

**IN THE MATTER OF THE ROYAL COMMISSION
INTO FAMILY VIOLENCE**

ATTACHMENT SW-38 TO STATEMENT OF SCOTT JAMES WIDMER

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Prepared by:
Victorian Government Solicitor's Office
Level 33
80 Collins Street
Melbourne VIC 3000



This is the attachment marked '**SW-38**' produced and shown to **SCOTT JAMES WIDMER** at the time of signing his Statement on 31 July 2015.

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SW-38



Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems

VOLUME I

Report of the Federal-Provincial-Territorial (FPT)
Ad Hoc Working Group on Family Violence

November, 2013

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Foreword

In February 2009, Justice Canada held a symposium entitled *Family Violence: The Intersection of Family and Criminal Justice System Responses*. The symposium was the first national conference to address the challenges posed by the different objectives and legal standards of the family, child protection¹ and criminal justice system responses to family violence. Approximately 300 government officials, family, child protection and criminal justice professionals, academics and front-line workers from across the country participated. The symposium also provided a forum to discuss innovative and promising mechanisms to enhance the linkages among different sectors of the justice system and address some of the challenges that were identified.

The symposium was followed by a meeting of federal-provincial-territorial (FPT) government officials from all Canadian jurisdictions to continue the discussion initiated at the symposium and examine how the issues directly impact their respective areas. One recommendation emanating from this FPT meeting was the creation of a joint family and criminal justice FPT working group. In January 2011, FPT Deputy Ministers responsible for Justice and Public Safety approved the terms of reference for an FPT Ad Hoc Working Group on Family Violence, which was tasked to:

1. Identify issues faced by the intersection of the family justice system (including child protection) and the criminal justice system responses to family violence;
2. Identify risk assessment needs and challenges;
3. Identify information-sharing obstacles (including privacy-related concerns);
4. Identify promising practices to address these issues (including technology to facilitate information sharing);
5. Identify model risk assessment tools, guidelines and information-sharing protocols that could serve to address some of the issues posed by potentially inconsistent or conflicting justice system responses to family violence; and
6. Share promising practices and research from within their areas of expertise.

Representatives from all Canadian provinces and territories participated in the development of this report which highlights some of the issues that arise as a result of the intersection of the family, child protection and criminal sectors of the justice system in responding to family violence. It also identifies selected tools, protocols and practices that have been implemented in Canada or elsewhere, or which have been recommended to address these issues. Although the report does not make specific recommendations, it is hoped that the findings will serve as a basis for future efforts to enhance collaboration on this important issue.

¹ The equivalent term “youth protection” is used in Quebec. Unless the context requires otherwise, the term “child protection” is used in this report.

Making the Links in Family Violence Cases:

Collaboration among the Family, Child Protection and Criminal Justice Systems

Executive Summary

In January 2011, federal-provincial-territorial (FPT) Deputy Ministers responsible for Justice and Public Safety approved the creation of a joint family and criminal Ad Hoc Working Group on Family Violence to examine how the family, child protection, and criminal sectors of the justice system interact in relation to family violence. Representatives from all Canadian jurisdictions collaborated in the development of this report which identifies some of the challenges facing litigants grappling with family violence and simultaneously navigating different sectors of the justice system. This report also highlights selected tools, protocols, and practices that have been implemented to address these issues in Canada or elsewhere.

This report is intended for justice system professionals and those working within the criminal justice, family justice and child protection systems. This includes federal-provincial-territorial officials, Crown prosecutors, family and criminal lawyers in the private sector, children's lawyers, members of the judiciary, court officials, child protection workers, child custody assessors, mediators, parenting coordinators, law enforcement officials, corrections officials, victim service workers and front-line service providers. The annexes to this report (Volume II) also contain a wealth of information about legal, policy, and service frameworks across Canada that have been developed to address family violence. There is no one-size-fits-all approach to these challenges given that each jurisdiction is unique and not all of the promising practices will be applicable in some remote, rural or Aboriginal communities. It is important to note that this report does not provide a thorough assessment of the specific needs and issues of Aboriginal Canadians experiencing family violence and having contact with the different sectors of the justice system. Although this report does not make specific recommendations and the promising practices do not necessarily address all the identified gaps, it is hoped that the findings will serve as a basis for future efforts to enhance collaboration on this important issue.

Why focus on family violence and the justice system?

Family violence is a devastating reality for many Canadians regardless of their social, economic, or cultural backgrounds. It may include various forms of abuse, mistreatment, or neglect experienced by adults or children in their intimate, family, or dependent relationships. In fact, in 2009, almost one fifth (17%) of Canadians indicated that they had experienced physical or sexual violence at the hands of their former marital or common-law partner. Family violence may be the cause, a contributing factor, or the outcome of the family breakdown. Studies have shown that separation and divorce can exacerbate an already violent relationship and that the period following family rupture represents a period of heightened risk for family members. Evidence indicates that child abuse and exposure to spousal violence can have serious long-

term negative impacts on children. In 2011, family violence accounted for just over one quarter (26%) of police-reported violent crime – almost half (49%) the family violence victims were victims of spousal and ex-spousal violence while the other half (51%) were children, siblings or extended family members. In 2011, almost one third (32.6%) of all solved homicides were family homicides – nearly one quarter (22%) of the victims were children.

The impacts of family violence on Canadian society are significant. According to a 2013 Justice Canada study, the economic cost of spousal violence in Canada in 2009 was \$7.4 billion, amounting to \$220 per capita. While family violence is a concern for all Canadians, women report intimate partner violence to police nearly four times more than men and are almost three times more likely than men to be killed by a current or former spouse. Almost half (48%) of women reported fearing for their lives as a result of the post-separation violence. Moreover, family violence is disproportionately experienced by Aboriginal Canadians who are almost twice as likely as non-Aboriginal Canadians to report being the victim of spousal violence (10% versus 6%). Aboriginal female victimization is almost triple the non-Aboriginal rate and the level of violence can be severe, with Aboriginal women more likely to be injured or to fear for their life. Aboriginal children are over-represented in the foster care system, and the rate of substantiated child maltreatment investigations is four times higher for Aboriginal children than for non-Aboriginal children.

While there is a growing body of research on the negative impacts of family violence and the indicators of risk of severe violence and homicide in families struggling with violence, there is also increasing support for co-parenting and promoting contact between children and their parents after separation or divorce. These distinct trends can result in divergent legal outcomes with respect to the same family because, once disclosed, family violence is a relevant factor in the responses of several sectors of the justice system. It can play a role in determining the best interests of the child for the purposes of custody and access or parenting arrangements in family law matters; it can be critical in assessing whether a child is in need of protection under the child protection or child welfare system; it can be grounds for the issuance of civil or criminal protection orders; and it can be a factor leading to the arrest as well as the potential detention and conviction of the alleged offender in the criminal justice system.

Numerous domestic violence death reviews, inquiries, and coroner reports have cited the lack of coordination between officials operating in these systems as a contributing factor in tragic family homicides. Without mechanisms in place to ensure coordination and communication between these systems, families can be faced with potentially inconsistent or conflicting orders, which may have implications for the safety of family members, including the most vulnerable – children. This in turn can undermine public confidence in the administration of justice.

What are the challenges facing families navigating the justice system and what are some promising practices to address these?

The criminal, family, and child protection systems all have distinct mandates, cultures, legal standards, and procedures. The criminal law is a branch of public law and is primarily concerned with protecting the safety of individuals. Crimes are prosecuted on behalf of the state and the *Charter* rights of the accused have a significant influence on the conduct of criminal investigations, proceedings and rules of evidence. In contrast, family law is a branch of private law designed to regulate the rights and responsibilities of family members upon the breakdown of the family unit with an emphasis on the best interests of the child, rebuilding relationships and maximizing a child's contact with both parents. Family law involves the resolution of disputes between private parties and the proceedings are almost always initiated by the parents rather than by the state. The child protection system is often referred to as part of the family justice system but it involves state-initiated proceedings and is focused on the safety of children. The state advocates on behalf of a child's interests and decisions are based solely on the best interests of the child. In these proceedings, the *Charter* rights of parents may be engaged.

Despite these differences, all of these systems must address the issue of family violence. As families navigate these systems, sometimes simultaneously, they are faced with differences in system objectives, procedures, and timing. The fact that these systems are often uncoordinated creates challenges for these families, as well as for those working within these systems. This report highlights many of those challenges and identifies some promising practices to address them.

Risk assessment (Chapter 2)

Ultimately, all sectors of the justice system, as well as officials working with the criminal, family and child protection systems, have at least one common goal - to see the violence end. As a result, families involved in the justice system will, at various points, likely participate in a screening process to determine whether family violence exists, or in a more formalized "risk assessment," to determine both the risk of family violence re-occurring and how to manage that risk. The failure to properly share information between the criminal justice system, the child protection system, and the family justice system impedes the ability to conduct a fully informed risk assessment which may be critical to preventing lethal consequences. The use of risk assessment tools is not consistent across Canadian jurisdictions. The report also points to the need for more regular family violence screening in the family law system in order to identify safety risks to litigants and make appropriate referrals.

Promising practices include:

- High-risk case coordination protocols, frameworks, or committees to manage the timely and confidential sharing of risk assessment, risk management, and safety planning information (subsection 2.7.1).

- Integrated threat and risk assessment centres which conduct professional assessments upon police referral and provide representatives who can testify in family or child protection hearings (subsection 2.7.2).
- Domestic death review committees which identify risk factors that assist in predicting lethality based on previous cases (subsection 2.7.3).

Impact of pre-existing orders and proceedings (Chapter 3)

While family members may assume that one sector of the justice system is aware of or has easy access to information about ongoing proceedings in another part of the system, this is often not the case. For example, it is not uncommon in many parts of Canada for a criminal court to issue a peace bond or make an order with respect to bail or sentencing, without knowledge that there are simultaneous family law proceedings between the parties, or that a family law order has already been issued. Similarly, a family court may not be aware of proceedings or orders related to the parties in the criminal system or child protection system if the parties do not bring this information to their attention. Without knowledge about pre-existing orders in the civil context, police or the criminal courts may place conditions on an accused that prevent contact with the victim and or the children that may be in conflict with pre-existing family court orders for access. Likewise, where a family court lacks knowledge of relevant criminal or child protection orders, it risks issuing conflicting orders that place family members at risk of harm.

Promising practices include:

- Information-sharing protocols that assist the Crown prosecutor in obtaining copies of relevant orders issued in previous or parallel family law or child protection proceedings prior to a bail hearing (subsection 3.3.2).
- Prosecution policies that encourage the use of graduated bail conditions that are sensitive to changing risks and to an accused person's family matters (subsection 3.3.3).
- Standard clauses in family law orders to make it easier to identify cases where there are issues of family violence, thereby facilitating a cross-reference where there are parallel proceedings (subsection 3.3.4).
- Court order databases which include all civil and criminal protection orders issued within the jurisdiction. Prior to releasing a person accused of family violence, police benefit from knowing whether the accused is subject to a child protection order, a civil family violence protection order, or a family law restraining order or a custody and access order (subsection 3.3.5).

Identification of multiple proceedings (Chapter 4)

Coordination within the court systems is only possible when the various individuals involved – the parties, court staff, judges, lawyers – are aware that there are in fact multiple proceedings or orders and that these are relevant to one another. In addition, since many individuals within the court system are unrepresented, courts cannot always rely upon counsel to bring relevant information about parallel proceedings to their attention. Ideally, computerized court databases would be able to identify parallel proceedings involving the same parties. However, separate courts may be involved (e.g. provincial or superior courts) and operate on distinct technological platforms that cannot be linked. Currently in Canada, there is no jurisdiction with the technological capacity to implement systematic matching on an ongoing basis.

Promising practices include:

- Consistent file designation of family violence cases within each court system that facilitates cross-referencing of cases between court systems and improves the manual searching of various databases. Court coordinators conduct the cross-referencing in order to identify families simultaneously navigating the family, child protection and criminal justice systems (subsections 4.1.1 and 4.1.4).
- Statutory amendments requiring litigants in family court to provide information about related proceedings and orders from other courts (subsection 4.1.2).
- Statutory amendments in Australia requiring the family court to ask each party about the existence of family violence in respect of themselves or their children (subsection 4.1.3).
- Creation of building blocks for the possible implementation of a complete electronic court case management system that would include most courts and allow staff to cross-reference connected cases by linking the cases (but not the parties) within the system (subsection 4.1.4).

Coordination of court proceedings (Chapter 5)

The lack of coordination of different legal proceedings has a number of very practical consequences from the perspectives of safety, access to justice, and respect for the administration of justice. With respect to timing in criminal matters, the average time it took in 2010/2011 for an adult criminal court case in Canada to be completed was 118 days. Cases that involved certain types of charges (such as sexual assault) or multiple charges took much longer. However, there are very different timelines in the family and child protection contexts. In the family law context, interim decisions with respect to parenting arrangements (custody and access) will likely be made while a criminal proceeding is outstanding. Similarly, very strict timelines exist in the child protection context, particularly where a child has been apprehended by the state or state-designated agency. As these multiple proceedings move forward, the

unresolved criminal proceedings may affect family members, particularly from the perspective of the willingness of the accused to participate in services or provide certain evidence, for fear of the impact on the ongoing criminal proceedings. Litigants may also be required to attend various hearings at many different times, often repeating the same story. Moreover, a lack of coordination with respect to protective orders may mean that one protective order (e.g. a peace bond) will expire before another is issued in a civil proceeding. As a result, there may be periods of time where protective provisions would be required but are not in place.

Promising practices include:

- Integrated domestic violence court models whereby the same judge or court hears both the family and criminal matters related to the same family. This ensures consistency in orders, enhanced safety, coordinated referrals to services, and efficiency in process, both for the court and litigants who appear less frequently (subsection 5.2.4).
- Judicial communication where there are concurrent proceedings related to the same family. The communication between judges relates strictly to process and not the merits of each case with a view to streamlining and co-coordinating the process to enhance access to justice for families (subsection 5.2.5).
- Coordinated court or court coordinator models whereby a designated domestic violence coordinator would act as a liaison between the different courts (e.g. family, child protection, and criminal) as well as services (e.g. victim/witness services, treatment providers, probation officers) involved for each family (subsection 5.2.6).
- The Aboriginal Courtwork (ACW) Program which helps Aboriginal people who are in conflict with the criminal justice system to obtain fair, just, equitable, and culturally sensitive treatment. Some ACW programs also provide information, support and referrals in family law and child protection as well as criminal matters (subsection 5.2.7).

Evidentiary issues (Chapter 6)

Families involved in the various sectors of the justice system may be perplexed to find that separate courts may arrive at different findings about whether family violence has occurred. There are several reasons for this. The criminal justice system uses the higher standard of “proof beyond a reasonable doubt” whereas the proceedings that are civil in nature (family law, child protection, family violence protection orders) use the standard of proof of a “balance of probabilities.” Thus, evidence which may be sufficient in a civil context may not be in the criminal context. Further, due to the varied timing of the proceedings, evidentiary rules, and procedures with respect to disclosure and production, different evidence may be before the courts in the various legal proceedings. For instance, although the accused in a criminal trial will have access to the Crown prosecution records through their constitutionally protected disclosure rights, the victim will face challenges obtaining these same records for the purposes of a simultaneous family law proceeding.

Promising practices include:

- The adoption of procedures to regulate the sharing of Crown prosecution records for simultaneous family or child protection proceedings. For example:
 - The Ontario Court of Appeal, in the 2004 case of *D P v Wagg* adopted a screening process which has since been applied with respect to the production of Crown prosecution records being sought for use in a civil matter. This screening process has been implemented through protocols in Ontario to facilitate the release of information to private parties as well as public bodies, such as child protection services (subsection 6.2.1).
 - The Uniform Law Conference of Canada (ULCC), in 2010, adopted a uniform law in order to provide a consistent set of rules regarding the admissibility of Crown prosecution records in civil and administrative proceedings. The effect of the *Uniform Prosecution Records Act* would be to extend the principles adopted in *D P v Wagg* uniformly across Canada (subsection 6.2.2).

Privacy (Chapter 7)

A coordinated response requires timely information sharing between responding sectors of the justice system. There are many sources of privacy legislation, regulations, guidelines and codes of ethics across federal, provincial and territorial jurisdictions that relate to the sharing of personal and confidential information. While privacy considerations may, and generally do, cede to a duty to share information for the purpose of preventing harm, there are many privacy-related challenges to information sharing in the context of cross-sector collaboration. Unfortunately, however, without clear legislation, ministerial directives, memoranda of understanding, or protocols about when personal information may be appropriately shared, cautious record holders may hesitate to disclose relevant, potentially lifesaving information even when it may be permissible to do so.

Promising practices include:

- A 12-month pilot project known as “Clare’s Law” in the UK directs police, in select jurisdictions, to disclose to victims or potential victims of domestic violence, information about their partner’s violent past (subsection 7.2.1).
- Legislative amendments that clarify that it is appropriate to collect, use and disclose information for the specific purpose of reducing the risk that an individual will be a victim of domestic violence, if such violence is reasonably likely to occur (subsection 7.2.3).

Out-of-court dispute resolution and services (Chapters 8 and 9)

The vast majority of cases in the criminal, family, and child protection systems are resolved without a trial. In fact, early resolution of the legal issues in dispute is strongly encouraged for many reasons. However, simply because a case is resolved without a trial or outside of court, does not necessarily mean that all issues related to family violence or risk have been resolved, or that there is no longer a need for coordination. Sometimes dispute resolution service providers lack training in the risks and consequences of family violence or do not screen for it. Information sharing between different sectors of the justice system is important so that everyone involved understands the implications of settlement in one sector on the others. Moreover, there are many services in the criminal, family, and child protection systems to assist family members, and yet there is sometimes a lack of coordination. For example, each sector of the justice system may send families to multiple services. Family members may find themselves running between different appointments, without a comprehensive plan in place.

Promising practices include:

- Family law regulations that set minimum training and practice standards for family dispute resolution practitioners, which would include family mediators, arbitrators, and parenting coordinators (subsection 8.2.1).
- Practice standards, policies and safeguards to address concerns about family violence indicators and mechanisms to ensure safety in child protection mediation (subsection 8.2.3).
- Family justice centres that provide referrals for victims of family violence to a variety of services including victim services, newcomer services, and family law services (section 9.5).
- Child advocacy centres that provide a range of services to reduce the trauma to child victim/witnesses and their families and assist them to navigate the criminal justice system and related services (section 9.5).

Cross-sector collaboration (Chapter 10)

There is a need for coordination not only among the criminal, family, and child protection systems, but also among the justice sector and other government sectors such as social services, addictions and mental health. This report explores the necessity and desirability for cross-sector collaboration when it comes to addressing family violence, and identifies some of the challenges involved in a broader collaborative approach.

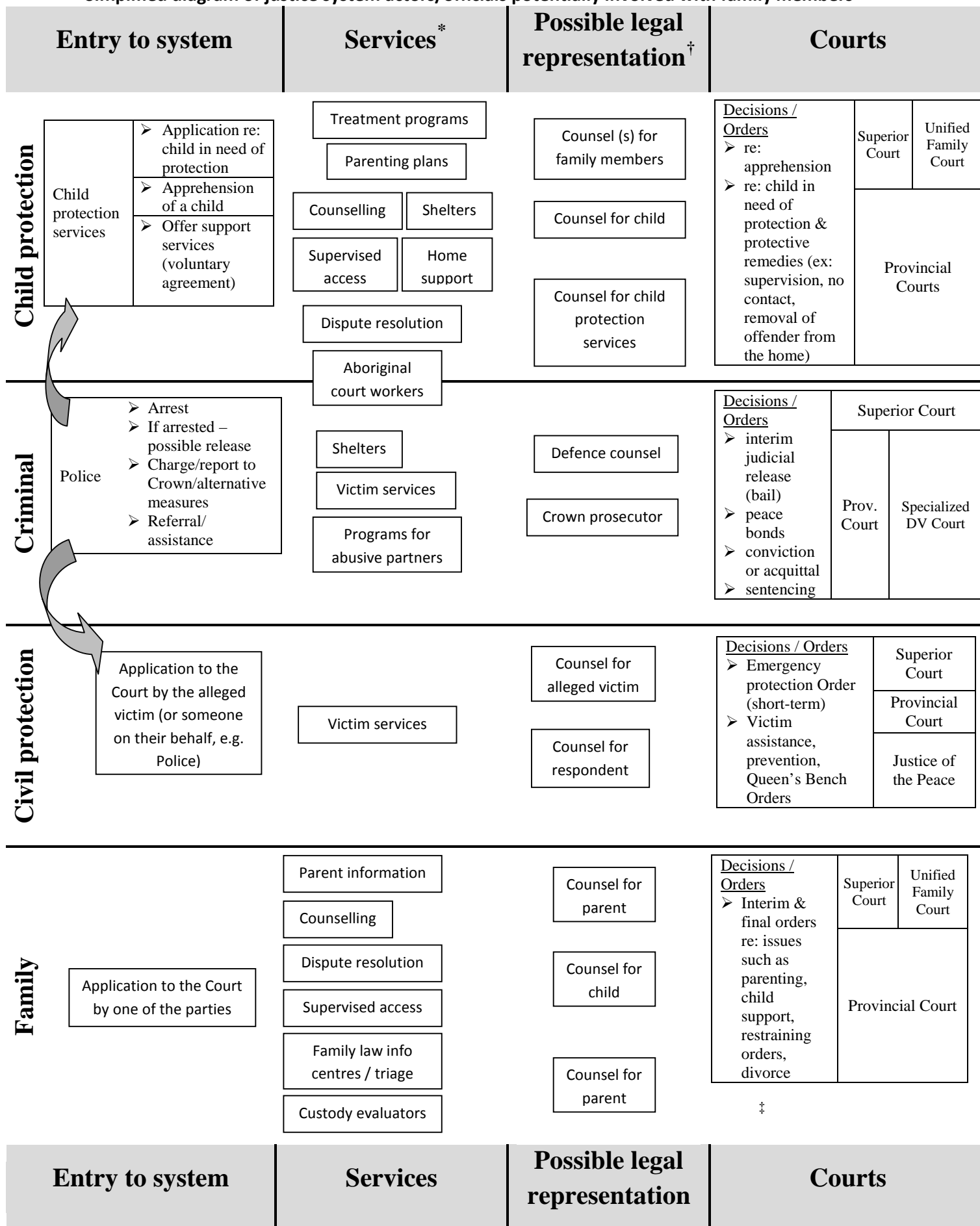
Promising practices include:

- Coordinating committees and inter-agency collaboration models that assist in coordinating government responses to family violence that bridge the family and criminal justice sectors (subsection 10.2.2).
- Government strategies and action plans that establish a clear accountability framework for coordinated inter-agency responses to family violence (subsection 10.2.2).
- Domestic violence courts and domestic violence treatment option court processes that provide a range of specialized supports to victims, child witnesses and offenders within the criminal justice system and that can provide links to the child protection and family law systems (subsection 10.2.2).

Conclusion

Given the distinct objectives, processes, evidentiary standards, and timelines associated with each of the family, child protection, and criminal justice system responses, families can be faced with fragmented responses, inconsistencies, and confusion. The different sectors of the justice system operate independently of one another with their own particular experts, assessors, and services. A lack of communication between the sectors responding to family violence cases increases the danger that potential risks associated with family conflict may not be consistently identified or fully appreciated. With respect to information sharing, this report also emphasizes the complex but very important legal evidentiary issues that may arise in proceedings involving family violence. It is hoped that some of the promising practices identified in this report can assist in addressing these intersectional barriers.

Simplified diagram of justice system actors/officials potentially involved with family members



Simplified diagram of justice system actors/officials potentially involved with family members

* It is important to note that family members may access services at different points in the various sectors of the justice system. For example, in the family justice system, parents may attend a parent information session before their first court hearing. Other services may be accessed at a later point in time. Note also that parole and correctional services are involved in the coordination of services for the accused. Given the scope of the report, however, they are not included in this diagram.

† The diagram refers to “possible” representation because the Working Group recognizes that large numbers of litigants are unrepresented.

‡ Note that only a superior court may grant a divorce and relief corollary to a divorce, for example, custody/parenting orders.

Chapter 1 Background

Justice system professionals are becoming increasingly aware of the importance of a more cohesive, coordinated and responsive approach to a wide range of important social issues, including family violence. This is evidenced in the growth of specialized, therapeutic and problem-solving courts and in the wide range of inter-ministerial and inter-agency coordinating committees and information-sharing protocols among diverse branches of the public sector. Increasing access to justice for Canadians is a critical driver behind many of these initiatives.

Most families experiencing separation or divorce are able to arrive at post-separation arrangements with little to moderate involvement with court systems. However, families grappling with violence in the home – be it intimate partner or ex-partner violence or child abuse – may come into contact with various sectors within the justice system, principally the criminal, family and child protection sectors. These sectors all have distinct mandates, cultures, legal standards and procedures. Due to the different purposes, processes, and speed at which each of these sectors of the justice system progress, individuals may be faced with a lack of pertinent information sharing among the various sectors.

While there is a growing body of research on the negative impacts of family violence and on the indicators of risk of severe violence and homicide in families struggling with violence, there is also increasing support for co-parenting and promoting contact between children and their parents post-separation or divorce. These distinct trends are evident in different sectors of the justice system. Once the sentence is complete, the criminal justice system is normally not involved with the family. The criminal justice system emphasizes risk assessment, risk management and safety planning for the victims. While also focussing on safety, the child protection system is concerned with the best interests of the child and can maintain a longer-term involvement with the family for the child. Child protection services may, however, be reluctant to intervene in cases where there are allegations of family violence and there is an ongoing family law dispute between the parents, where those issues may be addressed.² The family law system is also focused on the best interests of the child, which includes considerations of safety, but at the same time places an emphasis on rebuilding relationships and maximizing a child's contact with both parents.³

² See Department of Justice Canada, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices* by Peter G Jaffe, Claire V Crooks, & Nick Bala, Research Report 2005-FCY-3E (Ottawa: Department of Justice, 2006) at 25, online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/2005_3/pdf/2005_3.pdf> [Justice Canada, "Parenting Arrangements"].

³ See Department of Justice Canada, *Spousal Abuse Policies and Legislation: Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (Ottawa: Family, Children and Youth Section, 2003) at 39, online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf> [Justice Canada, "Spousal Abuse Policies"]; Marcie Campbell, "Threat Assessment and Risk Management in Domestic Violence Cases: An Overview of Ontario Justice and Community Collaboration for 2010 and Future Directions" (Paper delivered at the Reducing the Risk of Lethal Violence Collaboration in Threat Assessment & Risk Management: From Theory to Practice conference, Hamilton, 7-9 February 2010) at 8, online:

Numerous domestic violence death reviews, inquiries and coroners' reports have cited the lack of coordination among officials operating in the family law, child protection and criminal justice systems as a contributing factor in tragic family homicides.⁴ Without mechanisms in place to ensure coordination and communication among these systems, families can be faced with potentially inconsistent or conflicting orders, which may in turn have implications for the safety of family members, including the most vulnerable – children. This in turn can undermine public confidence in the administration of justice.

A holistic response to family violence entails linkages among multiple sectors such as health care, mental health, social and community services, shelters, housing, employment, welfare, education, child protection, civil law (including family, immigration, civil damages and torts law) as well as the criminal justice system (including victim services, police, prosecution services, the courts and corrections). Although clearly important, it is beyond the scope of the report to delve into non-justice sector responses to family violence. This report focuses on the intersection of certain aspects of the justice sector in response to family violence, namely the family law services, the family court, child protection and criminal justice services (principally victim services, prosecution and court responses). Another intersectional factor that has not been explored in this paper involves residents on reserve experiencing family violence.⁵ It is important to note that this report does not provide a thorough assessment of the specific needs and issues of Aboriginal Canadians experiencing family violence and having contact with the different sectors of the justice system. Civil issues related to immigration proceedings, non-family civil litigation (such as civil damages and torts) and the division of matrimonial property are also beyond the scope of this report.

<<http://www.learningtoendabuse.ca/sites/default/files/Threat%20Assessment%20and%20Risk%20Management%20report.pdf>>.

⁴ The following are examples of reports that have cited a lack of communication or coordination among justice system partners as factors in the homicides. While many of the recommendations have been responded to, this list provides an indication of the frequency with which these intersectional issues arise. Recommendations related to enhanced justice system coordination were present in the following reports: *Report to the Minister of Justice and Attorney General, Public Fatality Inquiry: Blagica and Alex Fekete* (Alberta: Provincial Court, May 2005); *Honoring Christian Lee – No Private Matter: Protecting Children Living with Domestic Violence* (British Columbia: Representative for Children and Youth, September 2009); *Honouring Kaitlynnne, Max and Cordon: Make Their Voices Heard Now* (British Columbia: Representative for Children and Youth, March 2012); *Commission of Inquiry into the deaths of Rhonda Lavoie and Roy Lavoie: A Study of Domestic Violence and the Justice System in Manitoba* (Manitoba: Provincial Court, 1997); *Report Respecting the deaths of Doreen Leclair and Corrine McKeown* (Manitoba: Provincial Court, 2002); *2011 Annual Report Domestic Violence Death Review Committee* (Ontario: Office of the Chief Coroner, September 2011); *Jury Inquests into the deaths of Jared and Andrew Osidacz* (Ontario: Office of the Chief Coroner, April 2009); *Hadley Inquest Jury Recommendations* (Ontario: Office of the Chief Coroner, February 2002); *Arlene May and Randy Iles Inquest* (Ontario: Office of the Chief Coroner, July 1998); *Coroner's Inquiry into the causes and circumstances of the deaths of Françoise Lirette, Loren Gaumont-Lirette and René Gaumont* (Quebec: Bureau du Coroner, 1997).

⁵ Statistics Canada, *Violent Victimization of Aboriginal women in the Canadian Provinces, 2009* by Shannon Brennan, Juristat, May 2011, Catalogue no 85-002-X, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>> [Statistics Canada, "Victimization of Aboriginal Women"].

1.1 Why focus on family violence?

Family violence is a devastating reality for many Canadians regardless of their social, economic or cultural backgrounds. It may be the cause, a contributing factor, or the outcome of the family breakdown. In addition, as noted below, studies have shown that separation and divorce can exacerbate an already violent relationship and that the period following family rupture represents a period of heightened risk for family members. While family violence is a concern for all communities, Aboriginal Canadians are almost twice as likely as non-Aboriginal Canadians to report being the victim of spousal violence (10% versus 6%).⁶ Aboriginal female victimization is almost triple the non-Aboriginal rate and the level of violence can be severe, with Aboriginal women more likely to be injured or to fear for their life.⁷

Victims of family violence, which for the purposes of this report includes violence against intimate partners and child abuse, can be traumatized⁸ and reluctant to disclose their experiences. Moreover, contact with the family, child protection and criminal justice systems can sometimes be traumatizing in and of itself – in addition to the trauma experienced through exposure to family violence. Members of these families often require considerable social support and may need to be linked to mental health services.

Once disclosed, family violence is a relevant factor in the responses of several sectors of the justice system. It can play a role in determining the best interests of the child for the purposes of custody and access or parenting arrangements in family law matters; it can be critical in assessing whether a child is in need of protection under the child protection or child welfare system; it can be grounds for the issuance of civil or criminal protection orders; and, it can be a factor leading to the arrest as well as the potential detention and conviction of the alleged offender in the criminal justice system.

Unfortunately for some families struggling with violence in the home, their experiences of the “justice system” can be highly stressful and perplexing. Litigants may presume, for instance, that the family court judge is aware of a previous criminal conviction or a civil protection order of pertinence to the best interests of the child. If this is incorrect, and the court does not have this information, the resulting family order might put the parent or child at risk. Family members may also be faced with a criminal or a child protection order that appears to contradict a family order. This can be confusing and can place family members in a situation

⁶ Statistics Canada, *Family violence in Canada: A statistical profile (2009)*, Canadian Centre for Justice Statistics, January 2011, Catalogue no 85-224-X at 11, online: <<http://www.statcan.gc.ca/pub/85-224-x/85-224-x2010000-eng.pdf>> [Statistics Canada, “Family Violence in Canada 2009”].

⁷ Statistics Canada, “Victimization of Aboriginal Women”, *supra* note 5 at 5, 7, 10.

⁸ Some may suffer from post-traumatic stress disorder (PTSD), which is a psychological disorder that may arise in response to experiencing or being exposed to a traumatic event accompanied by feelings of intense fear, hopelessness or horror. PTSD can also affect victim’s disclosure, sometimes significantly delaying disclosure of the violence, and their testimony, including potential emotional outbursts and memory loss. See Mary Ann Dutton, “Pathways Linking Intimate Partner Violence and Posttraumatic Disorder” (2009) 10:3 *Trauma, Violence & Abuse* 211; Michelle F Dennis et al, “Evaluation of Lifetime Trauma Exposure and Physical Health in Women with Posttraumatic Stress Disorder or Major Depressive Disorder” (2009) 15:5 *Violence Against Women* 618.

where they are inadvertently in breach of one of the orders. Ensuring adequate access to justice for families simultaneously navigating these various branches of the justice system requires a concerted effort on the part of justice system professionals and those working within these systems to provide a more cohesive and coordinated response to these important social issues. As noted by the Chair of the BC Justice Reform Initiative:

During consultations, I often heard of the need to break down silos that exist in the justice system. Institutional participants need to work together. This includes discussion of how their various responsibilities and accountabilities relate and how their budgets may be applied synergistically. Building integration and strategic coordination into the criminal justice system requires consideration of how resources may best be shared among justice system participants. There must also be a frank dialogue among participants as to how their policies affect each other and how their actions should be held to account by the system as a whole.⁹

1.2 What do we mean by family violence?

In its broadest sense, family violence refers to various forms of abuse, mistreatment or neglect that adults or children may experience in their intimate, family or dependent relationships. The definition of family violence continues to evolve as the nature and extent of violence within intimate relationships and families becomes better understood. Some forms of family violence are clearly criminal in nature and would also be taken into consideration in the context of family or child protection proceedings. In contrast, the family may experience other forms of violence that are potentially relevant in obtaining a restraining or emergency protection order or in the context of a family law or child protection hearing, but do not constitute a criminal offence.

For the purposes of this report, the focus will be primarily on intimate partner violence (which includes violence between legally married, separated, divorced, current and previous common-law partners, dating partners and other intimate partners) and child abuse (physical, sexual and psychological violence against children and neglect). In some places in this report, reference is made to “spousal violence”, “spousal abuse” or “domestic violence”, where these terms are used in statistical or reference sources or in the titles of particular policies, programs or laws.

While there is no specific offence of family violence in the *Criminal Code*, a wide range of offences related to the use of physical and sexual violence may be applicable including assault, aggravated assault, assault with a weapon, sexual assault, aggravated sexual assault, sexual assault with a weapon, forcible confinement, uttering threats, criminal harassment, failure to provide the necessities of life, homicide and attempted homicide. The particular harm associated with family violence is reflected in the sentencing provisions: section 718.2 provides that it is an aggravating factor for sentencing purposes when an offence is committed against a

⁹ D Geoffrey Cowper, Chair BC Justice Reform Initiative, *A Criminal Justice System for the 21st Century, Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, at 70, online: <<http://www.ag.gov.bc.ca/justice-reform/pdf/CowperFinalReport.pdf>>.

child, the offender's spouse or common-law partner or that the offender abused a position of trust or authority in relation to the victim.

Psychological or emotional abuse involves using words or actions to control, isolate, intimidate, deride or dehumanize someone. Some forms of psychological or emotional abuse within the family could constitute criminal behaviour, such as cruelty to animals, damaging or destroying property, uttering threats and criminal harassment. Often referred to as stalking, criminal harassment generally consists of repeated conduct that is carried out over a period of time that causes the victim to reasonably fear for their safety or the safety of someone known to them. In contrast, other types of psychological or emotional abuse, while abusive in nature and often a precursor to physical or sexual violence, would not be considered criminal behaviour: ridiculing, insulting, yelling, constantly criticizing, routinely making unreasonable demands, being excessively jealous, not allowing the family member to socialize, or threats of deportation.¹⁰ These types of behaviours may nonetheless be relevant in the context of family law, child protection or for obtaining civil protection orders in some jurisdictions.¹¹

Similarly, many forms of financial abuse within the family, such as theft and fraud, would constitute criminal behaviour. Economic or financial abuse includes acting without consent in a way that financially benefits one person at the expense of another. Other forms of economic control over an individual, however, would not be criminal, for example, keeping close track of the way a family member spends the small amount of money that they are given. While these behaviours may not constitute a criminal offence, they are relevant in a criminal prosecution and are often used by prosecutors to show the context of the relationship. They are also aggravating factors in sentencing. In addition, this type of behaviour may be relevant in the family law and civil contexts.

Neglect within the family may constitute criminal behaviour, such as failure to provide the necessities of life, abandoning a child and criminal negligence causing bodily harm or death. Neglect of a child is a ground for state intervention to assist a child in need of protection in all Canadian jurisdictions.

Regarding the impact of family violence on children, studies indicate that child abuse can have long-term impacts on the behavioural, developmental, emotional and physical health of the child.¹² It has been documented that children who are exposed to violence¹³ by one parent

¹⁰ It is important to note that immigration proceedings as well may be ongoing at the same time as criminal, family or child protection proceedings. This issue, however, is beyond the scope of this particular report.

¹¹ See e.g. *Victims of Family Violence Act*, RSPEI 1988, c V-3.2; *The Domestic Violence and Stalking Act*, SM 1998, c 41, CCSM c D93 (similarly define family violence as including "emotional or psychological abuse").

¹² Holly Johnson & Myrna Dawson, *Violence Against Women in Canada: Research and Policy Perspectives* (Don Mills, ON: Oxford University Press, 2011); Joseph Murray & David P Farrington, "Risk Factors for Conduct Disorder and Delinquency: Key Findings from Longitudinal Studies" (2010) 55:10 *Canadian Journal of Psychiatry* 633; Howard Meltzer et al, "The Mental Health of Children who Witness Domestic Violence" (2009) 14:4 *Child & Family Social Work* 491; David W Brown et al, "Adverse Childhood Experiences and the Risk of Premature Mortality" (2009) 37:5 *American Journal of Preventive Medicine* 389; James C Spilsbury et al, "Clinically Significant Trauma Symptoms and Behavioural Problems in a Community-based Sample of Children Exposed to Domestic Violence"

against another often suffer from emotional, social, cognitive, and behavioural maladjustment problems including emotional/anxiety disorders, and may also exhibit aggressive behaviours and engage in delinquent acts.¹⁴ In addition, there is evidence of the intergenerational impact of this violence. Men who witnessed violence as boys are more likely to be violent towards their partners as adults and women who witnessed violence growing up are more likely to suffer violent victimization in their adult intimate partner relationships.¹⁵ Exposing a child to intimate partner violence can be grounds for child protection intervention¹⁶ and can be a factor in family law proceedings.

(2007) 22:6 *Journal of Family Violence* 487; Shanta R Dube et al, "The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900" (2003) 37:3 *Preventive Medicine* 268; Etienne G Krug et al, eds, *World report on violence and health* (Geneva: World Health Organization, 2002).

¹³ Children exposed to intimate partner violence includes children who witness or hear the violence or see the aftermath of the violence (e.g. injuries and property damage).

¹⁴ Andrée Fortin, "L'enfant exposé à la violence conjugale : quelles difficultés et quels besoins d'aide?" (2009) 73:1 *Empan* 119; David A Wolfe et al, "The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique" (2003) 6:3 *Clinical Child and Family Psychology Review* 171; Peter G Jaffe, David A Wolfe & Susan Kaye Wilson, *Children of Battered Women* (Newbury Park, CA: Sage Publications, 1990); Gayla Margolin, "Effects of Domestic Violence on Children" in Penelope K Trickett & Cynthia J Schellenbach, eds, *Violence Against Children in the Family and the Community* (Washington, DC: American Psychological Association, 1998) 57-101; Penelope K Trickett & Cynthia J Schellenbach, eds, *Violence Against Children in the Family and the Community* (Washington, DC: American Psychological Association, 1998); Georges W Holden, Robert A Geffner & Ernest N Jouriles, eds, *Children Exposed to Marital Violence: Theory, Research, and Applied Issues* (Washington, DC: American Psychological Association, 1998).

¹⁵ Statistics Canada, *Witnessing Family Violence* by Mia Dauvergne & Holly Johnson, *Juristat* 21:6, June 2001, Catalogue no 85-002-XIE at 6-7, online: <<http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0060185-002-XIE.pdf>>; Shanta R Dube et al, "Exposure to Abuse, Neglect, and Household Dysfunction Among Adults who Witnessed Intimate Partner Violence as Children: Implications for Health and Social Services" (2002) 17:1 *Violence and Victims* 3; Rolf Loeber & Dale Hay, "Key Issues in the Development of Aggression and Violence From Childhood to Early Adulthood" (1997) 48 *Annual Review of Psychology* 371; John W Fantuzzo & Wanda K Mohr, "Prevalence and Effects of Child Exposure to Domestic Violence" (1999) 9:3 *Domestic Violence and Children* 21.

¹⁶ Many Acts include exposure to family violence as a ground for protection. See *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 1(3), provides that "For the purposes of this Act, (a) a child is emotionally injured... (ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of ... (c) exposure to domestic violence or severe domestic disharmony"; *Family Services Act*, SNB 1980, c F-2.2, s 31(1), provides that "The security or development of a child may be in danger when ... (f) the child is living in a situation where there is domestic violence"; *Child and Family Services Act*, SNWT 1997, c 13, s 7(3), provides that "A child needs protection where ... (j) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent of the child and the child's parent fails or refuses to obtain services, treatment or healing processes to remedy or alleviate the harm"; *Children and Family Services Act*, SNS 1990, c 5, s 22(2), provides that "A child is in need of protective services where ... (i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence"; *Child Protection Act*, RSPEI 1988, c C-5.1, s 9, provides that "A child is in need of protection where ... (m) the child has suffered physical or emotional harm caused by being exposed to domestic violence by or towards a parent"; *Child and Family Services Act*, SS 1989-90, c C-7.2, s 11, provides that "A child is in need of protection where (a) as a result of action or omission by the child's parent: ... (vi) the child has been exposed to domestic violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child."; *Youth Protection Act*, RSQ, c P-34.1, s 38, provides that "the security or development of a child is considered to be in danger if the child is abandoned, neglected, subjected to psychological ill-treatment or sexual or physical abuse, or if the child has serious behavioural disturbances."; *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2,

1.2.1 Typologies of intimate partner violence

There is a growing body of social science research that argues that not all occurrences of intimate partner violence are the same and can be differentiated with respect to partner dynamics, context and consequences. This differentiation of intimate partner violence has implications from the perspective of determining what legal and social responses are appropriate in particular cases and for assessing risk. Although various terms have been used to describe different types of violence; four patterns or types of intimate partner violence have been repeatedly identified.¹⁷

1. Coercive controlling violence or intimate terrorism – involves “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.”¹⁸ Control is central to this type of violence and non-physical tactics such as emotional abuse and monitoring may also be used to achieve this.¹⁹ This type of violence is primarily male-perpetrated and in cases involving intimate terrorism, the violence is generally more frequent and severe. This is the type of violence that comes to mind for most when speaking of “batterers” and it is believed that it is more likely to be behind much of the police-reported and homicide data. This form of coercive controlling violence is also often associated with child abuse.²⁰ Emotional and psychological abuse has been determined to be one of the most important predictors of physical and sexual violence in relationships. In 2009, 19% of women who experienced emotional or financial abuse by a current spouse reported being a victim of physical or sexual assault by this same spouse. This compares to 2% of women who did not experience emotional or financial abuse. The

s 10(1) provides that “A child is in need of protection where the child...(l) is living in a situation where there is violence or is living in a situation where there is a risk of violence.”

¹⁷ Johnson & Dawson, *supra* note 12; It is important to note that the terminology used here was modified in part as a result of discussions at the 2007 Wingspread Conference on Domestic Violence and Family Courts, which was organized collaboratively by the Association of Family and Conciliation Courts and the United States Family Violence Department of the National Council of Juvenile and Family Court Judges.

¹⁸ Joan B Kelly & Michael P Johnson, “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46:3 Family Court Review 476 at 478.

¹⁹ Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence*, (Lebanon, NH: Northeastern University Press, 2008) at 26-29.

²⁰ Lundy Bancroft, Jay G Silverman & Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 2nd ed (Thousand Oaks, CA: Sage Publications, 2012) ; Lundy Bancroft & Jay G Silverman, “Assessing Risk to Children From Batterers” (2006) 4 Commission on Domestic Violence Quarterly E-Newsletter; Scotland, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse – Directions for Good Practice* by Cathy Humphreys by Claire Houghton & Jane Ellis (Edinburgh: Scottish Government, 2008), online: <<http://www.scotland.gov.uk/Publications/2008/08/04112614/0>>; Alison Cunningham & Linda Baker, *What About Me! Seeking to Understand a Child’s View of Violence in the Family* (London, ON: Centre for Children & Families in the Justice System, 2004), online: http://www.lfcc.on.ca/what_about_me.html ; Linda C Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection) A Family Law, Domestic Violence Perspective* (June 30 2012), online: <http://www.learningtoendabuse.ca/sites/default/files/Enhancing_Safety.pdf>.

heightened risk was also evident when the violence involved previous spouses (32% versus 4%).²¹

2. Violent resistance – is in response to coercive controlling or intimate terrorism violence. This violence generally takes place as a response to an assault, and the objective is the protection of oneself or others (therefore primarily defensive force). The Supreme Court of Canada dealt with this type of violence in the 1990 *R v Lavallée* decision in which the “battered woman syndrome” was considered in order to contextualize the lethal use of force by a victim of intimate terrorism.²² Since coercive controlling or intimate terrorism violence is primarily committed by men, violent resistance is primarily committed by women and is relatively rare.
3. Situational (or common) couple violence – is violence that is not associated with a general desire to control one’s partner, but is rather more related to a particular incident or argument that escalates into physical violence, such as slaps or pushing. It appears to be related to situations where individuals do not have the capacity to manage conflict and/or anger. Generally speaking, the violence is less severe and frequent than in cases of coercive controlling or intimate terrorism violence. It should be noted, however, that situational violence can be quite serious and result in injuries.²³ It appears that situational couple violence is initiated at similar rates by men and women.²⁴ This type of violence is perhaps more widespread than the others, arising from everyday interactions and arguments and is likely to be the type of violence that results in an appearance of gender parity in the General Social Survey data.²⁵ However, female victims of spousal violence in 2009 were twice as likely as male victims to be physically injured, three times as likely to experience disruptions to their daily lives, and almost seven times as likely to fear for their lives.²⁶
4. Separation-instigated violence – this type of violence occurs at or around separation and generally occurs only once or twice; it can range from being quite minor to severe in

²¹ Statistics Canada, *Measuring Violence Against Women: Statistical Trends, 2011* edited by Maire Sinha, Juristat, February 2013, Catalogue no 85-002-X, at 62, online: <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>> [Statistics Canada, “Violence Against Women”].

²² *R v Lavallee*, [1990] 1 SCR 852 (The Court admitted expert evidence related to the *battered women’s syndrome*, based on the work of Dr. Lenore Walker who identified three phases of the cycle of domestic violence. The first phase, known as the *tension building phase*, is characterized by a series of minor assaults and verbal abuse. During the second phase, known as the *acute battering phase*, the batterer is unable to control the rage and severely beats the woman. This is followed by the third phase, the *kindness and contrite loving behaviour phase*, during which the batterer behaves kindly towards the woman, asking her forgiveness and promising never to repeat the violence. This final phase provides the woman with positive reinforcement for staying in the relationship. To explain why women remain in violent relationships after the cycle has been repeated more than once, Walker argued that battered women are psychologically paralyzed because they have learned from the repeated beatings that they cannot control their circumstances).

²³ Johnson, *supra* note 19 at 62.

²⁴ Kelly & Johnson, *supra* note 18 at 486.

²⁵ Johnson & Dawson, *supra* note 12.

²⁶ Statistics Canada, “*Measuring Violence Against Women*”, *supra* note 21 at 9.

nature.²⁷ It appears to be a reaction to the separation, and occurs in situations where there has been no violence previously. It is important to emphasize, however, that not all violence that occurs for the first time at separation, will necessarily fall into this category.²⁸

Although relatively clear in theory, the typologies may not be so clear cut to apply in practice.²⁹ This research does, however, highlight that not all violence is the same. Intimate partner violence stemming from severe mental illness has also been identified in the literature.³⁰ It is important in each case, whether in the context of the criminal, family, or other parts of the justice system, to gather as much information as possible about the violence such as its severity, frequency, and impact on victims and whether it occurs in the context of attempts to control or emotional or psychological abuse.

The type of violence will often have an impact on the appropriate legal response to the violence. For example, in the family law context, an understanding of the typologies of intimate partner violence is highly relevant to the appropriate parenting, or custody and access arrangements. It may be of assistance to apply the lens of the typologies of intimate partner violence to determine whether power and control issues are at play, raising the risk of harm, and suggesting the need for parenting arrangements which provide sufficient protections for family members. Caution is necessary, however, because in order to properly apply this typology in the family law context, sufficient evidence of family violence and its impact on family members needs to be before the courts or decision makers. While co-parenting may be workable in cases where there are minor and isolated acts of family violence, proper assessment is required in each case to determine whether there are any issues of power and control which would tend to contraindicate co-parenting. Since victims of intimate partner violence rarely call the police the first time they are assaulted, assessors need to be cautious about concluding that the first act reported represents an isolated event. For example, without this contextual information, cases of intimate terrorism may be categorized as another type of violence, such as situational couple violence, resulting in insufficient protections for family members. In addition, in applying the typology, consideration must be given to the stage of proceedings (i.e. interim vs. final) as well as the services available to family members.³¹

²⁷ Kelly & Johnson, *supra* note 18 at 487.

²⁸ Johnson, *supra* note 19 at 46-47, 102-104 (Johnson discusses the existence of nonviolent coercive control, which has the hallmarks of “coercive controlling violence”, e.g. control (including of money), emotional abuse, threats and intimidation, without the actual violence. He suggests, however, it is possible that in the context of this particular type of relationship, the act of separation may be what leads to a first act of violence.)

²⁹ As a result, experience and expertise in applying such typologies are key: Nancy Ver Steegh & Clare Dalton, “Report from the Wingspread Conference on Domestic Violence and Family Courts” (2008) 46:3 Family Court Review 454 at 459.

³⁰ *Ibid.*

³¹ Justice Canada, “Parenting Arrangements”, *supra* note 2 at 45 and chart at 47.

1.3 What do we know about family violence in Canada?

This section provides a brief overview of the research data related to family violence and the criminal, child protection and family law systems, as well as family violence protection orders. For a more detailed review of the data, please see Annex 1, in Volume II.

- According to the 2009 General Social Survey on Victimization (GSS)³², 6% of individuals with a current or former spouse reported being physically or sexually victimized by their spouse in the preceding five years; 2% reported experiencing victimization in the previous year.³³
- Overall, women report more serious forms of violence than men. In 2009, three times as many women who reported current spousal violence indicated that they had been sexually assaulted, beaten, choked or threatened with a gun or a knife by their partner in the previous five years (34% of women and 10% of men). A higher percentage of women (54%) than men (27%)^E who experienced violence after separation³⁴ indicated that they were physically injured as a result of the violence.³⁵ Almost half (48%) of women reported fearing for their lives as a result of the post-separation violence.³⁶
- The GSS indicates that less than one quarter of spousal violence victims report the violence to police. Almost two thirds of spousal violence victims (63%) said that they had been victimized more than once before they contacted the police. Nearly 3 in 10 (28%) stated that they had been victimized more than 10 times before they contacted the police.³⁷
- In 2011, 69% of the victims of police-reported family violence were women or girls. Women accounted for 80% of all police-reported spousal violence victims.³⁸
- According to police-reported data in 2011 there were almost 95,000 victims of family violence in Canada who reported to the police, accounting for one quarter of all victims of

³² The GSS on Victimization is conducted every five years; the last cycle took place in 2009. The GSS on victimization does not capture defensive spousal violence and therefore some of the reports of violence perpetrated against the respondents may in fact have been acts of self-defence. Data points which should be interpreted with caution are noted with an "E".

³³ Statistics Canada, "Family Violence in Canada 2009", *supra* note 6; Statistics Canada, "Victimization of Aboriginal Women", *supra* note 5 at 8-9.

³⁴ Note that in this report, data based on the 2009 GSS that refers to ex-spousal violence or violence that occurred after separation includes those who had had been in contact with an ex-spouse/partner in the previous five years and who had experienced physical or sexual violence by an ex-spouse/partner in that timeframe.

³⁵ Statistics Canada, Canadian Centre for Justice Statistics (CCJS), *General Social Survey (GSS)*, Special data request, August 2012.

³⁶ Note that the number of males reporting fear for their lives due to post-separation violence was too low to produce statistically reliable estimates. Statistics Canada, Canadian Centre for Justice Statistics (CCJS), *General Social Survey (GSS)*. Special data request, August 2012.

³⁷ Statistics Canada, "Family Violence in Canada 2009", *supra* note 6 at 12.

³⁸ Statistics Canada, *Family violence in Canada: A statistical profile, 2011*, Juristat, June 2013, Catalogue no. 85-002-X, at 7, online: <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11805-eng.pdf>> [Statistics Canada, "Family Violence in Canada 2011"].

police-reported violent crime. Almost half (49%) the family violence victims were victims of spousal and ex-spousal violence while the other half (51%) were children, siblings or extended family members.³⁹

- In 2009, 10% of victims of spousal violence obtained a restraining or protective order against their abuser.⁴⁰
- According to the 2009 GSS, about 15% of Aboriginal women who had a current or former spouse, reported being a victim of spousal violence in the five years preceding the survey. More specifically, close to half (48%) reported the most severe forms of violence, such as being sexually assaulted, beaten, choked, or threatened with a gun or a knife.⁴¹
- According to a recent study of the economic costs of spousal violence in Canada, the total economic impact of spousal violence in 2009 was \$7.4 billion, amounting to \$220 per capita. The most direct economic impact is borne by primary victims. Of the total estimated costs, \$6.0 billion was incurred by victims as a direct result of spousal violence for items such as medical attention, hospitalizations, lost wages, missed school days, and stolen/damaged property. The justice system bore 7.3% (\$545.2 million) of the total economic impact; \$320.1 million was borne by the criminal justice system and \$225.1 million was borne by the civil justice system.⁴²
- Between 2001 and 2011, family homicides accounted for 34% of all solved homicides. In 2011, 31 children were killed by a family member and 59 women and 7 men were killed by their current or former spouse.⁴³
- 72% of all domestic homicides in Ontario, reviewed from 2003-2011 by the Ontario Domestic Violence Death Review Committee, involved perpetrators and victims who had already separated or who were in the midst of a separation; separation was thus the most common risk factor identified.⁴⁴
- According to the Uniform Crime Reporting Survey (UCR 2 program) data, in 2011, police officers in Quebec recorded 19,373 offences against the person committed in a domestic

³⁹ *Ibid* at 6.

⁴⁰ Statistics Canada, "Family Violence in Canada 2009", *supra* note 6 at 12.

⁴¹ Statistics Canada, "Victimization of Aboriginal Women", *supra* note 5 at 10-11.

⁴² Department of Justice Canada, *An Estimation of the Economic Impact of Spousal Violence in Canada, 2009* by Ting Zhang et al, (Ottawa: Justice Canada, 2012), online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_7/rr12_7.pdf>.

⁴³ Statistics Canada, "Family Violence in Canada 2011", *supra* note 38 at 17, 55, 73.

⁴⁴ Office of the Chief Coroner of Ontario, *2011 Annual Report of the Domestic Violence Death Review Committee* (Toronto: September 2012), at 8, 15, online: <<http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec160943.pdf>>.

violence context, meaning the victims were female spouses, former female spouses, girlfriends or former girlfriends of the alleged aggressors.⁴⁵

- According to the same data, police officers in Quebec recorded 4,958 sexual offences, being 3,749 sexual assaults and 1,209 other sexual offences. As previous years, sexual offences recorded in 2011 were more frequent against youth and the perpetrator was predominantly a family member (48%), either a parent or step-parent (23%), an immediate family member (19%) or a distant relative (6%).⁴⁶
- In Quebec, domestic homicide represented 35% of all homicides committed in 2011.⁴⁷
- With respect to child abuse reported to child welfare authorities in Canada,⁴⁸ the two most common categories of substantiated maltreatment in 2008 were exposure to intimate partner violence (34%) and neglect (34%) as the primary category of maltreatment. Physical abuse was the primary form of maltreatment in 20% of substantiated investigations in 2008, emotional maltreatment accounted for 9% and sexual abuse was the principal concern in 3%.
- Custodial outcomes for divorcing parents from 2010-2012, from selected courts in Canada reveal:⁴⁹
 - *Physical custody (where the child resides)* – in 62.2 % of cases, children resided primarily with their mothers, in 9.4 % of cases primarily with their fathers, in 21.3% of cases there was a shared custody arrangement, whereby the child would live with each parent at least 40% of the time, and in 5% of cases there was a split custody arrangement whereby at least one child resided with each parent.
 - *Legal Custody (who makes major decisions with respect to the child)* – in 74.8% of cases there was a joint custody arrangement whereby both parents would make the major decisions about the child together. In 19.5% of cases the mother had sole responsibility to make major decisions and in 2.9% of cases the father had the sole responsibility to make major decisions.
- Statistics derived from a review of court file data in selected courts indicates that family violence is mentioned in 8% of divorce cases.⁵⁰

⁴⁵ Ministère de la Sécurité publique, Québec, 2011 Highlights/Statistics on crime committed in a domestic violence situation.

⁴⁶ Ministère de la Sécurité publique, Québec, 2011 Statistics on sexual assaults in Québec.

⁴⁷ Ministère de la Santé et des Services sociaux, *Report by the expert committee on intrafamilial homicide*, Québec, November 2012 at 6.

⁴⁸ Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008: Major Findings* (Ottawa: Minister of Public Works and Government Services Canada, 2010) at 31, online: <http://www.phac-aspc.gc.ca/cm-vee/csca-ecve/2008/index-eng.php>.

⁴⁹ Survey of Family Courts and Court File Review, internal analysis (Department of Justice, April 2013). These figures are based on limited data, and as a result may not be representative of the entire population of divorced parents. Totals may not add up to 100% due to the exclusion of the “other” category: 2.2% for physical custody and 2.8% for legal custody.

1.4 What do we know about the incidence of parallel justice sector involvement in family violence cases?

There is very little definitive Canadian information about the incidence of parallel family, child protection or criminal cases involving the same family and additional research is needed about the incidence and characteristics of overlap cases. There is, however, some information from several sources which provides a preliminary sense of the scope of the issue:

- Data is available from an evaluation underway of the Integrated Domestic Violence Court in Toronto, Ontario (discussed in detail in Chapter 5). In order to provide a comparison group of cases not heard in the Integrated Domestic Violence Court, the study examined court files from 2003-2010; there were 11,154 family files⁵¹ available on-site for review at the 311 Jarvis Street courthouse. Researchers examined every third file and found that, of these, there were 398 files where there was or had been a case in the criminal domestic violence court. This means that approximately in 10.7% of family cases there was also a criminal proceeding in relation to domestic violence.
- Of lawyers surveyed in 2010 at the National Family Law Program, over one third (38%) indicated that in situations involving family violence, their clients often or always were also before the criminal courts while the family law proceeding is ongoing. Anecdotal reports from family law lawyers also indicate that this is an issue that arises in a significant number of cases.⁵²
- Data from the Canadian Incidence Study of Reported Child Abuse and Neglect, provides information with respect to child maltreatment cases in 2008:⁵³
 - There were 50,304 cases in which intimate partner violence was a primary, secondary or tertiary ground for a child maltreatment investigation. In 36% of these cases, charges were laid in the adult domestic violence case; this represents 18,010 cases where there was a child maltreatment investigation and a criminal proceeding.
 - Criminal charges were laid in 28% of cases in which there was also a maltreatment investigation and a child custody dispute; this represents 2,049 cases where a child

⁵⁰ Court File Review, internal analysis (Department of Justice Canada, April 2013). This data comes from a review of court files in selected courts, where the court made a final determination on custody issues between 2000 and 2005.

⁵¹ These were cases where there was both an application under the *Children's Law Reform Act*, RSO 1990, c C.12 and the *Family Law Act*, RSO 1990, c F.3.

⁵² Department of Justice Canada, *Supporting Families Experiencing Separation and Divorce Initiative, Survey of the Practice of Family Law* (Ottawa: unpublished, 2010) [Justice Canada, "Supporting Families"].

⁵³ Department of Justice Canada, *Malicious Referrals, Custody Disputes and Police Involvement in the Canadian Child Welfare System: Data Tables from the CIS 2008* by Barbara Fallon, Rachael Lefebvre, Meghan Seto, and Melissa Van Wert (Ottawa: unpublished, 2013).

protection worker reported that the criminal, family and child protection systems were all involved with the family.

- In 6% of cases where there was a maltreatment-related investigation in respect of a youth aged 12-15, in the previous six months the youth had also been charged, incarcerated or subject to alternative measures in the Youth Criminal Justice system.

In assessing the number of overlap cases, it is important to keep in mind that these cases involve families who will require both significant involvement of the courts and support from the services associated with the criminal, family and child protection systems. For this reason, even if the numbers are not particularly large, from the perspective both of the families and the justice system, the coordination of these overlap cases is critical.

1.5 What are key differences between the relevant sectors of the justice system?

The objectives and processes of the various sectors of the justice system which address family violence are very different. Annex 2, in Volume II, provides a general overview of the criminal, youth criminal justice, child protection and family law systems as well as the procedures to obtain a civil family violence protection order. For readers who are not familiar with one or more of the justice system sectors (described also as systems) discussed in this report, that Annex provides a justice system “101”.

Despite their differences, all of these systems are dealing with the issue of family violence. As families navigate these systems, sometimes simultaneously, they are faced with the differences in system objectives, procedures and timing. The fact that these systems are often uncoordinated creates challenges for these families, as well as for those working within these systems. This section highlights key areas where issues arise.

The purpose of the criminal justice system is to maintain a just, peaceful and safe society. The criminal law is thus primarily concerned with protecting the safety of individuals and their property, while protecting their fundamental rights. Because of the public interest, crimes are prosecuted on behalf of the state against an accused.

An individual who is accused of a criminal offence faces a potential deprivation of their liberty, a criminal record and the negative stigma associated with a criminal conviction should they be found guilty of the offence. Consequently, accused persons benefit from a range of *Canadian Charter of Rights and Freedoms* protections⁵⁴ which have a significant influence on the conduct of criminal investigations, proceedings and rules of evidence.

⁵⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, this includes the right to be free from unreasonable search and seizure and arbitrary detention during investigation (sections 8 and 9), the right to know why they have been detained and to obtain legal counsel (section 10), the right to a fair trial, including the presumption of innocence and the right to a trial in a reasonable time (sections 7 and 11).

Like the criminal justice system, the child protection system is government based. The purpose of the child protection system, however, is different and is to ensure that parents and others who care for children meet a minimum standard of care.⁵⁵ The state advocates on behalf of the child's interests, and in the child protection system, decisions are made based on the best interests of the child. While the legislation in each province and territory differs somewhat, the types of behaviour that may be of concern pursuant to child protection legislation is much broader in scope than in the criminal system. For example, exposure to intimate partner violence may constitute sufficient grounds for child protection intervention in some circumstances.

While child protection proceedings are civil in nature, the rights of the individuals involved must be balanced against the state's objective of protecting vulnerable children. In addition, if as a last resort, the state applies to deprive a parent of custody of their child, the proceedings must be conducted in accordance with the principles of fundamental justice because the parents' *Charter* rights may be at stake.⁵⁶ Children are rights bearing individuals and their *Charter* rights may also be engaged in this context.⁵⁷

Nine provinces and territories have also passed civil domestic/family violence legislation⁵⁸ and this legislation generally provides for two types of protective orders: a short-term emergency intervention or protection order, and a long-term victim assistance order, sometimes called a protection, prevention, or restraining order.⁵⁹ The focus of this legislation is thus on safety and many of these orders offer additional remedies to complainants that are not available through the criminal justice system, such as exclusive possession of the matrimonial home for a specified time period, orders directing a peace officer to accompany a specified person to the

⁵⁵ Jeffrey Wilson, *Wilson on Children and the Law*, loose-leaf (consulted March 2012), (Markham: Lexis Nexis, 1994) §3-1.

⁵⁶ *New Brunswick v G (J)*, [1999] 3 SCR 46; *Winnipeg Child and Family Services v K L W*, 2000 SCC 48, [2000] 2 SCR 519. However, in the child protection context, a *Charter* violation will not result in a stay of proceeding or an exclusion of evidence.

⁵⁷ *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *R T, Re*, 2004 SKQB 503.

⁵⁸ *Victims of Domestic Violence Act*, SS 1994, c V-6.02; *Victims of Family Violence Act*, RSPEI 1988, c V-3.2; *Family Violence Prevention Act*, RSY 2002, c 84; *Domestic Violence and Stalking Act*, SM 2004, c 13, CCSM 1998 c D93; *Protection Against Family Violence Act*, RSA 2000, c P-27; *Domestic Violence Intervention Act*, SNS 2001, c 29; *Protection Against Family Violence Act*, SNWT 2003, c 24; *Family Violence Protection Act*, SNL 2005, c F-3.1; *Family Abuse Intervention Act*, SNU 2006, c 18; Note other jurisdictions provide for protection or restraining orders in their family law legislation, for example see *Family Law Act*, SBC 2011, c 25 and *Family Law Act*, RSO 1990, c F.3; Most provincial domestic violence legislation applies to cohabitants, family members or individuals who are living together in a family, spousal or intimate relationship, and to persons who are parents of children, regardless of their marital status or whether they have lived together.

⁵⁹ Nova Scotia's legislation only provides for the short-term emergency protection order. Manitoba's legislation allows a judge to issue a protection order if the respondent is stalking the subject, and their relationship need not have been intimate (section 6). Stalking is defined in almost exactly the same language as in section 264 (subsections (1) and (2)) of the *Criminal Code*. Nova Scotia includes the following in its definition of "domestic violence": "a series of acts that collectively causes the victim to fear for his or her safety, including the following, contacting, communicating with, observing or recording the person" (subsection 5(1)(e)). For more information on domestic violence legislation, see Justice Canada, "*Spousal Abuse Policies*", *supra* note 3.

residence to safely collect personal belongings, and orders directing a peace officer to remove the alleged offender from the residence. Temporary child custody orders may also be available.

An order under civil family violence legislation is between two private parties, a person who is found in need of a measure of protection, and the person against whom the order is made. Thus, it is a private proceeding in which the victim, or someone on their behalf (usually a police officer), applies for the order. While the courts often have standard forms or formats that indicate the type of information or evidence that parties are required to put before the court, it is ultimately the parties who determine what evidence to put before the court.

The purpose of the family law system is to regulate the rights and responsibilities of family members upon the breakdown of the family unit. In particular, the family law system deals with matters of separation, divorce, parenting arrangements (custody and access) for children, child and spousal support, division of family property and possession of the family home.⁶⁰

In comparison to criminal law and child protection proceedings, family law involves the resolution of disputes between private parties and the proceedings are almost always initiated by the parents rather than by the state. Because the state is not a party, if there is information that neither party wishes to place before the family court, it will not be placed before the judge. For example, if a victim of intimate partner violence prefers not to disclose an incident of violence, this information will likely not be before the court, even if there might be multiple forms of evidence (e.g. 911 calls, photographs, medical reports).

Because family law proceedings are private in nature, litigants do not benefit from the same *Charter* protections as accused persons in criminal proceedings or as, to a lesser extent, parents in child protection proceedings. There is, however, a public component to the family law system in the sense that society has an interest in ensuring that family law outcomes are in the best interests of children, and are fair.⁶¹

With regard to parenting arrangements (custody and access), the court will make decisions based on the best interests of the child, which will include consideration of many different factors, including the safety of family members, the emotional well-being of the child, as well as the general desire to promote a meaningful relationship between a child and both of his or her parents.⁶²

⁶⁰ Child protection is also considered a family law matter, however for the purposes of this report, it is dealt with separately. This report does not delve into division of property or support issues.

⁶¹ Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 128.

⁶² It is relevant to note that section 18(2)(a) of Alberta's *Family Law Act*, SA 2003, c F-4.5 provides that in determining what is in the best interests of a child, the court shall ... "ensure the greatest possible protection of the child's physical, psychological and emotional safety...". A similar provision also exists in British Columbia's new *Family Law Act*, SBC 2011, c 25, and which requires the parties in cases involving parenting issues to provide the court with information about "any civil or criminal proceeding relevant to the safety, security or well-being of the child or other family member" (s 37(2)(j)).

A consultation report completed for the National Judicial Institute in April of 2012 highlights the difficult position in which the systems, with their differing objectives, can place families. This is particularly the case where there is a lack of coordination between the systems:

Criminal courts order no contact, child protection authorities say the children will be apprehended if there is contact and family court focuses on the view that contact is in the best interests of the child and grants unsupervised access.⁶³

While this report primarily focuses on the intersection among the family, child protection and adult criminal justice systems, it is important to recognize that a young person involved in family or child protection proceeding may also be involved in the youth criminal justice system.⁶⁴ The youth criminal justice system is discussed in more detail at Annex 2 in Volume II.

1.6 Raising allegations of family violence

There are many cases where family violence exists, but is not brought to the attention of the police or the courts due to a variety of factors, including shame, a belief that the victim won't be believed or fear that they will be viewed as an "unfriendly parent" in the family proceeding. As noted above, less than one quarter of spousal violence victims report the violence to the police and the majority of those who do, were victimized more than once prior to reporting to the police. Professor Linda C Neilson explains the numerous reasons why family violence may not come to the attention of one or more sectors of the justice system:

The failure to document and to present evidence of domestic and family violence during mediation, hearings and trials in family law cases is reported repeatedly in empirical studies from all western common law jurisdictions. The reasons, include claims of domestic and other forms of family violence being 'negotiated' out of the litigation process in return for concessions from the other party (such as agreements to pay child support or to abandon joint custody claims); non-perpetrating parents succumbing to settlement pressure - from professionals who do not understand the significance of domestic violence in connection with harm to children; failure to present evidence when judges have demonstrated a resistance to considering such evidence or have a record of penalizing parents who seek restrictions on access to children; lack of specialized understanding of the dynamics and implications of domestic violence among those who work in the family and child protection systems.... Other exclusionary factors include: lack of financial and psychological resources required to pursue litigation and to hire domestic violence experts, fear of retaliation, embarrassment, protection of family and or cultural 'honour,' emotional inability to offer coherent testimony as a consequence of damage caused by domestic violence, and concerns about child safety (such as the potential for perpetrator retaliation against children). The

⁶³ The Honourable Donna Martinson, *British Columbia Community Consultation Report* (National Judicial Institute, April 2012) at 5, online: <<http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-B.C.-Community-Consultations-on-Family-Violence-Report.pdf>>.

⁶⁴ Specifically, under s 31 of the *Youth Criminal Justice Act*, SC 2002, c 1 (YCJA) a young person can be placed into the custody of a responsible person. It would be very relevant to the youth court to know whether there were other criminal/civil/family/child protection orders prohibiting contact by the "responsible person" with the young person in question.

failure to present full information of domestic violence during hearings is being reported regularly across western legal jurisdictions.

In the criminal context, Statistics Canada informs us that the vast majority of criminal acts of domestic violence are not reported to police much less prosecuted and tried in criminal court. People targeted by criminal acts of domestic violence can have numerous valid reasons for not cooperating in criminal proceedings, some of them associated with family safety. Research studies document that those who have negative experiences in the criminal justice system (e.g. they were subjected to violent retaliation, they were not protected because criminal sentences offered limited safety and protection, or they experienced perpetrator rage and increased abuse and violence following a criminal conviction) may not call the police on the next occasions. If family lawyers and courts ignore or discount patterns and incidents of domestic violence that do not result in a criminal charge, the vast majority of the criminal acts of domestic violence will not be considered in family and child protection litigation.

People who have been threatened, or have been taught to fear the involvement of police and or child protection 'authorities' (for example those new to Canada from oppressive countries), and those who fear perpetrator retaliation, may avoid the criminal system altogether but may initiate family law proceedings in an effort to protect the children. Family law cases involving domestic violence are not necessarily less serious or less dangerous than criminal cases. Indeed some are more dangerous.⁶⁵

And yet, as noted by three leading academics and researchers:

Family violence allegations raised in the context of parental separation are often met with skepticism and a concern that the allegation is being utilized to limit the involvement of the other parent, especially if there has *not* been significant police and criminal justice system involvement. The making of abuse allegations can be a double-edged sword for abuse victims. If the allegations are proven on the preponderance of evidence, the victim and her children may find a degree of safety, with recent legal reforms and improvements in community resources providing a greater degree of safety than in the past. However, if the allegations appear unfounded and are considered by the judge to have been made "maliciously", the abuse victim may lose custody. In some of these cases, mothers are accused of willful alienation⁶⁶ of the children against their father.⁶⁷

⁶⁵ Neilson, *supra* note 20 at 15.

⁶⁶ In some cases, a child is alienated from one of his or her parents, with the child expressing a desire not to see him or her on the basis of negative feelings that are disproportionate to the child's actual experience with the parent. The social science understanding of child alienation has developed from one of a custodial parent "brainwashing" the child against the access parent, to a more nuanced analysis emphasizing that both parents as well as the child can contribute to a situation where a child refuses to have contact with a parent. Although the term "parental alienation" is often used in relation to children who unreasonably refuse access, there may be many legitimate reasons why a child resists visitation with a parent. These reasons can include the developmental stage of a child which may, for example, result in separation anxiety, or with older children, less desire to spend time with either parent, the non-residential parent's parenting style, exposure to high conflict, concerns about leaving an emotionally weak custodial parent alone, and, importantly for the purposes of this report, exposure to family violence. These situations require assessment on an individual basis, since it is essential to determine the reasons behind the child's rejection of a parent as well as an understanding of the family context in order to determine the appropriate intervention. It is important to consider the child's views and reasons for resisting

Where the criminal or child protection systems are engaged, and there is an ongoing custody and access dispute, there is thus sometimes a suspicion that the other systems are being used strategically to gain an advantage in the family law matter.

False allegations of family violence, such as allegations of child abuse, can inflame already tense and hostile custody and access disputes, and have damaging consequences for both the child and the wrongly accused parent. All provincial and territorial child protection legislation, however, make it mandatory to report child abuse and a proper assessment of the allegations is required to ensure that a child is not placed at risk. Studies have indicated that deliberately false claims are rare and most false claims are the result of honest mistakes, parental anxiety and misinterpretations of children's statements, rather than intentional lies.⁶⁸ For example, data from the 2008 *Canadian Incidence Study of Reported Child Abuse and Neglect* indicates that 10% of reports of child maltreatment where there was also a child custody dispute between the parents, were intentionally false.⁶⁹ In contrast, in 60% of cases where there was also an ongoing custody dispute, the report of maltreatment was either substantiated or maltreatment was suspected. In a further 18% of cases, the report of maltreatment was considered unfounded, but there was no malicious intent by the person who made the report.⁷⁰ Therefore, there is a need to distinguish between a false allegation that is deliberately made to gain a tactical advantage in a family law dispute, and an unfounded allegation that is made on the basis of a misunderstanding and driven by concern for the child's safety.

contact. For more information on these issues, see: Joan B Kelly & Janet R Johnson, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39:3 *Family Court Review* 249; Peter G Jaffe, Nancy K D Lemon & Samantha E Poisson, *Child Custody and Domestic Violence* (Thousand Oaks, CA: Sage Publications, 2003) at 52–54; Carol S Bruch, "Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases" (2001) 35:3 *Family Law Quarterly* 527; Carol Smart & Bren Neale, "'It's My Life Too' – Children's Perspectives on Post-Divorce Parenting" (2001) 30 *Family Law* 163; Rhonda Freeman and Gary Freeman, *Managing Contact Difficulties: A Child-Centred Approach* (Department of Justice Canada, 2003), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2003_5/pdf/2003_5.pdf>; Barbara Jo Fidler and Nicholas Bala, "Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums" (2010) 48:1 *Family Court Review* 10; Nicholas Bala & Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" (2004) 23:1 *Canadian Family Law Quarterly* 1; As of December 1, 2012, the American Psychiatric Association (APA) has rejected the inclusion of "parental alienation syndrome" as a disorder in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5). The DSM is the definitive text used to classify mental disorders and is used by mental health professionals in the United States and elsewhere. The press release in relation to the DSM is available on the American Psychiatric Association website, online: <<http://www.psychiatry.org/advocacy--newsroom>>.

⁶⁷ Justice Canada, "Parenting Arrangements", *supra* note 2 at 20.

⁶⁸ Department of Justice Canada, *Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper* by Nicholas M C Bala et al, 2001, online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2001_4/pdf/2001_4.pdf>; Nicholas Bala & John Schuman, "Allegations of Sexual Abuse When Parents Have Separated" (2000) 17 *Canadian Family Law Quarterly* 191; Nico Trocmé & Nicholas Bala, "False Allegations of Abuse and Neglect when Parents Separate" (2005) 29:12 *Child Abuse & Neglect* 1333.

⁶⁹ 65% of these allegations were made by either a custodial or non-custodial parent, as opposed to others (e.g. neighbors); it is not possible to distinguish which parent (custodial or non-custodial) made the allegation.

⁷⁰ Justice Canada, "Data Tables from the CIS2008", *supra* note 53. The statistics in the 2008 Child Incidence Study are based on the clinical judgements of the investigating child protection worker.

Similar large scale statistics do not exist with respect to rates of substantiation of claims of intimate partner violence in the family law context. There are, however, some cases in the family law system where judges conclude that one of the parties has exaggerated allegations of intimate partner violence.⁷¹ As in the case of allegations of child abuse, it is important to distinguish between unfounded allegations, where the court finds that there is insufficient evidence that family violence has occurred, and an intentionally false allegation.

As noted, above, no jurisdiction in Canada includes specific provisions with respect to false allegations in their custody and access (parenting) legislation.⁷² A false allegation in civil court could, however, result in a finding of contempt of court and the falsely accused parent could also use the civil justice system to seek damages.⁷³ Moreover, a number of *Criminal Code* offences may also be relevant, although as noted below, their use may be inappropriate.⁷⁴ To conclude on this point, while in a small number of cases intentionally false allegations are made, it is also important to keep in mind the large number of cases where allegations are substantiated, or where family violence exists but is not brought to the attention of one or more sectors of the justice system. Better coordination between the various sectors of the justice system may make it easier for family members who have suffered family violence to obtain the remedies they need. At the same time, this may assist in identifying cases where there is an attempt to use one or more sectors strategically.

⁷¹ See for example, Martha Shaffer and Nicholas Bala, “Wife Abuse, Child Custody and Access in Canada,” in Robert A. Geffner, Robyn Spurling Igelman, and Jennifer Zellner eds, *The Effects of Intimate Partner Violence on Children* (New York: Hawthorne Press, 2003) 253. Of 42 cases where spousal abuse was raised as an issue with the mother alleging abuse by the husband, the court found that in eleven cases the mother’s allegations against the husband were exaggerated or unfounded; in a much larger proportion, 30 cases, the mother’s allegations of abuse were accepted by the court.

⁷² Australia introduced a false allegation penalty provision in the family law legislation in 2006. However, the provision was found to be ineffective, rarely used and many argued it created a “chill effect” that prevented people from reporting genuine concerns about child abuse for fear that it would be held against them if it was a mistaken belief or if the evidence was unable to support the claim. It was subsequently repealed in 2011.

⁷³ In cases of malicious and false reporting of child abuse, provincial and territorial child protection acts allow a civil action (leave required in Saskatchewan and New Brunswick) against the reporter, and a number of acts create a specific offence.

⁷⁴ For instance, a person who knowingly makes a false statement to a police officer accusing another person of committing a crime (including child abuse) commits the offence of public mischief, contrary to section 140 of the *Criminal Code*. If a parent persuaded or misled their child or another person to make a false statement, this could amount to obstruction of justice (section 139), counselling an offence that is not committed (section 464), or conspiracy (section 465(1)(b)). If the intentionally false allegation resulted in a civil or criminal proceeding in which the person who made the allegation testified, other offences might be committed, including perjury (giving false evidence under oath, section 131), or making a false affidavit (section 138). In the recent case of *R v Randell Wagnies-Lyons*, (January 11, 2012), Fredericton (NB Prov Ct), the accused was found guilty of the crime of perjury, specifically with lying under oath with the intention to mislead. In this case, the accused made a false statement in an affidavit in the context of family law proceedings before the Queen’s Bench of the New Brunswick Family Division. The affidavit in question had indicated that the child’s doctor had stated that the child had a foot infection due to unhealthy conditions in the other parent’s home. It was determined that this evidence had intentionally been falsely provided to the court. In sentencing the accused, the court rejected a conditional sentence and imposed a period of incarceration of 3 months. Prosecutions against alleged victims, unless the circumstances are compelling, are rare due to a concern regarding the potential re-victimizing of a victim.

Chapter 2 Risk assessment

Individuals working with victims of family violence are often haunted by a fear that something horrible will happen to the survivors of the violence and/or their children. This chapter explores risk assessment tools employed to help identify and mitigate risk.



Case Study – Different systems may have information relevant to risk assessment

On July 31, 2007, a car driven by Peter Lee in Victoria, British Columbia, struck a telephone pole. His wife, Sunny Park was a passenger in the vehicle and was injured. The incident was investigated by the local police department, and while in hospital for her injuries Sunny Park alleged that Peter Lee had intentionally caused the accident.

When she was interviewed by the police, Sunny Park indicated that there had been a history of escalating family violence. She suggested that Peter Lee had intentionally caused the accident after she told him that she wanted a divorce. Peter Lee had previously indicated that he would kill her and himself if the relationship ended. She was fearful that he would harm, and possibly kill their son, Christian Lee, and her parents. Police provided Sunny Park with information about victim assistance and shelters; she indicated, however, that she wished to stay in her residence.

Peter Lee was held in police custody until August 2, 2007. Police recommended to Crown counsel that he be held in custody and not be released on bail due to fear for the safety of Sunny Park and her family; at the time of the car crash, Peter Lee was already on bail, having been charged with uttering threats and unlawful confinement against a non-family member. Charges of unlawfully causing bodily harm and dangerous driving causing bodily harm were approved; Peter Lee was released on bail with the consent of Crown Counsel with a recognizance of \$5,000, and conditions including:

- To report to the bail supervisor on a regular basis. He was to notify the bail supervisor of a residential address and not to change that address without written permission;
- No direct or indirect communication with Sunny Park;
- Not to attend his family's residence;
- Not to be in possession of knives; not to be in possession of firearms or other weapons as listed on the recognizance.

There were no conditions related to Christian Lee or to Sunny Park's parents.

On August 3rd, the police contacted the Ministry of Children and Family Development (MCFD), and they became involved with the case. MCFD suggested to Sunny Park on more than one occasion that she have Christian's name added to the criminal restraining order as a "no-contact" person. MCFD spoke to Sunny Park about a safety plan; she indicated, however, that she felt safe at home after changing the locks and alarm code. MCFD concluded that Christian was safe because his parents were not together and his mother was safe.

Until August 15th, Peter Lee was of “no-fixed address”; it was on this date that an address was provided to his bail supervisor. On August 15th, the bail condition of “no-contact” was amended to allow for contact through legal counsel.

Although Sunny Park advised police on a number of occasions that bail conditions had been breached, no action was taken. For example, she advised that Peter Lee had called her to speak to Christian.

The issue of access to the child came up on several occasions. For example, Crown counsel suggested to Sunny Park to seek the advice of a family law lawyer regarding custody and access of Christian. In addition, Peter Lee called MCFD about access to Christian and was told that he should seek legal counsel since custody and access matters were outside of their mandate. It appears that Peter Lee had also been trying to see Christian through another individual.

Sunny Park retained a family law lawyer, who advised her that although an application for a restraining order would be made, she would also need a safety plan and should not return to the family home, based on the lawyer’s assessment of the risks. Sunny Park’s family law lawyer believed that this was a very extreme case, and “told office staff of concerns that Peter Lee would not stop until he killed Sunny Park.”

On September 4, 2007, a 911 call was made from the home of Sunny Park. The police discovered the deceased bodies of Sunny Park, her parents, and the child. They had been killed by Peter Lee who then killed himself.

In relation to this case, the British Columbia Representative for Children and Youth noted that the criminal justice system, the child welfare system and the family justice system had different details about the case, but because they were working independently from one another, no one system was able to conduct a fully informed risk assessment or develop an appropriate safety plan.⁷⁵ For example, with respect to the family justice system, the Representative for Children and Youth noted that lawyers for victims of intimate partner violence have no clear path to participating in an overall safety plan.

2.1 Importance of risk assessment

The criminal justice system must strike an appropriate balance between protecting victims of family violence and ensuring that the rights of the accused are respected. This challenge is most at play at stages where the liberty of the accused/offender is at stake, such as bail, sentencing and parole.⁷⁶ The issue of family violence is most relevant in the family justice system in determining which custody and access outcomes will be in the best interests of the children involved, and in the child protection system determining whether the children have any need of child protection services. Where one parent poses a risk of violence to the other parent, the issue is whether giving the allegedly violent parent contact with the child poses a risk to the

⁷⁵ British Columbia, *Honouring Christian Lee – No Private Matter: Protecting Children Living with Domestic Violence*, (Victoria: Representative for Children and Youth, September 2009), online: <http://www.rcybc.ca/reports-and-publications/reports/cid-reviews-and-investigations/honouring-christian-lee-no-private> [BCRCY, “Honouring Christian Lee”].

⁷⁶ Department of Justice Canada, *Intimate Partner Violence Risk Assessment Tools: A Review* by Melissa Northcott (Ottawa: Justice Canada, 2012) at 5, online <http://www.justice.gc.ca/eng/rp-pr/ci-jp/fv-vf/rr12_8/rr12_8.pdf> [Justice Canada, “Risk Assessment Tools”].

target parent. Also of concern is whether the fact that the one parent has been violent toward the other increases the risk that the children are in danger in the care of the violent parent. As noted in the case of Sunny Park, children may also be in danger when they are not in the care of the abusive parent. Unfortunately, these fears are based on the grim reality that in far too many cases of family violence, the violence has continued after justice system involvement, sometimes with lethal consequences. Indeed, in 2011 there were 89 intimate partner homicides in Canada.⁷⁷ Almost half of spousal homicide victims had a reported history of domestic violence (44%).⁷⁸ In the same year, there were 31 homicides of children by a family member.⁷⁹

Over the years, individuals working with victims and perpetrators of intimate partner violence, and their children, have come up with various ways of attempting to predict which victims were at the greatest risk of continuing violence or death, how to best reduce the chances of these undesirable outcomes, and how to make best use of limited personnel and resources. The appropriate level or type of intervention in a given case cannot be determined until a threat assessment or risk assessment has been made.

Different officials in the justice system may conduct various forms of risk assessment. Some assessments may be informal, sometimes through the use of a checklist, while others may be structured and based on a formalized evaluation system. It is important to keep in mind that there is no system-wide method for evaluating risk and while some jurisdictions may use very formal risk assessment tools, others may use more informal methods.

2.2 Terminology: “screening,” “threat assessment” and “risk assessment”

While the terms “screening,” “threat assessment” and “risk assessment” are often used interchangeably, they have different meanings. The first stage of assessment that a case of family violence will usually go through is a “screening”. Professor Linda C Neilson defines this term from the perspective of its use in the family law system, as follows: “screening refers to processes used to detect and identify the presence, type, frequency, pattern, timing, and severity of domestic and family violence. The ultimate purpose of screening is to match appropriate services, processes, and interventions to the type and level of abuse and violence.”⁸⁰

⁷⁷ Statistics Canada, *Homicide in Canada, 2011*, Catalogue no. 85-002-X (Juristat: December 2012) at 11.

⁷⁸ *Ibid* at 14; the Homicide Survey captures information on whether there was a history or pattern of family violence involving the accused and victim. Over the past decade, more than half (65%) of all accused spouses had a history of family violence involving the victim. This was most often the case when the spousal victim was estranged from their partner, including those divorced or separated from a legal marriage or common-law relationship. Specifically, for over two thirds (72%) of those accused of killing their estranged partner, police reported previous family violence. This compares to 62% of those accused of killing their current spouse, including legally married or common-law partners.

⁷⁹ Statistics Canada, “*Family Violence in Canada: A statistical profile, 2011*”, *supra* note 38 at 73.

⁸⁰ Neilson, *supra* note 20 at 8.

Moreover, the *Politique québécoise d'intervention en matière de violence conjugale*⁸¹ [TRANSLATION: Quebec domestic violence intervention policy] and the *Orientations gouvernementales en matière d'agression sexuelles*⁸² [TRANSLATION: Government Guiding Principles on Sexual Abuse] indicate that screening consists of recognizing the indicators of these forms of violence and creating an atmosphere of trust that is likely to encourage victims to disclose their situation. Screening provides victims with the assistance they need and helps prevent the harmful effects of the assaults they have experienced from escalating.

Screenings are often done using prescribed forms that may not require highly specialized knowledge of family violence by the individuals using them, may be designed to collect other information unrelated to family violence, and may or may not be based on established risk indicators.⁸³ Many police services also use screening tools or checklists in responding to calls involving family violence, as these tools are less complex and easier to complete in the field than more formalized assessments. The information gathered through these checklists can then be used to determine if the situation appears to be high-risk, requiring more thorough and formalized risk assessment.

“Threat assessment” is a term most often used in the law enforcement community. It refers to the process of assessing the risk of violence that the suspect poses to the complainant and assessing the potential impact of contemplated types of intervention on the complainant’s safety.

The term “risk assessment” refers more specifically to a developing body of research and tools aimed at improving the ability of various professionals in the criminal and civil (forensic) justice systems to evaluate “individuals to (a) characterize the risk that they will commit acts of violence and (b) develop interventions to manage or reduce that risk”⁸⁴ The assessments generally require more training and resources to implement, and are often reserved for cases that are perceived to be of higher risk.

Assessment tools for one type of offence may not be applicable to another offence. Threat assessment should involve considering all available evidence, as well as all records of police action. It should take into account relevant research findings, such as the facts that the risk of physical harm to a victim fleeing domestic violence is highest during the first three months of separation, and that such violence often arises from long-term problems or a history of violence.⁸⁵

⁸¹ *Prévenir, dépister, contrer la violence conjugale*, Government of Quebec, 1995 at 40.

⁸² *Orientations gouvernementales en matière d'agression sexuelle*, Government of Quebec, 2000 at 57.

⁸³ For a list of specific screening tools for family violence, particularly in family law and child protection settings, see Neilson, *supra* note 20 at 9-10.

⁸⁴ P Randall Kropp, Stephen D Hart & David R Lyon, “Risk Assessment of Stalkers: Some Problems and Possible Solutions” (2002) 29:5 *Criminal Justice and Behavior* 590 at 599.

⁸⁵ For more information on risk assessment in relation to criminal harassment and stalking, including the relevance of typology to assessment and the process of constructing a menu of risk factors, see *Ibid.*

2.3 Purpose: what do risk assessments tell us?

Each case must be treated seriously until evidence indicates otherwise. It is crucial to keep in mind that threat and risk assessments are contextual⁸⁶ and only relevant for a specific period. Factors should be updated and re-evaluated as needed for subsequent decision making. Furthermore, although this process can help the parties make decisions, the absence of “identified risk markers” does not mean that violence will not occur.⁸⁷

Risk assessments are conducted within many sectors of the justice system, as well as outside the justice system. For example, they may be conducted by police, child protection officials, victim services workers, mediators, those conducting supervised access, parole and probation officers, and shelter workers. As a result, victims can be repeatedly called upon to respond to similar questions regarding their risk, which can be a source of frustration for them.

Once a risk assessment has been done, the information is used to manage any risk that has been uncovered. The four main activities of risk management are: monitoring, treatment, supervision, and victim safety planning.⁸⁸

2.3.1 Risk assessment of family violence or lethality

Several risk assessment and management tools are now being used across Canada. Justice Canada’s 2009 report, *Inventory of Spousal Risk Assessment Tools Used in Canada*,⁸⁹ lists these tools, as well as investigative protocols and checklists used across the country in situations of family violence.⁹⁰

Diligence should be exercised in choosing tools and protocols used to assess and manage the risk of family and related violence, since each tool has been developed to predict the likelihood of a certain outcome within a particular context. In fact, many of the tools used across Canada were developed specifically for use in cases of intimate partner violence. For example, the *Spousal Assault Risk Assessment Guide* (SARA) was designed to assess the risk of an individual being violent against a spouse. On the other hand, the *Danger Assessment* has two parts: the first is a tool to help raise the victim’s awareness of the degree of risk he or she faces; and the second “presents a weighted scoring system to count yes/no responses of risk factors

⁸⁶ *Ibid* at 600.

⁸⁷ Justice Canada, “*Spousal Abuse Policies*”, *supra* note 3 at 73.

⁸⁸ P Randall Kropp, “Intimate Partner Violence Risk Assessment and Management” (2008) 23:2 *Violence and Victims* 202 at 214 [Kropp, “Risk Assessment and Management”].

⁸⁹ Department of Justice Canada, *Inventory of Spousal Risk Assessment Tools Used in Canada* by Allison Millar (Ottawa: Department of Justice, 2009), online: <http://www.justice.gc.ca/eng/rp-pr/cj-ip/fv-vf/rr09_7/rr09_7.pdf> [Justice Canada, “*Inventory of Spousal*”].

⁹⁰ For more information on the predictive ability of commonly used risk assessment tools, see Public Safety Canada, *The validity of risk assessments for intimate partner violence: A meta-analysis* by R Karl Hanson, Leslie Helmus & Guy Bourgon (Ottawa: Public Safety, 2007), online: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntmt-prtnr-vlnce/index-eng.aspx>.

associated with intimate partner homicide.”⁹¹

Professor Neilson emphasizes the importance of considering the nature of the risk each tool was designed to predict:

[I]t is important to distinguish facts and characteristics associated with the *onset of domestic violence*, from facts that indicate the *likelihood domestic violence will continue*, from facts associated with the *potential for lethal outcome*. ... For example, research has revealed that depression and suicidal thoughts are associated with a potential for a lethal outcome but not necessarily with the likelihood of repetitive domestic violence; witnessing domestic violence as a child is associated with the likelihood a person will engage in at least one incident of domestic violence as an adult, but has not been identified as a good predictor of whether or not a particular person will continue to engage in domestic violence.⁹²

There is also great variation in the method each risk assessment tool uses to determine the level of risk. The most common types of risk assessments are based on: (1) Unstructured Clinical Decision Making; (2) Structured Clinical Judgment; and (3) Actuarial Approach. Other approaches of assessing risk of intimate partner violence include (4) Consulting the Victim; and (5) Using Risk Assessment Tools for General and Violent Offending.⁹³ With such variation in the approaches to risk assessment and the tools available,⁹⁴ professionals need to consider a number of factors when determining which tool to use in appropriate circumstances, including:

- The type of information available to the individuals doing the assessment (e.g. whether the information is provided by the victim or by the perpetrator).
- The specific professional qualifications required to use the tool.
- The population group targeted (e.g. the gender of the perpetrator and the victim, application to intimate or non-intimate relationship, cultural or ethnic groups and the type of outcome to assess or manage).

⁹¹ Danger Assessment, online: <<http://dangerassessment.org>>.

⁹² Neilson, *supra* note 20 at 48-9 [emphasis added] [footnotes omitted].

⁹³ For descriptions of these different methods, as well as factors to consider when choosing a risk assessment tool and a discussion of the strengths and limitations of various approaches to risk assessment, please see Justice Canada, “*Risk Assessment Tools*”, *supra* note 76 at 9-14.

⁹⁴ For a comprehensive overview of the various approaches to risk assessment and management in cases of intimate partner violence, see Kropp, “*Risk Assessment and Management*”, *supra* note 88.



Caution: meaning of a "low risk of domestic violence" assessment

What does it mean when a witness testifies that a violator has scored 'low risk' on a recognized domestic violence risk assessment tool ...? It means only that other people who have committed violent acts of domestic violence, who have similar attributes and who have faced similar circumstances, have tended not to engage in repetitive domestic violence. It also means that most people who engage in repetitive domestic violence have different attributes and circumstances. It is thus not an absolute finding. And, since risk is situational, it [sic] risk can change rapidly as circumstances change. A low score does not mean the same perpetrator will continue to have a low score if circumstances change. In addition, a low score does not rule out the possibility that a particular domestic violator has an unusual set of circumstances that are not measured by risk assessment tools. Risk and safety assessment should be periodic, not a one-time occurrence.

Moreover, in a family law context, since the risk assessment tools tend to focus on violent physical acts, as opposed to other forms of domestic violence, a low risk assessment may not offer much reassurance with respect to other forms of domestic violence, including forms of coercion associated with child abuse and poor parenting.

Excerpted from: Linda C Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection) A Family Law, Domestic Violence Perspective* (June 30 2012) at 56-7, online: <http://www.learningtoendabuse.ca/sites/default/files/Enhancing_Safety.pdf>.

2.3.2 Risk assessment by responding police officers

The family violence risk assessment tools currently used in the field by responding police officers are less formal screening tools or specialized checklists. A formal risk assessment is typically only undertaken when front-line police officers have identified a case as possibly being high-risk based on the preliminary risk assessment.

For example, all police services in Alberta use the Family Violence Investigation Report (FVIR). The FVIR is not a risk assessment tool but is a mandatory report which must be completed when responding to matters related to family violence. The FVIR assists police officers by providing the questions that need to be asked to ensure that there is a complete investigation and risk factors are identified.

For some high-risk files or when police officers require a more specific assessment, police services in Alberta will consult with the Integrated Threat and Risk Assessment Centre (I-TRAC), a joint forces multidisciplinary unit that provides law enforcement and other criminal justice agencies with threat assessment services and proactive approaches to reduce acts of targeted violence within their communities (a more detailed description of I-TRAC is provided in subsection 2.7.2).

Likewise, some high-risk cases in Ontario are referred to the Threat Assessment Unit of the Ontario Provincial Police's Behavioural Sciences and Analysis Section. Some Ontario municipal services have their own Threat Assessment Units, such as Peel Regional Police, York Regional Police and Durham Regional Police. The Threat Assessment Unit of the Ontario Provincial Police's Behavioural Sciences and Analysis Section has trained those officers and works collaboratively with them, for example through case conferences. In other jurisdictions where dedicated units do not exist, high-risk cases are normally assigned to senior officers who have been trained in more formalized risk assessment tools.

In Quebec, work to incorporate the tool *Prévenir l'homicide de la conjointe – Aide-mémoire* [TRANSLATION: Preventing domestic homicide of women – checklist] into the *Guide de pratiques policières*⁹⁵ [TRANSLATION: Guide to police practices] is ongoing. This tool enables police to more accurately describe the risks of homicide in cases of domestic violence.

2.3.3 Screening in family law settings

Various family law programs initially screen applicants for indicators of family violence. For example, as part of an initial needs determination process, a preliminary family violence screen is conducted with all clients who contact a family justice centre in British Columbia. Clients who are referred to a family justice counsellor for further information or dispute resolution services complete a comprehensive assessment which screens for family violence, child protection issues, mental health issues, drug and alcohol issues, and financial issues. This assessment is used to determine whether mediation is an appropriate dispute resolution process for a particular family, and to facilitate effective referrals that address the family's needs. The comprehensive assessment process is also being used by family justice counsellors preparing court-ordered custody and access reports. In this context, the assessment screens for family violence issues and flags other issues that may impact the parties' abilities to care for their children. In Manitoba, mediators and custody and access assessors who work in the Family Conciliation office within government do conduct screenings for family violence as do the lawyer and social worker teams who deliver comprehensive co-mediation. The tool most used by these service providers is the Tolman Screening Model.

Mediators who are accredited by mediation governing bodies, as well as those who mediate in court-annexed or publicly funded programs, are required to screen for family violence.⁹⁶ There are several screening tools available.

Some have also suggested that family law lawyers should be screening their clients for family violence. From the perspective of the family law lawyer and his or her client, screening is important for several reasons:

⁹⁵ This guide is made available to all police organizations in Quebec.

⁹⁶ Hilary Linton, *When Knowing is Half the Battle* JUST. Magazine – Ontario Bar Association (October 2012), online: <http://www.justmag.ca/oct2012/feaHLintoni_Oct2012.html>.

- To assist the client with developing a safety plan;
- To refer the client to appropriate resources and forms of dispute resolution;
- To assist in determining what (if any) relief should be requested from the court in respect of the family violence (e.g. restraining orders, custody and access (parenting) orders).

For the most part, family law lawyers in Canada are not required to screen their clients for family violence. In fact, it appears that most family law lawyers do not use a screening tool to assess whether their clients have been victims of family violence. There is, however, a promising practice in British Columbia, where the *Family Law Act*,⁹⁷ implemented in March 2013, requires all family dispute resolution professionals, including lawyers, mediators, parenting coordinators and arbitrators to screen for family violence to assess whether dispute resolution processes are appropriate and safe for the family.

The related regulations provide that, as part of the minimum training and practice standards they must meet, family mediators, parenting coordinators and family arbitrators must complete at least 14 hours of family violence training to learn to identify, screen for, and deal appropriately with family violence. The Law Society of British Columbia practice standards have a similar requirement for lawyers acting as family mediators, parenting coordinators and family arbitrators and the Law Society strongly recommends that all family lawyers take the family violence training.

This training must include training on identifying, assessing and managing family violence and power dynamics to ensure that the processes used are appropriate for the family's circumstances. Professionals will learn how to screen for family violence so that they can determine whether or not dispute resolution processes can be used or adapted to account for safety concerns or power imbalances.

This is an area that is evolving rapidly. Many regulating bodies are providing a flexible approach to screening that can evolve with the field and be adapted to the needs of the various professions, while ensuring the professionals have the training needed to appropriately address the issue of family violence. For instance, the Law Society of Upper Canada provides voluntary free training on risk assessment in the context of family violence.

Quebec also has a guide to family mediation standards⁹⁸ and a guide on supervised access services.⁹⁹ These guides include sections that raise stakeholder awareness about individuals living with domestic violence in order to adapt the intervention accordingly and to conduct ongoing risk assessments.

⁹⁷ SBC 2011, c 25.

⁹⁸ Comité des organismes accréditeurs en médiation familiale, *Guide de normes de pratiques en médiation familiale*, 2012, online: <<https://www.barreau.qc.ca/pdf/mediation/familiale/guide-pratique-meditation-familiale.pdf>>.

⁹⁹ Ministère de la Famille et des Aînés, Gouvernement of Quebec, 2008, online: <http://www.mfa.gouv.qc.ca/fr/publication/Documents/guide-acces_vfinale_04-10.pdf>.

In addition, there are good examples of checklists that have been developed to assist family law lawyers in screening for family violence. For example:

- The *Saskatchewan Practice Checklists* developed by the Law Society of Saskatchewan includes a *Family Law Checklist*¹⁰⁰ that provides lawyers with advice on the type of information that should be requested during interviews with clients. The issue of the physical safety and abuse of the client and children is included in the checklist. The checklist is considered to be a starting point only and family law practitioners are required to do further legal analysis based on the facts of the particular case.
- The *Best Practices for Representing Clients in Family Violence Cases* developed by Justice Canada.¹⁰¹
- *Is Your Client Safe? A Lawyer's Guide to Family Violence* by the Legal Services Society of British Columbia in collaboration with the Ending Violence Association of British Columbia.¹⁰²

Another promising practice with respect to screening relates to family arbitration in Ontario, which is regulated under the *Arbitration Act, 1991*.¹⁰³ Where a separating couple chooses to submit their legal issues to an arbitrator, each of the parties must be screened for family violence. The screener will assess whether there is anything standing in the way of a party's full participation in family arbitration or whether any safeguard should be imposed (such as that the parties should not be alone together) before the arbitration begins. This report is provided to the arbitrator, who uses it to determine the appropriate process. While no specific screening tool is required, it has been suggested that the tools used in the context of family mediation could also be adapted to this context.

Finally, Australia has recently introduced its *Detection of Overall Risk Screen (DOORS)* framework for use across the family law system to detect risk to the well-being and safety of families. It was originally designed for former intimate partners who have or wish to have an ongoing parenting role after separation; a separate version now exists for clients who are not parents. The DOORS framework defines risk as "physical or psychological harm to self and other family members, and in the case of children, developmental harm." The DOORS framework was designed for use by all professionals working within the Australian family justice system, such as lawyers, court staff and family dispute resolution practitioners. DOOR 1 is a risk assessment questionnaire to be completed by clients; this is followed by DOOR 2, which is a questionnaire

¹⁰⁰ Law Society of Saskatchewan, *Practice Checklist: Support, Custody and Access* (Regina: 2012).

¹⁰¹ Department of Justice Canada, *Best Practices for Representing Clients in Family Violence Cases* by Cynthia Chewter (Ottawa: Department of Justice, 2012), online: <<http://www.justice.gc.ca/eng/fl-df/spousal-epoux/topic-theme/viol3.html>>.

¹⁰² Legal Services Society of British Columbia and Ending Violence Association of British Columbia, *Is Your Client Safe? A Lawyer's Guide to Family Violence* (British Columbia: Legal Services Society of BC, February 2012), online: <<http://resources.lss.bc.ca/pdfs/pubs/Is-Your-Client-Safe-eng.pdf>>.

¹⁰³ SO 1991, c 17.

completed by practitioners who follow up on areas of risk identified in the DOOR 1 questionnaire. DOOR 3 involves identifying resources to respond to the identified risk.¹⁰⁴

2.3.4 Risk assessment for children whose parents are experiencing intimate partner violence

The intimate partner violence risk assessment tools currently used in the criminal justice system in Canada generally measure the risk of continued violence or lethality to the female partner of a male abuser. As such, these tools should not be used to determine whether or not the children of the intimate partners being assessed are at risk themselves. There does not appear to be a family violence risk assessment tool that focuses solely on the risk to children within the context of criminal or family law at this time. Although intimate partner violence risk assessment tools do include indicators that are relevant to the safety of children, these indicators are not necessarily those that have been validated as indicators of whether or not the perpetrating parent presents a risk to the child. Therefore, when children are involved, intimate partner violence risk assessment tools are not appropriate on their own for determining whether the accused should have contact or communication with their children during criminal proceedings, nor should they be used “in a family law context to assess the safety of children, or to justify denial, reduction or delayed access to assistance or as a replacement for detailed consideration of factual evidence.”¹⁰⁵ Furthermore, the question of whether or not the child is at risk of physical violence, while an important consideration in determining if continued child-parent contact is in the best interests of the child, is not the sole consideration in the family law context.¹⁰⁶ Other psychological factors such as continuing trauma to the child and level of conflict between the parents are also relevant.

Although there does not appear to be any formal risk assessment tools used in the family justice system that measures risk to children, many provinces have custody and access assessors, such as in Saskatchewan, who use their clinical judgment in determining the needs of the child and the best parenting plan (including whether to have time with both parents). It is important to note Professor Neilson’s caution that children from homes where there is family violence require assessments from experts who are not only expert in the traditional areas of expertise, like child development, required by custody and access evaluators, but also in the dynamics and impacts of family violence. She notes that “professionals who evaluate child best interests in a child protection context or in a family law context may have appreciable expertise in connection with child development but may have limited understanding of how domestic violence affects adult parenting [of] children.”¹⁰⁷

¹⁰⁴ Jennifer E McIntosh and Claire Ralf (2012). The DOORS Detection of Overall Risk Screen Framework. Australian Government Attorney-General’s Department, Canberra.

¹⁰⁵ Neilson, *supra* note 20 at 57.

¹⁰⁶ *Ibid* at 26.

¹⁰⁷ *Ibid* at 58-59.

The child protection authorities in five Canadian provinces¹⁰⁸ currently use a Structured Decision Making (SDM) Tool developed by the Wisconsin Children's Research Centre in the United States. The SDM is an electronic case information and assessment tool, which assesses the risk of maltreatment to the child by his or her caregivers. If the parents are accused of or charged with violent criminal offences, they are assessed independently of one another. There are minor variations in the SDM used in each province since the tools are tailored to provincial legislation. Each index considers prior child abuse or neglect investigations. The abuse index also considers family violence in the household over the past year.

2.3.5 Risk assessment tools with diverse client populations

Challenges and cautions have been identified surrounding the use of risk assessment tools that have been designed and validated using populations that are primarily white and male with clients from diverse communities, including Aboriginal clients. These tools can have inherent biases that result in differential impacts on Aboriginal people, women, and members of other marginalized groups.

Specific examples of where bias can enter into risk assessment tools include: the assumption of universal applicability without accounting for age, race/ethnicity, class and gender; the selection of need/risk factors; and the focus on the individual to the exclusion of social, historical and situational context. In application, the attitude and skills of the assessor have an impact on the assessment, which also leaves the process open to bias.¹⁰⁹

For example, it has been argued that factors such as educational attainment, employment record, and substance abuse that are included in some tools are evidence of a middle-class perspective. In the case of Aboriginal peoples, responses to these factors record what is happening in communities (low educational attainment, high unemployment) rather than the characteristics or proclivities of individuals. Research has demonstrated that Aboriginal inmates in Canadian correctional facilities are disproportionately classified as high risk, based on actuarial assessments that do not take into account the unique needs and circumstances of Aboriginal offenders.¹¹⁰

Similar issues are at play with risk assessment and safety planning tools conducted from the victim's perspective. Approaches developed for the "mainstream" do not adequately address the circumstances of all clients. In Ontario, the unique circumstances of remote First Nation

¹⁰⁸ Structured Decision Making Tools are currently being used in British Columbia, Saskatchewan, Manitoba, Ontario, and New Brunswick.

¹⁰⁹ Public Safety and Emergency Preparedness Canada, *Risk Assessment of Male Aboriginal Offenders: A 2006 Perspective* by Tanya Ruggie (Ottawa: Public Safety and Emergency Preparedness Canada, 2006), online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-sssmnt-ml/index-eng.aspx>>.

¹¹⁰ Canadian Centre for Justice Statistics. 1999. *A One-day Snapshot of Inmates in Canada's Adult Correctional Facilities*, Statistics Canada Catalogue No 85-601-XPE; Office of the Correctional Investigator, *Annual Report 2005-2006*, (Ottawa: Correctional Investigator, 2006); Correctional Services Canada, *Northern Aboriginal Offenders in Federal Custody: A Profile* by Joseph C Johnston (Ottawa: Correctional Service Canada, 1994).

communities require distinct approaches to safety planning, the tools for which are currently lacking. For example, if there are no police on duty at night, a safety planning tool that assumes a police response will not work.

2.4 Risk management: how is the information used?

In keeping with the predominant goal of risk assessment, namely to prevent further violence or lethality, once a risk assessment has been done, the information is used to manage any risk that has been uncovered. The four main activities of risk management are: monitoring, treatment, supervision, and victim safety planning.¹¹¹

“Monitoring” refers to a form of continual, non-intrusive surveillance of how the perpetrator is doing in terms of the variable risk factors and is done in the way of continual assessment or reassessment of risk. This can include meetings with the perpetrator, and/or the victim and other key people who come into contact with the perpetrator (e.g. “therapists, correctional officers, family members, coworkers”).¹¹²

“Treatment” involves a plan to rehabilitate the perpetrator’s variable risk factors that may be remedied through: “individual or group psychotherapy, psycho-educational programs designed to change attitudes toward violence; training programs designed to improve interpersonal, anger management, and vocational skills; psychoactive medications, such as antipsychotics or mood stabilizers; and chemical dependency programs. Another important form of treatment is the reduction of acute life stresses, such as physical illness, interpersonal conflict, unemployment, legal problems, and so forth.”¹¹³

“Supervision” consists of the restrictions on an individual’s liberty in order to make it more difficult for the perpetrator to engage in further violence. The most extreme form of this is incarceration, or civil commitment in a mental health facility. Other forms of supervision generally involve “allowing the individual to reside in the community with restrictions on activity, movement, association, and communication”¹¹⁴ through use of peace bonds, bail conditions, probation conditions or civil restraining orders. Screening tools, threat assessments and risk assessments are often used by police and prosecutors in determining whether or not to release an accused pending trial, and if so, what conditions would be most appropriate. Similarly, the same tools are also used in making recommendations in pre-sentencing reports for probation and conditional sentences, including treatment conditions. Risk assessments are used by correctional officials to “develop treatment plans and to determine suitability for various conditions.”¹¹⁵ And lastly, risk assessments are used when offenders are released from custody in “setting conditions for release and developing treatment plans.”¹¹⁶

¹¹¹ Kropp, “Risk Assessment and Management”, *supra* note 88 at 214.

¹¹² *Ibid* at 212.

¹¹³ *Ibid* at 214-5.

¹¹⁴ *Ibid* at 215.

¹¹⁵ Justice Canada, “Risk Assessment Tools”, *supra* note 76 at 9.

¹¹⁶ *Ibid*.

“Victim safety” is the ultimate goal of risk assessment and management. Therefore, victim safety planning is a key component of risk management.

Victim safety planning involves improving the victim’s dynamic and static security resources, a process sometimes referred to as “target hardening.” The goal is to ensure that, if violence recurs—despite all monitoring, treatment, and supervision efforts—any negative impact on the victims’ psychological and physical well-being is minimized.¹¹⁷

Victim safety planning is often done by victim service providers, either through police services or non-governmental services, including shelters. It is also done by police, probation and parole officers, family services, child protection services, and family justice officials, including family lawyers. Safety planning generally consists of providing the victim with information to increase their awareness of the risk they may be facing and steps they can take to minimize that risk.¹¹⁸ This can also include planning for the safety of the children of the victim and perpetrator, including recommendations to assess risk to the children, and prohibiting or supervising contact between the children and the perpetrator until an assessment has been made regarding the children’s safety with the perpetrator.

2.5 Communicating risk

A critical issue relates to whether risk assessments should be and can be shared between the criminal and civil justice systems. Dr. Randy Kropp notes that:

Effective risk communication can and should prevent violence. Domestic violence fatality reviews tell us that in many cases of spousal homicide, many risk indicators were present and known but not necessarily documented or communicated to those who needed to know such as the victims, offender treatment providers, police, correctional agencies, and so forth.¹¹⁹

The effectiveness of a risk assessment is dependent on the degree to which its conclusions and recommendations are communicated to the various individuals who will be interacting with and managing the cases of the perpetrator, victim and their children. It is also critical that the information used to perform the risk assessment is as accurate and complete as possible.

Dr. Randy Kropp offers the following guidelines in effectively communicating risk:¹²⁰

1. Risk opinions must be supported clearly, concisely and with appropriate supporting evidence.

¹¹⁷ Kropp, “Risk Assessment and Management”, *supra* note 88 at 215.

¹¹⁸ Justice Canada, “*Risk Assessment Tools*”, *supra* note 76 at 9.

¹¹⁹ Kropp, “Risk Assessment and Management”, *supra* note 88 at 213

¹²⁰ P Randall Kropp, “Some Questions Regarding Spousal Assault Risk Assessment” (2004) 10:6 *Violence Against Women* 676 at 688-689.

2. Risk opinions should be communicated to the evaluatee's potential victims in order to properly inform them about the nature and severity of risk they may be facing, as well as to assist them in tailoring their safety planning.
3. Risk opinions should be clear as to what they are and are not assessing, as well as stating any limitations of the assessment. For example, the opinion should state whether any particular information was missing, such as victim input.
4. Risk assessments should be as specific as possible, for example where feasible, the opinion should "discuss the nature, frequency, severity, likelihood and imminence" of the predicted violence.

Risk opinions should state the qualifications of the assessor to conduct such an assessment, as they may assist those using the opinion in determining what kind of weight to give the opinion.

It cannot be emphasized enough that the safety of the targets of the violence and their children depends on the quality of the information used to inform the risk assessment tool, and the effectiveness with which resulting risk opinions are shared. The accuracy and validity of the opinion and the effectiveness of the risk management strategies can only benefit from sharing of information regarding risk indicators and coordination of individuals involved in managing the risk – including across various systems that a family experiencing violence may encounter, such as, criminal justice (including corrections), family justice, child protection, health care, social services, and child, youth and adult mental health.

2.6 What are the challenges/barriers to sharing risk assessments?

There are a number of challenges associated with effectively sharing information about risk across agencies and across disciplines. These often involve issues surrounding victim privacy, professional rules of conduct, confidentiality, as well as the fact that different assessment and screening tools are often used by different professionals due to the varied purposes for which the tools are needed.

When risk assessments are shared among justice system officials, the likelihood that the assessment will need to be disclosed to the perpetrator increases. In the criminal context, the accused can obtain disclosure of material in the possession of the prosecution and has some rights to access material in the possession of third parties. In the child protection system, similar *Charter* based disclosure requirements will apply (see subsection 6.1.2 for a more detailed analysis of this issue). The victim may be hesitant to provide full and accurate information as she or he may feel that when this information is disclosed to the perpetrator, it may provide them with additional information they were unaware of that could compromise the victim's safety (e.g. the perpetrator may use retaliatory violence after learning the victim shared certain information).¹²¹ Victims may also be hesitant to participate in the risk

¹²¹ Kropp, "Risk Assessment and Management", *supra* note 88 at 212.

assessment process for the multitude of other reasons they are often reluctant to participate in the criminal justice system, such as fear that child protection may remove the children, or not wanting the perpetrator to lose his or her job.¹²² This highlights the need for the individuals interviewing victims to be sensitive to the needs of victims and to build a relationship of respect and trust with them.

Professional confidentiality as well as privacy issues are often identified as challenges. For example, in British Columbia, pursuant to provisions in the *Family Law Act*,¹²³ risk assessment information collected by family justice counsellors is confidential, except for information regarding child protection concerns or a risk of serious harm. These provisions protect the confidential nature of the mediation process, while permitting the family justice counsellor to report any risk to children or serious risks to others. Also in British Columbia, the province's judiciary records access policy restricts access to medical reports, victim impact statements, and pre-sentence reports to Crown counsel, accused, defence counsel, the victim and to Corrections officials who require access for preparation of pre-sentence reports or parole hearings, unless otherwise ordered by the court. Notwithstanding these challenges, British Columbia revised its *Freedom of Information and Protection of Privacy Act*¹²⁴ in 2011 to give public bodies the ability to authorize the collection, use and disclosure of information for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur.

In Quebec, the *Act to amend various legislative provisions as regards the disclosure of confidential information to protect individuals*¹²⁵ adds, particularly to legislation regarding professional associations and privacy, provisions that make it possible to communicate confidential information without the consent of the person concerned, in order to prevent an act of violence. For more information on privacy legislation see Chapter 7.

Another challenge that has been identified in some jurisdictions is the lack of a formalised process or mechanism to share information. For example, in some cases the sharing of information currently occurs on a case-by-case basis, and protocols may need to be developed to clarify issues such as the nature of the information sharing (i.e. what information is to be shared), who the information can be provided to and for what purposes.

¹²² *Ibid* at 212; British Columbia, *Honouring Kaitlynn, Max and Cordon: Make Their Voices Heard Now* (Victoria: Representative for Children and Youth, March 2012), online: <http://www.rcybc.ca/reports-and-publications/reports/cid-reviews-and-investigations/honouring-kaitlynn-max-and-cordon>[BCRCY, "Honouring Kaitlynn, Max and Cordon"]; BCRCY, "Honouring Christian Lee", *supra* note 75.

¹²³ SBC 2011, c 25.

¹²⁴ RSBC 1996, c 165.

¹²⁵ SQ 2001, c 78.

2.7 Promising practices

2.7.1 High-risk case coordination protocol framework & protocol committees

After a domestic violence related murder-suicide in Nova Scotia in early 2000, the government of Nova Scotia undertook a review of its *Framework for Action against Family Violence*, which is a set of integrated policies and procedures for responding to family violence that had been in place since the mid-nineties. The review¹²⁶ made several recommendations for improved response to family violence including improved communications between justice and community partners and service providers in cases that were high-risk with the goal of improving case coordination and effective planning to reduce the dangers.

Based on the recommendations and working with community and justice stakeholders, the *High Risk Coordination Protocol Framework* was developed and signed in 2004. Six “primary service providers” were identified for the purpose of critical information sharing – police and police-based domestic violence case coordinators, victim services, corrections, child protection, Transition House Association of Nova Scotia member agencies (shelters for assaulted women and their children) and men’s intervention programs.

Risk assessment used in the identification of cases best suited for coordination has changed over the years as research and availability of tools has grown. Nova Scotia adopted the *Ontario Domestic Assault Risk Assessment* (ODARA) tool for all of its police agencies in 2008. Those cases that score in the highest range for risk of another violent offence are designated as high-risk for the purposes of proactive referral and case coordination. The *Jacqueline Campbell Danger Assessment* continues to be used by direct-service agencies such as transition houses, men’s intervention programs and victim services. Cases that register as highest risk using the *Danger Assessment* may also be designated for case coordination. In cases where no risk assessment tool is available or suitable, police may designate a case as high-risk if they can articulate their reasons for doing so.

Critical information is defined in the *High Risk Case Coordination Protocol Framework* and is based on risk factors associated with domestic violence (such as separation or renewed contact between victim/perpetrator) or information required for improved safety planning (release conditions, etc).

Because local information sharing and case coordination were seen as critical to the success of the Protocol, a Protocol Committee was formed of the primary service providers in each of the 18 counties in Nova Scotia. Each Protocol Committee was tasked with the development of a set of local procedures that would help them share critical information. Since their initial work, some Protocol Committees have merged with each other as it makes most sense in their areas.

¹²⁶ Nova Scotia Department of Justice, *Framework for Action Against Family Violence – 2001 Review* by Dawn Russell and Diana Ginn (Halifax: Department of Justice, May 31, 2001), online: <<http://www.gov.ns.ca/just/publications/docs/russell/toc.htm>>.

These Protocol Committees have become places to foster expertise on the issue of domestic violence within their regions. They are a critical connection to direct service providers and are valuable for the development and dissemination of new policies, programs and research on the issue of domestic violence.

Other provinces have established similar protocol frameworks. For example, in the 2010 revisions to British Columbia's *Violence Against Women in Relationships (VAWIR) Policy*,¹²⁷ a *Protocol for Highest Risk Cases*¹²⁸ was established with a stated intent of enhancing the justice and child welfare system response to highest risk domestic violence cases through heightened information sharing, comprehensive and collaborative safety planning and risk mitigation strategies.

It should be noted, however, that most often, committees with a mandate to coordinate and manage individual high-risk cases, do not have a representative from the family justice system. Given that there is no state party involved in family law matters, the question of who should participate on such a committee is a difficult one. In light of the comments by British Columbia's Representative for Children and Youth on the need for more coordination with the family justice system in terms of safety planning, this issue is an ongoing challenge.

Where coordinating committees are dealing with systemic issues as opposed to individual cases, attempts are being made to integrate the family justice system. For instance, in Alberta, the Family Violence Police Advisory Committee has recognized the need for input from the family justice system and will be extending the invitation for representation at this table. This is discussed further in Annex 4, Volume II.

2.7.2 Integrated threat and risk assessment centres

For high-risk files or when members require a more specific assessment in Alberta, they will often consult with the Integrated Threat and Risk Assessment Centre (I-TRAC). I-TRAC is a joint forces multidisciplinary unit that provides law enforcement and other criminal justice agencies with threat assessment services and proactive approaches to reduce acts of targeted violence within their communities. I-TRAC services include: assessing the level of risk an individual may pose to commit an act of targeted violence, providing case management strategies, training, safety planning, and expert testimony, and facilitating access to external agencies including mental health, specialized law enforcement, and other criminal justice units.

I-TRAC is one of many integrated units found under the Alberta Law Enforcement Response Teams (ALERT), and was established by the Alberta Government in 2007 to address threats posed in violent, high-risk relationships and stalking situations – including homicide and suicide. Domestic violence, criminal harassment and stalking remain I-TRAC's primary focus; however, I-

¹²⁷ Ministry of Public Safety and Solicitor General, Ministry of Attorney General & Ministry of Children and Family Development, *Violence Against Women in Relationships Policy* (Victoria: Government of British Columbia, December 2010), online: <<http://www.pssg.gov.bc.ca/victimservices/publications/docs/vawir.pdf>> [VAWIR].

¹²⁸ *Ibid* at 59.

TRAC has expanded its mandate by responding to various threats and acts of targeted violence, including workplace violence, school violence, and sexual violence.

All I-TRAC threat assessors are currently or recently retired police officers with extensive criminal investigative and support experience where duties were specifically dedicated to the investigation of violent and other benchmark crimes. Before becoming threat assessors, candidates go through an understudy period of 18 months. Understudy candidates are assigned a mentor who oversees their progress throughout this period. During this time, candidates attend various training sessions, complete mandatory home studies and reading as well as complete tests and live files. At the end of the understudy period, the candidate is required to successfully complete an oral and written examination in front of a panel as well as accurately complete a test case which demonstrates their knowledge and understanding of the concepts and theories utilized within I-TRAC.

I-TRAC reports may be distributed to the following areas and cannot be disseminated further, without the express written consent of I-TRAC: police, Crown prosecutors, Human Services, Probation (Alberta Justice and Solicitor General), Parole (Correctional Service of Canada), and court-ordered mental health professionals.

I-TRAC reports are used for criminal court proceedings in respect of judicial interim release (show cause/bail) hearings¹²⁹ and sentencing.¹³⁰ In civil and family court applications, I-TRAC reports are used in respect of child protection guardianship hearings under the *Child, Youth and Family Enhancement Act*,¹³¹ emergency protection order applications and reviews under the *Protection Against Family Violence Act*¹³² and child custody and access hearings under the *Family Law Act*¹³³.

All civil or family court applications require the personal attendance of the I-TRAC threat assessor in court by way of subpoena. Counsel for Children and Youth Services may be exempt from this requirement. Overall, I-TRAC threat assessment reports have been very well received by the courts. Sometimes the threat assessor testifies and other times, the report is read or provided to the court for bail and child protection matters.

2.7.3 Domestic violence death review committees

The death review process was developed in response to recommendations made at public inquests on cases of homicides, where a victim had been killed by an intimate (or former intimate) partner. The Ontario domestic homicide review process builds on the efforts of several jurisdictions in the United States who have developed domestic homicide review

¹²⁹ Pursuant to *Criminal Code*, RSC 1985 c C-46, s 518(1) (c), (d.2) and (e) and in compliance with *R v E M B*, 2000 ABQB 46, [2000] AJ No 91.

¹³⁰ Pursuant to *Criminal Code*, *Ibid*, s 726.1, subject to s 725 limitations on “other offences”.

¹³¹ RSA 2000, c C-12.

¹³² RSA 2000, c P-27.

¹³³ SA 2003, c F-4.5.

committees that seek to address the issue of community and agency coordination, collaboration and communication.¹³⁴

The Ontario Domestic Violence Death Review Committee (DVDRC) was established in 2003 by the Office of the Chief Coroner of Ontario in response to recommendations from two major inquests into the domestic homicides of Arlene May and Gillian Hadley. One of the purposes of the domestic violence death review committee is to identify risk factors to help predict potential lethality and to create recommendations aimed at preventing deaths in similar circumstances. These annual reviews have highlighted the need for more consistent approaches to domestic violence risk assessment and management skills in the justice and community support systems.¹³⁵

Domestic violence death review committees have also been established or are in the process of development in Alberta, British Columbia,¹³⁶ Manitoba, and New Brunswick.¹³⁷

A central theme emerges in domestic violence death review committees' findings: effective risk communication can prevent violence. As is too often observed, the failure to properly share information among the criminal justice system, the child protection system and the family justice system hampers the ability to conduct a fully informed risk assessment. When legal system service providers work collaboratively, risk can be identified more effectively, which can ensure the development of a risk-appropriate safety plan, thus preventing lethal consequences.

¹³⁴ United States Department of Justice, *The National Domestic Violence Fatality Review Initiative*, online: <<http://www.ndvfri.org/>>.

¹³⁵ Ontario Ministry of Community Safety and Correctional Services, *Ontario Domestic Violence Death Review Committee*, online: <http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/PublicationsandReports/DVDR/DVDR.html>.

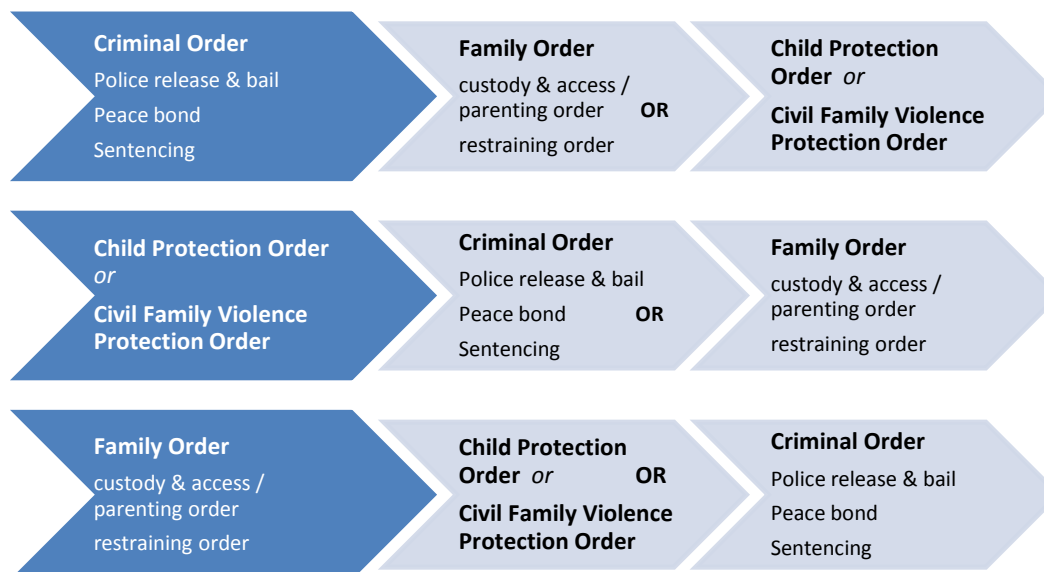
¹³⁶ British Columbia Ministry of Public Safety and Solicitor General, *Report to the Chief Coroner of British Columbia: Findings and Recommendations of the Domestic Violence Death Review Panel* (Victoria: May 2010), online: <<http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2010/465531/death-review-panel-members-domestic-violence.pdf>>.

¹³⁷ New Brunswick Government, Office of the Chief Coroner, *Domestic Homicide in New Brunswick 1999-2008* (Fredericton: October 2012), online: <<http://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/Publications/1999-2008DomesticHomocideInNB.pdf>>.

Chapter 3 Impact of pre-existing orders and proceedings

This chapter examines the challenges facing justice system professionals, and ultimately litigants, when there is a lack of knowledge about related proceedings or orders from another sector of the justice system. This chapter approaches this large topic from the perspective of how a pre-existing order from one sector of the justice system, either criminal or civil, has an impact on matters relating to the same family members in another sector of the justice system. When decision makers are unaware of these related proceedings or pre-existing orders, the subsequent orders may be at odds or conflict with the pre-existing orders. For instance, criminal orders made within the context of the judicial interim release (or bail) of a parent accused of family violence may have a significant effect on both the accused parent and the rest of his or her family in a parallel family law matter. Moreover, a lack of information sharing between various sectors within the justice system can cause frustration and confusion for families experiencing violence and can place individuals at risk.

The chart below provides an illustration of some possible scenarios whereby an order from one sector precedes consideration of matters related to the same family in one or more other sectors of the justice system:



Ideally, these pre-existing orders should be considered by decision makers in subsequent proceedings. However, this is not always the case because the court may not be aware of these pre-existing orders. While the parties should know if a relevant order exists, there may be issues regarding capacity to understand the order or the ability of some individuals to convey the information to court, particularly if they presume the other court is already aware of the

prior order. In some cases courts may not be informed of outstanding orders or information because the parties elect not to advise the court.

While this chapter does not explore all of the potential scenarios where a pre-existing order impacts or is not shared with the decision makers in a subsequent matter involving the same family, it does explore some of the more contentious points of intersection between the different sectors of the justice system and presents some promising responses to address these challenges.

3.1 Pre-existing criminal orders

Following the commission of an offence in the context of family violence, a series of potential scenarios arise related to the arrest, release to the community, remand into custody of the alleged offender, and sentencing of the offender. These various criminal orders may impact family litigation related to child custody/parenting. Alternatively, where the family court is not apprised of the pre-existing criminal order, the resulting family order may not appropriately assess the risk of contact as shown by the subsequent criminal proceedings. Similar concerns arise where the criminal court may not be aware of the family order and so cannot draft the criminal order to specifically address how the orders can work together or make it clear that the criminal order is overriding the family or child protection order (discussed below in section 3.2).

3.1.1 Intimate partner/spousal abuse charging policies

In response to concerns that intimate partner violence/spousal assaults were being treated as “private” matters and not processed with the same rigor as stranger assaults by some police and prosecutors, specific spousal abuse policies were introduced in all jurisdictions in Canada by the mid 1980’s. The intent of the policies¹³⁸ is to ensure that the same criminal standard is applied to spousal offences as would be applied to any other criminal occurrence against the person.¹³⁹ They were not intended to fetter police discretion but to ensure that the applicable *Criminal Code* tests for charging be applied. Pro-prosecution policies for spousal abuse generally require that spousal abuse cases should be prosecuted where, based upon all of the evidence, there is a reasonable prospect of conviction and it is in the public interest to prosecute.¹⁴⁰ The intent behind the policies was generally to ensure that spousal assaults were not treated any less seriously than stranger assault, to shield victims from pressure from their

¹³⁸ These are often referred to as “pro-charge policies” or “mandatory charge policies”. Alberta refers to “total enforcement” as opposed to “pro-charge” because the policy promotes total enforcement due to a history of inappropriate use of discretion in intimate partner violence cases.

¹³⁹ Justice Canada, “*Spousal Abuse Policies*”, *supra* note 3 at 11: Pre-charge approval or screening by the Crown prosecutor is required in British Columbia, New Brunswick and Quebec. In some jurisdictions, these policies provide police and Crown prosecutors with somewhat less discretion in cases of domestic violence than in other cases.

¹⁴⁰ *Ibid* at 13: In the case of Quebec, the criteria for laying a charge or an indictment involve consideration of the sufficiency of evidence and the feasibility of prosecution.

intimate partners to “drop” the charges and to protect victims from retaliatory violence for having personally laid charges. The overall goal of the policies was to encourage reporting of spousal offences, to send a strong message that spousal assault is a crime, to offer protection and assistance to victims and ultimately to reduce the incidence of spousal violence. While an assessment of the spousal abuse charging policies is beyond the scope of the current report, the application of some of these policies has come under criticism in a number of contexts.¹⁴¹

3.1.2 Police release and judicial interim release (bail)

The compelling appearance and judicial interim release (“bail”) provisions of the *Criminal Code* provide peace officers and judges with a wide range of powers to release or detain an accused person. Generally speaking, however, an accused has the right not to be denied reasonable bail without just cause,¹⁴² and peace officers or Crown prosecutors must justify why increasingly intrusive conditions, up to the point of detention are required.¹⁴³

Currently, police officers can release an accused person and compel their attendance in court through various different forms of release (appearance notice, promise to appear, recognizance, undertaking, etc.). The form of release used is contingent on various circumstances: if the accused is arrested; if the arrest is with or without a warrant; if the offence falls within a certain class of offences; and if the person authorizing the release is an “officer in charge” or an arresting officer. In addition, the form of release is often dependent upon the criminal history of the accused, including previous convictions for violence and whether they have followed bail conditions in the past. In the family violence context, an appearance notice or a summons is normally inappropriate given the inability to place conditions on an accused person.¹⁴⁴

At the first court appearance, the Crown prosecutor may consent to the accused’s release, with conditions, or oppose release.¹⁴⁵ Pursuant to section 515 of the *Criminal Code*, an accused will be released pending trial unless the prosecutor “shows cause” why the detention of the

¹⁴¹ Critiques of the pro-charge and pro-prosecution policies raise a number of concerns, including the following: (1) claims that the policies remove the sense of autonomy and agency from victims of spousal violence at a time when they need to reassert control; (2) concerns that they have an adverse impact upon marginalized and overly criminalized populations, such as members of Aboriginal and racially marginalized communities; (3) without primary aggressor guidelines, pro-charge policies can lead to dual charging resulting in the charging of victims acting in self-defence; and (4) some police have raised concerns with policies that may be seen to restrict their discretion, see Johnson & Dawson, *supra* note 12 at 162-165.

¹⁴² *Charter*, *supra* note 54, s 11(e).

¹⁴³ Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 161-162.

¹⁴⁴ Conditions may accompany a release by police pursuant to Form 11.1 of the *Criminal Code*. However a surety release is only available if the offender is held for a show cause hearing.

¹⁴⁵ Joseph Di Luca, Erin Dann & Breese Davies, *Best Practices where there is Family Violence (Criminal Law Perspective)* (Department of Justice, unpublished, 2012) at 10. The authors also note that the accused will sometimes spend more time in custody if they are arrested on a weekend or require time to retain a lawyer or secure a surety.

accused is necessary.¹⁴⁶ Section 515 also provides that the accused can be released on an undertaking (with or without conditions) or on a recognizance (with or without sureties). The Crown can seek an accused's detention on one of three grounds:

- 1) To ensure the accused's attendance in court ("primary ground");
- 2) For the protection and safety of the public ("secondary ground"); or
- 3) To maintain confidence in the administration of justice ("tertiary ground").

In situations of family violence, the secondary ground – protection of the safety of the public, and in particular that of the complainant, is of particular importance.¹⁴⁷

3.1.3 Common bail conditions

Even if the Crown prosecutor is unable to show cause why the accused should be detained, they can request conditions on the release of the accused.¹⁴⁸ It is imperative that the prosecutor be able to advise the court of outstanding previous bail conditions and outstanding family or child protection orders that may be in conflict with requested conditions on bail, so that conditions can be crafted to ensure clarity for the accused and family members/victims. There is great potential, however, for conflicting orders at this stage of the proceedings because bail is often spoken to before there is time for a complete investigation (into existing orders) by either the police or prosecutor.

In cases involving allegations in the context of intimate partner violence, the most common terms of release include: "no-contact" conditions in respect of the complainant and sometimes in regards to children of the union;¹⁴⁹ a "no-go" term restricting the accused from attending within a specified distance of the complainant's home, work place, and children's schools; restrictions on access to the children of the complainant; an abstain from drugs and alcohol clause; and a weapons prohibition. The *Criminal Code* also allows for an adjournment for up to three days to allow for further investigation. This would afford an opportunity to obtain orders from the family court where necessary.

¹⁴⁶ In certain situations specified in the *Criminal Code*, the onus is reversed and the accused must show cause why he or she should not be detained. For example, the onus will be on the accused where a firearm or other prohibited or restricted weapon was involved or if the accused is charged with failing to comply with a condition of a recognizance or undertaking, or if they have committed an indictable offence while he or she was on release for an earlier charge that is still pending (s 515(6)). The evidentiary burden upon the Crown prosecutor at the bail stage is a balance of probabilities: *R v Julian* (1972), 20 CRNS 227 (NSSC).

¹⁴⁷ See Tracey Vogel, "Family Law Concerns at the Initial Release/Bail Hearing: Crown Policy & Considerations" presented at Crime in the Family: Navigating the Intersection between Criminal and Family Law, Part II: Criminal Focus (Toronto: Ontario Bar Association, May 5, 2007).

¹⁴⁸ Conditions may only be imposed in a Crown onus situation if the Crown is in position to justify them. In cases involving an actual or threatened violence against a person, or criminal harassment, the Justice shall order a weapons prohibition, unless they deem this is not necessary for public safety, including the safety of any victims or witnesses (section 515(4.1)). Likewise in these cases, the Justice shall consider the desirability of no-contact and non-communications orders (section 515(4.2)).

¹⁴⁹ In Ontario it is not standard to obtain no-contact orders with children unless there is evidence the children are at risk of harm from the offender. The more common order in Ontario is access to children through a third party.

3.1.4 Impact of release or bail orders on child custody/parenting

The circumstances and conditions of an accused person's pre-trial release for a family violence-related offence may have an impact on any pending family law matters. Conditions placed upon an accused can remain in effect for extended periods of time and given the demands of the court docket, it could be eight to twelve months before the criminal trial; during this time, the release conditions will be in effect.¹⁵⁰ As well, it is not unusual for family law proceedings to take place after the criminal process is engaged.

These decisions are all made at a time of chaos and often confusion for the family members involved. It has been noted that the accused will sometimes agree to very restrictive conditions for release because they simply want to get out of jail.¹⁵¹ Moreover, the accused has a limited ability to come back to court and change conditions; to do so they have to show a change in circumstances or obtain consent of the Crown prosecutor. However, it should be noted that the intent of the criminal order is to reduce the risk of reoffending and to protect the victim.

The victim may have a change of heart or get caught in the cycle of reconciliation and seek to have the conditions on the accused lifted to allow for reconciliation and may then recant on the allegations. Concerns about conditions standing in the way of contact therefore pose a challenge to both the family and criminal processes.

The imposition of bail conditions prohibiting contact between an accused and his or her current or former intimate partner may effectively interfere with the ability of the accused to spend time with his or her children since some form of "contact" with the other parent will likely be necessary to make arrangements for contact with the child. A complete ban on contact with the other parent can thus significantly hamper contact with the child. Limits on access between the child and his or her parent, may establish a status quo situation, in the family law context.¹⁵² However, bail conditions limiting contact between the accused and the other parent may be appropriate based on the risk assessment conducted by police. Several domestic violence death review reports have encouraged the use of more robust bail conditions to address the heightened risk of violence, including lethal violence, following separation.

One of the factors generally considered in deciding what custody and access arrangements are in the child's best interest is the stability of the child's home environment or the status quo,

¹⁵⁰ Presentation by Joseph Di Luca at Justice Canada Symposium *Family Violence: The Intersection of Family and Criminal Justice System Responses* (Ottawa: February 26, 2009).

¹⁵¹ Presentation by the Honourable Mr. Justice Bruce E Pugsley, Ontario Court of Justice, at Justice Canada Symposium *Family Violence: The Intersection of Family and Criminal Justice System Responses* (Ottawa: February 26, 2009).

¹⁵² Saskatchewan and Ontario domestic violence courts utilize third party access as a means of addressing this concern.

particularly where it has proven beneficial to the child's welfare.¹⁵³ This is particularly important in interim custody proceedings.¹⁵⁴

Interim custody orders do not determine final custody and access outcomes and can be varied without proof of material change in circumstances.¹⁵⁵ However, in practice, because interim orders tend to establish a status quo situation and stability is recognized as important for children, it may prove challenging to change an interim arrangement that is working well for the children. In addition, often parties never proceed to get a final order but rely instead on the interim order. Nonetheless, when a custody and access decision based on the status quo would potentially harm the child, the child's safety will likely take priority in considering their best interests.¹⁵⁶

Concerns have been expressed in a few family law decisions that criminal interventions may have been used to gain a strategic advantage in a family law matter. For instance, in *Shaw v Shaw*,¹⁵⁷ Justice Pugsley vacated an *ex parte* interim order that granted the father custody of the children while the mother was on bail for an alleged assault that had occurred one month prior to the arrest and was not witnessed by the children. The father had attempted to establish interim custody on the basis of the status quo since the bail conditions upon the mother had effectively barred her from the family home and restricted her access to the children. Justice Pugsley was critical of the impact of routine bail provisions which result in exclusion of a parent from the home, thereby placing one party in a position of superiority over the other party in subsequent family or ongoing family law proceedings.

However, in light of the solid body of research indicating that the vast majority of intimate partner violence cases are not reported to the police, and that when victims do report they are likely to have been victimized multiple times, the underuse of the criminal justice system appears to be a much more significant problem than the occasional misuse. Moreover, the police cannot arrest an individual without a warrant in the absence of reasonable grounds to believe that an offence has or is about to be committed (section 495). As noted above, the police standard in intimate partner/spousal assault cases is the same as in stranger violence cases.

There may also be significant consequences to children when a pre-existing criminal order rendered to protect them is not considered in a subsequent family or child protection matter. For example, where the family or child protection courts allow an accused parent contact with a child complaining of physical or sexual abuse, the child's safety can be seriously compromised, particularly where the accused is allowed to move home with the child. Moreover, this can

¹⁵³ *Marshall v Marshall* (1998), 42 RFL (2d) 48 (NSCA).

¹⁵⁴ Interim custody orders set out the custody and access regime that governs until the matter is finally resolved.

¹⁵⁵ See e.g. *TCH v CM*, 2006 NSCA 111.

¹⁵⁶ See e.g. *GG v HD*, 2009 YKSC 52 (where the trial judge held it was premature to order interim supervised access until a custody and access report could be completed and evidence could be presented to the court relating to the impact of family violence on the child and on the child's best interests).

¹⁵⁷ *Shaw v Shaw*, 2008 ONCJ 130, [2008] OJ No 111; see also *Ffrench v Williams*, 2011 ONCJ 406 (CanLII).

have a strong inhibiting effect on the child who may then recant the complaint, resulting in the charges being dropped and the child being denied access to victim services. This undermines the child's confidence in the justice system and reduces the chances the child will bring forward future complaints.

3.1.5 Delays in reporting

Although the delay in reporting the alleged assault was not in itself determinative in the *Shaw* case, delays can nonetheless have an effect on the credibility of the complainant in the criminal and family proceedings. For instance, in *R v Jenkins*,¹⁵⁸ the delay in reporting allegations of serious assault until family litigation began resulted in acquittals on all counts. In the *Jenkins* case, the complainant alleged a series of physical assaults by her former common-law spouse over a period of several years resulting in a broken wrist, fractured ribs and lost teeth. She indicated that she did not report the assaults at the time for fear she would lose her children to the Children's Aid Society. However, by not raising allegations of serious assault until family litigation began, the trial judge was faced with the possibility that the allegations were fabricated to gain an advantage in family proceedings and acquitted the accused.¹⁵⁹

However, as noted in Chapter 1, it is well documented that victims of coercive family violence delay reporting and can suffer multiple assaults prior to contacting police. Fear, trauma and dependency upon the perpetrator are among the many factors that may play a role in a victim's delay in reporting intimate partner violence. Parties may also be reluctant to report family violence because of the risks of raising this issue and its impact on the ability to reach an agreement to work together to parent the children in the future. The *Jenkins* case also highlights how fears of triggering a child protection intervention can be a barrier to reporting intimate partner violence. Some promising practices to address this barrier to reporting are discussed below in subsection 3.3.1.

3.1.6 Lack of communication and safety concerns

Communication between the family and the criminal justice systems is critical to understanding the risks associated with bail and the potential impact of bail conditions upon the accused in family proceedings and vice versa. A key concern raised in numerous domestic violence death reviews and coroners reports/inquests relates to family courts making child custody and access or parenting orders without knowing all the risks that have been set out for the judge in criminal court who made a pre-existing no-contact order.¹⁶⁰ From the criminal perspective, the

¹⁵⁸ *R v Jenkins*, 2010 ONSC 6751, [2010] OJ No 5422.

¹⁵⁹ In *R v Jenkins*, *ibid*, the judge notes at paragraph 69 that: "... it is very common for there to be criminal allegations of domestic assault at the time of a spousal breakup resulting in parallel criminal and family court proceedings. It certainly cannot be said that when this occurs, the criminal allegations are always fabricated to assist a spouse in the family court."

¹⁶⁰ Peter G Jaffe and Marcus Juodis, "Children as Victims and Witnesses of Domestic Homicide: Lessons Learned from Domestic Violence Death Review Committees" (April 2006) 57:3 *Juvenile & Family Court Journal* 13.

Crown prosecutor has the obligation to ensure the court has adequate information to make a decision about release. As the trial judge in *R v E M B*¹⁶¹ notes:

The proper administration of justice requires that the judge determining bail understand the circumstances of the offence and the background of the offender in order to decide whether the offender is likely to resort to further violence or intimidation if released. That information can only be produced at a bail hearing if it has been elicited during the investigation and passed on to the prosecutor's office, and from the Crown to the court. Unfortunately, that is not being done in all cases. As a consequence, some decisions as to release of persons charged with assaulting their partners are not as informed as they should be. Sadly, Canadian legal history has been punctuated with cases where offenders charged with spousal assault have been released on bail and thereafter visited even greater violence on the victim.... in cases of spousal or intimate partner assault, the Crown cannot address bail without having certain vital background information in hand, in addition to the circumstances of the offence and the criminal record of the accused. That includes, at a minimum, the following:

1. Whether there is a history of violence or abusive behaviour, and, if so, details of the past abuse;
2. Whether the complainant fears further violence if the accused should be released and, if so, the basis for that fear;
3. The complainant's opinion as to the likelihood of the accused obeying terms of release, in particular no contact provisions; and
4. Whether the accused has any drug or alcohol problems, or a history of mental illness.

Without this information the court cannot make an informed decision as to bail. Indeed, without it the court is left to gamble and risk wrongly denying bail, or conversely, risk exposing the victim to greater harm. A system of justice which requires the respect and confidence of society, including those accused of crime, and which has as its primary objective the protection of the public, cannot make such critical decisions absent this information.

Additional considerations include whether the accused has demonstrated suicidal ideation; whether there has been any recent changes in the accused's employment status or in the couple's relationship; and whether there are pre-existing orders from the police, the criminal and/or family court.

3.1.7 Peace bonds

Peace bonds issued under section 810 of the *Criminal Code*¹⁶² are preventative orders requiring the defendant to "keep the peace" and obey certain conditions for a period up to twelve months. There are essentially two situations where a peace bond would be requested: firstly,

¹⁶¹ *R v E M B*, *supra* note 129 at para 9.

¹⁶² Peace bonds are issued pursuant to section 810 of the *Criminal Code* where a person fears on reasonable grounds that another person will cause personal injury to him or her/his or her spouse, common-law partner or child. A peace bond can also be issued under the common law jurisdiction of the court.

where there is no criminal charge (insufficient evidence to lay a charge) and the applicant initiates the proceeding and secondly, where the Crown prosecutor requests a peace bond instead of proceeding with criminal charges that have already been laid. However, in intimate partner violence cases, the issuance of peace bonds in lieu of a prosecution is discouraged.¹⁶³ Some courts, like the Calgary Domestic Violence Courtroom (known as Homefront), use peace bonds in situations where there is a low risk of reoffending and the defendant is willing to participate in counselling.¹⁶⁴ The advantages of a peace bond for the defendant are significant as he or she will not have a criminal record unless the conditions of the peace bond are breached.

The existence of a peace bond may have an impact on parallel or subsequent family law proceedings. It may contribute to the establishment of a status quo for the purposes of custody and access or parenting order determinations. The non-communication terms of the peace bond may interfere with communication between the parents, which in turn may have an impact on determinations with respect to child custody/parenting arrangements. However, the non-communication provisions are generally in response to concerns raised by the complainant for the purpose of managing the risk of future harm. Where communications are necessary, the order may generally state that the parties are to communicate through counsel, or by some other means.

While a civil court must accept a criminal conviction as proof of the conduct underlying the conviction,¹⁶⁵ the same cannot be said of a peace bond because the presumption of innocence is retained.¹⁶⁶ However, a peace bond can go to the issue of the complainant's reasonable fear for his or her safety or that of their child. In *Otis v Gregoire*¹⁶⁷ in lieu of criminal harassment charges against the husband, a peace bond had been issued and the court noted that "[i]n the present trial, the husband reluctantly agreed that he must have entered a plea of "true" to the charge [of criminal harassment]." ¹⁶⁸ In assessing the relevance of the peace bond for a custody and access determination, the trial judge found it to be:

... [C]onvincing evidence that the husband was responsible for criminal behaviour sufficient to support the conditions imposed. I accept that responsibility lay with the husband and that the wife had basis to fear for her safety. Such orders are not made lightly or without sufficient evidentiary foundation.¹⁶⁹

Although in *Otis*, the peace bond did not ultimately impact the custody decision because the trial judge found that the misconduct had been addressed by the criminal process, the

¹⁶³ Justice Canada, "Spousal Abuse Policies", *supra* note 3 at 26.

¹⁶⁴ *Ibid* at 46.

¹⁶⁵ A criminal conviction for a family violence related offence is binding on the civil courts. An offender cannot use family law or child protection proceedings to attempt to show that he or she was wrongfully convicted before a criminal court.

¹⁶⁶ Di Luca, Dann & Davies, *supra* note 145 at 59.

¹⁶⁷ *Otis v Gregoire*, [2008] OJ No 3860 (SCJ).

¹⁶⁸ *Ibid* at para 13.

¹⁶⁹ *Ibid* at para 14.

case does indicate that an existing peace bond can potentially be a factor in the determination of a family matter.¹⁷⁰

On the other hand, if the family courts are not even aware of the existence of a peace bond in making child custody/parenting orders, this could result in the family court rendering an order which places the intimate partner and/or the children at risk. It should be noted, however, that in many instances the family courts do not place much probative value on the issuance of a peace bond to support allegations of family violence.¹⁷¹

3.1.8 Sentencing

In assessing custody and access, many courts require the automatic disclosure of family violence-related criminal conviction records.¹⁷² The Supreme Court of Canada set out the general principles in this area in *British Columbia (Attorney General) v Malik*:¹⁷³

A judgment of a prior civil or criminal case is admissible, if considered relevant, as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. The weight to be given to the earlier decision will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all the varying circumstances of the particular case.

However, as the Court notes, the ruling of admissibility is distinct from the decision of whether the prior court decision will be conclusive because the prejudiced party will be given an opportunity to lead evidence to contradict the earlier finding (unless precluded by doctrines of *res judicata*, issue estoppel or abuse of process).¹⁷⁴ Nonetheless, proof that a party pled guilty or was convicted of a criminal offence is *prima facie* proof of the wrongdoing, subject to potential rebuttal in some circumstances.¹⁷⁵

¹⁷⁰ This was the case in the following decisions: *M J B v S A A*, 2003 BCSC 286 (CanLII); *Walters v Walters*, 2012 ONSC 1845 (CanLII); *P V v D B*, 2007 BCSC 237 (CanLII); *Robinson v Robinson*, 2011 BCSC 787 (CanLII); *Bains v Bains*, 2009 BCSC 1666 (CanLII); and *Haigh v Spence*, 2010 BCSC 270 (CanLII).

¹⁷¹ See for instance *Reid v Mulder*, 2005 CanLII 38108 (ON SC); *Philips v Mayers*, 2009 ONCJ 680 (CanLII); *A L v C C*, 2011 ABQB 819 (CanLII); and *Klebanowski v Fischer*, [2008] AJ No 1201.

¹⁷² Neilson, *supra* note 20 at 73; these records can be obtained on consent or pursuant to a summons (see sections 12 and 23 of the *Canada Evidence Act*, RSC 1985, c C-5; most provincial and territorial evidence acts have similar provisions).

¹⁷³ *British Columbia (Attorney General) v Malik*, 2011 SCC 18, [2011] 1 SCR 657.

¹⁷⁴ Neilson, *supra* note 20 at 79.

¹⁷⁵ See, e.g. *Ontario v O P S E U*, 2003 SCC 64, [2003] 3 SCR 149; *McGowan v Toronto (City)*, 2010 ONCA 362; *Hill v Kilbrei*, 2005 MBCA 81, 195 Man R (2d) 76 at 51-53; *Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees*, 2004 NLCA 58, 245 DLR (4th) 234; *W H v H C A*, [2006] OJ No 3283, 2006 CanLII 27865 (ONCA); *Children's Aid Society of Toronto v C (S A)*, 2005 ONCJ 274, [2005] OJ No 2154.

3.2 Pre-existing civil orders

At the stage where the police or a court are considering whether to release an individual with or without conditions, or to detain them, the existence of civil protection orders, family law or child protection orders (and the conditions) in relation to the accused is relevant. Without knowledge about pre-existing orders in the civil context, police or the criminal courts are not able to assess how to reconcile or address the intersection of the various orders, or they may lack critical information to fully assess the risks of harm to family members. There are a number of reasons why it may be relevant for a criminal court to be aware of family law or child protection orders or proceedings:

- At a minimum, the court needs to be aware of whether they are making an order that conflicts with the order of another court. Not only may a criminal court order render certain provisions of family court orders inoperative, from a practical perspective, conflicting orders can also cause confusion for family members. For example, if there is a family court order which provides for access, and a criminal court order which provides for no contact with a parent, an accused may unintentionally violate the criminal order by exercising access to the child through indirect contact with the other parent. Moreover, from a safety perspective, conflicting orders may create confusion about the actual limitations on contact. The accused may use this confusion to their benefit, making contact with a complainant, who is uncertain about whether the accused is actually in breach of one of the competing orders.
- The existence of a family or child protection order prohibiting contact between the accused and a child could be one factor considered by the court as part of the overall context in determining whether an accused poses a safety risk.
- A history of breaches of civil restraining orders, or orders in respect of a child for no contact or supervised contact, goes to the likelihood of an accused obeying the terms of release.
- If there are significant upcoming court dates in the family or child protection proceeding, this is relevant, as they may heighten risk due to potential contact between the victim and the accused as well as the possibly heightened emotional context.

When families are faced with conflicting orders from different sectors of the justice system, they understandably question which order takes precedence. This is particularly the case where one order was made without knowledge of the existence or contents of the pre-existing order. Some means of addressing this challenge are found in subsection 3.3.6 below.

3.3 Promising practices

Some of the challenges identified above – where a pre-existing order adversely affects a parallel proceeding or is not brought to the attention of the decision maker in another proceeding with

potentially devastating results – have prompted the development of a number of promising practices. Given that in most cases the same judge will not preside over the bail hearing and the child custody/parenting hearing, it would be of assistance if: court clerks send family orders to police for entry on the Canadian Police Information Centre (CPIC), which is discussed below; police have policies that require inclusion of the orders in reports; and Crown prosecutors have as a best practice an easy method of requesting family court documents, as demonstrated in Alberta.

3.3.1 Removing intersectional barriers to reporting

In response to concerns that intimate partner violence victims may be reluctant to contact police for fear of child protection intervention and seizure of their children, some jurisdictions have introduced differentiated policies and plans. For instance, as part of the Ontario *Domestic Violence Action Plan* (Ministry of Citizenship and Immigration, 2005), the Ministry of Children and Youth Services developed a more supportive approach to children and families who have experienced domestic violence. It also allows for a more flexible response so that children who have been victims of or witnesses to violence will receive support that is more appropriate for their individual needs. Many child welfare agencies in Ontario have since established domestic violence teams to help work cooperatively with a parent who is suffering abuse. The *Children's Aid Society/Violence against Women (CAS/VAW) Collaboration Agreement* policy informs how both the violence against women and child welfare sectors must work together in situations where there is violence against women. One of the principal objectives is to provide women with adequate support and safety when they suffer intimate partner violence in order ensure that their children are also safe. The policy also aims to reduce barriers to reporting for victims of intimate partner violence who might otherwise be reluctant to contact police for fear of triggering child protection service involvement.

3.3.2 Protocols and policies for Crowns to obtain orders prior to bail hearings

There is no standard process for Crown prosecutors across the country to obtain relevant family court orders. In some cases, the complainant or the police might provide the Crown with these orders; in other cases, the Crown will request a copy of the relevant family or civil orders from the issuing court. Moreover, because family court orders are frequently varied, it is important that the Crown prosecutor have the most recent version of a family court order prior to each appearance in the criminal matter.¹⁷⁶

When victims are relied upon to provide the most recent order, it can place an onus on the victim which may be impossible to meet if the victim has fled her/his home in crisis. If orders are obtained through other means, this reduces the burdens upon the victims. In Ontario, the *Domestic Violence Supplementary Report* includes a place for officers to indicate whether the accused person is the subject of other current court orders.

¹⁷⁶ Susan Goldberg, *Problem-solving in Canada's Courtroom: A Guide to Therapeutic Justice* (Ottawa: National Judicial Institute, 2011) at 53.

Prior to making a bail order, the criminal court judge can ask the parties to obtain information regarding parallel family law proceedings. The information can be more readily provided by the Crown with the assistance of information-sharing protocols. As an example, in British Columbia, the Criminal Justice Branch policies contain guidelines for the exercise of prosecutorial discretion and are found in the Branch's *Crown Counsel Policy Manual*.¹⁷⁷ The *Spousal Violence* policy, dated March 18, 2013, recognizes the Branch's commitment to working effectively and cooperatively with its justice system partners.¹⁷⁸ With respect to bail, the policy states that:

The Report to Crown Counsel should contain information on any other court orders affecting the accused, including orders made under the former *Family Relations Act*, the *Family Law Act*, the *Child, Family and Community Service Act* and the *Divorce Act*. These orders may have conditions relating to property entitlement, child custody, access, guardianship, parental responsibilities, parenting time, contact or child welfare. Crown Counsel should provide relevant information concerning those orders to the court in order to minimize possible conflicts with any conditions of release ordered on the bail hearing.¹⁷⁹

Obtaining this information can be a challenge in jurisdictions where family proceedings are confidential unless the victim or accused is advised of the proceedings.

In Edmonton, a memo/letter is sent by the Crown prosecutor to the clerk of the court requesting an exemplified copy (court sealed) of whichever document is required. The clerks pull the documents and prepare a court sealed copy for the prosecution. The documents are then picked up by the court runner and returned to the Crown office for use in the prosecution. As long as the Crown is aware of the related proceeding, they may order copies at no charge. The documents are used in court pursuant to the *Canada Evidence Act*.¹⁸⁰

3.3.3 Bail clauses that consider the impact on family proceedings

The release provisions relating to communication with and access to children are arguably the most difficult to draft and have the greatest impact on parallel family law proceedings. The family court needs to be able to react to changes in the situation of a family in a meaningful way, particularly since no-contact bail orders can remain in place for a year or more in some cases.¹⁸¹ The challenge in crafting these orders lies in protecting the safety of complainants, while at the same time recognizing that in many cases it will be necessary for the parents

¹⁷⁷ Other jurisdictions also have prosecution manuals that have sections on family violence including policies on bail. Please consult the jurisdiction-specific Annexes (Volume II) of this report for further information.

¹⁷⁸ British Columbia Ministry of Attorney General, Criminal Justice Branch, SPO1, *Spousal Violence Crown Counsel Policy Manual* (March 18, 2013) online: <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/SPO1-SpousalViolence.pdf>> at 2.

¹⁷⁹ *Ibid* at 5.

¹⁸⁰ RSC 1985, c C-5; See *R v Tatomir*, 1989 ABCA 233 (CanLII), 99 AR 188, [1990] 1 WWR 470, 69 Alta LR (2d) 305.

¹⁸¹ Joseph W Bovard, *Some Judicial Comments from the Family Court Bench on Bail Orders that Conflict with Family Law proceedings*, (Justice of the Peace Conference II: Intersection of Family and Criminal Law, 2009).

(accused and complainant) to contact each other to deal with ongoing custody and access issues on the family law side.

The termination of contact between parents and children can have serious and potentially detrimental effects on the long-term parent-child relationship.¹⁸² No-contact orders can also impede counselling or other efforts to address the underlying issues facing the family, and can prevent any meaningful assessment of whether regular contact with the parent is in the child's best interest.¹⁸³

The prosecution policies in Alberta encourage the use of graduated bail conditions that are both sensitive to changing risk and to an accused person's family matters. Based on the needs of the victim and the level of risk, Crown prosecutors can craft graduated conditions beginning with no contact, moving to contact by telephone only to discuss the children, then permitting child transfer in public, and so on.

In situations where there is a clear assessment that the risk to safety is low, some have suggested that an option may be to craft conditions of release that allow for family courts to determine subsequently whether and how access should occur. However, there may still be concerns about whether the bail court ought properly to be delegating its responsibilities with respect to public safety and the safety of the victim to the family court.

Due to mandate and resource issues, it may not be appropriate to specify in the bail conditions that access be supervised by or as directed by child protection agencies.¹⁸⁴ Similar concerns are raised with regards to specifying that access through a third party approved of in writing by the probation officer. With respect to this issue, Professor Linda C Neilson notes that:

General provisions in criminal, civil, or family orders that prohibit contact between the parents "except for contact with respect to the children" or "except for contact necessary to make arrangements for access to the children" not only lack clarity, they also provide opportunities for continuing monitoring, harassment and intimidation on the one hand or for inadvertent breach, on the other, making such orders difficult, if not impossible, to enforce.

¹⁸² Goldberg, *supra* note 176 at 54.

¹⁸³ *Ibid.*

¹⁸⁴ Kate Kehoe, *Intersection of criminal and family proceedings in domestic violence cases: Suggestions for Criminal Court Judges* (Ottawa: National Judicial Institute, 2008) at 4: "Child protection authorities have a specific legislative mandate to ensure the safety and well-being of children, and can provide services to the family to alleviate protection concerns. However, orders which only provide for access as directed by the child protection authorities do not permit any variation in cases where the family court judge is of the opinion that the child protection authorities are not exercising their discretion in the best interests of the children. Further, orders which provide for access 'supervised by the child protection authority' can place the child protection authority in a difficult position. In some cases, the agency may not have grounds to bring the matter before the court or may be of the view that the safety of the child can be ensured without a court order (perhaps with a family member or access centre providing the supervision). However, child protection agencies are often not funded by their governing bodies to supervise access except where such access is court-ordered. The agency will therefore be forced to commence litigation solely for the purpose of carrying out the order made by the criminal court."

Instead, problems can be avoided by specifying exactly how contact to make arrangements for children may or may not take place (for example through a specified third party, by leaving a message related only to arranging contact with children on a telephone answering machine or by email ...). See, for example, *Naylor v Malcolm* [2011 ONCJ 629 (CanLII), Ontario Court of Justice]. Any related safety concerns associated with communications identified by the targeted parent should be discussed and addressed.

Family lawyers will also want to consider the need to take into account the potential impact of such orders on subsequent proceedings and thus the potential need to include provisions such as “subject to the provisions of any subsequent criminal court order made in response to facts arising after the date of this order” or “subject to the provisions of any subsequent criminal order, after taking into account the particulars of this agreement or order”, “subject to arrangements for contact made after the date of this order by child protection authorities” or “subject to contact arrangements in a family court order made after the date of this civil protection order.”¹⁸⁵

3.3.4 Standard form orders in family law

Where there are allegations of family violence, clarity in orders is essential. Understanding what the parties may and may not do, particularly where it involves potential contact between an alleged abuser and victim(s) is critical both for the family members as well as those called upon to assist them. A family law or child protection order which is clear as to the terms of access/parenting time will be much easier to consider, than one which is ambiguous. Clear orders assist police officers releasing an accused, prosecutors considering conditions, or judges releasing an individual on bail. Similarly, clearly drafted and standardized restraining order and enforcement clauses in family or child protection orders, may be much easier to understand and to work with.

Further, in the immediate aftermath of a family violence incident where temporary orders may be required on an expedited basis, the existence of standard clauses may assist in speeding up the process on the civil side. The existence of a standard order system may allow the order to be issued quickly after a decision, rather than waiting for negotiations between the parties as to the terms of the order before it can be entered and filed. This may facilitate coordination between systems, as the decisions in one system can be conveyed more quickly to the other; it may also help in directly promoting safety, as once an order is in place, it can be enforced.

The use of standard clauses may also assist in identifying cases where there are parallel proceedings ongoing in different jurisdictions. Standard wording may make it easier to do keyword searches to identify family violence cases, where identifiers such as name and date of birth are not sufficient.

¹⁸⁵ Neilson, *supra* note 20 at 73.

There are several jurisdictions in Canada which have various forms of standard clauses or orders.¹⁸⁶ For example, Manitoba has a comprehensive bank of standard clauses for family law cases which can be accessed electronically. The use of these clauses is mandatory, with possible exceptions under the rules of court. The wording of the clauses was developed through cooperation among stakeholders, the judiciary, the Bar and government officials.

In situations of family violence, there will be no one-size-fits-all approach that will be applicable with respect to the appropriate family law order. For example, the nature of the appropriate order should vary based on factors such as the type and severity of the violence, the resources available in the community (e.g. whether supervised access facilities are available), and the particular circumstances of the child. A variety of standard clauses that are particular to family violence cases may, however, facilitate this process as different types of arrangements, particularly in the case of children, will be appropriate depending on the case.¹⁸⁷ The Coordinating Committee of Senior Officials – Family Justice Parenting Arrangements Working Group is currently examining standard clauses that are being used in jurisdictions and intends to develop proposals for model clauses in various areas.

3.3.5 Court order databases

The ability of justice system officials to access pre-existing orders related to the same parties is critical in order to avoid potentially conflicting orders and to mitigate risks. As a result, court order databases serve as promising tools for justice system officials in responding to family violence cases. For instance, prior to releasing a person accused of family violence, police would benefit from knowing whether the accused was subject to a child protection order, a civil family violence protection order or a family law restraining order or a custody and access order.

a) Canadian Police Information Centre (CPIC)

The Canadian Police Information Centre (CPIC) was created in 1966 as a computerized information system to provide all Canadian law enforcement agencies with information to assist in combating crime. The CPIC is operated by the RCMP under the stewardship of National Police Services, on behalf of the Canadian law enforcement community. CPIC is used by 3,185 CPIC Agencies and has over 80,000 users.

There are four data banks of information within the CPIC system: (1) investigative; (2) identification; (3) intelligence; and (4) ancillary. The four data banks hold different information that is entered and maintained by different sources. The investigative data bank contains four categories: Persons, Vehicles, Property and Marine. Information is entered by the investigating agency. The identification data bank contains criminal record information, supported by fingerprints. Information is provided by police agencies but maintained by the Canadian

¹⁸⁶ Cox and Palmer, New Brunswick Department of Justice and Consumer Affairs, *Standard Form Orders – Experiences in Canadian Family Courts and Options for New Brunswick* (Fredericton: unpublished, March 7, 2011).

¹⁸⁷ See e.g. Justice Canada, “Parenting Arrangements”, *supra* note 2.

Criminal Real Time Identification Services (CCRTIS). The intelligence data bank contains criminal intelligence information entered by the police community. The ancillary data bank contains information provided by police and non-police agencies, such as provincial Registry of Motor Vehicles, INTERPOL or Alzheimer Society.

A subject's "CORE" information is entered on CPIC, then an agency may add associated records such as: "Court Action", "Accused" and Special Interest Police ("SIP"). A "PERSONS" record on CPIC (Investigative data bank) starts with the "CORE". The CORE record contains the subject's basic information— surname, given name(s), date of birth, physical description, address, cautions (includes violent, family violence, contagious disease, armed & dangerous) and other information.

Included in a "Court Action" record is the case number, expiry date, response area (Canada or province-wide), indication if the case is firearms related, conditions (street enforceable), offence(s) and what is called the "Condition Code". The "Condition Code" refers to the type of court order, specifically: alternative measures, conditional sentence, suspended sentence, conditional discharge, conditional supervision order (*Youth Criminal Justice Act*, section 42(2)), open custody (*Youth Criminal Justice Act*), probation, peace bond, recognizance, undertaking, mental health order (found not criminally responsible on account of mental disorder and is subject to conditions of a Review Board's disposition order), restraining order and custody order – the subject has legal custody of a child as specified in an order of the court (criminal or civil).

The Accused category is used to enter information about a subject who has a criminal charge laid against them; this is usually *Criminal Code* offences but may also be a provincial statute or municipal by-law if the court has released them with conditions. The Accused category is also used in cases where a subject has been issued an Appearance Notice or released by an Officer in Charge. The Offence(s) and any Conditions (street enforceable) are recorded in the CPIC entry.

The Special Interest Police (SIP) category is used to record information about a person who is of interest to police for various reasons including a person who is known to: (1) be a danger to police, him/herself or other persons (applicable in family violence cases); (2) be a subject of a peace bond that has expired; or (3) be in danger of family violence. The SIP category covers cases where a subject suffers from an apparent emotional or mental health disorder and there are reasonable grounds to believe that the person is, or is likely to be, a threat to himself/herself or someone else as a result of that disorder.

CPIC is therefore available to register restraining orders, family protection orders, and family court orders of relevance to family violence where there is information that the police can take action on. CPIC will not enter an order received directly from the victim or a party – it has to come from the courts or a police agency. Sometimes there are conflicting orders between criminal and family courts, creating a problem for the justice system participants. The police are most concerned with criminal orders and there is an effective process in place for sending

criminal orders from the court to the police for entry. There is less emphasis on civil orders and therefore CPIC is sometimes inaccurate in relation to these orders; police agencies may not be informed of changes to civil orders, particularly if they have had no involvement in the case.

There are, however, promising examples of civil orders being provided to CPIC on a systematic basis. In Manitoba, the court sends all protection orders to police for entry on CPIC. Similarly, in Ontario, court clerks send all family law restraining orders to the local police for entry on CPIC. Indeed, CPIC holds significant potential to assist police in identifying pre-existing civil orders (family, child protection or civil protection orders), which would then need to be brought to the attention of the prosecutor in family violence matters.

b) British Columbia Protection Order Registry

Another example is the Protection Order Registry (POR), a confidential database containing all civil and criminal protection orders issued in British Columbia. The mandate of the POR is to support the enforcement of civil and criminal protection orders and to contribute to the reduction of violence against women, vulnerable adults, youth, children and other victims. The POR was created in 1995 to support the *Attorney General's Violence Against Women in Relationships* policy and to address the policing community's growing concerns about a lack of an accurate, accessible database by providing police with a means to verify protection orders to assist them in making informed law enforcement decisions in a timely manner. In 1998 a *Memorandum of Understanding* was established between Court Services Branch, Public Safety & Regulatory Branch, Corrections Branch, and Community Justice Branch regarding the delivery of the POR and victim notification.

The POR is a comprehensive image based database that provides users with a hard copy of each order, along with the defendant(s) and all protected parties associated with the order and maintains these records indefinitely. Information sent to the POR is available within 24 hours of receipt, and the orders in POR can be searched by protected party name. The system provides an instantaneous response to queries, allowing police to assess whether an individual is protected before entering a premise or responding to a call. On average, 51 search requests are completed by POR staff each day.

The POR contains all criminal and civil orders that include a protective clause. These orders are sent to the POR in several different ways. When police issue an Undertaking to a Peace Officer, this order is faxed to the POR for entry within 24 hours of receipt by the POR. A criminal court order which contains protective conditions, including a Probation Order, Recognizance of Bail, Undertaking to a Justice or Judge, Conditional Sentence Order, Common Law Peace Bond, Recognizance after Allegation, Intensive Support and Supervision Order, or Deferred Custody and Supervision Order is automatically sent to POR by electronic means when it is entered into the court database. British Columbia Review Board and Court of Appeal decisions are faxed directly to the Registry to ensure they are included in the database. Civil family court orders such as family law and child protection orders are also faxed to POR for timely entry into the database. Integration with the Civil Electronic Information System is currently in progress to

provide a faster, more streamlined process for civil orders. POR is also notified by the court when any criminal or civil protective order is varied or cancelled so that the system is up-to-date.

Full access to the database is limited to the agents working within the POR. All other access is based on specific organizational requirements and approvals. Emergency Management British Columbia acts as a hub for access to the database. They have direct, read-only access to valid orders to provide other stakeholders with up-to-date information. Police agencies across the province provide data for input and have read-only access to the database through the CPIC query. In addition, police agencies across Canada would have read-only access to query the POR through CPIC, as would other agencies that work in support of law enforcement.

All levels of courts issue orders and provide data for input to the database. British Columbia Corrections and the Correctional Service of Canada request information through manual searches for the purpose of offender management of incoming offenders and upcoming releases. The British Columbia Corrections Probation Officers have direct, read-only access to POR. Likewise, the Canadian Firearms Registry Centre has direct, read-only access which is used to help determine if there is a history of violence prior to issuing gun licenses. The Victim Safety Unit has access to allow staff to identify, locate, and notify a victim of the impending release of an offender. VictimLink BC is a toll-free, confidential telephone service available across British Columbia and the Yukon that provides information and referral services to all victims of crime in more than 110 languages. As one of its services, it provides victims with confirmation their order is entered on the POR database.

The POR supports the enforcement of civil and criminal protection orders, thus contributing to the reduction of violence against women, vulnerable adults, youth, children and other victims. When used effectively, it is a valuable tool to assist police in investigations and Reports to Crown Counsel.

3.3.6 Statutory provisions addressing conflicting orders

Specific statutory provisions or construction of statutes and constitutional principles can assist in resolving express contradictions between orders issued under different acts with respect to the same parties. The doctrine of federal paramountcy might play a role where there is a clear conflict between orders issued under a federal and a provincial/territorial act. As Peter Hogg noted:

Paramountcy is a quality inherent in federal legislative power, and should in my view be attributed only to statutes enacted by the federal Parliaments (and to regulations or orders made thereunder).¹⁸⁸

¹⁸⁸ Peter Hogg, *Constitutional Law of Canada*, Loose-leaf. 5th edition (Carswell, 2007, December 2011 update) fn 9 at 16-3. However, some courts have found that an order made under provincial child protection legislation will take precedence over an order made under federal legislation, such as the *Divorce Act*, because the court is exercising protective jurisdiction, see for example *Children's Aid Society of the Regional Municipality of Waterloo v*

Accordingly, for example, a *Criminal Code* order engages federal paramountcy, rendering a provincial law order inoperative to the extent of any legal conflict, irrespective of the level of issuing court. However, paramountcy only applies where it is impossible to comply with the two orders, or where the compliance with one order would frustrate the purpose of the other.¹⁸⁹

Another means of addressing confusion regarding potentially inconsistent or conflicting orders is to clarify in legislation which type of order shall take precedence. For instance, in British Columbia's new *Family Law Act*,¹⁹⁰ section 189 provides rules on conflicting orders where one of the orders is a safety-related protection order (including bail conditions, civil protection order, peace bond) and the other is a family law order, such as an order around guardianship or parenting time. In these cases, the protection order will trump the other order until such time as the issue is resolved. This means that access orders, for example, will be suspended until the protection order is terminated or changed to eliminate the inconsistency.

In Alberta, Ontario and Saskatchewan, child protection legislation explicitly provides that child protection orders will have precedence over any other custody order.¹⁹¹ In Newfoundland and Labrador, a party to a child protection case may apply to the court to consolidate with a separate custody case concerning the same child, in order to have both matters decided together.¹⁹²

None of the civil family violence legislation in Canada currently restricts or prohibits the issuing of a protection, prevention, intervention or assistance order on the basis that a related criminal or civil order has already been granted. That being said, jurisdictions deal differently with issues relating to potentially overlapping and related orders. In Prince Edward Island, the emergency protection order (EPO) or victim assistance order (VAS) is automatically varied by any subsequent EPO or VAS, or any order made pursuant to any other act or any act of the Parliament of Canada.¹⁹³

Alberta's family violence legislation specifies that a protection order may still be issued even if a protection, restraining or no-contact order from any court has previously been granted.¹⁹⁴ The family violence legislation in Newfoundland and Labrador,¹⁹⁵ Nova Scotia¹⁹⁶ and Nunavut¹⁹⁷ specifies that protection or intervention orders take precedence over any prior or subsisting

B A, 2005 ONCJ 220, [2005] OJ 2844; *Re J D* (1978), 8 RFL (2d) 209 (Ont Prov Ct); and *Re Fortowsky*, [1960] OWN 235, 23 DLR (2d) 569 (Ont CA).

¹⁸⁹ See *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161; *Bank of Montreal v Hall* [1990] 1 SCR 121.

¹⁹⁰ SBC 2011, c 25.

¹⁹¹ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 39; *Child and Family Services Act*, RSO 1990, c C.11, s 57.2; *Child and Family Services Act*, SS 1989-90, c C-7.2, s 37(8).

¹⁹² *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2, s 59.

¹⁹³ *Victims of Family Violence Act*, RSPEI 1988, c V-3.2, s 10(5).

¹⁹⁴ *Protection Against Family Violence Act*, RSA 2000, c P-27, s 2(2.1).

¹⁹⁵ *Family Violence Protection Act*, SNL 2005, c F-3.1, s 13(1).

¹⁹⁶ *Domestic Violence Intervention Act*, SNS 2001, c 29, s 8(4).

¹⁹⁷ *Family Abuse Intervention Act*, SNU 2006, c 18, ss 9(1) & (2).

orders regarding custody or access of children,¹⁹⁸ including orders made under the federal *Divorce Act*, but excluding decisions that place children under the care of child protection services. In certain cases, the legislation specifies that an order pursuant to the *Criminal Code* will override an order made under domestic violence legislation, such as the provision in the Northwest Territories' *Protection Against Family Violence Act* dealing with the seizure of firearms or other weapons.¹⁹⁹ Manitoba requires the person seeking the protection order to disclose any related order or agreement to which the alleged victim and respondent are both parties including orders for support, custody and access as well as other protection or prevention orders,²⁰⁰ although the failure to do so will not necessarily be fatal to the application.²⁰¹ Finally, the Yukon's *Family Violence Prevention Act* encourages the consolidation of court proceedings dealing with the same subject matter between the same parties in order to avoid contradictory orders.²⁰²

¹⁹⁸ This rule does not normally extend to subsequent orders.

¹⁹⁹ *Protection Against Family Violence Act*, SNWT 2003, c 24, s 4(6).

²⁰⁰ *Domestic Violence and Stalking Act*, CCSM c D93, s 22.

²⁰¹ *Hitch v Nickarz*, 2005 MBQB 25, [2005] MJ No 33, at 26, aff'd 2005 MBCA 111.

²⁰² *Family Violence Prevention Act*, RSY 2002, c 84, ss 8(5) & (6).

Chapter 4 Identification of multiple proceedings

Coordination within the court systems is only possible when the various individuals involved – the parties, court staff, judges, lawyers – are aware that there are in fact multiple proceedings or orders and that these are relevant to one another. Often, however, one court does not know about proceedings ongoing in another court.²⁰³

In some cases, the family members involved may realize that there are connections between what is happening in a criminal proceeding and a family and/or child protection proceeding, and bring this to the attention of the courts. For a variety of reasons, however, this may not occur, particularly where those individuals are unrepresented in some or all of the proceedings:

- Family members may assume that all parts of the court system are connected to one another, and that there is an automatic sharing of information about cases.
- Family members may not realize that the proceedings or orders are relevant to one another. For example, an individual who has been assaulted, and whose intimate partner has been charged criminally may not realize that the courts will consider this as a factor in determining the best interests of the child in family or child protection proceedings.
- Family members may simply not know what is going on in the other proceedings or may not understand sufficiently to be able to provide helpful information. Particularly in a time of crisis, it can be very difficult for people to understand the legal system and its various components.

Having legal representation can have a positive impact on coordination, as this may make it more likely that the presence of multiple proceedings will be brought to the attention of the court. There are challenges even in this situation, however. There may be more than one lawyer involved per party – for example, different lawyers may be acting in the criminal and family proceedings. A child may also have legal representation by a children’s lawyer where the circumstances require their interests to be protected.²⁰⁴ In this situation, communication and coordination are required between the lawyers. In other cases, the parties may be represented for some proceedings but not others. In either scenario, the lawyers involved will need to have a sufficient knowledge of the other proceedings to recognize where such communication and coordination are required.

²⁰³ See Martinson, *supra* note 63: The report notes that there is no institutional sharing of information, little to no requests by the court in individual cases for information about other proceedings, and little or no information provided by the parties about other proceedings; the information that is provided by parties may not be accurate.

²⁰⁴ For example *Child and Family Services Act*, RSO 1990, c 11 ss 38, 39; and *Child, Family and Community Service Act*, RSBC 1996, c 46, s 33.1. Issues concerning the role of a children’s lawyer and children’s legal representation are beyond the scope of this report.

The reality, however, is that large numbers of individuals navigating the court system are unrepresented. Within this context, it is important for the court system to be able to identify where there are multiple proceedings involving the same parties. In an ideal world, this would mean that on an ongoing and systematic basis, computer systems would be able to identify and match cases from different court systems involving some or all of the same parties.

Currently in Canada, there is no jurisdiction which has the technological capacity to do this systematic matching on an ongoing basis. The information management systems in the various courts across the country were not developed with this type of matching in mind. While the databases, case management systems and technological platforms differ among courts in Canada, there are some common challenges to achieving this systematic matching capability.

The records of civil (family, child protection, protection order) and criminal cases are generally housed in different systems. In many cases, the various systems use distinct technological platforms and as a result, it is not technologically possible for the systems to speak to one another. To add an additional complication, it is sometimes the case that provincial and superior court computer databases are not linked. So for example, in some situations there may not be an automatic linking of family law cases between the same parties in both provincial and superior court.²⁰⁵

It is possible to do a manual search of the various databases. For example, this could involve taking a list of criminal cases, and individually cross-referencing them by name and date of birth, with family and child protection files. This is, however, very time-consuming and in larger jurisdictions, it may take several hours to search the new cases that appear on a court docket in a single day. In smaller jurisdictions or in specific areas, however, this may be more feasible and there are examples of this happening in Canada. For example, as discussed further below, the Domestic Violence Court in Moncton, New Brunswick relies upon manual searches to link cases.

There are also practical challenges whether the search is done manually or automatically. First, there can be human error in inputting the information; misspelled or incorrect names or dates of birth can hamper searching. It is also not uncommon in the criminal system for an accused to be identified by several aliases and/or dates of birth. Second, if searches are being conducted by keyword, for example “family violence,” cases may be missed, since standard clauses or terms are not always used by the judiciary and legal community. Third, various court registries may record different information about case files. For example, family law cases may be coded based on the names of the parents, in the child protection context, the case may be coded based only on the child’s name. At a minimum, there should be two common identifiers for family members: a name and an additional piece of information such as date of birth. If these same two identifiers are not collected in all court registries, matching becomes more difficult. Fourth, there is the issue of which officials have access to which databases. In some

²⁰⁵ This of course is not the case in areas with a unified family court, since all family matters are heard at the superior court.

jurisdictions, staff in the provincial court will only have access to provincial court files, and the same will hold true for superior court files. In other cases, access may be limited to the extent that clerks for the family court in one particular location will only have access to the cases in that location and not to cases province-wide. This may also hold true for the criminal system. Where access is restricted in this way, it limits the number of cases that it is possible to search. Finally, it is worth noting that these issues present themselves in the context of a search within one jurisdiction. In situations where family members have crossed provincial or territorial boundaries, there may be multiple proceedings taking place in different jurisdictions. Searches within one jurisdiction will not identify cases from another jurisdiction. Overcoming these technological issues involves substantial investments of financial, technological and human resources.

There are also some privacy issues that must be considered in this context. The sharing of information between court registries will not be an issue in most cases. Particular care, however, needs to be taken to protect privacy interests and to comply with relevant legislative provisions in cases involving youth justice, child protection, as well as in cases where there is a publication ban or sealed court files. This becomes a particular concern where there is the possibility that individuals apart from court staff may have access to files. For more information on privacy considerations see Chapter 7.

4.1 Promising practices

In the absence of automatic matching of cases, there are nonetheless a number of examples of Canadian and international initiatives to help ensure that the various court systems are aware of proceedings or orders from other court systems.

4.1.1 Identifying family violence cases

In addressing the practical challenges associated with identifying where there may be multiple proceedings involving the same parties, one approach is achieving consistent file designation of the relevant cases within each court system. Even if the designated family violence cases are under-inclusive, (which they likely are in family court where litigants may not disclose incidents of family violence), properly coded family violence files and records can facilitate cross-referencing of cases between court systems, and, where required, improve the manual searching of various databases. A number of Canadian jurisdictions flag cases involving family violence in the context of criminal proceedings, and this is of course automatic in domestic violence courts. In contrast, the flagging of cases in the family law system is uncommon.

Systematically flagging family violence cases allows for easy identification and tracking of these cases through the system, as well as the uniform collecting and recording of appropriate information and data. Given the complexity of family violence cases, this requires developing common definitions and directives to ensure appropriate coding, and training of all personnel to help ensure consistency. While flagging of court files may be one approach to promote

coordination between systems, on its own, however, it is not sufficient. The information about the cases that are flagged in one system needs to be communicated to the other systems.

4.1.2 Requiring litigants to provide information about related proceedings and orders

In Ontario, several amendments related to information sharing about court orders were brought into effect on March 1st, 2010, when the *Children’s Law Reform Act*²⁰⁶ was amended by the *Family Statute Law Amendment Act, 2009*.²⁰⁷ The amendments were a response to the death of a child in Ontario, who was voluntarily placed by her mother with a friend, who then sought a custody order. The caregiver and her partner were subsequently charged with the child’s murder. The application for custody said very little; the caregiver’s application indicated that the mother had a drug addiction and had lost other children to the Children’s Aid Society (CAS). The record showed that the judge asked the mother a few questions regarding her knowledge of the caregiver, her friend of many years, and about the friend’s partner. The information was given orally in response to questions by the court; there was no sworn evidence.

As of March 1, 2010, anyone (including parents) who applies for custody or access to a child has to complete a parenting affidavit. (An electronic version can be found at www.ontariocourtforms.on.ca under the *Family Law Rules*—Form 35.1: Affidavit in support of claim for custody or access). Part A of Form 35.1 requires everyone applying for custody or access (including parents) to provide information on:

- Any aliases or other names used, including maiden name;
- Whether they have acted as a parent for other children (excluding foster parents);
- Court cases involving custody or access to a child, or if they have been involved as a caregiver in a child protection case;
- Whether they have been found guilty of criminal offences without pardon, and whether there are any current criminal charges;
- Any violence to a spouse, parent of the child, member of the household;
- Where a child has lived since birth; and
- A detailed parenting plan.

Part B of the form must be completed by all non-parents²⁰⁸ and requires additional information about:

- Any children involved in child protection cases;
- Police records check (similar to a vulnerable sector police check); and

²⁰⁶ RSO 1990, c C.12.

²⁰⁷ SO 2009, c 11.

²⁰⁸ Parents are defined as including the biological, adopted, court declared parent, or the presumed father.

- Where they have lived in Ontario since they turned 18 or became a parent. This is so that notices can be sent to different CAS agencies throughout the province.

The non-parent applicant is required to sign a form authorizing any CAS in any Ontario jurisdiction where they have lived to report back if they have any records relating to the person (as a caregiver, not as a child) and the dates their files were opened and closed. There are 53 independent CAS in Ontario, which means that several agencies may be asked for confirmation. There is no sharing of records among the CAS and in some areas, there are multiple agencies operating in parallel. For example, if a litigant lives or has lived in Toronto, record requests must be sent to the Children's Aid Society of Toronto, the Catholic Children's Aid Society of Toronto, Jewish Family and Children's Services and Native Child and Family Services.

In cases involving a non-parent applicant for custody, court staff run a report to identify whether the person was involved in other family court cases (this includes child protection cases) in their local court as well as province-wide.

Given the extra information now potentially being filed in court files, including police records check, CAS records, mental health records, etc., a new section was introduced to the *Children's Law Reform Act*²⁰⁹, to protect people's privacy. This amendment allows all or part of the normally publicly available court file to be restricted or subject to a non-publication order for anyone referred to in the file (this is known as a section 70 order). The court shall consider the nature and sensitivity of the information when making an order for access to information.

There are a number of benefits associated with the section 35.1 affidavit. First, the affidavit requires the disclosure of personal information that may raise flags and it encourages all parties to articulate a plan. Second, for non-parents, courts will have access to a significant amount of information: the affidavit, a recent record check, reports from any CAS operating in Ontario and a report that identifies family court file matches involving those families. This record check targets the family courts, but can also include criminal courts at the judge's request. This may happen for example, if there is reason to believe the criminal record check is missing something. As a result of all this information, a parent who consents to the transfer of custody to a non-parent will be able to reassess their position based on a more complete record.

There are, however, certain drawbacks to the requirement for the affidavit. First, the definition of "parent" does not include a same-sex partner who has not adopted the child. While those in this situation can ask for a court declaration that they are a parent, it adds an extra step to the process. There are also some drawbacks related to the process for non-parents. The CAS record search can be cumbersome. Court staff are required to figure out which CAS has jurisdiction, and in a municipality like Toronto, this is not a very straightforward search given the number of different agencies and data systems. Further, the procedure takes time. Police can take up to 60 days for a criminal records check. CAS has 30 days to reply to requests, indicating the existence of any files on that person, the dates of opening and closing and whether there are

²⁰⁹ *Supra* note 206.

any outstanding files. If the records check comes back clear, that information goes into an envelope and gets sealed. But if there are existing records, that information is shared with the applicant who then has 20 days to tell the court why they feel the information contained in the file should not be made part of the court record. After those 20 days elapse, the fact that there is a CAS record is shared with the parent authorizing the custody transfer, and is put in the court records. If a party wishes to see the CAS record, they would need to bring a motion for production.

In New Brunswick, section 7 of the *Family Services Act*²¹⁰ specifies that in all family cases where there is an application for custody, whether under that *Act* or the *Divorce Act*,²¹¹ the court must advise the Minister of Social Development of the case and inquire whether the Minister plans to intervene.

In Quebec, under the *Rules of practice of the Superior Court of Québec in family matters*²¹² the party requesting custody or tutorship of a child must attest that the child is not the object of a court decision or pending case, or of an agreement with the Director of Youth Protection, or, if such is the case, must give the details of such decision, case or agreement.

In British Columbia, the *Family Law Act*²¹³ (FLA) requires that anyone applying to court for guardianship of a child (mostly non-parents) will be required to provide an affidavit (under section 51 of the FLA and the court rules) to provide evidence about whether the appointment of this person as guardian is in the best interests of that child. The affidavit must include copies of a child protection records check, protection order registry check and criminal records check.

There are other approaches to having litigants bring forward information about related proceedings contained in civil/domestic family violence legislation. In Manitoba, the *Domestic Violence and Stalking Act*,²¹⁴ requires a person applying for a protection order or a prevention order to provide the details of any order or agreement to which the applicant and respondent are parties, including those for custody or access, and other protection and prevention orders. The Australian *Family Law Act 1975* requires a party to a proceeding for a parenting order to inform the court about family violence orders (civil protection orders) relevant to the child or a member of a child's family.²¹⁵ Similarly, a party to a proceeding who is aware that a child, who is the subject of an application for a parenting order or another child of that family, is under the care of a person pursuant to child welfare laws, must inform the court. Further, a party to a

²¹⁰ SNB 1980, c F-2.2.

²¹¹ RSC 1985, c 3 (2nd supp).

²¹² RRQ c C-25, r 13, s 18.

²¹³ SBC 2011, c 25.

²¹⁴ SM 1998, c 41, CCSM c D93, s 22.

²¹⁵ Where a family violence order does apply, in determining what parenting arrangement is in the best interests of the child, the court must consider whether any relevant inferences can be drawn from the order taking into account the nature of the order, the circumstances in which it was made, the evidence admitted in the proceedings for the order, any findings made by the court in the order, or in the proceedings for the order. See *Family Law Act, 1975* (Cth), s 60CC(k).

proceeding must inform the court if they are aware of any notification or report to a child protection agency or investigation by a child protection agency in relation to either a child who is the subject of a parenting order application, or another child of the child's family.²¹⁶

4.1.3 Requirement on court to inquire about family violence

In addition to the requirement on parties to bring forward information about family violence orders as well as child protection orders, reports and investigations, the Australian *Family Law Act, 1975* also requires the courts to inquire about the existence of family violence or abuse. In child-related proceedings, the court is required to ask each party to the proceedings whether they have any concerns about family violence or abuse, either in respect of themselves or the child.²¹⁷ The intent of these provisions is to encourage the disclosure of information about family violence or abuse so that the courts can make parenting arrangements that are in the best interests of the child and provide for safety. In response to these inquiries by the court, family members may bring other relevant proceedings or orders to the attention of the court.

4.1.4 Court coordinators

As noted above, the Domestic Violence Court in Moncton, New Brunswick has made connections with the family courts to ensure that relevant cases are matched. The Moncton Domestic Violence Court is the first of its kind east of Ontario. Although the court is a Provincial Court dealing solely with criminal matters, it has successfully bridged an information-sharing gap between the criminal and family justice systems.

A court coordinator collects information from Family Division court records, including both child protection matters (Department of Social Development) and private family law matters. The information is shared with the Crown prosecutor prior to the Domestic Violence Court sessions. Immediate key partners of the Domestic Violence Court consult on a regular basis such as police, Crown prosecutors, legal aid, probation and a Victim Services coordinator. The court coordinator and the Domestic Violence Court stenographer distribute a weekly Domestic Violence Court docket by email to immediate key partners (such as the RCMP, Crown attorney's office, probation staff, Victim Services and the Department of Social Development). Child protection services use this information to flag cases of interest appearing at the Domestic Violence Court. To prevent the issuing of conflicting court orders between the criminal and family justice system, the coordinator consults the family court information system on a weekly basis to cross-reference potential overlapping domestic violence cases, by using identifying information of offenders and victims scheduled to appear in Domestic Violence Court each week. If documents in the Family Justice file indicate that there is a child custody and access matter, copies of court orders are provided to the Crown prosecutor. The Domestic Violence

²¹⁶ A person who is not a party to the proceedings, but is aware that: a family violence order applies to a child or member of the child's family, that a child is under the care of a person under child welfare law, or that there has been a report notification or report, or investigation of a child, or a child of the child's family by child welfare authorities, *may* inform the court. See sections 60CF and 60CH of the *Family Law Act, 1975*.

²¹⁷ *Family Law Act 1975* (Cth), s 69ZQ.

Court coordinator is informed by child protection workers of their involvement in the file and in response, the coordinator provides the status of domestic violence court files to the child protection workers and the Victim Services coordinators.

In addition, the Domestic Violence Court coordinator's role includes distributing information about provincial court orders to victims of domestic violence and child protection social workers. One factor which reportedly enhances the bridging of information exchanges between key stakeholders is that there is a designated staff person in each sector dedicated to domestic violence files. Information-sharing protocols developed between RCMP and Victim Services enhance victims' safety at the Domestic Violence Court. Furthermore, Victim Services coordinators can notify victims of domestic violence crimes who register for the service, about the movement of offenders. In Saskatchewan, the domestic violence court coordinators connect with Child Protection prior to court dates and Child Protection is an active participant in the Steering Committees for each court.

4.1.5 Technological innovations

Since 2010, the province of New Brunswick has been gradually implementing a complete electronic court case management system for most levels of court across the province, namely the Court of Queen's Bench, including Family Division and Trial Divisions (civil matters only) and the Probate, Bankruptcy, and Small Claims courts. The new system is called NOTA. An existing criminal justice database called Justice Information Services New Brunswick (JISNB) is being used by Court Services staff for the purpose of recording information related to clients and court proceedings involving the provincial criminal justice system, as well as selected case information for Court of Queen's Bench criminal trials (superior court).

Ongoing developments of NOTA have included: document production and management, case history, scheduling (including assignment of judiciary and dockets for sheriffs, Crown prosecutors and court stenographers), some disposition information, and an electronic index book. The final phase of implementation of NOTA will include advanced public access so that with a case number and a PIN, any plaintiff, applicant, petitioner, respondent, witness or juror can access information about their own case, particularly their schedule and requirements.

With respect to the coordination between criminal and civil systems, consideration of the feasibility of integrating the criminal database electronically with NOTA is being explored, which, if implemented, would enable staff to conduct manual searches and to cross-reference connected cases by linking the cases (but not the parties) within the system. Court Services staff can currently search any non criminal case in NOTA by party name, region, and/or type of case. If the case has a scheduled court appearance, they can also search by lawyer name.

Other provinces as well are looking at technological enhancements. For example, Prince Edward Island has a committee examining the feasibility of establishing a database of criminal and family law orders.

Internationally there are also some good examples. The State of New York has an Automatic Case Identification System (ACIS). This system reads and matches cases from the criminal and family law databases on a daily basis. The family database includes civil protection cases, custody and visitation cases, child support cases, and in about half of the areas of the state, child protection matters. After the automatic matching is complete, a clerk will go through the list to verify it. Once a match is confirmed, it will be assigned a family number which is used to track the family for the purpose of all proceedings.

4.1.6 Other

Other approaches are also possible to facilitate awareness by courts of related cases. For example, when the Erie County Integrated Domestic Violence (IDV) Court, which hears both family and criminal cases, was introduced in Erie County, New York, in December 2003, as part of the approach to identifying IDV Court eligible cases, police in Buffalo began a practice of asking parties involved in misdemeanour family violence cases whether they had any ongoing divorce or family cases. Subsequently, the police would put an IDV Court transfer form in the case file to alert staff at the criminal court and of the Buffalo City Domestic Violence Court to check for related family or matrimonial cases.

Chapter 5 Coordination of court proceedings

5.1 Challenges

As noted elsewhere in this report, family members facing family violence may be involved in multiple proceedings. Due to the structure and organization of the courts, families need to navigate multiple sectors of the justice system which have different purposes, processes and timing. In addition, the relevant courts may be either provincial or superior courts and therefore funded by different government even if they are in the same jurisdiction.²¹⁸ These factors make it challenging for family members to get effective access to the justice system to resolve their issues in a meaningful fashion.

This problem is exacerbated by the high rates of self-represented litigants who do not have the assistance of someone who is legally trained, to guide them through the various proceedings and systems. For example, between 2006 and 2010, at the time of the filing of the court application, over 50% of family law litigants in Ontario were self-represented.²¹⁹



Specialized domestic violence courts or court processes

One area where there has been a significant amount of work in terms of improving the court system with respect to family violence is the introduction of specialized domestic violence courts or court processes.

In practice, the vast majority of offences related to family violence are tried in provincial court. One of the critical challenges in prosecuting domestic (spousal) violence offences relates to some victim's concerns about providing evidence against their spouse. Victims' reluctance may be based on a number of reasons including fear for their own or their children's safety, love or affection for the accused, financial dependency upon the accused and concerns about the impact of criminal conviction on the accused's employment and immigration status.

In order to improve the criminal justice system response to domestic violence, nine Canadian jurisdictions have implemented specialized domestic violence courts or court processes at the provincial court level: Manitoba (1990); Ontario (1996); Alberta (2000); the Yukon (2000); Saskatchewan (2003); New Brunswick (2007); Nunavut – Rankin Inlet (2002); Northwest Territories (2011); and Nova Scotia (2012). The specialized courts or court processes generally follow one of three models: early intervention models, some for low-risk offenders; therapeutic court models; or vigorous prosecution for severe and repeat offenders. However, regardless of the model, these courts share similar objectives, notably to provide mechanisms designed to respond to the unique nature of family or domestic violence; to facilitate intervention and prosecution of

²¹⁸ The provinces have jurisdiction with respect to both civil and criminal provincial courts. The territories also have similar provincial-level courts. Although superior courts are administered by the provinces and territories, the judges are appointed and paid by the federal government.

²¹⁹ Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers of Family Litigants Without Representation" (2012) 63 UNBLJ 99 at 101.

family violence; to provide support to victims; to increase offender accountability; to expedite court processing time; and to provide a focal point for programs and services for victims and offenders. Some courts also provide for specialization of police, Crown prosecutors and the judiciary.

In some domestic violence courts, for example in Saskatchewan, as well as New Brunswick, there is a dedicated judge (and in Saskatchewan, dedicated Crown prosecutors, duty counsel lawyers and probation officers)²²⁰ assigned to the court for a period of time, which provides for consistency. In these courts all accused with charges involving domestic violence are referred to the domestic violence court by police. In other domestic violence courts, however, as well as in non-specialized criminal courts, the accused may appear before multiple judges in the course of the criminal proceeding.

A number of evaluations have been conducted of the various specialized domestic violence courts in Canada.²²¹ A study of the Family Violence Court in Winnipeg showed increases in victim reporting rates, conviction rates, and the proportion of convictions resulting in probation supervision, jail sentences, and court-mandated treatment for offenders following the implementation of the specialized court.²²² Moreover, the Domestic Violence Front End Pilot Project in the Manitoba provincial court won the 2006 United Nations Public Service Award for improving service delivery. Recidivism studies in Saskatchewan showed that offenders entering treatment programs prior to sentencing who completed the treatment sessions recidivated less often than those who completed post sentence or were self-referred.²²³

Families affected by family violence may be impacted in a number of ways due to a lack of coordination among the various sectors of the justice system (i.e. criminal, family, and child protection). These include the following:

- Families may be required to attend multiple hearings on different days, in potentially different court locations; in some centres, the family and criminal courts are not even in the same building. These family members are required to tell their story to different courts multiple times. All of this occurs at a very stressful time in their lives.

²²⁰ In the Saskatchewan domestic violence courts, child protection workers are directly involved and the police must apply no-contact conditions on all accused released.

²²¹ See, for instance: Muriel McQueen Fergusson Centre for Family Violence Research, *Moncton Provincial Court-Domestic Violence Pilot Project: A Comparative Study* by Carmen Gill & Lanette Ruff (Fredericton: November 2010), online: <<http://www2.gnb.ca/content/dam/gnb/Departments/eco-bce/WI-DQF/pdf/en/2010-03ViolencePilotProject.pdf>>; Canadian Research Institute for Law and Family, *The Domestic Violence Treatment Option (DVTO) Whitehorse, Yukon: Final Evaluation Report* by Joseph P Hornick et al <http://www.domesticpeace.ca/documents/YukonDVTOAnalysisReportrevisedNov2005.pdf> (Calgary: October 2005), online: ; “A case study of the K Court in Toronto, Ontario” is available in Susan Eley, “Changing Practices: The Specialised Domestic Violence Court Process” (2005) 44:2 *The Howard Journal* 113; Information on the effectiveness of other domestic violence court models can be found in Jane Ursel, Leslie M Tutty & Janice LeMaistre, *What’s Law Got To Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Markham: Cormorant Books, 2008) at 197-227; Justice Canada, *Rankin Inlet Spousal Assault Counselling Pilot Program, Final Evaluation* (Ottawa, 2007), online: <www.uregina.ca/resolve/PDFs/Rankin%20Inlet%20Evaluation.pdf>.

²²² Jane Ursel & C Hagyard, “The Winnipeg family violence court” in Jane Ursel, Leslie M Tutty & Janice LeMaistre, *What’s Law Got To Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Markham: Cormorant Books, 2008) at 95-119.

²²³ Policy, Planning and Evaluation, Ministry of Justice and Attorney General of Saskatchewan, 2009.

- Because of the involvement of multiple courts, each court has only a partial view of what has occurred. As a result, decisions in each court are often made without an appreciation of the family's full situation. This partial view is exacerbated where there is no case management system within each of the justice systems (i.e. family or criminal).
- Because judges in criminal court are often not aware of the orders made by or the evidence presented to a court hearing in a family law or child protection matter and vice versa, inconsistent orders can result. For example, a judge in criminal court may make an order for no-contact with all family members, while a family court judge may make an order for supervised access. Family members and law enforcement officials can be left confused about which order should be followed, and in some cases inconsistencies can provide an opportunity for subsequent abuse.
- Further, because there is sometimes little or no coordination in terms of how long various orders are in effect, there may be gaps in protection. For example, the conditions contained in a peace bond may expire before a civil restraining order is ordered.
- Family and child protection proceedings are sometimes delayed as a result of criminal proceedings. For example, if there has been a criminal charge, and there is also an ongoing child protection proceeding, the accused parent may be advised by counsel not to speak to anyone about the alleged incident until the trial is concluded or a guilty plea is negotiated. In 2011/2012, the median length of time taken to complete an adult criminal court case in Canada was 117 days.²²⁴ Adult criminal court cases involving certain types of charges took longer than others to complete, such as homicide (386 days), attempted murder (259 days) and sexual assault (308 days), or where multiple charges were laid (147 days).²²⁵ This can have serious impacts on the child protection proceeding. There are strict timelines in child protection proceedings, and in some jurisdictions there are limits to the period before which a child who has been in foster care must be returned either to the family or made a Crown ward/ward of the court. In situations where the parents have reunited and, due to the criminal proceeding, the accused does not admit that the family violence occurred, the child protection concerns will likely not have been addressed within the prescribed time limits. As a result, the child may end up being made a Crown ward/ward of the court, where otherwise it may not have been the appropriate solution.²²⁶
- Counselling, and sometimes even negotiation, may be precluded in the family context because of no-contact provisions in a bail order.

²²⁴ Statistics Canada, *Adult criminal court statistics in Canada, 2011/2012*, Catalogue no. 85-002-X (Juristat: June 13, 2013) at 16. There was, however, considerable provincial and territorial variation in the amount of time taken to complete adult criminal court cases in 2011/2012.

²²⁵ *Ibid* at 23.

²²⁶ Kehoe, *supra* note 184.

- Family litigants may be apprehensive about addressing some issues in the family proceeding for fear of the impact on the criminal case.
- Services are associated with both the criminal and family courts, as well as child protection proceedings. A lack of coordination between these proceedings may result in a duplication of efforts, and thus inefficiencies.
- Victims can also be left confused about the different processes and protections for victims in each court system. For example, the *Criminal Code* sets out circumstances under which a judge may appoint a lawyer to conduct the cross-examination of a victim when the accused is self-represented.²²⁷ The situation in family court is quite different, however. A recent Ontario study of self-represented family law litigants found that there were significant numbers of cases involving family violence where the parties were self-represented (26% males and 31% females). One of the issues highlighted by judges in this context was their discomfort with the fact that the alleged abuser was able to directly cross-examine the alleged victim.²²⁸
- As the number of processes in which family members are involved increases, the greater the potential for increased stressors on family members. In some cases, this may create increased risk of conflict.²²⁹
- The absence of coordination can have very concrete impacts on people's lives outside of the court process. Where families facing issues related to family violence are also facing other social challenges, such as unemployment or precarious employment, a lack of coordination between systems, and a large number of court hearings, can have a particularly adverse socio-economic impact on family members.

The Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters²³⁰ has highlighted the importance of both triage – the “initial and ongoing assessment of a case to determine such matters as degree of urgency, pressing needs, and the most efficient and appropriate path to resolution” – and referrals to appropriate services. It is noted that proper triage can reduce the possibility of both gaps and overlaps in services, and thus result in efficiencies for the justice system. An important element of the triage process is

²²⁷ *Criminal Code*, *supra* note 129, s 486.3 which allows for the court to appoint counsel for cross-examination of victims of criminal harassment and victims/witnesses who can demonstrate that personal cross-examination by the accused will prevent them from being able to give a full and candid account of events.

²²⁸ Rachel Birnbaum and Nicholas Bala, “Experiences of Ontario Family Law Litigants with Self-Representation and Representation” (Presentation at Annual Family Law Summit, Toronto, Ontario, May 10, 2012).

²²⁹ Martinson, *supra* note 63.

²³⁰ Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words* (April 2013), online: <<http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>>.

screening for safety. Better and more comprehensive training, enhanced screening, and differentiated responses in cases involving family violence are widely recommended.²³¹ While triage would seem to be especially relevant where families are involved with multiple sectors of the justice system, for the most part, there is no “single entry” triage system for such cases into the various sectors of the justice system. As noted elsewhere in the report, different levels of court may be involved in the different justice sector responses, and each sector may have its own form of intake process.



Case study – Integrated Domestic Violence Court, Toronto, June 2012

A litigant, having spent two years on a family law matter, was also the subject of an application for a peace bond, based on allegations by his former partner. Although the case was not transferred to the Integrated Domestic Violence (IDV) Court since the family matter was almost completed, the judge sitting at the IDV Court set the next court date for the criminal proceeding. The litigant noted that he had been unemployed until recently and that every time he came to court he had to take time off work. He complained to the judge that between the family matter and the criminal matter, it seemed as though he was “coming to court every week.”



Case study – *Children’s Aid Society of Huron County v R G (2003), 124 ACWS (3d) 712*

R.G. and S.R.(1) have two children. In July of 2000, R.G. separated from S.R.(1) after he assaulted her. S.R.(1) was charged and later convicted of this assault and the Children’s Aid Society became involved with the family. R.G. eventually moved in with another partner. In December of 2000, a neighbour overheard R.G.’s partner abusing one of her children, S.R.(2). The child was brought to the hospital by the neighbour where a number of red welts were found on the child’s legs. As a result of those injuries, the CAS went to the mother’s home and apprehended her other child (K.R.). K.R. was found to have significant injuries to the side of his face including some bleeding in the ear area. Shortly after the children were apprehended, R.G.’s partner was charged with assaulting S.R.(2) and R.G. was charged with assaulting K.R.

R.G. denied assaulting K.R. Her evidence was that she was out shopping when the injuries occurred.

Ultimately, the partner pleaded guilty to assaulting S.R.(2). The charge against the mother regarding K.R. was withdrawn at the time of the trial in November of 2001. At that time, the mother pleaded guilty to a minor assault on S.R.(2). In the interim, however, child protection proceedings moved forward with the mother reluctant to be fully cooperative for fear that it would prejudice her in the criminal court proceedings. She made almost no progress in terms of addressing the issues that brought her children into care.

²³¹ Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Family Justice Reform: A Review of Reports and Initiatives* by Erin Shaw, April 2012, at 30, online: <<http://www.cfcj-cfjc.org/sites/default/files/docs/2012/Family%20Justice%20Reform%20Review%20-%20April%2015%20Final.pdf>>.

In the course of the child protection proceedings, a parental capacity assessment was ordered. At the time it was completed, the mother was still subject to outstanding criminal charges relating to the very reason that the children were apprehended. In assessing the efficacy of the assessment, Justice Glenn noted:

In these circumstances, exercising a right to remain silent ran contrary to the assessor's need to obtain information on how the children came to be harmed. Speaking frankly, however, it could have risked having these statements introduced at the criminal trial as a confession. Dr. Walter J. Friesen, Ph.D., C. Psych., completed the parental capacity assessment of the mother and the father in March of 2001. In this assessment, the mother was strikingly defensive in her responses. She portrayed herself as an exemplary citizen, an excellent parent and a person without psychological, interpersonal or moral vulnerabilities. One will never know how different this aspect of the assessment might have been had her criminal matters already been resolved and the protection issues already determined by the court.

The fact that the society felt that she misrepresented herself to the assessor has haunted her throughout the rest of the child protection proceedings since it believed that she had poor insight into her failings as a parent. Her apparent lack of insight was one of the important basis on which the psychologist determined that her prognosis for change was poor.

In child protection proceedings, the best tack a parent can take generally involves open discussion of parenting shortcomings and co-operation with the child protection authorities. The dynamics of a criminal case, however, will sometimes dictate the opposite approach. Justice Glenn makes two suggestions for ameliorating this situation and preventing child protection proceedings from coming to a stand still during the resolution of parallel criminal charges:

First, criminal counsel must become aware of the potential cost of delay and silence in the face of companion protection proceedings. Second, all parties should explore the possibility of holding a combined settlement conference and criminal pre-trial in an effort to resolve the shared facts between each case. If the resolution of a protection issue is delayed because it is tied to a criminal charge, this issue should be flagged for the next status review proceeding and resolved as soon as possible.

Excerpted from: Joseph DiLuca, Erin Dann & Breese Davies, *Best Practices Where there is Family Violence (Criminal Law Perspective)* (Submitted to Justice Canada, 2012) at 31-32.

5.2 Promising practices

A number of promising practices which may assist in addressing these issues have been identified. These include variations on the “one family – one judge” concept, judicial communications and court coordination models. Annex 3, in Volume II, provides more information on evaluations related to some of these court coordination models.

5.2.1 One family – one judge

There is a spectrum of how broadly “one family – one judge” can be interpreted. It ranges from one judge for a private family law case, to one judge for all related civil cases, to one judge for all related civil and criminal cases. Each of these approaches is discussed in turn.

5.2.2 One judge for each family law case

Currently, in many family courts across the country, one family may appear before multiple judges. Where case management does not exist, in cases with continuing conflict, it would not be unusual for family members to appear before five to ten different judges on private family law matters before trial. This presents particular challenges in cases of family violence, where it is critical to ensure the protection of victims and to meet children’s best interests.



Case study – Involvement of multiple judges and sectors of the justice system

The facts of the family law case *Ridehalgh v De Melo*, [2012] OJ 3385 (QL) (ON SC) provide an example of how many parts of the justice system may be involved where there are allegations of family violence. The case summarized here relates to the resolution of the private family law issues between the parties – custody and access in respect of two children as well as financial issues. The facts of the case also indicate the involvement of the criminal justice as well as child protection systems.

According to the trial judge, the parents of the children had a “turbulent” relationship, and separated while living under the same roof in December 2008. In March of 2009, they physically separated after a call to the police to attend at their home. The father was charged with three counts of assault and one count of assault causing bodily harm. The father denied all allegations but eventually pled guilty to one count of assault.

Shortly after the father was charged, family law proceedings, which included competing custody claims by each parent, were also commenced. The father had no access to the first child for about four months; access was then gradually expanded, but always under the supervision of his parents. The bail conditions of the father prohibited contact with the mother. While the father was on bail, however, he and the mother did have contact and a second child was conceived.

The involvement of child protection with the parents was referenced extensively in the decision. The intersection of the child protection and criminal law system was relevant to the timing at which the father accessed services. The father testified that he had been required to participate in a men’s anti-violence program as part of his probation, as well as a substance abuse and awareness program. He admitted under cross-examination that child protection officials had previously asked him to participate in these same programs, but that he wanted to wait until the criminal proceeding was completed before doing so.

The trial judge ultimately found that the father had engaged in family violence and that his refusal to acknowledge his problems with respect to anger and domestic violence was problematic. Custody was awarded to the mother and reasonable access to the father; the court concluded that supervised access was no longer required. The parties were encouraged to reach their own agreements with respect to timesharing,

but the court established a default access regime in the event that they were not able to do so.

From the perspective of case management and coordination, it is worth noting that six different judges issued orders in the family case. Three years passed between the commencement of the family law proceedings and the trial, and several temporary family law orders were issued in the interim.

Some of the challenges when there are multiple judges are as follows:

- There may be delay as no one judge is monitoring the progress of the case and ensuring that the parties complete the steps in the process in a timely way. It is often the parties who decide how frequently they will come to court and the rate at which matters will proceed.
- Each judge may take a different approach to similar issues, which can lead to inconsistency. For example, one judge may treat breaches of an order very seriously, and impose sanctions, while another judge hearing a motion with respect to a further breach, may take a different approach. This lack of consistency can create risks to safety and leave family members confused and uncertain about what to expect.
- This lack of consistency can also encourage a proliferation of motions as litigants have little to lose making the same arguments before a different judge with the hope of getting a different result. Further, without a judge monitoring the overall number of applications, their frequency, or necessity, vexatious litigation can result in perpetrators using the legal system to continue abuse of the victim. This has been referred to as “paper abuse” or “procedural stalking.”²³²
- All of the above can drag out the family law case and the conflict and can result in additional costs both to litigants, as well as to the justice system as a whole.²³³ As just one example, each time the case comes before a new judge, he or she must learn the case anew.

Coordination among different sectors of the justice system is certainly more challenging and complex in this context. Commentators have suggested that the family justice process in Canada ideally requires a system whereby one judge manages and hears all pre-trial appearances while another judge presides over the trial and hears all post-disposition matters.²³⁴ It is argued that this is consistent with the modern role of judges in both family cases generally, as well as in specialized domestic violence courts, where judges go beyond

²³² See Linda C Neilson, *Best Practices Where there is Family Violence (Family Law Perspective)* (Submitted to Department of Justice, March 2012); S L Miller & N L Smolter, ““Paper Abuse”: When all else Fails, Batterers use Procedural Stalking” (2011) 17:5 *Violence Against Women* 637.

²³³ Nicholas Bala, Rachel Birnbaum & Donna Martinson, “One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict” (2010) 26 *Can J Fam L* 395 at 402.

²³⁴ *Ibid.*

their role as neutral decision-makers, and take a problem-solving approach to the family.²³⁵ The emphasis on consistent post-disposition adjudication is also argued to be critical. Because of the nature of family law proceedings, there is often no finality to the issues. As a result, even if a matter is ultimately resolved by way of trial, there may still be a need for the family to come back to court on more than one occasion due to changed circumstances.

Some of the advantages of the “one family – one judge” model in the family violence context are that the judge:²³⁶

- Can take overall control of the management of the case and ensure that the number of proceedings are appropriate, thus minimizing the potential for “paper abuse.”
- Can monitor over time the actions of parents and act rapidly to hold parents accountable when court orders are breached. In the family violence context, this is particularly important with respect to provisions related to contact.
- Can gain important insights about the particular programs and services to which the family should be referred. Because the judge would have contact with the same family over a period of time, he or she may become familiar with the family dynamics and patterns, which can inform decisions about the types of solutions that may be appropriate for the family.
- Can consistently emphasize the need for appropriate behaviours, such as putting the interests of the child first, and discouraging abusive behaviours. Skilled engagement by the judge with the family members can have the impact of motivating behavioural change.²³⁷ This is over and above the ability of judges to issue orders.

There are good examples of the “one family – one judge” approach being used in Canada. For example, the Alberta Court of Queen’s Bench has a case management system, which is applicable to family law cases. Upon application by one of the parties, a single judge may be designated to hear all applications related to an action other than the trial. To further enhance case management, the Court of Queen’s Bench of Alberta is currently piloting a case management counsel project. Case management counsel, in Edmonton and Calgary, provide support to the parties and to the judge, as appropriate. The Case Management Counsel’s responsibilities include assisting to narrow or resolve issues, directing parties to appropriate services and procedures, including dispute resolution processes, and providing guidance to parties, including discouraging unnecessary or inappropriate applications.

²³⁵ See e.g. Michael S King & Becky Batagol, “Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts” (2010) 33 Family Court Review 406.

²³⁶ Bala, Birnbaum & Martinson, *supra* note 233.

²³⁷ King & Batagol, *supra* note 235.

While there is potential for a “one family – one judge” model to be implemented in various court settings (i.e. unified family court, superior court, provincial courts), this may not be possible due to lack of resources or the realities of smaller centres. In addition, a downside of the “one family – one judge” model, is that in some cases it may involve delay for families, since they are waiting for “their” judge to be able to hear their matters. Alternatively, it has been suggested that other approaches such as a “one family – one team” approach could be used to promote consistency; the one team could, for example, comprise two judges as well as a case manager and a mediator.²³⁸

The benefit in terms of coordination in family violence cases is as follows: a case that is carefully and consistently managed within the family justice system will be more easily coordinated with parallel cases in other sectors of the justice system.

5.2.3 One judge for all civil cases

One further step along the “one family – one judge” spectrum is exemplified by the State of Kentucky which adopts a “one family – one judge” approach with respect to its civil cases. This approach initially started as a pilot project in Louisville, Kentucky in 1991, and as of 2001 became a state-wide constitutionally established court. The central aspect of this approach is that all civil cases related to the same family are heard in the same court before the same judge; this includes matters such as divorce, custody, support, child protection and civil protection matters. While not all matters are heard on the same day, the single judge approach provides for consistency. While the civil judge does not hear criminal cases, there is a memorandum of understanding between the criminal and civil courts, providing that the criminal courts will generally defer to the civil courts with respect to “no-contact” provisions relating to family members.

A particularly important aspect of this system is the fact that each judge is supported by a court employee called a “case specialist.” The case specialist plays a very important function from the perspective of family violence. First, the case specialist is a neutral source for referrals to community services. Second, the case specialist is responsible for researching each case that comes before the judge to determine whether there are any related cases. The case specialist searches for both civil and criminal cases, and has access to all of the databases that would contain the criminal information. In this way, although the judge in the civil court is not making decisions related to the criminal case, coordination with criminal proceedings and orders is facilitated. The case law in the United States permits the courts to take judicial notice of prior court findings and orders (see subsection 6.1.5 in Chapter 6 for a discussion of judicial notice in the Canadian context). The case specialist is assisted in his or her search by the fact that litigants in civil cases are required to complete an intake form that asks for date of birth and their social security number and criminal accused are also required to provide this information. There are therefore common identifiers.

²³⁸ Alfred A Mamo, Peter G Jaffe & Debbie G Chiodo, *Recapturing and Renewing the Vision of the Family Court* (Toronto: Ministry of the Attorney General, 2007) at 97-98.

This search by the case specialist can be very informative to the court and sometimes to the parties. For example, in a hypothetical case, if parents are parties in a child protection case, the case specialist would be able to make known to the court and to the parties the existence of a previous child protection case involving the father and a different child and mother, in which the child was abused. This could have an impact on the disposition of the court in the matter. It may, however, also change the position of the mother, for example, if she did not know about the previous child protection proceeding and its outcome. As another example, where there is an application for a civil protection order, the search by the case specialist may help the court to better understand the context. In a case where a batterer is seeking a civil protection order against a victim, a search for previous orders could reveal that the batterer has been the subject of previous protection orders by different victims. This may, in combination with other evidence, lead the court to question whether a protection order is warranted in this case, or whether this is an attempt to use the legal system to control or harass the victim.

Another innovative aspect of the Kentucky approach is with respect to intake. When there is a report of family violence, there are several people present at the intake meeting with the alleged victim: a police officer, a prosecutor, a representative of victim services and a civil court clerk. Part of the intake meeting is a discussion about the coordination of different civil and criminal mechanisms, and this facilitates the prosecutor beginning criminal warrants while the civil court clerk can begin the process to obtain a civil protection order.

Coconino County in Arizona has an Integrated Family Court (IFC), which focuses on helping the family to achieve long-term solutions through a problem-solving approach. A pilot of the IFC was evaluated in 2008 which found that the court was successful in achieving its goals. The court has jurisdiction over all of the family's related civil but not criminal issues, and adopts a "one family – one judge" model, with extensive associated specialized family services, including drug testing, anger management, domestic violence assessment and treatment, counselling, divorce education for children, parent education, supervised exchange, and both therapeutic and non-therapeutic supervised parenting time. Extensive assistance with respect to completing legal forms is provided to parties through self-help centres. In addition, the director of the Self-Help Center has direct access to the judicial assistant and the IFC judge, when necessary, to answer parties clarification questions with respect to orders and "next steps," thus helping to expedite matters. Front end case management, and a focus on alternative dispute resolution are also key aspects of this model. Among the evaluation results, it was determined that the IFC had increased predictability, eliminated conflicting orders for families, and reduced the number of high-conflict cases.²³⁹

²³⁹ Mark Morris Associates with Joanne M Brown Consulting, *Integrated Family Court: Helping Families and Children in Coconino County, Arizona* (Arizona: Integrated Family Court, May 18, 2008).

5.2.4 One judge for civil and criminal cases – integrated domestic violence courts

Perhaps the fullest expression of the concept of “one family – one judge” is found with Integrated Domestic Violence (IDV) Courts. These have been established in a number of American jurisdictions, such as New York, Idaho, and Vermont, and there is now a pilot in Toronto, Ontario.²⁴⁰ While the exact eligibility requirements and processes in the various IDV courts differ, they are united by some common principles:²⁴¹

1. **One family – one judge** – One judge hears cases related to a single family on both the criminal and civil side.²⁴² As a result, this judge obtains a fuller picture of the situation and can make orders and decisions that are consistent and designed to address the family’s situation in its totality. Thus, orders with respect to matters such as bail, sentencing, protection or restraining orders, parenting (custody and access), orders to attend treatment (e.g. batterer/partner assault programs), as well as referrals to services can be consistent and comprehensive. Because one judge has a global picture, safety is enhanced. Further, there is an aim to increase the efficiency of the process for both litigants as well as the court system, with less court appearances and a quicker resolution of cases. Because one judge is dealing with all matters, it is also more difficult for family members to attempt to manipulate the justice system.
2. **Individual treatment of each case** – While the same judge hears the family’s criminal and civil cases, all of the cases are treated separately and the rules of evidence and standard of proof associated with each process are applicable. Although the same judge is involved in both cases, supporters of the IDV Court model argue that it is integral to the judicial function to be able to hear evidence on one context, and then proceed to make findings without reference to that evidence, in another context. Courts do this on a regular basis when they make determinations about the admissibility of evidence.
3. **Coordinated resources for families** – IDV courts generally have staff members who play a central role in acting as a liaison between the parties, the court and various community and other services. This resource person is generally responsible for helping to support adults

²⁴⁰ Although an Integrated Domestic Violence Court was introduced in Croydon, United Kingdom, in 2006, the court was discontinued, due to a lack of cases being streamed into the system. The project was evaluated. See Marianne Hesterd, Julia Pearce & Nicole Westmarland, *Early Evaluation of the Integrated Domestic Violence Court, Croydon* (Ministry of Justice Research Series 18/08, November 2008), online:

<<http://nicolewestmarland.pbworks.com/f/IDVC+evaluation.pdf>>.

²⁴¹ See e.g. Center for Court Innovation, *Integrated Domestic Violence Courts: Key Principles*, online:

<www.courtinnovation.org/domesticviolencecourt.html>; Liberty Aldrich & Judge Judy Harris Kluger, “New York’s One Judge-One Family Response to Family Violence” (2010) 61: 4 *Juvenile and Family Court Journal* 77.

²⁴² It should be noted that case eligibility may differ between courts. For example, some courts do not hear child support cases, while others do not hear divorce cases, or cases where there are more serious criminal charges involved. See e.g. Judy Reichler & Liberty Aldrich, *Child Support Protocol: A Guide for Integrated Domestic Violence Courts* (New York: Centre for Court Innovation, 2004) (developed to provide guidance in light of the fact that IDV Courts in New York cannot address all child support issues).

and child victims by referring them to services, as well as helping an accused to access programs ordered by the court.

4. **Monitoring of compliance with orders** – In order to improve offender accountability, IDV courts generally require frequent court appearances to determine if the offender is complying with conditions in orders, for example orders for no-contact, or to attend programs such as substance abuse or partner assault programs. In this way, offender accountability can be increased, because if there is non-compliance, the court can respond quickly.
5. **Victim advocacy** – one of the key objectives of the courts is to improve victim safety and this is accomplished, in part, by ensuring greater consistency of orders. In addition, victim service providers often play an integral role in the court, by providing information, safety planning and access to services for victims.
6. **Involvement of community partners** – IDV courts generally involve a great deal of collaboration with stakeholders such as police officers, probation officers, prosecutors, defence lawyers, family lawyers, victims services, partner assault program staff, services for children, lawyers for children as well as other service providers. There is recognition that IDV courts need to have support from stakeholders in order to function effectively, and thus ongoing communications and relationship building with stakeholders is generally viewed as important.

5.2.4.1 Toronto Integrated Domestic Violence Court

The Toronto Integrated Domestic Violence (IDV) Court was launched on June 10, 2011 on a pilot basis, and was developed, taking into account the research on IDV Courts and experiences of other jurisdictions. The IDV Court sits every other Friday. For a family to participate in the IDV Court there must be a criminal domestic violence charge originating out of two designated courts in Toronto²⁴³ and a family court case in one of two of Toronto's provincial courts.²⁴⁴

The IDV Court will hear family cases involving any of: custody, access, child support, spousal support or restraining orders. Criminal cases are eligible when the criminal domestic violence charges have originated in the designated courthouse and the Crown is proceeding summarily. When a party approaches the court counter to file materials, staff may be prompted to ask about a criminal domestic violence case (e.g. if the party is asking for a restraining order). If it appears that there is a criminal domestic violence case, staff then provide the party with the IDV Court Information Package. A determination is then made as to whether there is a criminal case and if the matter is eligible for the IDV Court.

²⁴³ Old City Hall was the original criminal court site for the pilot. College Park was added to the pilot as of April 26, 2013.

²⁴⁴ One at 311 Jarvis Street and one at 47 Sheppard Avenue.

If a family case is already before the family court and the case is eligible to be transferred to the IDV Court, the family judge hearing the case must also consent to the transfer. A specific form has been developed for this purpose. If the family judge does not consent to the transfer of the case to the IDV Court, the cases will be returned to the regular family and criminal streams. If the judge consents, the cases will be scheduled into the IDV Court.

To prepare for the court appearance, the clerk ensures that both the criminal and family cases are on their respective dockets and the criminal information and family file are ready for the IDV Court judge. However, both the criminal and family matters will continue as separate files and the IDV Court judge hears each matter separately. Orders are prepared according to existing rules and practices. Staff in both the criminal and family courts make the appropriate data entries into the ICON (criminal) and FRANK (family) databases, throughout the process. Given that the Toronto IDV Court is a pilot, there are no new court rules. Existing court rules and procedures will continue to apply for criminal and family cases. For example, Crowns will prosecute according to Crown Policy and if eligible, individuals may be referred to the Partner Assault Response (PAR)²⁴⁵ program in criminal domestic violence matters. Victims will continue to receive assistance from the Victim/Witness Assistance Program.

There are several services associated with the IDV court. For the first two years of the operation of the IDV Court, there was funding for a Community Resource Coordinator (CRC) who was present in the courtroom when the IDV judge was sitting. The CRC was responsible for:

- Connecting parties to community resources;
- Coordinating the transfer of clients to the IDV Court;
- Advising the parties of upcoming IDV Court attendances;
- Providing the judge with information and updates regarding the availability of community programs; and
- Reporting back to the IDV Court on the status of the parties' court-ordered treatment.

In terms of legal services, on the day of IDV Court, Duty Counsel is available at the IDV Court to provide legal advice and assistance in court for family cases and the accused. The accused in the criminal case can also speak with Duty Counsel about their criminal matter. Other legal services available to the accused and the family litigants include: an Advice Lawyer at the Family Law Information Centres (FLIC), Legal Aid's Family Law Service Centre, and Pro Bono Law students.

Since its inception, the IDV Court has had 31 cases on its docket (between June 2011 and August 2013). As outlined below, mandating eligible cases to the IDV Court (instead of requiring their consent) and adding the College Park criminal court to the catchment area of the pilot may also increase the number of cases before the IDV Court.

²⁴⁵ Partner Assault Response (PAR) programs are specialized counselling and educational services offered by community-based agencies to people who have assaulted their partners. Offenders are ordered to attend the PAR program by the court. PAR programs aim to enhance victim safety and hold offenders accountable for their behaviour.

The IDV Court originally required the consent of all parties for a case to be transferred to the Court. As of winter 2011, very few cases had been transferred to the Court. Pursuant to a Practice Direction issued by the Ontario Court of Justice, effective March 16, 2012, cases are automatically transferred to the IDV Court, if the eligibility conditions are met. As a result of making attendance at the IDV Court mandatory, the IDV Court now hears trials of short duration and Crown consent is no longer required.

As of April 26, 2013, by Practice Direction issued by the Ontario Court of Justice, eligible criminal cases from a second criminal court – College Park – are included within the scope of the IDV Court. Adding the College Park criminal court to the catchment area of the pilot allows more families with concurrent criminal and family cases, to appear before the IDV Court.

Most recently, the Ministry has implemented the Family Court Support Worker Program (discussed further in Chapter 9), which provides support to victims of domestic violence who are involved in a family court process. The Barbra Schlifer Commemorative Clinic currently provides the Family Court Support Worker services in the Toronto family courts, including at the IDV Court.

There are some potential challenges associated with the IDV courts in the Canadian context. For example, given that in Canada most criminal matters are heard in provincial court, there may be challenges associated with the IDV model for matters that must be heard at the superior court level, for example, proceedings under the *Divorce Act* or property matters; this may also be an issue in places where family matters are under the jurisdiction of a unified family court, which is a superior court. The Toronto IDV Court has addressed this particular challenge by limiting its mandate to include only family matters that may be heard by the provincial court. Another issue is that depending on the size of a court's docket, particularly in less populated areas or smaller jurisdictions, there may be insufficient cases for a dedicated IDV court.

Concerns with respect to fairness and due process have also been raised in the context of IDV courts based on the perception that judges may be unduly influenced by evidence that they hear in one case affecting the family that is not admissible or before the court in the other case affecting the same family. Some have argued in response to such concerns that judges in this court model consider the merits of each case separately and decide each case based on the evidence presented and in accordance with the standard of proof required in that proceeding.²⁴⁶ It has also been argued that judges regularly, in both criminal and civil courts, hear evidence which they find inadmissible, and then proceed to decide the case without reference to that evidence.²⁴⁷ It therefore follows from these arguments that fairness and due process should not necessarily be compromised simply on the basis that the same judge is hearing both criminal and family cases. Also see subsection 6.1.5 in Chapter 6 for a discussion of judicial consideration of matters not placed on the record by the parties.

²⁴⁶ Aldrich & Kluger, *supra* note 241 at 83.

²⁴⁷ *Ibid.*

Despite these concerns, the Toronto IDV Court appears promising in approach and an evaluation of the benefits of the Toronto IDV Court by Professors Rachel Birnbaum, Nicholas Bala and Peter Jaffe is underway.

5.2.5 Judicial communications

Direct judicial communication involves discussion between judges where there are concurrent and related proceedings. The purpose of such communications is to coordinate each of the proceedings to ensure that they proceed more efficiently. The focus is not on the merits of the proceedings, but on the process that each is following. Judicial communications must be conducted in a manner which affords procedural fairness to all parties. In the absence of an IDV court, increased judicial communications between the various sectors of the justice system has the potential to improve coordination.

Direct judicial communications are increasingly being used in international cases. In Canada, they have primarily been used in the context of international child abduction cases.²⁴⁸ There, judicial communications are used to obtain information about matters such as the custody laws of the other jurisdiction, to assist in managing the case in each jurisdiction more efficiently, and to promote return of the child, including by ensuring that mirror orders are made in each jurisdiction.²⁴⁹

The Honourable Justice Donna Martinson has suggested that it could be possible to use this model of direct judicial communications in the context of simultaneous criminal and family law proceedings. The objective would be to provide for greater coordination and thus better outcomes for family members. She notes that in cases where there is no IDV court (the situation in most of Canada), the same objective can be achieved through judicial communications.



Case Study – An example of judicial communications in the family violence context

One example of communications between the Supreme Court and the Provincial Court took place in Kelowna, British Columbia in 2009. The issue was delay in the criminal proceeding. The Supreme Court was faced with an interim motion for custody by the mother, an order for no contact, and an order allowing her to leave the province. The father was accused of sexually interfering with a young child and faced a criminal trial in Provincial Court. The family was in chaos; this child and another were experiencing difficulties. Counsel advised the Court that because of the backlog in dealing with criminal cases in the Provincial Court,

²⁴⁸ The Honourable Justice Donna Martinson, “One Assault Allegation, Two Courts: Can we do a Better Job of Coordinating the Family and Criminal Proceedings?” (Presented at the National Judicial Institute program, Quebec, November 2010).

²⁴⁹ See *Hoole v Hoole*, 2008 BCSC 1248.

the trial could not be heard for many months, notwithstanding the important issues at stake.

The fact that the criminal proceedings were ongoing created significant problems in the family law proceeding. It was important that both proceedings be concluded in a timely way. The Supreme Court judge, with the agreement of counsel, contacted the local Administrative Judge of the Provincial Court to see if an early trial date could be obtained. The Administrative Judge immediately scheduled a case conference in her court to do just that. A timely trial date was obtained.

Excerpted from: The Honourable Justice Donna Martinson, “One Assault Allegation, Two Courts: Can we do a Better Job of Coordinating the Family and Criminal Proceedings”? Presented at the National Judicial Institute program, Quebec, November 2010 “Managing the Domestic Civil Case”

Justice Martinson suggests that another option would be for the two courts to hold a joint management/resolution conference in order to help manage both processes effectively. This same approach was suggested by Justice Glenn in *Children’s Aid Society of Huron County v R G.*²⁵⁰ This could provide for a more consistent approach to safety and risk assessment as well as coordination of the processes. It may also provide an opportunity for all of those involved – judges, parties, and lawyers to discuss solutions that could work within the context of both the criminal and family systems. Such discussions would need to safeguard procedural justice guarantees. For example, in the criminal context the accused must be present whenever their case is discussed.

Where courts become aware of a simultaneous proceeding in another court, such judicial communications may offer a means to achieving better coordination in some cases.

5.2.6 Coordinated court/court coordinator models

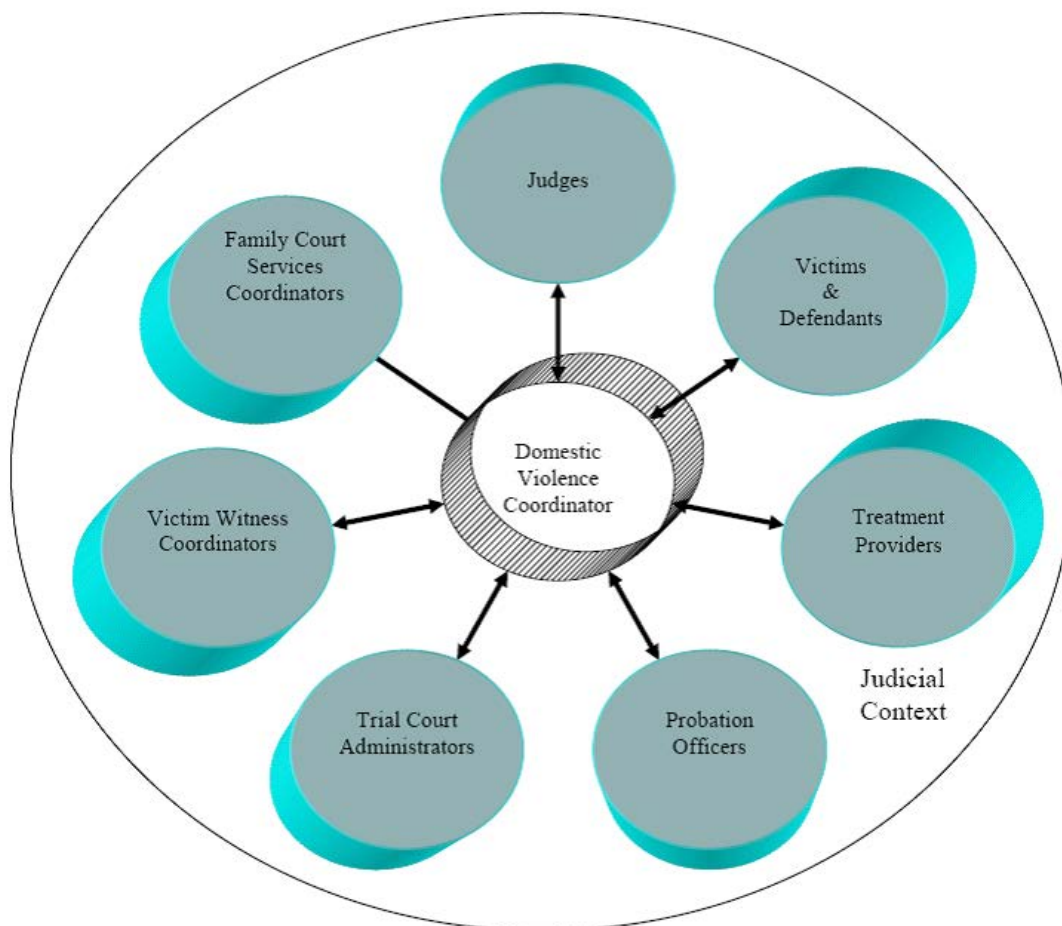
Another model that has been recommended is a coordinated court model: the individual courts still specialize in family, criminal or child protection matters and these matters are heard by different judges, but the proceedings, evidence, and court-related services would be coordinated by a court coordinator.²⁵¹

This approach is similar in concept to the role played by the Domestic Violence Court Coordinator in the Idaho IDV Court model. They are the center of the system linking the courts, services and family members. This model is illustrated²⁵² as follows:

²⁵⁰ (2003), 124 ACWS 3d 712.

²⁵¹ Neilson, *supra* note 20 at 150.

²⁵² Nicole R Hill and David M Kleist, *Evaluation of the Idaho Supreme Court OVW Grant to Encourage Arrest Policies and Enforcement of Protection Orders* (United State Department of Justice, Office on Violence Against Women, August 2008).



While in the Idaho model the Coordinator plays this role within an IDV Court, conceivably, a Coordinator could play a similar role, although a more challenging one, by coordinating between the different justice systems, associated services and family members. In fact, although primarily focused on coordination in the criminal justice system, the Domestic Violence Court Coordinator in New Brunswick partially plays this role, through their information-sharing function between the different sectors of the justice system.

The Domestic Violence Division of the Eleventh Judicial Circuit in Miami-Dade, Florida also has a model where administrative officers play a critical role in the coordination of cases and services. The Domestic Violence Court has jurisdiction over civil injunctions, orders of protection, violations of orders and misdemeanor criminal offences involving domestic violence. The court also has jurisdiction over all family law issues, including division of property, custody and support. There are seven judges of the court who rotate in and out of hearing the civil and criminal cases. Unlike the models in New York, Idaho and Vermont, there is not a “one family – one judge” model. Coordination, however, is facilitated through “intake officers” and “case managers.”

In the Miami-Dade model, there is an intake unit, which provides assistance in obtaining temporary injunctions (protective orders) as well as referrals to community resources. The intake process uses what is described as a “customized state-of-the-art network and client-server software application program”, which allows all case information to be available to the Clerk of the Court, for follow-up and reprinting of forms as necessary. Once a case is processed, the network database searches for all pending or connected civil, family, juvenile and misdemeanor criminal court cases. This information is included in the petition for the injunction with the purpose of avoiding conflicting orders.

The case management unit is staffed with lawyers, and their primary role is to help the Domestic Violence Division with respect to permanent injunctions (permanent protection order) hearings. Their role is particularly important since most litigants are unrepresented. The case managers have numerous functions, which include to:

- Provide information to litigants about the court processes and community resources;
- Cross reference information between the Domestic Violence, Family, Criminal and Juvenile divisions of the Court – to ensure a coordinated approach and reduce the likelihood of conflicting orders;
- Write draft orders for the court on issues such as visitation schedules;
- Calculate child support;
- Make referrals to community agencies providing services;
- Conduct criminal and injunction checks, in advance of a determination of whether referral to a 26 week batterer’s intervention program is appropriate (it is mandatory in some cases and if an individual has had a previous injunction in any jurisdiction, there is a mandatory requirement that they attend a batterer intervention program); and
- Monitor compliance with the conditions of injunctions.²⁵³

Although there has been no formal evaluation of the Domestic Violence Division, Judge Kelly, the Administrative Judge of the Domestic Violence Division, reports that it is working well. Further improvements to the functioning of the court, including the ability to search additional criminal databases are under consideration.

5.2.7 Aboriginal Courtwork Program

The Aboriginal Courtwork (ACW) Program serves as an example of a service that can assist with respect to the coordination of the different court sectors. The ACW’s primary purpose is to help Aboriginal people who are in conflict with the criminal justice system to obtain fair, just, equitable and culturally sensitive treatment. This objective is achieved by:

²⁵³ Joel H Brown et al, *Eleventh Judicial Circuit of Florida, Administrative Office of the Courts: Domestic Violence Division* (Miami, FL: Eleventh Judicial Circuit, 2010). See also Eleventh Judicial Circuit of Florida (Miami), online: <<http://www.jud11.flcourts.org/multitop.aspx?pid=267>>.

- Providing non-legal advice and information to Aboriginal persons charged with an offence and their family members at the earliest possible stage and throughout the criminal justice process;
- Referring Aboriginal persons charged with an offence to appropriate legal resources at key stages of the justice process (e.g. arrest, trial, sentencing);
- Referring Aboriginal persons charged with an offence to appropriate community resources, including alcohol, drug and family counselling, and educational, employment and medical services to ensure they have help addressing the underlying problems that have contributed to their criminal behaviour or problems that have led to the laying of criminal charges, and where appropriate, advocating for services for Aboriginal persons charged with an offence and ensuring that those services are delivered;
- Providing assistance, as appropriate, to other Aboriginal persons involved in the criminal justice process (e.g. victims, witnesses);
- Promoting practical, community-based justice initiatives and helping build the capacity of these programs to identify and address problems that could end up in the courts or community justice system;
- Serving as a bridge between criminal justice officials and Aboriginal people and communities, by providing a liaison function and facilitating communication and promoting understanding between the parties; and
- As “Friends of the Court,” providing critical background and contextual information on the accused and making the court aware of alternative measures and options available in the Aboriginal community.

In many jurisdictions, there are no Aboriginal-specific services providing information, support and referrals for family law court cases; therefore jurisdictions report a need to better connect criminal and family justice system responses. Many ACW Programs report that they are often asked to continue to support their clients through parallel or related proceedings in family law or child protection matters.²⁵⁴

ACW family law services do exist in some jurisdictions. Alberta and Ontario have been supporting ACW family services for over 35 years and Saskatchewan is currently piloting ACW family services. In the Northwest Territories, the role of ACW services in family matters expanded following a study in 2008/2009 that provided recommendations on how courtworkers could provide additional services to family law clients. Where they exist, ACW family law services allow for services similar to those provided to clients with criminal matters: information, support, liaison and referral services to Aboriginal parents and other family members in relation to family law or child protection matters, and establishing effective communication between Aboriginal people and justice officials.

²⁵⁴ FPT Deputy Ministers Responsible for Justice and Public Safety highlighted the ACW Program as an effective program response in the *2009 Action Plan to Address Victimization and Abuse in Aboriginal Communities*. They also supported “expanding the mandate of the Aboriginal Courtwork Program to support the provision of courtworker services in family law matters.”

Chapter 6 Evidentiary issues

Evidentiary issues are extremely complex and can be very overwhelming for self-represented litigants. In the context of parallel or related proceedings involving family violence, there are a number of evidentiary issues that may potentially arise and which are related to coordination and safety, notably:

- Whether evidence from one proceeding may be produced by the parties as evidence in another proceeding (e.g. criminal to family and vice versa); and
- Whether the scope of disclosure of information to the accused in the criminal proceeding, or to the parent(s) in child protection proceedings, may have safety implications for the victim(s) of family violence.

In addition to litigants' attempts to obtain evidence from one proceeding to place before another related proceeding, there is also the issue of whether the court can consider orders from a related proceeding even when the litigants have not introduced the orders into the record. This is particularly relevant where litigants are self-represented.

6.1 Evidence from one proceeding to another

When parties are involved in multiple proceedings stemming from situations of family violence, they may well find information and documents gathered for one case or investigation to be relevant and useful in another related court proceeding. For example, documents gathered by police as part of a criminal investigation or in preparation for a trial (known as Crown prosecution records or briefs) can include such information as:

- The statements given to the police by the accused, the complainant(s), and witnesses;
- "Will say statements" summarizing the anticipated evidence of the witnesses;
- Police occurrence or incident reports;
- Forensic reports;
- Photographs;
- Medical reports; and
- Police officers' statements and notes.

These may be very helpful to a parent who is attempting to gain custody or access to children in a private family law matter, especially when these documents support allegations of intimate partner violence or child abuse on the part of the other parent. Child protection officials may also want to access these police and prosecution records when attempting to establish a case that a child is in need of protection due to family violence. Likewise, information compiled by child protection agencies may be helpful to prove or defend against criminal charges relating to intimate partner violence or child abuse. These include:

- Investigative notes;
- Taped interviews;
- Statements from family, friends and neighbours; and
- Medical, psychiatric, therapeutic and educational records.

However, as we will see in this section, a party's ability to access these documents or to file them as evidence will depend on more than mere relevance to the case.²⁵⁵

Any party wishing to access information originally generated for the purpose of one proceeding and have it admitted as evidence in another proceeding must request it pursuant to the relevant court rules, which will vary according to jurisdiction and type of proceeding. However, even where production of information and its admissibility in court is provided for by statute or common law, trial judges always have the discretion to exclude evidence when the prejudicial impact outweighs its probative value. The court's determination is therefore often highly contextual, requiring a delicate balancing of the various interests at stake.

The following sections describe certain challenges related to production of records in the context of criminal or civil trials. Most of the barriers to accessing and admitting potential evidence are grounded in statutory and common law rules. This section also points out some of the challenges that disclosure rules can pose to the safety of victims of family violence. The chapter ends with a discussion of recent initiatives which help provide courts with a consistent framework determining the admissibility of relevant police-generated records in civil matters, as well as to facilitate parties' access to this information.

6.1.1 Criminal trials

The Crown prosecuting a criminal matter may be barred from submitting information that was generated for a civil or child protection case given the criminal law rules regarding hearsay,²⁵⁶

²⁵⁵ This report does not address the complex and nuanced area of law regarding the admissibility of pleas, admissions and court rulings from related proceedings. Indeed, parties may encounter a host of evidentiary considerations when dealing with parallel cases stemming from situations of family violence. For example, a guilty plea in a criminal matter is considered a full admission to responsibility for all of the elements of the offence for the purpose of a civil matter; nonetheless in some circumstances the convicted party may be permitted to rebut the presumption of wrongdoing in a civil hearing. On the other hand, a finding of not guilty in a criminal trial does not automatically determine responsibility in a civil matter, considering the different standards of proof and rules of evidence in the two proceedings. While these and other rules of evidence may be critical considerations for parties engaged in multiple proceedings, it is beyond the scope of this paper to delve into these legal issues.

²⁵⁶ Statements and records generated in other contexts by persons not before the court are *prima facie* hearsay and may not be admitted for the truth of their content in criminal proceedings unless they fall within one of the exceptions to the hearsay rule, including the principled exception to the hearsay rule which evaluates the necessity and reliability of the statement. The court has a residual discretion not to admit a statement that falls within one of the exceptions to the hearsay rule if the court assesses that the prejudicial effect of the evidence outweighs its probative value.

prior statements,²⁵⁷ self-incrimination,²⁵⁸ and the non-admissibility of involuntary out-of-court statements.²⁵⁹ Parties may furthermore be restricted from accessing and filing child protection records – however relevant – on the basis of the public interest in promoting therapeutic and other relationships of trust, as well as by concerns to protect the privacy of individuals who deal with social agencies.²⁶⁰ In summarizing the position of the Children’s Aid Society (CAS) in *R v Medwid*, the Ontario Court of Justice confirmed the importance of privacy:

Applications involving [CAS] records tend to place an already marginalized group at a further disadvantage by making them the subject of additional scrutiny based solely on the fact that their lives have been documented by reason of their involvement with social agencies. As well, therapeutic records developed in the course of contact with social agencies hold a particular privacy interest because they are characterized by an inherent assumption of confidentiality and trust, such that revealing the records bears the risk of impairing the dignity of the subject person.²⁶¹

It should be noted that in the bail context the rules of evidence are relaxed. The court may make its decision about whether to detain or release the accused pursuant to Part XVI of the *Criminal Code* based on evidence considered credible or trustworthy notwithstanding that the evidence may not be admissible at trial.²⁶² Thus in the bail context it is possible for the court to consider information from third parties, such as a child protection agency, to decide whether the accused should be released or detained in custody. Of particular relevance in the child

²⁵⁷ The prior statement of a witness is not evidence of the truth of its content unless the witness repeats or adopts the statement while testifying, or an exception applies. A prior statement is normally used to test the credibility of a witness in respect of their testimony before the court. A party calling a witness may not bolster the testimony of the witness through introduction of a prior consistent statement (for example, one made in a civil proceeding) unless one of the exceptions apply, such as an allegation made by the other party of recent fabrication of the in-court statement, such as where a rebuttal is necessary to counter a specific allegation of recent fabrication.

²⁵⁸ The protection against self-incrimination is guaranteed under section 13 of the *Charter*. In *R v Nedelcu*, 2012 SCC 59, [2012] 3 SCR 311, the majority of the Court held that the Crown could cross-examine the accused on evidence given by him at a related civil discovery on the basis that section 13 does not extend to *any* evidence the witness may have been compelled to give in a prior proceeding but only to *incriminating* evidence.

²⁵⁹ In criminal law, an out-of-court statement or confession made by an accused to a person in authority must have been given freely and voluntarily to be used by the Crown as evidence of the truth of its content in a criminal trial. In some cases, child protection workers have been found to be “persons in authority”, in particular when their work is done in collaboration with conventional investigatory and prosecutorial state agencies. If the Crown decides not to introduce the statement for the truth of its content, but instead to use it as a prior statement upon which to cross-examine the accused, the Crown must still prove the voluntariness of the statement. The defence cannot introduce into evidence a statement made by the accused to a person in authority.

²⁶⁰ If the records of the child protection agency do not fall within the Crown’s primary disclosure obligation they may be subject to an application by the accused to have the records accessed and produced pursuant to the common law procedure and test set out in *R v O’Connor*, [1995] 4 SCR 411. If the defence is able to satisfy the court that the records are “likely relevant” then the court may order the production and review of the records to determine whether they should be produced to the accused. The records may be redacted to ensure that only relevant material is produced and that no unwarranted invasion of privacy occurs. The accused’s access to third party records as defined in section 278.1 of the *Criminal Code* in proceedings involving sexual offences is subject to the statutory scheme outlined in sections 278.2 to 278.9 of the *Criminal Code*.

²⁶¹ *R v Medwid*, [2008] OJ No 4614 at para 21.

²⁶² *Criminal Code*, *supra* note 129, s 518(1)(e).

protection context is paragraph 518(1)(d.1) of the *Criminal Code* which directs a justice deciding whether to release or detain an accused to take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of, or witness to, an offence.

6.1.2 Disclosure to the accused in the criminal proceeding and to parents in child protection proceedings

Disclosure rules in the criminal and the child protection contexts are grounded in constitutionally protected rights. Disclosure in the criminal context can potentially place the accused in an advantageous position with respect to a family law matter in which the other parent may not have access to the same evidence related to incidents of family violence. There are also concerns that the accused might receive disclosure of sensitive information in the possession of the Crown or may have a right to access sensitive information in the possession of a third party. For instance, information gathered in the context of a risk assessment related to whether the victim is in another romantic relationship could trigger retaliatory violence against the victim should the accused obtain the information through either disclosure or through a right to access information. Similar concerns arise in the context of disclosure of records to an allegedly abusive parent in the context of child protection hearings.

In order to ensure that the *Charter* rights of the accused to make full answer and defence are respected, the defence has the right to disclosure of all relevant information in the Crown's possession (Crown disclosure) as well as a right to access material in the possession of a third party (third party disclosure).²⁶³ In *R v Stinchcombe*, the Supreme Court of Canada clarified and consolidated the general principle of Crown disclosure, as summarized in *R v Taillefer*:

The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea. Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. This Court has defined the concept of "relevance" broadly...²⁶⁴

The obligation of the police to provide the prosecution with disclosure under *Stinchcombe* is limited to all materials pertaining to the investigation of the accused.²⁶⁵ The Crown then has some very limited discretion with respect to the manner and timing of disclosure²⁶⁶ to the

²⁶³ *R v Stinchcombe*, [1991] 3 SCR 326 at para 29 (which significantly expanded the common law obligation on the Crown to disclose relevant evidence to the defence); *R v O'Connor* [1995] 4 SCR 411 at 156 (sets out the regime for disclosure of third party records).

²⁶⁴ *R v Taillefer*, 2003 SCC 70, [2003] 3 SCR 307 at para 59.

²⁶⁵ *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 at paras 13, 14.

²⁶⁶ See e.g. Alberta Ministry of Justice and Solicitor General, *Guideline: Disclosure by the Prosecution* (May 28, 2008), online:

defence but the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege, most notably informer and solicitor-client privilege (two forms of “class privilege”)²⁶⁷ and privilege in counselling records.²⁶⁸ Solicitor-client privilege has been classified as a principle of fundamental justice by the Supreme Court of Canada.²⁶⁹ Therefore, the obligation to produce solicitor-client privileged materials through disclosure, as with informer privilege, arises only when the accused’s innocence is at stake²⁷⁰ or where there is a threat to public safety.²⁷¹

With regards to third party records (including psychiatric, medical or other counselling records), the privilege must be assessed on a case-by-case analysis according to the *Wigmore* test for privilege.²⁷² Moreover, access to third party records to which the complainant has a reasonable expectation of privacy is governed by both the common law rules (known as the *O’Connor* rules)²⁷³ and by sections 278.1 to 278.91 of the *Criminal Code*. The statutory provisions cover

http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/disclosure_by_the_prosecution.aspx, which provides that disclosure may be delayed where the safety or security of a person would be at risk as a result of disclosure. A specific process for the delay of disclosure is outlined. Disclosure to a self-represented accused may also be controlled by the Crown in cases where the safety, security or privacy of a person providing relevant information to the prosecution might be jeopardized.

²⁶⁷ *R v Gruenke*, [1991] 3 SCR 263 (The Court made a distinction between “class” and “case-by-case” privilege whereby the former benefit from a *prima facie* presumption that the communications are privileged and inadmissible and the latter are subject to a *prima facie* assumption that the communications are not privileged and are admissible. Class privileges are few, including under statute (spousal immunity) and at common law (solicitor-client privilege, informer privilege, litigation privilege and settlement discussions between actual or contemplated litigants); David M Paciocco & Lee Struesser, *The Law of Evidence* (Toronto: Irwin Law, 2008) at 219; Coughlan, *supra* note 143 at 210.

²⁶⁸ Coughlan, *supra* note 143 at 215.

²⁶⁹ *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445 at para 41.

²⁷⁰ *Ibid* at para 46-61 (The Court set out the *McClure* test which comprises a threshold question and a two-stage innocence at stake test, in *R v Brown*, 2002 SCC 32, [2002] 2 SCR 185 at para 4. The accused must first establish that the protected information is not available from any other source. If this is satisfied, the judge must assess that (1) the accused demonstrated sufficient evidence that the communication exists and that it could raise a reasonable doubt as to the guilt of the accused; and (2) the communication itself is likely to raise a reasonable doubt regarding the guilt of the accused (which the judge would review alone)).

²⁷¹ Paciocco & Struesser, *supra* note 267 at 234.

²⁷² John H Wigmore, *Evidence in Trial at Common Law*, 3rd ed, revised by J T McNaughton, vol 8 (Boston: Little Brown, 1961) at 2258 (Wigmore set out four conditions for the case-by-case analysis of privilege: (1) the communication must originate in a confidence that it will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relations by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation).

²⁷³ *R v O’Connor*, [1995] 4 SCR 411 at para 31 (The Court created a two stage process for deciding whether third party records should be produced. First, the accused must persuade the judge to examine the records personally – this involves a balancing of the accused’s right to full answer and defence and the third party’s privacy interests. At the second stage, the judge must decide whether to order the release of any portion of the records based on a number of factors including: (1) the extent to which the record is necessary to the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or

and include education, employment, child welfare and social services records,²⁷⁴ however, these provisions apply only to listed sexual offences; for non-sexual family violence offences, the *O'Connor* rules would apply.

It should be noted that privilege belongs to the “holder”, for whose benefit it was created, and can therefore be explicitly or implicitly waived.²⁷⁵ Therefore, in most cases where confidential information was provided by a victim to a counsellor and then subsequently shared with others upon the consent of the victim (e.g. through a risk assessment) the privilege will likely have been waived. Moreover, the disclosure rules apply to all relevant material even if the material is not in the hands of the Crown. Production requests for third party records may result in disclosure unless the records can be withheld under sections 278.1 to 278.91 of the *Criminal Code* (for sexual offences) or under the *O'Connor* rules.²⁷⁶

In child protection cases, standards for disclosure are set out in provincial child protection legislation.²⁷⁷ In addition, as noted above, constitutional disclosure requirements similar to those in the criminal context, apply in the context of child protection matters since the state removal of the child from parental custody constitutes an interference with the psychological integrity of the parent and triggers *Charter* protection.²⁷⁸

6.1.3 Family law and child protection trials

Police investigation and child protection files are routinely shared between these two agencies on an informal basis. This is especially true if police and child protection officers are conducting a joint investigation in their efforts to obtain all relevant information required to ensure the safety of victims of family violence. However, where there has been disagreement over the production of police investigation records in child protection cases, courts have placed a strong emphasis on accessing information which can help to determine the best interest of the children, even at the expense of privacy concerns or potential *Charter* violations. While police reports and witness statements may be of questionable value as evidence of parental capacity, (especially if they have not led to the laying of actual criminal charges and have not been scrutinized under cross-examination), evidence of past criminal behaviour has generally been considered relevant to child custody disputes and protection applications. These documents will normally be redacted or information withheld to reflect concerns for the integrity of the criminal justice system, the goal of witness cooperation, party and third party privacy rights, safety concerns and Crown privileges.

bias; and (5) the potential prejudice to the complainant’s dignity, privacy or security of the person that would be occasioned by the production of the record in question [emphasis added]).

²⁷⁴ *Criminal Code*, *supra* note 129, s 278.1; However, see *R v Mills* [1999] 3 SCR 668.

²⁷⁵ *Paciocco & Struesser*, *supra* note 267 at 220-222.

²⁷⁶ *R v O'Connor*, [1995] 4 SCR 411; *R v Carosella*, [1997] 1 SCR 80.

²⁷⁷ For example, in Ontario, s 74 of the *Child and Family Services Act*, RSO 1990, c C-11, provides the procedure for accessing records. Also, pursuant to s 76(20) and (21) of Manitoba’s *Child and Family Services Act*, CCSM c C80, an individual can seek access to all or part of a record in the possession of a child and family services agency.

²⁷⁸ *Supra* note 56.

Tensions are heightened, however, when such Crown prosecution/police investigation records are sought by child protection agencies when there is an ongoing criminal matter, especially when the documents at issue will be subsequently disclosed to parents who are themselves implicated in the criminal file. It is important to keep in mind that in the child protection context, parents have the right to access most of the documents in the hands of child protection agencies relating to their case. Therefore, releasing police files to these agencies may directly result in their being released to the parents. In such circumstances, there may be a real concern that prematurely exposing prosecution/investigation records will jeopardize the integrity of the criminal investigation or trial. On the other hand, given the often slow pace by which criminal matters proceed through the courts, the urgency of having child custody and protection issues handled quickly with the help of the broadest possible evidentiary record is also of great public interest. Courts have asserted that when it comes to family violence, neither system is paramount. Indeed, since both systems are designed to protect the safety of those vulnerable to family violence and abuse, when interests collide, courts will have to engage in a fact-driven and sensitive balancing process. As noted in *Children's Aid Society of Algoma v S B*²⁷⁹:

In reality, the collective criminal justice system and child protection system are integrated and have separate and overlapping features to protect the mother and the children. Neither system by itself offers the optimal protection of the mother or the children. Only a blend of the two systems and proceedings can optimize the protection of the mother and children.

6.1.4 Practical issues

A review of the law in this area demonstrates that it is highly complex, even for those who are legally trained. One can only imagine how overwhelming evidentiary issues would be for unrepresented litigants, who comprise a large number of individuals in the family law context. A self-represented litigant, seeking to have information from a criminal proceeding introduced as evidence in a family law trial, will likely find it extremely challenging. In some cases, this may result in inconsistent findings in the criminal and family cases. Mr. Justice Harvey Brownstone has written the following about this issue:

There have been cases in which a family court was not satisfied on a balance of probabilities that Parent A assaulted Parent B, and yet a criminal court was satisfied beyond a reasonable doubt that the assault occurred. How could this happen if the standard of proof in family court is so much lower than in criminal court? If the evidence was not even compelling enough to convince a family court judge that Parent A *probably* assaulted Parent B, how could a criminal court judge (or jury) find *beyond a reasonable doubt* that the assault happened?

There can be several reasons for this apparent inconsistency. Different evidence may have been presented in each case. For example, medical records providing the injuries may have been presented in the criminal court case but not in the family court case. Witnesses who

²⁷⁹ [2008] OJ No 3132 at para 15.

observed the incident may have testified in the criminal court but not in the family court case. I have seen this happen in cases in which the assaulted party did not have a lawyer in the family court case and did not put the best available evidence before the court. In criminal court, this problem does not exist because the prosecution does all of the work in obtaining and presenting the evidence needed to prove the offence.²⁸⁰

6.1.5 Judicial consideration of orders and evidence not on the record

Concerns have been expressed regarding how a judge might consider orders and evidence from another proceeding, where that evidence has not been adduced by the litigants and therefore not on the record before the court. A judge may be placed in a difficult position, being aware of a relevant order or evidence in another proceeding involving the same litigants and yet not wanting to intrude on the adversarial process and jeopardize trial fairness by considering evidence which has not been formally admitted.²⁸¹ There is jurisprudence which highlights this evidentiary issue.²⁸² Proponents of the Integrated Domestic Violence Courts in the State of New York assert that the court can take judicial notice of information contained in another case where notice has been provided to both parties and the information has been made part of the record.²⁸³ It is unclear in the Canadian context whether the doctrine of judicial notice would apply in such circumstances.²⁸⁴

6.2 Promising practices

6.2.1 *D P v Wagg*

Although determining when to order the production of Crown prosecution records is a highly contextual exercise, certain guidelines are being developed. The Ontario Court of Appeal, in the 2004 case of *D P v Wagg*²⁸⁵ adopted a screening process which has since been widely applied when these records are being sought for use in a civil matter. In *Wagg*, the plaintiff brought a civil action for damages arising out of an alleged sexual assault by the defendant. The defendant had not been criminally convicted, since the charges were stayed due to unreasonable delay. In support of her civil action, the plaintiff was seeking the production of statements the defendant had given to police during the criminal investigation. These statements had been held to be inadmissible at the criminal trial because the Court found that the right of the accused to counsel under section 10(b) of the *Charter* had been violated.

²⁸⁰ Brownstone, *supra* note 61 at 130-131.

²⁸¹ This may be a greater concern when a litigant in a family case who was a victim of intimate partner violence chooses not to introduce a relevant criminal or emergency protection order into the record. The reasons for not doing so could include fear that the litigant may be viewed as an “unfriendly parent” or reluctance to be cross-examined on sensitive issues.

²⁸² See *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367; *R v Truong*, 2008 BCSC 1151.

²⁸³ Aldrich & Kluger, *supra* note 241 at 82, citing the case of *Hector G v Josefina P*, Supreme Court of New York, Bronx County, 2 Misc 3d 801; 771 NYS 2d 316 (2003).

²⁸⁴ See *R v Find*, 2001 SCC 32, [2001] 1 SCR 863; *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458.

²⁸⁵ *D P v Wagg* (2004), 239 DLR (4th) 501, [2004] OJ No 2053 (CA), *aff'g* *D P v Wagg* (2002), 61 OR (3d) 746 (Ont Div Ct).

As a result of disclosure during the criminal trial, the defendant in *Wagg* was in possession of the police investigation records held by the prosecution. Under the Ontario Rules of Civil Procedure, there was no mechanism to put the Crown on notice regarding the production request, and no way to afford the Crown the opportunity to be heard on the matter. In order to address this issue, and in particular concerns related to privacy and the integrity of the criminal process, the Ontario Court of Appeal confirmed the use of a process which has come to be known as the *Wagg* screening mechanism, and ordered the evidence to be produced. While emphasizing the importance of having the most complete form of discovery possible in civil proceedings, Justice Rosenberg accepted that there may be compelling public interest reasons for withholding some information.²⁸⁶

The process adopted by the Court of Appeal in *Wagg* is as follows:

- A party in possession of Crown prosecution materials must disclose their existence in the affidavit of documents if they are party to a civil proceeding in which the materials may be relevant.
- Secondly, that party should not disclose the full contents of the records until the Crown, the police, or both have consented to its release, or until a court order has been issued compelling its disclosure. When deciding whether to compel disclosure, the court must be satisfied that the record in question contains information that may be relevant.
- If this threshold is met, the court then embarks upon a weighing process in order to determine whether “there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information.”²⁸⁷

Justice Rosenberg recognized that the *Wagg* screening process could add significant delay and cost to litigation.²⁸⁸ However, he thought that most production requests could be resolved on consent:

I would expect that the parties and the state agents could usually agree to disclosure of materials in many circumstances. Where the party in possession of the Crown prosecution records has access to the materials, fairness will generally dictate that they be produced to the other side....

As well, the parties and the state agents should agree to produce any information in the Crown prosecution records that was used in court in the course of the criminal prosecution, subject to some interest of superordinate importance, such as private records of sexual assault complainants or confidential medical records.²⁸⁹

²⁸⁶ *Ibid* at para 54. Notably, this particular *Charter* violation was *not* considered a barrier to production for civil purposes, according to the Court of Appeal, since it would not necessarily bring the administration of justice into disrepute, para 71.

²⁸⁷ *Ibid* at para 17.

²⁸⁸ *Ibid* at para 50.

²⁸⁹ *Ibid* at para 52; See also Di Luca, Dann & Davies, *supra* note 145 at 45-46 for a discussion of this issue.

While not adopted in every jurisdiction, the *Wagg* screening process has been used both in and outside of Ontario and has been mentioned with approval by the Supreme Court of Canada.²⁹⁰

Since *Wagg* had to do with private parties litigating a civil matter, the issue quickly arose whether the *Wagg* procedure also applied when public bodies such as CAS were seeking access to prosecution records. Indeed, amongst the explosion of requests for prosecution records made to the Ontario Ministry of the Attorney General following *Wagg*, twenty percent involved child protection cases, second only to motor vehicle accidents.²⁹¹ A 2007 decision, *Children's Aid Society of Algoma v D P*,²⁹² settled the issue, confirming that *Wagg* does apply to CAS applications for third party records.

In *Algoma*, the CAS was concerned that children in a reportedly high-conflict and violent household were at risk of emotional harm and exposure to inappropriate conduct. The CAS requested that the Attorney General (AG) of Ontario disclose police records, the contents of Crown prosecution records and probation and parole records in relation to the children's mother and her boyfriend. The AG asserted a privacy interest on the part of third parties identified in the records. The AG also expressed concern that there would be a "litigation chill" for criminal matters if the information was produced: witnesses might be reluctant to cooperate with police if their names might afterwards be disclosed to the CAS.²⁹³

The CAS argued that the privacy rights of those third parties should be trumped by the need to protect the best interest of the children. In this case, there was no ongoing criminal investigation, the integrity of which might be affected by the production of records. Justice Pardu agreed that privacy and public interest concerns may potentially limit production, although that will be rare considering the "substantial public interest in supporting the work of children's aid societies."²⁹⁴ Ultimately, CAS was given access to the files, with the exception of internal police codes, Finger Print Service numbers, and confidential informant names which were redacted. In addition, for copies provided to the children's parents by way of disclosure, the court further ordered the removal of third party social insurance, driver's license and license plate numbers, dates of birth, telephone numbers and addresses. The court stated that:

[I]ndividuals who give police information that raises concerns about the wellbeing of a child, should expect that that information will be transmitted to a children's aid society, as police officers are required to report reasonable suspicions that a child may be at risk to a children's aid society. (...) While there may be records which are exceptionally sensitive and touch upon intensely private matters and should be protected from disclosure even to [a] children's aid society, on the ground that they are of marginal utility to an investigation, in

²⁹⁰ *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 at para 46.

²⁹¹ Crystal O'Donnell & David Marriott, "Collateral Use of Crown Brief Disclosure – A Study Paper" (Edmonton: Paper delivered at the Uniform Law Conference of Canada, 2006) at 23.

²⁹² [2007] OJ No 3601.

²⁹³ *Children's Aid Society of Algoma v D P*, [2006] OJ No 1878, at para 27.

²⁹⁴ *Ibid* at para 14.

most cases production of relevant police records to a children's aid society will not undermine the reasonable expectations of privacy referred to in those records.²⁹⁵

It should be noted that there are different practices in various provinces and territories with respect to *Wagg* applications with varying degrees of cooperation between the child protection and Crown prosecution services.

6.2.2 Uniform Prosecution Records Act

In 2010, the Uniform Law Conference of Canada (ULCC) adopted a uniform law in order to provide a consistent set of rules regarding the admissibility of Crown prosecution records²⁹⁶ in civil and administrative proceedings.²⁹⁷ The effect of the *Uniform Prosecution Records Act* would be to extend the principles adopted in *D P v Wagg* uniformly across Canada when the Crown or police refuse to produce requested documents.²⁹⁸

According to the *Uniform Prosecution Records Act*, under ordinary circumstances, prosecution materials can only be produced upon the consent of the Attorney General or the Ministry responsible for the investigation and prosecution of the offence, or of the relevant police force.²⁹⁹ The only exception would be when a court orders production under the rules established in the Act.³⁰⁰ This rule does not apply to prosecution records being shared between child protection authorities.³⁰¹ Subsection 3(3) empowers courts to make a determination as to who should receive notice of an application for disclosure, with the expectation that those who are the subject of the prosecution records will have the reasonable opportunity to make representations.

When considering whether to compel production despite objections, subsection 4(2) directs the court to take into consideration the following factors:

1. The stage in the proceeding at which the court hears the application;
2. The specific purpose for which the application is made and the anticipated use of the prosecution record in the proceeding;

²⁹⁵ *Ibid* at paras 21, 27.

²⁹⁶ "Prosecution record" is defined in the *Uniform Act* as a record that is, (a) made or obtained by a police force during the investigation of an offence or alleged offence, regardless of whether the record is or has been shared with the Crown, or (b) made or obtained by the Crown in relation to the investigation or prosecution of an offence or alleged offence (section 1).

²⁹⁷ Proceedings include actions, applications or other civil proceedings; administrative, disciplinary or regulatory proceedings; inquests or inquiries other than coroners' inquests or public inquiries, arbitrations, and any other proceedings before a court or tribunal in Canada other than the prosecution of an offence. (section 1)

²⁹⁸ *Uniform Prosecution Records Act*, Uniform Law Conference of Canada, online: <http://www.ulcc.ca/en/2010-halifax-ns/573-civil-section-documents-2010/1196-uniform-prosecution-records-production-act>.

²⁹⁹ *Ibid*, s 2.

³⁰⁰ *Ibid*, s 3.

³⁰¹ *Ibid*, s 2(4).

3. Whether the information contained in the prosecution record is readily available from another source;
4. The role of the following persons in the investigation or prosecution to which the prosecution relates:
 - a. The party, if any, wishing to produce the prosecution record;
 - b. Any party to whom or on whose behalf the prosecution record would be produced;
5. The privacy interests of any person who is referred to in the prosecution record;
6. In the case of a child protection proceeding, the best interests of the child who is the subject of the proceeding;
7. Any other relevant factor.

According to subsection 4(3) of the *Uniform Prosecution Records Act*, the court is to refuse an application for production if there is an ongoing investigation or prosecution to which the record relates, unless the records are being sought for a child protection proceeding, or unless other special circumstances militate in favour of production. It is worth noting that the best interests of the child who is the subject of a private custody or access matter in a family court is not specified as a relevant factor which would weigh in favour of compelling production.

6.2.3 Use of access to information legislation

Because the *Wagg* application process does not appear to be widespread across the country, litigants in many jurisdictions rely upon applications for information through the relevant access to information legislation. For example, in Alberta the *Freedom of Information and Protection of Privacy Act*³⁰² contains a section that allows a public body (which would include Crown prosecutors) to disclose personal information under the following relevant circumstances:

40(1) A public body may disclose personal information only

...

(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,

...

(ee) if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person,

...

(gg) to a law enforcement agency, an organization providing services to a minor, another public body or any prescribed person or body if the information is in respect of a minor or a parent or guardian of a minor and the head of the public body believes, on reasonable grounds, that the disclosure is in the best interests of that minor.

For more information on privacy legislation and the exchange of information, see Chapter 7.

³⁰² RSA 2000, c F-25.

6.2.4 Ontario protocols

As indicated by Justice Rosenberg and by the *Uniform Prosecution Records Act*, the *Wagg* decision does not preclude the Crown or relevant police forces from choosing to release their own materials. According to Helen Murphy of the Catholic Children's Aid Society of Toronto, resistance to information sharing in these circumstances can often be resolved through discussions between the counsel for child protection and counsel for the Crown, provided that a Crown is assigned to the criminal matter at an early stage of the proceedings.³⁰³ Taking this arrangement one step further, a protocol has recently been implemented in Ontario to facilitate the release of information directly between police services and a CAS, without the need for the involvement of the Ministry of the Attorney General. According to the protocol, the CAS files a *Wagg* motion with the court and serves the police, who respond with a template order for the court. The protocol specifies that when there are no outstanding charges or ongoing proceedings, the police force is empowered to release the police-generated information in its possession, subject to a number of considerations including statutory protections, public interest immunity and/or privileges and third party privacy. Information is provided which covers the essential substance needed to inform the applicant of the child welfare concerns (i.e. synopses, statements, police officer notes, forensic reports). The recipient must also agree not to use the information outside of the child protection proceeding for which it is being sought.

While third parties have an interest in protecting their privacy in these matters, it would be extremely time intensive if not impossible to try to contact them all to obtain their consent to disclosure. Therefore, the Attorney General and police have tried to assess the appropriate balance between relevancy and privacy when it comes to third parties whose information is being sought through a *Wagg* motion. Routine redactions include addresses, personal information, driver's licence and health care numbers, unrelated criminal records, psychiatric records, medical history, journals, autopsy photos and statute-based exclusions (such as DNA information, wiretap materials, youth records and information obtained via a search warrant under the *Criminal Code*).

According to the Ontario Ministry of the Attorney General, the template order has been a success; the demand to the AG's office has dropped considerably and there has not been one litigated case since the template order came into use. Nonetheless, the Ministry of the Attorney General's office continues to handle about five hundred disclosure requests per year and, given how context-sensitive these requests can be, there remain opportunities for creativity and compromise in crafting the release order. A very similar template order is currently being introduced for use by the Ontario Office of the Children's lawyer.

³⁰³ Helen Murphy, *Police Records, Privacy and the Best Interests of the Child, the Child Protection File: Best Practices* (Toronto: Law Society of Upper Canada, 2007).

Chapter 7 Privacy

7.1 Challenges

The desire to improve information sharing between the criminal, family and child protection systems stems from the need for coordination and effectiveness when ensuring the safety and well-being of intimate partners, children and others. The objective is to compile information from among a range of sources, both criminal and civil, to ensure that the real risks are properly identified and assessed, and that appropriate measures are taken to promote the safety of victims and prevent the reoccurrence of future incidents of family violence.

Depending on the particular context (e.g. why the information was collected, what type of decision is being made and by whom) there are many pieces of information that may be relevant to share. For example:

- The fact that an offence has been alleged;
- The name of the victim or the accused;
- Alleged exposure of children to family violence;
- Breaches of orders;
- 911 or other emergency calls that have been made;
- Applications for emergency protection orders or peace bonds;
- An offender's criminal records and history of violence;
- Assessment of the risk of an accused to family members or others;
- Court dates or sentencing hearings;
- Further offences committed by the accused;
- Alleged new threats against family members;
- Initiation of court proceedings (e.g. for divorce, orders related to children or support);
- Participation in and completion of programs such as partner abuse or substance abuse programs;
- Participation in family justice services such as parenting information, supervised access, mediation;
- The date of the release of an accused into the community (if they have been incarcerated);
- The victim's contact information;
- Indicators of risk from other sectors (e.g. information gathered from police indicating alerts to escalating mental health status of the accused, indicators from mental health professionals, suicide attempts); and
- Other relevant risk factors.

Some of these pieces of information will be particularly relevant for the police to be aware of in terms of law enforcement and protecting victim safety. Police may want to know, for example about an upcoming family court application or date, as this may heighten risk to the victim. Some information will be particularly relevant for service providers in order to gain a full picture of the situation facing the family and to fulfill their respective mandates. It may be relevant for victim services in the criminal justice system to know about the services that family members are accessing on the family justice side, for example, supervised access or exchange, in order to help with safety planning. It could also be helpful for supervised access providers to know that the family member, whose access is being supervised, has been found to have breached protective orders.

However, efforts to improve information-sharing conflict with another important value – concern for privacy when intimate or confidential information is being held by local, provincial and federal public agencies, boards, commissions and corporations, victim services, police services, community programs, advocacy organizations, and health and other professionals. This value is supported by the *Charter's* protection against undue interference with an individual's reasonable expectation of privacy in section 8. According to the Privacy Commissioner of Canada, Jennifer Stoddart, privacy should be defined not merely as the passive right to be left alone, but rather as the broader “ability to control our personal information.”³⁰⁴

It goes without saying that people wish to maintain the privacy of information that constitutes the most intimate and personal details of their lives. This information includes for example: identification and contact information; psychological and medical assessments; genetic history, prescriptions and diagnoses; family background and social histories; encounters with police and correctional services; religious and political beliefs, associations and activities; information about sexual orientation and family status; children's educational reports; and financial information such as employment records and income tax information.

There are important reasons for keeping certain information confidential.³⁰⁵ In the case of health records, for example, fears of exposure of personal information could discourage people from seeking the very help which may in fact prevent violence from occurring. Revealing information may, perversely, further endanger someone whose safety depends on the ability to keep contact information and whereabouts secret. Moreover, the disclosure for collateral

³⁰⁴ Jennifer Stoddart, *Commissioner's Message* (Office of the Privacy Commissioner of Canada, 2008).

³⁰⁵ See Saskatchewan Human Services, *Sharing Information to Improve Services for Children, Youth and Families*, (Regina: ADM's Forum on Human Services, May, 1997). This forum studied the issue of information sharing and compiled a list of reasons why the children, youth and families they canvassed were concerned that private information remain confidential, including to avoid embarrassment from disclosure of their private problems; avoid the exposure of inaccurate, inflammatory information; protect their personal and family security in particular with regards to the location and contact information of victims of domestic violence; allow a victim of intimate partner violence to talk freely with an advocate and share details of her abuse in order to effectively plan for safety; support victims' autonomy by placing the control over personal information squarely in their hands.

purposes of information gathered by the police could prohibit people from communicating freely in support of a criminal investigation.³⁰⁶

In Canada, there is a wide array of legislation, regulations, guidelines and codes of ethics across the federal provincial and territorial jurisdictions relating to privacy. In recognition of the importance of privacy to society, in 1995, the Canadian Standards Association adopted a voluntary national standard for the protection of personal information that addresses the way organizations collect, use, disclose, and protect personal information, and the right of individuals to have access to personal information about themselves.³⁰⁷

The key privacy issue relating to information sharing between the various sectors of the justice system relates to how protecting the disclosure of personal information is balanced against the use of this information to prevent risk and protect individual safety. At the court level, provincial and territorial statutes and Rules of Court govern the disclosure, discovery and production of private records. In addition, there is complex case law associated with the production of records from one proceeding to another. Discussion of these evidentiary issues is found in Chapter 6 of this report.

Many recognize, however, that privacy considerations can and should give way to a duty to share information when doing so would prevent harm to children and/or intimate partners. It should be noted that all provincial and territorial child protection legislation, without exception, requires anyone with information about a child in need of protection to report to the relevant agency.

All jurisdictions have access to information and privacy statutes that govern the collection, use and disclosure of personal information held by government agencies. In all cases, legislation permits information to be shared when the person it concerns provides their consent. When there is no consent, the release of personal information may be permitted when the public interest outweighs privacy concerns or when disclosure is necessary to protect health and safety, but often only in specified circumstances and sometimes with qualifications.³⁰⁸ Access to information and privacy statutes also allow for the release of personal information when its use is consistent with the purpose for which it was obtained and this may offer some flexibility for community and public agencies to coordinate their efforts and share information under the

³⁰⁶ See *Algoma*, *supra* note 293 at para 17.

³⁰⁷ The Canadian Standards Association's CAN/CSA-Q830 *Model Code for the Protection of Personal Information* was adopted in 1995. Ten interrelated principles, known as the "fair information principles" form the basis of the Standard. These are: accountability, identifying purposes, consent, limiting collection, limiting use, disclosure and retention, accuracy, safeguards, openness, and individual access. Each principle is accompanied by an explanatory note, and can be found at Office of the Privacy Commissioner of Canada, *Legal information related to PIPEDA: Privacy Principles* online: <http://www.priv.gc.ca/leg_c/p_principle_e.cfm>.

³⁰⁸ See e.g. section 42 (h) of *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 refers to "compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates".

overarching purpose of protecting their clients.³⁰⁹ There is also the possibility for personal information to be obtained by way of a court order in the absence of consent.³¹⁰

Professional groups – including medical professionals, social workers and lawyers – are guided on the disclosure of personal information by provincial or territorial statutes, by-laws or codes of ethics. For lawyers, codes of professional conduct govern the maintenance of confidential information and most authorize revealing confidential information in the face of imminent risk of harm to identifiable persons.³¹¹ However, there remains confusion surrounding the circumstances in which information on risk can be disclosed in the absence of consent. While most codes of professional conduct authorize lawyers to reveal confidential information in the face of imminent risk of harm to identifiable persons, the advice in the commentary associated with the rules can suggest that such disclosures be limited to “very exceptional circumstances” and may make it difficult, in responding to imminent risk, to do so in a timely fashion.³¹² Similarly, other professional groups, including medical professionals and social workers, are generally permitted by codes of ethics to reveal information if a client is in danger of harm (by oneself or others) or in danger of committing harm to an identified person or group.

³⁰⁹ For example, sections 7 and 8 of the federal *Privacy Act*, RSC 1985, c P-21 state that personal information may be used or disclosed by a government institution without the consent of the individual to whom it relates for a purpose directly related to the purpose(s) for which the information was obtained or compiled. Such related purposes are termed “consistent uses”. For a use or disclosure to be consistent, it must have a reasonable and direct connection to the original purpose(s) for which the information was obtained or compiled; See Treasury Board of Canada Secretariat, *Principle 5: Use of Personal Information*, online: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25498§ion=text>.

³¹⁰ For example, subsection 8(2)(c) of the federal *Privacy Act*, RSC 1985, c P-21 provides that personal information may be disclosed by a government institution “for the purpose of complying with a subpoena or warrant issued or order made by a court”. Obtaining personal information from a federal government institution pursuant to this section may result in Crown immunity issues where an order for the disclosure of documents emanates from a provincial court and provincial statute.

³¹¹ See e.g. Canadian Bar Association, *Code of Professional Code*, Chapter IV, Rule 2 “Public Safety Exception” (2009), online: <http://www.cba.org/cba/activities/pdf/codeofconduct.pdf>; Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Rule 2.03(3).

³¹² Discussed in Neilson, *supra* note 20 at 64; *Model Code of Professional Conduct*, *ibid*, allows (but does not mandate) release of confidential information (limited to that required) when the lawyer believes on reasonable grounds that “there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent death or harm.” However, the advice in the commentary associated with Rule 2.03(3) may make it difficult for lawyers to respond in a timely fashion. The commentary suggests that such disclosures will be limited to “very exceptional circumstances” and advises:

- ⤴ Considering the factors *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385 when assessing whether public safety outweighs solicitor-client privilege. Such factors include:
 - ⤴ The likelihood that the potential injury is imminent;
 - ⤴ The apparent absence of any other feasible way to prevent the potential injury;
 - ⤴ The circumstances under which the lawyer acquired the information about the client's intent or future course of action;
 - ⤴ Contacting the local law society for ethical advice; and, when practical,
 - ⤴ Seeking a judicial order for release of information; and
 - ⤴ Recording particulars in writing (such as time and date, grounds for release, extent of the client's consent to release, particulars surrounding the decision to release such as the circumstances in support of the reasonableness of the belief in imminent harm.)

It is worth noting that the various legislation, regulations, guidelines and codes of ethics related to privacy across Canada, allow but do not require personnel to share information even when there is an imminent threat of danger. Some have argued that there is room for governments to create a presumption in favour of the exercise of this discretion, a *prima facie* obligation to share³¹³ rather than withhold critical and relevant information in circumstances where health and safety may be at risk.

Unfortunately, however, without clear legislation, ministerial directives, memoranda of understanding or protocols about when personal information may be appropriately shared, cautious record holders may hesitate to disclose relevant, potentially lifesaving information, even when doing so would likely override privacy obligations. Indeed, in some cases, agency or department policies may direct personnel to refrain from sharing information although the legislation provides them the discretion to do so. This may be due, in part, to concerns about penalties for breaches of privacy rules.



Case Study – Privacy concerns in cases where there is a risk of violence

The 2004 near-fatal shooting of Martina Seymour in Port Moody, British Columbia may have been prevented if the police from whom Seymour sought help had informed her of her ex-boyfriend Antonio Pinheiro's record of domestic threats and violence. Among his records could be found a court-ordered psychiatric assessment that Pinheiro was at risk of a repeated pattern of offenses. Police cited restrictions contained in privacy laws that made it difficult for them to release information about past criminal convictions.

See Ending Violence Association of British Columbia, Community Coordination For Women's Safety, Backgrounder "Can a Woman Get Information from Police about her Abuser's Criminal Past?" November, 2006, online:

<http://www.endingviolence.org/files/uploads/backgrounder_FINAL_DRAFT_for_posting_nov_06.pdf>

7.2 Promising practices

³¹³ In this respect note the *Personal Health Information Act*, SNL 2008, c P-7.01, which requires information sharing with police and with Child, Youth and Family Services. Under section 42, "1) A custodian shall disclose personal health information, including information relating to a person providing health care, without the consent of the individual who is the subject of the information to a person carrying out an inspection, investigation or similar procedure that is authorized by or under this Act, the *Child, Youth and Family Services Act*, another Act or an Act of Canada for the purpose of facilitating the inspection, investigation or similar procedure."

This section provides examples of important information-sharing opportunities which have been hindered by privacy considerations, and the various initiatives that have sought to facilitate and enable disclosure when lives and safety are at risk.

7.2.1 Police providing information directly to victims or potential victims of family violence

Some information regarding an offenders' incarceration and release may be provided to victims in efforts to ensure safety planning. For example, New Brunswick's *Victim Services Act* allows for victims of provincially incarcerated offenders, or of those found not criminally responsible due to a mental disorder, to register for access to limited release information.³¹⁴ However, preventive information sharing from police to the public has been more restrictive. Current interpretations of privacy requirements and limited delegation of decision making can make it difficult for police and correctional services to release information about someone's criminal record quickly in high-risk domestic violence situations. Limiting victims' access to criminal records has been considered a barrier to constructing realistic safety plans or requesting appropriate custody and access orders, especially given the evidence that past criminality may be a risk factor for family violence.³¹⁵

While basic information about pending charges and past convictions may sometimes be accessed by the public from criminal court databases or clerks, if someone reports threatening behaviour or actual assaults to the police, officers may not automatically disclose the records in their possession. Rather, an officer must make an assessment about whether to use the discretionary exception available under federal or provincial privacy legislation. Under the federal *Privacy Act*, the RCMP must ask whether the public interest in disclosure outweighs the harm associated with the invasion of the offender's privacy.³¹⁶ Under most provincial acts and regulations, municipal or sometimes provincial police officers must ask themselves whether there are imminent health and safety concerns that require them to disclose past criminal

³¹⁴ *Victims Services Act*, SNB 1987, c V-2.1, s 7; at the federal level Correctional Service of Canada (CSC) implemented the National Victim Services Program (NVSP) in 2007. Once registered, victims will receive information on the correctional system and the offender who harmed them. This includes such information as the beginning and length of the offender's sentence as well as certain information about an offender's eligibility with respect to escorted and unescorted temporary absences from the correctional facility. The information that can be disclosed to victims is dictated in the *Corrections and Conditional Release Act*, RSC 1992, c 20; Alberta Solicitor General and Public Security, *What victims of crime can expect from the criminal justice system* (Alberta: 2007), online: http://www.solgps.alberta.ca/programs_and_services/victim_services/help_for_victims/Publications/Victims%20of%20Crime%20Protocol.pdf (Alberta has the Victims Protocol when requires the sharing of information with a victim).

³¹⁵ Sharon Agar, *Safety Planning with Abused Partners: A Review and Annotated Bibliography* (Vancouver: BC Institute Against Family Violence and Ministry of Public Safety and Solicitor General, 2003); Department of Justice Canada, *"Inventory of Spousal"*, *supra* note 89.

³¹⁶ *Privacy Act*, RSC 1985, c P-21, s 8(2) (m).

records.³¹⁷ Furthermore, the information provided must be limited only to what is deemed necessary to avert potential harm.

It has been suggested that the disclosure of information about an individual's past violent criminal record to potential victims of family violence may be seen as consistent with the purpose for which it was obtained, namely for police to assess risk and to protect the public from future harm from that person. From this perspective, it could be argued that officers would be able to release private information without overstepping their privacy duties. However, the release of information on such untested interpretive waters might leave police services hesitant.³¹⁸

A 12-month United Kingdom pilot project that began in July 2012 and runs to September 2013 addresses this very issue. "Clare's Law" gives police in select jurisdictions the direction to disclose to victims or potential victims of domestic violence information about their partner's violent past. The initiative was launched in the name of Clare Wood, who was killed in 2009 by a violent ex-partner she met through Facebook. Despite several police complaints, Ms. Wood was never informed of her boyfriend's history of domestic violence, which included repeated harassment, threats and even kidnapping at knifepoint. The project enables an individual to ask the police to determine whether their partner has a violent past. If the person has such a past, police will consider whether to disclose the information. The pilot will also examine how the police can proactively disclose information to prevent harm to an individual from family violence, in defined circumstances. Police will collaborate with the United Kingdom's Multi-Agency Risk Assessment Conferences (MARAC) a cross-sectoral information-sharing forum for high-risk domestic violence cases. MARAC will advise police on the risk levels associated with a particular offender and will use its expertise to ensure that appropriate safety and risk-assessment procedures are followed when disclosing the information.³¹⁹

7.2.2 Police and victim services

The police and victim services have an interest in cooperating in order to ensure that victims are made aware of and can access available services. These services can provide appropriate support to victim witnesses to strengthen prosecution efforts, and can also potentially assist them with family matters as well. Challenges, however, have arisen in providing victim information to victim services in order to ensure that victims receive appropriate services while also respecting federal privacy law. The RCMP and provinces continue to work towards

³¹⁷ For example, in Ontario, the *Disclosure of Personal Information*, O Reg 265/98 under the *Police Services Act*, RSO 1990, c P.15 allows the police to disclose any personal information about someone who has been convicted of an offence in order to prevent harm to other persons or property, at s 2(1).

³¹⁸ British Columbia Association of Specialized Victim Assistance & Counselling Programs, British Columbia/Yukon Society of Transition Houses and British Columbia Institute Against Family Violence, *Critical Elements of an Effective Response to Violence Against Women: High Risk Information-Sharing Protocol* (2007), online: <http://www.endingviolence.org/files/uploads/BN_3_INFO_SHARING.pdf>.

³¹⁹ United Kingdom Home Office, *Domestic Violence Disclosure Pilots Impact Assessment* (United Kingdom: 2010), online: <<http://www.homeoffice.gov.uk/publications/about-us/consultations/domestic-violence-disclosure/dom-violence-disclo-pilots-ia?view=Binary>>; <<https://www.gov.uk/government/news/clares-law-pilot-begins-today>>.

resolving the issue of ensuring that referrals to victim services are made while respecting obligations under the *Privacy Act*. Prince Edward Island and New Brunswick have reported considerable progress in this regard over the past year. In 2011, the Saskatchewan legislature passed *The Victims of Crime Amendment Act, 2011*,³²⁰ which now requires police to provide information about certain victims to victim services, even though consent was not obtained. This information is used to contact the victim for the purpose of providing or facilitating the delivery of victim services. In Alberta, police services (other than the RCMP) share information with the victim service unit without issue.³²¹ Manitoba is currently reviewing its *Police Services Act*³²² in order to ensure that privacy concerns do not impede the sharing of information by police with victim services.

7.2.3 Legislative changes

As mentioned above, legislation operates at every jurisdictional level and across various sectors to create and frame privacy requirements for government agencies, public institutions and, in some cases, for professionals. Privacy legislation generally permits the disclosure of personal information under appropriate conditions, as outlined above. However, British Columbia has recently gone one step further, by amending its *Freedom of Information and Protection of Privacy Act (FOIPP Act)* to clarify that it is appropriate to collect, use and disclose information for the specific purpose of reducing the risk that an individual will be a victim of domestic violence, if such violence is reasonably likely to occur.³²³ Furthermore, new authorities in the Act enable public bodies to share personal information for delivering or evaluating a common or integrated program or activity.³²⁴ In the years leading up to these changes in British Columbia, a number of reports from across various sectors strongly recommended improving coordination in domestic violence cases by amending the *FOIPP Act* to enable public bodies to disclose personal information proactively in appropriate circumstances.³²⁵

³²⁰ SS 2011, c 21.

³²¹ *Victims of Crime Act*, RSA 2000, c V-3.

³²² SM 2009, c 32, CCSM c P94.5.

³²³ *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, sections 26(f), 27(1)(c) and 33.1(1)(m.1):

26 A public body may collect personal information only if (f) the information is necessary for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur.

27 (1) A public body must collect personal information directly from the individual the information is about unless (c) the information is collected for the purpose of (v) reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur.

33.1 (1) A public body may disclose personal information referred to in section 33 inside or outside Canada as follows: (m.1) for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur;

³²⁴ *Ibid*, ss 27(1), 33.2 (d).

³²⁵ This included reports by judges, the Representative for Children and Youth, the British Columbia Coroner's Service and the provincial Violence Against Women Steering Team. As noted in the Government of British Columbia, *Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act*, (March 15, 2010) at 18, the shooting of Martina Seymour, described above, played a role in prompting this

In Ontario, the *Police Services Act*³²⁶ confers power for police officers to disclose personal information to protect the public or victims of crime, despite any other act. This exceptional power aims to reduce the reasonable risk posed by an individual who has been charged, convicted or found guilty of a criminal offence.³²⁷ Further, personal information can be shared with “any person or agency engaged in the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program” once an individual is simply under investigation.³²⁸

With regards to children at risk of family violence, Alberta has introduced amendments to the *Freedom of Information and Protection of Privacy Act* which clarify that a public body has discretion to share information regarding a minor when disclosure is reasonably believed to be in the best interests of that minor.³²⁹ Moreover, the *Personal Health Information Act* in Newfoundland and Labrador requires health care professionals to share information with police related to the safety of a child.³³⁰

7.2.4 Multidisciplinary collaborations

Increasingly, multidisciplinary collaborations are being formed which prioritize information sharing between agencies and programs in order to enhance their protective and supervisory role, even when the cases are not designated as “high-risk”. In the United States, for example, jurisdictions are encouraged to bring together individuals from a range of backgrounds to share information and coordinate for improved responses to violence against women. These structured collaborations, referred to as “coordinated community responses” (CCR), are required under the *Violence Against Women Act* in order to access grants and funding from the Office on Violence Against Women.³³¹

New Brunswick has introduced two information coordination protocols in association with its Provincial Domestic Violence Court – Moncton. One protocol has been established between the Department of Social Development responsible for child protection and the Domestic Violence

legislative change. Similarly, as noted in the report entitled *Honouring Christian Lee – No Private Matter: Protecting Children Living with Domestic Violence*, *supra* note 75, the tragic murder/suicide was due to a lack of coordination and information sharing between pivotal public agencies.

³²⁶ RSO 1990, c P.15, s 41.

³²⁷ *Disclosure of Personal Information*, O Reg 265/98.

³²⁸ *Ibid.*

³²⁹ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 40(1)(gg).

Disclosure of personal information

40(1) A public body may disclose personal information only (gg) to a law enforcement agency, an organization providing services to a minor, another public body or any prescribed person or body if the information is in respect of a minor or a parent or guardian of a minor and the head of the public body believes, on reasonable grounds, that the disclosure is in the best interests of that minor.

³³⁰ *Personal Health Information Act*, SNL 2008, c P-7.01, s 42;

³³¹ United States Department of Justice, Office on Violence Against Women, *Working Together to End the Violence*, online: <<http://www.ovw.usdoj.gov/docs/vawa.pdf>>.

Court. These partners will jointly intervene in addressing incidents of family violence. In cases of domestic violence, key partners of the Court, including Police, Crown prosecutors, legal aid, probation officers, the victim service coordinator and the Department of Social Development, share information on the status of existing court orders and intervention plans, thereby fostering a coordinated response in cases of domestic violence. The goal is to promote more informed decisions, and to eliminate conflicting orders and the duplication of intervention programs. A second protocol involves the Department of Public Safety Probation Services, the Department of Health and Community Mental Health and Addiction services. By describing privacy obligations as paramount and setting out privacy safeguards, the protocol provides for an accelerated flow of information sharing to the probation officers on the status of services offered, recommendations for interventions and services being delivered to the offender.

In another example from New Brunswick, in 2011, a pilot therapeutic court was implemented in that province's Elsipogtog First Nation. The mandate of the Provincial Healing to Wellness Court (HWC) is to address criminal behaviour associated with mental health or substance abuse issues. Family violence related offences which do not involve serious bodily harm or carry minimum mandatory sentences can be considered for eligibility into the program, subject to Crown prosecutor discretion. At the onset, a privacy protocol was established to guide information sharing between court personnel, case managers and project partners, including social service providers, provincial and federal prosecutions, law enforcement, victim services and counsel. The protocol informs personnel of their privacy obligations, clarifies the types of information that are considered private, indicates with whom it is appropriate to share information and for which purpose, provides a model consent form and a list of issues that should be addressed when seeking consent and specifies protocols for safely transmitting information.

7.2.5 High-risk case coordination

Coordination models also exist for especially high-risk domestic violence cases. Multi-Agency Risk Assessment Conferences (MARACs) are an example of a recently developed model in the United Kingdom. MARACs are regular meetings where information about high-risk domestic abuse victims (those at risk of murder or serious harm) is shared between local agencies, often including police, probation, independent domestic violence advisers, child services, health and housing. By bringing all agencies together at a MARAC, a risk focused, coordinated safety plan can be drawn up to support the victim. Over 250 MARACs are operating across England and Wales and Northern Ireland, managing over 45,000 cases a year.³³²

Canadian examples of high-risk case coordination involve protocols which facilitate and encourage the sharing of information among justice, child welfare and community agencies. By providing specific protocols between identified officials and agencies, and by determining

³³² Narissa Steel, Laura Blakeborough & Sian Nicholas, *Supporting high-risk victims of domestic violence: a review of Multi-Agency Risk Assessment Conferences (MARACs)* (United Kingdom: UK Home Office, 2011), online: <<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/horr55/horr55-report?view=Binary>>.

desired outcomes, these protocols supplement the discretion which exists in provincial and other privacy legislation to share information in high-risk situations.

In Nova Scotia, a high-risk case coordination protocol was developed in response to a call for more proactive approach to family violence. Under the protocol, partners will share critical, high-risk developments, such as the release of the accused into the community, further offences, the breach of orders, emergency calls, applications for emergency protection orders or peace bonds, the approach of court dates or sentencing hearings and the initiation of legal proceedings related to children. Certain challenges are being addressed, such as the continued reluctance among certain agencies or community services to share information,³³³ the inconsistent application of risk assessment tools across the province, and the need to tailor information appropriately for different partners. Also, in British Columbia,³³⁴ there is a protocol for the highest risk domestic violence cases, which forms part of the Violence Against Women in Relationships (VAWIR) policy. The protocol directs agencies who have discretion to share information under provincial privacy legislation to do so as a matter of practice, subject of course to legal and constitutional obligations.³³⁵ The case update form designed to facilitate this sharing includes a notice about the strict confidentiality of the information being exchanged, directions regarding its safe storage and retention, and the appropriate use of the information, namely to protect health and safety.³³⁶ Both of these protocols are also referenced in Chapter 2 at subsection 2.7.1.

In Ontario, justice-based domestic violence high-risk committees bring together justice sector personnel as well as community agencies, when appropriate, in an effort to manage cases identified as high-risk. The focus is on victim safety and offender management and permits the sharing of personal information permitted under the *Freedom of Information and Protection of Privacy Act*³³⁷ when the information is shared by a justice participant with a community agency for a purpose consistent with the purpose for which it was collected.

³³³ The protocols address the legal justification for information sharing, in light of privacy concerns. Under section 27(1) and section 28 of the Nova Scotia *Freedom of Information and Protection of Privacy Act* (FIPPA), SNS 1993, c 5, agencies can disclose information in a manner that is consistent with the purpose for which it was collected, in this case to assist in the continued safety of the individual. And while consent should always be sought before information is shared, in high-risk situations posing a serious threat to someone's health or safety, partners to the protocol are reassured that such information may be disclosed under the provincial FIPPA as well as other legislation, such as the *Youth Justice Act*, the *Children and Family Services Act*, and the *Municipal Government Act*.

³³⁴ Other successful high-risk information-sharing protocols have also been developed in British Columbia for initiatives such as the Capital Region Domestic Violence Unit and the North Okanagan Domestic Violence Integrated Case Assessment Team. Both agreements rely on information sharing provisions contained within provincial and federal privacy legislation as well as other provincial statutes including, for example, child welfare legislation.

³³⁵ VAWIR, *supra* note 127.

³³⁶ British Columbia, *Optional Notification Form, Protocol for Highest Risk Domestic Violence Cases, (VAWIR Policy)* online: < <http://www.pssg.gov.bc.ca/victimservices/publications/docs/vawir-optional-notification-forms-guide-high-risk-cases.pdf>>.

³³⁷ RSO 1990, c F.31.

In Québec, since 2001, following a high profile domestic murder-suicide case in which privacy considerations were seen as a deterrent to effective prevention, amendments were brought to laws, including the *Act respecting access to documents held by public bodies and the Protection of personal information*.³³⁸



Case study – Sharing information where there is imminent harm to an identifiable person or group

In 1996, René Gaumont murdered his ex wife Françoise Lirette and their son Loren, despite numerous police complaints about Mr. Gaumont's threatening behaviour and despite his attempts to seek psychiatric help. The Coroner's report concluded that all three lives could have been saved if agencies had collaborated with one another, and recommended that privacy protections be lifted if a social, medical or legal professional has a reasonable doubt that someone is in imminent danger.

An Act to amend various legislative provisions as regards the disclosure of confidential information to protect individuals, SQ 2001, c 78, now enables professionals or agencies to disclose information without consent when there is an imminent risk of harm to an identified person or group. Partner organizations who receive this kind of identifying information are still bound by privacy obligations; they must agree to abide by strict confidentiality conditions and are bound not to reveal this private information unless permitted under this act, or unless consent is obtained.

7.2.6 Other practice models

Professionals such as non-government lawyers and social workers or medical professionals may have important information relevant to family violence which is often considered confidential. Without including them explicitly in information protocols or creating a duty for these private parties to report the abuse, efforts are being made to encourage such disclosure. For example, in Saskatchewan, child abuse protocols provide guidelines to different professionals, including child protection workers, school personnel, doctors and other health care providers, about what information can be legally shared with others in a position to help.

Especially when they have entered into an information-sharing agreement, agencies and their staff must continue to respect their privacy obligations. As such, certain best practices have been recommended for agencies working to support victims of family violence – even those bound by a memorandum of understanding or information-sharing agreement with other jurisdictions – in order to protect the privacy interests of those involved. These include:

- Developing sound record-keeping policies;
- Clearly identifying confidentiality obligations in relation to other members of the agreement and presenting a statement that the mere fact of collaboration does not alter those obligations;

³³⁸ RSQ c A-2.1.

- Maintaining a closed office and spatial boundaries so that clients are reassured that their information will remain protected; and
- Sharing private information in non high-risk situations only with clients' consent and only after informing them about every agency that is part of the team, their role and purpose, any protections for information that is shared, the risks and benefits of sharing the information with the team, and about how team members coordinate their work.³³⁹

As evidenced in numerous death reviews and coroners' reports or inquiries, timely information sharing between various sectors can be critical to averting tragedy. The models above demonstrate that safety can be prioritized without compromising privacy concerns.

³³⁹ Sandra Tibbetts Murphy, "Advocacy challenges in a CCR: Protecting Confidentiality While Promoting a Coordinated Response" (Minneapolis MN: The Battered Women's Justice Project, January 2011), at 8-10, online: <http://www.bwjp.org/files/bwjp/articles/Advocacy_Challenges_in_a_CCR.pdf>.

Chapter 8 Out-of-court dispute resolution

While much of this report focuses on the court system, it is important to remember that the majority of family law, child protection and criminal cases are resolved without a trial. In the context of family law, dispute resolution mechanisms such as mediation, negotiation, with or without lawyers, and collaborative law may be used to achieve resolution out of court. Mediation is also used in the child protection context. Similarly, many criminal cases settle by way of plea negotiation, with some resulting in the dropping of charges. Thus, issues related to information sharing and collaboration need to be considered in this context.

While settlement is generally desirable, it cannot be assumed that risk has been addressed during the negotiation or settlement of the family law issues. Research suggests that in some cases where settlement has occurred, safety will continue to be an issue and that there may still be risks to family members.³⁴⁰



Case Study – Potential continuing risk where issues settled out of court

The Ontario Domestic Violence Death Review Committee has pointed to the risks faced by victims of abuse where they arrive at family law resolutions outside of the court system. In 2006, they reported the following:

This case involved an attempted homicide followed by suicide. The couple had recently separated following recurrent incidents of domestic violence that included threats by the male perpetrator and assault with a weapon. The female victim, who had sole custody of her two children, had moved out of the matrimonial home but there were ongoing access issues for the perpetrator. He entered her apartment early one morning while she was taking the children to school. When the victim returned home, her estranged husband came out of the kitchen and an argument ensued, during which he stabbed her several times and then stabbed himself. The victim was able to escape the apartment and seek help, ultimately surviving her injuries. The perpetrator subsequently died in hospital from his self-inflicted stab wounds.

Discussion: Although there was insufficient information in this case review to offer specific recommendations, the circumstances highlight the plight of abuse victims who must remain in contact with their ex-partners due to the need to support on-going access to the children. In this matter there had been an extensive history of serious domestic violence, but the perpetrator still had unsupervised visits to the children on a regular basis. This access appears to have been an agreement between the parties rather than the product of any litigation or family court decision. The perpetrator continued to exhibit jealousy, and had not been part of an intervention for his problems with domestic violence and his history of being abused as a child. The case demonstrates the challenges in providing safety for victims and their children when there is ongoing access by

³⁴⁰ Neilson, *supra* note 20 at 102-104.

the perpetrator without a safety plan or intervention to manage the risks.

Excerpted from: Ontario Domestic Violence Death Review Committee, *Annual report to the chief coroner, 2006* (Toronto, ON: Office of the Chief Coroner).

There are several information-sharing and coordination implications related to out-of-court settlements. It is important that Crown prosecutors and child protection officials keep abreast of progress on related family law files. Claims for restraining or protection orders, or for the protection of children, such as requests for “no-contact” or “supervised access,” which are made in initial family court documents, may never be heard by a court if the case is settled. Child protection officials, for example, may wish to monitor the outcomes of family law cases that have been resolved by way of mediation or some form of negotiation, in order to explore whether adequate protection has been provided for children.³⁴¹ As part of preparing submissions with respect to conditions of release or sentencing, it is also important for Crown prosecutors to be aware of what the parties have agreed to, both with respect to contact with each other and with respect to contact with the children.

It would be improper for a Crown prosecutor to make a decision about the course of a prosecution, including plea negotiations, based on how that decision might impact on a child protection or family proceeding.³⁴² Further, Crown prosecutors are not civil lawyers and cannot give advice to victims about how a criminal prosecution might influence a civil proceeding. Nonetheless, there is recognition that it is important for information about the outcome of a criminal proceeding to be communicated to the victim.³⁴³ The outcome in the criminal proceeding may impact the type of relief requested in the family law proceeding. In some jurisdictions, information about the outcome of the proceeding will be conveyed to the victim by the Crown prosecutor. For example, in Alberta, the *Victims of Crime Act*³⁴⁴ and Protocol require that the prosecutor both discuss the outcome of the prosecution with the victim (with the victim’s counsel present if requested by the victim) and explain what happened in court. In other provinces, this information would be conveyed by victim services.

8.1 Mediation and other dispute resolution

In a family law context, most cases are settled in negotiation, mediation or judicial dispute resolution processes and do not continue as contested hearings followed by a judicial decision. Because research suggests that many requests for protective provisions (e.g. supervised access) are abandoned during negotiation and mediation processes, there is a considerable amount of

³⁴¹ *Ibid* at 102-104.

³⁴² However, impact on the victim is an appropriate factor for the Crown to consider when making decisions regarding a prosecution.

³⁴³ As opposed to how the Crown prosecutor exercised their discretion (e.g. in plea bargaining).

³⁴⁴ RSA 2000, c V-3.

debate and controversy about whether dispute resolution mechanisms such as mediation are appropriate in family law cases where there is family violence.³⁴⁵

Some oppose mediation where there has been family violence, citing concerns about safety risks, fear and intimidation, and unequal power dynamics that can adversely affect a person's ability to negotiate safely and in their own interest. They argue that it can put victims in an unsafe situation and in a process that allows their spouse to continue to victimize, intimidate or bully them. Further, it is thought that victims may make agreements in mediation that do not deal adequately with safety issues and are not in their or their children's best interest. This is because mediation lacks the strong partisan advocacy that some victims need and they do not feel empowered enough to adequately represent their own interests. As well, due to the focus on settling, some victims can feel pressured into agreement by both their spouse and the mediator.

Many of these concerns are countered by research and practitioners who believe out-of-court dispute resolution, such as mediation and family group conference,³⁴⁶ can offer better outcomes and a more therapeutic and holistic approach that benefits family members and encourages longer-term solutions, even where there is family violence.³⁴⁷ Proponents of dispute resolution also argue that the practice has responded to the concerns by implementing

³⁴⁵ See e.g. Honorable Leonard Edwards, Steve Baron & George Ferrick, "A Comment on William J Howe and Hugh McIsaac's Article "Finding the Balance" Published in the January 2008 Issue of Family Court Review" (2008) 46:4 Family Court Review 586; Anne Fuchs, *Considering the needs of Domestic Violence Victims: The Exceptions to Minnesota's Alternative Dispute Resolution Rule 114*, (Minneapolis MN: The Battered Women's Justice Project, April 2011), online:

<http://www.bwjp.org/files/bwjp/articles/Considering_The_Needs_Of_Domestic_Violence_Victims_Mediation.pdf>; Linda C Neilson, *Spousal Abuse, Children and the Legal System; Final Report for the CBA, Law for Futures Fund*, (2001), online: <http://www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/team2001.pdf> (Professor Linda C Neilson's study of domestic violence cases in New Brunswick offers insight into the practice of mediation in cases with family violence. The study found that survivors of abuse who experienced face-to-face mediation were highly critical of the process. She found, however, that non-mediation, shuttle negotiation processes may provide opportunities for non-adversarial settlement, with few of the risks of face-to-face facilitated mediation).

³⁴⁶ A family group conference is a formal meeting where members of a child's immediate family come together with extended kin and members of the child's community who are, or might be, involved to develop a plan for the child. See Ministry of Children and Family Development, *Family Group Conference Reference Guide* (British Columbia: Government of British Columbia, August 2005), online: <http://www.mcf.gov.bc.ca/child_protection/pdf/fgc_guide_internet.pdf>.

³⁴⁷ This line of research suggests that modified out-of-court processes with trained professionals can provide victims of family violence with better outcomes and a more empowering experience than the adversarial court process. In an adversarial system, the victim still must face their abuser (in the same court room); there is much less time for the judge to hear evidence and understand the family dynamics; there is no opportunity for the family to have control over what happens; and there is little opportunity for therapeutic interventions that may resolve underlying issues. It is argued that mediated agreements tend to be more nuanced and detailed than court orders, which is particularly important to effectively managing high-conflict families. It is also argued that many lawyers have little or no training about family violence and fail to see signs and adjust the process, whereas more and more family dispute resolution practitioners do. See Family Justice Reform Working Group, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (British Columbia: Ministry of Attorney General, May 2005), online: <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf>

procedures to ensure a safe physical environment and mitigate threats to self-determination in the dispute resolution process.³⁴⁸

The reality is, however, that some cases involving family violence are mediated. As a result it is important to consider issues related to coordination and collaboration in this context. The discussion below primarily focuses on mediation but would also apply to lawyers and others working with the parties in other collaborative planning and decision-making processes.

As a first point, both sides of the debate agree that in cases where there is family violence, screening to identify safety concerns is necessary. The view is that this screening must be mandatory and used to adapt the mediation or other dispute resolution process to ensure that the participant's concerns are mitigated. Specialized training regarding violence issues for mediators is also critical from this perspective.³⁴⁹ Courts as well, may have concerns about mediation or arbitration provisions in minutes of settlement, in cases of family violence. For example, in the case of *Wainright v Wainwright*,³⁵⁰ the court questioned, and ultimately replaced, a clause which provided for mandatory mediation/arbitration. This was because the court found that the mother feared the father, and the father had trouble focusing on his child's needs when they conflicted with his own.

How prevalent is screening?

According to a small scale national survey of mediators, the majority do screen for family violence (93%).³⁵¹ In contrast, most Canadian lawyers do not systematically screen for family violence. In a survey of lawyers attending the National Family Law Program in 2010, 83% indicated that they never or rarely use a screening tool (e.g. standardized test) to identify cases of family violence.³⁵²

Second, where there are ongoing proceedings or orders in place, for example in the criminal justice system, it is important for the mediator or other dispute resolution professional to be aware of those proceedings. This information is often very relevant. In order to assist with the screening process and the determination of whether mediation is appropriate, at the initial intake meeting the mediator can ask about previous or outstanding criminal charges or orders. The mediator can then obtain copies of the orders. This is the approach taken in court-annexed mediation in Ontario.

³⁴⁸ For example, Family Mediation Canada has Standards of Practice for mediators that require mediators seeking certification to acquire at least 21 hours of specialized education on abuse and control issues. The Ontario Association of Family Mediators developed a policy that recognizes: "Abuse in intimate relationships poses serious safety risks and may significantly diminish a person's ability to mediate." The Policy requires mediators to have family violence training, to screen out inappropriate cases by having initial individual screening meetings with each party; and to implement safeguards during mediation.

³⁴⁹ While mediation and other types of dispute resolution are not regulated professions, some jurisdictions have training and policies. For example, British Columbia's Child Protection Mediation Program has a Mediator Roster, which requires mediators to have special training and experiential and other requirements.

³⁵⁰ 2012 ONSC 913.

³⁵¹ Survey of Mediators, internal analysis (Department of Justice Canada, April 2013). These results are from a small survey of mediators and are not nationally representative.

³⁵² Justice Canada, "Supporting Families", *supra* note 52.

If, for example, there is a criminal or civil protection or restraining order in place which prohibits all contact, both direct and indirect, between the parties, unless and until such a provision is no longer in force, the mediation cannot proceed. Even if contact is not completely prohibited, the existence of a criminal proceeding or other proceeding should result in further probing about the nature and extent of the family violence in a particular case. This can inform what, if any, modifications might be necessary to the mediation process to promote safety. Aside from ensuring the physical safety of the parties, these could include agreed signals between a client and mediator about that client's comfort level, having the client attend with a support person, or establishing "ground rules" for the mediation.³⁵³ A similar approach can be helpful where other forms of dispute resolution are used.

Even outside of the screening process, it is also important for the mediator to be aware of other relevant proceedings and their status. Mediation requires the full commitment of both parties and if, for example, there are ongoing criminal proceedings, there may be reticence on the part of the accused to participate and engage in full disclosure. This may undermine the process and the ability of the parties to reach a resolution and therefore, knowledge of the stage and timing of the criminal law proceedings can assist in determining when best to engage in the mediation process.

8.2 Promising practices

8.2.1 Training and practice standards

British Columbia's *Family Law Act*³⁵⁴ requires all family dispute resolution professionals, including lawyers, family mediators, family arbitrators and parenting coordinators to screen for family violence to ensure the processes used are safe and appropriate to the family's circumstances. The *Family Law Act* Regulations also set minimum training and practice standards for non-lawyer family mediators, family arbitrators and parenting coordinators who wish to assist people to resolve family law disputes.

These family dispute resolution professionals must meet a reasonable minimum standard that includes a level of family related experience and training in their area of practice. They must take training on family law and must take a minimum of 14 hours of training in screening for family violence. As well, they must take at least 10 hours a year of ongoing training to ensure their training remains relevant.

The professional is required to confirm to the parties that they meet the minimum statutory requirements. Also, they must be members of a professional body (such as the College of Psychologists) or a dispute resolution organization (such as Mediate BC or the Parenting

³⁵³ See Lene Madsen, "A Fine Balance: Domestic Violence, Screening and Family Mediation" (2012) 30:3 Canadian Family Law Quarterly 343 at 359-360 (for a list of various modifications which can be made to the mediation process to promote safety).

³⁵⁴ SBC 2011, c 25.

Coordinators Roster Society). These organizations have complaints and discipline mechanisms that their members are subject to.

The British Columbia Law Society has implemented new practice standards for lawyers who act as family law mediators, parenting coordinators or family arbitrators. The new Law Society rules are similar to the standards provided under the regulations for non-lawyers. This will ensure that family dispute resolution professionals, whether they are lawyers or non-lawyers, meet minimum standards.

8.2.2 Standardized assessment forms

In British Columbia, all clients who seek services from a family justice counsellor (a government funded service) for information or dispute resolution services concerning their family law matters complete a comprehensive assessment which screens for the following: risk of family violence, child protection issues, mental health issues, drug and alcohol issues, and financial issues. This assessment is used to determine whether mediation is an appropriate dispute resolution process for a particular family, and to facilitate effective referrals that address the family's needs. The comprehensive assessment process is also being used by family justice counsellors preparing court-ordered custody and access reports. In this context, the assessment screens for family violence issues and flags other issues that may impact the parties' abilities to care for their children

8.2.3 Practice standards and safeguards to address concerns about child protection mediation

Several provinces, for example Alberta, use mediation in the child protection context and have developed practice standards, policies and safeguards to address concerns related to cases involving family violence. In child protection mediation programs, the mediation generally focuses on issues such as amendments to case plans, access, conditions attached to supervisory orders or whether a child should remain in care. The Child Protection Mediation Practice Standards generally prioritize safety of all participants and mediators are required to adhere to the standards. Participant safety at the mediation is a priority and a child protection mediator must make every reasonable effort to identify threats to the safety of any participant, and either make the mediation process safe or terminate it safely. The Association of Family and Conciliation Courts has established Guidelines for Child Protection Mediation. While these guidelines indicate that family violence should not necessarily preclude child protection mediation, they recognize the importance of screening for family violence, and that "mediation is not appropriate when a mediation party is unable to safely advocate for his or her needs and interests or anyone's safety may be endangered as a result of mediation."³⁵⁵

³⁵⁵ Child Protection Mediation Guidelines Workgroup, *Guidelines for Child Protection Mediation* (Association of Family and Conciliation Courts, 2012), online: <http://www.afccnet.org/Portals/0/Guidelines%20for%20Child%20Protection%20Mediation.pdf>.

It is important to note that in some of these cases, there may be related criminal proceedings or family law proceedings which have been adjourned to allow the child protection mediation to take place, and coordination is a key factor in this context. One of the challenges for the mediator is making a determination as to whether or not to request that a criminal “no-contact order” be temporarily varied to allow the participants to participate in the mediation process.³⁵⁶ Another challenge is to determine at what point in the criminal process it will be productive to engage parents in child protection mediation. If there is a concurrent unresolved criminal matter involving assault of the child, parents and their legal counsel generally will have concerns about disclosure even if the process is without prejudice. In some provinces, because child protection social workers are one of the key participants at the mediation, and are most often aware of criminal matters that relate to their clients, knowledge about the criminal proceeding and any other relevant orders can be brought to the attention of the mediator.

³⁵⁶ For example, the victim could be asked to contact the Crown prosecutor and ask for a relaxing of the “no-contact” provisions (if in agreement, the Crown would then contact the defence counsel and make arrangements for the matter to be brought back to court for a new bail order). Or, the accused could contact his/her lawyer and the defence counsel would then contact the Crown prosecutor to arrange for either a consent change or a bail review application to amend the conditions based on a change in circumstances.

Chapter 9 Services for families experiencing family violence

Where family violence has occurred, victims, children and abusers require a range of services to assist them, both in addressing the impact of the violence on the family and in navigating the justice system. As discussed elsewhere in this report, many parts of the overall justice system may be implicated: the criminal justice system, the child protection system and the family justice system. There are services associated with all of these systems which are intended to help families.

9.1 Services associated with the criminal justice system

All jurisdictions offer victim services, through government departments, police forces or non-governmental organizations. Victim services are varied and cover a broad spectrum of victim needs. Some examples are mechanisms and systems to provide victims and witnesses with information about the criminal justice system, court proceedings, as well as the status of the case. Victim service providers make counselling and other referrals to victims and provide assistance in the preparation of victim impact statements or the use of testimonial aids. Victim service providers are key to informing victims of available services, helping victims recover from the event, advocating for their safety, and preparing the witnesses to testify. In the Yukon, the Northwest Territories and Nunavut, the Attorney General of Canada (through the Public Prosecution Service of Canada (PPSC)) has responsibility for prosecuting *Criminal Code* offences. While there are other services provided to victims by the territorial governments and other agencies, the PPSC is responsible for the delivery of Crown/court-based victim services in the territories to assist victims and witnesses as it relates to court accompaniment and witness preparation as well as ensuring appropriate referrals to victims support agencies as needed.

The Policy Centre for Victim Issues has made the *Victim Services Directory* available on the Department of Justice website: <http://victimservices.justice.gc.ca>. By entering the name of the town, the type of victimization experienced, or the type of services needed, victims may search the database for victim-serving agencies in their area, and find what best suit their needs.

Court³⁵⁷ and corrections³⁵⁸ based treatment programs for domestic violence offenders are recognized as a form of offender accountability.³⁵⁹ Throughout Canada there are treatment

³⁵⁷ The Domestic Violence Treatment Option (DVTO) Court in Whitehorse, Yukon is a specialized court and treatment program for dealing with domestic violence cases that was created in 2000. The DVTO Court provides the offender with an opportunity to choose a Spousal Abuse Program (SAP) to assist in changing abusive attitudes and behaviours, online: <<http://www.yukoncourts.ca/courts/territorial/dvtoc.html>>; and the Partner Assault Program (PAR) in Ontario, online: <http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#partner>.

³⁵⁸ Since 2001, the Correctional Service of Canada (CSC) has implemented programs for male offenders who have a history of violence against their female partners. Programming for men is also offered in provincial correctional facilities, for example the Respectful Relationship Program in British Columbia, online: <<http://www.justicebc.ca/en/cjis/you/offender/custody/provincial/programs.html>>.

programs that address the needs of men who behave abusively in their intimate relationships.³⁶⁰ Most treatment programs are open to all men, whether or not they are involved with the criminal justice system, although some evaluate candidates to determine whether they may benefit from the type of treatment provided by program personnel. Many of the programs use multiple approaches (e.g. individual counselling and support groups) in the provision of services. It is important to stress, however, that the effectiveness of these family violence intervention programs is not established and the research is equivocal.³⁶¹ The literature suggests that there is a difference between treatment programs that address power and control dynamics and approaches such as anger management which may not address the underlying causes of family violence. While often a component of specialized family violence intervention programs, anger management by itself is not recommended in coercive intimate partner violence cases.³⁶²

Crown prosecutors, family and child protection lawyers need to carefully weigh the many important considerations associated with these programs being recommended or ordered and the implications to the clients participating in them.³⁶³

While participation in a family violence intervention program is often connected to the criminal law proceedings, attendance in these programs may be raised in connection with family or child protection proceedings. Several issues arise in this context, including:

- Will information about an individual's participation in this program be shared with the family or child protection system? Issues with respect to confidentiality and disclosure may be of concern to lawyers representing an accused in a family or child protection context, as well as to lawyers representing the other parent.
- In particular, will information about non-attendance or non-completion of these programs be shared? This is critical information from a safety perspective since non-attendance or non-completion of programs is associated with increased risk of continued intimate partner violence.
- How will evidence of participation in such a program be used in relation to determinations about parenting or the likelihood of intimate partner violence re-

³⁵⁹ See Keeping Women Safe: Eight Critical Components of an Effective Justice Response to Domestic Violence, Prepared by the Critical Components Project Team (British Columbia, April 16, 2008) at 25, online: <<http://www.endingviolence.org/files/uploads/KeepingWomenSafe0416.pdf>>.

³⁶⁰ See National Clearinghouse on Family Violence, *Canada's Treatment Programs for Men Who Abuse their Partners*, (Government of Canada, 2008) (provides a listing of treatment programs by province and territory that address the needs of men who behave abusively in their intimate relationships).

³⁶¹ Neilson, *supra* note 20 at 134; For an overview of the current state of research on this issue see Edward W Gondolf, *The Future of Batterer Programs: Reassessing Evidence Based Practice* (Boston, MA: Northeastern University Press, 2012).

³⁶² Neilson, *ibid* at 137.

³⁶³ *Ibid* at 134-137: Identifies these considerations. It is important to obtain information, when available, about the effectiveness of the program and to ensure that it addresses the particular type of violence involved in the case.

occurring? Evidence of completion of a program may be insufficient from a safety perspective. Rather, evidence of a change in behaviour may be necessary.³⁶⁴

9.2 Services associated with the family justice system

While not targeted specifically toward victims of family violence, there are many government-based services associated with the family justice system in Canada. These include:

- Mediation;
- Parent education and information related to separation and divorce;
- Family law information centres (which may be called family justice centres or otherwise, depending on the jurisdiction). These services provide legal information, help clients deal with the court system, and refer people to organizations that can help them with their court cases;
- Information programs for children about separation and divorce; and
- Programs to put the child's views before the court – such as representation by a children's lawyer or reports on children's views.

Custody and parenting evaluations may be helpful to family law courts in situations of family violence. It is important to ensure that individuals conducting child custody evaluations have specialized knowledge of family violence, or that they consult with an individual who is a family violence expert. In the absence of this expertise, the custody evaluation may be misleading. The National Council of Juvenile and Family Court Judges has developed a guide for judges to help them address situations where a custody and access assessment may be necessary in situations of family violence; the guide addresses, in part, the need for custody evaluators to have this expertise.³⁶⁵

Also very important in the family violence context are Supervised Access Centres available in many jurisdictions across Canada. These centres provide a safe, neutral, child-focused setting for visits or exchanges between children, parents or other persons such as grandparents. They are used in cases where there are concerns for the safety of the child or a parent, and as a result, can be a particularly important service in the context of family violence. The centres provide a means for safe compliance with orders of the court where there are safety or parenting dispute concerns. Some Supervised Access Centres provide reports to the court regarding participants' use of or involvement with the service.

³⁶⁴ *Ibid* at 136.

³⁶⁵ National Council of Juvenile and Family court Judges, *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (2004), online: <http://www.afccnet.org/Portals/0/PublicDocuments/ProfessionalResources/BenchGuide.pdf> (This report also notes that a parent who is not an appropriate candidate for custody may desire visitation and a careful evaluation may be necessary to determine (a) the motivation for that request, (b) what impact ongoing contact will have on the children, and (c) whether and how visitation can be structured to assure the safety of the vulnerable parent and the child).

9.3 Services associated with the child protection system

Many services are available to families involved with the child protection system. Some of these include:

- Counselling;
- Supervised access;
- Parent education programs;
- Psychological assessments;
- Youth work supports;
- Addictions counselling;
- Anger management;
- Social safety net services;
- Income supports;
- Aboriginal Courtwork family law services (which is discussed further in subsection 5.2.7); and
- Child protection mediation (which is discussed further in subsection 8.2.3).

In Alberta, when a child is apprehended and a parent charged, and/or the parents are separating, and/or the child is in the youth justice system with their own charges, programs and services will come into play. The coordination is for the most part done informally through Child and Family Services who will work with families to determine together what supports and interventions will sustain capacity building to alleviate the concerns in the family or the individual.

9.4 Challenges where there is a lack of coordination

While many services are available to families, problems can arise where these services are not coordinated with one another. For example:

- Family members may need to attend a number of different services, thus requiring multiple appointments which may be uncoordinated. Multiple and uncoordinated appointments can wear family members down, and may even discourage them from seeking the services that they require.
- Inconsistent supports may be provided to victims in different contexts. For example, while victim services in the criminal justice system may ensure that the victim and alleged perpetrator are not left to wait in the same waiting room to ensure safety, such supports do not always exist in the family justice system, and the victim may find her/himself in the same waiting room as the alleged perpetrator.

The Family Justice Centre in the United States explains the issue as follows:

Most criminal and civil justice systems make it difficult for victims to seek help and unintentionally wear them down. Victims are often required to travel from location to location to seek services that are scattered through a community or region. They have to tell their story over and over again to officials representing agencies, such as, law enforcement, courts, legal aid, medical, transportation, housing, social services, mental health, rehabilitation, financial assistance and many more. The criminal justice system unintentionally makes it easy for victims to become frustrated and ultimately stop seeking help.³⁶⁶

9.5 Promising practices

In Alberta, there are two examples of community-justice responses that highlight coordination. HomeFront (Calgary) partners with the criminal justice system to respond in an improved and coordinated manner with families experiencing domestic violence by:

- Ensuring victims' concerns are brought to the attention of the specialized domestic violence court providing them with a voice in the outcome;
- Supporting treatment for victims and for offenders who choose to accept domestic violence treatment as part of a court order;
- Providing early intervention for families when calls have been made to police, but no charges are laid; and
- Supporting victims by increasing their level of safety and encouraging them to pursue their capacity to change in their own and their family's best interests.

The Today Family Violence Help Centre in Edmonton began offering services in October 2009. The service delivery model is a collaborative, community response that draws upon co-located, centralized services, and community-based services not co-located in the centre. The goal is to reduce the barriers facing those affected by domestic violence as they attempt to navigate what they often see as a dispersed and complex system. By delivering a comprehensive, multidisciplinary response to family violence, it offers a safe place for those affected by domestic violence to access timely, short-term services and support and provides links to medium-term and long-term services and supports in the community.

While services for victims have traditionally been primarily focused on a victim's involvement with the criminal justice system, there has been increasing recognition that victims of family violence need support in the family justice system as well. For example, in September 2012, the British Columbia Ministry of Justice advised victim's assistance workers that they can provide assistance in both criminal and family law cases where the clients are victims of family or sexual violence. The Ministry of Justice recognizes that court proceedings and the serving of documents can be a time of increased risk, and that safety planning and providing emotional support to victims in the family court context is important. In addition, victim services workers

³⁶⁶ Family Justice Centre Alliance, online: <<http://www.familyjusticecenter.org/the-family-justice-center-approach.html>>.

may provide emotional support to victims of crime in relation to family law issues and family court matters, helping to obtain protection orders or obtaining copies of orders, helping to obtain information about the family court process, and providing information on peace bonds and protection orders to victims.

Ontario's Family Court Support Worker program provides assistance and support to victims of domestic violence as they move through the family court process; in addition, linkages are also made with the criminal system. The objectives of the Family Court Support Worker Program include providing supports primarily for female victims of domestic violence involved in the family court process, as well as enhancing victim safety and access to services and supports. The Family Court Support Worker will assist the victim in a number of ways, which include to:

- Provide information to the victim about the family court process;
- Assist the victim to record the history of abuse for court documentation;
- Provide the victim with safety planning and referrals for risk assessments where appropriate and assist with safety planning related to court attendances;
- Support the victim to follow through on requests received from lawyers;
- Debrief and discuss court outcomes, lawyer appointments, Family Law Information Centre meetings, consultations with duty counsel and next steps;
- Refer the victim to specialized services (both domestic violence-specific and culturally relevant services) in the community, and communicate with other family court-based services and referral sources to ensure seamless delivery of appropriate information and support; and
- Accompany the victim to a court proceeding, where appropriate.

From the perspective of better coordination between systems, a particularly important role of the Family Court Support Worker is to communicate with criminal court-based services, such as the Victim/Witness Assistance Program, where appropriate and in accordance with an established protocol.

As noted in the chapter on coordination of court proceedings (Chapter 5), Domestic Violence Coordinators (in the Ada County model), can play an invaluable role by coordinating access to services both on the criminal and family justice systems. These individuals act as a focal point, and have an overall view of the services to which family members have been referred, and the outcomes of those services. They can then share this information with the courts and other service providers as appropriate and necessary.

Family Justice Centres are also another example of coordination of services in cases of family violence. These centres are based on the San Diego Family Justice Centre model, where a number of different service providers are co-located in order to provide the varying and coordinated services that victims of family violence may require. Depending on the community in which the Family Justice Centre is found, its specific services and support may vary, but in principle, it includes police, prosecutors, legal resources, including family lawyers, and other resources such as counsellors.

There are a number of Canadian examples of Family Justice Centres, including the Safe Centre of Peel which opened in November 2011. It has 15 partners including social services (e.g. counselling and youth-based services), legal services, with family law duty counsel and a Family Court Support Worker, settlement services to assist newcomers to Canada and child protection services, with its specialized domestic violence team and victim services. Victim Services of Peel are the first contact for victims who come to the Centre. They conduct a risk assessment and then determine which other services the victims require; usually, within the first three-hour meeting, the victim will be referred to those other services. Similarly, the Family Violence Project of Waterloo Region, is also based on the San Diego Family Justice Centre model, and includes police specialized in domestic violence.

Children's Advocacy Centres (CACs) provide an array of services to reduce the trauma of child victims and witnesses and their families in navigating the criminal justice system, and are a good example of coordination between the criminal and child protection systems. CACs were first developed in the United States in the 1980s to provide a coordinated approach to addressing the needs of children implicated in the judicial system either as victims of, or witnesses to, crime. CACs seek to minimize system-induced trauma by providing a single, child-friendly setting for children and youth victims or witnesses and their families to seek services, and by reducing the number of interviews and questions directed at children during the investigation or court preparation process.

Not all CACs offer the same services, but key components include:

- A multidisciplinary team that includes law enforcement, child protection services, prosecution, mental health services, victim advocacy services and the child advocacy centre;
- Child and family-friendly facilities;
- Forensic interviewing services;
- Victim advocacy and support, including court support;
- Specialized medical support and treatment;
- Specialized mental health services;
- Training and education for professionals working with child abuse victims; and
- Community education and outreach.

Some of the American research results achieved through CACs are: reduction of system-induced trauma for child and youth victims; increased satisfaction with services received; reduction in number of forensic interviews conducted; and better quality of evidence.³⁶⁷ It

³⁶⁷ David N King et al, *Annotated Bibliography of the Empirical and Scholarly Literature Supporting the Ten Standards for Accreditation by the National Children's Alliance* (2010), online: <http://www.nationalcac.org/professionals/images/stories/pdfs/annotated%2Bbibliography--final.pdf> (This bibliography includes all the research completed by the team at the Crimes against Children Research Center at the University of New Hampshire based on a large, multi-site evaluative study of the impacts and outcomes of CACs).

should be noted, however, that some of the criminal justice outcomes often cited (increases in charges laid; better quality of evidence; more guilty pleas; and higher conviction rates with more appropriate sentences) have yet to be demonstrated through empirical research.³⁶⁸

There are several CACs across Canada, and their numbers are growing. For example, The Regina Children's Justice Centre (1993) and the Saskatoon Children's Justice Centre (1996) provide coordinated interviewing and court preparation, as well as outreach, all in child-friendly facilities with referrals to mental health services. Substantial resources are being made available under the Federal Victims Strategy, to support the development and enhancement of CACs in Canada.

Saskatchewan offers services to children exposed to domestic violence in approximately 10 locations across the province and has a program manual available to help guide how such a service can be provided. The Ministry of Justice and Attorney General provides support for children exposed to violence programs in Saskatchewan to address the needs of children who are exposed to violence. The programs assist children and youth who have witnessed or experienced interpersonal violence or abuse, with a goal of preventing them from becoming victims or perpetrators of violence and abuse in the future.

Edmonton's Zebra Child Protection Centre, the first centre of its kind in Canada, enables the community to respond to child abuse with a professional, compassionate, and highly integrated program of healing and justice. The centre integrates a multidisciplinary community of professionals – Edmonton Police Service, Alberta Children's Services, Crown prosecutors, Child at Risk Response Teams, medical and trauma screening professionals, and volunteer advocates – in a child-centred environment that nurtures the abused child and uses all the wisdom of its partnership to see that justice is done. The multidisciplinary team allows for streamlined, thorough and expert investigations, interventions, prosecutions, and supports. Through their own resources as well as alliances within the community, Zebra provides children and their non-offending parents and guardians with essential social, medical, and mental health services and supports.

Discovering the truth behind suspicions and allegations of child abuse is a complex task. Zebra's collaborative approach lends strength to the child during the investigative process and also lends power to law enforcement. No one agency or professional alone is fully equipped to prioritize the well-being of a child abuse victim and balance the stringent demands of justice. Using a multidisciplinary approach is a cornerstone of best practices for children's advocacy centres worldwide.

In Manitoba, the Winnipeg Children's Advocacy Centre opened in January 2013. Once fully operational, the centre will be staffed by a team of professionals including police, child protection and victim service providers who will work in a child-friendly setting to help a child

³⁶⁸ Theodore P Cross et al, "Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse" (2008) *Juvenile Justice Bulletin* (United States Department of Justice) at 6.

or youth victim or witness navigate the child abuse investigation process and justice system on-site instead of services at multiple locations or at a police station where suspects are typically held. One of the key features of the centre will be a forensic interviewer who will interview children or youths with the objective of limiting the number of times they will have to tell and re-tell their ordeal to the various professionals involved in an investigation.

Chapter 10 Models of cross-sector collaboration

While this report is focused on cross-sector collaboration within the justice system, notably among the family, child protection and criminal justice sectors, this last chapter briefly examines some of the challenges to a broader collaborative approach to family violence as well as some promising practices in this area. Cross-sector collaboration refers to the linking or sharing of policies, information, resources, activities and services by organizations in two or more sectors to jointly achieve an outcome that would not be accomplished by organizations in one sector separately.³⁶⁹ Cross-sector collaboration of relevance to family violence includes multidisciplinary and inter-agency cooperation, identifying appropriate government and community-based services and facilitating the development of coordinated policy frameworks and structured collaborations to allow for proactive referrals and follow-ups. It often involves the establishment of Inter-agency Committees to more formally promote and coordinate common policies, protocols, and service contracts.

Every major report and much of the research on violence against women and children over the past 25 years has confirmed the crucial importance of cross-sector collaboration.³⁷⁰ For example, the *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* highlighted the need for comprehensive and coordinated strategies to address the problem of domestic violence as one of the key lessons learned, noting:

Within each jurisdiction, a comprehensive, co-ordinated strategy is needed to address the problem of domestic violence and the factors that contribute to it. Such co-ordination needs to occur across policy sectors (social, justice, education and health) and at all levels within each jurisdiction: at the provincial level (to establish a policy framework); at the local community level (to co-ordinate services and to identify needs, gaps and solutions); and at the individual level (to provide effective case management and conferencing mechanisms). The essential ingredients of an effective strategy addressing domestic violence within each jurisdiction include resources, a focal point of leadership and co-ordination, senior-level commitment and support to undertake these initiatives, and an accountability framework based on commitment to a long range vision.³⁷¹

The central importance of coordination in family violence cases has also been specifically emphasized in a number of coroner's and other reports on deaths resulting from or linked to

³⁶⁹ See John M Bryson, Barbara C Crosby & Melissa Middleton Stone, *The Design and Implementation of Cross-Sector Collaborations: Propositions from the Literature* (2006) 66:s1 Public Administration Review 44, online: <http://www.hhh.umn.edu/people/jmbryson/pdf/cross_sector_collaborations.pdf>.

³⁷⁰ British Columbia Critical Components Project Team, *Keeping Women Safe: Eight Critical Components of an Effective Justice Response to Domestic Violence* (April 2008) at 32, online: <<http://www.endingviolence.org/files/uploads/KeepingWomenSafeExec0416.pdf>>.

³⁷¹ Justice Canada, "Spousal Abuse Policies", *supra* note 3 at 83.

domestic violence.³⁷² The Report to the Chief Coroner of British Columbia (2010) *Findings and Recommendations of the Domestic Violence Death Review Panel* noted that “victims and perpetrators of domestic violence encounter a number of service providers as they progress through the legal system. It is absolutely critical that there be a standardized, collaborative approach to domestic violence by all agencies, ministries, and support networks reinforced by enhanced public awareness of the risks for families in distress.”³⁷³

In the context of family violence cases that involve two or more of the criminal, family and child protection systems, the need for coordination is especially critical. The distinct legal processes have different objectives and legal standards which increase the likelihood of fragmented responses, inconsistent orders and confusion. Lack of coordination can have serious negative repercussions for victim’s safety, offender accountability, police and program accountability and system costs. Coordination is therefore required within the broad justice sector – between the criminal, family and child protection systems, and also between the justice sector and other government sectors such as child protection, social services, and mental health. Coordination with community services and stakeholders is also necessary.

10.1 Challenges/barriers to coordinated responses

While the importance of coordinated and integrated criminal justice, family law, social service, mental health and community responses to family violence has been recognized for some time, this goal has been difficult to achieve. The different mandates, goals, standards and accountability frameworks amongst the various sectors and systems create barriers to coordinated responses. From a government perspective, there are also practical challenges associated with multidisciplinary coordination. It has been noted that:

Coordination needs to happen at all levels to be effective. It also takes staff to do the work and a commitment of resources to carry out activities. These (coordinating) bodies need a mandate to coordinate, [one] that is supported by real commitment at the top and that is enforceable. Partnership is a very time-consuming process, but no more so than the resources spent on uncoordinated policies, programs and service delivery systems.

Coordination is difficult in part because it operates, by definition, across professional disciplines and departmental boundaries, and outside line authority. Typically the coordination function comes with responsibility but is not supported by the authority to make it happen. Accountability mechanisms tend to be weak if not supported by the senior

³⁷² See e.g. BCRCY, “Honouring Kaitlynne, Max and Cordon”, *supra* note 122 in executive summary (A key message is the need for a collaborative, systemic approach to complex cases across British Columbia’s child-serving, mental health and criminal and civil justice systems and in particular that “each arm of the system of supports and protections for vulnerable children and adults in B.C. must be attuned to the risks for their clients, especially to children, and be prepared to refer to and accept referrals from other services”).

³⁷³ British Columbia Ministry of Public Safety and Solicitor General, *Report to the Chief Coroner of British Columbia: Findings and Recommendations of the Domestic Violence Death Review Panel* (May 2010) at 4, online: <http://www.pssg.gov.bc.ca/coroners/reports/docs/death-review-panel-members-domestic-violence.pdf>

management of multiple departments/stakeholders. When coordination works, it is in spite of this and is usually the product of partnership and trust-building effort.³⁷⁴

It has also been noted that potential stakeholders in collaborative processes do not always trust each other or fully understand or concur with the motives and philosophy of each other's organizations. Since organizations have diverse mandates and work primarily with different individuals within a family or an intimate relationship, there can be concerns that some representatives may try to prioritize their own or their client's perspective and, in the process lose sight of the safety of the victims. A collaborative team also requires impartial leadership to provide direction and organization for members. However, deciding who will govern the collaborative team is a challenge. Governing the collaborative team includes arranging meetings, taking minutes, storing confidential information, communicating with members and providing staff support.³⁷⁵

This inter-agency work involves creating and sustaining multidisciplinary and cross-sector collaborations and supporting community level coordinating committees. While it can be resource-intensive, and the challenges are often greater in rural and remote areas, this work is critically important.

10.2 Promising practices

While specific examples of promising collaborative practices are found within the body of this report, this section highlights at a more general level, the different types of models of cross-sector, inter-agency and multidisciplinary collaboration that are being used to design and implement improved cross-sector coordination among the criminal, family and child protection systems.

10.2.1 International

In the United Kingdom, the Family Justice Council (FJC), established in 2004, is an advisory, non-statutory, non-departmental public body sponsored by the Judicial Office. It provides independent expert advice, from an interdisciplinary perspective, on the operation and reform of the family justice system in England and Wales to the Family Justice Board. It is chaired by the President of the Family Division, and in August 2012, became part of the President's Office.

The primary role of the Family Justice Council is to promote an interdisciplinary approach to family justice and to monitor the system. It advises on reforms and consists of a representative cross-section of those who work, use or have an interest in the family justice system.

³⁷⁴ Nova Scotia Department of Justice, *Nova Scotia Family Violence Framework for Action Review: Interjurisdictional Comparison and Literature Review* by Carolyn Marshall (2001) at 55.

³⁷⁵ Campbell, *supra* note 3 at 6.

There are a number of FJC Committees and several reports which consider issues relating to domestic violence. For example:

- An earlier Family-Criminal Interface Committee of the Family Justice Council published, through the Law Society, the *Good Practice Guide: Related Family and Criminal Proceedings*. It was designed as a tool for specialist legal practitioners in dealing with cross-jurisdictional issues to address an identified need for legal practitioners to understand how the other system works.
- Family Justice Council Report to the President of the Family Division on the approach to be adopted by the Court when asked to make a contact order by consent, where domestic violence has been an issue in the case.
- A Report to the Family Justice Council, January 2013, by Rosemary Hunter and Adrienne Barnett on behalf of the FJC Domestic Abuse Committee, Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm.

10.2.2 Models within Canada

a) Coordinating committees and inter-agency collaboration

In Canada, formalizing a coordinating committee is the most common model utilized to develop and implement collaborative relationships and endeavours. Particularly when formed in response to a specific priority, the committee format provides important formal authority and status, as well as access to resources. It can also serve to provide a dedicated forum for discussions and decisions which are a key component to the development of common visions, goals and outcomes.

As an example, in Prince Edward Island, the Premier's Action Committee on Family Violence Prevention (PAC) is an advisory committee to the Premier with member organizations appointed by Executive Council representing government departments, community advocates, crisis and outreach workers, and representatives of legal, medical, and law enforcement circles to ensure diversity and collective responsibility for family violence prevention. The PAC Ad Hoc Working Groups and Committees are comprised of PAC members, and other government and community representatives. The Civil/Criminal Issues Working Group (CCWG) coordinates the activities of various committees in the province who are focused on family violence issues in the context of the criminal and civil justice systems, including the Linking Criminal/Civil Justice Systems Working Group. This working group focuses on information access between the Civil and Criminal justice systems in cases of family violence and has held ongoing meetings to determine the feasibility of a system to link civil and criminal orders in cases of family violence involving children.

Another example is the Family Violence Police Advisory Committee in Alberta. Chaired by the Public Security Division of Justice and Solicitor General, this committee is comprised of representatives from the RCMP, municipal and First Nations police services, the Alberta Council of Women's Shelters, the Criminal Justice Division, and Alberta Human Services and Correctional Services. This Committee meets monthly to discuss issues of protection as well as issues within the criminal justice system. It was through the efforts of this committee that the Domestic Violence Guidelines for Police, the Family Violence Investigation Report (FVIR) and the Considerations for Safety Guide were developed. PAC has recognized the need for input from the Family Justice System and will be extending the invitation for representation at this table.

Furthermore, "gap" assessments are critical to figuring out what services are available, how they overlap, and where there are holes in service delivery. The Safe Communities Project (SAFECOM) in Alberta is an initiative designed specifically to gather cross-ministry personnel to address crime prevention.³⁷⁶ The Integrated Justice Project in Calgary (developed through SAFECOM) is an example of how co-locating services can encourage collaboration and ensure that individuals are receiving the full benefit of available services, otherwise known as "wrap around service."³⁷⁷

In addition, in Quebec, the ministère de la Justice [TRANSLATION: Ministry of Justice] and the ministère de la Condition féminine [TRANSLATION: Ministry on the Status of Women] co-chair the deputy ministers' committees en matière de violence conjugale, familiale et sexuelle [TRANSLATION: on spousal, family and sexual violence] and the comité interministériel de coordination en matière de violence conjugale, familiale et sexuelle [TRANSLATION: interdepartmental coordinating committee on spousal, family and sexual violence]. The primary mandate of the latter committee is to make certain that government action in these areas is consistent. The coordination done by these committees is also aimed at avoiding duplication of services and ensuring an adequate response to client needs. It also results in ongoing evaluation of joint actions while respecting the autonomy of the parties. This coordination mechanism has existed since 1987. Currently, ten ministries are taking part in this work.

There are many additional examples of government-based integrated coordinating committees throughout Canada with mandates related to violence against women and/or family violence that are identified in Annexe 4, Volume II of this report.

b) Policies and standards

A key component of collaborative efforts is negotiating common formal and informal policies and standards. British Columbia's Violence Against Women in Relationships Policy (VAWIR

³⁷⁶ Alberta Government, Justice and Solicitor General, *Integrated Justice Services Project (IJSP)*, online: http://justice.alberta.ca/PROGRAMS_SERVICES/SAFE/Pages/ijsps.aspx

³⁷⁷ Alberta Government, Justice and Solicitor General, *Safe Communities and Strategic Policy*, online: http://justice.alberta.ca/programs_services/about_us/Pages/SafeComStrategicPolicy.aspx.

policy) December 2010³⁷⁸ is an example of a comprehensive provincial policy framework which sets out the protocols, roles and responsibilities of service providers across the justice and child welfare system that respond to domestic violence cases including Police, Crown counsel, Corrections, Victim Services, Ministry of Children and Family Development, Court Services, Family Justice Services, and the Family Maintenance Enforcement Program. The policy also reflects the operational policies of the various agencies involved. The identified primary purpose of the VAWIR policy is to ensure an effective, integrated and coordinated justice and child welfare response to domestic violence. The goal is to support and protect those individuals at risk and facilitate offender management and accountability. It includes the Protocol for Highest Risk Cases³⁷⁹ that outlines the responsibilities of justice and child welfare system partners for the delivery of a coordinated response to domestic violence cases designated by police as being highest risk. Key protocol partners include Police, Crown counsel, Corrections, Victim Services and Child Protection Workers.

In Ontario, Policy (LE-024) of the Policing Standards Manual (2000)³⁸⁰ provides advisory policies and guidelines for undertaking and managing investigations into domestic violence occurrences and includes suggested terms of reference for domestic violence coordinating committees.

Saskatchewan Towards Offering Partnership Solutions to Violence Inc (STOPS) has prepared a manual Community Connections Plan to help provide direction for a consistent, coordinated, and effective response to interpersonal violence and abuse in Saskatchewan. The *Community Connections Plan* outlines actions that individuals, agencies, communities, and government can take to respond to victims/survivors of violence and abuse; provides tools for communities to organize and work together; and broadly outlines the roles and responsibilities of various agencies in their delivery of services.

These are just some of the many examples of policies and standards throughout Canada designed to assist with a coordinated and collaborative response to family violence. See Annex 4, Volume II, for further examples.

c) Protocols and memoranda of understanding

Many jurisdictions have developed protocols and/or memoranda of understanding to structure system and sector collaboration in specific areas. For example, in Ontario, the Victim/Witness

³⁷⁸ Government of British Columbia, *Violence Against Women in Relationships Policy*, 2010, online: <<http://www.pssg.gov.bc.ca/victimservices/publications/docs/vawir.pdf>>.

³⁷⁹ Government of British Columbia, *Protocol for Highest Risk Domestic Violence Cases (VAWIR Policy)*, online: <<http://www.pssg.gov.bc.ca/victimservices/service-provider/docs/victim-service-worker-vawir-protocol-high-risk.pdf>>.

³⁸⁰ Government of Ontario, Ministry of the Solicitor General, *Policing Standard Manual*, 2000, online: <http://govdocs.ourontario.ca/results?source=Ontario.%20Ministry%20of%20the%20Solicitor%20General%20and%20Correctional%20Services.%20Policing%20Services%20Division.&source=Ontario.%20Ministry%20of%20the%20Solicitor%20General%20and%20Correctional%20Services.%20Policing%20Services%20Division.&sort=score+desc>

Assistance Program (V/WAP) which assists during the criminal court process, and the Family Court Support Worker Program (FCSWP), which assists victims of domestic violence during the family court process, have a protocol in place to help support clients with concurrent criminal and family law cases. The protocol encourages proactive referrals between programs, and provides guidelines for sharing of information and case coordination.

In the Northwest Territories, the Yellowknife Interagency Family Violence and Abuse Protocol is an agreement among eight cross-sectoral agencies to improve responses to adult victims of family violence. The Protocol describes how agencies will respond to adult victims of family violence and interact with each other to provide a more coherent response to victims of family violence. Other, similar protocols are listed in Annex 4, Volume II.

d) Court coordination

In New Brunswick, The Moncton Domestic Violence Court³⁸¹, made permanent in 2011, includes a Domestic Violence Coordinating Team with a Court Coordinator, who collects and shares information with the immediate key partners of the Court. To prevent the issuing of conflicting court orders between the criminal and family justice system, the coordinator consults the family court information system on a weekly basis to cross-reference potential overlapping domestic violence cases, by using identifying information of offenders and victims scheduled to appear in Domestic Violence Court each week. This Domestic Violence Court Docket is circulated weekly to the social workers and all involved in the Domestic Violence Court in order to facilitate a coordinated response for domestic violence files.

Ontario's Domestic Violence Court Advisory Committees were established to support the effective operation of the Domestic Violence Court Program. The Committees are comprised of justice and community representatives and are intended to provide a coordinated, effective justice system response to domestic violence cases. The Committees provide a mechanism for information sharing, process review, and problem solving. Typically, membership on the Domestic Violence Court Advisory Committee includes: Crown; Victim/Witness Assistance Program; Court Services; Police; Probation and Parole; Partner Assault Response Program agencies; Interpreter agencies; Sexual Assault/Domestic Violence Treatment Centre; and a representative from the Violence against Women sector. Representatives of the defence bar, the Children's Aid Society, and shelters may also sit on these committees. Domestic Violence Advisory Committees are not designed to deal with case-specific issues, but rather as a forum for discussion on systemic and policy issues related to the operation of the Domestic Violence Court Program.

³⁸¹ New Brunswick, *Operational Review, Moncton Domestic Violence Court Pilot Project* by Aline Saintonge & Carole Dilworth, 2009, online: <<http://www.gnb.ca/0012/womens-issues/DomesticViolenceCourt/2009-10OperationalReviewMoncton.pdf>>.

e) *Government strategies and actions plans*

Cross-sector collaboration is increasingly assumed to be both necessary and desirable as a strategy for addressing many of society's most difficult public challenges.³⁸² To address the complex and often interconnected issues related to violence against women and family violence, all jurisdictions within Canada have developed high-level strategies, action plans and campaigns that promote cross-sector collaboration that are identified in Annex 4, Volume II.

In Quebec, mechanisms have been established to ensure cooperation and coordination among agencies that respond to domestic violence and sexual abuse. In 1995, the intervention policy on domestic violence, *Preventing, Detecting, Ending Domestic Violence* was made public with a first action plan containing 57 commitments. In 2001, the *Orientations gouvernementales en matière d'agression sexuelle* [TRANSLATION: government guiding principles on sexual abuse] were published as well as a first action plan that contained 59 commitments. In 2004, a second action plan on domestic violence (2004-2009) was adopted that contained 72 commitments. The reports on the implementation of these action plans, published in 2007 and 2011 respectively, are excellent examples of following through and measuring these actions.³⁸³ To update its commitments, the government published in April 2008, the *Plan d'action gouvernemental 2008-2013 en matière d'agression sexuelle* [TRANSLATION: 2008-2013 government action plan on sexual abuse] containing 100 commitments and in December 2012, the 2012-2017 Action Plan on Domestic Violence was published.³⁸⁴ This latter contains 135 commitments presented in two components: the first includes 100 measures that address the general population and the second includes 35 measures that specifically address the Aboriginal population.

Alberta's Cross-Ministry Action Plan *Strategy for the Prevention of Family Violence and Bullying (2009-2012)*, includes the priority of identifying issues related to the intersection between the family law and criminal justice systems in supporting family violence victims and offenders (it

³⁸² See John M Bryson, Barbara C Crosby & Melissa Middleton Stone, "The Design and Implementation of Cross-Sector Collaborations: Propositions from the Literature" (2006) 66:s1 Public Administration Review 44, online: <http://www.hhh.umn.edu/people/jmbryson/pdf/cross_sector_collaborations.pdf>.

³⁸³ *Rapport sur la mise en œuvre des engagement gouvernementaux 2001-2006 en matière d'agression sexuelle* (2007), online: <<http://www.mcc.gouv.qc.ca/fileadmin/documents/publications/Rapport-engagements-gouvernementaux2001-2006.pdf>>; *Bilan de la mise en œuvre du plan d'action gouvernemental 2004-2009 en matière de violence conjugale* (2011), online: <http://www.scf.gouv.qc.ca/fileadmin/publications/Violence/BilanViolenceConjugale_Final.pdf>.

³⁸⁴ Government of Québec, *Preventing, Detecting, Ending – 2012-2017 Government Action Plan on Domestic Violence*, 2012, online: <http://www.scf.gouv.qc.ca/fileadmin/publications/Violence/Plan_d_action_2012-2017_version_anglaise.pdf>.

involves Justice and Attorney General; Solicitor General and Public Security; Children and Youth Services).³⁸⁵

In March of 2012 the British Columbia government created the Provincial Office of Domestic Violence (PODV) in response to the findings and recommendations made in the Representative for Children and Youth's (RCY) report, *Honouring Kaitlynne, Max and Cordon: Make Their Voices Heard Now* (2012).³⁸⁶ The RCY completed this in-depth investigative report into the lives and deaths of these three children who were affected by exposure to domestic violence and their father's untreated mental illness.

The PODV, in collaboration with six key ministries, developed the *Taking Action on Domestic Violence in British Columbia* (September 2012) action plan which sets the course towards a coordinated approach to addressing domestic violence across the child and family serving systems in British Columbia. The action plan lays out the key deliverables, actions and timelines that respond to the recommendations in the RCY report and outlines the provincial government's short-term plan to improve and strengthen the response to domestic violence in British Columbia with a clear focus on the safety of children, women, families and communities.

A holistic response to family violence requires not only enhanced linkages among the key sectors within the justice system but also collaboration between the justice system and other critical systems such as the health care, welfare, housing, shelters, educational, social and community service sectors. This chapter set out just a couple of the multiple examples of government strategies and action plans to respond to family violence throughout Canada involving multiple sectors. See Annex 4, Volume II: Family violence responses by jurisdiction, for further examples.

³⁸⁵ Government of Alberta, *Cross-Ministry Action Plan, Strategy for the Prevention of Family Violence and Bullying, 2009-2012 Action Plan*, online: <http://www.child.alberta.ca/home/documents/familyviolence/Cross-Ministry_Action_Plan.pdf>.

³⁸⁶ BCRCY, "Honouring Christian Lee", *supra* note 75.

Conclusion

Representatives from all Canadian provinces and territories participated in the FPT Ad Hoc Working Group on Family Violence with the objective of identifying and analyzing issues posed by the intersection of family, child protection and criminal justice system responses to family violence. In keeping with the terms of reference of the Working Group, this report does not offer definitive recommendations to address the challenges identified. Instead, it identifies various tools, protocols and practices that have been implemented in Canada or elsewhere, or which have been recommended to address these issues. It is hoped that these promising practices will be a starting point for moving forward in this area.

This report attempts to examine the issues from the perspective of families having to reconcile multiple orders and to navigate various parallel proceedings. Given the distinct objectives, processes, evidentiary standards and timelines associated with each of the family, child protection and criminal justice system responses, families can be faced with fragmented responses, inconsistencies and confusion. Currently, the various court systems operate separately from one another and although efforts have been made to enhance coordination between these systems, more work needs to be done, especially with regards to technology.

The proceedings and orders made in one court can have significant impacts on parallel or subsequent matters involving the same family in another court. If orders within the criminal context (notably pre-trial release of the accused, bail, peace bonds or conditional sentence orders) are issued without knowledge of the existence or content of family law or child protection orders, inconsistent or contradictory court orders can result and family members may be placed in a situation where they are inadvertently in breach of one of the conflicting court orders. On the other hand, where family courts are issuing child custody or parenting orders without knowledge of pre-existing criminal, civil protection or child protection orders related to family violence, they run the risk of issuing an order that could place the child and or the parent in danger. While acknowledging the complexities associated with the intersectional impact of pre-existing orders in family violence cases, it is hoped that some of the best practice resources identified can assist in addressing these intersectional barriers. These include the establishment of family violence teams, bail protocols, policies and model clauses, and the use of standard family law orders. Court order databases can also serve as promising tools for justice system officials to help ensure that justice system officials are aware of relevant civil and criminal protection orders relating to the same family.

The different sectors of the justice system operate independently of one another with their own particular experts, assessors and services. In many cases, victims of family violence will be subject to multiple risk assessments by different agencies or shelters intervening on their behalf. A lack of communication between the sectors responding to family violence cases increases the danger that potential risks associated with families in distress may not be consistently identified or fully appreciated. This report emphasizes the need to ensure that knowledge of risk indicators is fully shared across the various sectors of the justice system and that all necessary partners are informed and engaged in risk management and safety planning.

The report identifies some examples of high-risk case coordination practices being undertaken in Canada to improve threat and risk assessment communication and case coordination and notes the establishment of death review committees to identify risk factors to help predict potential lethality and to create recommendations aimed at preventing deaths in similar circumstances.

The desire to improve information sharing between the criminal, family and child protection sectors is a key theme of this report. Coordination among different court systems involves the capacity of the parties, court staff, lawyers and judges to access records from other sectors of the system. Parties may erroneously believe that one court has prior knowledge of related parallel proceedings involving the same family in another court. However, the various courts involved may have little to no connection between them and may not be at the same jurisdictional level (one may be at the provincial and the other the superior court level). As a result, courts are often unaware of other proceedings or orders that may be relevant – a problem that is linked to a current lack of institutional sharing of information between different court systems. Technological requirements and huge costs are among the challenges associated with establishing computerized systematic matching of cases from different court systems. Nonetheless, there are a number of examples of Canadian initiatives that improve the way various court systems can be made aware of proceedings or orders from other court systems.

With respect to information sharing, the report also emphasizes the complex but very important legal evidentiary issues that may arise in proceedings involving family violence. Parties may be surprised to find that the evidence used to substantiate a finding of family violence in one court is either not available to them or is not sufficient to substantiate the violence in another. The report examines how evidence from one proceeding may be produced as evidence in another proceeding and the safety implications for the victim of family violence associated with the scope of disclosure of information to the accused in the criminal proceeding, or to the parent(s) in child protection proceedings. Determining when to order the production of Crown prosecution records is a highly contextual exercise. Some guidelines and protocols that are being developed and that may be of assistance are identified in this report.

Depending on the particular context, there may be many pieces of information that are potentially relevant to share for coordination purposes between different sectors of the justice system. However, there is a wide array of privacy legislation, regulations, guidelines and codes of ethics across federal, provincial and territorial jurisdictions that relate to the sharing of personal and confidential information. While privacy considerations can and should generally give way to a duty to share information, when doing so would prevent or protect children and intimate partners from harm, there are many privacy-related challenges to information sharing in the context of cross-sector collaboration. The report emphasizes the importance of clear legislation, directives, memoranda of understanding and protocols in order to address these challenges.

The lack of coordination of court proceedings has impacts on both the administration of justice, as well as on the safety and well-being of family members. For example, the potential adverse

effects of criminal orders on parallel or subsequent family law proceedings include procedural delays, impacts on negotiations, and inappropriate participation in mediation, counselling or other programming. Promising practices which may assist in addressing these issues include variations on the “one family – one judge” concept, judicial communications and court coordination models.

While much of the report focuses on the court system, the reality is that the majority of family law, child protection and criminal cases settle outside of court or never make it to trial. For this reason, issues relating to information sharing and collaboration in the context of mediation and other dispute resolution mechanisms are considered. While the use of these various dispute resolution mechanisms in the context of family violence cases is not without controversy, the report provides a few examples of these mechanisms in family violence cases in Canada.

Finally, specific examples of promising collaborative practices are found within the body of the report. In a broader sense, cross-sector collaboration should also include multidisciplinary and inter-agency cooperation among the justice system and other government sectors such as social services and mental health sectors. In addition, coordination is required with community stakeholders in order to allow for referrals and follow-up to appropriate community based non-governmental services. In this respect the report identifies at a more general level, the need for cross-sector inter-agency committees to more formally promote and coordinate common policies, protocols and service contracts and identifies some international examples as well as models within Canada that promote cross-sector, inter-agency and multidisciplinary collaboration.

As noted in the introduction of the report, each jurisdiction is unique and it is important to emphasize that there is no one-size-fits-all approach which will work in all contexts and for all purposes. The Ad Hoc FPT Working Group on Family violence hopes that this report will serve as a springboard to support ongoing and future work by jurisdictions on this very important issue.