Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts

Discussion Paper

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Research Project - Canadian Observatory on the Justice System Responses to Intimate Partner Violence

Dr. Margaret Jackson, Principal Investigator

The Honourable Donna Martinson

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PART I – INTRODUCTION- MULTIPLE PROCEEDINGS AND FAMILY VIOLENCE

A. Nature of the Research Project

Recent Canadian access to justice reports identify research, leading to evidence based decisions, as one of the components necessary to achieve access to justice. Several British Columbia judges and lawyers have helpfully agreed to participate in a qualitative, exploratory research project focusing on British Columbia which deals with allegations of family violence. It addresses two broad concerns. The first deals with the ways in which information about risk of future harm is or could be presented in individual family law proceedings and criminal law proceedings. The second, and the primary focus of the research project, considers ways in which that information is or could be shared between courts when there are criminal and family law proceedings taking place at the same time.

With respect to individual family proceedings there is a concern that judges may not receive information and/or actual risk assessments, including assessments about risk management, when interim best interests of children decisions, "final" best interests of children decisions, and Protection Order decisions are being made. With respect to individual criminal law proceedings, the concern is that judges may not be receiving that kind of information when considering judicial interim release (bail) and when making sentencing decisions.

When there are both family law and criminal law proceedings taking place at the same time, relating to the same family, concerns have been raised that judges may not be provided with information about or otherwise know about: the existence of the other proceeding generally; orders relating to the risk of future violence made in the other proceeding; actual risk assessments used in the other proceeding; and all relevant information relating to risk available in the other proceeding. Risk decisions may be made with only part of the relevant information available. Inconsistent court orders can result, causing at best confusion about contact with the person against whom the allegations are made, and at worst the opportunity for continued abuse.

The judges and lawyers participating in this exploratory study are being asked to consider these five questions:

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

Part II of this Discussion Paper provides information specific to questions 1 and 2 and deals with **Risk Assessment.**

Part III provides information specific to question 3 and considers **the Present State of Information Sharing Between Courts.**

Part IV provides information specific to question 4(a) and deals with **Benefits of Sharing Information about Risk.**

Part V provides information specific to question 4(b) and 5 and looks at **Challenges and Promising Practices**

B. Recent Canadian Developments Dealing with Multiple Court Proceedings

In 2009 Justice Canada held an interdisciplinary symposium called ***Family Violence: The Intersection of Family and Criminal Justice System Response*** attended by some 300 people. This lead to the formation in January 2011 of a federal-provincial-territorial Working Group on Family Violence to consider the complex issues that arise. That Working Group consulted widely, conducted research, and commissioned an academic study by Canadian researcher, Dr. Linda Neilson, released in June 2012, called ***Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective***[1] (Enhancing Safety). The Working Group released its two volume report in November 2013 called, ***Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice Systems***[2]**,** (the Federal-Provincial-Territorial Report). The comprehensive report discusses the prevalence of family violence and its particularly negative impact on women and children. It explains the nature of multiple proceedings and the problems they create when they operate in silos, and suggests that this is a significant justice system issue. It identifies and deals with important challenges that arise including privacy concerns - what should and should not be disclosed/shared to keep victims of domestic violence safe. It considers promising practices across the country.

In 2010 the Ontario Court of Justice developed, as a pilot project, a court management system for family law and criminal law cases taking place at the same time with respect to the same family within that court system. It is called an Integrated Domestic Violence Court. One judge manages both cases, and if there is a trial, another judge hears the trial. The cases are not merged, and are managed on the same day, but separately, one following the other. For cross-border child abduction cases a group of judges from all across Canada, set up through the Canadian Judicial Council and the Council of Chief Judges, has developed court to court coordination and judicial communication guidelines. Their purpose is to facilitate coordination and communication between courts when there are two different proceedings relating to the same family taking place at the same time; one proceeding is in the jurisdiction from which the child was taken,

[1] http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/index.html

[2] Volume I http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html

and the other is in the jurisdiction to which the child was taken. That group has recommended an extension of these court coordination and communication processes to multiple proceedings involving the same people within a province or territory. Both these court initiatives are described further in Part V of this paper.

In 2012 the National Judicial Institute (NJI) presented a four day national judicial education program in Vancouver called ***Managing the Domestic Violence Case in Family and Criminal Law.*** This was the third in a series of three NJI programs focusing on domestic violence. The first, in 2008, dealt with domestic violence and criminal law cases. The second, in 2010, considered domestic violence in family law cases, and raised the topic dealt with in 2012 in a presentation called, ***Can We Do a Better Job of Coordinating Family and Criminal Proceedings in Domestic Violence Cases?***[3] As part of the program development for the 2012 initiative, the NJI conducted a community consultation in Vancouver to assist the Institute in identifying issues that may arise in domestic violence cases generally and when there are multiple proceedings in particular. The resulting report, ***National Judicial Institute Domestic Violence Program Development for Judges – April 2012, British Columbia Community Consultation Report*** , identified multiple court proceedings taking place at the same time involving the same family as a "dangerous disconnect" and a significant justice system problem, particularly for women and children.[4]

The topic of multiple court proceedings and family violence has also been considered at lawyer education programs. At the July 2014 National Family Law Program one of the topics dealt with was ***Bridging the Gap – Promoting Better Coordination of Family, Child Protection and Criminal Proceedings in Cases of Family Violence*****.** A similar presentation was made in May 2014 in Toronto at the annual Association of Family and Conciliation Courts Conference.

Recent access to justice reports,[5] initiated by the legal profession, have identified an access to justice crisis in Canada and have made numerous far-reaching and forward

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[3] The Hon. D. Martinson, prepared for Managing the Domestic Violence Family Case, November 17 – 19, 2010, National Judicial Institute, Quebec City, Quebec, National Judicial Institute Library.

[4] Prepared for the National Judicial Institute National Judges Conference: Managing the Domestic Violence Case in Family and Criminal Law, October 29 – November 2, 2012, Vancouver, British Columbia.

http://fredacentre.com/wp-content/uploads/2012/10/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-B.C.-Community-Consultations-on-Family-Violence-Report.pdf

[5] ***Access to Civil and Family Justice, A Roadmap for Change*****,** Final Report of the National Action Committee on Civil and Family Justice**,** October 2013;
http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf
"equal justice, balancing the scales"**,** Interim Report, the Canadian Bar Association, August 2013,
file:///C:/Users/Donna/Downloads/Equal-Justice-Report-eng.pdf
"equal justice, balancing the scales"**,** Final Report**,** the Canadian Bar Association, December 2013.
http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf
Futures – Transforming the Delivery of Legal Services in Canada, August 2014.
http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf

looking recommendations about how to remedy the crisis. Though the reports consider individual civil and family processes, the recommendations apply to and support the coordination of multiple court proceedings. They emphasize the need to: improve collaboration and coordination throughout the entire justice system. ***Roadmap for Change*** for example, speaks about the fragmentation of the administration of justice:

> Collaborate and Coordinate:[6]
>
> We also need to focus on collaboration and coordination. The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system – as opposed to many systems and parts of systems…
> …
> We can and must improve collaboration and coordination across and within jurisdictions, and across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.)…
>
> We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well.

It emphasizes the value of focusing on fair and just outcomes for those using court processes, an important objective when there are multiple proceedings:[7]

> …We should not be preoccupied with fair processes for their own sake, but with achieving fair and just r**esults** for those who use the system… (emphasis in original)
> …
> Providing justice – not just in the form of fair and just process but also in the form of fair and just outcomes – must be our primary concern.

The Report makes the important point that reform strategies must put the needs and concerns of the people who use the court systems first:[8]

> The focus must be on the people who need to use the system…
> Litigants and especially self-represented litigants are not, as they are too often seen, an inconvenience; they are why the system exists.
> …
> Until we involve those who use the system in the reform process, the system will not really work for those who use it…

It also notes that to achieve meaningful access to justice for those people a significant shift in culture is needed:[9]

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[6] Above, note 5 at p. 07.
[7] Above, note 5 at p. 09.
[8] Above, note 5 at p. 07.
[9] Above, note 5at p. 06.

> We need a fresh approach and a new way of thinking. In short, we need a significant shift in culture to achieve meaningful improvement to access to justice in Canada – a new culture of reform.

Roadmap for Change also supports the promotion of case management in all appropriate cases,[10] a recommendation consistent with the case management approaches used in the integrated court and court coordination and communication approaches mentioned above. The Federal-Provincial-Territorial Report makes the point that case management by one judge in individual proceedings is helpful when there are multiple proceedings because "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."[11]

Roadmap for Change also specifically recommends specialized judges, those who either have, or are willing to acquire, the necessary expertise, ideally judging in a unified family court. The recommendation highlights the importance of judicial education on "family violence":[12]

The Province of British Columbia, as part of its response to the access to justice reports, organized a two day multidisciplinary Domestic Violence Summit which took place in November 2014. Judges and lawyers attended, including the Chief Judge of the Provincial Court and the Chief Justice of the Supreme Court. The challenges created by the lack of coordination between courts and the lack of information sharing about domestic violence and risk were identified as concerns.

C. <u>An Overview of the Issues</u>

In November 2014 well known Canadian family law expert, writer and publisher, Philip Epstein Q.C., succinctly stated the concern raised when there are family law proceedings and criminal law proceedings taking place at the same time; he also suggests a solution:[13]

> When family law intersects with criminal law or *vice versa*, there is bound to be trouble. That is the reason that some jurisdictions have a court that can deal with criminal law issues and family law issues at the same time. We have one such court in Ontario. We need more such courts around the country.

The Canadian initiatives referred to above conclude that for the most part family and criminal courts do operate in silos, with little or no coordination or cooperation between them. They identify a number of concerns in addition to the one relating to conflicting

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[10] Above, note 5, at p. 16**.**
[11] Above note 2 at p. 93.
[12] Above, note 5 at p. 19.
[13] Cases of the week for November 10, 2014, *Gonzalez v. Trobradovic* – Intersection of Criminal Law and Family Law, CCDB #1559495 – 2014 CarswellOnt 12842, Ontario Superior Court of Justice – Price J.

court orders. With respect to procedure they include: the need for the person making the allegations of violence to repeatedly provide information to a series of judges; the need for multiple court appearances in different courts; increased opportunity for litigation harassment; delay and extra cost; escalation of the conflict which can increase risk of harm; and ineffective use of resources. The fragmented approach, in which decisions makers may have only a partial view of the circumstances because of a lack of relevant information, can increase the risk of future harm. Providing meaningful access to justice requires not just the making of consistent decisions, but the best decisions possible, based on as much relevant and admissible information as possible, reached within the parameters of the individual criminal law and family law legal frameworks. That is difficult to achieve when proceedings are not coordinated.

Reaching the best decisions possible is not an easy task as family law and criminal law proceedings are different in nature and have different purposes. The burden of proof and the legal principles relating to evidence and disclosure are often different. Yet the decisions reached in each proceeding apply to the very same people, and the focus is usually on the same allegations of violence and the decisions made deal with essentially the same broad issues. This is particularly true with respect to the safety related issue of whether there should be contact (and if so how and when) between the person making the complaint, and or the children, and the person accused of the violence conduct.

Family and criminal systems are viewed as different because criminal law has a strong public interest aspect to it. Family law, on the other hand, is litigation between private people. Yet, there is a strong public interest in ensuring that the family law system operates in such a way that it protects victims of domestic violence and that it does not keep the private invisible when it comes to such violence.

The stakes are very high for all involved. People accused of criminal offences rightly have important constitutionally protected rights aimed at preventing wrongful convictions, including the right to be presumed innocent, the right to be protected against self-incrimination, and the right to a fair process. Children normally benefit from a close relationship with both parents. At the same time, people, and especially children, have the right to be protected from the serious physical, psychological, emotional and financial consequences that can result when there is family violence. Those consequences can and do include death.

There is also a tension between the need to have as much relevant information as possible about the risk of future harm in each proceedings and the importance of respecting privacy and confidentiality. There is the added concern that in some cases, sharing risk information may actually increase the risk of harm, particularly if it is given to the person accused of the violent conduct. And, the reality is that a significant majority of family law proceedings and criminal law proceedings end without a formal hearing or trial, often by agreement. Ensuring that relevant risk information is available in those processes adds another layer of complexity.

PART II – RISK ASSESSMENT

A. The Relevance of Information about Risk

The Federal-Provincial-Territorial Report refers to the significance of risk assessment and risk assessment tools, stating that:[14]

> 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 the risk opinions are *shared* (emphasis added)…including across various systems that a family experiencing family violence may encounter, such as, criminal justice…, family justice, child protection, health care, social services, and child, youth, and adult mental health.

Lawyers and Judges are well aware of the legal relevance of risk of future harm. It is of course relevant in criminal law proceedings at the judicial interim release and sentencing stages of the court process. B.C.'s new ***Family Law Act***[15] requires judges, lawyers and parents to determine what is in the best interests of a child. In doing so all of the child's needs and circumstances must be considered, including: s. 37(2)

> (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs.

It also:

- requires judges, lawyers and parents to consider specific factors relating to domestic violence and risk found in s. 38.
- includes the requirement that judges, lawyers and parents must, when determining the best interests of a child, consider other civil and criminal proceedings affecting the safety, security and wellbeing of the child (s. 37(2)(j));
- requires persons applying for guardianship to provide evidence about other civil and family proceeding as well as with respect to all others. 37 factors relating to domestic violence (s. 51(2)).
- requires dispute resolution professionals, including lawyers, to screen for family violence in all family law related cases, not just those involving parenting issues (s. 8); and
- requires all mediators, arbitrators and parenting coordinators to take a minimum of 14 hours training in screening for domestic violence.[16]

[14] Above note 2 at p.48
[15] (SBC 2011) C. 25.
[16] B.C. Re 347/2012, O.C. 837/2012.

Part 9 of the ***Family Law Act*** gives judges the authority to make a Protection from Family Violence Order (formerly a restraining order). It specifically provides that a judge must consider "at least" six specific risk factors: s. 184.

In focusing specifically on risk within individual proceedings and how information of risk associated with domestic violence should be shared between the two courts, it should first be noted that risk assessments are conducted not only by the police for criminal cases of domestic violence, but also completed by child protection workers, victim services workers, transition house/shelter workers, mediators and others for domestic violence situations.[17] Therefore there is potential for much valuable risk information to be shared about the victim, the alleged offender and the incident itself from these sources for both courts.

British Columbia revised its ***Freedom of Information and Protection of Privacy Act*** in 2011 to give public bodies the ability to authorize the collection, use and disclosure of information for the purpose of reducing the *risk* (emphasis added) that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur.[18]

"Reasonably likely to occur" brings us back to the consideration of risk and risk factors. Risk assessments for the purposes of discussion here involve the identification and estimations of levels of risk in a domestic violence situation. As such they require a consideration of what an acceptable level of risk might be in that situation. The outcome of the risk assessment and the determination of such matters as "high risk" and "low or minor risk" assessed offenders and situations, is usually framed in terms of risk to reoffend or risk to cause future harms.

In the 2012 report from the BC Office of the Representative of Children and Youth, entitled ***In Honour of Kaitlynne, Max and Cordon***, many recommendations were made about how similar tragedies (the death of children by their father) could be prevented. Two sub recommendations are specific to the need for frontline workers to have the ability to identify risk factors in order for them to be able to reduce those risks.[19] One of them, Recommendation 1, states

> That the Ministry of Health, in partnership with the Ministry of Children and Family Development, take immediate steps to ensure that all staff and professionals connected to their systems understand the *risk factors* (emphasis added) relating to children of parents with a serious untreated mental illness, and promote the well-being of children by:
>
> • developing and implementing policies and procedures to support workers to identify and reduce risk factors for children affected by parental mental illness and domestic violence

[17] http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html, at p.38
[18] See the Federal-Provincial-Territorial Report, above note 2, at p.49
[19] https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynne.pdf, at p.95

• developing and implementing policies for early detection of risk factors for families associated with mental illness (e.g., social isolation, frequent moves, emotional and financial instability, violent episodes).

B. Risk and the Process of Risk Assessment

There are numerous risk assessment instruments which focus upon factors deemed through research to be valid indicators of risk prediction in domestic violence situations. The following are examples of risk assessment tools used for domestic violence/ intimate partner violence situations in Canada:

• Ontario Domestic Assault Risk Assessment – ODARA;
• Brief Spousal Assault Assessment for Evaluating Risk - B-Safer – British Columbia, New Brunswick;
• Domestic Violence Investigative Guide - DVIG (derived from Alb.) – also called SVDRF (see below);
• Spot the Signs – Jocelyn Coupal;
• Spousal Assault Risk Assessment – SARA; and
• Danger Assessment Tool – Jacqueline Campbell. [20]

In British Columbia, the B-Safer structured risk assessment tool (Brief Spousal Assault Form for Evaluating Risk), is used by the police in high risk situations, as specified as necessary in the VAWIR (Violence Against Women in Relationships) policy. However, the SDVRF checklist (Summary of Domestic Violence Risk Factors) is used by both Municipal Police and the RCMP forces in the province to guide decisions in all cases of domestic violence, especially with regard to the initial categorization of level of risk.[21] It is of importance to note as well that in their deliberations, the ICATs' representatives (a B.C. collaborative, multidisciplinary committee discussed in Part V) also use the same 19-factor checklist[22].

There do not appear to be equivalent formal risk assessment tools in the family justice system which assess risk to children in these specific circumstances, although in BC, the ***Family Law Act*** stipulates that the best interests of the child need to be determined in such cases.[23] However, under the Ministry of Children and Families' (MCFD's) directives, an Immediate Safety Assessment (ISA) does take place:

> An ISA occurs after the social worker assesses the intake report. It's recorded on the ministry's Management Information System (MIS). Social workers fill out

[20] A full description of risk assessment tools used in Canada can be found at http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr09_7/rr09_7.pdf. They are contained in the updated Canada Justice report by Millar, Code and Ha (2013), entitled, ***An inventory of spousal violence risk assessment tools used in Canada***. The exception being the Spot the Signs guide created by Jocelyn Coupal which can be found at http://www.spotthesigns.ca/pdf/SpotTheSigns.pdf.
[21] http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html, Vol. 2, at p.71.
[22] Personal communication, Regional Coordinator for EVA BC, January 6, 2015.
[23] Above note 2, at p. 44

a number of questions addressing safety on the ISA and then answer yes or no to the question: Are the children safe?[24]

The requirement is for child protection workers to conduct a Safety Assessment on all incidents that are assigned for follow-up. The Safety Assessment assesses 13 safety factors, one of which is *Intimate Partner Violence Exists in the Family*.[25]

C. Key Risk Factors to Consider for Family and Criminal Law Cases

There are several key factors (red flags) that are important to any risk assessment for family violence:

- Recent separation of two partners;
- Power and control over partner issues;
- Past/ongoing /escalation of abuse prior to present incident;
- Alcohol/drug abuse/mental illness;
- Complainant's perception of personal safety and future violence;
- Lack of support systems – family and community;
- Use of threats to use weapon/firearm; and
- Choking.

Intersecting diversity issues impact on both risk and responses to domestic violence. This impacts in particular on aboriginal, immigrant, and refugee women. Factors that are significant include[26]:

- Minority status;
- Language/cultural challenges;
- Sponsorship threats;
- Poverty/lack of access to services;
- Social and geographic isolation; and
- Lack of services/lack of access to services.

As previously noted, provision is made in the B.C. ***Family Law Act*** for a Protection from Family Violence Order. An application can be made by or on behalf of an at risk family member, defined as a person whose safety and security is or is likely at risk from family violence carried out by a family member:

Judges hearing family law cases under the ***Family Law Act*** must consider many of the same risk factors noted above, such as alcohol, mental illness, drug abuse;

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[24] https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynne.pdf, p. 62

[25] http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html, Vol. 2, at p.70

[26] The Hon. Donna Martinson & Dr. Margaret Jackson, ***Judicial Leadership and Domestic Violence Cases – Judges can Make a Difference***, http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf, at pp. 21-22

complainant's perception of personal safety and future violence; and past and ongoing/escalation of violence.[27]

Information about many of the risk factors considered in a risk assessment for a criminal law domestic violence proceedings would also inform most of those risk factors above that are needed for family law proceedings; therefore, the reverse could be true as well.

D. Different Types of Assessments and Their Purposes

Assessments can differ according to purpose as well as the degree of training required to administer them appropriately. They can also occur at differing junctures during a family court or criminal court proceeding.

The three terms "screening," "threat assessment," and "risk assessment" may be used interchangeably, however they do have different meanings. Screening usually refers to an assessment which occurs earlier on in a family violence or potential family violence situation.[28]

Police, in attending a domestic violence incident, may also use screening tools or checklists, such as the SDVRF. These tools can be filled out more quickly and do not require the level of detail needed in the formal risk assessments.[29] They can be used to determine if the situation is high-risk or not. If yes, then a more formalized assessment tool, such as the B-Safer, would be completed.

Formal "risk assessments" ("threat assessments" are sometimes included in this category) do require more training with higher level of analyses involved.[30] The assessments take into account core risk factors whether for a family court protection order or the criminal court equivalent. Safety of the victim is a key focus in all three types of assessments. The assessors need to consider the realities of research outcomes, which show, for example:

- that the risk of physical harm to a victim leaving a domestic violence situation is highest in the first three months following separation;
- that choking is a risk factor for lethality;
- that pregnancy is also a risk factor for further violence;
- that there should be an awareness if children are exposed to the violence or also experiencing it[31], and

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[27] The Hon. Donna Martinson***, Family Violence and the New B.C. Family Law Act***, at p. 36
[28] See the Federal-Provincial-Territorial-Report, above note 2, at p.36
[29] See the Federal-Provincial-Territorial-Report, above note 2, at p. 36
[30] See the Federal-Provincial-Territorial-Report, above note 2, at p. 36
[31] Children exposed to violence are at greater risk of psychological harm, including increased incidence of aggression, hyperactivity, anxiety, depression, or behavioural problems,
The Hon. Donna Martinson & Dr. Margaret Jackson, ***Judicial Leadership and Domestic Violence Cases – Judges can Make a Difference***,
http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf, at p. 17

•that there is need to find out more about the context and history of the violence in order to understand how the victim responds.

E. Risk Context and Victim Reluctance to Report or Proceed

In the latter regard, in the NJI Community Consultation, the participants said that it is difficult to make appropriate sentencing decisions in criminal cases and contact decisions in civil cases without an understanding of the nature and extent of the violence and its context, as well as the risk of future violence.[32] One issue of relevance to that context is the problem of women not reporting domestic violence to the police or the issue of their recanting after there has been disclosure.

Some of the reasons for recanting or not disclosing may lie in the dynamic of the intersecting diversity risk factors listed earlier, that is, language/cultural challenges, minority status, poverty and isolation. Other women may not report family violence until there have been multiple incidents.

During the consultation, women indicated that leaving a violent or controlling relationship is difficult because of fear of[33]:

- escalating violence resulting from their partner's anger if they leave or if charges are laid;
- poverty or of not being able "to make it" on their own;
- shaming or losing the support from one's family or cultural community, often as a result of family or community pressures, especially true for marginalized women, such as immigrant, Aboriginal[34] and disabled women;
- the police, the court process, and child protection authorities (fear of having children removed from them); and
- breaking up the family and the children "losing" their father.

[32] See the Federal-Provincial-Territorial-Report, above note 2, at p. 36

[33] The Hon. Donna Martinson & Dr. Margaret Jackson, ***Judicial Leadership and Domestic Violence Cases – Judges can Make a Difference***, http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf, at p.46.

[34] Domestic violence is a particularly challenging issue for Aboriginal women. 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, See the Federal-Provincial-Territorial-Report, above note 2, at p. 15

Part III - THE PRESENT STATE OF INFORMATION SHARING BETWEEN COURTS

A. Courts Operating in Silos

For the most part, criminal and family proceedings (as well as child protection proceedings) operate separately – in silos. There is little or no information sharing either generally, or about risk and this can adversely affect the safety of victims of family violence.

Dr. Rachel Birnbaum, Professor Nick Bala and Dr. Peter Jaffe refer to the silo approach, in their 2014 evaluation of the Toronto Integrated Domestic Violence Court, (the Birnbaum, Bala Jaffe evaluation), ***Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes and Lessons Learned***:[35]

> there are serious problems in Canada with a lack of co-ordination and poor information sharing about domestic violence matters. The "separate silos" approach to domestic violence sometimes exposes children and women to continuing increased risk and results in poor outcomes for children…

They further comment that:[36]

> In most places, the domestic violence court and criminal justice system operate independently of the family justice process, with no sharing of information or co-ordination concerning the criminal and family court cases involving the same parents and children

The Federal-Provincial-Territorial Report suggests that there may be a problem with information sharing between courts:[37]

> 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 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.

That Report further refers to findings of domestic violence death reviews, inquiries and coroners' reports, indicating that they:[38]

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[35] In print, Canadian Journal of Family Law, at p. 3. (Will be cited as: (2014) 29:1 Can J Fam L 117).
[36] Previous note, , at p. 7
[37] Above note 2, at p. 3
[38] Above note 2, at p. 15.

> …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. [Footnote omitted] Without mechanisms 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.

Dr. Linda Neilson, in Enhancing Safety, refers to court system fragmentation and its impact, stating that:[39]

> Numerous reports cite court-system fragmentation as one of the primary causes of the failure of the legal system to protect targeted adults and children in domestic violence cases.

Dr. Neilson also emphasizes the importance of sharing risk information to the protection of victims of domestic violence:[40]

> …the sharing of information pertinent to risk across legal systems is critically important for family and child safety. Information sharing can enable accurate and consistent assessment of risk and the potential for lethal outcomes, as well as seamless, co-ordinated and consistent use of community services and therapeutic resources. In addition, sharing information across legal sectors discourages litigation harassment such as the filing of frivolous claims in multiple courts. It also prevents inconsistent orders and agreements. The failure to identify and share information across legal systems has been credited repeatedly by Canadian commentators with the failure to offer adequate protection in domestic violence cases, sometimes resulting in death…

B. The Extent of Multiple Proceedings

The Federal-Provincial Territorial Report[41] states that there is little definitive Canadian information about the number 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. However, it says that there is some information from several sources. One of the sources was a survey in 2010 of lawyers attending the Federation of Law Societies' National Family Law Program. Over one third (38%) indicated that their clients often or always were also before the criminal courts in situations involving family violence. That report also states that anecdotal reports from family law lawyers indicate that this is an issues that arises in a significant number of cases.

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[39] Above note 1, at p. 5
[40] Above note 1, at p. 26.
[41] Above note 2, at p. 26

The Federal-Provincial-Territorial Report suggests that "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 in the courts and support from the services associated with the criminal, family and child protection systems." The Report concludes that even if the numbers are not especially large, the coordination of the cases is critical, from the perspective both of the justice system and the families involved.[42]

PART IV– BENEFITS OF SHARING INFORMATION ABOUT RISK

The reports and articles referred to in this paper suggest that information sharing can be beneficial by helping to address a number of concerns that have been expressed about the consequences of multiple proceedings. The concerns raised can be broken down into three areas. The first is the existence of conflicting orders. The second deals with challenges said to be created by process issues. The third is that the outcome/result is not the most just outcome possible, within the separate legal frameworks involved.

A. Conflicting Orders

The Federal-Provincial-Territorial Report points to the fact that inconsistent orders can result when there are multiple proceedings. This can cause confusion, and even further harm:[43]

> Because judges are often not aware of the orders made by or the evidence presented…inconsistent orders can result. 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.

That Report refers to a concern raised in the NJI Consultation relating to challenges created when different courts, which sometimes have different approaches, make decisions that impact upon the very same people:[44]

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

The Community Consultation participants also noted that "there is little or no coordination with respect to the length of time a particular order is in effect, often leaving gaps."[45]

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[42] Above note 2, at p. 27
[43] Above note 2, at p. 87
[44] Above note 4, at p. 5.
[45] Above note 4 at p. 5

B. Process Challenges

1. The Need to Repeatedly Provide Information

During the NJI Consultation participants were concerned that women were required to repeat information a number of times:[46]

> Women are required to "tell their stories" over and over, often to a series of judges, both among and within proceedings.

The Federal-Provincial-Territorial Report makes this point by stating that families affected by family violence when there is more than one court proceeding are:[47]

> Attending multiple hearings on different days in potentially different locations. Family members "are required to tell their story to different courts multiple times". All this occurs at a very stressful time in their lives.

Dr. Neilson, in Enhancing Safety, emphasizes the negative impact caused to children when they have to retell "their story":[48]

> Other considerations relate to research findings that children who are involved in multiple proceedings suffer from being asked to convey information about child abuse and domestic violence more than once in multiple proceedings…

University of Calgary Law Professor Jennifer Koshan, in her article called ***Investigating Integrated Domestic Violence Courts: Lessons from New York*** makes the point that, "Victims and children may have to tell the same stories multiple times, resulting in possible revictimization."[49]

2. Delaying the Resolution

Delay has been tied to adding to stress, especially for children, increasing the conflict, and possibly increasing the risk of harm. It of course also adds to both the cost of the litigation, and, in many cases, a loss of income.

3. Litigation Harassment

Litigation harassment, in which one litigant brings constant, inappropriate court applications, can be a significant problem within individual proceedings. This problem can be compounded when several judges deal with one case. The problems created are exacerbated when there are unconnected proceedings going on at the same time.[50]

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[46] Above note 4, at p. 5.
[47] Above, note 2, at p. 86
[48] Above, note 1, at p. 25
[49] (2014) Vol. 51, No. 3, Osgoode Hall Law Journal, at p. 19.
[50] NJI Community Consultation, above note 4, at p. 6.

C. Challenges to Effective Outcomes

1. Access to Justice Objectives

A just result requires not only consistency of the decisions made in each of the proceedings, but a result that is the most effective decision possible within the separate legal frameworks in which they operate:[51]

> …Traditionally these proceedings have operated separately, with one court not even knowing about the existence of another court proceeding, let alone knowing about what happened in that proceeding. This fragmented approach has significant and adverse consequences for those alleging IPV (intimate partner violence), particularly women and children. Among the consequences is the lack of sharing of information about and decisions made about the risk of future violence. It can lead to inconsistent approaches and exacerbate conflict. This fragmentation has been rightly called a dangerous disconnect as it can increase the risk of harm; there is an urgent need for coordination of the separate court proceedings and their outcomes. Providing meaningful access to justice in these cases requires using innovative approaches to such coordination that lead to not just consistent solutions, but the most effective solutions possible within the legal frameworks that apply. (Emphasis added)

The Federal-Provincial-Territorial Report calls the objective of making sure that there is coordination across systems as aiming for a holistic response. The Report suggests that such a response requires linkages among multiple sectors, including courts:[52]

> A holistic approach 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 victim services, police, prosecution services, the courts and corrections)…

Professor Koshan also supports a holistic approach, one which does not fragment domestic violence issues.[53]

2. Decisions Made Based on Partial Information

The Federal-Provincial-Territorial Report states that each court has only a partial view of what has happened and that partial view can be made worse if there is not case management system within the individual criminal and family courts:[54]

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[51] The Hon. Donna Martinson, ***Multiple Court Proceedings and Intimate Partner Violence – A Dangerous Disconnect***
http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote.pdf

[52] Above, note 2, at p. 15
[53] Above, note 49, at p. 19.
[54] Above, note 2 at p. 87

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. The partial view is exacerbated where there is no case management system within each of the justice systems (i.e. family or criminal).

PART V – CHALLENGES AND PROMISING PRACTICES

A. Court Initiatives

Some steps have been taken by Canadian courts to address the issues that arise when there are multiple proceedings dealing with the same people and the same allegations of violence.

1 The Toronto Integrated Domestic Violence Court

The Ontario Court of Justice created Toronto's Integrated Domestic Violence Court pilot project based on the extensive use of such courts in the United States. This approach can be used when there are two or more proceedings taking place within the same Court. For example, in British Columbia the Provincial Court might be dealing with a family law proceedings, and criminal law proceedings and even a child protection proceeding at the same time.

In spite of the word "integrated" in the name of the Court, the proceedings are not merged in any way. Rather, one judge has the role of managing the individual family proceeding and the individual criminal proceeding. As noted in the Introduction, during the management process the cases are not heard at the same time but rather one right after the other. The management judge will consider the case management issues that arise in each case separately. For example, in the family law proceeding the case management judge may discuss: what the specific issues in the case are and how many are contested; whether there has been adequate pre-trial discovery; whether there has been adequate disclosure of who the witnesses will be and what other evidence might be presented; and whether pre-trial hearings on disclosure or the admissibility of evidence are required. The case management judge can make interim orders, including those relating to interim parenting arrangements.

Similarly, in the criminal proceeding the judge will determine whether the accused person will plead guilty or not guilty. If it is a guilty plea the case management judge would schedule a sentencing hearing. If the plea is not guilty, the judge would determine what the issues are in the trial and whether disclosure has been made. The judge may make interim judicial release orders.

If there are hearings required and/or a trial in either or both cases, the case management judge can schedule them. The same case management judge hears the cases each time

there is a court appearance. However, if there is a trial, the judge hearing the case at the trial will be a judge other than the case management judge.

This process addresses many of the concerns that have been identified when there are multiple proceedings. For example, inconsistent orders will not be made. The number of court appearances are significantly reduced. Court hearings can be scheduled in a manner that considers similar issues (such as discovery and disclosure) at the same time. Decisions can be made about the timing of and scheduling of contested hearings and the trial so that each proceeding is dealt with as effectively as possible. Everyone will know what is happening in each proceeding.

One possible outcome of this management approach is that some or even all of the issues raised may be resolved by agreement, and in a timely manner. This is so because having both proceedings managed at the same time, and early in the processes, brings both Crown counsel and the parties (and their lawyers if they have lawyers) together. That, anecdotally, has been the experience at the Toronto Integrated Domestic Violence Court.

The Court was evaluated in 2014 by Dr. Rachel Birnbaum, Professor Nicholas Bala, and Dr. Peter Jaffe: ***Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes and Lessons Learned***.[55] See also the discussion about the appropriateness of using integrated domestic violence courts in Canada by University of Calgary Law Professor Jennifer Koshan, in ***Investigating Integrated Domestic Violence Courts: Lessons from New York***.[56]

2 Judicial Coordination and Communication

Though management of each proceeding by one judge may be the most effective way of managing the separate cases, that process may not work well if the proceedings are taking place in different courts instead of the same court. For example, in British Columbia there may be a divorce proceeding in the Supreme Court and a criminal proceeding in the Provincial Court.

In that instance the Federal-Provincial-Territorial Report identifies as a promising practice judicial communication between Courts, including joint court management hearings, between the two judges hearing the separate proceedings. As noted in the Introduction, this suggestion is based on existing practices and procedures involving coordination and communication between courts and judges in cross-border child abduction cases.

Direct Judicial Communication[57] arises in cases where there are parallel proceedings in different jurisdictions dealing with the same parties. It involves communication between

[55] Above, note 35.
[56] Above, note 49.
[57] For more information about the Network Judges, see: Justice Robyn Moglove Diamond, ***The International Hague Network of Judges: Canadian Judicial Initiatives***, International Family Law Journal, [2013] IFL 307. See also the Honourable Donna Martinson, ***The Canadian Approach to Direct Judicial Communication – Making Concurrent Proceedings Operate Effectively***.

judges, with the knowledge of the parties, often in a joint hearing - with the parties and their counsel present - for the purpose of coordinating and harmonizing the proceedings so that a resolution of all the outstanding issues can be reached in a just, timely and cost effective way. The communications do not relate to the merits of each case, and there are safeguards in place to ensure that the processes are fair and do not interfere with the judicial independence of either Court; a judge of one court does not make decisions which are within the jurisdiction of the other court. Joint hearings take place in open court, there is a record of the proceedings, the parties are notified, and the parties and their lawyers, if they have lawyers, can participate.

In Canada direct judicial communication has been primarily used in cross-border litigation. However, Rule 86 of the Nova Scotia Supreme Court Civil Procedure Rules governs judicial communication in a broad range of cross-border cases in that province It is a comprehensive rule that provides for both joint conferences and joint hearings. An educational note to the Rule says it "will be particularly useful in multi-jurisdictional class proceedings under R.68, cross-border insolvency cases, and applications under the Hague Convention for the return of abducted children."

The British Columbia Supreme Court has had in place since 2004 guidelines for such communication: ***Guidelines Applicable to Court to Court Communication in Cross-Border Cases.*** They provide that a Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings with those in the other jurisdictions: Guideline 2. They were developed in the context of bankruptcy and insolvency litigation and used regularly in those cases. They, however, apply to all cross-border cases.

In relations to cross-border abduction cases, the Canadian Judicial Council, which approved the establishment of the Canadian Network of Contact Judges, gave the Network the mandate to consider the concept of judicial networking and collaboration in cases of child abduction and custody. The Network, chaired by Justice Robyn Diamond of the Manitoba Court of Queen's Bench, developed and approved ***Recommended Practices for Court-to-Court Judicial Communications,*** referred to as Judicial Communications Guidelines, for direct communication between courts. At the 6th World Congress on Family Law and Children's Rights in Australia in March 2013 those attending passed resolutions encouraging the creation of judicial networks within countries and encouraging judges to use judicial communication and set up communication guidelines. The resolution states that the "Canadian guidelines provide a helpful model for such communication."

The purpose of such communication was described in the British Columbia Supreme Court case of ***Hoole v. Hoole***:[58]

http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-The-Canadian-Approach-to-Direct-Judicial-Communication.pdf

[58] 2008 BCSC 1248.

> 21 …There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful.
>
> 22 Communication can also make case management more efficient, thereby facilitating expedited procedures to return the child to his or her habitual residence, where appropriate. It can assist in obtaining, when ordered, the prompt and safe return of the child, by the use of various mechanisms such as undertakings to be done by the parents and the making of identical orders in each jurisdiction to ensure enforcement (mirror orders).
>
> 23 Such communication has been found to be useful in encouraging a parent to agree to voluntarily return a child and in encouraging a more amicable resolution of the parents' dispute…

In May 2014 the Network Judges, after considering the Federal-Provincial-Territorial Report and the concerns raised in the NJI Community Consultation, passed a resolution supporting the use of such judicial communication when there are multiple proceedings within a province. That resolution says that the Network Judges support: 1) the extension of judicial communication from communication between judges in different jurisdictions to communication between judges within a province or territory; 2) adapting the existing judicial communication guidelines and the step-by-step procedures to apply to such communications; and 3) taking the matter back to their courts for consideration.

The same processes and safeguards used in cross-border cases would be used in coordination and communication between courts and judges when there are two different proceedings taking place in different courts within British Columbia, relating to the same family, and their domestic violence situation. As in the integrated court approach, the cases are not merged in any way; judges of one court do not make decisions which are within the jurisdiction of the other court. Rather the very same kinds of case management issues discussed in the integrated court approach would be discussed in this approach.

3 Nature of the Coordinated Judicial Processes

It is well-known to lawyers and judges that family law proceedings and criminal law proceedings are different in nature and have different purposes.[59] By way of example only, criminal law is viewed as public in nature whereas family law is viewed as a private dispute. Unlike family law cases, the focus in criminal cases is and must be on

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[59] See the differences described in the Federal-Provincial-Territorial Report, above note 2 at pp. 27-30. See also The Hon. D. Martinson, ***Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases***, pp. 15-18. http://fredacentre.com/wp-content/uploads/2012/11/MartinsonPaper_5e.pdf

constitutionally protected rights of accused persons, including the protection against self-incrimination. There are different burdens of proof – beyond a reasonable doubt in criminal cases and the balance of probabilities in family law cases. As noted in the previous section, different evidence laws and disclosure laws may apply. There may be different requirements relating to pre-trial dispute resolution. They have different potential consequences, particularly the potential loss of liberty in criminal cases. Some have expressed the concern that approaches such as the integrated court used in Toronto, or the use of judicial communication and case management, would have the negative effect of turning the criminal law proceedings, which must be public, into private proceedings, without taking the broad public interest in criminal prosecutions into account. If this were true, it would be an unfortunate and significant step backwards to the days when domestic violence was viewed as a private matter.

The Federal-Provincial-Territorial Report identifies both the integrated court approach and the judicial communication approach as promising practices and deal with these public/private concerns in the following manner. With respect to the integrated court approach, the Report emphasizes the point made earlier that there is not a merger of the proceedings; there remains a separate family law proceeding and a separate criminal law proceeding. All hearings are in open court. The appropriate legal processes are applied in each. The same points about the process are made in the Birnbaum Bala Jaffe evaluation.

With respect to the judicial communication and management approach, the Federal-Provincial-Territorial Report notes that the focus is not on the merits of the proceedings, but on the process that each is following:[60]

> Direct judicial communication involves discussion between judges when there are concurrent 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 communication 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 communication.

4 Coordinated Court/Court Coordinator Models

In addition to the integrated court approach and the judicial communication approach just discussed, the Federal-Provincial-Territorial Report considers other approaches. One is the coordinated court or court coordinator models. The Report describes these as instances in which a designated domestic violence coordinator would act as a liaison between different courts, as well as different services.[61] The Report also refers to the Aboriginal Court Network.[62]

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[60] Above note 2, at p. 99
[61] Above note 2, at pp. 100-102
[62] Above note 2 at p. 102

B. Multi-disciplinary Coordination Initiatives

While the discussion in Section A has presented specific court related initiatives which have incorporated notions of collaboration and coordination, including information sharing, there have also have been non-court justice initiatives which have paralleled such efforts. Two such examples in British Columbia are the creation of the Community Coalition for Women's Safety (CCWS) and the Provincial Office for Domestic Violence (POD-V). CCWS is driven by a working group comprised of representatives from the upper levels of the police, victim services, government, academe, as well as court officials, such as Crown and the Judiciary. Under the Ending Violence Association of BC (EVA BC), CCWS assists BC communities to develop new models or improve upon existing models of cross-sectoral coordinated response to violence against women. Coordination brings together various sectors — including counselling centres, transition houses, police, hospitals, Aboriginal services, etc.[63]

One way this is operationalized is through the ICATs (Interagency Case Assessment Teams) initiative. Throughout the province, ICATs share information in "local" domestic violence cases through coordinated risk identification, management and safety planning with police, victim services, child protection, probation and other community agencies at the table (some Crown also sit at the table, but are not members). Currently there are about 30 ICATs around the province.[64]

As described on the EVA BC website, the purposes and benefits are:

> …To facilitate an effective and co-ordinated justice and child welfare system response, and protect the victim and others at highest risk for violence or death, timely sharing of information is required between police, Crown counsel, corrections staff (e.g. bail supervisor and/or probation officer), the victim service worker, and child welfare worker.

The benefits of ICATs include better identification of risk factors and better sharing of relevant information on domestic violence cases amongst its members to facilitate women's safety in domestic violence cases.[65]

The second non Court related work has emerged from recommendations made by the BC Office of the Representative for Children and Youth. Given the reality that children both exposed to domestic violence and/or targeted by it can be impacted quite seriously with both short term and long term effects[66], a special office with a focus on children and

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[63] http://endingviolence.org/prevention-programs/ccws-program/ccws-services/
[64] Personal Communication, EVA Regional Coordinator, January 6, 2015
[65] http://endingviolence.org/prevention-programs/ccws-program/interagency-case-assessment-teams-icats/
[66] http://journals.uvic.ca/index.php/ijcyfs/article/view/13274, at p.497

youth in those circumstances was created in March 2012, POD-V (the Provincial Office of Domestic Violence)[67].

The office is mandated by the B.C. government to coordinate and strengthen services for children and families dealing with domestic violence. The office is housed within the Ministry of Children and Family Development (MCFD) and works in collaboration with other provincial ministries, law enforcement agencies, and community stakeholders to ensure the effective delivery and coordination of domestic violence services in communities across the province. In fact, in the 2014 release of its Three Year Strategy, the BC Provincial Domestic Violence Plan, the first two of the three stated goals for that strategy were to promote:

> 1) an integrated coordinated response to domestic violence and,
>
> 2) an enhanced information sharing to increase safety.[68]

It specifically states that it will be working to develop shared protocols and other materials with the Ministry of Health:

> The Ministry of Health (MOH) and MCFD will work together to develop protocols, including screening tools, risk assessments, information sharing and referral processes for staff within both systems. This work will focus on addressing the *risk factors* (emphasis added) relating to children of parents experiencing serious untreated mental illness, problematic substance use and/or domestic violence.[69]

C. Specific Challenges and Recommendations

1. Privacy and Confidentiality

a. Generally

There is a tension between the need to have as much relevant information as possible about the risk of future harm and the importance of respecting the privacy of the person alleging the violent conduct. There is the added concern that in some cases, sharing risk information may actually increase the risk of harm, particularly if it is given to the person accused of the violent conduct. The Federal-Provincial-Territorial report makes the point that when risk assessments are shared among justice officials there is an increased likelihood that the assessment will be disclosed to the person against whom the violence is alleged. The person making the allegation may be hesitant to provide full and accurate information as she or he may feel that when this information is disclosed to that person, it may provide the person with additional information that could compromise safety.[70]

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[67] www.mcf.gov.bc.ca/podv/
[68] http://www.mcf.gov.bc.ca/podv/pdf/dv_pp_booklet.pdf, at p. 24
[69] Previouw note, at p.12
[70] Above note 2 at p. 48.

That same report notes that legislation, regulations, guidelines and codes of ethic govern the disclosure of such personal information. Provincial and territorial statutes, and court rules govern the disclosure, discovery and production of private records. Case law has developed with respect to the disclosure of records in one proceeding for use in another. The report notes that privacy legislation generally permits the disclosure of personal information under appropriate circumstances, but expresses the concern that these tests for disclosure are not always as clear as they could be.

b. Crown Information Sharing Practices

In B.C. Crown Counsel are governed by a Criminal Justice Branch policy in situations where information obtained in a criminal prosecution is sought for other proceedings, including family law proceedings. The policy, called *Disclosure of Information to Parties Other than the Accused* says:[71]

> Information provided by law enforcement agencies, including information in a Report to Crown Counsel, is provided to Crown Counsel for the limited purpose of prosecution, and it belongs to those agencies.
>
> Where Crown Counsel is requested by a person other than the accused or defence counsel to provide a record of information relating to a prosecution (including evidence) which has originated with the police or another law enforcement agency, the request should be referred to that agency.

This policy also states:

> Subject to this policy and the requirements of the Freedom of Information and Protection of Privacy Act, Criminal Justice Branch files are generally confidential in order to:
>
> • ensure that there is no prejudice to ongoing prosecutions
>
> • protect public safety, including the safety of witnesses or other individuals involved in prosecutions
>
> • protect third party privacy interests
>
> • satisfy privilege or public interest immunity where it applies.

[71] http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/DIS1.1-DisclosureOfInformationtToParties-18Nov2005.pdf Thanks to Debbie Granger, Crown Counsel, for providing this information to the researchers.

c. Promising Practices – Federal-Provincial-Territorial Report

The Federal-Provincial-Territorial Report points to these promising practices:[72]

Police providing information directly to victims or potential victims of family violence

The United Kingdom conducted a pilot project known as "Clare's Law" which in some jurisdictions directs police to disclose to victims or potential victims of domestic violence information about their partner's violence past.

Cooperation between police and victim services

This cooperation is happening more and more and is encouraged.

Legislative changes

The report highlights the amendment to B.C.'s *Freedom of Information and Protection of Privacy Act* which says 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 that violence is reasonably likely to occur.[73]

Multidisciplinary collaborations

The report points to the use of information sharing protocols relating to agencies and programs.

High-risk case coordination

British Columbia has a high-risk case coordination policy as part of its VAWIR policy.

Other practice models

The report notes that for professionals such as non-government lawyers, social workers or medical professionals efforts are being made to encourage appropriate disclosure.

d. The New Zealand Experience with Information Sharing Between Courts

A report released by the New Zealand Ministry of Justice in October 2014, called ***Improving Information sharing between the family and criminal jurisdictions in domestic violence cases*** illustrates some of the challenges to information sharing

[72] Above note 2, at pp. 120 - 129
[73] Above note 2, at p. 124

between courts that can arise.[74] That Ministry is asking for input from the New Zealand Bar Association. There are existing rules and regulations in New Zealand dealing with the sharing of information between the criminal and family/civil jurisdictions. The Ministry is asking for information from the Bar because:[75]

> …
> 1. The current rules and regulations relating to information sharing between the criminal and family/civil jurisdiction appear to be unduly restrictive or unclear in a number of respects. This may prevent informed, consistent judicial decision-making, and reduce the likelihood of safe outcomes for victims and protected persons.
> 2. We suggest the existing rules and regulations could be amended to clarify what information can be shared between the criminal and family/civil jurisdictions, and in what circumstances, where there are related protection order proceedings and criminal DV-related proceedings.

2. Different Rules of Evidence and Disclosure

The Federal-Provincial-Territorial Report considers[76] the challenges created when there are different rules of evidence and standards of proof in the different proceedings. It also considers issues relating to disclosure:[77]

> 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, notables:
>
> - 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 parents, in child protection proceedings, may have safety implications for the victim(s) of family violence.

The Report also raises the question of whether "the court can consider orders from a related proceeding even when the litigants have not introduced the order into the record."[78]

The report highlights two promising practices relating to the use of prosecution records in family law or child protection proceedings. The first is the approach taken by the Ontario Court of Appeal in ***DP v. Wagg***.[79] The second is the adoption by the Uniform

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[74] http://www.nzbar.org.nz/Folder?Action=View%20File&Folder_id=72&File=Stronger%20Response%20to%20Family%20Violence%20October%202014.pdf
[75] Previous note, at p. 1
[76] Above note 2, at pp. 14-116
[77] Above note 2, at p, 104
[78] Above note 2, at p. 104
[79] [2004] OJ No. 20/53.

Law Conference of Canada of a ***Uniform Prosecution Records Act***, which it says applies the ***Wagg*** principles. In ***Wagg*** the criminal proceedings had been stayed but police investigation records had been disclosed to the accused person. The plaintiff in a civil action sought production of statements made by the defendant to the police. Justice Rosenberg, In ***Wagg***, set out a "screening" process which is an effort to balance the need to have information in the civil proceedings with compelling public interest reasons for withholding the information.

All of the reports rightly point to the importance of protecting the rights of the accused person in the criminal proceeding. A particular concern, found in the Federal-Provincial-Territorial Report, is "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."[80] The Report points out that others have argued in response both that in the integrated court model judges consider the merits of each case separately and that judges regularly hear information they find to be inadmissible and decide the case without reference to that evidence.[81] The Report concludes that:[82]

> 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.

It will be recalled in this respect that if there is a trial the judge who hears the trial will not be the case management judge.

3. Identifying the Existence of Other Proceedings

Knowledge of other proceedings is of course a pre-requisite to coordination of those proceedings. The Federal-Provincial-Territorial Report emphasizes the importance of knowing that there are other proceedings relating to the same family taking place at the same time. It identifies some promising practices including these:[83]

1. 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:
2. Statutory amendments requiring litigants in family court to provide information about related proceedings and orders from other courts (as s. 37(2)(j) in B.C.'s ***Family Law Act.***):
3. Statutory amendments in Australia requiring the family court to ask each party about the existence of family violence relating to themselves or their children: and

[80] Above note 2, at p. 98
[81] Above note 2, at p. 98.
[82] Above note 2, at p. 98.
[83] Above note 2, at p. 7.

4. 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.

4. Impact of Pre-Existing Orders

The Federal-Provincial-Territorial Report emphasizes the importance of knowing that there are already orders in place granted by another court and points to these promising practices:[84]

1. Information sharing protocols that assist the Crown prosecutor in obtaining copies of relevant orders issues in previous or parallel family law or child protection proceedings prior to a bail hearing;
2. Prosecution policies that encourage the use of graduated bail conditions that are sensitive to changing risk and to an accused person's family matters;
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; and
4. Court order databases which include all civil and criminal protection orders issued within the jurisdiction.

[84] Above note 2, at p. 6 (Executive Summary).