, and making the justice system more accountable. They also said that case management by one judge in family law proceedings should take place more often as it is beneficial overall, and it helps with obtaining relevant information about family violence and risk. Both the family law lawyers and defence counsel thought that, in cases where there are both family law and criminal law proceedings, judicial case management of the two cases together might help in dealing with both siloed court processes and the sharing of risk information in particular.

Responsibilities of Judges and Lawyers

There were observations connected more directly to the legal responsibilities of judges and lawyers to ensure that relevant information, including information about other proceedings, is available. The judges thought family lawyers should be in a position to provide information about other proceedings. However, the
judges raised as a "significant concern" the fact that lawyers who act in family law proceedings “are not well-informed about the status of other criminal proceedings and what other orders might say." They said that some of those lawyers don't think that it is their responsibility to find out, even if asked to do so by a judge.

The judges also said that there is a concern that the Crown does not always have all information a criminal court judge would like to have about the risk of future harm. They noted that the exception is when "dedicated" Crown are involved—those who only do domestic violence cases.

Our report on the judicial responses also states:

Some judges were concerned about an Australian "promising practice" identified in our Discussion Paper this way: “Statutory amendments in Australia requiring the family court to ask each party about the existence of family violence relating to themselves or their children.” They pointed out that there is not an "inquisitorial" judicial system in Canada, one in which judges have a role in gathering evidence. Rather, judges in our system make decisions based on the evidence presented to them by the parties; it is not their role to gather evidence and judges must be careful about not "descending into the fray." As noted earlier, judges often have to "put blinders on" and decide cases based on the evidence presented. And judges often sign orders called Desk Orders—orders granted by consent, based on written material, including affidavits which judges read in their offices. Most of the time additional information is not requested by judges in those cases.\(^{96}\)

\(^{96}\) *Ibid* at 88.
One judge expressed the view that there are serious concerns which exist when there are conflicting court orders. Because of that, judges should take a little more time and ask a few questions because it is useful to have basic information about other proceedings. Depending on the answers, more questions might be asked. “The fact that there have not been more cases of serious injury or death as a result of conflicting court orders is due more to good luck than good management.”

Another related concern was the limited amount of court time available and the need to make the most effective use of that court time. "Court time is so valuable." Judges are concerned that it could de-rail a proceeding for them to intervene and start asking questions about whether there is missing information relating to the risk of future harm.

Judges had no difficulty with receiving information about the existence of other court proceedings and about orders made in those proceedings. However, more concerns were expressed about sharing other information from those proceedings that might be relevant to the risk of future violence. A significant concern related to what a judge would do with information that the judge does get. For example, it was suggested that a judge should not get a Report to Crown Counsel generated by a police investigation.

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97 Ibid.
98 Ibid.
Research Responses Connected to Judicial Specialization

Some challenges were raised by the lawyers, but not the judges, that related to specialized knowledge and skill. First, both family law lawyers and the criminal law lawyers said that some lawyers and judges are not well-informed about family violence and its impact generally or about "red flags" for future risk, so can miss both the significance of the violence generally and the important indicators of future risk specifically. Second, and related to the first, was a concern that there can be an overemphasis on the importance of keeping families together at the expense of the safety and security of women and children; in this respect claims of violence can be minimized, particularly if it is non-physical violence.

Third, there was a concern raised by family law lawyers that even when family violence is considered, it can be set aside as not being relevant to the children's safety, security, and wellbeing; when this happens, there is usually not an analysis of the factors in the FLA relevant to whether family violence exists and, if it does, whether there is a risk of future harm. This is so in spite of the fact that the FLA requires judges to consider those factors. The second and third concerns were noted more often at judicial dispute resolution conferences. Fourth, family lawyers, in discussing the need for specialized knowledge, emphasized the importance of understanding the nature and impact upon women of trauma caused by the violence. This can affect their ability to disclose family violence and can make it hard for lawyers and judges to obtain accurate information. This means that lawyers and judges have to provide women with time and space to "tell their stories" in their own way.
ANALYSIS OF THE RESPONSES

The responses to our research questions suggest that many of the concerns relating to judicial oversight and the need for specialized knowledge and skill that were identified in the NJI Community Consultation in 2012, before the FLA came into force, may still exist. We suggest that many of the initial responses are strikingly similar to those found in the *Risk of Future Harm* Report. This suggests that some judges may not be receiving the relevant information they need about family violence and its impact and that they may not have the specialized knowledge and skill necessary to determine what is relevant and to assess it properly. If this is the case, there is a significant justice system concern.

**Judicial Oversight**

The similarities between the two reports with respect to the judicial oversight role are: 1) limited information received about the existence of family violence; 2) a lack of or limited assessment of the risk of future harm; 3) an apparent lack of screening for family violence in family law cases in the court process; 4) a need for more case management and by one judge; and 5) at judicial dispute resolution conference, a lack of enquiry about, or analysis of, information related to family violence and its impact and a concern that its impact may be minimized. In addition, both reports raise the concern that when there are both criminal law and family law proceedings taking place at the same time, they operate in silos, creating significant concerns regarding both access to equality-based justice and safety.

We have said in Part II that being able to obtain relevant information about family violence and its impact is essential to appropriately protect the safety of victims of family violence. Everyone, the judges, lawyers, and other community members who participated, agrees that it is needed and that there are problems
obtaining it. The issue is: who has the responsibility to make sure it is available? We have argued that in a constitutionally enhanced adversary system, judges have a judicial oversight role; the judge as neutral arbiter no longer meets the needs of the modern justice system.

Yet, the approach taken by most of the judges in our research—that it is not part of their role—is not uncommon and is not out of step with the approach taken in the traditional adversary system. Their approach is reflected in *Morrill v. Morrill*, in which the Manitoba Court of Appeal recently stated that it "has long been acknowledged that counsel for the parties are to have conduct of a trial, and it is counsel who must decide what is put before the judge…”99 We think this view may not be uncommon; as noted in Part I, that is also the view of Professor Devlin, Justice Adele Kent, and Susan Lightstone. Because our research was exploratory and qualitative, the sample of judges was relatively small. Yet even within that small sample there were diverse perspectives on that issue.100

**Specialized Knowledge Needed**

There are similarities between the two reports with respect to specialized knowledge. They include: the observation that there is a need for judges with specialized knowledge generally; the need for an understanding of the challenges relating to the disclosure of family violence; and the need to be aware of the link between family violence and the ability to parent effectively. These responses correlate with the recommendation for specialized judges made by the National Action Committee, discussed above.101


100 We are not able to provide actual numbers per response because of the agreement with the judges with respect to reporting out the responses.

101 See “Specialized Judges for Family Law Cases,” found at 40, above.
A similar view of the need for specialized knowledge by judges emerges from the work of Susan B. Boyd, Professor Emeritus, Allard School of Law, University of British Columbia, and her co-author, Ruben Lindy, in a recent article entitled “Violence against Women and the BC Family Law Act: Early Jurisprudence.”\(^{102}\) The authors examined relevant case law from March 2013, when the FLA was implemented, to December 2015. The questions they asked were “to what extent judges are taking account of the realities of women’s lives in their assessment of family violence, and to what extent courts are still relying on faulty assumptions about the nature and impact of spousal violence,” focusing primarily on the impact that family violence has on parenting arrangements and orders.\(^{103}\)

They conclude that a number of problematic assumptions about family violence remain. Among them are these: in many cases decisions leaned toward the assumption that shared parental responsibility, and even parenting time, are the preferred arrangements—the consequences of being abused or being exposed to abuse appear to be too often underestimated; in some cases it is assumed that the child is too young for family violence to have a significant impact, or that the violence was not directed at the child, whereas the research shows that clear harm—specifically emotional and behavioural problems—can result even for infants and toddlers who are exposed to family violence\(^ {104}\); and some judgments indicate that because the violence happened in the past, it is not necessary to take it into account.\(^ {105}\)


\(^{103}\) Ibid at 102.


\(^{105}\) Supra note 102 at 137.
Other cases, the authors state, have read in a “friendly parent” rule with the emphasis on maximum contact, when that is not part of the FLA framework. Some courts still suggest that both parents have a role in the “conflict” when one parent is clearly the aggressor. They stress that those in the justice system need to be “educated, on a continuing basis, about the complexities of family violence, including its gendered nature and its complex patterns and consequences.”

**British Columbia Justice Summits**

British Columbia Justice Summits have dealt with the idea of specialized judges and family courts. The Summits have been convened by the Attorney General and Minister of Justice of BC at least once a year since 2013 to facilitate innovation in and collaboration across the justice and public safety sector. They are multidisciplinary in nature and have focused on both criminal law and family law. Among those in attendance are the Minister of Justice and many government personnel, as well as the Chief Judge of the Provincial Court and the Chief Justices of the Supreme Court and the Court of Appeal.

The Third Summit, held in May 2014, was centred primarily on family law. Among the themes of that Summit was support for an increase in specialized judges and family courts, as well having one

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106 Ibid.
107 Ibid.
108 Ibid at 138.
judge oversee a case.\textsuperscript{110} The Fourth Summit, held in November 2014, was called \textit{Better Responses to Violence Against Women} and focused on issues related to domestic and sexual violence.\textsuperscript{111} A theme, under the heading “Making realistic efforts to achieve a more holistic approach,” was that “… a move towards greater coordination would require substantial awareness and practical training (and specialization) of judges, Crown Counsel, defence bar and participants to become viable as consistent practice.”\textsuperscript{112}

\textbf{PART IV. CONCLUSION: HOW CAN EQUALITY VALUES INFORM FAMILY LAW REFORM?}

We have explained the need for judicial oversight and judicial specialized knowledge and skill, emphasizing the equality values at play for women. We began the discussion by referring to the work of the National Action Committee on Access to Justice and its conclusion that what is needed is a cultural shift—a fresh approach and a new way of thinking. We now return to that conclusion and look at what is in fact needed to give meaning to those words in relation to our two themes. We discuss the need to elevate the status of family law in the legal profession and the role courts can play in doing so. We then consider two other conclusions reached by the Committee that are particularly relevant. The first is the importance of involving users of the justice system in the reform process. The second is the need for not just words but action. Finally, we discuss how it is important to guard against the use of subjective views and

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\textsuperscript{110} \textit{Ibid} at 11, 15.
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\textsuperscript{112} \textit{Ibid} at 31.
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values in deciding who should be involved in reform decisions and what reform decisions should be made.

We emphasize that members of the legal profession, including judges, deserve significant credit both for the leadership role they played in initiating major access-to-justice studies and for the work they continue to do in implementing the comprehensive recommendations made in their reports. Many concrete steps are being taken across the country, coordinated nationally, to address access-to-justice concerns. In British Columbia, the Chief Justice of the Province has created, and chairs, a broad-based committee, which includes the Chief Judge of the Provincial Court, called Access to Justice BC. It is significant that the BC Committee has begun its work by considering family law reform.

THE IMPORTANCE OF FAMILY LAW IN THE JUSTICE SYSTEM

We have referred to the devaluing of family law by some in the legal profession as a barrier to women’s ability to access justice. Family law should not be marginalized; it matters to everyone, but particularly to women. We suggest that central to the reform approach is the need to recognize its importance. It deals with issues that profoundly affect Canadian families. It is perhaps the area of the justice system with which people come into contact the most and by which they form their views about whether the justice system is in fact fair and just. Though family law proceedings are private, in the sense that "the state" is not a party to the proceedings, as in criminal proceedings or child protection proceedings, there is a significant public interest in having both processes and outcomes that are fair and just and that effectively address the pressing issue of family violence and its impact. The report by the Family Law Working Group of the National Action Committee on Access to Justice contains important recommendations for law schools and law societies to enhance the reputation of family law. Courts too have a
role to play. They can and should also acknowledge its value by assigning judges to family law cases who have the kind of specialized knowledge and skill needed, and the interest in and aptitude for, dealing with these complex cases.

INVolVEMENT OF USERS IN THE REFORM PROCESS

A Roadmap for Change makes the important point that reform strategies must put the needs and concerns of the people who use the court systems first: “Until we involve those who use the system in the reform process, the system will not really work for those who use it…”113 Involving users of the system who understand women's equality concerns is essential to the determination of the nature of a reformed family justice system. Users include not only people who have used the court process, but those who assist people in their use, and all adults and children as potential users. It goes without saying that to “involve” users must mean more than politely listening to them, and then excluding them in the actual decision-making process. Decisions should not be made “about them without them.”114

113 Supra note 1 at 7.

114 The phrase “making decisions about us without us” was used by members of the Youth Advisory Committee for the Vancouver Aboriginal Child and Family Services. They are all Indigenous young people who either are now in, or have been in, the child protection system. They spoke at a meeting of the Canadian Bar Association BC Branch, Children's Law Section in June 2016. They told the section members that it is not good enough for the section to invite them to talk about what justice and reconciliation mean to them, listen politely, then go away, and make decisions about them, without them. Instead, they said the members should stand side by side with them, respect and value what they say, and together everyone can make decisions that really make a difference.
Instead, judicial accountability to users requires that users are directly involved when decisions are being made. The women who participated in our NJI Consultation and our Risk of Future Harm research, and those like them in other jurisdictions, are such users of the court system; they should participate at the decision-making table. Their focus is the advancement of women’s equality and they have considerable expertise, including expertise in family violence, to offer.

The choice of who is involved in reform decisions can have an influence on the result. By way of example, we have raised the issue of mandatory mediation before courts can be accessed and suggested that this requirement raises women's equality concerns. If those making the family law reform decisions are predominantly people who support such mediation, and those who have concerns about it are not participating, a meaningful consideration of women’s equality rights relating to family violence can be missed.

**NOT WORDS BUT ACTION ON JUDICIAL OVERSIGHT AND COMPETENCY**

* A Roadmap for Change* states that “[w]e need research, thinking and deliberation. But for meaningful change to occur, they are not enough. We also need action.” We suggest that though there are many family law reforms that can be made that do not concern the responsibilities of judges as equality guardians, addressing those responsibilities as identified in this article must be an integral part of the approach to family law reform. Action is required now on the issue of the need for judicial specialization; this is not a topic that can be put off for another day. The specialist judges will be in a position to develop their judicial oversight role.

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115 Supra note 1 at 8.
In our *Risk of Future Harm* Report, we suggest that the Courts in British Columbia should collaborate with justice system partners to respond to recommendations in *A Roadmap for Change*. They provide a framework for analysis to achieve specialization and recommend that the following questions be answered by each jurisdiction: “Would the implementation of a unified family court be desirable or feasible? If not, why not? If not, how can the court take into account the hallmarks of unified family courts, which include specialization of the judges, and institute them as far as appropriate and possible?”

**INFORMED IMPARTIALITY: AVOIDING PREJUDICE IN THE REFORM PROCESS**

We have emphasized the concept of informed impartiality and its relationship to equality. When making decisions about family law reform it is important to recognize that the preferences, convictions, and prejudices referred to by Chief Justice McLachlin, above, can also adversely influence decisions about what is and what is not relevant to the reform process. Our focus has been on women and family violence. We have referred to historic discriminatory views about women and their credibility and suggested that these views continue to exist. Could they also unconsciously influence decisions about family violence and the family justice reform process?

**CONCLUDING OBSERVATION**

Finally, we refer once more to the preamble to the *Statement of Principles on Self-Represented Litigants and Accused Persons*, which states that the system of family justice in Canada is predicated

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116 *Supra* note 17 at 69–71.

117 *Ibid* at 70.

118 As discussed at 26, above.
on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons.\textsuperscript{119} Justice for all includes justice for women.

\textsuperscript{119} \textit{Supra} note 76 at 1.