THE INTERSECTION BETWEEN CRIMINAL LAW, FAMILY LAW AND CHILD PROTECTION IN DOMESTIC VIOLENCE CASES

INTRODUCTION

Domestic violence is considered to be any form of abuse, mistreatment or neglect that an adult or child experiences from a family member, or from someone with whom the adult or child has an intimate relationship.[1] It is a scourge that harms families from all backgrounds, regardless of socioeconomic, educational, cultural or religious background, and is a sad reality for many Canadians.

Domestic violence is dealt with in the criminal law, family law and child protection regimes, and consequently, there are different systemic approaches to addressing the problem. These three sectors of the justice system all have distinct mandates, cultures, legal standards and procedures.[2] These different approaches can exacerbate an already challenging and perilous situation for the parties. For instance, the non-adversarial approach that is encouraged in family law disputes may be inappropriate where there are allegations of criminal violence, especially in light of the power imbalance between the parties and the concern that an abusive spouse may not have a sincere interest in resolving the family law problems.

Conversely, judges must be alive to the possibility that claims of violence or abuse may be fabricated in a family law case to allow one partner to seek to have restrictive terms imposed on the other partner, including non-contact orders and limited access to the children, and to gain exclusive possession of the matrimonial home. When criminal conduct is alleged, bail conditions may be imposed without regard to the best interests

[1] "Family Violence", online: Department of Justice Canada <www.justice.gc.ca/eng/cj-jp/fv-vf>.
[2] See Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*, vol 1 (November 2013) at 14, online: Department of Justice Canada <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html> [Justice Canada, "Making the Links"].

of the child and the overall well-being of the family unit. These conditions may lead to the establishment of a status quo that disadvantages the accused person, and arguably the child, in the family law proceedings.

The strain between criminal, family and child protection cases occurs with frequency, and there is often a disconnect between the manner in which the different divisions of the Superior Court address the situation. This disconnect may lead to inconsistent court orders, and create confusion, increased stress and expense for those who are already vulnerable. This report reviews the literature that examines the challenges inherent in concurrent proceedings, and their impact on the parties. It includes research undertaken by third year law students at the Faculty of Law, University of Toronto, whom I supervised throughout the January-April 2015 academic term. Their research includes an empirical study of cases in the Superior Court where different sectors of the justice system were involved (Schedule A); a review of the different standards in family, child protection and criminal proceedings relating to evidentiary issues and standards of proof (Schedule B); and a review of approaches that have developed, in Canada and elsewhere, to address the challenges of concurrent proceedings (Schedule C). This report concludes with proposed suggestions in order for the Superior Court to help address the problems, and in turn, better serve the public.

WHAT IS THE PROBLEM?

The Three Sectors of the Justice System: Criminal, Child Protection and Family Law

Statistics confirm the pervasiveness of family violence in Canada.[3] In 2009, 17% of Canadians revealed that they had suffered physical or sexual violence inflicted by a former intimate partner.[4] In 2011, 26% of violent crime in Canada that was reported to the police was rooted in family violence, and the victims were both spouses and children.[5]

A study of data from the Ontario Court of Justice for the period 2003 to 2010 revealed that in about 10.7% of the family cases, there was also a criminal proceeding with respect to domestic violence.[6] There is no firm data on the incidence of concurrent justice sector involvement in family law cases in the Ontario Superior Court. However, as part of my study leave research, I worked with a 3rd year law student at the University of Toronto Faculty of Law to examine 5 weeks of data that was collected from judges hearing family law matters at 393 University Avenue. While the reliability of the data collected has limitations, among other things, it suggests that 43% of the sampling of family law cases had an indication of some degree of intimate partner violence. Even accounting for the limitations in the data, this analysis illustrates the high incidence of domestic violence in family law cases. The analysis of this data is found in the student's report annexed as Schedule A.

When one parent assaults the other parent, criminal charges may be laid; child protection issues may arise if there is risk to the child; and the family relationship may break down. Similarly, the three areas may be engaged if there is a marriage

[3] Canadian Centre for Justice Statistics, "Measuring violence against women: Statistical Trends" by Maire Sinha, ed (2013) online: StatsCan, <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>.
[4] Justice Canada, "Making the Links", *supra* note 2 at 3.
[5] *Ibid* at 23.
[6] *Ibid* at 26.

breakdown and one party alleges that the other has abused a child.[7] However, the three sectors of the justice system serve different objectives, and the different foci can lead to inconsistent results.

The Criminal System

The purpose of the criminal justice system is to provide a just, peaceful and safe society.[8] Criminal conduct, including domestic violence offences, is prosecuted by the state. An accused person faces a wide range of jeopardy, which can include a custodial sentence, and is entitled to all protections offered by the *Canadian Charter of Rights and Freedom.* [9] In very general terms, the criminal justice system is focused on protection for the victim in the particular case, on taking steps to denounce the criminal conduct and to deter both the specific offender, as well as other offenders, from behaving in similar criminal conduct. While family issues, including the welfare of the children, may be factors for consideration on sentence, these factors are not in any way relevant in determining whether an accused should be found guilty of a criminal offence.

In this regard, it is interesting to note that most jurisdictions across Canada have "pro charge" policies with respect to domestic violence—directions that require the police to lay charges whenever there are reasonable and probable grounds to believe that an offence has occurred.[10] Similarly, Crown offices are guided by pro-prosecution policies that require the prosecution of a domestic violence case where there is a reasonable prospect of conviction and the prosecution is in the public interest.[11] This is the case regardless of whether the complainant spouse wishes to have the charges pursued, and

[7] See Nicholas Bala & Kate Kehoe, *Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective* (Justice Canada, 2013) [Bala & Kehoe, *Concurrent Legal Proceedings*].
[8] Justice Canada, "Making the Links", *supra* note 2 at 27.
[9] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK) 1982, c 11 [*Charter*].
[10] Joseph Di Luca, Erin Dann & Breese Davies, *Best Practices Where There is Family Violence (Criminal Law Perspective)* (Justice Canada, March 2012) at 5 [Di Luca, Dann, & Davies, *Best Practices*].
Family, Children and Youth Section, Department of Justice Canada March 2012) page 5 [Di Luca "*Best Practices*"]
[11] *Ibid* at 5.

regardless of the consequences for the family. If an accused person cannot afford counsel, he or she may be entitled to legal assistance from the state.

The Child Protection System

While the child protection system is also state based, its objective is to ensure that parents and others who care for children meet a minimum standard of care.[12] If a child protection worker determines that a child is in need of protection, the appropriate provincial children's aid society may commence an action.[13] Where, for instance, the need for protection flows from family violence, or failure to provide the necessities of life, there may be concurrent criminal and child protection proceedings. However, as the overriding objective of the child protection system is the best interests of the child, the purview of child protection legislation is broader than that of criminal law. The mandate of child protection agencies is not to punish those who have abused or neglected their children, but rather, to protect the children.[14] Accordingly, conduct that may constitute grounds for intervention in the child protection realm may not necessarily be a criminal offence.[15] That said, the Supreme Court of Canada has held that where a parent's security of the person, namely his or her relationship to the child, is threatened by state action in a child protection case, the *Charter* principles of fundamental justice may be invoked to entitle the parent to state funded legal counsel if he or she cannot afford counsel.[16]

The Family Law System

In contrast to the criminal and child protection systems, the state is not a party in family law matters. Family matters, which include custody, access, divorce, separation, support, and property, are initiated by the parties, and the parties themselves must fund

[12] Jeffrey Wilson, *Wilson on Children and the Law*, loose-leaf (consulted March 2012), (Markham: Lexis Nexis, 1994) §3-1.
[13] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 18.
[14] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 5.
[15] Justice Canada, "Making the Links", *supra* note 2 at 28.
[16] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 41; *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46, 177 DLR (4th) 124.

the litigation. There is no requirement for state funded counsel in family litigation for parents who cannot afford to pay.

Family remedies can be invoked where there are allegations of violence. In Ontario, these remedies include, among other things, a restraining order, and an order for exclusive possession of the matrimonial home.[17]In particular, section 24(3)(f) of the *Family Law Act* provides that one of the considerations in determining whether a party should have exclusive possession of the matrimonial home is "any violence committed by a spouse against the other spouse or children." However, since family matters are commenced by the parties, the information before the courts is only the information that each of the parties choose to submit. As recognized in the Justice Canada, *Making the Links* report:

> If there is information that neither party wishes to place before the family court, it will not be placed before the judge. For example, if a victim of intimate partner violence prefers not to disclose an incident of violence, this information will likely not be before the court, even it there might be multiple forms of evidence (e.g. 911 calls, photographs, medical reports.)[18]

In fact, research has shown that it is common for incidents of family violence not to be brought to the attention of the court dealing with the family law issues. This omission has been explained as follows:

> The failure to document and to present evidence of domestic and family violence during mediation, hearings and trials in family law cases is reported repeatedly in empirical studies from all western common law jurisdictions. The reasons include claims of domestic and other forms of family violence being 'negotiated' out of the litigation process in return for concessions from the other party (such as agreements to pay child support or to abandon joint custody claims); non-perpetrating parents succumbing to settlement pressure - from professionals who do not understand the significance of domestic violence in connection with harm to children; failure to present evidence when judges have demonstrated a resistance to considering such evidence or have a record of penalizing parents who seek restrictions on access to children; lack of specialized understanding of the dynamics and implications of domestic violence among those who work in the

[17] *Family Law Act*, RSO 1990, c F 3, ss 24 and 46.
[18] Justice Canada, "Making the Links", *supra* note 2 at 29.

> family and child protection systems.… Other exclusionary factors include: lack of financial and psychological resources required to pursue litigation and to hire domestic violence experts, fear of retaliation, embarrassment, protection of family and or cultural 'honour,' emotional inability to offer coherent testimony as a consequence of damage caused by domestic violence, and concerns about child safety (such as the potential for perpetrator retaliation against children). The failure to present full information of domestic violence during hearings is being reported regularly across western legal jurisdictions.[19]

There are other practical, systemic reasons why family violence, especially as it relates to children, may not come to the attention of the Superior Court in a timely way. This is the case even though domestic violence is recognized by statutes and precedent in Ontario as a factor that must be considered in family matters. In particular, section 21 of the *Children's Law Reform Act* was amended in 2009 to require that all applications for custody of or access to a child be accompanied by an affidavit in the required form (Form 35.1) of the persons applying for custody or access.[20] The amendment was passed following a judicially approved adoption which had tragic consequences for the adopted child. [21] Form 35.1 requires that the parties to a claim for custody or access provide details that may identify whether there is a potential risk of physical or emotional harm to a child. Among other things, the parties must provide details of any other court cases involving custody or access or child protection in which the party has been involved; a copy of the orders, if any, made in those cases; whether the party has been found guilty of any criminal offences for which they have not been pardoned; any outstanding criminal charges; the terms of release; the periods of time the children have spent with caregivers; and whether a child of those persons has ever been in the care of a children's aid society. [22] However, the practical reality is that the information set out in a Form 35.1 is often not provided to a judge within a time frame that allows for

[19] *Ibid*, at 30; see Linda C. Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection) A Family Law, Domestic Violence Perspective* (June 2012), online: Learning to End Abuse <http://www.learningtoendabuse.ca/sites/default/files/Enhancing_Safety.pdf>.
[20] *Children's Law Reform Act*, RSO 1990, c C 12 [*CLRA*]
[21] The Honourable Mr. Justice Victor Paisley, "Managing High Risk Cases in Family Law, A Judicial Perspective on The Effective Use of the Affidavit in Support of Claim for Custody or Access-Form 35.1" (Seminar delivered at the Law Society of Upper Canada, 8 April 2014), [unpublished] [Paisley J.].
[22] *CLRA* ss 21(2), (2.1)

effective intervention for a child at risk of harm. [23] This is because the overwhelming majority of Applications for Divorce, including those with claims for custody or access, are unopposed, and based on the parties having been separated for at least one year. [24] They are submitted in writing to the Superior Court, and do not require a case conference or a motion. In Toronto, it may take several days or weeks before the uncontested application is put before the judge, and thus, the child can be at risk for a significant period. This type of "high risk" case can be compared to a high conflict case that is usually readily identifiable to the judge because the record is large and reveals numerous motions, case conferences, and obvious antagonism between the parties. [25] In contrast, a high risk case may easily pass 'under the radar', especially where the dispute between the parents is not focused on the child. [26]

Stated generally, the non-adversarial approaches that predominate in the resolution of family matters may clash with allegations of domestic and child violence. Victims may be unintentionally pressured to settle in a way that does not adequately protect their safety, or the risk to a child may not be apparent in a timely manner. [27]

The Siloed Approach

In the Superior Court of Ontario, the criminal justice system, the child protection system and the family law system regularly operate independently of one another, and there are no established or adequate procedures for the flow of information among the different sectors. In Toronto and other regions of the Superior Court that do not have a unified family court, child protection matters in the first instance are dealt with at the Ontario Court of Justice. As well, criminal matters and family matters can be dealt with both at the Superior Court and the Ontario Court of Justice. The challenges of this "siloed" and often confusing approach are illustrated by the following observation:

[23] Paisley J., *supra* note 21.
[24] *Ibid*.
[25] Paisley J., *supra* note 21.
[26] *Ibid*.
[27] Nicholas Bala & Claire Crooks, "Making Appropriate Parenting Arrangements in Custody and Access Cases with Allegations of Spousal Violence" (Presentation delivered at the Judicial Development Institute of the Ontario Court of Justice, 18 January 2007), [unpublished].

> For parents involved in high-conflict separations, especially for those who are the victims of intimate partner violence, the lack of coordination between agencies, professionals and court proceedings can be bewildering, time-consuming, and emotionally and financially devastating. The parents and children may have to navigate between two or three legal processes (child protection, criminal, family, which itself may have proceedings in both superior and provincial courts, and in some cases, immigration), repeat their stories in multiple proceedings, understand the consequences of different and often conflicting orders, and reconcile different results in the different proceedings. An acquittal of the alleged abuser in the criminal proceedings, a finding that the children are in need of protection from exposure to violence in the child protection proceedings, and an order for joint custody in the family proceedings are all possible determinations for one family. [28]

CONCURRENT PROCEEDINGS: WHERE ISSUES ARISE

When there are criminal, family and/or child protection proceedings that are linked by allegations of violence by a partner in the relationship, an existing order in one proceeding will often impact the other proceeding. For instance, after criminal charges are laid, bail conditions, imposed at a time when the accused is presumed innocent, may ignore the best interests of the child and the overall well-being of the family unit.

For discussion purposes only, the examples used throughout are premised on the male partner or spouse inflicting violence on the female partner or spouse, or the child. While men can also be victims of domestic violence, statistics indicate that women report more serious forms of violence than men. [29] It is also recognized that domestic violence occurs in same sex relationships, and that same sex couples face the same challenges that flow from concurrent proceedings. The discussion that follows is equally applicable to situations where the female partner or spouse is the aggressor, and to same sex relationships.

Bail

An accused charged with domestic violence or with a criminal offence involving a child may be released directly by the police, or held for a bail hearing. If the accused is not

[28] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 3.
[29] Justice Canada, "Making the Links", *supra* note 2 at 23.

held for a bail hearing, he may be released on an appearance notice or with the intention of having a summons issued, a promise to appear or a recognizance. [30] Both a promise to appear and a recognizance can have an undertaking attached which requires the accused to abide by certain terms. It is not surprising that often the accused will agree to certain terms in order to be released immediately, and avoid the possibility of detention. If the accused is not released immediately, the pressure to agree to conditions is even stronger after detention.

If the accused is not released at the police station, he will be held for a show cause hearing.[31] If the Crown opposes release, there will be a contested bail hearing before a justice of the peace.

Section 515 of the *Criminal Code* sets out the provisions that must be considered on an application for release. While the Crown can seek detention to ensure the accused's attendance in court (the primary ground), for the protection and safety of the public (the secondary ground), and to maintain public confidence in the administration of justice (the tertiary ground), it is generally the secondary ground concern that is triggered in cases of domestic violence. Often this concern can be met by imposing terms of release that limit contact with the complainant spouse, which address the risk of the substantial likelihood of reoffending by the accused. Common bail terms include no contact, directly or indirectly, with the complainant spouse, and often no contact with the children; and geographic restrictions preventing the accused from being within a certain distance of where the complainant spouse lives, works or is known to be. Terms of this nature may also be included in an undertaking given on a promise to appear or on a recognizance.

If a justice of the peace detains the accused, the accused may bring an application for judicial interim release. This is where the Superior Court is engaged.[32] Again, the provisions of s. 515 are the relevant considerations; however at the time of the

[30] Di Luca, Dann & Davies, *Best Practices*, *supra* note 10 at 11; see *Criminal Code*, RSC 1985 c C-46, s 515 [*Criminal Code*].
[31] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 12.
[32] *Criminal Code* s 520.

application for release in the Superior Court, the onus is on the accused to satisfy the judge that he should not be detained.

Stated simply, it is not uncommon for the accused person to agree to restrictive terms, at any stage of the release process, solely to ensure that he does not remain in custody. [33]

However, regardless of the accused's acquiescence to terms, when addressing bail conditions, it is important that the police and the court are aware of any family or child protection orders that already exist. A criminal release which frustrates the objectives of the family or child protection order is at best confusing, and at worst, can create an unsafe situation.[34] However, the reality is that the police or the Crown may not have had the opportunity or foresight to investigate other orders at the time judicial interim release is dealt with, even when the release is at the Superior Court level. The everyday pressures of time and workload may result in conflicting court orders, at this very early stage in the criminal process.

Consequences of Bail Orders

The suggested guidelines for time to trial for a superior court matter are 8-10 months in the Ontario Court of Justice and 6-8 months in the Superior Court. [35] As such, restrictive bail terms can remain in place for a lengthy period, unless the accused applies to have them varied.

When these restrictive terms include no contact with the complainant spouse and or children, the accused's ability to connect and have a relationship with his children will be impacted. In addition to impeding access, no contact orders can also frustrate family counseling, therapy, monitored access visits, or other means to address the problems facing the family.[36] Yet, the reality is that it is not the norm for a judge determining the

[33] Justice Canada, "Making the Links", *supra* note 2 at 58; The Honourable Mr. Justice Bruce E. Pugsley, "Family Violence: The Intersection of Family and Criminal Justice System Responses" (Presentation delivered at Justice Canada Symposium, Ottawa, 26 February 2009).
[34] It would also be beneficial for the court to be aware of any risk assessment and or safety checklist that may have been completed by the police. See Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 15.
[35] *R v Morin*, [1992] 1 SCR 771, 71 CCC (3d) 1.
[36] Justice Canada, "Making the Links", *supra* note 2 at 67.

terms of release on a bail review to consider the best interests of the child or the welfare of the family structure. The problems that flow from restrictive bail conditions where there are allegations of family violence in conjunction with ongoing family law issues have been described as follows:

> Family law cases are quite complex and the dynamic is often in flux; things change rapidly and the Family Court has to be able to react to these changes in a meaningful way without being encumbered by bail orders that tie its hand behind its back. Bail conditions can last a long time and this makes it almost impossible to deal with issues that come up regarding the welfare of children and access and support issues. People need to contact each other to deal with these issues. It is especially important to resolve issues that touch on the best interest of children in the most efficient manner. This is difficult, if not impossible, to do if the parents are not allowed to contact each other (Bovard, 2009). [37]

For instance, while third party intermediaries may be used to implement access arrangements, it may not be realistic or practical to have this option canvassed upon release or at the first bail hearing, given the pressure to obtain release. [38] The no contact situation contemplated by common bail terms, in turn, may lead to the establishment of a status quo in the family law proceedings that disadvantages the accused father, notwithstanding that he ultimately may be acquitted of the conduct alleged. In other words, if the accused father has had no, or very limited, contact with the children because of his bail terms, this could become the existing state of affairs that influences subsequent family law proceedings. Similarly, the no contact order may, in essence, evict the accused from the matrimonial home, even without a family law order granting the other spouse exclusive possession. This too can produce a status quo that can be difficult for the accused spouse to alter. It can also create ancillary practical issues for the accused spouse who will be prohibited from attending at the home to

[37] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 15.

[38] Further, if an accused requests his lawyer to contact the other spouse to make arrangements, for example, to see the children or for counseling, it is arguable that the accused will be in breach of the order to have no contact indirectly, unless the exception for contact through the lawyer has been specifically incorporated into the court order. See Todd B. White, "Kramer v. Kramer; Regina v. Kramer-When family and criminal cases co-exist" (Presentation delivered at the Family Law Summit: A Multidisciplinary Perspective, Law Society of Upper Canada, Toronto 2007).

collect his personal documents that are needed in order to participate in the family law proceedings. [39] None of these scenarios will be addressed at the time of release unless they are brought to the attention of the court. As indicated, given the pressure for release, combined with defence counsel's typical unfamiliarity with family law, the judge hearing the bail application is not commonly asked to consider these issues.

Peace Bonds

Peace bonds are issued pursuant to section 810 of the *Criminal Code*. Although peace bonds are discouraged in domestic violence cases, they may be issued where the prosecution does not proceed because there is not enough evidence to lay a formal charge.[40] Pursuant to a section 810 peace bond, a justice only has to find that the complainant has reasonable and probable grounds to fear that the accused will cause injury to the complainant, or to the child, or will damage property. Peace bonds may also be used where there is little risk of reoffending and the defendant agrees to participate in counseling.[41]

Notwithstanding that there is no finding of guilt with the imposition of a peace bond, it too can impact concurrent family or child protection proceedings. Similar to a bail release, the peace bond may include non-communication or non-contact provisions that affect, among other things, the ability of the parties to interact regarding the children. If the family or child protection court judge is not aware of a pre-existing peace bond, and orders contact with a partner or spouse, there may be the possibility of harm to the partner or children.[42]

[39] Harold Niman & Janice Ho, "How Criminal Charges Affect Family Law Cases" (Presentation delivered at the Six Minute Family Law Lawyer Conference, Law Society of Upper Canada, Toronto 2009).
[40] Justice Canada, "Making the Links", *supra* note 2 at 62.
[41] *Ibid*, at 62.
[42] However, unlike a criminal conviction which serves as proof of the underlying facts in a subsequent family proceeding, a peace bond does not operate in the same manner. Nonetheless, a peace bond can be evidence at a subsequent proceeding from which the complainant's fear for her own or the child's safety can be inferred. See Justice Canada, "Making the Links", *supra* note 2 at 62.

Risk of False Accusations

In view of the consequences of restrictive terms of release in a bail order or arguably, a peace bond, some commentators suggest that there is always the risk that complainants will fabricate or exaggerate claims of domestic violence to further their objectives in the family law dispute.[43]

The case of *Shaw v Shaw* illustrates the problem. [44] The mother was charged with assault after a 'one-punch' bar fight. The children of the marriage were not present at the bar. The mother was detained in custody, then released on her own recognizance, but with a surety and in the amount of $5,000. The terms of the interim judicial release in the criminal proceeding effectively gave custody to the father, restricted access to the mother, and essentially granted the father exclusive possession of the matrimonial home. However, when determining temporary custody in the subsequent family law case, the court made the following observations:

> The events after the arrest of Ms. Shaw do not, in retrospect, show the police, the Crown, counsel or the criminal judicial system in a good light, although her story is commonplace. These events have become routine and predictable in almost every allegation of spousal assault such that there is presumably some policy guiding the police and the Crown attorney and forestalling professional discretion in all such matters, no matter how remote the assault may be in time or indeed how trivial the contact. Spouses of every walk of life and often with completely unblemished prior character are routinely detained for a formal bail hearing for such assaults. Invariably, the defendant (not yet convicted) is excluded from his or her home and prevented from exercising custody of or access to the defendant's children without any consideration of the factors that this court must apply by law before determining incidents of custody or access. This is not for one moment to diminish the impact of spousal abuse on family members and children in Canada. Spousal assaults are by nature serious and there are very sound policy reasons to lay such charges and have them proceed through the judicial system to ultimate resolution if not diverted. I

[43]Gary S. Joseph & Michael Stangarone, "When Family Courts and Criminal Courts Collide: The Impact of Bail Conditions on the Adjudication of Family Law Matters" (Presentation delivered at the 3rd Annual Family Law Summit, Law Society of Upper Canada, 2009), [unpublished].
[44] 2008 ONCJ 130, 62 RFL (6th) 100 [*Shaw*].

> observe, however, that the damage of which I speak is not from the laying of the charge — this will happen in any event, regardless of the manner in which the defendant is brought before the court. The way that the criminal justice system approaches the commencement of these matters, however, often wreaks family law havoc with the family unit of the defendant and the complainant, and in particular the children of those parties. Family courts decide custody and access issues on the basis of statute and case law defining the best interests of the children. The criminal justice system pays no attention to such interests because it is not geared up to do so nor are the participants widely trained in how the actions of the system — from the officer who refuses to release the defendant at the station, to the duty counsel who allows the defendant to agree to inappropriate conditions of release out of expediency — effect the lives of the members of the defendant's family. Similarly the Superior Court is tasked with the duty of adjudicating the respective rights of the parties to remain in the matrimonial home pending the resolution of the matrimonial litigation. Routine orders excluding a party from the common home of the parties until the end of the criminal matter without thought to the consequences thereof, and without a remedy short of a bail review, place one party in a position of immediate superiority over the other party for as long as it takes (perhaps a year) for defended criminal charges to be resolved. Such rote treatment of all matters of domestic assault can lead, on the one hand, to concocted or exaggerated claims of criminal behaviour or, on the other hand, to innocent defendants pleading guilty at an early stage out of expediency or a shared desire with the complainant to start to rehabilitate the family unit.[45]

In the recent case of *Gonzalez v. Trobradovic*, the police charged the wife with assaulting her common law husband by stabbing him in the face with a fork.[46] The charge was laid on the uncorroborated complaint of the husband, notwithstanding that the wife alleged that the husband injured himself to bolster his own credibility when the police were called to the home after an altercation. The wife was arrested and released from custody on terms that prohibited her from returning to the home, which she owned, and prohibited her from contacting the husband, except to arrange access to their one year old child. In the family law proceeding, the wife moved for an order dispensing with the case conference on the ground of urgency, and for an order restoring her to possession of her home, and primary care of the child. The court held that the

[45] *Shaw, supra* note 44 at para 5.
[46] 2014 ONSC 2468, 244 ACWS (3d) 892 [*Gonzalez*].

circumstances justified dispensing with the case conference, restored possession of the home to the wife and ordered that the status quo that prevailed with respect to the child before separation be restored, namely that the child would reside primarily with the wife/mother with liberal access to the husband/father. [47] The court identified numerous factors that may require the prompt intervention of the family court when there are restrictive bail terms imposed by a criminal court, including, among other things, where a spouse's parental and/or property rights are interfered with in the absence of judicial consideration of the factors that normally guide the family court when it determines those rights. [48] It went on to state as follows:

> The court must be vigilant of the risk that parents may engage the criminal process in order to achieve a strategic advantage in family law proceedings. Chappel J. adverted to this risk in *Batsinda v. Batsinda*:
>
> > This case also raises important issues respecting the interplay between Family Law and Criminal Law proceedings involving allegations of domestic violence, where criminal charges have been laid but not yet proceeded to trial. The fact that allegations of domestic violence have been made is a very important factor for a court to consider in the context of motions to address temporary custody and access, and the terms of release in criminal proceedings may be determinative, in full or in part, of the issues. However, the existence of criminal charges and proceedings respecting allegations of violence is not determinative of the issues of temporary custody and residence of the children of the parties' relationship. The focus of the analysis remains at all times the best interests of the children, and this involves a careful consideration and weighing of all of the evidence and relevant factors. Part of this process involves a careful consideration of the evidence relating to the alleged violence and whether there are any clear concerns on the record before the court regarding the strength of that evidence. If there are concerns of this nature, the court should exercise caution before relying heavily on the existence of the criminal charges. (see *Shaw v. Shaw*, 2008 Carswell, Ont. 1626 (O.C.J.)). Allowing the existence of criminal charges in such circumstances to dictate the outcome of the motion runs the risk of allowing a party to invoke the criminal law

[47] *Ibid,* at para 5.
[48] *Ibid,* at para 32.

> system as a tool to gain an unfair advantage and hijack the Family Law proceedings. [49] (footnotes omitted)

Cases like *Shaw*, a one punch bar fight, and *Gonzalez*, a fork stabbing, illustrate that domestic violence allegations may be strategically embellished or fabricated for the family law advantage. That said, the research appears to rebut the suggestion that claims of domestic violence are frequently falsely made. Rather, the research concludes that most cases of *serious* domestic violence are not reported to the police and that the underuse of the criminal justice system is more problematic than the occasional misuse.[50]

[49] *Gonzalez*, *supra* note 46 at para 54.

[50] Justice Canada, "Making the Links", *supra* note 2 at 59; see *R v R.J.*, 2010 ONSC 6751, [2010] OJ No 5422.

IMPACT OF CONCURRENT PROCEEDINGS

The issues that flow from different standards in family, criminal and child protection proceedings (related to evidentiary issues, standards of proof, and privacy and disclosure) are examined in detail in the paper annexed as Schedule B. These issues exacerbate the challenges of concurrent proceedings, and while the different standards cannot be reconciled, an appreciation of the complexities can assist judges dealing with these intersecting proceedings.

Child Protection and Criminal Proceedings

If an accused is charged with a criminal offence and is involved in child protection proceedings, the accused may be reluctant to cooperate with the children's aid society for fear that it will negatively impact the criminal proceedings. The accused may be concerned about self-incrimination in the criminal case, yet the child protection agency and the court may draw negative influences if the accused does not willingly participate in the child protection matter. [51]

In *Children's Aid Society of Huron v R.G.*, at the time of the parental capacity assessment, the mother was still subject to criminal charges that were the reason that her children had been apprehended. [52] She did not fully participate in the child protection proceedings, given the risk of prejudice in the criminal matter. The court noted:

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

[51] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 29; Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 32.
[52] [2003] OJ No 3104, 124 ACWS (3d) 712 (OC.J) [*CAS Huron v RG*].

> matters already been resolved and the protection issues already determined by the court.
>
> The fact that the society felt that she misrepresented herself to the assessor has haunted her throughout the rest of the child protection proceedings since it believed that she had poor insight into her failings as a parent. Her apparent lack of insight was one of the important basis on which the psychologist determined that her prognosis for change was poor. [53]

If the accused makes a statement to a children's aid society during its investigation, it will only be admissible at the criminal proceeding if it was not made to a person in authority, or if was made voluntarily. [54] In *R v Sweryda*, the Alberta Court of Appeal held that a social worker was a person in authority because he was investigating an alleged criminal act, with the power to launch a prosecution against the accused.[55] As such, it appears that a child protection worker will be considered a person in authority when his or her role dovetails with the conventional investigatory and prosecutorial agencies of the state. [56]

In addition, child protection statutes limit the period of time during which a child may be in temporary foster care, before a permanent placement order will be made. Accordingly, when a parent is subject to restrictive bail conditions, or is held in custody, that parent may face greater likelihood of losing the child to a permanent wardship because of his or her inability to deal with the child. [57]

If there are concurrent criminal and child protection proceedings, and the criminal matter results in a conviction, the child protection agency does not need to prove the offence. [58] However, an acquittal on the criminal charges does not carry any legal consequences for the child protection matter, where the standard of proof is balance of probabilities and not proof beyond a reasonable doubt.[59] Accordingly, the agency can still prove

---

[53] *CAS Huron v RG*, *supra* note 52 at paras 36-38.
[54] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 30; see *R v Oickle*, 2000 SCC 38, [2000] 2 SCR 3*, R v Grandinetti*, 2005 SCC 5, [2005] 1 SCR 27.
[55] [1987] AJ No 212, 34 CCC (3d) 325.
[56] Di Luca, Dann, & Davies, *Best Practices*, *supra* note 10 at 30.
[57] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 58.
[58] *Ibid*, at 38.
[59] *Ibid*, at 38.

abuse. Not surprisingly, many parents wrongly assume that if they are acquitted on the criminal matter, the child protection matter will end also.

Conversely, given the different standards of proof, a finding that a child is in need of protection will have no impact on the criminal determination of guilt.

Child Protection and Family Proceedings

In child protection proceedings, the state has the onus of establishing if a child is in need of protection, and if so, what disposition is in the best interests of the child. In a family dispute over custody and access, the only issue is best interest. If violence is involved, the onus is on the parent in the family dispute to establish that violence has been inflicted by the other parent. This can be challenging, especially when the parent is self-represented and does not have the means or ability to marshal the necessary evidence, including expert evidence. In other words, if the local children's aid society is not already involved with the family, violence issues may not be addressed.

As noted, resolution is seen as a desirable end goal in family matters, and a family case in which there are allegations of violence may settle without the violence being addressed, due to, among other things, pressure on the spouse, financial concerns and litigation exhaustion. When a family case settles, the judge may be asked to endorse minutes of settlement. The judge may not be aware of any violence issues and, as such, not inquire as to whether the settlement is in the best interests of the child. Understandably, when these issues are not 'on the table', risk to the spouse or child may ensue. While child protection cases often settle as well, the child protection agency will not agree to a settlement if there is risk of harm. [60]

Family and Criminal Proceedings

It is critical that a court hearing a family case be cognizant of pre-existing criminal orders, and conversely, that the police, the prosecution and the court in a criminal

[60] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 22.

matter be aware of pre-existing family law orders when considering release of an accused. As stated in the *Making the Links* Report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence:

> - At a minimum, the court needs to be aware of whether they are making an order that conflicts with the order of another court. Not only may a criminal court order render certain provisions of family court orders inoperative, from a practical perspective, conflicting orders can also cause confusion for family members. For example, if there is a family court order which provides for access, and a criminal court order which provides for no contact with a parent, an accused may unintentionally violate the criminal order by exercising access to the child through indirect contact with the other parent. Moreover, from a safety perspective, conflicting orders may create confusion about the actual limitations on contact. The accused may use this confusion to their benefit, making contact with a complainant, who is uncertain about whether the accused is actually in breach of one of the competing orders.
>
> - The existence of a family or child protection order prohibiting contact between the accused and a child could be one factor considered by the court as part of the overall context in determining whether an accused poses a safety risk.
>
> - A history of breaches of civil restraining orders, or orders in respect of a child for no contact or supervised contact, goes to the likelihood of an accused obeying the terms of release.
>
> - If there are significant upcoming court dates in the family or child protection proceeding, this is relevant, as they may heighten risk due to potential contact between the victim and the accused as well as the possibly heightened emotional context. [61]

[61] Justice Canada, "Making the Links", *supra* note 2 at 64.

THE GAP IN IDENTIFICATION OF CONCURRENT PROCEEDINGS

Why does the gap exist?

It is the hiatus or gap in identification of concurrent proceedings that is at the root of much of the conflict that flows from concurrent or multiple proceedings. While family members may advise one court that they are engaged in other courts, this does not always occur, especially given the increasing numbers of self-represented parties in family litigation. It is significant that between 2006 and 2010, at the time of the filing of the court application, over 50% of family law litigants in Ontario were self-represented.[62] This number is likely to increase as a matter progresses, given that it is common for family law litigants to be unable to continue to pay counsel.

Researchers cite other reasons why family members may not advise one court that they are also engaged in another court:

- Family members may assume, not unreasonably, that all parts of the court system are connected to one another, and that there is an automatic sharing of information about cases.

- Family members may not realize that the proceedings or orders are relevant to one another. For example, an individual who has been assaulted, and whose intimate partner has been charged criminally may not realize that the courts will consider this as a factor in determining the best interests of the child in family or child protection proceedings.

- Family members may simply not know what is going on in the other proceedings or may not understand sufficiently to be able to provide helpful information. Particularly in a time of crisis, it can be very difficult for people to understand the legal system and its various components. [63]

[62] Justice Canada, "Making the Links", *supra* note 2 at 84.
[63] *Ibid*, at 75.

Where the parties are represented by counsel, it is more likely that counsel will advise the court that there are other court proceedings involving the same parties. However, even with counsel, this information sharing does not always occur. There may be different lawyers involved with the different proceedings, who themselves may not appreciate the significance of information sharing. As well, there may be complications and privacy concerns that serve to counteract information sharing. For instance, where a child is represented by a child's lawyer, confidentiality may prohibit disclosure.[64]

The large number of self-represented parties in family law matters, together with the inherent complexities of different proceedings, leads to the conclusion that it is not realistic to expect that the parties will provide the different courts with the necessary information about the concurrent proceedings. It is therefore important for the court system to be able to readily access this information. That said, at present, there is no jurisdiction in Canada that has this capacity.[65]

Parties involved in concurrent criminal, family and child protection proceedings in Toronto are faced with particular logistical challenges. In the Toronto Superior Court, criminal cases and family matters are heard at two different courthouses. (361 University Avenue and 393 University Avenue) However, many criminal domestic violence matters are dealt with at the Ontario Court of Justice, which has 7 locations across Toronto. Further, family matters involving one family may be divided between the Superior Court and the various locations of Ontario Court of Justice. In Toronto and other regions which do not have a unified family court, child protection matters in the first instance are dealt with at the Ontario Court of Justice, and appeals therefrom are heard at the Superior Court. There is no computer linkage or sharing of information between the cases heard in the criminal system and those heard in the family system, and no linkage or sharing of information between the Superior Court and the Ontario Court of Justice. [66]

[64] Justice Canada, "Making the Links", *supra* note 2 at 75.
[65] *Ibid*, at 76.
[66] Outside of Toronto, some jurisdictions have developed information sharing protocols to ensure that the criminal court has information regarding the family law proceedings before a bail decision is made. See Di Luca, Dann, &

An alternative to computer database linkage is manual searching which, by definition, is time consuming and prone to human error. Indeed, regardless of whether a search is conducted electronically or manually, there are inherent problems in the identification of concurrent proceedings. These problems have been described as follows:

> First, there can be human error in inputting the information; misspelled or incorrect names or dates of birth can hamper searching. It is also not uncommon in the criminal system for an accused to be identified by several aliases and/or dates of birth. Second, if searches are being conducted by keyword, for example "family violence," cases may be missed, since standard clauses or terms are not always used by the judiciary and legal community. Third, various court registries may record different information about case files. For example, family law cases may be coded based on the names of the parents, in the child protection context, the case may be coded based only on the child's name. [67]

A Summary of the Impact on the Parties

The *Making the Links* Report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence summarizes the effect that a multiplicity of unconnected court proceedings can have on the parties:

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

- Because of the involvement of multiple courts, each court has only a partial view of what has occurred. As a result, decisions in each court are often made without an appreciation of the family's full situation. This partial view is exacerbated where there is no case management system within each of the justice systems (i.e. family or criminal).

- Because judges in criminal court are often not aware of the orders made by or the evidence presented to a court hearing in a family law or child protection matter and vice versa, inconsistent orders can result. For

Davies, *Best Practices*, *supra* note 10 at 14 and for ex. Lanark County Protocol for Domestic Violence Cases involving Criminal and Family Courts.

[67] Justice Canada, "Making the Links", *supra* note 2 at 76.

example, a judge in criminal court may make an order for no-contact with all family members, while a family court judge may make an order for supervised access. Family members and law enforcement officials can be left confused about which order should be followed, and in some cases inconsistencies can provide an opportunity for subsequent abuse.

- Further, because there is sometimes little or no coordination in terms of how long various orders are in effect, there may be gaps in protection. For example, the conditions contained in a peace bond may expire before a civil restraining order is ordered.

- Family and child protection proceedings are sometimes delayed as a result of criminal proceedings. For example, if there has been a criminal charge, and there is also an ongoing child protection proceeding, the accused parent may be advised by counsel not to speak to anyone about the alleged incident until the trial is concluded or a guilty plea is negotiated. In 2011/2012, the median length of time taken to complete an adult criminal court case in Canada was 117 days. Adult criminal court cases involving certain types of charges took longer than others to complete, such as homicide (386 days), attempted murder (259 days) and sexual assault (308 days), or where multiple charges were laid (147 days). This can have serious impacts on the child protection proceeding. There are strict timelines in child protection proceedings, and in some jurisdictions there are limits to the period before which a child who has been in foster care must be returned either to the family or made a Crown ward/ward of the court. In situations where the parents have reunited and, due to the criminal proceeding, the accused does not admit that the family violence occurred, the child protection concerns will likely not have been addressed within the prescribed time limits. As a result, the child may end up being made a Crown ward/ward of the court, where otherwise it may not have been the appropriate solution.

- Counselling, and sometimes even negotiation, may be precluded in the family context because of no-contact provisions in a bail order.

- Family litigants may be apprehensive about addressing some issues in the family proceeding for fear of the impact on the criminal case.

- Services are associated with both the criminal and family courts, as well as child protection proceedings. A lack of coordination between these proceedings may result in a duplication of efforts, and thus inefficiencies.

- Victims can also be left confused about the different processes and protections for victims in each court system. For example, the *Criminal Code* sets out circumstances under which a judge may appoint a lawyer to conduct the cross-examination of a victim when the accused is self-

represented. The situation in family court is quite different, however. A recent Ontario study of self-represented family law litigants found that there were significant numbers of cases involving family violence where the parties were self-represented (26% males and 31% females). One of the issues highlighted by judges in this context was their discomfort with the fact that the alleged abuser was able to directly cross-examine the alleged victim.

- As the number of processes in which family members are involved increases, the greater the potential for increased stressors on family members. In some cases, this may create increased risk of conflict.

- The absence of coordination can have very concrete impacts on people's lives outside of the court process. Where families facing issues related to family violence are also facing other social challenges, such as unemployment or precarious employment, a lack of coordination between systems, and a large number of court hearings, can have a particularly adverse socio-economic impact on family members. [68]

[68] Justice Canada, "Making the Links", *supra* note 2 at 85-87 (footnotes omitted).

WHAT CAN JUDGES DO: BASIC STEPS

The Report annexed as Schedule C identifies and examines various court practices to help address the challenges of concurrent proceedings, and reviews approaches that have been implemented in other jurisdictions that face similar problems. Improved technology to facilitate communication among the courts is a common recommendation and would be of great benefit. Other approaches recommend more collaboration among judges and courts, such as joint case conferencing, while recognizing the scheduling issues and the complexity presented by the division between the superior and provincial courts in Ontario. Some jurisdictions have implemented more wholesale change, such as the integrated domestic violence court, together with additional resources for specialized staff to ensure that the court functions properly. However, in addition to some of the broad (and often costly) transformations reviewed in Schedule C, there are also basic 'no cost' steps that can be adopted to help mitigate the challenges.

In particular, when a criminal court judge is considering terms of release in a domestic violence case, he or she should seek to have the following information:

- Does the accused have children?
- How will the conditions affect his or her access to the children?
- Is the accused involved in any child protection or family proceedings?
- What is the status of the child protection or family proceedings?
- Are there any pre-existing child protection or family court orders regarding custody and access or exclusive possession of the matrimonial home? If so, what are the terms of the order?
- Do the circumstances of the allegation make the previous order(s) inappropriate?
- Is the issue of access better left to the child protection or family court judge? [69]

[69] Di Luca, Dann, & Davies*, Best Practices*, *supra* note 10

If this information is not available at the bail hearing, it is recommended that the hearing be adjourned to allow the parties to collect and present the information to the court.

Further, the following provisions may be appropriate for inclusion in an order for judicial interim release where there are concurrent family law proceedings:

- Conditions relating to contact between the accused and any children should provide for access to be "as per family or child protection court order made following the date of this order, provided that judge has awareness of this criminal court order."[70]

- Conditions prohibiting contact with the other parent or child should be "subject to such contact with the other parent as may be necessary for participation in child protection or family proceedings, which includes safety concerns but other factors as well." [71] These other factors may relate to contact necessary for family therapy or access, for example.

- Conditions of release should permit the accused to return to the family home to collect personal items (in the company of police, if necessary).

Similarly, before making an order for custody or access in a family court proceeding, the judge should know:

- Is this a case where there may be family violence?

- Are there criminal charges?

- Are there any bail or probation conditions relating to access to the child or the other parent?

- How will the family court keep apprised of the criminal proceedings?

[70] Bala & Kehoe, *Concurrent Legal Proceedings*, *supra* note 7 at 68.
[71] Ibid at 51.

- Is this a case where it might be useful to hear from police or the Crown?[72]

Finally, there are numerous "red flags" that should prompt further inquiry by a judge, whether hearing a criminal or a family case, to ensure that issues of family violence are addressed. These include:

- A documented history or allegations of mental illness, substance abuse, or child abuse by either party;
- Indications that the children are exhibiting symptoms consistent with abuse, such as sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression, or other behavioural problems, depression or anxiety;
- The presence of one or more prior court orders restricting a parent's access to any of his or her children;
- A history of court or social services involvement with the family;
- Allegations of alienating behaviour by a parent; and
- Indications that one or both parents are inattentive to the children's needs. [73]

It is critical for the judge to have as much relevant information as possible about the concurrent proceedings in which a family is involved in order to best serve that particular family. When that family is well served, the public also benefits. A judge in possession of all the relevant information will allow the system to operate fairly and efficiently, and respect for the judiciary and the administration of justice will be maintained. Until technology is available to readily inform a court that there are concurrent proceedings, it is incumbent upon the judge to make the necessary and appropriate inquiries.

[72] Ibid at 71.
[73] National Council of Juvenile and Family Court Judges, Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide by Clare Dalton, Leslie M Drozd & The Honourable Frances QF Wong at 8.