RISK OF FUTURE HARM: FAMILY VIOLENCE AND INFORMATION SHARING BETWEEN FAMILY AND CRIMINAL COURTS

Research Project – Summary of Findings and Conclusions

Prepared for the Fifth B.C. Justice Summit, November 6-7, 2015

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Overview

The Fourth B.C. Justice Summit, *Better Responses to Violence Against Women*, considered the topic of better coordination of criminal justice, family justice and child protection matters. Since that time we have been engaged in a qualitative exploratory research project which focuses on British Columbia and directly relates to this coordination issue. It was prepared for the Canadian Observatory on the Justice System Responses to Intimate Partner Violence.

That project is complete and the final report will be released in the near future. A number of B.C. lawyers and judges were involved in our research, all of whom seemed very interested in the issues we were dealing with and in assisting us with the project. We have, in short, concluded that there is the potential that many of the concerns relating to family violence and the risk of future harm, including those dealing with multiple court proceedings that B.C.'s *Family Law Act* (FLA) was designed to address, continue to be concerns in 2015.

The final report incorporates the background information provided in the Fourth Summit, in the presentation entitled *Multiple Court Proceedings and Intimate Partner Violence – A Dangerous Disconnect.*[3] As the Fifth Summit has a focus on taking action, this summary only touches on that background information; its primary focus is to describe, in summary form, the purpose of the project, our methodology, the results, including recommendations, and our analysis of them,

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[3] Based on the Honourable Donna J. Martinson Keynote Address, *Multiple Court Proceedings and Intimate Partner Violence, a Dangerous Disconnect*, Canadian Observatory on the Justice System's Responses to Intimate Partner Violence National Conference, October 20-22, 2014, Wu Conference Centre, University of New Brunswick, Fredericton, N.B. http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote.pdf

and our conclusions, focusing on – goals, objectives and concrete action. We do this using these headings:

A. Purpose of the Project
B. Methodology
    1. Development of the Research Questions
    2. Selection of the Research Participants
    3. Use of a Discussion Paper – Setting the Stage
C. Research Responses and Analysis
    1. The Results
    2. Comparing Concerns Raised to Those Identified in the Original Consultation
    3. Research Response Recommendations
    4. Legal Professionals as Justice Leaders – Achieving Just Outcomes in Family Law Cases
D. Moving Forward – Goals, Objectives and Essential Concrete Action
    1. Our Approach
    2. Overarching Family Violence Goals
    3. Specific Objectives Relating to Multiple Court Proceedings
    4. Essential Concrete Action
        a. Protection Order Enforcement
        b. Case Management
        c. Specialized Knowledge
        d. Determining Appropriate Roles for Lawyers and Judges in a Constitutionally Enhanced Adversary System

A. Purpose of the Project

Our primary purpose was to obtain information about whether the FLA, which was enacted in 2011 and came into effect on March 18, 2013, was having an impact on the ways in which the court system obtains and addresses information about family violence and the risk of future harm. We considered two related broad questions: What information about family violence and the risk of future harm is available to judges when making best interests of children decisions and Protection against Family Violence Orders in family law cases, and Judicial Interim Release Decisions and sentencing decisions in criminal cases? What information about family violence and the risk of future harm is shared when there are both criminal and civil cases going on at the same time relating to the same people?

Our collaboration on issues dealing with family violence and the justice system began in 2012-2013 when we had the privilege of working together on the development of and presentation of two legal education programs relevant to family violence generally and the issue of multiple court proceedings in particular: The National Judicial Institute's program for judges, *Managing the Domestic Violence Case in Family and Criminal Law*; and the B.C. Continuing Legal Education Society's program for lawyers called *Family Violence and the New Family Law Act.* Our consultations in preparation for these programs included a community consultation in Vancouver to assist in identifying issues that may arise in domestic violence cases generally and when there are multiple proceedings in particular.

The resulting report, *The National Judicial Institute Domestic Violence Program Development for Judges, April 2012, British Columbia Consultation Report*[4] concluded, in summary, that:

[4] National Judicial Institute - British Columbia Community Consultation Report. The Honourable Donna Martinson, April 2012

1. Judges would benefit from more knowledge about the dynamics of domestic violence including knowledge about: (a) why, when, where and how domestic violence occurs; (b) the impact of domestic violence on victims of violence; (c) the critical link between domestic violence and the ability to parent; (d) an understanding of why women don't report abuse; (e) legitimate reasons why abuse may be reported after separation, but not before and information suggesting that it is more likely that a man will falsely deny abuse than it is that a woman will falsely report it; and (f) cultural considerations and their impact.
2. Judges would benefit from more knowledge about the reality of women's lives, including the continued existence of gender inequality.
3. There is often either no or a limited assessment of either the nature and extent of the violence or the risk of future harm.
4. In individual cases there can be gaps in the knowledge the judge has about the nature and extent of the violence; this gap is exacerbated when there is more than one judge involved in the case.
5. Enforcement of court orders that are breached is a significant problem which can compromise women's safety.
6. There are challenges women face when attending judicial dispute resolution proceedings. Among the concerns they raised are these:
    a. Many judges do not understand the concept of gendered violence;
    b. Many women "don't even know or fully understand what a judicial case/settlement conference is and can end up agreeing to things out of intimidation";
    c. Many women go through the process because they have no other options; they cannot afford a lawyer and cannot get legal aid; they can give up other things for custody as it is used as a bargaining tool;
    d. There is a strong emphasis (a starting presumption) that joint parenting is best, without any information about the family dynamics generally and the existence of family violence in particular; and
    e. Many women do not raise the issue of violence because they are afraid that they will be accused of trying to alienate the father from the children, rather than trying to protect them, and end up losing custody.

A key concern was the "over use and misuse of exert reports when there are allegations of violence and abuse". They said that:

- Many experts do not have the necessary qualifications to assess cases where there are such allegations;
- There is often no "screening" for violence; this should be a requirement; and
- Women's concerns about violence and abuse have too frequently been ignored or minimized, or rejected completely by psychologists; often no or no adequate analysis is done to explain this result.

The consultation participants also 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. They pointed to such concerns as the dangers caused by conflicting court orders, the need to repeatedly provide information, the increase in

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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

litigation harassment, the delay in resolution, adding to stress, especially for children, increasing conflict and possibly increasing the risk of harm.

The FLA came into effect after lengthy and significant research and consultations. Similar issues were identified. As the Ministry of Justice itself has put it, the best interests factors found in the FLA, including the new family violence factors "modernize[s] the *Family Relations Act* to better reflect current social values and research." As a result, the FLA contains an important scheme to address issues of family violence, risk and the challenges of having more than one family violence related court proceeding relating to the same family taking place at the same time. It recognizes the importance of having *all* relevant information about whether family violence, broadly defined, exists, and if it does, what its impact is upon decisions with respect to future safety, security and well-being. Specifically, it requires parents, lawyers and judges to consider whether family violence, broadly defined, exists, and if it does what its impact is - whether there is a risk of future harm to children and other family members and whether it has an impact on dispute resolution processes. By way of example, the parties when making an agreement and the court when making an order must consider:

- the impact of family violence on the child's safety, security or well-being, whether the family violence is directed at the child or another family member: s. 37(2)(g).

- whether the actions of the 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: s. 37(2)(h).

Section 38 requires that, for the purposes of those two sections a court must consider all of the following:

(a) the nature of seriousness of the family violence;
(b) how recently the family violence occurred;
(c) the frequency of the family violence;
(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
(e) whether family violence was directed toward the child;
(f) whether the child was exposed to family violence that was not directed toward the child;
(g) the harm to the child's physical, psychological and emotional safety**,** security and well-being as a result of the family violence;
(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring; and
(i) any other relevant matter.

The FLA also requires parents when making an agreement and the court to consider other civil or criminal proceedings relevant to a child's best interests. 37(2)(j).

The Act has a comprehensive Protection from Family Violence part (Part 9), with its own specific risk factors that must be considered. If a child is involved the court must also consider: whether the child may be exposed to family violence and whether there should be a specific Protection Order protecting the child. The Orders are enforced under s. 127 of the *Criminal Code*, not under the FLA or the *Offence Act*.

Section 8 provides that a family dispute resolution professional (which includes a lawyer*)* must:

- assess in accordance with the regulations whether family violence may be present: and
- if it appears that family violence may be present, the extent to which the family violence may adversely affect:
    - the safety of the party or a family member of that party, and
    - the ability of the party to negotiate a fair agreement.

The regulations require, for mediators, parenting coordinators and arbitrators, at least 14 hours of in-depth training on how to identify and screen for family violence or power imbalances to determine whether, or what type of, dispute resolution process is appropriate. The B.C. Law Society strongly encourages all lawyers dealing with family law cases to have such training.

This comprehensive scheme is an important one, one which reflects the approach to legal analysis required in Canada to ensure that all decisions made concerning family violence and its impact – the creation of law, including laws of evidence, and their application, as well as court processes - are equality based, taking into account the principles and values in the Charter of Rights and Freedoms, other Canadian laws and the principles and values found in international instruments to which Canada is a signatory.

B. Methodology

In this section we discuss the development of the research questions, the selection of the research participants, and the creation of a Discussion Paper that the research participants read before answering the questions.

1. Development of the Research Questions

We designed our research questions on two bases. The first was our own knowledge of the British Columbia/Federal context, with a particular focus on our NJI Consultation. The Consultation involved holding three focus groups (for a total of 42 people) comprised of a variety of community group members and justice personnel, with separate individual interviews also being conducted. The second involved a preliminary comparison of reported cases to see whether there was a difference of approach taken to the issue of multiple court proceedings and to the sharing of information between the two courts before and after the implementation of the FLA.

The judges and lawyers participating in this exploratory study were 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? (e.g., risk instruments, experts)
3. Generally, when there are both family proceedings and criminal proceedings relating to the same family, is information about future risk of harm shared between courts in any way?
4. Are there (a) any benefits that exist for the sharing of such risk information? (b) Any barriers, concerns?
5. What recommendations if any could be made to ensure that courts have relevant information about risk in legally permissible ways?

The questions refer to all family law proceedings in the province, and would include those under the federal *Divorce Act.* The responses however tended to focus on the family violence

proceedings under the FLA relating to family violence and its relevance to the best interests of children and, more broadly, to the granting of Protection from Family Violence Orders aimed at protecting "at risk" family members, including children. This is likely due, at least in part, to the fact that the specific FLA provisions have informed the interpretation of the much more broad "best interests" test under the *Divorce Act.*

Our research questions were designed to determine whether, at least in the early stages of the implementation of the FLA, family violence was being raised as an issue in judicial settlement discussions, hearings and trials, whether risk information was in fact being provided and if so, when there are multiple proceedings, that risk information is being shared. We wanted to find out about challenges that exist/have been encountered, and to consider how those challenges might be addressed. We could then compare the judges' and lawyers' responses to the identification of challenges with those which emerged through the community consultation process.

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

Our primary focus was on violence by men against women. While men do experience family violence, and while men are without question entitled to the benefit of and protection of the law when that happens, the research relied upon by the Ministry shows that violence, particularly violence within the family, significantly and disproportionately impacts upon women and children. The Ministry points out that according to Statistics Canada, the nature and consequences are more severe for women. Women are more likely to experience the most severe and frequent forms of spousal assault, are more likely to be physically injured and require medical attention, and are more likely to report negative emotional and psychological consequences. Children are more likely to witness violence inflicted on their mothers.[5]

2. Selection of the Research Participants

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

With respect to judges, we made a written request to both the Provincial Court and the Supreme Court asking for the participation of judges from each Court in a roundtable discussion. The judges who attended were selected by the Courts. The nine judges who attended included both men and women and were judges who had extensive experience in family law, criminal law, or both. The judges agreed in advance that they would meet with Donna Martinson as a group, and respond to the five research questions. She would then prepare a summary of the

[5] "Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference", Martinson & Jackson (2012), p.16
http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf

responses which would then be approved by all of the judges who attended. They quite understandably wanted it made clear that the responses represented the views of a small group of judges only and do not represent the general views of each court. Nor do all of the comments contained in the summary necessarily represent the views of all of the judges attending the meeting. The summary report was prepared by Donna Martinson and all of the judges who attended agreed to it. The full report will be included in our final project report.

Our initial consultations in 2012-2013, referred to above, included two judges and seven lawyers. Five other lawyers were selected for the interviews for this project. The three family lawyers who were interviewed were selected specifically because of their demonstrated interest in and particular knowledge about family violence and because, in their practices, they attend court on a regular basis. Similarly, the defence counsel were selected because of their experience defending family violence charges, their demonstrated interest in family violence issues and their regular attendance in court (defence and family lawyers were interviewed by both Donna Martinson and Margaret Jackson together).

With respect to Crown Counsel, we initially asked to interview individual Crown Counsel who specialize in family violence persecutions. We were advised by the Criminal Justice Branch that such research requests need approval. The Branch at that time provided us with some general information about the legal framework within which the Branch operates. We then made a specific request to have the Branch respond to our five questions "in whatever way the Criminal Justice Branch considers appropriate." The Branch helpfully provided us with a written response to questions 1, 2 and 3. Those preparing the response did not feel that they were in a position to respond to questions 4 and 5.

3. Use of a Discussion Paper – Setting the Stage

Much of the discussion and research relating to the issue of domestic violence, risk and multiple court proceedings is new. We thought it was important to ensure that those participating in this research project were well-informed about the work that has been done. We therefore prepared a Discussion Paper, called *Risk of Future Harm: Family Violence and Information Sharing between Family and Criminal Courts,*[6] which all of the participants in the research project, including the judge participants, read before meeting with the researchers.

C. Research Responses and Analysis

1. The Results

There was agreement among the judges and lawyers that there is a need to ensure that decisions made about family violence and its impact are made with all relevant information about the nature make of family violence and the risk of future harm in order to make fair and just decisions about the risk of future harm. At the same time there was agreement that there is a significant and concerning disconnect between that goal and what is actually happening. It is not common for Judges to get the relevant information from lawyers and if they do not, they are not asking for it. There was also agreement that relevant information they are not getting or asking for includes information about, at a minimum, other related court proceedings and court

[6] http://fredacentre.com/wp-content/uploads/2010/09/Discussion-Paper-Jackson-Martinson-Risk-Of-Future-Harm-Family-Violence-and-Information-Sharing-Between-Family-and-Criminal-Courts-January-2015.pdf

orders. This lack of that relevant information may be at all stages of the judicial process: settlement discussions, interim hearings, case management and pre-trial management conferences and at trial. If the question of the risk of future harm is raised, it is usually by way of arguments made to the judge (submissions), not expert or other evidence.

The judges said that with respect to family law cases they rely on their own knowledge and experience. Particular comments about the information they did receive included these two:

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

Under the FLA, Protection Orders granted in family law proceedings either in Provincial Court or Supreme Court are enforced by a criminal law proceedings in the Provincial Court. This creates a situation where two proceedings, a family law proceeding and a criminal law proceeding relating to the same people, are going on at the same time. The Protection Order provisions of the FLA are an essential part of the FLA scheme relating to the safety, security and well-being of women and children. Both judges and lawyers identified the lack of enforcement of Protection Orders as a serious concern. In the judges' responses, it was described as a massive problem that could undermine the effectiveness not only of Protection Order provisions in the FLA, but also the whole FLA scheme, making it a "broken piece of legislation".

The family law lawyers discussed the importance of a holistic, comprehensive approach about actual risk, capturing multiple factors which influence behaviour and events and making the justice system more accountable. Defence counsel said that there "is a benefit to the effective administration of justice in sharing risk information in permissible ways; it is helpful in creating informal discussion…" Defence counsel also said there are benefits to an accused person of knowing about other court orders, to avoid being accused of breaching an order. There were several challenges to the obtaining of relevant information identified by both the judges and lawyers. They related to both individual criminal and family proceedings, and to the sharing of information:

- There are fair trial/process concerns generally, and with respect to the constitutionally protected rights of accused persons in particular
- The ability to disclosure of relevant information can be affected by:
    - privacy concerns
    - the limitations created by solicitor client privilege
    - privacy and disclosure of information laws
    - disclosure policies such as those governing Crown Counsel
- The challenges created because there are a high number of self-represented people in family law cases.
- Lack of legal aid generally, and the tariff in particular, in both family law and criminal law.

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

there was also a concern raised by family law lawyers that even when family violence is considered, it can be set aside as not being relevant to the children's safety, security and well-being; when this happens, there is usually not an analysis of the s. 37 factors in the FLA relating to family violence and its relevance to parenting or to the s. 38 factors relating to the risk of future harm. The second and third concerns were noted more often at judicial dispute resolution conferences.

Fourth, family lawyers, in discussing the need for specialized knowledge, emphasized the importance of understanding the nature and impact of trauma upon women caused by the violence, which can make it hard to obtain accurate information, and which means that lawyers and judges have to understand that and provide women with time and space to "tell their stories" in their own way.

Fifth, defence counsel said that we have developed a system of “fast justice” in criminal courts which makes obtaining information about family violence and risk difficult generally. This was described as a system in which duty counsel may have 30 cases to deal with at a time, they are dealt with quickly and different Crown counsel deal with cases as the case progresses.

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

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

Crown counsel, through the Criminal Justice Branch, provided helpful information about the laws, practices and policies that apply to the decisions they make about both obtaining and providing information about risk. With respect to obtaining information about other proceedings for use in the criminal law proceeding they said that:

- there is no formal process in place for Crown Counsel to obtain information when there are proceedings taking place other than the criminal law proceedings
- in the Branch’s view, the onus is on those involved in other proceedings to provide it.
- it is rare for Crown Counsel to be told about risk information provided to the court in family law proceedings;
- however, the Crown's Spousal Violence Policy requires the police to provide information about any other orders affecting the accused person.

With respect to information that Crown Counsel can provide to lawyers and others, they said that:

- the Crown is governed by its own policies, privacy legislation and case law.
- in criminal cases it provides "Stinchcombe" disclosure as required by the Supreme Court of Canada case of that name.
- family lawyers must make a written request which is considered on a case by case basis.

- B.C.' s Freedom Of Information and Protection of Privacy Act provides for the collection of and disclosure of family violence information for reducing the risk that someone will be the victim of domestic violence.

(The full written response will be included in our final project report)

Defence counsel said that any sharing of information cannot be their responsibility because of solicitor client privilege and undertakings given to the Crown; there should be an institutional responsibility on the court to do it.

Most, but not all, of the judges were of the view that judges should not be asking questions themselves when information about risk, including information from other proceedings, is not provided. The judges said that judges in our system make decisions based on the evidence presented and it is not their role to gather evidence. They have to "put blinders on" and cannot descend into the fray. One of the judges took a different view on the issue of asking about other court orders, emphasizing the safety concerns that can arise when there are conflicting orders:

> there are serious concerns that exist when there are conflicting court orders. Because of that judges should take a little more time and ask a few questions because it is really useful to have basic information about other proceedings. Depending on the answers more questions might be asked. The fact that there have not been more cases of serious injury or death as a result of conflicting court orders is due more to good luck than to good management.

2. Comparing the Concerns Raised to Those Identified in the Original Consultation

The responses to our research questions suggest that many of the concerns relating to individual proceedings and the sharing of information when there are multiple proceedings that we have described above in "Purpose of the Project" may still exist. If this is the case, there is a significant justice system concern.

We suggest that the results are strikingly similar respect to:

- the limited information judges receive about the nature and extent of family violence and the risk of future harm;
- the lack of or limited assessment of the risk of future harm;
- the apparent lack of screening for family violence in family law cases;
- the need for more case management;
- the emphasis, particularly during judicial dispute resolution conferences, on joint parenting without information about the family dynamics generally and the existence of family violence in particular;
- the lack of enforcement of Protection from Family Violence Orders;
- the need for judges with specialized knowledge;
- the challenges caused by the lack of effective legal representation; and
- the fact that when there are both criminal law and family law proceedings taking place at the same time, they operate in silos, creating both significant access to equality based justice and safety concerns.

3. Research Response Recommendations

The judges and lawyers who participated in our study helpfully made several recommendations, both with respect to individual family law and criminal law proceedings and the sharing of information when there are both family and criminal law proceedings.

The family law lawyers and the criminal law lawyers recommended that judges and lawyers dealing with each proceedings have specialized knowledge about family violence and risk.

Family lawyers recommended that case management in individual family law proceedings can assist with obtaining relevant information. They also recommended that judges "seize" themselves of cases by hearing all of the future applications, as doing that helps with obtaining relevant information about family violence and risk. Doing that provides consistency of approach and sends a strong message to those who choose not to follow court orders that they will be "kept on a short rein".

Both the family lawyers and criminal lawyers suggested that judicial case management of multiple court proceedings is worth trying. Defence counsel emphasized that this must be done in a way that protects the rights of accused people.

The criminal law lawyers recommended that the sharing of information be done at an institutional level.

Everyone recommended that in order to obtain relevant information about risk, legal aid must be more widely available and provide adequate time for the work needed

The judges recommended that they should have the ability to appoint a lawyer when a person needs one and is not represented.

The judges made additional specific suggestions:

- Using as a starting point the requirements in the FLA that judges and parents must consider other criminal and civil proceedings when deciding the best interests of a child. (s. 37(2)(j))
- Similarly, using as a starting point as well as the provision in the FLA that a non-parent applying for guardianship must file an affidavit providing the relevant information. (s. 51(2) of the *Act*))
- The use of Court Rules to facilitate the sharing of information about other court proceedings.
- Carefully worded plain language court forms containing tick boxes which would require people using the court to provide information about other court processes.
- A systemic rather than ad hoc cross-referencing of files.
- A software system that would allow data sharing about other proceedings between/among courts.

The judges also suggested that joint judicial education on the topic of multiple court proceedings would be helpful.

4. Legal Professionals as Justice Leaders – Achieving Just Outcomes in Family Violence Cases

One of the questions raised in the responses is the appropriate role of judges and lawyers themselves in making sure that relevant information about family violence and risk is available. The recommendations did not address this question. We respectfully suggest that judges and lawyers, as guardians of our constitutional principles and values, including the fundamental principle of equality, have an important role to play in this regard; they both have a responsibility to take a more active role, facilitating equality based justice. Judges can do this in what is described below as a "non-prejudicial way", consistent with principles of judicial independence and impartiality.[7]

The development of substantive equality as a fundamental constitutional value that informs all legal analysis, together with the significant changes in the kind of work judges and lawyers do, has led to what can be described as the development of a constitutionally enhanced adversary system. Under this system both judges and lawyers have professional responsibilities to ensure that in each case the court/decision maker has the information needed to reach a just decision. This is a responsibility judges and lawyers take very seriously; not only have they been at the forefront of development of and implementation of substantive equality principles, but they have looked inward, in recent access to justice reports, to consider what is required to achieve access to just results in the legal system.

In this section of our final report we consider three topics. The first describes substantive equality and demonstrates how it is not only consistent with, but informs the important concepts of judicial independence, impartiality and accountability to the public generally and the users of the justice system in particular. The second deals with the nature of the adversary system in the 21st century. We consider: the traditional adversary system, with the generalist judge (one who deals with every kind of case) hearing disputed cases in the role of neutral arbiter of a case presented by lawyers; the evolving nature of the roles of judges and lawyers; and the need now for a constitutionally enhanced adversary system.

The Canadian Judicial Council has captured the dramatic change in the roles and responsibilities of judges and lawyers generally when developing its guidelines for people who are self-presented, called *Self-Represented Litigants and Self-Represented Accused – Understanding and Responding,*[8] The preamble emphasizes the broad nature of the responsibilities of judges and lawyers and other justice system personnel in both criminal and civil cases, stating that:

> Whereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural just and equal treatment under the law for all persons
>
> …

[7] See our discussion of the evolving roles of Judges and Lawyers in *Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference*, above, note 5.

[8] "Statement of Principles on Self-represented Litigants and Accused Persons", Adopted by the Canadian Judicial Council, September 2006.
https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf

> Therefore, judges, court administrators, member of the Bar, legal Aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court.

Under the heading called Promoting Rights of Access, the Council makes the important statement that, "Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation." (Emphasis ours). In the commentary to that section, the guidelines state that it is "important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons."

Under the heading "Promoting Equal Justice", the Council makes the equally important statement that, "Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all person on an equal basis, regardless of representation." Under the Principles explaining that statement, Principles 3 and 4 set out several ways in which a judge can take "affirmative and non-prejudicial steps" which are "consistent with the requirements of judicial neutrality and impartiality". These include but are not limited to significant case management, and providing information about "the law and evidentiary requirements" and "questioning witnesses." The Council points out that its *Ethical Principles for Judges,* has "already established the principle of equality in principles governing judicial conduct."

The guidelines state that "All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness. With respect to justice, the principles that apply state that, …Depending on the circumstances and nature of the case, judge may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

We suggest that these principles go far beyond the approach taken in the traditional adversary system that lawyers present what evidence they choose and judges, as neutral arbiters, decide the case based upon that evidence.

The final part of this section in our final report looks broadly at what is required to ensure that, in family violence cases, the "law" that is explained and applied, addresses the substantive equality issues at play. With respect to family law, the FLA provides, in a legislated format, the kinds of equality based considerations that are relevant. It requires that judges, lawyers and parents consider numerous important factors; applying them helps achieve a consistent approach to the question of how the justice system determines whether family violence is in fact an issue, and if it is, what impact it may have on safety, security and well-being of its victims.

D. Moving Forward – Goals, Objective and Essential Concrete Action

1. Our Approach

"We need research, thinking and deliberation. But for meaningful change to occur, they are not enough. We also need action. We cannot put off, to another day, formulation and carrying out a specific and effective action plan."[9]

[9] *Access to Civil & Family Justice- A Roadmap for Change",* Action Committee on Access to Justice in Civil and Family Matters, October 2013, p. 8.

We have pointed out that many of the challenges relating to multiple court proceedings have been identified, and the lawyers and judges who participated in our research project were quite interested in seeing change happen. The FLA provides a very useful framework for reform, as do the NJI consultation results and the access to justice initiatives undertaken by the legal profession. However, our project results show that there may be a significant justice system concern that the steps that have been taken up until now are not having the desired outcome at a practical, operational level. If the concerns are accurate, concrete action is required.

In this concluding section we suggest overarching goals, and specific objectives that can guide the development of concrete action steps. We then make specific suggestions for concrete action in the areas of concern identified by the responses: protection order enforcement; case management when there are both criminal and family proceedings; the need for specialized knowledge; and a consideration of evolving roles of judges and lawyers.

Our ideas are based on our view that it is important to look for opportunities for change, not obstacles to change.[10] There are challenging issues to address, but, as emphasized in *A Roadmap for Change*, we "need a fresh approach and a new way of thinking… - a new culture of reform." Chief Justice McLachlin, speaking in August 2015 at the Canadian Bar Association's annual meeting in Calgary, succinctly made the point that lawyers and judges have to stop fearing change.[11]

The Third BC Justice Summit Report noted that priority action items for next steps require first a consideration of change in the culture of the justice system itself. The report references a quote from Lawrence Friedman which was taken from *A Roadmap to Change*. He states, "law reform is doomed to failure if it does not take legal culture into account". Some of the foundational/core values of the family justice system must be revised in order to meet the changing needs of the communities. The historical shift in family law to cooperative values need to be integrated more deeply into the family justice system. Three elements that are needed for the change are listed as being: A vision based upon the core values; leadership from the judiciary on collaboration and cooperation; and an enforcement mechanism to ensure those values are actually put into place.[12]

Following the recommendations in *Roadmap for Change* we consider it to be critical, in the context of family violence, risk of future harm and multiple court proceedings, to put the needs and concerns of the people who use the court system first. What are the needs and concerns of women and children who use the court system? What are their reasonable expectations of a justice system which has separate court proceedings dealing with the same issues, which can have such a significant impact on their day to day lives?

We of course do not purport to provide right answers. Rather, we provide a framework for analysis, identify areas to be considered, suggest what some of the issues might be, and refer to some possible solutions. Our hope is that the collective wisdom of those gathered at the Fifth Justice Summit will create an effective way forward. We have not addressed the well-known and much considered issue of effective legal representation.

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[10] Referred to by Donna Martinson in her remarks at the Fourth Justice Summit, and in *Multiple Court Proceedings and Intimate Partner Violence, a Dangerous Disconnect*, above, note 3.
[11] The Legal Profession in the 21st Century, Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, At the 2015 Canadian Bar Association Plenary, pp. 13-14
[12] http://www.cba.org/CBA/sections_family/newsletters2014/bc.aspx

2. Overarching Family Violence Goals

We suggests that any reforms focused on family violence and the risk of harm must ensure:

All available relevant information

- that all decisions about family violence generally and the risk of future harm in particular, are based on all available relevant information.

Equality rights and values

- that decisions about family violence, including decisions about relevance, are based on equality rights and values.

All stages of the justice process

- that such equality based analysis is applied to decisions made at **all** stages of the justice process, including decisions made:
    - between parents, with or without lawyers
    - in mediations,
    - arbitrations
    - parenting coordinating processes
    - judicial dispute resolution forums
    - case management hearings and
    - court hearings and trials

Development of legal principles and legal processes

- such an equality based analysis is applied to the development of legal principles and legal processes such as considering
    - existing and proposed laws
    - existing and proposed principles of evidence and
    - existing and proposed court processes.

Indigenous laws and values

- that particular attention is paid to Indigenous laws, values and dispute resolution practices, especially in light of the disproportionate impact of family violence on Indigenous women and children

Children's legal rights

- that particular attention is paid to children's legal rights generally and with respect to their rights to participate in all matters affecting them in particular.

3. Specific Objectives Relating to Multiple Court Proceedings

We also suggest that these specific objectives relating to multiple court proceedings should inform the development of concrete action. We should:

All constitutionally based rights

- look for solutions that protect the constitutionally based rights of women and children to be safe and secure while at the same time protecting the constitutional rights of accused persons.

Consistent and fair, just results

- aim for not just consistent results, but also fair and just outcomes;
- doing so applies the suggestion in *A Roadmap for Change* that an important objective – the primary concern is "[p]roviding justice – not just in the form of fair and just process but also in the form of fair and just outcomes."

Sharing of incomplete/inaccurate information

- avoid sharing information that is incomplete and/or inaccurate by finding ways of obtaining all available relevant information in individual proceedings

4. Essential Concrete Actions

a. Protection Order Enforcement

Issue

The Protection from Family Violence Order enforcement scheme in the FLA, one in which Protections Orders granted by judges sitting in Family Court are enforced in the Provincial Court criminal proceedings, necessarily creates a second court proceeding in a different court before a different judge. As a Protection Order can be granted by either a Supreme Court judge or a Provincial Court judge, it may create different proceedings within the same court, or create one process within the Supreme Court and one within the Provincial Court. As noted above, the issue of the enforcement of protection orders is a "massive" problem, one which may make the new *Family Law Act* ineffective – a "broken piece of legislation".

This enforcement process provides a good example of when and why the sharing of information between courts is necessary. What happens in the criminal court proceedings is directly relevant to the family law proceeding. Achieving a fair and just result requires both coordination, and a timely resolution of both court proceedings.

Possible Concrete Action

- evidence based research examining the short and long term outcomes of the use of this scheme, in terms of whether safety from harm was secured for both the involved women and children victims.
- looking at case management options (see below, under the heading Case Management)

b. Case Management

Issues

Two case management issues arise. The first is management by one judge of individual proceeding. The second is case management when there is more than one proceedings. Our focus here is on the second form of case management.

The federal-provincial-territorial Working Group on Family Violence, in its report, *Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice* Systems[13] working group, in its report, points to several "promising practices" relating to case management, which are described in our Discussion Paper.[14] They are not mutually exclusive. They include:

- The Toronto "Integrated" Domestic Violence Court
    - In spite of the word "integrated" 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. They are heard consecutively.
- Judicial Coordination and Communication
    - Though management of each proceeding by one judge may be the effective way of managing the separate cases, that process may not work well if the proceedings are taking place in different courts (one in the Supreme Court and one in the Provincial Court) rather than in one court. The communications take place with the knowledge of the parties, often in a joint hearing – with the parties and their counsel present. The communications do not relate to the merits of each case; 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.
- Coordinated Court/Court Coordinator Models
    - a designated domestic violence coordinator would act as a liaison between different courts as well as different services.

Possible Concrete Action

- Creation of an interdisciplinary working group composed of judges from each court, lawyers, representatives of the anti-violence sector and other community agencies providing resources and support for women facing family violence to work towards specifically developing a case management process.

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[13] Volume I, p. 9, http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html

[14] Risk of Future Harm; Information Sharing in Domestic Violence Cases: Between Family Court and Criminal Court, pp. 20-26 http://fredacentre.com/wp-content/uploads/2010/09/Discussion-Paper-Jackson-Martinson-Risk-Of-Future-Harm-Family-Violence-And-Informaton-Sharing-Between-Family-and-Criminal-Courts-January-2015.pdf

- This working group could, as raised as a theme in the Fourth Justice Summit[15] consider the privacy questions that arise when considering the sharing of information, taking into account the FPT report promising practices outlined in our Discussion Paper.[16]
- The Working Group could develop pilot initiatives in which specific practices are implemented and evaluated. The working group would no doubt find helpful the operational suggestions made by the judges, referred to above.

c. Specialized Knowledge

Issues re Judges

Several access to justice reports, including *A Roadmap for Change,* recommend/have as a theme, the importance of having judges with specialized knowledge.

A Roadmap for Change endorsed the recommendations of the Family Law Working Group, chaired by Jerry McHale Q.C. from British Columbia. It includes a specific recommendation that Courts should be restructured to better handle family law issues. The judges "presiding over proceedings in the court should be specialized". Family violence is identified as a specific area in which judges "should have or be willing to acquire substantive and procedural expertise." It also recommends that the same judges should preside over all pre-trial motions, conferences and hearings.

It also says that jurisdictions "that do not consider implementation of a unified family court to be desirable or feasible should take into consideration the hallmarks of unified family courts as set out above and strive to provide them as far as appropriate and possible."

Among the themes of the Third Justice Summit was this:

> Systems of case management and judicial case continuity should be considered. Such change would be supported by an increase in specialized judges and family courts, with the capacity to handle the significant percentage of litigants who are self-represented litigants.[17]

In the discussion entitled "the family court process should be simplified further", there is a reference to specialized judges:

> Users are best served through consistency of process. With one judge overseeing one case, and the use of specialized judges, there is greater accountability for all parties.[18]

A theme of the Fourth Justice Summit, under the heading "Making realistic efforts to achieve a more holistic approach, was that "…a move towards greater coordination would require substantial awareness and practical training (and specialization) of judges, Crown Counsel, defence bar and participants to become viable as consistent practice."[19]

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[15] Fourth Justice Summit p. 31
[16] Pp. 26-29
[17] Third summit p. 11
[18] Third summit p. 15
[19] Fourth Summit p. 31

The need for specialized knowledge by judges was, as we have explained, a response by lawyers in this project.

Judges - Possible Concrete Action

The Courts in British Columbia should collaborate with justice system partners to respond to the recommendations in *A Roadmap for Change*, answering the following questions raised in the report. Would the implementation of a unified family court be desirable or feasible? If not why not? If not, how can the court take into account the "hallmarks of unified family courts as set out and provide them as far as appropriate and possible"?

The Courts in British Columbia should consider how to ensure that those hearing family violence cases either "have or be willing to acquire substantive and procedural expertise" in family law in the areas identified in *A Roadmap for Change* including family violence.

Issues – Lawyers

Recommendations about specialized knowledge necessarily include specialized knowledge by lawyers. The provisions in the FLA, and the directions of the Law Society are helpful first steps. However, more is required to make sure that advice based on the required equality based analysis is being given.

British Columbia has, through the Continuing Education Society of British Columbia, the Canadian Bar Association, and other institutions focusing on education, provided education on family violence. The B.C. Joint Training Forum, taking place in December 2015, called "Together! BC Collaborates to stop Sexual and Domestic Violence" provides a very good example of both the kinds of educational opportunities that are available, and how educators can collaborate in presenting programming.

The challenge for lawyers' education, as we see it, is that while the Law Society requires participation in legal education programming, it does not require lawyers who practice family law to take the courses offered relating to family law generally or family violence in particular.

Lawyers - Possible Concrete Action

The Law Society should reconsider its approach to specialization, particularly considering that in legal areas which involve family violence, the stakes for those involved are very high. The Ontario Law Commission has created a course on domestic violence for law school curriculum[20] Other provinces should consider this "early start" approach to specialization/education while maintaining workshops and training on domestic violence for practicing lawyers subsequently as well.

[20] http://www.thestar.com/news/gta/2015/02/03/law-schools-fail-on-domestic-violence-training-experts-say.html

d. Determining Appropriate Roles for Lawyers and Judges in a Constitutionally Enhanced Adversary System

Issues

How do judges and lawyers, as guardians of our constitutionally based legal system, facilitate, in family violence cases, equal, equality based justice for everyone? How can the affirmative, non-prejudicial steps described by the Canadian Judicial Council be applied in family violence cases in ways that are consistent with the modern views of judicial independence and impartiality?

Possible Concrete Action

Judges could examine, in a judicial education setting, the kinds of affirmative, non-prejudicial steps judges and lawyers might take. Similarly, lawyers could examine the same question in a continuing legal education setting.

A very specific step judges might take to assist in information sharing between courts is to make available quickly their Reasons for Judgment in both family law and criminal law cases involving family violence. Those reasons would describe the issues that arose, arguments that were made, and the basis for the decisions that were made.