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The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers' Ethics

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Deanne Sowter* The Future Harm Exception: Coercive Control
as Serious Psychological Harm and the
Challenge for Lawyers' Ethics

Can a lawyer use the future harm exception to prevent her client from coercively controlling his former spouse? Lawyers are required to keep their clients' secrets unless an exception applies. One of those exceptions is where there is a clear and imminent risk of serious bodily harm or death to an identifiable group or person. The exception provides that serious psychological harm constitutes serious bodily harm, but there is very little guidance as to what type of threat might meet the test. Coercive control is a type of family violence whereby an abusive spouse will use a pattern of tactics designed to control his partner. In this paper, I argue that the psychological harm caused by coercive control meets the test for the future harm exception. An abuser's lawyer can use the exception to try to prevent psychological harm to her client's former spouse. However, this idea creates tension with the lawyer's duty of loyalty, and the test itself is challenging in the context of coercive control. As a result, when a lawyer who is representing an abusive client has a reasonable hunch that her client is behaving badly, she has very few options. I provide three recommendations for amendments to the Model Code of Professional Conduct to be responsive to coercive control; but to be truly responsive, real change needs to be made to the justice system and the lawyer's role itself.

Une avocate peut-elle utiliser l'exception du préjudice futur pour empêcher sa cliente de contrôler son ex-conjoint de manière coercitive? Les avocats sont tenus à la confidentialité en ce qui a trait aux secrets de leurs clients, à moins qu'une exception ne s'applique. L'une de ces exceptions est le cas où il existe un risque clair et imminent de préjudice corporel grave ou de mort pour un groupe ou une personne identifiable. L'exception prévoit qu'une atteinte psychologique grave constitue aussi une atteinte grave à l'intégrité physique, mais il existe très peu d'indications sur le type de menace qui pourrait répondre à ce critère. Le contrôle coercitif est un type de violence familiale par lequel un conjoint violent utilise un ensemble de tactiques destinées à contrôler son partenaire. Dans cet article, je soutiens que le préjudice psychologique causé par le contrôle coercitif répond au critère de l'exception pour préjudice futur. L'avocat d'un agresseur peut utiliser l'exception pour tenter d'empêcher que l'ex-conjoint de son client ne subisse un préjudice psychologique. Cependant, cette idée crée une tension avec le devoir de loyauté de l'avocat, et le test lui-même est difficile à préciser dans le contexte du contrôle coercitif. Par conséquent, lorsqu'une avocate qui représente un client violent a une intuition raisonnable que son client se comporte mal, elle a très peu d'options. Je propose trois recommandations de modifications au Modèle de code de déontologie pour qu'il soit adapté au contrôle coercitif ; mais pour qu'il le soit vraiment, il faut apporter de véritables changements au système de justice et au rôle de l'avocat lui-même.

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Introduction

Can a lawyer use the future harm exception to prevent her client from coercively controlling his former spouse?¹ A lawyer has a near “absolute” duty to keep her client’s confidences.² She can only disclose protected information in the most extraordinary circumstances, pursuant to a limited range of exceptions. There is no exception to solicitor-client privilege and the duty of confidentiality designed specifically for coercive control, or family violence generally.³ The one exception that might be helpful is the future harm exception, which provides that a lawyer may disclose protected

1. The use of gendered pronouns is not meant to hide violence in lesbian and gay relationships, or to exclude non-binary persons. I use gendered pronouns throughout this paper because coercive control is primarily a gendered form of intimate partner violence, perpetuated by men against women. See generally: Pamela Cross, et. al., Department of Justice, “What You Don’t Know Can Hurt You: The importance of family violence screening tools for family law practitioners” (2018) at 9-10, online (pdf): *Department of Justice* <www.justice.gc.ca/eng/rp-pr/jr/can-peut/can-peut.pdf> [perma.cc/3JDM-H8C2] [Luke’s Place Report].

2. *R v McClure*, 2001 SCC 14 at para 35 [McClure].

3. The term family violence is an umbrella term which includes domestic violence, intimate partner violence, coercive control, and abuse by family members against each other.

information where there is a clear and imminent risk of serious bodily harm or death to an identifiable group or person.⁴ In such a case, limited disclosure of protected information may⁵ be made for the singular purpose of trying to prevent harm. The exception provides that serious psychological harm constitutes serious bodily harm, but there is very little guidance as to what type of threat might meet the test. Although the exception was clearly not designed to accommodate cumulative psychological harm, the type caused by coercive control, the exception is all we have and so this paper explores its possible usefulness and ultimately points to a need for broader systemic change to properly respond to coercive control.

Coercive control is a gendered form of family violence⁶ that is “overwhelmingly perpetrated by men against women.”⁷ Dr. Evan Stark defined the behaviour as an “ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control.”⁸ There are competing definitions of coercive control that often turn on whether physical violence is necessary, but the commonality is a pattern of coercion and control tactics.⁹ Stark’s conception does not

4. See *Smith v Jones*, [1999] 1 SCR 455 (SCC), 169 DLR (4th) 385 [*Smith*]; Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2019, R 3.3-3 [Model Code].

5. The exception to solicitor-client privilege and confidentiality is discretionary (meaning a lawyer has no obligation to disclose what she knows), except in New Brunswick, Manitoba and Saskatchewan where the exception to confidentiality is mandatory. (This is discussed further below.) See Model Code, *ibid* at R 3.3-3; Law Society of Saskatchewan, *Code of Professional Conduct*, Regina, SK: Law Society Saskatchewan, 2016, R 3.3-3A [LSS]; Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg, MB: Law Society of Manitoba, 2011, R 3.3-3A [LSM]; Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton, NB: Law Society New Brunswick, 2018, R 3.3-3A (except where there is financial harm, see R 3.3-3B) [LSNB].

However, the discretionary nature of *Smith v Jones* is a point of contention with the decision, see: Wayne N Renke, “Secrets and Lives—The Public Safety Exception to Solicitor Client Privilege: *Smith v Jones*” (1999) 37:4 *Alta L Rev* 1045 at 1059-1061; Adam Dodek, “Doing our Duty: The Case for a Duty of Disclosure to Prevent Death or Serious Harm” (2001) 50 *UNBLJ* 215 at 216-219 [Dodek, Duty]; Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) at 216 [Woolley, ULEC]; David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 *Dal LJ* 267 at 297.

6. See generally Kristin L Anderson, “Gendering Coercive Control” (2009) 15:2 *Violence Against Women* 1444.

7. Luke’s Place Report, *supra* note 1 at 9.

8. Evan Stark, “Re-presenting Battered Women: Coercive Control and the Defense of Liberty” (Paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World Conference, Montreal, 2012) at 7, online (pdf): *Stop Violence Against Women* <www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf> [perma.cc/J2XU-LKZ3] [Stark, Re-presenting]. See also: *R v Craig*, 2011 ONCA 142 at para 26 [*Craig*]; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York, NY: Oxford University Press, 2007) [Stark, CC].

9. See Evan Stark & Marianne Hester, “Coercive Control: Update and Review” (2019) 25:1 *Violence Against Women* 81 at 89 [Stark & Hester]; Michael P Johnson, *Typology of Domestic*

demand violence,¹⁰ he defines coercion tactics as “the use of force or threats to compel or dispel a particular response” and control tactics as including “deprivation, exploitation, and command that compel obedience indirectly.”¹¹ The effect is “a condition of *entrapment* that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity.”¹² Coercive control can cause “serious physical injuries, death, and long-term psychological harm.”¹³ The survivor may suffer from post-traumatic stress disorder (PTSD)¹⁴ or what is known as complex-PTSD, which is associated with never ending trauma, the kind typically seen in political kidnappings.¹⁵

While it may seem obvious that a lawyer should try to prevent any kind of harm, it is not part of her role. Her role, properly understood, is to pursue her client’s interests within the bounds of legality.¹⁶ A lawyer provides access to the law and facilitates her client’s ability to make decisions.¹⁷ She can only do what the client instructs and the law allows.¹⁸ Lawyers are famous for keeping secrets that if disclosed would have prevented harm, but because of their role and the duty to maintain client confidences, they kept the secret. That said, those examples are often obscure and not replicated in daily practice—a bomb in a central train

Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence (Lebanon, NH: Northeastern University Press, 2008) at 1-28 [Johnson]; Dr. Jane Wangmann, “Different Types of Intimate Partner Violence—An Exploration of the Literature” (2011) 22 *Australian Domestic & Family Violence Clearinghouse* 1 [Wangmann].

10. See Stark & Hester, *ibid* at 89.

11. Stark, CC, *supra* note 8 at 228-229. See also: Stark & Hester, *ibid* at 89.

12. Stark, Re-presenting, *supra* note 8 at 7.

13. Luke’s Place Report, *supra* note 1 at 9.

14. See *Craig*, *supra* note 8 at paras 24-31.

15. See Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from Transcripts* (Vancouver, BC: UBC Press, 2014) at 2-3; Charlotte Bishop & Vanessa Bettinson, “Evidencing domestic violence, including behaviour that falls under the new offence of ‘controlling or coercive behaviour’” (2018) 22(1) *Intl J Evidence & Proof* 3 at 11-12 [Bishop & Bettinson, Evidence].

16. See generally Gerald Postema, “Moral Responsibility in Professional Ethics” (1980) 55 *NYULR* 63 at 73; Alice Woolley, “Is Positivist Legal Ethics an Oxymoron?” (2019) 32 *Geo J Leg Ethics* 77 at 88 [Woolley, Positivist]; Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 176 [Wendel, Fidelity].

17. See Woolley, ULEC, *supra* note 5 at 56.

18. See Wendel, Fidelity, *supra* note 16 at 49-50; Postema, *supra* note 17 at 73-74; Woolley, Positivist, *supra* note 16 at 88.

station,¹⁹ the existence of a brain aneurysm,²⁰ or the location of a dead body.²¹

In contrast, every family lawyer will represent a victim or perpetrator of family violence at least once in their career. I would guess that most family lawyers have at least one client who has experienced or inflicted family violence. Moreover, under the newly amended *Divorce Act*,²² coercive control is now relevant under the best interests of the child doctrine;²³ and family lawyers need to consider whether a settlement-oriented process²⁴ is “appropriate”²⁵ and advise accordingly.²⁶ In other words, all family lawyers need to understand coercive control.²⁷

In this paper, I argue that the future harm exception to solicitor-client privilege and confidentiality can be used to try to prevent serious

19. See Monroe Freedman, “The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought To Be” (1996) 29:4 Loy LA L Rev 1631 at 1632 [Freedman, Confidentiality].

20. See *Spaulding v Zimmerman*, 116 NW 2d (Minn 1962) (US); David Luban, “Partisanship: Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann” (1990) 90:4 Colum L Rev 1004 at 1026; Freedman, Confidentiality, *ibid*; Woolley, Positivist, *supra* note 16 at 94; Wendel, Fidelity, *supra* note 16 at 72-76 and 138-139.

21. See *People v Belge*, 83 Misc 2d 186, 372 NYS 2d 798 (Onondaga County Ct 1975) aff’d, 50 AD 2d 1088, NYS 2d 711 (1975), aff’d 41 NY 2d 60, 359 NE 2d 371, 390 NYS 2d 867 (1976); Wendel, Fidelity, *ibid* at 30; David Luban, *Lawyers and Justice: An ethical study* (Princeton, NJ: Princeton University Press, 1988) at 53-54.

22. See also *Family Law Act*, SBC 2011 c25 at ss 1, 8, 37-38 [BC FLA]; Bill 207, *An Act to amend the Children’s Law Reform Act, the Courts of Justice Act, the Family Law Act and other Acts respecting various family law matters*, 1st Sess, 42nd Parl, Ontario, 2020 s 18(2) at 24 (Third Reading Debate 5 November 2020).

23. See Bill C-78, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess 42nd Parl 2019, ss 1(7), 16(3) and 16(4) (Royal Assent 21 June 2019); *Divorce Act*, RSC 1985, c 3 (2nd Supp).

24. See Model Code, *supra* note 5 at R 3.2-4.

25. Bill C-78, *supra* note 23 at ss 1(7) and 7.7(2). See also *Divorce Act*, *supra* note 23 at s 9(2); BC FLA, *supra* note 22 at s 8 (The BC FLA is more explicit, requiring family lawyers to “assess” whether coercive control is present, and if so, the “extent to which” it may affect the “safety” and “ability” of the parties to “negotiate a fair agreement”). Assessment must be done in accordance with the regulations, but there are currently none for lawyers, see: BC Reg 84/2019.

26. Cf Department of Justice, “Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78 in the 42nd Parliament)” (29 August 2019) at B, online (pdf): *Department of Justice* <justice.gc.ca> [perma.cc/2GJT-9MC9] [Legislative Background]; Senate Standing Senate Committee on Legal and Constitutional Affairs, “Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-78)” at 4, online (pdf): *SenCanada* <sencanada.ca> [perma.cc/E4JK-UGK8] [Senate Committee]; Linda C Neilson & Susan B Boyd, “Interpreting the new *Divorce Act*, Rules of Statutory Interpretation & Senate Observations” (8 March 2020) at 12-13 [unpublished].

27. Cf Model Code, *supra* note 4 at R 3.1. See also Deanne Sowter, “Lawyer (In)competence and Family Violence” (20 March 2019), online (blog): *Ablawg* <ablawg.ca/2019/03/20/lawyer-incompetence-and-family-violence> [perma.cc/AGZ7-E67B] [Sowter, (In)competence].

psychological harm.²⁸ When the test is met, a lawyer can use the exception to disclose protected information to whomever she reasonably believes can prevent the harm. The challenge is that coercive control may not be clear, and even if it is, the decision about whether to disclose will be difficult because of competing obligations. In part one, I describe a lawyer's duty to maintain her client's confidences and the future harm exception. Part two provides a detailed examination of coercive control. In part three, I argue that the psychological harm caused by coercive control can constitute serious psychological harm for the purpose of the future harm exception. A challenge with coercive control is that there is no one identifiable pattern, but rather a broad range of possible combinations which will be specific to the parties. In that sense, the fact that the exception was designed to prevent a would-be serial killer becomes challenging to transfer to coercive control, where there is not necessarily one seriously harmful attack but an ongoing pattern of abuse. In the final part, I raise concerns about the lack of guidance for lawyers who are worried about victim safety but do not have enough information to meet the test—the hard cases. Finally, I provide three ways that the Federation of Law Societies of Canada, *Model Code of Professional Conduct*²⁹ can be clarified to respond to coercive control.

I. *The lawyer's ethical obligations*

The role of a lawyer is to pursue her client's interests within the bounds of legality.³⁰ The duty of loyalty is grounded in the law governing fiduciaries and is the heart of the solicitor-client relationship.³¹ A lawyer has an almost unwavering duty to her client's cause, matched only by her duty to the administration of justice. If she were to have an obligation to a third person, that may risk her ability to be loyal to her client and may amount to a conflict of interest.³² The duty of loyalty supports the duty to preserve client confidences. A lawyer must keep her client's secrets and only

28. See *Smith*, *supra* note 4; Model Code, *ibid* at R 3.3-3.

29. See Model Code, *ibid*.

30. See Postema, *supra* note 16 at 73; Woolley, Positivist, *supra* note 16 at 88; Wendel, Fidelity, *supra* note 16 at 176.

31. The following duties spring from the duty of loyalty: avoid conflicting interests, commitment to the client's cause, candour, and keeping a client's confidence, see Model Code, *supra* note 4 at Rs 3.2-2, 3.3, and 3.4-1[5-9]; *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at paras 19-26 [*McKercher*]; *R v Neil*, 2002 SCC 70 at para 16.

32. See Model Code, *ibid* at R 3.4.

disclose protected information in the most extraordinary circumstances pursuant to an exception,³³ client consent or waiver.³⁴

The need for a client to be able to make “full and frank” disclosure to his lawyer so the lawyer can competently represent her client, is cited as the purpose of a lawyer’s obligation to keep her client’s confidences.³⁵ The argument often given is that a client will not disclose all the relevant facts to his lawyer unless he is “secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed.”³⁶

If a lawyer discloses protected information absent a court order and she is wrong about whether an exception applies, or if she discloses because she thinks it is in the public interest despite no exception permitting the disclosure, she may be held liable. Her client may sue her for damages,³⁷ citing breach of confidentiality³⁸ and breach of fiduciary duty.³⁹ She may

33. Exceptions include the following: the innocence at stake exception to solicitor-client privilege; the future harm exception; some statutory overrides, such as in the context of child protection legislation (some provinces only require reporting if the information is confidential—e.g.: Ontario, British Columbia, Alberta and Nova Scotia – whereas Newfoundland requires reporting regardless if the information is both confidential and protected by solicitor client privilege); and, in the lawyer’s self-defence or to collect legal fees. See generally *R v Brown*, 2002 SCC 32; *Smith*, *supra* note 4; *McClure*, *supra* note 2; *Model Code*, *ibid* at R 3.3-1(c), R 3.3-3, R 3.3-4, R 3.3-5, R 3.3-6, and R 3.3-7; *Child, Youth and Family Services Act*, 2017, SO 2017 c 14 s 1, s 125(10-11); *Child, Family and Community Services Act*, RBC 1996 c 46, s 14(1-2); *Child, Youth and Family Enhancement Act*, RSA 2000 c C-12, s 4(2-3); *Children and Family Services Act*, RSNS 1990 c 5 at s 25A; *Children, Youth and Families Act*, SNL 2018 c C-12.3, s 11.

34. See *Model Code*, *ibid* at R 3.3-1(a-b). See generally Adam Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis, 2014) at 189-256 [Dodek, SCP].

35. *Solosky v The Queen*, [1980] 1 SCR 821, 105 DLR (3d) 745 at 834 [*Solosky*]. See also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 26; *McClure*, *supra* note 2 at para 33; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9 [*Blood Tribe*]; *Model Code*, *ibid* at Rs 3.3-1[1] and 3.3-3[1]; Dodek, *Duty*, *supra* note 5 at 220-221; Adam Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 *Queen’s LJ* 493 at 508-511; Dodek, SCP, *ibid* at 7-8. But see William H Simon, “Attorney-Client Confidentiality: A Critical Analysis” (2017) 30 *Geo J Leg Ethics* 447 at 449 (trust does not rationalize confidentiality, lawyers can breach it in self-interest re. claiming fees and in self-defence).

We cannot be certain that a client would not be truthful if there were no duty, see: Fred C Zacharias, “Rethinking Confidentiality” (1989) 74 *Iowa L Rev* 351 at 364-366; Monroe H Freedman & Abbe Smith, *Understanding Lawyers’ Ethics, Fifth Edition* (Durham, NC: Carolina Academic Press, 2016) at 138-140; Renke, *supra* note 5 at 1053.

36. *Smith*, *supra* note 4 at para 35. But see Luke’s Place Report, *supra* note 1 at 15 (In the context of family violence clients may not disclose everything because of shame, denial, fear or because they think it is irrelevant.).

37. See *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860 (SCC) at 871 [*Descôteaux*].

38. Legal action for breach of confidentiality tends to occur when a client seeks to disqualify a lawyer where there is potential for misuse of confidential information. This occurs more often than a client suing a lawyer for actual misuse of confidential information causing harm. See generally: Woolley, ULEC, *supra* note 5 at 195-198; Brooke MacKenzie, “Explaining Disqualification: an empirical review of motions for the removal of counsel” (2020) 45:2 *Queen’s LJ* 199.

39. See i.e. *Szarfer v Chodos*, [1986] 54 OR (2d) 663 (ON H CJ), aff’d [1988] 66 OR (2d) 350 (ON

also be subject to disciplinary action by her law society for professional misconduct.⁴⁰ It is uncommon for lawyers to be disciplined for violating privilege and confidentiality by trying to prevent harm from occurring;⁴¹ but that is not necessarily because privilege-holders are unwilling to seek damages and law societies are unwilling to prosecute. It's more likely that it is just uncommon for lawyers to breach their professional obligations by disclosing protected information.⁴² Lawyers typically take the obligation seriously.

There are two distinct sources of the lawyer's obligation to keep a client's confidences: the common law doctrine of solicitor-client privilege, and the ethical duty of confidentiality found in law societies' codes of professional conduct.⁴³ They both provide a benefit to the client by protecting information from disclosure indefinitely, absent an exception.⁴⁴ That said, not all communications are protected. A lawyer cannot assist her client with illegal activity.⁴⁵ The crime/fraud exclusion works to exclude communications that are the material element of a crime (a.k.a. criminal communications),⁴⁶ and information exchanged when a client is seeking legal advice for the purpose of committing a crime or fraud because those communications "do not form part of the legal professional relationship and hence no privilege can apply."⁴⁷ Excluding these communications protects

CA). See generally Alice Woolley, "Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:2 UTJLJ 285.

40. See i.e. *Law Society of Alberta v Clark*, [1998] LSDD No. 152 (LSDD); *Law Society of Upper Canada v A Member*, 2005 CanLii 16408 (ON LST); *Law Society of Upper Canada v Anber*, [2014] LSDD No. 169 (LSDD); *Re. Mccarthy*, 2016 LSBC 23.

41. I found two cases: *LSBC v MacAdam*, [1997] LSDD no. 55 (LSDD); *Law Society of Alberta v Burgener*, 2016 ABLs 29. See also: Woolley, ULEC, *supra* note 5 at 195-197 (FNs 117-128).

42. But see Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (2013) 51:4 Fam Ct Rev 681 at 692 (20 per cent of children's lawyers in Ontario and Alberta have divulged a child's "secret" to prevent harm).

43. See Model Code, *supra* note 4 at R 3.3-1.

44. See *Blood Tribe*, *supra* note 35 at para 9; *R v Campbell*, [1999] 1 SCR 565, 171 DLR (4th) 193 at para 49 [*Campbell*]; Model Code, *ibid* at R 3.3-1[3].

45. See Model Code, *ibid* at Rs 3.2-7, 3.2-8 and 5.1-2(e); Dodek, SCP, *supra* note 34 at 54.

46. See i.e. *R v Malone*, 1999 BCCA 446 at paras 3 and 14.

47. Dodek, SCP, *supra* note 34 at 54.

The crime fraud exclusion does not exclude a confession about a past crime, communications about whether something is illegal, or the intention to commit a future crime. The exclusion only excludes communications that are criminal in themselves. See *Solosky*, *supra* note 35; *Descôteaux*, *supra* note 37 at 893; *Campbell*, *supra* note 44 at paras 55-64; *Smith*, *supra* note 4 at para 55; Woolley, ULEC, *supra* note 5 at 184-186; Dodek, SCP, *ibid* at 54-64. There are two lines of jurisprudence about whether an unlawful end, such as a tort or breach of contract, would be excepted, see i.e. *Dublin v Mottessori Jewish Day School of Toronto*, [2007] 85 OR (3d) 511, 281 DLR (4th) 366 (ON Sup Ct J) (leave to appeal was granted but abandoned); *Blank v Canada* (Minister of Justice), 2015 FC 956. See also *Industrial Alliance Securities Inc. v Kunicyn*, 2020 ONSC 3393.

the administration of justice.⁴⁸ The codes of conduct do not expressly address the crime-fraud exclusion, but given that these communications are excluded from solicitor-client privilege, they are likely also excluded from the ethical duty.⁴⁹ I will explain both solicitor-client privilege and confidentiality in more detail, before examining the future harm exception.

1. *Solicitor-client privilege*

The Supreme Court of Canada has described solicitor-client privilege as “one of the most ancient and powerful privileges known to our jurisprudence.”⁵⁰ Adam Dodek has called solicitor-client privilege the “strongest privilege protected by law.”⁵¹ Solicitor-client privilege began as a rule of evidence but it has evolved into a “quasi-constitutional right,”⁵² and a principle of fundamental justice under section 7 of the *Charter*.⁵³

Solicitor-client privilege protects communications between the lawyer and client made for the purpose of giving and receiving legal advice.⁵⁴ In other words, it does not typically protect communications between third parties and a lawyer (except a lawyer’s agent, as in *Smith v Jones*).⁵⁵ Where a lawyer works in multiple capacities (e.g. as in-house counsel) legal advice is distinguished from other types of advice. But if the lawyer’s sole purpose is to provide legal advice, solicitor-client privilege will protect the full continuum of communications between the lawyer and client, including written and verbal communications as well as demeanour, tone and volume of speech, facial expressions, and gestures.⁵⁶ As a result, all the lawful communications between a family lawyer and her client are protected by solicitor-client privilege.

2. *The ethical duty of confidentiality*

The ethical duty of confidentiality is distinct from solicitor-client privilege, and it is broader. The duty of confidentiality can be found in professional codes of conduct. The *Model Code*, which is almost mirrored by most

48. See Dodek, SCP, *ibid* at 68.

49. See Woolley, ULEC, *supra* note 5 at 187.

50. *R v National Post*, 2010 SCC 16 at para 39.

51. Dodek, SCP, *supra* note 34 at 1.

52. Dodek, SCP, *ibid* at 3 and 18-21 (the following cases elevated solicitor-client privilege from a rule of evidence to a quasi-constitutional right: *Campbell*, *supra* note 44; *Lavallee, Rackel & Heintz v Canada (Attorney General)*; *White, Ottenheimer & Baker v Canada (Attorney General)*; *R v Fink*, 2002 SCC 61, *Smith*, *supra* note 4; *McClure*, *supra* note 2).

53. See *McClure*, *ibid* at para 41.

54. See John H Wigmore, *Wigmore on Evidence*, *McNaughton rev ed* (Boston: Little Brown, 1961) at vol 8 s 2292; *R v Howley*, [1927] SCR 529, 3 DLR 265 at para 11; Dodek, SCP, *supra* note 34 at 48-49.

55. See *Smith*, *supra* note 4 at paras 9-18; Dodek, SCP, *ibid* at 38.

56. See *R v Amsel*, 2017 MBPC 52 at para 27 [*Amsel*]; Dodek, SCP, *ibid* at 49-53.

provincial and territorial law societies, provides that “a lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship.”⁵⁷ The rule captures all oral and written information and communications between the lawyer and client throughout the solicitor-client relationship.⁵⁸ It includes information a lawyer receives about the client from a third party, and it applies regardless of whether others know the information.⁵⁹ In other words, if a client’s child divulged information to their parent’s lawyer, that information is not privileged, only confidential. Everything that is privileged is confidential, but not everything that is confidential is protected by solicitor-client privilege.⁶⁰ As will be seen, however, the distinction between solicitor-client privilege and the duty of confidentiality has little significance for the future harm exception.

3. *The future harm exception (a.k.a. the public safety exception)*

Exceptions to solicitor-client privilege and confidentiality are very rare. We place a high value on preserving client confidences, maintaining the duty of loyalty, and ensuring a client has access to the law. The idea that a lawyer can violate that relationship by divulging protected information contrary to her client’s interests is in direct tension with the lawyer’s role.

An exception means the communication was protected but a competing public policy reason overrides the protection. The public policy reason for the future harm exception is safeguarding the public’s physical and psychological safety.⁶¹ The Supreme Court of Canada established the public safety exception to solicitor-client privilege in *Smith v Jones* when they held that “[d]anger to public safety” can justify setting aside the privilege.⁶² A commonly used example is where a lawyer learns there is a bomb in a central train station set to explode at rush hour;⁶³ a singular event that is imminent, huge, and so disastrous that it would be immoral for a lawyer to remain silent.

57. Model Code, *supra* note 4 at Rs 3.3-1, 3.3-3, 3.3-4, 3.3-5, 3.3-6, and 3.3-7 (the information can only be divulged pursuant to an exception).

58. See Dodek, SCP, *supra* note 34 at 118-119.

59. See Model Code, *supra* note 4 at R 3.3-1[2].

60. See Dodek, SCP, *supra* note 34 at 21-23. See generally Woolley, ULEC, *supra* note 5 at 179-182, 188-193.

61. Although the dissent argued that an exception does not promote public safety but rather encourages a criminal accused to stay silent instead of seeking medical treatment, see: *Smith*, *supra* note 4 at paras 19-23. See also Adam Dodek, “The Public Safety Exception to Solicitor-Client Privilege: *Smith v Jones*” (2000) 34 UBC L Rev 293 at 308-309 [Dodek, *Smith*].

62. *Smith*, *ibid* at para 75.

63. See Freedman, Confidentiality, *supra* note 19 at 1632.

In *Smith v Jones*, a man was charged with aggravated sexual assault of a prostitute.⁶⁴ The expert, a psychiatrist (whose communications were protected by solicitor-client privilege because the protection is extended to agents and experts retained by a lawyer⁶⁵) wanted to reveal that the accused had plans to kidnap, rape, and murder prostitutes and that he was likely to act on those plans if he did not have treatment.⁶⁶ To determine whether public safety outweighs solicitor-client privilege, the Court held that there must be “an imminent risk of serious bodily harm or death to an identifiable person or group.”⁶⁷ The three prongs of the test—“seriousness, clarity, and imminence”—will “overlap and vary in their importance and significance” and so their weight will vary depending on the context.⁶⁸ If the test is met, a lawyer (or her agent) may disclose a limited amount of information to prevent the harm.⁶⁹ Justice Cory did not clearly state whether a lawyer is *required* to disclose if the test is met.⁷⁰

To determine whether there is a “clear” risk, Cory said the intended victim(s) must be an “identifiable person or group of persons.”⁷¹ There should be consideration of whether there is a method of attack and “long range planning,” a “prior history of violence or threats of violence,” and prior assaults or threats similar to what is planned.⁷² If there is a “history of violence,” the question is whether it has increased in severity.⁷³ All of the “surrounding circumstances” must be considered.⁷⁴

To constitute a “serious” threat, there must be danger that the victim(s) will be “killed” or suffer “serious bodily harm.”⁷⁵ Planning future crimes “without an element of violence” does not meet the test.⁷⁶ The Court did not hinge seriousness on a criminal act; instead, they focused on the harm that will be inflicted. Importantly for victims of coercive control, Cory also said that “serious psychological harm may constitute serious

64. See *Smith*, *supra* note 4 at para 36.

65. See *Smith*, *ibid* at paras 9-18; Dodek, *Smith*, *supra* note 61 at 314; Dodek, SCP, *supra* note 34 at 38.

66. See *Smith*, *ibid* at paras 9-18 and 36-41.

67. *Smith*, *ibid* at para 78.

68. *Smith*, *ibid* at paras 78 and 85.

69. See *Smith*, *ibid* at para 86.

70. See Renke, *supra* note 5 at 1059-1061; Dodek, Duty, *supra* note 5 at 216-219; Woolley, ULEC, *supra* note 5 at 216; Tanovich, *supra* note 5 at 297.

71. *Smith*, *supra* note 4 at paras 79-80.

72. *Smith*, *ibid* at para 79.

73. *Smith*, *ibid* at para 79.

74. *Smith*, *ibid* at para 80.

75. *Smith*, *ibid* at paras 82.

76. *Smith*, *ibid* at paras 82.

bodily harm.”⁷⁷ In doing so, the Court relied on *R v McCraw*.⁷⁸ In that case, the Supreme Court held that the threat of rape can constitute serious psychological harm.⁷⁹ They did not define psychological harm, only that it “substantially interferes” with a person’s “health or well-being”, and it may be more “pervasive and permanent...than...physical harm.”⁸⁰ There is no subsequent jurisprudence dealing with the issue of psychological harm, and little guidance on what psychological harm means in that context.⁸¹ There is no jurisprudence or guidance from any law society on whether coercive control would constitute serious psychological harm for the purpose of the exception. There is also limited jurisprudence dealing with the future harm exception and family violence generally.⁸² Use of the future harm exception is rare.⁸³

Finally, the Court in *Smith v Jones* held that “imminence” does not mean immediate. They emphasized that context is critical. The harm can be imminent even if it does not manifest for a period of time as long as it “creates a sense of urgency” that is “applicable [at] some time in the future.”⁸⁴ A sense of urgency and clarity is more important than establishing the specific time when the threat will be carried out or the harm will be inflicted.⁸⁵

The test requires a lawyer or court to determine whether a “threat to public safety outweighs the need to preserve solicitor-client privilege.”⁸⁶ Justice Cory gave no helpful guidance on what type of threat may qualify, particularly where there is uncertainty about the link between the act and the harm.⁸⁷ For example, it is easy to see that a would-be serial killer’s actions would cause harm if he were able to go through with his plans. It is less clear whether environmental contamination may cause illness in

77. *Smith, ibid* at para 83, citing *R v McCraw*, [1991] 3 SCR 72 49 OAC 47 at 81 [*McCraw*].

78. *McCraw, ibid*.

79. See *McCraw, ibid* at 88.

80. *Smith, supra* note 4 at para 83, citing *R v McCraw*, [1991] 3 SCR 72 (SCC) at 81.

81. See generally Dodek, SCP, *supra* note 35 at 263.

82. I noted up *Smith v Jones* on Westlaw and found 227 cases, of those, 3 cases use the phrase “family violence” or “domestic violence,” and no cases use the phrases “coercive control” or “intimate partner violence” (12 July 2020). See also *Re TSZK*, 2017 ABPC 270 at paras 35-44.

83. One of the few examples *R v Butt*, 2012 ONSC 4326 (HIV status of someone who confessed to sexually assaulting a minor fell within the exception, but there was no analysis from the court).

84. *Smith, supra* note 4 at para 84.

85. See *Smith, ibid* at para 84.

86. *Smith, ibid* at para 85.

87. See *Smith, ibid* (he did not elaborate on what constitutes “public safety” but other examples included are “a threat, put forward with chilling detail, to kill or seriously injure children five years of age and under” and “a threat of death directed toward single women living in apartment buildings,” but not “a general threat of death or violence directed to everyone in a city or community”); Dodek, SCP, *supra* note 34 at 262-264.

residents who live close to the toxic site.⁸⁸ Or whether a spouse's verbal harassment and control over the couple's financial lives would cause his partner serious psychological harm. Adam Dodek,⁸⁹ David Tanovich,⁹⁰ and Wayne Renke⁹¹ have raised questions about other specific scenarios and whether they may qualify, including, the transmission of infectious diseases,⁹² cyber security issues, importing large quantities of illegal drugs,⁹³ or defective medical, drug or vehicle products.⁹⁴ In essence, there is confusion about what type of threat qualifies; the exception seems to prioritize public safety in the obvious cases of physical violence.

At the time of *Smith v Jones*, law societies had already recognized a public safety exception, but it was not uniform.⁹⁵ Since then, the decision has been codified by all Canadian law societies.⁹⁶ This means the exception applies to both confidentiality and solicitor-client privilege. However, the law societies of Saskatchewan, Manitoba, and New Brunswick require disclosure of confidential information when the test is met;⁹⁷ whereas the other law societies' rules are discretionary.⁹⁸ Saskatchewan and Manitoba both relieve lawyers from the obligation if the lawyer believes disclosure will "bring harm upon the lawyer or the lawyer's family or colleagues"⁹⁹ (for example, through retaliation or a threat of retaliation¹⁰⁰).

The discretionary aspect of the exception in most jurisdictions means that it is up to the lawyer whether to disclose what she knows, even when the test is met. Meaning, if a lawyer is satisfied that the test is met, even with a court order confirming it, she is not required to disclose. The *Model Code* suggests that she should consider whether there is another way to prevent the harm,¹⁰¹ but ultimately, the choice is hers. If she does disclose,

88. See generally Tanovich, *supra* note 5 at 300; Dodek, SCP, *ibid* at 264.

89. See generally Dodek, SCP, *ibid* at 261-264.

90. See Tanovich, *supra* note 5 at 299.

91. See Renke, *supra* note 5 at 1056.

92. See Dodek, SCP, *supra* note 34 at 261-262.

93. See Renke, *supra* note 5 at 1056.

94. See Tanovich, *supra* note 5 at 299.

95. See *Smith*, *supra* note 4 at para 75; Dodek, Smith, *supra* note 61 at 312; Dodek, Duty, *supra* note 5 at 217-218.

96. See i.e. Model Code, *supra* note 4 at R 3.3-3; Law Society of Ontario, *Rules of Professional Conduct*, Toronto, ON: Law Society of Ontario, 2019, R 3.3-3 [LSO]; Law Society of Alberta, *Code of Conduct*, Calgary, AB: Law Society Alberta, 2020, R 3.3-3 [LSA].

97. See: LSS, *supra* note 5 at R 3.3-3A; LSM, *supra* note 5 at R 3.3-3A; LSNB, *supra* note 5 at R 3.3-3A.

98. See i.e. Model Code, *supra* note 4 at R 3.3-3; LSO, *supra* note 96 at R 3.3-3; LSA, *supra* note 96 at R 3.3-3.

99. LSS, *supra* note 5 at R 3.3-3A[5]; LSM, *supra* note 5 at R 3.3-3A[4].

100. See LSS, *ibid* at R 3.3-3A[5]; LSM, *ibid* at R 3.3-3A[4].

101. See Model Code, *supra* note 4 at R 3.3-3[3](b).

there is very little guidance to help her decide who to tell. Both the Supreme Court and the Federation have refrained from providing guidelines to help a lawyer determine who they might disclose to because the choice depends on the “specific circumstances.”¹⁰² As a result, where there is coercive control, the lawyer might disclose to opposing counsel, the victim, child protective services, the police, or whomever the lawyer reasonably believes can prevent the harm. Once disclosed, the communication is essentially protected again.¹⁰³

Adam Dodek argues that the ruling in *Smith v Jones* was confusing about the discretionary nature of the test, the Court used “the logic of duty but the language of discretion.”¹⁰⁴ Given the sanctity of the protection and the extraordinary nature of the exception, a lawyer *should be* required to disclose to protect public safety when the test is met. Alice Woolley also argued that the test should be mandatory.¹⁰⁵ Given that law reflects what society has decided is moral, she argued that the lawyer’s only job should be to determine whether the test is met. A lawyer should not have to determine whether to disclose.¹⁰⁶

In my view discretion regarding disclosure is helpful in the context of family violence for two reasons. As identified by the law societies of Manitoba, Saskatchewan, and New Brunswick,¹⁰⁷ if an abuser’s lawyer were to violate her client’s trust by disclosing protected information it would sever the trust the solicitor-client relationship depends on, and the betrayal may provoke him. In my view, a lawyer is entitled to weigh the risk to her own safety in making that decision.¹⁰⁸

Second, the client may not be the one posing a threat.¹⁰⁹ The exception was conceptualized in response to a clear and imminent threat posed by a would-be serial killer. The exception did not consider a situation where the

102. *Smith*, *supra* note 4 at para 97. See also: Model Code, *ibid* at R 3.3-3[4]; Dodek, SCP, *supra* note 34 at 267-269.

103. See *Amsel*, *supra* note 56 at paras 31-34.

104. Dodek, SCP, *supra* note 34 at 265.

105. See Woolley, ULEC, *supra* note 5 at 237-238.

106. See Woolley, ULEC, *ibid* at 237-238.

107. See LSS, *supra* note 5 at R 3.3-3A; LSM, *supra* note 5 at R 3.3-3A; LSNB, *supra* note 5 at R 3.3-3A.

108. See generally *R v Amsel*, 2017 MBPC 58; *Amsel*, *supra* note 56; *R v Amsel*, 2018 MBPC 19; *R v Amsel*, 2018 MBPC 46; Katie Dangerfield, “A bitter, lengthy divorce and a homemade bomb. How Guido Amsel cost a Winnipeg lawyer her hand” (22 November 2018), online: *Global News* <<https://globalnews.ca/news/4688492/guido-amsel-letter-bomber-divorce-lawyer/>> [perma.cc/7XBV-DTAD].

109. This argument is taken from my earlier Slaw column, see: Deanne Sowter, “A Lawyer’s Duty to (Sometimes) Report a Child in Need of Protection” (26 February 2020), online (blog): *Slaw* <www.slaw.ca/2020/02/26/a-lawyers-duty-to-sometimes-report-a-child-in-need-of-protection/> [perma.cc/H3HX-4M8A].

privilege-holder reveals the threat but is not the perpetrator of the harm. Where there is family violence, the client may be a victim. If a lawyer reported information without her client's consent, she may revictimize her client and increase the risk by inflaming the abuser. Discretion allows a lawyer to maintain her loyalty to her client by discussing the situation and getting instructions on how to proceed. A client may be unwilling or unable to do what seems objectively safest and discretion gives a lawyer the ability to disclose, if necessary. Ultimately, discretion places the lawyer in the uncomfortable position of determining a course of action absent client instructions and direction from the law, but family violence complicates established norms in many ways, and this is one of them.

II. *Coercive control*

There is no universal definition of coercive control. The British Columbia *Family Law Act* (BC FLA) and the newly amended *Divorce Act* both contain a broad definition of "family violence" that includes coercive control.¹¹⁰ Coercive control is also recognized at common law.¹¹¹ What is confusing is that sometimes coercive control tactics are folded into descriptions of domestic violence, intimate partner violence (IPV), and battering.¹¹² There are at least five different IPV topologies,¹¹³ such as "situational couple violence" which typically refers to violence both parties perpetuate towards the other.¹¹⁴ In contrast, coercive control is one-

110. See *Divorce Act*, *supra* note 23; Bill C-78, *supra* note 23 at ss 1(7) and 16(4) (tactics include "physical abuse," "sexual abuse," "threats," "stalking," "failure to provide the necessities of life," "psychological abuse," "financial abuse," and threatening, damaging, or killing animals or property); BC FLA, *supra* note 22 at s 1 (includes "psychological or emotional abuse" such as "intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property," and it emphasizes control by including "unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy"). See also: Bill 207, *supra* note 22 at ss 18(1-2) and 24(3-4).

For an overview of how the rest of the Canadian provinces and territories respond to family violence, see generally: Jennifer Koshan, Janet Mosher & Wanda Wieggers, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Trevor Farrow & Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver, BC: UBC Press, 2020) [Koshan et al, Mapping].

111. See *NDL v MSL*, 2010 NSSC 68 at para 34; *C(JR) v C(SJ)*, 2010 NSSC 85.

112. See Sheehy, *supra* note 15 at 12; Luke's Place Report, *supra* note 1 at 6-10. See also: Sylvia Walby & Jude Towers, "Untangling the Concept of Coercive Control: Theorizing Domestic Violence Crime" (2018) 18:1 *Criminology & Criminal Justice* 7.

113. See Wangmann, *supra* note 9 at 5 (coercive control, violent resistance, situational couple violence, separation-instigated violence, mutual control violence). See also: Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, "Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems—Vol 1" (2013) At 20-23, online (pdf): *Department of Justice* <www.justice.gc.ca> [perma.cc/YSK3-W3G4] [Working Group Report].

114. Luke's Place Report, *supra* note 1 at 8-10. See also: Wangmann, *ibid* at 3.

sided, such that the victim is entrapped by her abuser.¹¹⁵ I have chosen to focus on coercive control because of the emphasis on psychological harm and the lack of a requirement for physical violence.¹¹⁶ Psychological harm is harder to identify than bruises and broken bones, yet the harm is understood to be longer-lasting and more severe suggesting a heightened need for intervention.¹¹⁷ Finally, although there are competing definitions of coercive control that are distinguishable based on a requirement for physical violence plus controlling behaviours,¹¹⁸ I have chosen to focus on Stark’s research, who was the first to develop the term,¹¹⁹ because his work emphasizes psychological harm rather than physical harm—which easily falls within the future harm exception.

Coercive control has two distinguishing features: the pattern of tactics, and the motivation to create a “willing victim.”¹²⁰ The abuser is not someone who is responding to a conflict—for example, an ordinary fight or an abusive outburst because of a perceived wrong. It is not a conflict between equals, because there is a lack of reciprocity. Coercive control is about male domination and control empowered by family and social norms, not through reliance on “raw power alone.”¹²¹ Although coercive control is not confined to low-income or marginalized populations, immigration, housing, and child welfare issues can be leveraged by an abuser to further entrap his victim because her primary survival is contingent upon him and she is unable to access social supports—she may not speak English, be undocumented, or be ill-equipped to earn an income.¹²² In short, the abuser uses a pattern of physical, emotional, psychological, and financial tactics to exert control. Stark uses the analogy of thinking of the victim as a hostage—a victim of a “capture crime.”¹²³ The abuser “requires gratitude, admiration, and love.”¹²⁴

There are no Canadian statistics about coercive control, but IPV statistics are starting to reveal its prevalence. Because coercive control

115. See Luke’s Place Report, *ibid* at 8-10. See generally: Joan S Meier, “Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation” (2017) 70:1 Rutgers UL Rev 115; Wangmann, *ibid*.

116. See Stark and Hester, *supra* note 9 at 89.

117. See Luke’s Place Report, *supra* note 1 at 9.

118. See Johnson, *supra* note 9 at 1-28; Wangmann, *supra* note 9 at 4 and 13-14.

119. See generally Stark, CC, *supra* note 8.

120. Sheehy, *supra* note 15 at 3.

121. Stark, CC, *supra* note 8 at 105. See also Stark & Hester, *supra* note 9 at 91.

122. See generally Janet Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners” (2015) 32 Windsor YB Access Just 149 [Mosher]; Walby & Towers, *supra* note 113 at 21.

123. Stark, CC, *supra* note 8 at 204-205.

124. Sheehy, *supra* note 15 at 3.

involves a pattern of various tactics, both police-reported violence and self-reported violence should be considered.¹²⁵ The existing criminal offences are for individual tactics,¹²⁶ such as assault and bodily harm, sexual assault, criminal harassment, and the threat to cause bodily harm;¹²⁷ no offence recognizes the pattern of tactics that constitutes coercive control. Of all police-reported violent crime in 2019, 30 per cent was caused by IPV, affecting 107,810 victims, primarily women.¹²⁸ However, only 19 per cent of spousal violence is reported to the police (by the victim or by someone else).¹²⁹ Most victims of coercive control do not report the abuse, presumably because it is not a criminal offence, but also because the victim may be financially dependent on her abuser, they may have children together,¹³⁰ or she may “not feel safe calling the police.”¹³¹ We do not know how many instances of police-reported violence also involved coercive control.

When IPV (not just coercive control) is defined to include both criminal and non-criminal conduct, approximately “6.2 million women 15 years of age and older [report] experiencing some kind of psychological, physical, or sexual violence in the context of an intimate relationship in their lifetime.”¹³² Statistics Canada has measured three different types of violence (psychological, physical, and sexual) through twenty-seven distinct types of abuse¹³³ and found that 30 per cent of female victims of

125. See Shana Conroy, Statistics Canada, “Spousal Violence in Canada, 2019” (6 October 2021) at 4, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/ZD5Z-LYD4] [Spousal Violence].

126. For example stalking, see *Criminal Code*, RSC 1985, c C-46, ss 264, 372(2) and (3) [CCC]; Marta Burczyk & Shana Conroy, Canadian Centre for Justice Statistics, “Family Violence in Canada: A statistical profile, 2016” (17 January 2018) at 4, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/E5G4-V7NY] (in 2014, 8 per cent of women were stalked and 21 per cent of victims were stalked by a current or former intimate partner) [Justice Stats, 2016].

127. See CCC, *ibid* at ss 229-239, 264, 264.1, 265-269, 271-273, 278, and 430.

128. See Shana Conroy, Canadian Centre for Justice Statistics, “Family Violence in Canada: a statistical profile, 2019” (2 March 2021) at 29, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/G6AA-B9UX].

129. See Government of Canada, “Family violence: How big is the problem in Canada?” (31 May 2018), online: *Government of Canada* <www.canada.ca/en/public-health> [perma.cc/G956-A4JB]; Spousal Violence, *supra* note 125 at 11.

130. See Spousal Violence, *ibid* at 4 and 11.

131. Haley Hrymak & Kim Hawkins, “Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger” (January 2021) at 39, online (pdf): *Women’s Legal Centre* <womenslegalcentre.ca> [perma.cc/QS9G-4FVQ] [Rise Report].

132. Adam Cotter, Statistics Canada, “Intimate Partner Violence in Canada, 2018: An Overview” (26 April 2021) at 5, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/A4BN-8EMC] [IPV, 2018].

133. See IPV, 2018, *ibid* at 4 (“Psychological violence” includes “abuse that target a person’s emotional, mental, or financial well-being, or impede their personal freedom or sense of safety” such as “jealousy, name-calling and other put-downs, stalking or harassing behaviours, manipulation,

IPV experienced at least one type of abuse repeatedly, “either on a monthly basis or more often.”¹³⁴ Psychological abuse is reported to be the “most common type of IPV.”¹³⁵ One in three victims experience ten or more different tactics.¹³⁶ When considering the range of tactics, 26 percent of victims of emotional or financial abuse also experience spousal violence.¹³⁷ Combined, these statistics indicate that approximately 30 percent of IPV victims experience abusive suggestive of coercive control.

In 2015, the UK became the first country in the world to criminalize coercive control,¹³⁸ so their data is illuminative. For the year ending March 2019, there were 17,616 police-recorded instances of coercive control.¹³⁹ Police laid 1,177 charges, and where coercive control was the principal offence there were 516 defendants prosecuted. Of those, 97 per cent were male, and 308 were convicted for coercive control.¹⁴⁰ It is not clear why there is a disparity between the prevalence of reports, instances and charges; however, the data does indicate the scope of coercive control that may be occurring in Canada.

There is a direct link between coercive control and an increased risk of fatality.¹⁴¹ In Canada, a woman or girl is killed by violence every 2.5

confinement, or property damage”; “physical violence” includes “physical assault or the threat of physical assault...items being thrown at the victim, being threatened with a weapon, being slapped, being beaten, and being choked”; and “sexual violence” includes “sexual assault or threats of sexual assault...being made to perform sex acts that the victim did not want to perform, and forcing or attempting to force the victim to have sex”).

134. See IPV, 2018, *ibid* at 7.

135. IPV, 2018, *ibid* at 5. See also Rise Report, *supra* note 131 at 24-25.

136. See IPV, 2018, *ibid* at 5.

137. See Spousal Violence, *supra* note 125 at 10 (spousal violence includes physical and sexual assault that is criminal, and behaviour that does not reach the criminal threshold such as slapping, pushing, shoving, or throwing something at the person that could have hurt them).

138. See *Serious Crime Act 2015*, UK Public General Acts, 2015 c 9 Part 5 at s 76. See generally Vanessa Bettinson & Charlotte Bishop, “Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence” (2015) 66 N Ir Leg Q 179 at 190 [Bettinson & Bishop, Offence]; Ciara Nugent, “‘Abuse is a Pattern.’ Why These Nations Took the Lead in Criminalizing Controlling Behaviour in Relationships” (21 June 2019), online: *Time* <time.com/5610016/coercive-control-domestic-violence/> [perma.cc/UUF3-3AW7] [Nugent]; Stark, CC, *supra* note 8 at 382-384.

139. See Office for National Statistics, “Domestic Abuse and the Criminal Justice System, England and Wales: November 2019” (25 November 2019) at 5, online (pdf): *Office for National Statistics* <www.ons.gov.uk> [perma.cc/QF52-JPQQ] [ONS 2019].

140. See ONS 2019, *ibid* at 26.

141. Death may not be caused by murder. See Stark, CC, *supra* note 8 at 233 (Stark describes a case involving a woman who was diagnosed with cancer, whose husband flew into a rage when she was diagnosed. He pinned her against the wall and sprayed her with Raid as his “cure.” He insisted that she use a different hospital than the one he worked at and he insisted that she leave the hospital against medical advice. She developed sepsis and might have died but for the help of her daughter).

See also BBC News, “Husband not culpable for suicide” (16 May 2006), online: *BBC News* <news.bbc.co.uk/go/pt/fr/-/2/hi/uk_news/4785728.stm> [perma.cc/9UYA-QPVL] (*R v Dhalival* brought the impact of coercive control into the UK media’s purview. In that case, a victim of coercive control committed suicide. A clinical psychologist confirmed that she had sustained

days; of those, 53 per cent are killed by male partners, and 13 per cent are killed by male family members.¹⁴² Common indicators or motives for gender-based murder include coercive control, jealousy, and separation.¹⁴³ In a study that looked at 224 cases involving family violence and uxoricide they found that if the abuser was both “highly controlling” and physically violent, there was a nine times greater chance he would kill his partner upon separation.¹⁴⁴ Another study showed that the presence of coercive control was “four times more likely than the presence of violence to explain the post-separation escalation of violence.”¹⁴⁵ The level of control is a better predictor of future severe assaults and death than physical violence alone because the psychological harm inflicted on the victim compromises her capacity to resist abuse.¹⁴⁶ Immediately following separation—when she is most likely to talk to a lawyer—poses the highest risk to the survivor.¹⁴⁷ Nearly half (49 per cent) of all spousal homicides occur within two months after separation.¹⁴⁸ In short, coercive control increases the risk of fatality during the period that both parties are most likely to retain counsel.

“psychological injury, characterized by features of depression” and PTSD as a result of domestic violence which led to her suicide.) [BBC]; Bettinson & Bishop, Offence, *supra* note 138 at 186-187 (The Crown charged her husband with manslaughter and argued that the psychological harm she suffered amounted to bodily harm, causing her to commit suicide. The argument failed because the court did not recognize the impact of abuse absent a diagnosis of battered woman’s syndrome or PTSD.).

Risk of fatality can extend to the children. See generally Peter Jaffe et al, Canada, “Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce” (February 2014) at 14-19, online (pdf): *Department of Justice* <justice.gc.ca> [perma.cc/D2CF-NPSY] [Jaffe et al]; *R v Berry*, 2019 BCSC 2430; Lori Chambers, Deb Zweep & Nadia Verrelli, “Paternal Filicide and Coercive Control: Reviewing the Evidence in *Cotton v Berry*” (2018) 51:3 UBC L Rev 671; Gillian Calder & Susan Boyd, “Comment: Connecting the dots in family-violence cases” (3 January 2018), online: *Times Colonist* <www.timescolonist.com> [perma.cc/5X5M-PG7C].

142. See Myrna Dawson et al, “#CallItFemicide: Understanding Gender-Related Killings of Women and Girls in Canada 2018” (2018) at 7, online (pdf): *Canadian Femicide Observatory for Justice and Accountability* <femicideinacanada.ca/callitfemicide.pdf> [perma.cc/9UYA-QPVL] [Femicide Report].

143. See Femicide Report, *ibid* at 38-41.

144. Stark, CC, *supra* note 8 at 277 citing Nancy Glass, Jennifer Manganello & Jacquelyn C Campbell, “Risk for Intimate Partner Femicide in Violent Relationships” DV Report 9, no 2 (December 2003 / January 2004) at 1-2 and 30-33.

145. Stark, Re-presenting, *supra* note 8 at 13.

146. See Stark, Re-presenting, *ibid* at 4.

147. Cynthia Chewter, “Best Practices for Representing Clients in Family Violence Cases” (2015), online: *Department of Justice* <justice.gc.ca> [perma.cc/D2CF-NPSY].

148. See Tina Hotton, “Spousal Violence after Marital Separation” (2001) at 7, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/H83Y-PLZB] (length of separation at the time of the murder: 49 per cent (2 months or less), 32 per cent (2 months to 1 year), 19 per cent (1 year or more)).

1. *The psychological harm caused by coercive control*

Where there is coercive control, the cumulative pattern of tactics causes the psychological harm, not the individual tactics in isolation.¹⁴⁹ The victim becomes trapped in her “personal life.”¹⁵⁰ The impact of coercive control on a victim is captured in the following quote from a survivor:

What I remember most is that it’s like being put in a box. How you end up there is the biggest trick—I never managed to work that one out. Maybe you think it’s a treasure box at first: you’re in there because you’re special. Soon the box starts to shrink. Every time you touch the edges there is an argument. So you try to make yourself fit. You curl up, become smaller, quieter, remove the excessive, offensive part of your personality. You eliminate people and interests, change your behavior. But still the box gets smaller. You think it’s your fault. You don’t realize that the box is shrinking, or who is making it smaller. You don’t yet understand that you will never, ever be tiny enough to fit.¹⁵¹

Coercive control can cause serious psychological harm;¹⁵² a “hostage-like condition of *entrapment* that arises from the suppression of a victim’s autonomy, rights and liberties.”¹⁵³ The description of a box echoes Stark’s theory of coercive control, as something that creates a “cage” around the victim.¹⁵⁴ Each tactic is another bar, trapping the victim inside her own life.¹⁵⁵ Kristy Candela found “the most frequent psychological effects of coercive control are fear and anxiety, loss of self-esteem, and depression.”¹⁵⁶ Four in ten victims of IPV (broadly defined) report being afraid of their partner, and those who experience a range of tactics “experience greater levels of fear.”¹⁵⁷ Victims of coercive control lose their jobs, friends, families, and other sources of support. They lose their “sense of self.”¹⁵⁸ They are forced to “violate their own boundaries and moral

149. See Kristy Candela, “Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes” (2016) 54 *Fam Ct Rev* 112 at 116; Stark, Re-presenting, *supra* note 8 at 115.

150. Candela, *ibid* at 113.

151. Candela, *ibid* at 112.

152. See Luke’s Place Report, *supra* note 1 at 9-10; Bettinson & Bishop, Offence, *supra* note 138 at 183-185; Stark, CC, *supra* note 8 at 228-229. Cf Heather Douglas, Bridget A Harris & Molly Dragiewicz, “Technology-Facilitated Domestic and Family Violence: Women’s Experiences” (2019) 59 *Brit J Criminol* 551 at 555 [Douglas et al]; Margaret B Drew, “Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)” (2017) 32 *Ohio St J Disp Resol* 373 at 391 [Drew].

153. Stark, Re-presenting, *supra* note 8 at 5.

154. Stark, CC, *supra* note 8 at 198.

155. See Stark, CC, *ibid* at 198.

156. Candela, *supra* note 149 at 115.

157. IPV 2018, *supra* note 136 at 6.

158. Candela, *supra* note 149 at 115. See also Sheehy, *supra* note 15 at 3.

codes.”¹⁵⁹ They “forget who they are, and live in a world created by their abusers.”¹⁶⁰ Stark testified in *R v Craig* that coercive control would make a victim feel “afraid of her abuser, feel trapped in the relationship, and [she] would be under significant psychological and emotional stress.”¹⁶¹ The abuser wants her “total surrender” and the abuse can lead her to commit suicide.¹⁶² Moreover, the impact can continue post-separation causing fear, “psychosocial, medical, and behavioral problems.”¹⁶³

Coercive control is linked to PTSD, psychological trauma, and complex PTSD.¹⁶⁴ Research indicates that “any event or set of enduring conditions” can be found to be traumatic if the person is unable to integrate their emotional experience, or if they feel threatened.¹⁶⁵ This includes a psychological “threat to life or integrity,” including in the absence of physical violence.¹⁶⁶ About one in three women who experience IPV tactics monthly or more often also report symptoms consistent with PTSD.¹⁶⁷ Complex PTSD is caused by never-ending trauma, often associated with political kidnappings, prisoners of war, and members of cults, due to the “inescapable nature of the abuse,” the “hypervigilance” for the victim, and the requirement to “conform” to the abuser’s needs.¹⁶⁸ The constant hypervigilance is traumatic, coupled with the “ongoing verbal, psychological and emotional abuse, which the brain experiences as threatening in the same way as a physical threat to life.”¹⁶⁹

Coercive control is challenging for both the abuser and victim to reveal.¹⁷⁰ The abuser will not want to admit the truth of his conduct, and the victim is trained to keep his conduct a secret out of fear of the consequences, or humiliation.¹⁷¹ Moreover, victims of coercive control “tend to minimize the abuse.”¹⁷² Research shows they have a distorted sense of what is real, and will normalize and even “redefine” their own

159. Sheehy, *ibid* at 3.

160. Candela, *supra* note 149 at 116.

161. *Craig*, *supra* note 8 at para 28.

162. Sheehy, *supra* note 15 at 3. See also BBC, *supra* note 141.

163. Stark & Hester, *supra* note 9 at 90.

164. See Luke’s Place Report, *supra* note 1 at 14; Bishop & Bettinson, Evidence, *supra* note 15 at 11; Sheehy, *supra* note 15 at 2-3; Emma Williamson, “Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control” (2010) 16:12 Violence Against Women 1412 at 1416; *Craig*, *supra* note 8 at paras 24-31; Candela, *supra* note 149 at 115.

165. Bishop & Bettinson, Evidence, *ibid* at 11.

166. Bishop & Bettinson, Evidence, *ibid*.

167. See IPV 2018, *supra* note 132 at 8.

168. Bishop & Bettinson, Evidence, *supra* note 15 at 11. See also: Sheehy, *supra* note 15 at 2-3.

169. Bishop & Bettinson, Evidence, *ibid* at 11-12.

170. See Drew, *supra* note 152 at 385; Luke’s Place Report, *supra* note 1 at 14.

171. See Candela, *supra* note 149 at 113; Stark, Re-presenting, *supra* note 8 at 9.

172. *Craig*, *supra* note 8 at para 29.

“reality to match” their abuser’s.¹⁷³ As a result, a primary issue is whether a lawyer can see the pattern.

2. *The pattern of tactics*

Stark based his theory of coercive control on the work of his feminist predecessors and their development of the “Power and Control Wheel.”¹⁷⁴ According to Stark, there are two distinct categories of tactics, those that use “force or threats to compel or dispel a particular response” (‘coercion’), and those that are “structural forms of deprivation, exploitation, and command that compel obedience indirectly” (‘control’).¹⁷⁵ Cases are not predictable; abusers may not use the same tactics or all of the categories. A relationship that is dominated by coercion looks different than one dominated by control.¹⁷⁶ One study found that survivors of coercive control identified ten different tactics used against them throughout the relationship.¹⁷⁷ Abusers may use a variety of combinations; the pattern depends on their effectiveness to humiliate, isolate, and control the victim. The abuser will use trial and error to determine which are the most effective.¹⁷⁸ The only commonalities are the existence of a pattern and the malevolent intent of the abuser.¹⁷⁹ The following is an overview of the types of tactics, primarily drawing from Stark’s work.

(a) *Coercion tactics*

Physical violence

Physical force is used to keep the victim in a state of dread and compliance, establish dominance and prevent escape.¹⁸⁰ Some abusers will use physical violence early in the relationship to show his willingness to do so.¹⁸¹ The threat of physical violence then becomes more devastating in

173. Bishop & Bettinson, Evidence, *supra* note 15 at 12.

174. Mosher, *supra* note 122 at 153. See generally Stark, CC, *supra* note 8 at 198-228; Luke’s Place Report, *supra* note 1 at 11-12; Candela, *supra* note 149 at 115 (the wheel includes the following tactics: “intimidation; emotional abuse; isolation; minimizing, denying, and blame; using children and male privilege; economic abuse; and coercion and threats”).

175. Stark, CC, *ibid* at 228-229. See also Stark & Hester, *supra* note 9 at 89; Stark, Re-presenting, *supra* note 8 at 8 (tactics that are “deployed to hurt and intimidate” are “coercion” tactics, and those that are “designed to isolate and regulate” the victim are “control” tactics).

176. See Stark, CC, *ibid* at 241.

177. See Stark, CC, *ibid* at 275.

178. See Stark, CC, *ibid* at 206-207.

179. See Stark, CC, *ibid* at 241.

180. See Sheehy, *supra* note 15 at 3; Stark, CC, *ibid* at 242.

181. See Drew, *supra* note 152 at 388-389; Sheehy, *ibid* at 3. But see *TEA v RLHC*, 2019 BCSC 1042 at paras 173-176 (The expert suggested that physical violence would continue and not just occur once at the beginning of the relationship.).

the mind of the victim than actual violence.¹⁸² Often physical violence is less severe but more frequent (i.e. shoving, slapping, kicking). Assault becomes “a routine, like using the toilet” and not the result of a particular conflict.¹⁸³ Tactics can include frequent pushing, shoving, slapping, smacking, twisting her arm, kicking, punching, using weapons; and more severe violence, such as stabbing, choking, strangling, beating the victim while she is asleep, and sexually assaulting her.¹⁸⁴ Physical abuse may also escalate post-separation.¹⁸⁵ Whether physical violence is required to establish coercive control is debated, however, Stark’s view is that not all cases involve physical or sexual violence.¹⁸⁶

Intimidation

Intimidation is used to keep the abuse a secret, and instill a sense of “fear, dependence, compliance, loyalty and shame” in the victim.¹⁸⁷ The goal is to remind her that if she does not do what she is told, then whatever harm he inflicted on her in the past will reoccur.¹⁸⁸ Intimidation is achieved through threats, gaslighting, surveillance, and degradation.¹⁸⁹

Threats

An abuser will threaten to do anything that will intimidate the victim. He will threaten to harm the children or have them taken away,¹⁹⁰ or make her choose between a child’s safety and her own. He will threaten to have the victim committed, to assault her or kill her, or to commit suicide himself. He will threaten to harm friends or family.¹⁹¹ He will also make threats to withhold necessities of life, including prescription medication, food, money, and clothes.¹⁹²

Gaslighting

Gaslighting tactics are designed to make the victim feel “crazy.”¹⁹³ For example, an abuser might re-park the victim’s car during the night, so

182. See Stark, CC, *supra* note 8 at 251.

183. Stark, Re-presenting, *supra* note 8 at 9. See also Stark, CC, *ibid* at 244.

184. See Stark, Re-presenting, *ibid* at 8-9; Stark, CC, *ibid* at 242.

185. See Luke’s Place Report, *supra* note 1 at 11; Sheehy, *supra* note 15 at 3.

186. See Stark & Hester, *supra* note 9 at 89; Wangmann, *supra* note 9 at 13-15; Johnson, *supra* note 9 at 1-28.

187. Stark, Re-presenting, *supra* note 8 at 9.

188. See Bettinson & Bishop, Offence, *supra* note 138 at 184.

189. See Stark, Re-presenting, *supra* note 8 at 9; Stark, CC, *supra* note 8 at 249.

190. See Heather Douglas & Emma Fell, “Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence” (2020) 35 J Family Violence; Stark, CC, *ibid* at 251; Mosher, *supra* note 122 at 157-158.

191. See Stark, Re-presenting, *supra* note 8 at 9-10; Sheehy, *supra* note 15 at 3.

192. See Stark, Re-presenting, *ibid* at 9-10; Stark, CC, *supra* note 8 at 253-254.

193. Stark, Re-presenting, *ibid* at 10. See also Stark, CC, *ibid* at 254-255.

she feels crazy thinking she left it elsewhere. An abuser may remove car parts, things around the house, or exploit secret fears.¹⁹⁴ Stark provided an example of a man who stole his wife's expensive camera, got mad at her for losing his gift, and then returned it to its place when the police came to investigate.¹⁹⁵ Where a court order prohibits contact, the abuser may leave subtle signs that he was in the home.¹⁹⁶ Technology also facilitates gaslighting through smart home devices such as Wi-Fi enabled thermostats, locks, lights, speakers, and doors. An abuser will change access codes and turn devices on and off without being physically in the home, reminding the victim of his power.¹⁹⁷

Surveillance

Surveillance is used to deprive the victim of her privacy and tell her the abuser is “omnipotent and omnipresent.”¹⁹⁸ As a consequence, the victim will go out less and become isolated.¹⁹⁹ The abuser may use “check-ins” to monitor behaviour, such as calling or texting throughout the day.²⁰⁰ For example, he may require the victim to call him when she leaves the house and when she returns. One twisted example provided by Stark was called the “beeper game.”²⁰¹ In that case, the victim was required to wear a beeper when she was out without him. He would beep her using different numbers, and her safety depended on guessing the significance. For example, a store number meant she had to guess what shirt he wanted from that store.²⁰² She described breaking into a “cold sweat” when her beeper went.²⁰³

Surveillance tactics include stalking and cyber-stalking.²⁰⁴ One study showed that abusers install tracking apps without consent (i.e. installing a tracking device in a child's toy to stalk the parent²⁰⁵). Cyber-security company Kaspersky, found what is known as “stalkerware” or

194. See Stark, Re-presenting, *ibid* at 10; Stark, CC, *ibid* at 254-255.

195. See Stark, CC, *ibid* at 255.

196. See Stark, CC, *ibid* at 254.

197. See Nellie Bowles, “Thermostats, Locks and Lights: Digital Tools of Domestic Abuse” (23 June 2018), online: *The New York Times* <www.nytimes.com> [perma.cc/XMY2-LNDQ].

198. Stark, CC, *supra* note 8 at 255. See also Sheehy, *supra* note 15 at 3; Justice Stats, 2016, *supra* note 126 at 18; Delanie Woodlock et al, “Technology as a Weapon in Domestic Violence: Responding to Digital Coercive Control” (2019) *Australian Social Work* 1 at 5 [Woodlock et al].

199. See Stark, CC, *ibid* at 255.

200. Stark, CC, *ibid* at 257-258.

201. Stark, CC, *ibid* at 326-327.

202. See Stark, CC, *ibid* at 327.

203. Stark, CC, *ibid* at 198-199.

204. See generally Douglas et al, *supra* note 152; Jennifer Koshan, Janet Mosher & Wanda Wieggers, “COVID-19, Domestic Violence, and Technology-Facilitated Abuse” (13 July 2020), online (blog): *Ablawg* <<https://ablawg.ca>> [perma.cc/3JR4-GMSJ] [Koshan et al, Technology].

205. See Douglas et al, *ibid* at 561.

“spouseware” on 37,532 devices between January and October 2019.²⁰⁶ Technology allows an abuser to monitor and track his victim.²⁰⁷

Degradation

Finally, an abuser may use tactics that are designed to degrade and humiliate the victim.²⁰⁸ They may include name-calling, being verbally abusive, and posting defamatory comments and personal or sexual images on social media.²⁰⁹ This category also includes physical forms of abuse. For example, the abuser may force his victim into degrading sexual acts or to sleep in inhumane conditions. He may brand her by tattooing her, burning her, or biting her to leave a mark.²¹⁰ The goal is to deny the victim any sense of self-respect. Women have been “forced to eat off the floor, wear a leash, bark when they [want] supper, or beg for favours on their knees.”²¹¹ In an example provided by Time Magazine, a police officer at a scene of family violence saw a large dog cage and asked the victim where the dog was. She replied: “We don’t have a dog. That’s for me.”²¹²

(b) *Control tactics*

While coercion tactics are designed to intimidate the victim and keep her in line, control tactics are designed to isolate and regulate the victim, to control her.²¹³ Control tactics impair the victim’s capacity for personal gain and gratification, require her to conform to gender stereotypes, and deprive her of the ability to escape.²¹⁴

Isolation

The abuser will isolate his victim by inserting himself between her and the outside world, so she must rely on him for information and recreation.²¹⁵

206. Joe Tidy, “Stalkerware: The software that spies on your partner” (25 October 2019), online: *BBC News* <www.bbc.com> [perma.cc/KAJ5-YQM4] (their work does not appear to be limited to one jurisdiction).

207. See *Thomas v Wohleber*, 2020 ONSC 1965 [*Thomas*]; Woodlock et al, *supra* note 198 at 2; Koshan et al, *Technology*, *supra* note 204.

208. BC courts have recognized derogatory remarks as emotional abuse when directed to or made in the presence of a child. See i.e. *KLL v DJ*, 2014 BCPC 85 at paras 17-18; *LAR v EJR*, 2014 BCSC 966 at para 149; *R(C) v M(A)*, 2015 BCPC 76 at paras 56-58 [R(C)]; *L(DN) v S(CN)*, 2013 BCSC 809 at para 58; *Charnock v Charnock*, 2016 BCSC 44 at paras 33-36. See also Susan B Boyd & Ruben Lindy, “Violence Against Women and the BC Family Law Act: Early Jurisprudence” (2016) 35 CFLQ 101 at 105.

209. See Douglas et al, *supra* note 152 at 552.

210. See Stark, *Re-presenting*, *supra* note 8 at 11; Stark, *CC*, *supra* note 8 at 260; Sheehy, *supra* note 15 at 3.

211. Stark, *CC*, *ibid* at 258-259.

212. Nugent, *supra* note 138.

213. See Stark, *Re-presenting*, *supra* note 8 at 8.

214. See Stark, *CC*, *supra* note 8 at 271.

215. See Stark, *CC*, *ibid* at 262-263.

Isolation tactics include: cutting the victim off from her support system, forcing her to steal from friends or employers, and generally keeping her house-bound.²¹⁶ The abuser will try to make her dependent on him and deprive her of autonomous decision-making.²¹⁷ The victim's friendships with women threaten her abuser, so he monitors those friendships, denies access to phones and cars so she cannot maintain them, interrogates her about them, or insists on tagging along during visits.²¹⁸

Financial control

Financial control is used to increase the victim's dependence on her abuser by depriving her "of any financial independence."²¹⁹ He will deny her access to money (even if she earns an income), prohibit the use of credit cards, and withhold information about family finances.²²⁰ Financial abuse may continue and get worse after the relationship has ended if the abuser withholds financial support or manipulates the justice system to maintain financial control.²²¹

Micromanagement

The final category of control tactics is micromanagement. The abuser will manage every aspect of his victim's life including what she watches on TV, what websites she visits, how she dresses and wears her hair, and how she parents their children, cooks, and cleans.²²² For example, in one case the abuser provided an itemized list of daily tasks and house rules that were organized by room, including what type of potpourri to use and a requirement to alphabetize CDs.²²³ In that case, the victim described these tasks to Stark in a way that she owned them, she claimed she was obsessive-compulsive.²²⁴ To survive, she had made "his reality hers."²²⁵

3. *Litigation harassment*

Stark does not include litigation harassment in his framework, but it is recognized that litigation can be another way to coerce and control.²²⁶ Two

216. See Stark, CC, *ibid* at 265; Sheehy, *supra* note 15 at 3.

217. See Stark, Re-presenting, *supra* note 8 at 12.

218. See Stark, CC, *supra* note 8 at 266-267; Stark, Re-presenting, *ibid* at 12.

219. Lieran Docherty et al, "Hidden in the Everyday: Financial Abuse as a Form of Intimate Partner Violence in the Toronto Area" at 27, online (pdf): *WomanACT* <www.womanact.ca> [perma.cc/EGH2-HZDD].

220. See Stark, Re-presenting, *supra* note 8 at 13.

221. See Docherty et al, *supra* note 219 at 27; Luke's Place Report, *supra* note 1 at 12-13; Rise Report, *supra* note 131 at 29.

222. See Stark, Re-presenting, *supra* note 8 at 13; Mosher, *supra* note 122 at 153-154.

223. See Stark, CC, *supra* note 8 at 318.

224. Stark, CC, *ibid* at 317-320.

225. Stark, CC, *ibid* at 320.

226. See generally Esther L Lenkinski, Barbara Orser & Alana Schwartz, "Legal Bullying: Abusive

studies report that survivors feel revictimized by dealing with their former partners through the justice system, causing feelings of “helplessness.”²²⁷ Legal disputes allow the abuser to contact the survivor under the pretext of legitimate legal proceedings.²²⁸ This tactic may be overlooked because the litigation may be wrongly justified as a legitimate exercise of legal rights.²²⁹ Litigation harassment occurs when a spouse uses the justice system to control and punish a former spouse;²³⁰ it is also known as “legal bullying,”²³¹ “systems abuse,”²³² or “paper abuse.”²³³ Tactics include: refusing to file court documents, filing late, filing incomplete statements, self-representation when it is not necessary, bringing vexatious claims, disobeying court orders, delaying, changing lawyers, refusing to negotiate, making threats, bringing applications to review or vary, appealing, refusing to disclose or withholding assets, and refusing to pay support.²³⁴

Courts in British Columbia have recognized litigation harassment as a form of family violence.²³⁵ In one case, the court accepted that the father’s threat to use his stronger financial position to fight the mother until “she lives in a box” constituted “psychological and emotional abuse.”²³⁶ The father also used the following tactics: he called the mother names; sent her demeaning text messages; threatened to tell their child, friends and associates “vicious slurs” and threatened to make false allegations to the police. He also made her take care of their child so he could “sleep undisturbed,” was verbally abusive, and ultimately made her “afraid to stand up to irrational, irresponsible behaviour because the consequences of

Litigation within Family Law Proceedings” (2003) 22 CFLQ 337 [Lenkinski et al]; Boyd & Lindy, *supra* note 208 at 105 and 107; Koshan et al, Technology, *supra* note 204; Mosher, *supra* note 122; Susan L Miller & Nicole L Smolter, “Paper Abuse’: When All Else Fails, Batterers Use Procedural Stalking” (2011) 17(5) Violence Against Women 637; Lesley Laing, “Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System” (2017) 23:11 Violence Against Women 1314.

227. Miller & Smolter, *ibid* at 642. See also Laing, *ibid*.

228. See Miller & Smolter, *ibid* at 237; Heather Douglas, “Legal Systems Abuse and Coercive Control” (2018) 18:1 Criminology & Criminal Justice 84 at 94; Douglas & Fell, *supra* note 190 at 2.

229. See Douglas, *ibid* at 85; Miller & Smolter, *ibid* at 641.

230. See Mosher, *supra* note 122 at 158-159. See also Rise Report, *supra* note 131 at 30-36.

231. Lenkinski et al, *supra* note 226; Mosher, *ibid* at 158.

232. Douglas & Fell, *supra* note 190 at 2.

233. Miller & Smolter, *supra* note 226; Douglas, *supra* note 228 at 85; Mosher, *supra* note 122 at 158.

234. See Mosher, *ibid* at 158; Douglas, *ibid* at 91-92; Luke’s Place Report, *supra* note 1 at 13; Koshan et al, Mapping, *supra* note 110 at 20; Douglas & Fell, *supra* note 190 at 2; Miller & Smolter, *ibid* at 637-638 and 641-642; Koshan et al, Technology, *supra* note 204.

235. See i.e. *B(MW) v B(AR)*, 2013 BCSC 885 at paras 199-209; *R(C)*, *supra* note 208 at paras 10 and 56-59; Boyd & Lindy, *supra* note 208 at 104; *Hokhold v Gerbrandt*, 2014 BCSC 1875 at paras 30, 131-132; aff’d 2015 BCCA 268; aff’d 2016 BCCA 159 [*Hokhold*].

236. *R(C)*, *ibid* at paras 57-58.

doing so [were] so dreadful.”²³⁷ The court found this behaviour constituted coercive control.²³⁸

An abuser may also use children as “pawns” to exert control over their mother.²³⁹ Stark explained that “one of the most effective ways of gaining” control is by threatening to prevent the mother from seeing her children.²⁴⁰ Children are used as a tactic by commencing a claim for custody, ignoring parenting agreements, through claims of “alienation,”²⁴¹ making false claims to child welfare authorities, asking a child to do things that puts them at risk of harm if they fail to comply,²⁴² or making them complicit in the abuse.²⁴³ There is overwhelming evidence that children who are exposed to family violence suffer from physical, developmental, and psychological harm.²⁴⁴ In the context of coercive control, a child may be used as a tactical pawn and therefore become a “secondary victim.”²⁴⁵ This term does not mean a child’s suffering is of “secondary importance” but rather “because the children are almost always being harmed when, why, and how they are to subordinate the mother.”²⁴⁶

A lawyer cannot participate in litigation harassment given her obligation to the administration of justice.²⁴⁷ She cannot “knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct.”²⁴⁸ This includes a requirement to be “on guard against becoming the tool or dupe of an unscrupulous client.”²⁴⁹ And a lawyer cannot bring any proceedings “motivated by malice” or brought “solely for the purpose of injuring the

237. *R(C)*, *ibid* at para 56-59.

238. See *R(C)*, *ibid* at para 59 (the finding of family violence led the court to require that access be supervised).

239. Stark & Hester, *supra* note 9 at 96. See also: Laing, *supra* note 226 at 1315 and 1325.

240. *Craig*, *supra* note 8 at para 26.

241. Elizabeth Sheehy & Susan B Boyd, “Penalizing Women’s Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases” (2020) 42:1 J Soc Welfare & Fam L 80 at 80 (In the context of IPV, the authors found that some judges focus on claims of alienation by the father, instead of claims of IPV by the mother, engage in victim-blaming and heighten the risk for the mother and children).

242. See Jaffe et al, *supra* note 141 at 14-19; Mosher, *supra* note 122 at 157-158; Miller & Smolter, *supra* note 226 at 642; *F(C) v V(D)*, 2015 BCPC 309 at paras 42, 46-56 and 75-76.

243. See Stark & Hester, *supra* note 9 at 98.

244. See generally Bill C-78, *supra* note 23 at ss 1(7), 16(3)(j), 16(4), 16.8(3) and 16.9(3); *DNL v CNS*, 2014 BCSC 1417 at paras 71-75; *LAR v EJR*, 2014 BCSC 966; *Jackson v Jackson*, [2008] 50 RFL (6th) 149, OJ No 342 (Ont Sup Ct J) at paras 12-24; Neilson & Boyd, *supra* note 26 at 6-7; Senate Committee, *supra* note 26 at 2-3; Jaffe et al, *supra* note 141 at 14-19; Boyd & Lindy, *supra* note 208.

245. Stark & Hester, *supra* note 9 at 96-98.

246. Stark & Hester, *ibid* at 96.

247. See generally *Canada (Attorney General) v Federation of Law Societies*, 2015 SCC 7; *R v Cunningham*, 2010 SCC 10; *McKercher*, *supra* note 31; *MacDonald Estate v Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249.

248. Model Code, *supra* note 4 at R 3.2-7(a).

249. *Ibid* at R 3.2-7[1]. See also: Douglas, *supra* note 228 at 95.

other party.”²⁵⁰ Together these professional obligations mean that a lawyer must investigate her client’s motive.²⁵¹ Her obligation is to approach the law in good faith, not undermine it by allowing the justice system to be manipulated. In short, a lawyer’s professional obligations require that she refuse to follow her client’s instructions if they constitute litigation harassment. The problem arises when conduct is lawful, but a lawyer is concerned about the well-being of her client’s former spouse.

III. *The future harm exception applied to coercive control*

To use the future harm exception, a lawyer needs more than a mere suspicion, she must be “satisfied” that she has enough evidence to meet the test’s high threshold.²⁵² There must be a strong likelihood that harm will occur,²⁵³ but not proof beyond a reasonable doubt.²⁵⁴ If there is time, she can obtain a court order to confirm that she may disclose the information.²⁵⁵

1. *Clarity*

The clarity prong of the test requires a clear risk that it is directed towards a clearly “identifiable” person or group.²⁵⁶ Where there is coercive control, the source of the risk and the identity of the survivor are both clearly identifiable. It is obvious that the abuser is the source of the threat, and the survivor is an identifiable person. Children of the relationship would also qualify as identifiable persons.

To identify a clear risk, it means consideration of whether there is a “prior history of violence or threats of violence,” prior assaults or threats similar to what is planned, and whether the “history of violence” has increased in severity.²⁵⁷ In *Smith v Jones*, the Court emphasized that all of the “surrounding circumstances” must be considered.²⁵⁸ The test is not limited to criminal acts or a tort; the conduct may be lawful²⁵⁹—the focus is on the effect of the conduct.

Coercive control involves a pattern of abuse, the tactics often change and in increase in severity post-separation,²⁶⁰ meaning there is a history of abuse. This would make the *history of violence* aspect of the test easy

250. *Ibid* at R 5.1-2(a).

251. *Cf Ibid* at R 3.1-2.

252. See *Ibid* at R 3.3-3[1].

253. See Renke, *supra* note 5 at 1057; Dodek, SCP, *supra* note 34 at 264.

254. I am indebted to Malcolm Mercer for this point. See also Renke, *ibid* at 1057.

255. See Model Code, *supra* note 4 at R 3.3-3[4].

256. *Smith*, *supra* note 4 at para 79.

257. *Ibid* at para 79.

258. *Ibid* at para 80.

259. See Renke, *supra* note 5 at 1055.

260. See Stark & Hester, *supra* note 9 at 90; Wangmann, *supra* note 9 at 14-15; Mosher, *supra* note 122; Miller & Smolter, *supra* note 226; Laing, *supra* note 226; Douglas, *supra* note 228.

to meet where there is coercive control. What may be challenging is identifying the fact that there is coercive control, meaning identifying the tactics and understanding their significance.²⁶¹ It is much easier to apply the test to the type of situation it was originally designed for, trying to stop a would-be serial killer. A pattern of tactics, such as a making a victim sleep in a dog cage, moving her car at night, or playing the beeper game do not meet the test in isolation. They are morally abhorrent, but stopping immoral behaviour is not the purpose of the exception. Moreover, the context of those tactics is critical. The Court emphasized that context matters,²⁶² which is helpful; but given the gendered and cumulative nature of this type of abuse, the pattern can be hard to identify.²⁶³ Individual tactics may look like a “bad marriage” to a lawyer,²⁶⁴ which would make sense given the breakdown of the relationship. Without training in family violence and screening, an abuser’s lawyer may normalize his behaviour by relying on gender stereotypes.²⁶⁵ For example, patriarchal and gendered social norms can camouflage an abuser’s control over family finances.²⁶⁶ In other cases, some tactics can look like tokens of love and affection.²⁶⁷ An abuser will use a token as a signal to the survivor that there will be consequences once they are alone, contributing to an atmosphere of fear,²⁶⁸ but his lawyer will not recognize the token for what it is. The private nature of abuse complicates the evidence.²⁶⁹ Research shows that the survivor’s

261. In my view, a family lawyer is required to screen her client to be considered competent to practice family law, see generally Sowter, (In)competence, *supra* note 27. See also Luke’s Place Report, *supra* note 1. Screening tools are currently being developed, see generally “Enhanced Safety: Risk Assessment Tool in Family Courts,” online (pdf): *Barbara Schlifer Commemorative Clinic* <www.schliferclinic.com> [perma.cc/ZAU8-M2QV]. However there are several complex challenges including the competing typologies in the family violence literature, see i.e. Wangmann, *ibid*, and whether lawyers should engage in risk assessments, see generally: Working Group Report, *supra* note 113 at 34-52, and the overall lack of training in family violence by family lawyers, see: Pamela Cross, “Increasing Access to Justice through Lawyer Education” (28 January 2020), online (blog): *Luke’s Place* <lukesplace.ca/increasing-access-to-justice-through-lawyer-education/> [perma.cc/Y37L-BG8C].

262. See *Smith*, *supra* note 4 at para 84.

263. See generally Stark & Hester, *supra* note 9 at 96.

264. Stark, Re-presenting, *supra* note 8 at 15. See also Bishop & Bettinson, Evidence, *supra* note 15 at 8.

265. See Bishop & Bettinson, Evidence, *ibid* at 8-10. See also Sowter, (In)competence, *supra* note 27.

266. See Docherty et al, *supra* note 219 at 27.

267. See Bishop & Bettinson, Evidence, *supra* note 15 at 9; Stark, Re-presenting, *supra* note 8 at 9; Stark, CC, *supra* note 8 at 229 (i.e. An abusive husband brought a sweater to his wife during a softball game. To outsiders, the act looked like love and affection, but it caused the wife to fall apart. She knew that it was a signal that she would need to cover the bruises on her arms later when he beat her for drawing too much attention to herself during the game.).

268. See Bettinson & Bishop, Offence, *supra* note 138 at 184.

269. See generally Boyd & Lindy, *supra* note 208.

cooperation is often required to have evidence of the harm she suffers.²⁷⁰ This presents a considerable challenge, as the abuser's lawyer may have a sense of the abuse and be concerned because his behaviour is becoming alarming, but that is not enough to meet the test.

2. *Serious psychological harm*

The Supreme Court held that "serious psychological harm may constitute serious bodily harm,"²⁷¹ but the only guidance we have for what constitutes serious psychological harm is that it must substantially interfere with a person's "health or well-being," and it may be more "pervasive and permanent...than...physical harm."²⁷² The term "bodily harm" is defined in the *Criminal Code* to include a "hurt or injury" that "interferes with" the person's "health or comfort" in a way that is "more than merely transient or trifling."²⁷³ For example, "strong negative emotions" have been found to indicate psychological harm.²⁷⁴ Courts have also interpreted the terms "serious harm"²⁷⁵ and "grave risk...[of] psychological harm"²⁷⁶ in child abduction cases. Where a parent argues a child cannot be returned because they are at risk of psychological harm, under the *Hague Convention*, the risk of psychological harm must be "substantial" and "not trivial,"²⁷⁷ and under the Ontario *Children's Law Reform Act*, which implements the *Hague Convention* in Ontario, a court must determine the "likelihood and severity" of the future harm.²⁷⁸ These lines of jurisprudence do not provide a clear answer as to what might indicate serious psychological harm absent an expert report, except to suggest the harm must be more than transitory or trifling, and it must be substantial and not trivial.

The case the Court relied on in *Smith v Jones* involved a threat to rape.²⁷⁹ The psychological harm caused by the threat "substantially" interfered with

270. See Bishop & Bettinson, Evidence, *supra* note 15 at 12-13. See generally Nugent, *supra* note 138.

271. *Smith*, *supra* note 4 at para 83.

272. *Smith*, *ibid* at para 83, citing *R v McCraw*, [1991] 3 SCR 72, 1991 CanLII 29 at 81.

273. CCC, *supra* note 126 at 2.

274. *R v F(T)*, 2008 NWTTC 11 at paras 8-24. See also *R v Arcand*, 2010 ABCA 363 at para 168; *R v B(D)*, 2016 ABPC 23 at paras 33-34, 45-47; *R v S(WL)*, [2014] 1102 APR 180, 115 WCB (2d) 455 (NL PC) at paras 73-76.

275. *Children's Law Reform Act*, RSO 1990, c C12, s 23.

276. *Convention of the Civil Aspects of International Child Abduction*, 25 October 1980, CTS 1983/35; 19 ILM 501, art 13(b) (entered into force 1 December 1983).

277. *Ojeikere v Ojeikere*, 2018 ONCA 372 at para 55 [*Ojeikere*]; *Thomson v Thomson*, [1994] 3 SCR 551, 119 DLR (4th) 253; [*Thomson*]; *Husid v Daviau*, 2012 ONSC 547; *Pollastro v Pollastro*, [1999] OJ No 911 (ON CA), 1999 CanLII 19933.

278. *Ojeikere*, *ibid* at paras 51-58 and 62; *Thomson*, *ibid*.

279. See *Smith*, *supra* note 4 at para 83.

the “health or well-being” of the intended victim.²⁸⁰ Therefore, any threat that substantially interferes with the health or well-being of a survivor may meet the test. For example, a threat to harm the survivor’s children or have them taken away, to harm the survivor’s friends or family, to withhold the necessities of life, to have her committed, or to kill her, any of these threats may substantially interfere with her health or well-being. If a survivor is already suffering from coercive control and a threat is made to harm her or her loved ones, it could cause serious psychological harm analogous to a threat of rape provided the threat interfered with her health or well-being.²⁸¹ Put another way, provided a pattern of tactics exists, meaning the victim is already suffering, then any threat would likely increase the severity of her distress and thus meet the seriousness prong of the test.

Finally, financial control is a common tactic post-separation.²⁸² In British Columbia, the Provincial Court has recognized that refusal to pay support can be “designed to inflict psychological and emotional harm,” and it may contribute to a finding of family violence under the BC FLA.²⁸³ The threat to cause financial harm is an exception to confidentiality in New Brunswick, where there is risk of substantial financial injury caused by an unlawful act.²⁸⁴ That rule has not been duplicated by any other Canadian law society. Financial control, or threats to inflict financial devastation can be traumatic to vulnerable women (and their children) who are already suffering financially because of the end of the relationship.²⁸⁵ In my view, given that financial control robs the survivor of her independence and ability to provide for herself and her children, the threat to financially harm her would meet the seriousness prong of the test.²⁸⁶ The Department of Justice has said that coercive control is the “most serious type of violence

280. *McCraw*, *supra* note 77 at 88.

281. *Cf Dodek*, SCP, *supra* note 34 at 263 (since the threat to rape constituted a threat of serious bodily harm, “a threat of kidnapping or torture would qualify as ‘serious psychological harm’ even in the absence of physical harm”).

Cf Tanovich, *supra* note 5 at 299 (emotional and psychological child abuse would qualify as psychological harm).

282. See i.e. *Thomas*, *supra* note 207.

283. *P(JC) v B(J)*, 2013 BCPC 297 at para 15. See also *BC FLA*, *supra* note 22 at ss 37-38; *Boyd & Lindy*, *supra* note 208 at 105; *Hokhold*, *supra* note 235.

284. See *LSNB*, *supra* note 5 at R 3.3-3B.

285. See Mary Jane Mossman et al., *Families and the Law: Cases and Commentary*, 2nd ed (Concord, ON: Captus Press, 2015) at 894; *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456 at 853-857.

286. Financial harm could mean refusing to pay child or spousal support, threatening to hide assets, threatening to call social services when they are providing financial assistance, threatening reputational harm that would impact income, and so on. *Cf Dodek*, SCP, *supra* note 34 at 263 (a threat to a home, a threat similar to that posed by Bernie Madoff, or a threat to defraud a senior of her life savings, should qualify).

Cf Tanovich, *supra* note 5 at 300 (significant economic loss suffered by a vulnerable victim qualifies).

in family law.”²⁸⁷ Provided there is coercive control, any ongoing abuse, or the threat of any abuse, should meet the seriousness prong of the test.

3. *Imminence*

The Court held that “imminence” does not mean immediate. A threat can be imminent even if it does not manifest for a period of time as long as it “creates a sense of urgency.”²⁸⁸ The purpose of the exception is not about addressing a past harm, it is about addressing a future harm. As a result, where there is coercive control, the question should be whether the pattern of abuse has ceased. If it has, if there is no future threat, the exception does not apply.

Where there is ongoing coercive control, it would be illogical to suggest that because the abuse is not getting worse—it is only maintaining its terribleness—that the imminence prong is not met. Although the test was conceived for a new threat, it does not omit an ongoing harm provided there is a sense of urgency.²⁸⁹ As such, where tactics are currently causing serious psychological harm, in my view, the imminence prong is satisfied. This idea also applies where a pattern exists, and a new tactic is introduced; indeed, urgency may become clearer after separation given the increased risk that occurs once the parties separate.

Despite the seriousness of coercive control, violating the lawyer-client relationship by betraying a client’s loyalty and disclosing protected information contrary to his interests should only be done when there is no other option to prevent harm.²⁹⁰ A lawyer’s role is not to morally evaluate her client’s conduct, but rather to facilitate his ability to make decisions about how to live relative to what the law allows. A lawyer’s role is to provide access to the law and to pursue her client’s interests within the bounds of legality.²⁹¹ Canadian law has not prohibited coercive control²⁹² (despite the obvious need), and even the most heinous individual deserves competent representation and access to the law. In short, the purpose of disclosure must not be to punish the privilege-holder. A lawyer cannot elect to disclose because her client’s behaviour is morally objectionable

287. Legislative Background, *supra* note 26 at B.

288. *Smith*, *supra* note 4 at para 84.

289. *Cf* Dodek, SCP, *supra* note 34 at 264 (where there is a “history of child abuse and a strong likelihood of future child abuse, the imminence factor would be met”).

290. See Model Code, *supra* note 4 at Rs 3.3-3[1] and [3].

291. See Wendel, Fidelity, *supra* note 16 at 49-52 and 176; Woolley, Positivist, *supra* note 16 at 88.

292. See generally Private Members Bill C-247, *An Act to amend the Criminal Code (controlling or coercive conduct)*, 2nd Sess, 43rd Parl, 2020 (first reading 05 October 2020).

and she wants to sever the relationship. The threat to the victim must outweigh the need to preserve the solicitor-client relationship.²⁹³

In sum, the seriousness and imminence prongs of the test are the easiest two prongs to meet. The challenge for an abuser's lawyer is whether she will see enough of the pattern to meet the third prong. In other words, the test will only be helpful in the clearest of cases. As a result, the exception is unhelpful in most cases, where a lawyer only has her client's side of the story and an uncomfortable hunch.

IV. *Where does that leave us?*

An abuser's lawyer may want to disclose information to the judge to ensure they make a fully informed decision about the abuse.²⁹⁴ She may want to influence a parenting schedule that includes overnights or unsupervised access because she is concerned. She may want to warn opposing counsel that her client's behaviour is getting worrisome, so they can manage the case together safely. However, a lawyer's role properly viewed does not allow her to do any of these things absent her client's consent. She cannot influence an outcome in a way that she perceives is better than what her client wants, and the law allows. She cannot violate his confidence to try to steer him towards what she perceives is just or moral. Even where adversarial proceedings "will likely affect the health, welfare or security of a child" the *Model Code* only allows a lawyer to "advise" her client to "take into account the best interests of the child."²⁹⁵ The Code does not prioritize the child's well-being over that of the client. The lawyer could withdraw if there is a "serious loss of confidence" between the two,²⁹⁶ but that will not help the survivor. Where the future harm exception is not met, a lawyer must maintain her client's confidences and pursue his interests as he has identified them, within what the law allows. A lawyer can morally counsel her client the same way anyone can, but she must be certain that he can tell the difference between her moral advice and her legal advice,²⁹⁷ and she must allow him to be the moral decision-maker over his life—even when he makes a foolish and even harmful decision. A lawyer is her

293. See *Smith*, *supra* note 4 at para 85.

294. This argument is taken from my earlier *Slaw* column, see Deanne Sowter, "Coercive Control: What Should a Good Lawyer Do?" (27 December 2019), online (blog): *Slaw* <www.slaw.ca/2019/12/27/coercive-control-what-should-a-good-lawyer-do/> [perma.cc/5SZA-JRQ8] [Sowter, Coercive Control].

295. See *Model Code*, *supra* note 4 at R 5.1-1[4]. See also Law Society of British Columbia, "Common-sense guidelines for family law lawyers" (May 2013) at 7 and 8, online: Law Society of British Columbia <www.lawsociety.bc.ca/> [perma.cc/5SZA-JRQ8].

296. *Model Code*, *ibid* at R 3.7-2.

297. See Wendel, *Fidelity*, *supra* note 16 at 137-143; Bradley Wendel, "The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations" (2017) 30 *Can JL & Jur* 443 at 450.

client's agent,²⁹⁸ her role is to provide access to our system of laws—for someone else. To do that well, she must be neutral about the moral merits of his lawful objectives.

The very obvious problem is just how harmful ignoring a hunch and facilitating the client's interests can be when there is coercive control. The future harm exception can be helpful in some instances when warning the survivor might be helpful; but there is no agency that a lawyer can call to intervene the way there is with children, and since the behaviour is not criminal the criminal justice system will likely not be helpful either. The exception does not alter the lawyer's role, it was not designed with coercive control or even family violence in mind, and there is no other exception that fits that purpose. As Alice Woolley has argued, where the law allows or requires objectionable conduct, we shouldn't look to blame the lawyer but rather to change the law that allows or requires the behaviour.²⁹⁹ As such, a comprehensive response to the problem I have presented here would involve a national family violence strategy³⁰⁰ that recognizes and criminalizes coercive control, and that changes the lawyer's role in resolving disputes involving coercive control. Absent such an overhaul, within the existing legal framework, I suggest the following amendments to the *Model Code*:

1. **Definitions—Rule 1.1: “coercive control”** means an ongoing pattern of domination by which abusive partners primarily interweave repeated tactics which may include physical and sexual violence, intimidation, sexual degradation, isolation and control.

Commentary

[1] Two distinguishing features of coercive control are the pattern of tactics, and the motivation to create a willing victim. Tactics will likely include a pattern of coercion tactics coupled with a pattern of control tactics, used over a prolonged period of time;

[2] Coercion tactics may include but are not limited to physical violence (including sexual abuse), intimidation, threats (including to animals or property), gaslighting, surveillance (including stalking), and degradation;

298. See Wendel, Fidelity, *ibid* at 49-54.

299. See Woolley, Positivist, *supra* note 16 at 81.

300. See also Yves Faguy, “Q&A with Jennifer Koshan: The University of Calgary law professor on Canada's patchwork of laws addressing domestic violence” (20 April 2020), online: *CBA National Magazine* <www.nationalmagazine.ca> [perma.cc/4N8D-L9PN].

[3] Control tactics may include but are not limited to isolation, financial control, and micromanagement;³⁰¹

[4] What is commonly known as litigation harassment, legal bullying, systems abuse, or paper abuse, may also be a tactic of coercive control;

[5] The harm caused by coercive control can also extend to a victim's child who may be a secondary victim.³⁰²

2. **Advocacy—Rule 5.1-1—Commentary**³⁰³

[1.1]: In Adversarial and Non-Adversarial Proceedings: A lawyer should be on guard against becoming the tool or dupe of an abusive client's scheme to continue a pattern of coercive control. Vigilance is required because the means of these tactics may include abusing the justice system, such as by: refusing to file court documents, filing late, filing incomplete statements, bringing vexatious claims, disobeying court orders, delaying, changing lawyers, refusing to negotiate, making threats, bringing applications to review or vary, appealing, refusing to disclose or withholding assets, and refusing to pay support.

3. **Advocacy—Rule 5.1-2.** When acting as an advocate, a lawyer must not:³⁰⁴

(a.1): knowingly assist or permit a client to abuse the process of the tribunal by instituting or continuing proceedings that, although legal in themselves, are clearly brought for the purpose of continuing a pattern of coercive control;

(a.2): knowingly assist or permit a client to intentionally use tactics that, although legal in themselves, are designed to continue a pattern of coercive control during any form of negotiations including mediation and collaborative practice;³⁰⁵

301. This description is drawn from a combination of Stark's work and the Bill C-78 amendments, and is intentionally broad in order to capture psychological harm without unnecessarily confining the description thereby excluding competing typologies.

302. See Stark & Hester, *supra* note 9 at 96.

303. See Model Code, *supra* note 4 at R 5.1-1 (deals with the lawyer's role as an advocate in an adversarial proceeding).

304. See Model Code, *ibid* at R 5.1-2 (deals with the type of conduct that is prohibited when a lawyer is acting as an advocate in an adversarial proceeding before a tribunal).

305. See generally Wanda Wiegers, Jennifer Koshan & Janet Mosher, "Domestic Violence and Alternative Dispute Resolution in Family Law Disputes" (15 November 2018), online (blog): *Ablawg* <www.ablawg.ca> [perma.cc/TLW5-FDC9]; Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" (2020) 53:1 UBC L Rev 139; Sowter, Coercive Control, *supra* note 294.

4. **Future Harm / Public Safety Exception—Rule 3.3-3—Commentary**³⁰⁶

[2.1] Coercive control that is either ongoing or increasing in severity can indicate serious psychological harm for the purpose of the exception.³⁰⁷

Including coercive control in the *Model Code* would raise lawyers' awareness of this type of abuse. Even though there are better methods for responding to coercive control, such as criminalization and family law reform, it is vital that a systemic response includes the law governing lawyers. By including coercive control in the *Model Code*, it tells all lawyers that coercive control is serious enough to warrant exceptional treatment and a collective response. Family violence changes the rules for lawyers, and it is time for the regulation of the profession to reflect that.

Conclusion

Coercive control requires “the strongest legal interventions, both family and criminal.”³⁰⁸ The system we have is not responsive enough to family violence generally, and coercive control specifically. Coercive control creates a challenge for lawyers and judges who need to be able to see the connection between “seemingly unrelated events,”³⁰⁹ and respond safely. The pervasiveness of abuse and the seriousness of the harm indicate we need a systemic shift in how family law disputes are resolved, and the lawyer's role within that system. We need a justice system and professional rules that acknowledge, identify, and respond to coercive control.

306. See Model Code, *supra* note 4 at R 3.3-3.

307. Since this is merely guidance it should not create a disconnect between the test as it is applied to solicitor-client privilege.

308. Luke's Place Report, *supra* note 1 at 9.

309. Bettinson & Bishop, Offence, *supra* note 138 at 182.

