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

FINAL Research Report

January 14, 2016

Research Project – Canadian Observatory on the Justice System's Response to Intimate Partner Violence

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Social Sciences and Humanities Research Council Strategic Knowledge Cluster Grant #857-2006-33

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OVERVIEW

Canadian justice reports[1] identify research, leading to evidence-based decisions, as one of the components necessary to achieve access to justice. The present exploratory qualitative study, which deals with family violence in family law and criminal law court proceedings, was undertaken with that objective in mind. The primary purpose of the researchers, the Honourable Donna Martinson[2] and Dr. Margaret Jackson,[3] was to obtain information about whether the British Columbia ***Family Law Act***[4] (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 overarching questions: (1) What information about family violence and the risk of future harm is available to judges when making decisions about the best interests of children and Protection against Family Violence Orders in family law cases, and Judicial Interim Release Decisions and sentencing decisions in criminal cases? (2) What information about family violence and the risk of future harm is shared

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[1] ***Access to Civil and Family Justice, A Roadmap for Change*****,** Final Report of the National Action Committee on Civil and Family Justice**,** October 2013.
http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf
Meaningful Change for Family Justice: Beyond Wise Words, **Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, April 2013.**
http://flsc.ca/wp-content/uploads/2014/10/services5.pdf
"equal justice, balancing the scales"**,** Interim Report, the Canadian Bar Association, August 2013.
file:///C:/Users/Donna/Downloads/Equal-Justice-Report-eng.pdf
"equal justice, balancing the scales"**,** Final Report**,** the Canadian Bar Association, December 2013.
http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf
Futures – Transforming the Delivery of Legal Services in Canada, August 2014.
http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf

[2] The Hon. Donna Martinson Q.C., a retired judge, has been a Justice of the British Columbia Supreme Court and a Judge of the British Columbia Provincial Court. Before becoming a judge she practiced criminal law, both as Crown and defence counsel, and family law. She taught criminal law at UBC's law school and family law at the University of Calgary's law school. She is now an Honorary Visitor at the UBC Allard School of Law, and an Adjunct Professor at Simon Fraser University's School of Criminology. She is a member of the Community Coordination for Women's Safety (CCWS) committee. She chairs the Canadian Bar Association United Nations Convention on the Rights of the Child Sub-Committee, a part of the National Children's Law Committee, and is Chair of the new B.C. Canadian Bar Association Children's Law Section.

[3] Dr. Margaret Jackson, Principal Investigator for the project, is the Director and Co-founder of the FREDA Centre, a research centre on violence against women and children issues. She is a Professor Emerita with, and past Director of, the School of Criminology at Simon Fraser University. She is also past Director of the Institute for Studies in Criminal Justice Policy at SFU. In the latter capacity, she co-authored reports for the Canadian Sentencing Commission, the Commonwealth of Ministers, and the Federal Auditor General. Currently she is a member of the Community Coordination for Women's Safety (CCWS) committee and the Canadian Observatory on the Justice System's Response to Intimate Partner Violence. Other research involves projects with the Ending Violence Association of BC; BC Society of Transition Houses and BC Non-Profit Housing Society; and the Centre for Education, Law and Society at SFU.

[4] SCBC 2011 c. 25.

when there are both criminal and civil cases going on at the same time relating to the same people? Though the primary focus of the study was to consider the sharing of risk information, we first looked at the issues relating to family violence and risk in individual family and criminal court proceedings. We did so on the basis that it is important to have as much relevant and reliable information as possible about family violence and the risk of future harm in individual proceedings, leading to just results, before that information is shared effectively.

This research involved lawyers and judges. It was a follow-up to a larger consultation completed in 2012 in connection with a judicial education program developed by Canada's National Judicial Institute on domestic violence in family law and criminal law proceedings. That consultation involved some lawyers and judges, but most of the people consulted were representatives of many organizations in British Columbia that deal with violence against women and children. This time we wanted to concentrate on lawyers and judges, as the people who operationalize required policy and legislative directions in their judicial settlement conference work, their case management work, and, for judges, their decisions after hearings and trials.

The 2012 consultation raised a number of concerns, including, but not limited to: the ways in which family violence is (or is not) identified and incorporated into decision-making in individual proceedings at judicial settlement conferences, interim (temporary) hearings and trials; the lack of specialized knowledge about family violence, its complexity and its impact by some lawyers and judges; challenges with case management; and the "dangerous disconnect" created when family law and criminal law proceedings operate in silos. At the same time, the people with whom we consulted were optimistic that the comprehensive scheme relating to family violence and its impact found in the FLA, including the requirement that parents, lawyers and judges consider other relevant civil and criminal proceedings, could and should make a difference.

We were also encouraged by the access to justice reports initiated by both lawyers – through the work of the Canadian Bar Association – and judges and lawyers together – through the National Action Committee, chaired by Supreme Court of Canada Justice Thomas Cromwell. Those reports, released in 2013 and 2014, acknowledged significant access to justice challenges in Canada, and made important, far-reaching recommendations to address those challenges. Work is being done across the country aimed at implementation.

In this 2015 study, all of the judges and lawyers who participated responded to five questions. In their responses, all of the judges and lawyers agreed that in individual proceedings there is a need to ensure that decisions made about family violence and its impacts are made with all relevant information about the nature of family violence and the risk of future harm in order to make fair and just decisions about the risk of future harm. They agreed that when there are two proceedings, each court should have relevant information about the other court proceedings. At the same time, there was an agreement that there is a significant and concerning disconnect between those goals

and what is actually happening. They said that for the most part, information about family violence and the risk of future harm is not being provided to the court, and when it is not, judges are not asking for it. When there are two proceedings, they operate separately – in silos – and the judge in one proceedings rarely knows about the existence of the other, let along what it is about or whether there are relevant court orders in place.

We have concluded that the responses, overall, show concerns existing in 2015 which are "strikingly similar" to those identified in 2012. These results raise the potential that the aims of the FLA to ensure the safety, security and well-being of victims of family violence, and in particular children, are not, at least in these early days, being met. If this is true, this presents a significant justice concern.

Responses also raised questions about the appropriate role judges and lawyers should play when dealing with cases in which family violence is – or may be – an issue. We ask what the professional responsibilities of judges are in these cases, as guardians of our constitutional principles and values. What are the professional responsibilities of lawyers, as the self-governing protectors of our legal system? We acknowledge that both lawyers and judges have done significant and admirable work in this area. However, we respectfully suggest that both judges and lawyers can and should be taking a more active role in ensuring equality-based, just results in both criminal law and family law cases.

This non-passive role is required because of the significant changes in the work lawyers and judges do now, and the evolving nature of decision-making itself in a pluralist society. We suggest that there are core competencies necessary to do this work effectively; both lawyers and judges have professional responsibilities to ensure that they have the skills and specialized knowledge needed to do the work well. Much more is required than just a one-time "course"; there is an ongoing obligation to pursue professional development.

In looking at possible next steps, we provide both overarching family violence goals and specific objectives relating to multiple court proceedings that can guide the discussions. In our final observations, we relate those goals and objectives to concrete suggestions for action and to some concrete examples of how those goals and objectives have already been operationalized into action; one example being the Toronto Integrated Domestic Violence Court.

The present report is divided into eight parts. Part I describes, in more detail, the purpose of the research project, providing information about the 2012 consultation and about the relevant family violence provisions of the FLA. Part II describes our methodology, including how the research questions were developed, how the research participants were selected, the use of a Discussion Paper, and an explanation of why we have focused on violence by men against women and children. Part III provides relevant background information. It begins, in section A, with an overview of the issues relating to family violence and multiple court proceedings. Section B considers the

relevance of Canadian access to justice reports. Section C looks at specific B.C. responses to the National Action Committee reports. Section D looks more closely at risk assessment and the relevance of information about risk.

Part IV provides the responses to the research questions. Part V provides an analysis of the research results by looking at the themes that arose, comparing the concerns the themes raise to those raised in 2012, and reviewing the recommendations. Part VI discusses the roles of lawyers and judges as justice leaders, considering how they can ensure just outcomes in family violence cases. Part A provides an introduction to the issues, suggesting that both judges and lawyers need to play a more active role. Part B discusses the importance of substantive equality as a fundamental constitutional value informing that role. Part C looks at the evolving nature of the adversary system and how it relates to the modern role of judges and lawyers. Part D considers core professional competencies and the need for both judges and lawyers to have specialized knowledge. Part E explains why a more active role for judges, though necessary, is not a substitute for effective legal representation.

Part VII reviews our approach to moving forward – taking concrete steps. It describes our proposed goals and objectives that can be used for guidance, and concludes by recommending specific concrete steps. Part VIII acknowledges and summarizes the sources of influence informing the development of this unique study and continues on to look to future visions for collaborative and equity-based research which appear to be emerging in Canada. These will hopefully inform collaborative and equity-based justice practices.

I. PURPOSE OF THE RESEARCH PROJECT

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 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 four-day national program for judges, ***Managing the Domestic Violence Case in Family and Criminal Law***, which took place in Vancouver in the fall of 2012**,** and the B.C. Continuing Legal Education Society's program for lawyers called ***Family Violence and the New Family Law Act.***

A. 2012 Community Consultation

As part of the consultation in which we engaged to prepare for these programs, we had the privilege of organizing a National Judicial Institute (NJI) Domestic Violence Program Development Community Consultation in Vancouver in April 2012. It was specifically developed for the Institute's four-day program for judges just described, a program that was the third in a series of three NJI programs focusing on domestic violence. The first, in 2008, dealt with domestic violence and criminal law cases. The second, in 2010, considered domestic violence in family law cases. We described this consultation in detail in an article written for the NJI Conference, ***Judicial Leadership and Domestic Violence – Judges Can Make a Difference***.[5]

Obtaining information through such a consultation fell within the mandate of the NJI, at the direction of the Canadian Judicial Council, to provide credible, in-depth and comprehensive social context education for judges and to obtain community input in doing so. The NJI's Board of Governors and the Canadian Judicial Council support the notion that while judicial education programming should be led by judges, it is enhanced by the involvement of not only lawyers and legal and other academics, but also broader community participation.

The consultation brought together representatives of many organizations who deal with violence against women and children. They discussed two broad questions: (1) What would you see as priorities in judicial education dealing with violence against women and children in intimate relationship? And, (2) Are there particular concerns that arise when there are (or there is the potential for) more than one judicial process taking place at the same time? If so, how could these concerns be dealt with?

The seven areas covered were:

a. concurrent (multiple) proceedings in cases involving violence against women and children;

b. credibility assessment (including education on the dynamics of domestic violence, "good enough" English, and understanding the realities of women's lives);

[5] The Honourable Donna Martinson & Dr. Margaret Jackson (2012). http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf

c. risk assessment;

d. expert parenting reports;

e. court orders and their enforcement;

f. use of language in judgments; and

g. alternative dispute resolution (including challenges with respect to dispute resolution generally, judicial dispute resolution, and concerns about parenting coordinators).

The resulting report, ***National Judicial Institute Domestic Violence Program Development for Judges – April 2012, British Columbia Community Consultation Report***[6] identified a number of themes. With respect to individual proceedings, among the themes raised were these:

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; (c) the critical link between domestic violence and the ability to parent; (d) an understanding of why many women do not 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 that can compromise women's safety.
6. There are challenges women face when attending judicial dispute resolution proceedings. Among the concerns 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

[6] ***National Judicial Institute Domestic Violence Program for Judges, British Columbia Community Consultation Report*** **(April 2012), The Honourable Donna Martinson**
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

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

Lack of legal advice at all stages of the process, not just at judicial dispute resolution proceedings, was identified as a significant concern. Those present at the consultation agreed that: many women, especially marginalized women, cannot afford a lawyer and are not eligible for legal aid; male partners often have more money for a lawyer; and male partners get legal assistance for criminal proceedings. Without legal counsel it is even more difficult to navigate through concurrent proceedings, let alone deal with one proceeding. Front-line support people without formal legal training end up giving legal advice.

B. The Potential of the FLA to Make a Difference

The FLA came into effect after lengthy and significant research and consultations. Similar issues to those found in our consultations 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 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 and 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: S. 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.[7] The Orders are enforced under S. 127 of the *Criminal Code*, making it a criminal offence to disobey court orders granted under the FLA.

Section 8 provides that a family dispute resolution professional (a designation which includes lawyers) must:

[7] "This kind of protection order is distinct from one made in a separate child protection proceeding. In the latter cases, the courts face two distinct questions, and in some cases will actually divide a trial into two stages: first determining whether the child is in need of protection, and then, and only if that finding is made, considering what disposition is in the best interests of the child." Bala, Nicholas & Kehoe, Kate (2015). ***Concurrent Legal Proceedings in Cases of Family Violence*: *The Child Protection Perspective***. Department of Justice Canada. Though our project did not deal directly with child protection proceedings, for those interested in multiple court proceedings in that context, the Bala, Kehoe article provides a very helpful analysis of the issues that arise. http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/index.html

- 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, 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. Such decisions must take 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. It is this approach to legal analysis that led to the development, by the National Judicial Institute, of in-depth and comprehensive social context education for judges, referred to above.

II. METHODOLOGY

In this section we discuss the development of the research questions, and the selection of the research participants, the use of a Discussion Paper, and the reasons we have focused on violence by men against women.

A. 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 and (b) any barriers or 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*.[8] 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, quite appropriately, 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

[8] RSC 1985 c. 3 (2nd Supp)

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 that 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 as possible concerning risk of future harm. Without that, the sharing of information would not be effective.

B. 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 conference work, their case management work, and, for judges, 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 responses, which would be reviewed and approved by all of the judges who attended. They quite understandably wanted it made clear that the responses represent 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 can be found in Appendix A.

Our initial consultations in 2012–2013, referred to above, included two judges and seven lawyers among the 42 participants. Five other lawyers were selected for 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 (also referred to throughout this report as criminal law lawyers) 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 prosecutions. We were advised by the Criminal Justice Branch that such research requests first 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. The full Criminal Justice Branch Response can be found in Appendix B.

C. Use of a Discussion Paper

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***,[9] which formed an integral part of our research methodology. It provides information relating to each of the five research questions and was read by all of the participants in the research project, including the judge participants, before meeting with the researchers.

Part I of the Discussion Paper describes recent Canadian developments dealing with multiple court proceedings and provides an overview of the issues. Part II provides information about the assessment of risk: the legal relevance of risk information; risk and the process of risk assessment; key risk factors to consider for family and criminal cases; different types of risk assessments and their purposes; and risk context and victim reluctance to report or proceed. Part III looks at the present state of information sharing between courts, noting how they do operate in silos, and considers the extent of the multiple proceedings problems.

Part IV deals with the benefits of sharing information about risk, noting that the Canadian initiatives suggest that it can address conflicting orders and time gaps. With respect to process challenges, it can address the negative requirement to repeatedly provide information, the delays in resolution caused by multiple proceedings, and increased litigation harassment that can arise.

Part V set out both challenges and promising practices under three broad headings: The first is Court Initiatives and it refers to (1) The Toronto Integrated Domestic Violence Court, (2) Judicial Coordination and Communication, (3) Nature of the Coordinated Court Processes, and (4) Coordinated Court/Court Coordinator Models. The second part describes Multidisciplinary Coordination Initiatives. The final section of Part V deals with (1) Privacy and Confidentially, (2) Different Rules of Evidence and Disclosure, (3) Identifying the Existence of other Proceedings, and (4) The Impact of Pre-existing Orders.

[9] 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

D. Focus on Violence Against Women

Our primary focus was on violence by men against women. We know that men can be victims of violence by women and other men, that women can be victims of violence by other women, and that violence occurs in relationships involving other sexual minorities. These are important issues, everyone is entitled to the benefit of and protection of the law when that happens, and the FLA language is gender neutral to ensure their inclusion.

However, the research relied upon by the B.C. Ministry of Justice shows that violence, particularly violence within the family, significantly and disproportionately impacts 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.[10]

In the authors' report, ***Judicial Leadership and Domestic Violence Cases: Judges can Make a Difference,*** completed for the 2012 National Judicial Institute national judicial education program on domestic violence, the reality of domestic violence in Canada as a social problem was set out. We stated that gender-based violence has been noted as perhaps the most widespread and socially tolerated of human rights violations. Violence reinforces inequities between men and women. It compromises the health, dignity, security and autonomy of its victims. Violence is not only gendered, but additional intersectionality factors, such as race (in that regard, IPV is a particularly challenging issue for Aboriginal women), ethnicity, class, disability, and sexual orientation (such as LGBTQ), also interact/intersect to affect risk, and impact safety and other social responses.[11]

Keeping the reality of under-reporting of intimate partner violence in mind, we noted that statistical information for Canada* shows that:

- In 2010, almost 103,000 victims of intimate partner violence (IPV) were reported; that figure includes both spousal and dating violence.
- 460,000 women were sexually assaulted in one year (2004).[12]

* An addendum at the end of the paper provides a few findings from the most recent Statistics Canada Report on Family Violence for 2014. It was released on January 21, 2016. Those findings do not change the essential analyses or basic issues discussed in our report, and, although it is reported that rates have declined for family violence in Canada since 2009, it does not address the reasons why that might be the case nor explain the related issue of undisclosed/unreported cases.

[10] Above, note 5, at p.16
[11] Above, note 5, at p.14-15
[12] Statistics Canada General Social Survey on Victimization, Gannon & Mihorean, 2005, as quoted in M. Dawson & H. Johnson, *Violence Against Women in Canada*…(2011), p. 93.

- 65 women were murdered by a spouse and 24 by a dating partner in 2010.[13]
- ~64, 500 abused women are admitted to emergency shelters each year.[14]
- Of Aboriginal women who had a current or former spouse, 15% reported being a victim of spousal violence in the five years leading up to a survey, compared with 6% of non-Aboriginal women in the same time period (Violent Victimization of Aboriginal Women in the Canadian Provinces, Statistics Canada, 2009).

In 2010, police reported approximately 48,700 victims of spousal violence in Canada.[15]

The 2012 B.C. Coroners Report[16] provided the following information about deaths from the period 2003–2011:

- There were 147 intimate partner violence related deaths in B.C:
    - 72% were women
    - 100% of IPV-related suicides were men (40% of homicide/suicide deaths were male)
    - Men were responsible for 83.7% of all intimate partner deaths, including 100% of incidents resulting in more than one death

Similar quantitative information was cited by the Honourable Justice Bonnie Croll of the Ontario Superior Court of Justice in April 2015 in ***The Intersection between Criminal Law, Family Law and Child Protection in Domestic Violence Cases***.[17] She confirms that the evidence is clear that family violence is pervasive in Canada, describing it as a "scourge that harms families from all backgrounds regardless of socioeconomic, educational, cultural or religious background, and is a sad reality for many Canadians."[18]

She first quotes from the Statistics Canada reports which indicate that, in 2009, 17% of Canadians revealed that they had suffered physical or sexual violence inflicted by a former intimate partner.[19] In 2011, 26% of violent crime in Canada that was reported to the police emerged from family violence, with both spouses and children as victims.[20] She also points to a study of data from the Ontario Court of Justice for the period 2003–2010 which indicates that in approximately 10.7% of the family law cases, "there was also a criminal proceeding with respect to domestic violence".[21]

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[13] Statistics Canada, *Family Violence in Canada: A statistical profile, 2010* (Ottawa, Minister of Industry, 2012) online: http://www.statcan.gc.ca/daily-quotidien/110127/dq11027a-eng.htm, citing information from the General Social Survey 2010 on Family Violence

[14] Statistics Canada, *Shelters for Abused Women in Canada 2012,* Mazowita & Burczycka, Table 2.

[15] Above note 13, p.19.

[16] http://www.pssg.gov.bc.ca/coroners/publications

[17] ***The Intersection between Criminal Law, Family Law and Child Protection in Domestic Violence Cases***" (2015). The Honourable Justice Bonnie Croll (along with three of her law students), unpublished study leave report, copy obtained from Justice Croll and is referred to with her permission, at p. 1. Report on file with the authors.

[18] Previous note at p. 1.

[19] Above note 17, at p. 1,

[20] Above note 17, at p. 3.

[21] Above, note 17, at p. 3.

We note and agree with the recent personal comments of Maria Fitzpatrick, member of the Alberta Legislative Assembly, made in support of Bill 204, a bill that allows victims of domestic violence to break their leases early without penalty from landlords. She points both to the distressing fact that societal attitudes have not changed significantly, and to the fact that more women are speaking out about it .[22]

> The most distressing thing is that since my first encounter with this violence around 1973, it is now 2015 – 41 years later – and our societal attitudes have not changed significantly enough to make domestic violence a thing of the past. The most heartening thing is that so many people are reaching out and beginning to tell their stories to move forward in a positive way in their lives.

British Columbia introduced a bill for similar legislation in October 2015. West Coast LEAF led the lobbying force to have the legislature amend provincial tenancy legislation to ensure that the law does not become yet another obstacle to women attempting to flee domestic violence. They recommended a change to B.C.'s *Residential Tenancy Act* that would allow victims of violence to break a fixed-term lease without penalty in order to escape an abusive situation.[23]

Thus domestic violence remains a significant issue in Canada; because of this, we argue in this study that it is important to obtain all relevant information about risk in individual court proceedings and to coordinate court proceeding to facilitate the sharing of risk information amongst the different proceedings, in order to ensure the safety of the victims.

[22] The Globe and Mail, November 27, 2015, at p. L.3.
[23] *West Coast LEAF News Alert*, October 8, 2015.

III. BACKGROUND INFORMATION

A. Multiple Court Proceedings – An Overview of the Issues

The key Canadian initiatives, referred to below, conclude that for the most part family and criminal courts do operate in silos, with little or no coordination or cooperation between them. They identify a number of concerns in addition to the one relating to conflicting court orders. With respect to procedure they include: the need for the person making the allegations of violence to repeatedly provide information to a series of judges; the need for multiple court appearances in different courts; increased opportunity for litigation harassment; delay and extra cost; escalation of the conflict, which can increase risk of harm; and ineffective use of resources. The fragmented approach, in which decision makers may have only a partial view of the circumstances because of a lack of relevant information, can increase the risk of future harm.

Providing meaningful access to justice requires not just the making of consistent decisions, but the best decisions possible, based on as much relevant and admissible information as possible, reached within the parameters of the individual criminal law and family law legal frameworks. That is difficult to achieve when proceedings are not coordinated.

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

Family and criminal law systems are often viewed as different because criminal law is said to have a strong public interest aspect to it; the “state” brings a charge against an individual and protection of the public is an important factor in doing so. Family law, on the other hand, involves disputes between individual people so is viewed as private. Yet, there is a strong public interest in ensuring that the family law system operates in such a way that it protects victims of family violence and that it does not keep the private invisible when it comes to such violence.

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

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

B. Key Canadian Initiatives

1. Initiatives in Existence at the Time of the Discussion Papers

In 2009, Department of Justice Canada held an interdisciplinary symposium called ***Family Violence: The Intersection of Family and Criminal Justice System Responses***, attended by some 300 people. This led to the formation, in January 2011, of a Federal-Provincial-Territorial Working Group on Family Violence to consider the complex issues that arise. That Working Group consulted widely, conducted research, and commissioned an academic study by Canadian researcher Dr. Linda Neilson, released in June 2012, called ***Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) – A Family Law, Domestic Violence Perspective***[24] (herein referred to as, "Enhancing Safety"). The Working Group released its two-volume report in November 2013, called ***Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice Systems***, [25] (herein referred to as the "Federal-Provincial-Territorial Report"). The comprehensive report discusses the prevalence of family violence and its particularly negative impact on women and children. It explains the nature of multiple proceedings and the problems they create when they operate in silos, and suggests that this is a significant justice system issue. It identifies and deals with important challenges that arise, including privacy concerns – what should and should not be disclosed/shared to keep victims of domestic violence safe.

The Federal-Provincial-Territorial Report examines court management practices, including those used in individual family law proceedings. It makes the point that when dealing with issues of coordination and the risk of future violence, managing individual family law cases well and consistently will make coordination of multiple proceedings more effective:[26]

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[24] Neilson, Linda (Second edition, 2013). ***Enhancing Safety: When Domestic Violence Cases are in multiple legal systems (Criminal, family child protection) A Family Law, Domestic Violence Perspective,*** Family, Children and Youth Section. Department of Justice: Ottawa, p. 9. http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/index.html

[25] ***Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice Systems***, Federal-Provincial-Territorial Report (2013) http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html

[26] Above, at p. 93.

> …a case that is carefully and consistently managed within the family justice system will be more easily coordinated with parallel cases in other sectors of the justice system.

It considers promising practices across the country. One of those promising practices is the Toronto Integrated Domestic Violence Court. In 2010, the Ontario Court of Justice developed, as a pilot project, a court management system for family law and criminal law cases taking place at the same time with respect to the same family within that court system. One judge manages both cases, and if there is a trial, another judge hears the trial. Though the court includes the word "integrated," the cases are not merged. Rather, they are managed on the same day, but separately, one following the other.[27] The Court was evaluated in 2014 by Dr. Rachel Birnbaum, Professor Nicholas Bala, and Dr. Peter Jaffe, in a report called ***Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes and Lessons Learned***.[28] The results were favourable overall, generally leading to more timely and effective outcomes, often by way of early resolution. Bringing all the participants, including the professionals, to the same courtroom, on the same day, before the same judge. See also the discussion about the appropriateness of using integrated domestic violence courts in Canada, by University of Calgary Law Professor Jennifer Koshan, in ***Investigating Integrated Domestic Violence Courts: Lessons from New York***.[29] Professor Koshan concludes that there are many potential benefits to Integrated Domestic Violence Courts in Canada, along with some challenges, which would have to be addressed.

Another promising practice identified evolved through the use of judicial communication in cross-border child abduction cases.[30] For those cases, a group of judges from all across Canada, set up through the Canadian Judicial Council and the Council of Chief Judges, has developed court-to-court coordination and judicial communication guidelines. Their purpose is to facilitate coordination and communication between courts when there are two different proceedings relating to the same family taking place at the same time; one proceeding is in the jurisdiction from which the child was taken, and the other is in the jurisdiction to which the child was taken. That group has recommended an extension of these court coordination and communication processes to multiple proceedings involving the same people <u>within</u> a province or territory.[31]

The Federal-Provincial-Territorial Report identifies both the integrated court approach and the judicial communication approach as promising practices and dealt with these public/private concerns in the following manner. With respect to the integrated court approach, the report emphasizes the point made earlier that there is not a merger of the proceedings; there remains a separate family law proceeding and a separate criminal

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[27] For more detailed information about the Court, see the Discussion Paper, above note 9 , at pp. 20-21.
[28] Rachel Birnbaum, Nicholas Bala, and Peter Jaffe, "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned" 29 Can J Fam L 117.
[29] Jennifer Koshan,"***Investigating Integrated Domestic Violence Courts,*** ",Osgoode Hall Law Journal, Vol 51, No. 3 (2014).
[30] For a more detailed description of the practice, see the Discussion Paper, at pp. 21-23.
[31] Both of these court processes are described in more detail in the discussion paper, at pp. 22-23.

law proceeding. All hearings are in open court. The appropriate legal processes are applied in each. The same points about the process are made in the Birnbaum, Bala, and Jaffe evaluation (see below for more detail).

With respect to the judicial communication and management approach, the Federal-Provincial-Territorial Report notes that the focus is not on the merits of the proceedings, but on the process that each is following:[32]

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

A third promising practice is the coordinated court or court co-ordinator models. They are described as instances in which a designated domestic violence coordinator would act as a liaison between different courts, as well as different services.[33] Such a model exists and has proven to be effective in Moncton, New Brunswick.

2. Recent Initiatives

a. An Ontario Superior Court Study Leave

The study leave paper mentioned earlier, written by The Honourable Justice Bonnie Croll, of the Superior Court of Justice in Ontario, related to multiple court proceedings. Justice Croll discusses the three sectors of the justice system referenced in the title of the paper, pointing out that all have distinct mandates, cultures, legal standards and procedures.[34] There are also distinctive gaps that exist in the identification of concurrent proceedings amongst the three sectors, and it is those gaps that are "at the root of much of the conflict that flows from concurrent or multiple proceedings."[35]

The large number of self-represented parties in family law matters, and the very complex nature of the cases themselves, works against the parties providing the different courts with the information on multiple proceedings.[36] In fact, they may assume that the courts would be aware of one another's proceedings. She suggests what judges can do to alleviate this gap. She set out questions that the criminal court judge should ask when considering release in a domestic violence case, such as, "Are there pre-existing child protection or family court orders regarding custody and access or

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[32] Above note 25, at p. 99
[33] For more information see the Discussion Paper, Note 9, at pp. 24.
[34] Above note 17, at p. 1.
[35] Above note 17, at p. 22.
[36] Above, note 17, at p.23.

exclusive possession of the matrimonial home?" In the case of the family court judge, "Similarly, before making an order for custody or access in a family court proceeding, the judge should know:" if "…this is a case where there may be family violence" and "(A)re there any criminal charges?" Finally, Justice Croll indicates there are numerous "red flags" that both the criminal court judge and the family court judge should be aware of to ensure that issues of family violence are dealt with to close the information gaps.[37]

In Schedule C of her paper, one of Justice Croll's law students writes about "Best Practices Where There Are Concurrent Criminal and Law Proceedings," in which there is a discussion about case management in family law proceedings, including a description of the Magellan Project Model in Australia. A team, consisting of a judge, a registrar and a family consultant, manages each case of sexual/physical abuse of children with a goal of settling the matter within six months – start to finish. There is a front-loading of resources and the making of appropriate interim orders to protect the child until the matter goes to trial (p.10). This project has been evaluated and cases were found to be resolved more efficiently, with the average Magellan case being resolved 4.6 months faster (p. 11), dealt with by fewer judges and more likely to be settled early.

As well, there is a consideration of integrated domestic violence courts, by referencing research conducted in New York by the Centre for Court Innovation, and work done in Ontario by Birnbaum, Bala, and Jaffe on the evaluation of the Toronto Integrated Domestic Violence Court. This moves the research discussion beyond the many challenges commonly identified with current justice processing of domestic violence courts, not only in Canada, but internationally in the United States and Australia. Features identified which have been shown to benefit the processing are: enhanced access to justice – with families with matters before the integrated court having coordinated appearances with one judge in one location; compliance monitoring made easier with a resource coordinator moving relevant information from services (and other courts) about the offender and victim statuses to the court; having victim advocacy for domestic violence victims; and improved judicial decision-making because a better understanding of relevant issues is possible.

b. The Toronto Integrated Domestic Violence Court (IDVC)

Birnbaum, Bala, and Jaffe summarized evaluation studies on IDVC in England and the United States, from which they identified a number of important themes: (a) the need for strong collaboration and communication between administrative staff, the courts, and community agencies; (b) the need for a comprehensive information sharing database that is accessible for research purposes; (c) the need for identifiable and measureable outcomes; and (d) the need for a dedicated coordinator to liaise between the criminal and family court and community supports.[38]

[37] Above, note 17 at pp. 27-29.
[38] Above, note 29, p.25.

For their own evaluation of the Toronto IDVC, one research team member noted that, "The court now has 60 cases, 7 criminal trials (only one male convicted, he is back as he breached his probation); no family trials and no motions to vary for any family files since (the) beginning of the IDVC."[39]

Most of the stakeholders interviewed for the evaluation were positive about the potential of the court but the evaluators noted two major issues: (1) the provision of services to support the victims and offenders and (2) administrative support for the court.[40] In their conclusions, the authors indicate "the participants generally report that the Court provides a better approach to dealing with domestic violence post separation, though there are some concerns expressed about its operations, especially by lawyers representing alleged abusers."[41]

The second author of the present report had the opportunity to interview one of the first dedicated justices, as well as the current dedicated justice, of the Toronto IDVC. Most of their comments were consistent with the Birnbaum, Bala and Jaffe conclusions. One problem they identified was a funding cut many months previous for the community resource coordinator the court had assigned to them initially.[42] They lost that key person who had specialized knowledge about such cases. They argue that it is necessary to clearly task such a designated person with the vetting of cases in order that they can make decisions on those suitable to go to the IDVC. Also, there is the need to enlist other people to create a supportive network around these court processes.

The second issue they noted was related to the small catchment area of the court. There have been attempts to expand the catchment area beyond the 311 Jarvis Street and 47 Sheppard Avenue Courts, and to garner additional resources and people to keep the court going, to no avail to date.[43]

These efforts have included attempts to add child protection cases to their docket.

c. National Collaboration

The authors of this report are engaged in discussions with others across the country about future national steps. We hope they lead to a national initiative focused on the challenges created in family violence cases when there are multiple court proceedings. The Moncton Domestic Violence Court is looking at implementing a pilot project focused on the challenges created by domestic violence in the event of multiple court proceedings.

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[39] Birnbaum, R. (e-mail conversation, dated Nov. 22, 2015). Birnbaum reports the above with a forthcoming paper on the final data for the IDVC.
[40] Above, note 28, at pp.22-23.
[41] Above, note 28, at p. 2.
[42]The conversation was with one of the Founding Dedicated Justices of the Toronto IDVC and Current Dedicated Justice of that Court, Personal Communications, September 3, 2015.
[43] Previous note.

C. The Relevance of Canadian Access to Justice Reports

At the time we began our research, access to justice reports[44] initiated by the legal profession identified an access to justice crisis in Canada and have made numerous far-reaching and forward-looking recommendations about how to remedy the crisis.

The National Action Committee was created by the Supreme Court of Canada and Chaired by Supreme Court Justice Tom Cromwell. The final report, ***A Roadmap for Change*****,** for example, finds that the "…family justice system is too complex, too slow and too expensive…and too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve."[45] Though the access to justice reports consider individual civil and family processes, the recommendations apply to and support the coordination of multiple court proceedings as well.

A Roadmap for Change makes the important point that reform strategies must put the needs and concerns of the people who use the court systems first:[46]

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

It also notes that to achieve meaningful access to justice for those people, a significant shift in culture is needed:[47]

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

The reports emphasize the need to improve collaboration and coordination throughout the entire justice system. ***A Roadmap for Change***, for example, speaks about the fragmentation of the administration of justice:[48]

> Collaborate and Coordinate:
>
> We also need to focus on collaboration and coordination. The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system – as opposed to many systems and parts of systems…

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[44] Above, note 1.
[45] ***A Roadmap for Change,*** above, note 1, at p. 01.
[46] Above, note 1, at p. 07.
[47] Above, note 1, at p. 06.
[48] Above, note 1, at p. 07

…

> We can and must improve collaboration and coordination across and within jurisdictions, and across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.)
>
> …
>
> We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well.

It emphasizes the value of focusing on fair and just outcomes for those using court processes, an important objective when there are multiple proceedings:[49]

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

The family law recommendations in ***A Roadmap for Change*** come almost exclusively from ***Meaningful Change for Family Justice: Beyond Wise* Words,** the report of the National Action Committee Family Law Working Group chaired by Jerry McHale Q.C. ***A Roadmap for Change*** supports the promotion of case management in all appropriate cases,[50] a recommendation consistent with the case management approaches used in the integrated court and court coordination and communication approaches mentioned above. The Federal-Provincial-Territorial Report makes the point that case management by one judge in individual proceedings is helpful when there are multiple proceedings because "a case that is carefully and consistently managed within the family justice system will be more easily coordinated with parallel cases in other sectors of the justice system."[51] Justice Croll, in her study leave report referred to above, also supports the judicial case management of cases suggested in ***A Roadmap for Change.***

A Roadmap for Change also specifically recommends specialized judges for family law – those who either have, or are willing to acquire, the necessary expertise, ideally judging in a unified family court. The recommendation highlights the importance of judicial education on "family violence." Recommendation 4.5 states:[52]

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[49] Above, note 1, at p. 09.
[50] Above, note 1 at p. 16**.**
[51] Above note 25 at p. 93.
[52] Above, note 1 at p. 19

Courts should be Restructured to Better Handle Family Law Issues

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children, jurisdictions should consider whether implementation of a unified family court would be desirable.

…The judges presiding over proceedings in the court should be specialized. They should have or be willing to acquire substantive and procedural expertise in family law; the ability to bring strong dispute resolution skills to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and an awareness of the range of family justice services available to the families appearing before them. *[emphasis added]*

Both ***A Roadmap for Change*** and ***Beyond Wise Words*** support the encouragement of consensual dispute resolution processes, even in family violence cases, recognizing that the issue is a controversial one. At the same time, they emphasize the importance of ensuring the safety, security and well-being of those involved in family violence cases. Specifically, ***Beyond Wise Words*** states that:[53]

- Any system of mandatory CDR (Consensual Dispute Resolution) must fully take into account the realities of power imbalance and family violence in the context of family breakdown. It is well recognized that mandatory CDR could put vulnerable spouses at risk, and that the goal of encouraging early out-of-court resolution by agreement cannot be implemented at the expense of the goals of ensuring safety, security and well-being and reaching fair agreements. Necessary and appropriate safeguards include:
    - recognizing a broad definition of family violence which includes, among other things, psychological or emotional abuse, controlling behaviours and direct or indirect exposure of the child to family violence;
    - requiring, in every case, screening to assess for violence to determine whether or not all family members would be safe if CDR were to proceed, or whether some other process or service is indicated;
    - in cases where danger is not initially apparent, imposing ongoing duties on mediators and other justice system professionals to monitor throughout the process for signs of violence and power issues;
    - creating exemptions for cases involving urgency or danger, and allowing a qualified dispute resolution professional to identify those cases that are not appropriate to proceed to CDR – and doing so without requiring that the purpose for the exemption be disclosed;

[53] ***Meaningful Change for Family Justice: Beyond Wise Words***, above, note 1 at pp. 34-35.

- ensuring that judges, lawyers, mediators and other neutrals involved in a CDR process are educated about family violence.

These points are reinforced when dispute resolution processes are conducted by judges, according to Canadian legal academic Dr. Linda Neilson's article, ***At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases***.[54] While setting out many of the concerns raised about dispute resolution processes, she focuses on what is required to ensure just outcomes if a judge does engage in such a process. Among the many suggestions she makes is the need for preliminary screening to determine the suitability of the process.[55] She notes that it "goes without saying that accurate assessments of family violence and its impact depend on the scope and quality of the information on which they are based."[56] She set out many of the challenges that exist when trying to obtain accurate information and makes suggestions to overcome them. In her section called *Considering Judicial (or Mediator) Specialized Knowledge*, she notes that assessing the impact of family violence on a person's ability to participate equitably in a settlement process requires "considerable knowledge of the complexity and impact of domestic violence."[57] She makes the important point that:[58]

> …In the absence of specialized knowledge, problems with screening, mistaken assumptions about parenting and child safety, erroneous conclusions based on the demeanour and behaviour of targeted adults, or potentially misleading public demeanour and behaviour of violators can produce erroneous assumptions and conclusions. *[footnotes omitted]*

D. B.C.'s Response to the National Action Committee Report

B.C. Justice Summits have been convened by the Attorney General and Minister of Justice of B.C. at least once a year since 2013 to facilitate innovation in and collaboration across the justice and public safety sector. Section 9 of the ***Justice Reform and Transparency Act*** sets out the conditions for a Summit to review and consider initiatives and procedures undertaken in other jurisdictions: and "…provide input to assist the Justice and Public Safety Council of B.C. in creating a strategic vision for the justice and public safety sector;" and "…make recommendations relating to priorities, strategies, performance measures and procedures and new initiatives related to the justice and public safety sector…"[59] They are multidisciplinary in nature and have focused on both criminal law and family law. Among those in attendance are the Minister of Justice, many government personnel attend, as well as the chief judge of the Provincial Court and the chief justices of the Supreme Court and the Court of Appeal.

The Third Summit, held in May 2014, built upon the momentum of the first two more generally focused summits and was centered primarily on family law. It also tied in very

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[54] Family Court Review, Vol 52 No. 3, July 2014, at pp. 529-563.
[55] Above, at p. 533.
[56] Above, at p. 533.
[57] Above, at p. 542
[58] Above, at p. 542
[59] http://www.justicebc.ca/shared/pdfs/FourthSummitReport.pdf, at p. 2

well with the release of the work of the National Action Committee, adopting as themes many of the recommendations found in ***A Roadmap for Change*** and ***Beyond Wise Words***. Among those themes were case management and the need for specialized judges and courts. Improved access to justice, culture change and sector accountability were stated as key goals of the justice transformation efforts in British Columbia.[60]

The Fourth Summit, held in November 2014, focused specifically upon better responses to violence against women, particularly issues related to domestic and sexual violence. Some of the common themes included the need to: get more concrete actions; better coordinate the response to sexual violence; have Indigenous voices integrated into dialogue about violence against women; ensure that cultural competency and diversity inform practices; improve alignment and coordination of court processes and improve access; have trauma-informed responses to violence against women; and implement effective approaches and exploit technology to make services available.[61]

The Fourth Summit had a specific session on "Better coordination of criminal justice, family justice and child protection matters." One goal was to make a realistic attempt to achieve a more holistic approach in coordination of criminal justice, family justice and child protection issues.

One theme was that the degree of information sharing across all systems requires significant improvement in the interests of just outcomes but it must be done while respecting privacy. Some suggestions were: identifying a "keystone" player responsible for facilitation and/or oversight; finding better mechanisms to share information, including "exploitation of technology"; and designating Crown counsel with enhanced file ownership to improve file continuity, and as appropriate, information sharing.

Effective coordination will require prior review and a thorough understanding of privacy law and other issues – a working group may be needed. A problem-solving approach would require policy on coordination of family, criminal and child protection processes with clearly specified goals/intended outcomes and associated evaluative procedures.

Some caveats were expressed. For many Aboriginal people, the question of coordination of matters is problematic because it presupposes consideration under formal procedures. Full coordination is highly complex, requiring a great deal of analysis, and potentially integrating two different analytical frameworks (and sets of constitutional issues). It was suggested that many elements restricting coordination are important safeguards and guiding legal principles. Care is required to ensure new injustices are not created while trying to avoid undesirable ones. If the processes are coordinated "too much" some participants felt family violence could be turned unintentionally into a private matter when it should remain a societal issue.

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[60] http://www.justicebc.ca/shared/pdfs/ThirdSummitReport.pdf, at p. 5.
[61] Above note 59, at pp.33-37

A Fifth Summit, entitled "Next Steps in Sector Innovation," took place on November 6th and 7th, 2015. One of the summit's two themes was information sharing and coordination of family, domestic violence and child protection proceedings. The researchers were asked to present information about the current research project. We prepared a summary for that purpose.[62] The summit was focused on taking action on the suggestions from the earlier summit. The report of the summit findings should be released in early 2016. In addition to the justice summits, an Access to Justice B.C. committee has been formed which is chaired by Chief Justice Bouman, the chief justice of British Columbia. The committee is broad based and interdisciplinary. The members have decided to focus on family violence first, and are in the process of developing a specific plan to do that.

E. Risk Assessment – The Relevance of Information about Risk

Aside from the legislative directives in the FLA itself, as discussed above, which require specific knowledge about the existence of family violence with a focus on the best interests of children, there are several other reasons why the emphasis in this report is placed upon the sharing of information about the risk of future harm/violence between the two courts. Information gathered by a risk assessment, whether by clinical, archival, or structured professional risk tool[63] methods, or by an individual who has awareness of critical "red flag" risk factors, as for example noted in the B.C. 19-factor guideline for the police (also used by others, such as Inter-agency Case Assessment Team, or ICAT, members), can serve a multitude of purposes. For deliberations in a family law proceeding, it can assist in determining not only the need for a Protection Order, but the appropriate restrictions the order sets out as well. It can also assist in the development of immediate and longer-term safety plans and the Family Development Response. For criminal law proceedings the terms for interim release orders, as well as for sentencing decisions, can be guided by risk information. It can also direct appropriate services needed, such as treatment, support, and other preventative programming, for both the victim and offender. All such risk information should be enveloped in a broader context of knowledge about the case,[64] including a balancing assessment of protective factors for both adult and child victims (see further detail below).

Apart from those purposes, there are those who argue that yet another purpose is to have the knowledge of the risk factors themselves disseminated through the listing of them in the risk instruments. The listing of the "red flag" risk factors in the instruments,

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[62] Risk of Future Harm: Family Violence and Information Sharing between Family and Criminal Courts Research Project: Summary of Findings and Conclusions
fredacentre.com/reports/reports

[63] Structured professional risk assessment processes are generally thought to more effective than either unstructured clinical or archival risk assessment tools, as they allow for professional judgment to be considered - that is, more of the context of the circumstance is assessed, in addition to any outcome ratings from an assessment tool, *Intimate Partner Violence Risk Assessment Tools: A Review*, Melissa Northcott, Department of Justice Canada, p. 10..

[64] Neilson, Linda (2014). "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases", above note 54 at p.539.

for example, should inform those working with abused women in the community and the general public about "the nature of IPV and escalation; the ability to highlight when particular care and caution may be required to assess danger…"[65]

Interestingly, other instruments have been more recently developed as additions or supplements to the risk assessment instruments, the latter of which focus mostly upon negative risk factors. One recent development is illustrated by the SAPROF (Structured Assessment of Protective Factors) instrument. The idea here is that the assessor obtains a more balanced assessment of risk for future violence. It takes a dynamic approach in considering protective factors, aiming to create effective treatment options.

1. The Relevance of Information about Risk

In the 2012 report from the B.C. Office of the Representative for Children and Youth, entitled *Honouring* ***Kaitlynne, Max and Cordon, Make Their Voices Heard Now***, many recommendations were made about how similar tragedies (the deaths of children by their fathers) could be prevented. Two sub-recommendations are specific to the need for front-line workers to have the ability to identify risk factors in order for them to be able to reduce those risks.[66] One of them, Recommendation 1, states:

> That the Ministry of Health, in partnership with the Ministry of Children and Family Development, take immediate steps to ensure that all staff and professionals connected to their systems understand the *risk factors [emphasis added]* relating to children of parents with a serious untreated mental illness, and promote the well-being of children by:
>
> • developing and implementing policies and procedures to support workers to identify and reduce risk factors for children affected by parental mental illness and domestic violence
> • developing and implementing policies for early detection of risk factors for families associated with mental illness (e.g., social isolation, frequent moves, emotional and financial instability, violent episodes).

2. Risk and the Process of Risk Assessment

There are numerous risk assessment instruments which focus upon factors deemed through research to be valid indicators of risk in domestic violence situations.

In British Columbia, the B-SAFER (Brief Spousal Assault Form for Evaluating Risk) structured risk assessment tool is used by the police in high-risk cases, as specified as necessary in the VAWIR (Violence against Women in Relationships) policy. However, the Summary of Domestic Violence Risk Factors (SDVRF) checklist is used by both Municipal Police and the RCMP in the province to guide decisions in all cases of domestic violence, especially with regard to the initial categorization of level of risk.[67] It

[65] Johnson, Holly and Dawson, Myrna (2011), ***Violence against Women in Canada,*** p. 169.
[66] https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynne.pdf, at p.95
[67] http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html, Vol. 2, at p.71.

is of importance to note, as well, that in their deliberations, the ICAT representatives (a B.C. collaborative, multidisciplinary committee referred to above) also use the same 19-factor checklist.[68]

3. Ministry of Children and Family Development: Mother and Child Protection

In addition to the FLA sections already referenced above that deal with the need for an assessment of future harm of domestic violence, there are elements in the existing legislation that also specify the need for assessment. As noted previously, the FLA does stipulate that the best interests of the child need to be determined in such cases.[69] The Ministry of Children and Family Development (MCFD) uses an assessment that measures the risk of future harm that could impact children. The assessment, termed a Vulnerability Assessment, includes a question about adult/partner conflict. The Vulnerability Assessment itself is the *process* by which a child protection worker determines the likelihood of *future* child maltreatment within a family setting. This process involves the use of clinical skills to engage the family, relying on the worker's judgment to analyze the information collected from the family, collaterals and previous child welfare history. The tool is used to organize the information and identify families that have low, moderate or high probability of future abuse or neglect relative to other families. It is seen to be a forward-looking evaluation that considers factors that are known to contribute to vulnerability of future harm. It attempts to determine whether harm will likely continue or reoccur. It is an actuarial (statistically-driven) instrument in which collected information is organized along two indices: Abuse and Neglect.[70] This is of obvious relevance to a child living in a domestic violence situation.

The ***Child, Family, and Community Service Act*** **(CFCSA)** provides a number of grounds under which a child may be in need of protection and for which an assessment is needed.[71] According to the document entitled ***Policy: Best Practices Approaches****,* issued by MCFD in 2014, an amendment to Section 13 of that Act references domestic violence as one indicator that harm to the child is *likely* to increase if it exists. It notes that Section 28 addresses the parameters needed for a Protection Intervention Order (PIO).[72] Appendix 5 of the MCFD Best Practices paper contains questions to ask mothers in order to help them (and the child protection worker) identify whether they are in an abusive relationship. These include questions related to possible emotional and physical harm, not just the focus on the physical harms.[73]

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[68] Personal communication, Regional Coordinator for EVA BC, January 6, 2015.
[69] Above note 4, Part 4, Division 1, The Best Interests of the Child.
[70] Personal communication, paraphrased quote, December 18, 2015, by a Barrister and Solicitor within the Ministry of the Attorney General, and a BC MCFD staff member. We appreciate their willingness to share their understandings with us.
[71] The ***Child, Family, and Community Services Act***, [RSBC 1996] Chapter 46, Part 3, Child Protection, Division 1, "Responding to Reports when Protection is Needed".
[72] ***Policy: Best Practices Approaches*** (2014), Ministry of Children and Family Development. See pages 11, 12.
[73] In the ***BC handbook for Action on Child Abuse and Neglect: For Service Providers***, the possible indicators of emotional harm are provided, p.28.

Finally, Appendix 6 of the MCFD paper lists risk factors associated with decreased safety for women – which are consistent with the risk factors listed in the B-SAFER tool:

> The child welfare and service planning should include an analysis of any risk factors presented by the abusive man, the child's degree of exposure and resilience, protective factors and supports available in the community.[74]

A caution should be noted here, however, with regard to the use of the formal risk assessment tools for risk of future harm for domestic violence, as referenced above, in the criminal or family court setting: these tools are not designed to assess such factors as the continuing psychological effects of past exposure to domestic violence and the risk of continuing non-physical forms of coercive violence and the associated risk of negative parenting patterns and child abuse.[75] But, if they do indicate high risk for abuse from the offender, involved children would obviously require attention[76] paid to their safety and security for their own best interests. CFCSA tools, taken as a package and combined with training and social work practice, can assist in gaining an understanding of the other issues identified above.[77]

Of critical importance is the fact that under the Ministry of Children and Family Development (MCFD's) directives, a Safety Assessment (SA) does take place:

> A SA occurs after the social worker assesses the intake report (there is also a tool to assist with screening in the initial report to ensure consistency and the correct response). It is recorded on the ministry's Integrated Case Management System (ICM). Social workers fill out a number of questions addressing safety on the SA and then answer yes or no to the question: Are the children safe?[78] There is also space for a narrative and some questions have additional information requested, for example, if the parent caused serious physical harm, there are then five additional check boxes to determine what that harm was.[79]

The requirement is for child protection workers to conduct a Safety Assessment on all incidents that are assigned for follow-up. The Safety Assessment assesses 13 safety factors, one of which, as indicated above, is *Intimate Partner Violence Exists in the Family*.[80]

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[74] Above note 75, see pp. 62, 63.
[75] Neilson, Linda (2014). "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases", above note 54, pp. 537-538.
[76] Neilson, Linda (Second edition, 2013). ***Enhancing Safety: When Domestic Violence Cases are in multiple legal systems (Criminal, family child protection) A Family Law, Domestic Violence Perspective,*** Family, Children and Youth Section. Department of Justice: Ottawa, above, note 24 at p. 9.
[77] Above note 70.
[78] https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynne.pdf, p. 62.
[79] Above note 70.
[80] http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html, Vol. 2, at p.70

The above brief description of the process does not provide the full outline of what the Ministry does when there is a concern registered, but gives a sense of some of the assessments made with regard to risk of future harm in the case of any children involved.

4. Social Context, Risk Decision-Making and Equitable Justice

Decision-making theory offers supporting rationales for the value of having relevant information in making judgments. Many decisions can be based upon personal beliefs concerning the likelihood of events such as the outcome of an election, the future value of the dollar, or, the guilt or innocence of an accused person going to trial.[81] To continue the justice system analogy, the same is true for beliefs concerning future behaviour of an accused person, in this case, the accused person's level of risk for causing future harm. The decision-maker/assessor must have sufficient information to make appropriate decisions; otherwise the individual may fall back upon existing, but erroneous, personal beliefs (for example, such as those represented in myths and stereotypes about family violence) to fill in the missing information required to make a judgment. The decision-maker may be a judge who personally believes that if an intimate partner abuser does not abuse his/her children that access to the children may be in the best interests of the child, whereas in fact, children can be negatively impacted by such abuse to their parent even if they themselves do not experience it directly.[82] However, if the judge is not aware of that reality and dynamic, that judge may make a parenting decision which does not take that information into account and which may place the child(ren) in danger.

On the other hand, if the judge in the family law proceeding is unaware that risk information is available with respect to an accused person in a criminal court proceeding involving the same individuals, the judge may act on only the *available* information, which may simply be insufficient for making an appropriate parenting decision. The same could be true for a judge hearing a criminal case who is unaware of the rationale for the granting of a Protection Order in the family law proceeding.

Either way, whether there is a lack of evidence-based information needed to challenge established, but potentially dangerous, beliefs, or existing and critical risk information is not being shared, the result is a gap in the context information needed for the decision-maker.

There are several parallel processes of decision-making going on in family violence cases with multiple proceedings. First, are those involving the judiciary/counsel in both family court and criminal court. But, in addition, the clinicians/police officers/probation officers, and family counselors/victim services assessors associated with the case in both courts. Advanced assessment (judgment) in risk assessment processes for the

[81] ***Judgment Under Uncertainty: Heuristics and Biases*** (1982). Daniel Kahneman, Paul Slovic, and Amos Tversky. New York: Cambridge University Press, p. 3.
[82] MacDonald, Gillian (2015). "Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact?", in ***Violence against Women*****,** p.15.

latter group can call upon the use of structured professional judgment;[83] that is, the use of a guideline tool that sets out risk factors to consider, but then, in addition, the professional is able to use discretion to consider specific knowledge about the dynamics within the individual's risk factor context.

Similarly, the judiciary is called upon to assess a case based on certain evidentiary guidelines of acceptability, but then the argument presented in this report suggests that additional social context information about the individual case should be considered. That information can emerge from knowledge about risk information, but also from knowledge about the impact of intersectionality factors associated with the victim and accused offender. Such knowledge, and most particularly the knowledge about the "lived reality" of the woman victim and her child(ren), is necessary in order to make more equitable decisions, considering those other inequitable realities. The intersectionality factors, such as race, gender, disability, sexual orientation, ethnic background, poverty, past abuse, and power and control issues should come to the judge's awareness through knowledge gained about the very nature of family violence and its dynamics – one way that knowledge can be acquired is through judicial education, a strong recommendation emerging from the study and one which the National Judicial Institute has implemented nationally.

Finally, as we will see later in the report, the same recommendations emerge from a legal analysis of the evolved role of the judiciary, requiring contextual analysis, as they do from the psychological decision-making analysis above. That is, sufficient knowledge about the dynamics and reality of family violence is needed in order to make equitable and unbiased decisions in these cases. Such a recommendation and directive also came from the NJI Consultation Report as well as being included in the FLA Section 37(2), which 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." This can take the form not only of risk information, but the other information about the social context of an individual case and the particular configuration of intersectionality factors inherent for both the victim and offender in the case.

[83] The evaluator must conduct the assessment according to guidelines that reflect current theoretical, professional, and empirical knowledge about violence. Such guidelines provide the minimum set of risk factors that should be considered in every case:
http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr05_fv1-rr05_vf1/p4.html

IV. LAWYER AND JUDICIAL RESPONSES TO RESEARCH QUESTIONS

In this part we begin by reviewing the responses of the judges, family law lawyers, defence counsel, and Ministry of Justice Criminal Justice Branch relating to individual family law proceedings and criminal law proceedings. We do that by first summarizing the responses in each proceedings and then provide more detailed information. With respect to the sharing of information, we similarly first provide a summary of the responses and then more detailed information

A. SUMMARY – INDIVIDUAL CASES

Family Law Proceedings

The following responses were given with respect to individual family law proceedings:

- Judges and lawyers need and want relevant information about family violence, risk factors, and the risk of future harm in judicial dispute resolution conferences, hearings or trials.
- It is not common for family lawyers to provide information about risk factors and the risk of future harm
- It is not common for judges or masters to ask for information about family violence, risk factors and the risk of future harm.
- If such information is provided, it is usually by way of arguments by lawyers rather than by the use of risk assessments or experts.
- Judges and lawyers should have specialized knowledge about family violence and its impact; they can miss “red flags” and underestimate the significance of family violence, particularly in judicial dispute resolution conferences.
- Case management by one judge can help with obtaining relevant information
- To make sure that relevant information is provided, legal aid must be more widely available and provide adequate time for the work needed.
- There are significant concerns about the lack of enforcement of Protection from Family Violence Orders.

Criminal Law Proceedings

The following responses were given with respect to individual criminal law proceedings:

- Our system of “fast justice” in criminal courts makes obtaining information about family violence and risk difficult.
- Obtaining this information is even more challenging when judges, defence counsel and Crown counsel do not have specialized knowledge.
- Some relevant information about risk factors and the risk of future harm may not be provided to the court at the judicial interim release (bail) hearing.
- Some relevant information about risk factors and the risk of future harm may not be provided at sentencing hearings.

- Crown counsel have a number of policies and processes in place designed to obtain relevant risk information.
- If risk information is provided, it is done by the arguments (submissions) of the lawyers, not through expert reports or other risk assessments.
- Obtaining relevant information is more difficult when judges and lawyers do not have specialized knowledge.
- The legal aid tariff is not high enough and does not allow enough hours to effectively represent people in family violence cases.

B. DETAILS – INDIVIDUAL FAMILY LAW CASES

Judges and lawyers need and want relevant information about family violence, risk factors, and the risk of future harm

Both the judges and the family law lawyers thought it was important to have as much relevant information as possible. Judges "would 'like to have the information that is out there' about past behaviour that could be an indicator of future behaviour." The lawyers said that it "is important to take steps in individual proceedings to make sure that relevant risk information is available."

It is not common for family lawyers to provide information about risk factors and the risk of future harm

The judges and lawyers agreed that it was uncommon (judges) or rare (family law lawyers) for lawyers to provide to the court information about risk factors and the risk of future harm. They also agreed that if the issue of risk factors and the risk of future harm arises, it does so in the submissions of the lawyers at the end of the case. Formal risk assessments are not used. Judges can rely on their own knowledge and experience. Judges commented that, "rarely, if ever is accurate information provided about the risk of harm; lawyers stay away from this topic and provide a sanitized version." They also said that it "can be a challenge to muster even a basic case."

The lawyers said the exception may be when there is an application for a Protection from Family Violence Order. The judges said such information may be found in a Parenting Assessment, but it focuses more on parenting capacity generally.

It is not common for judges or masters to ask for information about family violence, risk factors and the risk of future harm

The family lawyers said it was uncommon for judges or masters to ask for information about family violence, risk factors and the risk of future harm if it is not raised. This is the case in both court hearing/trials and at case conferences over which judges or masters preside that deal with settlement. They almost never review the factors relating to family violence found in Sections 37 and 38 of the FLA.

Some judges were concerned about an Australian "promising practice" identified in the Discussion Paper this way: "Statutory amendments in Australia requiring the family

court to ask each party about the existence of family violence relating to themselves or their children."

They pointed out that there is not an "inquisitorial" judicial system in Canada, one in which judges have a role in gathering evidence. Rather, judges in our system make decisions based on the evidence presented to them; it is not their role to gather evidence. Judges have to be very careful about not "descending into the fray." Judges often have to "put blinders on" and decide cases based on the evidence presented. And judges often sign Desk Orders – orders granted based on written material, including affidavits, which judges read in their offices. Most of the time additional information is not requested in those cases.

Another related concern was the limited amount of court time available and the need to make the most effective use of that court time. "Court time is so valuable." It could de-rail a proceeding to intervene and start asking questions about whether there is missing information relating to the risk of future harm.

Judges and lawyers should have specialized knowledge about family violence and its impact

The judges did not raise the issue of whether judges and/or lawyers should have specialized knowledge about family violence and its impact. The family lawyers said we "should have both judges and lawyers with specialized knowledge about family violence and its implications."

Two specific comments were provided. The first specifically related to risk of future harm:

> 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 important indicators of future risk. Related to this is a concern that there is an overemphasis on the importance of keeping families together, at the expenses of the safety and security of women and children.

The second dealt with knowledge about ways in which family violence can be linked to post separation parenting:

> Even when family violence is considered, it can be set aside as being not relevant to parenting ability and the children's future safety, security and well-being; when this happens there is usually not an analysis of the s. 37 factors relating to family violence or s. 38 factors relevant to the risk of future harm.

These two concerns were noted most often at judicial dispute resolution conferences.

Family lawyers, in discussing the need for specialized knowledge, made the point specific point that, "the use of information about future risk will only be effective if

accurate information can be obtained; women may be traumatized by the violence, which makes it hard to get accurate information in the usual ways; lawyers and judges have to understand that and provide women with time and space to 'tell their stories' in their own way."

Case management by one judge can help with obtaining relevant information

The issue of case management was not raised by the judges in their responses to the questions posed. The family lawyers said that the one judge management system should be used in individual family law cases. It would be beneficial overall, and would assist in obtaining relevant information about family violence and its impact generally, and about risk factors and risk of future harm in particular:

> In the few cases in which judges/masters "seize themselves" of cases – hearing all future applications of a case – it helps with obtaining relevant information about family violence and risk; it can "have a real impact, providing consistency of approach and sending a strong message that those who choose not to follow court orders will be kept on a short rein."

To make sure that relevant information is provided, legal aid must be more widely available and provide adequate time for the work needed

The family lawyers said that though allegations of violence may qualify women for legal aid, the amount paid is "insanely" low.

There are significant concerns about the lack of enforcement of Protection from Family Violence Orders

All of the family lawyers raised concerns about difficulties in getting Orders granted under the FLA enforced in the criminal courts. They said "there is still some confusion among police, Crown and the courts about how Protection Orders should be enforced.

The judges said this:

> There was a concern about the lack of enforcement of the court orders that are granted. This was viewed as a serious problem, described as "massive," one which may make the new *Family Law Act* ineffective – a "broken piece of legislation." Examples were provided of situations where orders were being breached without consequence. Enforcement may be less of an issue in smaller communities.

C. DETAILS – INDIVIDUAL CRIMINAL CASES

Our system of "fast justice" in criminal courts makes obtaining information about family violence and risk difficult

Defence counsel said that for many reasons, including lack of adequate legal aid, we have developed a system of "fast justice" in criminal courts 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 cases progress. This makes obtaining information about family violence and risk difficult, generally.

Obtaining this information is even more challenging when judges, defence counsel and Crown counsel do not have specialized knowledge

Defence counsel said that obtaining this information is even more challenging when judges, defence counsel and Crown counsel do not have specialized knowledge relating to family violence and its impact generally, and risk factors and risk of future harm specifically. It "is 'critical' to have judges and lawyers, including Crown lawyers who are knowledgeable about family violence and its impact."

Some relevant information about risk factors and the risk of future harm may not be provided to the court at the judicial interim release (bail) hearing

The judges said "the Crown does not always have all information a judge would like to have about the risk of future harm." Particular comments included these:

- The Crown is not able to say whether previous assault conviction relates to the same complainant
- Not enough information is provided; it is really difficult to "drill down" and find out anything

The judges were very clear that "the exception is when 'dedicated' Crown are involved – those who only do domestic violence cases."

The defence lawyers said that the risk of future harm is "rarely raised" at a bail hearing.

Some relevant information about risk factors and the risk of future harm may not be provided at sentence hearings

With respect to sentencing, the judges said that pre-sentence reports usually do not focus on risk specifically. Judges must read between the lines. The question of risk may be raised in a psychological assessment, but usually does not include a formal risk assessment. The latter are not at all common. They are only seen in "serious" criminal cases, which would attract a substantial jail sentence.

The defence lawyers said that the risk of future harm is often not raised at sentencing hearings. Crown counsel sometimes asks for pre-sentence reports, which may refer to risk. Defence lawyers prefer to get their own reports, which can be very expensive.

Crown counsel have a number of policies and processes in place designed to obtain relevant risk information

In response to the question "Is Information about the risk of future harm generally provided to judges hearing criminal law cases?" the Criminal Justice Branch said:

- As provided for in the Branch's Spousal Violence Policy Crown counsel consider risk information at various stages, including bail, preparation for a hearing and during sentencing.
- What information will be provided to the court is considered on a case-by-case basis applying disclosure and evidentiary law principles.
- With respect to bail the Policy says that:

o Crown counsel should have particular regard for the safety of victims and other family members, especially children and must consider all available information with respect to the risk factors presented. When Crown counsel has reason to believe that additional information is available counsel should request it from the police before making submissions and should ask for an adjournment if necessary.

- In preparation for a hearing, Crown counsel should seek an early trial date whenever possible, when counsel has "reason to conclude" that there is "a significant potential for serious bodily harm or death."
- Crown counsel will assess the relevance of and admissibility of risk information provided, such as risk of future harm,and present it when appropriate at all stages including sentencing. The information regarding risk factors and social context could be provided by:
    - Police
    - Other investigative agencies, and
    - Other stakeholders such as probation officers, victim service representatives and child protection workers

In response to the question, "How is such information provided?" the Criminal Justice Branch said:

- One way of obtaining relevant risk information is through Reports to Crown counsel, provided by the police.

o Since 2013, police are required to provide a Domestic Violence Risk Summary, based on nineteen (19) risk factors.

- This is a screening device, not a formal risk assessment.

- It is rare to get a formal risk assessment, such as B-SAFER or SARA, before a bail hearing.
- It is also uncommon to get a formal risk assessment before sentencing, but there may be additional information such as information from a bail supervisor or correctional staff member.
- In some cases, especially those that potentially present the highest risk factors and risk of future harm, there may be a pre-sentence report.

• There is a High Risk Offender Program that deals with all offenders, those who are identified as having criminal histories which could make them eligible for a

Dangerous or Long Term Offender application. These could include offenders with a history of family violence offences. Significant information is gathered and available to Crown counsel to consider.

If risk information is provided, it is done by the arguments (submissions) of the lawyers, not through expert reports or other risk assessments

The Criminal Justice Branch said that generally risk information is provided as part of the Crown's submission, not through expert reports or risk assessment reports. This was also the response of defence counsel.

The legal aid tariff is not high enough and does not allow enough hours to effectively represent people in family violence cases

Defence counsel recommended that there should be an increase in the legal aid tariff, and/or that defence counsel should be allowed more than 25 hours for preparation so as to allow effective representation in cases involving family violence.

D. SUMMARY – SHARING OF RISK INFORMATION

Sharing Of Risk Information When There Are Both Criminal Proceedings And Family Law Proceedings Taking Place At The Same Time

Family Law and Criminal Law Proceedings in British Columbia Operate Separately – In Silos

- When there are both criminal and family law court proceedings taking place at the same time, dealing with the same people, they operate separately – in silos; one court rarely knows about the other proceedings, let alone whether court orders dealing with risk exist, or whether other relevant risk information is available.

There are Significant Justice System Benefits to Having a Non-Siloed Approach

- The judges and lawyers agreed that there are significant justice system benefits to making changes to the siloed approach to ensure that the judge in each court proceeding knows about the other and has the relevant risk information needed to make a fair and just decision about the risk of future harm.

It is Uncommon for Family Law Lawyers and Criminal Law Lawyers to Provide Information to the Court about Other Proceedings

- It is uncommon for either family law lawyers in family law proceedings or defence counsel in criminal proceedings to provide information about other proceedings, orders, or other risk-related information arising in those proceedings.

If information about other Proceedings is not provided to the Court, it is Uncommon for Judges to Ask for that Information

- If lawyers do not provide information relating to other proceedings, it is uncommon for judges to ask about whether there are other relevant proceedings,

orders, or other information that may be relevant to risk available in the other court proceeding.

The Criminal Justice Branch says the Onus is on Lawyers in Other Proceedings to Provide Relevant Risk Information to the Crown for use in the Criminal Law Proceeding

- 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.
- The Criminal Justice Branch says 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.

Crown Counsel can Provide Lawyers and others with Information Relevant to Risk in Certain Circumstances

- With respect to providing information, 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 (FOIPPA) provides for the collection and disclosure of family violence information for reducing the risk that someone will be the victim of domestic violence.

There are Challenges to the Sharing of Risk Information that must be Addressed

- There are challenges to sharing risk information that must be addressed, including but not limited to: fair trial/process concerns generally; the admissibility of information that is shared; privacy concerns; limitations placed on lawyers and judges by other professional responsibilities; and technical challenges at an institutional level.

Specialized Knowledge about Family Violence and Risk is Required

- Risk information could be shared between courts more effectively if both lawyers, including Crown lawyers, and Judges had specialized knowledge about family violence and risk.

Judicial Case Management of Multiple Court Proceedings is Worth Trying

- Judicial case management might help in dealing with both siloed court processes generally, and the sharing of risk information in particular.

Courts as Institutions Can and Should Take Responsibility for Sharing Risk Information

- From a criminal defence perspective, sharing of information must be done at an institutional level.
- The judges had a number of suggestions that may assist including an information-sharing software system, use of Court Rules, using Court Forms, and use of the provisions in the FLA relating to other court proceedings.

Legal Aid Funding is Inadequate

- The lack of adequate legal aid funding is a challenge to the effective sharing of risk information.

People without Lawyers Face Particular Challenges

- People attending court without lawyers often do not have accurate Information about other court proceedings.

Judges Need the Power to Appoint Lawyers

- Judges should have the ability to appoint a lawyer when a person needs one and is unrepresented.

E. DETAILS – SHARING INFORMATION ABOUT RISK

We now consider each area of response in more detail.

Family Law and Criminal Law Proceedings in British Columbia Operate Separately – In Silos

The judges said that they almost never know that other proceedings relating to the same family are taking place. They "may get hints that there is another proceedings, but that is all." They do not have information about other court orders. They said they "don't know what they don't know" in this respect. This can happen when there are two or more proceedings taking place within the same courthouse. The judges also said that information from other proceedings specifically about the risk of future harm is not shared.

The family law lawyers and criminal defence counsel agreed with those observations, saying that there is almost no communication between courts about the existence of other proceedings, or the existence or content of other orders. They also said that there is a lack of communication between courts, both formally and informally, about the risk of future harm and very limited sharing of information between family lawyers and criminal law lawyers about that risk.

The judges said that even when a non-parent asks for guardianship of a child, that the proceeding is not cross-referenced with any other file dealing with the same child(ren). They thought that managing multiple proceedings may be a bigger problem in larger communities because in smaller communities people involved know about both/all proceedings.

There are Significant Justice System Benefits to Having a Non-Siloed Approach

The judges all agreed that it is very important for them to know about other court proceedings and court orders.

The family lawyers saw a clear benefit of having all relevant information, or as much as possible, about the risk of future harm available to decision-makers, whether there is one or more than one proceeding, noting that the more information available to each court, the less likely it is that there will be inconsistent orders. They said there is a "need to find a way to share risk information in a 'safe' way when there are multiple court proceedings."

They also discussed the importance of a holistic, comprehensive approach about actual risk, capturing multiple factors that 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.

The judges provided an example of the challenges the lack of information about other proceedings can present:

> …A woman signed a safety plan with the child protection authorities in which she agreed the husband would not have contact with her or the children. The judge hearing a later case in which contact was an issue did not know about that plan.
>
> The challenges that arise in such a case when the people do not have lawyers was also raised. Because it involved a review hearing the legal services society would not provide legal assistance. Yet two to three day hearing was scheduled at which substantive parenting decisions would be made.

It is Uncommon for Family Law Lawyers and Criminal Law Lawyers to Provide Information to the Court about Other Proceedings

The family law lawyers and criminal defence counsel said that for the most part neither family lawyers nor criminal lawyers obtain or present information about other proceedings.

The judges confirmed that they do not get that information from lawyers. They raised as a "significant problem" the concern that lawyers "who act in family proceedings are often not well informed about the status of other criminal proceedings and what other orders might say." They said that some do not think that it is their responsibility to find out, even if asked to do so by a judge.

They added that others "provide answers that cannot be accurate, indicating a lack of knowledge about the criminal law process."

If information about other Proceedings is not Provided to the Court, it is Uncommon for Judges to Ask For that Information

The Family lawyers said that Judges and masters usually do not ask, “notwithstanding s. 37(2)(j) of the FLA requiring the court to consider any civil or criminal proceeding relevant to the child's safety, security or well-being.” Similarly, judges in criminal law bail or sentencing hearings usually do not ask about other court proceedings.

The judges confirmed that most judges would not ask. For the reasons described above in the discussion about the judges’ role in individual family law proceedings, most of the judges did not think that it was their role be “gathering evidence.” They were also concerned about such an intervention detracting from the effective use of “valuable court time.”

One judge thought some questions should be asked, saying:

> One judge expressed the view that 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 good management.

The Criminal Justice Branch says the Onus is on Lawyers in Other Proceedings to Provide Relevant Risk Information to the Crown for use in the Criminal Law Proceeding

The information in this section was provided in the written responses of the Ministry of Justice Criminal Justice Branch.

In summary, there is no formalized information sharing process in place to obtain information when there are other proceedings taking place at the same time, such as family proceedings and/or child protection proceedings. The onus is on those involved in the other proceedings to provide, as they deem appropriate, information regarding risk factors or the status of the other proceeding.

When there are family law proceedings Crown counsel may receive information from family legal counsel regarding the status of the proceedings and outstanding court orders.

It is rare for Crown counsel to be advised about what, if any, risk information is provided to the court during the family court proceedings. However, the Branch's Spousal Violence Policy states that Reports to Crown Counsel (RTCC) from police should provide information on any other court orders affecting the accused person.

When there are parallel child protection proceedings, Crown counsel may receive information regarding risk factors, the status of the proceedings, and any orders made, from child welfare workers with the Ministry of Children and Family Development or Delegated Aboriginal Agency.

Crown Counsel can Provide Lawyers and Others with Information Relevant to Risk in Certain Circumstances

This section contains the responses of the Criminal Justice Branch.

Disclosure of information is governed by the Criminal Justice Branch policies, by privacy legislation such as B.C.'s *Freedom of Information and Protection of Privacy Act* (FOIPPA) and case law.

The Branch Policy, in a section called "Disclosure of Information to Parties other than the Accused" (DIS 1.1), says that information received from the police and other law enforcement agencies is provided solely for the Branch to meet its mandate under the *Crown Counsel Act* to approve and conduct prosecutions.

Therefore when family lawyers want to obtain information from the Crown they must submit a written request to the Branch's Information Access and Privacy Office.

FOIPPA applies to all records in the custody of or under the control of a public body, including court administration records: 3(1)(h). It would apply generally to records kept by the Crown as a result of *Stinchcombe* disclosure (a Supreme Court of Canada case requiring the Crown to disclose to the defence all evidence that might be relevant to the case, whether or not the Crown intends to present that evidence) but not to information outside the scope of that disclosure.

It does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed: s. 26(f).

FOIPPA has specific provisions relating to domestic violence. It allows for the collection of information and for the disclosure of that information for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur: s. 26(f) and s. 33.1(1)(m.1).

All requests are considered on a case-by-case basis to determine what is appropriate in the specific context of the case and to make sure that the fair trial rights of the accused person are protected.

There are Challenges to Sharing Risk Information

Both family lawyers and criminal defence counsel said that co-ordination and risk information sharing processes raise fair trial/process concerns. Constitutional protections are at issue including the right to be presumed innocent and the right against self-incrimination. Great care would have to be taken to protect those rights in any coordination efforts.

There are important privacy concerns that arise for women because disclosing information could adversely affect their future safety. Women's "safety may be compromised if certain information is shared."

The family lawyers said it is difficult for them to get information about risk that exists in other proceedings; they noted that it would be even more difficult for those who do not

have lawyers. The judges also raised the concern about people without lawyers, saying that it is “very difficult for them to get information about other proceedings.”
For family lawyers, it can be difficult to obtain information about risk from the Crown or from other sources. Defence counsel are subject to implied undertakings to the Crown not to disclose information provided by the Crown. Both lawyers are subject to solicitor-client privilege so cannot disclose information given by their clients without consent.

The kind of legal aid funding that exists does not even come close to providing the time needed to adequately address issues of risk of future violence when there are multiple proceedings.

At the institutional level, there are technical and policy challenges that are difficult to overcome and that impede the sharing of risk and other information between different court proceedings.

While judges had no difficulty with receiving information about the existence of other court proceedings and about orders made in those proceedings, more concerns were expressed about receiving other information that may be relevant to the risk of future violence. A significant concern related to what a judge should do with information that the judge received. “For example, a judge should not get a Report to Crown Counsel generated by a police investigation.”

The family law lawyers said that there is a significant challenge to sharing risk information with respect to “no contact” orders – Protection Orders in family cases and primarily bail orders or peace bonds in criminal cases. Most women rely on the criminal orders because of the cost and complexity of getting a Protection Order; however, the woman has more control over what is sought in a Protection Order and how long it will last. There is still some confusion among police, Crown and the courts about how Protection Orders should be enforced.

For defence counsel, the system of “fast justice” referred to when discussing individual criminal proceedings above not only makes obtaining information about family violence and risk difficult generally, but it makes it “even more difficult when there are other proceedings taking place at the same time.”

Defence counsel said that the lack of specialized knowledge makes sharing of information about risk factors and risk of future harm more challenging.

Specialized Knowledge about Family Violence and Risk is Required

As noted above in the section on individual family law proceedings, family law lawyers expressed a concern 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 overall and important indicators of future risk. They said that “we should have both judges and lawyers with specialized knowledge about family violence and its implications, keeping in mind the issue of choice of counsel.”

Defence counsel said that, when considering multiple court proceedings, the "lack of specialized knowledge also makes sharing of information about risk factors and risk of future harm more challenging." It is "critical" to have judges and lawyers, including Crown lawyers who are knowledgeable about family violence and its impact.

Judicial Case Management of Multiple Court Proceedings is Worth Trying

The family lawyers, after noting that case management by one judge could assist with obtaining risk information in individual proceedings, said that it "is also worth trying the one judge management system and/or the judicial communication system when there are multiple court proceedings to assist with the challenges created by siloed court processes and to help with the appropriate sharing of risk information."

Defence counsel also said that it is worth trying the one judge management approach when there are multiple court proceedings. The point was made that such an approach could be effective and would, in addition, save institutional costs.

They emphasized that this must be done with great care to ensure that the rights of accused people are properly protected.

Courts as Institutions Can and Should Take Responsibility for Sharing Risk Information

Family lawyers said that we need to find a way to share risk information in a "safe" way when there are multiple court proceedings.

For defence counsel the sharing of information about risk must be done at the institutional level as they are not in a position to share information. As noted above, defence counsel made the point that they are subject to implied undertakings to the Crown not to disclose information provided by the Crown. Both lawyers are subject to solicitor-client privilege so cannot disclose information given by their clients without consent.

The judges had a number of suggestions that may assist:

- A software system that would allow data sharing about other proceedings between/among courts.
- The use of Court Rules to facilitate the sharing of information about other court proceedings. (The Provincial Court is in the process of revising its rules and the Rules Committee will consider this issue.)
- Carefully worded plain language Court Forms containing tick boxes, which would require people using the court to provide information about other court proceedings.
- Using as a starting point the requirements in the *Family Law Act* that judges and parents must consider other criminal and civil proceedings when deciding the best interests of a child. (S. 37(2)(j) of that *Act* requires that judges, lawyers and

parents, when determining the best interests of a child, consider other civil and criminal proceedings affecting the safety, security and well-being of the child.)

- Similarly, using as a starting point the provision in the *Family Law Act* that a non-parent applying for guardianship must file an affidavit providing the relevant information (S. 51(2) of the *Act*).

- A systemic rather than ad hoc cross-referencing of files.

One judge made the point that it is very important, before making recommendations, to have a real understanding of what the existing problems are in each process, which have led to the present situation. Otherwise, a solution in one area may have adverse consequences in another.

Legal Aid Funding is Inadequate

Like the comments made with respect to individual court proceedings above, here the family lawyers indicated that, because of the very low rates paid for legal aid, even if a women qualifies for it, “efforts to obtain relevant risk information in other proceedings can be even more costly and time consuming.”

People without Lawyers Face Particular Challenges

The judges raised two concerns relating to the particular challenges faced by people who do not have lawyers. The first is that even if they know that there is an order in another proceeding, they do not know what it says. The second is that it is the people involved, not the Court, who prepare court orders in family law cases. People without lawyers often do not do that:

> If people who do not have lawyers raise the fact that there is an order in another proceedings, they usually do not know what it says. A challenge with self-represented people is that they often do not prepare the necessary formal court order when a judge makes a decision. This creates problems because the "losing" party can try to apply again in front of another judge. It also makes it very difficult to prevent conflicting orders when the judge does not know what the order says. However, if the order is a Family Law Protection Order under the *Family Law Act,* it will be prepared by the Court registry and placed on the B.C. Protection Order Registry.

Judges Need the Power to Appoint Lawyers

One suggestion made by the judges was that they should “have the ability to appoint a lawyer for an unrepresented person when appropriate to assist that person in dealing with the challenges created” by multiple court proceedings.

V. RESULTS: THEMES ARISING FROM THE RESEARCH

A. Overarching Themes

As has been seen, 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 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 orders. This lack of relevant information may exist at all stages of the judicial process: settlement discussions, interim hearings, case management and pre-trial management conferences, and 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.
- 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 the 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 that influence behaviour and events and make the justice system more accountable. They also said that case management by one judge in family law proceedings should take place more often as it is beneficial overall, and it helps with obtaining relevant information about family violence and risk. Both the family law lawyers and defence counsel thought that, in cases where there are both family law and criminal law proceedings, judicial case management of the two cases might help in dealing with both siloed court processes, generally, and the sharing of risk information in particular.

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 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 disclose 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 cases.

Some challenges were raised by the lawyers, but not by the judges. First, both family law lawyers and defence counsel indicated that some lawyers and judges do not appear well informed about family violence and its impact generally in either family law or criminal law proceedings. They also do not seem knowledgeable about "red flags" for future risk, and therefore can miss both the significance of the violence and any important indicators of future risk. Second, and related to the first, was a concern in family law proceedings 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 the s. 38 factors relating to the risk of future harm. The second and third concerns were noted more often with respect to 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. This

was described as a system in which duty counsel may have 30 cases to deal with at a time, these cases are dealt with quickly, and different Crown counsel deal with cases as the cases progress.

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 prosecute 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:

- 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 (FOIPPA) provides for the collection and disclosure of family violence information for reducing the risk that someone will be the victim of domestic violence.

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. The approach is not out of step with the role judges have traditionally taken in the adversary system. This recalls the statement one judge made, which was referenced earlier, about the need for judges to take more time to obtain basic information in order to avoid conflicting orders. That judge said that "(t)he 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."

B. 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 described above in "Purpose of the Research Project" may still exist. If this is the case, there is a significant justice system concern.

We suggest that the results are strikingly similar with respect to:

- the limited information judges receive about the nature and extent of family violence and the risk of future harm;
- the lack, or limited assessment, of the risk of future harm;
- the apparent lack of screening for family violence by the courts 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.

We suggest that these concerns relating to British Columbia align with the concerns identified in other Canadian reports described above in Part III, "Background Information."

C. Recommendations from Research Results

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 to 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 of future harm. 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." (For more information about the importance of having specialized judges in the family law context, together with case management, see both: Professor Nicholas Bala, Dr. Rachel Birnbaum and Justice Donna Martinson, ***One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict***; and the Hon. Donna Martinson, ***One Case-One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases.***[84])

Both the family law lawyers and defence counsel 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 who participated 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.

As noted above, 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)).

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[84] ***One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict*****,** **(**2010) 26 Can. J. Fam. L. pp. 395-450; ***One Case-One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases*****,** Vol. 48 No. 1 Family Court Review, January 2010, pp. 180-189.

- Similarly, using, as a starting point, 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 that 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 said that both courts should consider the issues raised further, and then consider having a joint education program dealing with multiple court proceedings. One judge said that it is very important, before making recommendations, to have a real understanding of what the existing problems are in each process, which have led to the present situation. Otherwise, a solution in one area may have adverse consequences in another.

Some steps have already been taken with respect to the suggestion that there should be judicial education on the topic of multiple court proceedings. The Chief Judge of the Provincial Court of British Columbia, Tom Crabtree, has suggested a court webinar that would be available to all judges, and planning is underway. At the national level, the Canadian Association of Provincial Court Judges, at its annual conference in Vancouver in September 2016, will consider issues relating to multiple court proceedings. In addition, the Provincial Court Rules Committee is considering whether, and if so, how, court rules might address the challenges that arise.

VI. LEGAL PROFESSIONALS AS JUSTICE LEADERS: ACHIEVING JUST OUTCOMES IN FAMILY VIOLENCE CASES

A. The Role of Legal Professionals in Family Violence Cases – An Introduction

The responses of the judges and lawyers to our research questions raise issues about the nature of their role in ensuring both that relevant information about family violence and risk is available, and is shared when both family law and criminal law proceedings are taking place at the same time, and that the analysis based on that information leads to just outcomes. As we have said, most of the judges felt that they had to "put blinders on" and make decisions based on the evidence presented. This view is not uncommon and not out of step with the approach judges have traditionally taken to their role in the adversary system but it is a view that warrants rethinking. Questions also arose about the responsibilities of lawyers to provide relevant information.

Those questions can be considered through the lens of the recommendations of the National Action Committee. What does it mean for the legal profession – both judges and lawyers – when dealing with family violence and risk of future harm in family law proceedings and criminal law proceedings, to engage, as ***A Roadmap for Change*** suggests, in a cultural shift – a fresh approach and a new way of thinking, from the perspective of the people who use the system – to achieve both just processes and just outcomes?

Taking a fresh look at the roles of judges and lawyers is important because, while much has been done by both judges and lawyers already in trying to address family violence, the reports we have reviewed, and the results of our own consultations, show that much remains to be done to achieve fair and just processes and outcomes in family violence cases in both family law proceedings and criminal law proceedings and when both take place at the same time. More is required than just a few adjustments to what is already being done, and the need to do so is pressing. Issues relating to family violence and its impact are extremely complex and multi-faceted. Understanding these complexities is not intuitive. Yet, at stake are the safety, security and well-being of women and children, matters of significant public concern. Well-informed decisions can help address the concerns. Ill-informed decisions have the potential to increase the likelihood of future harm.

There have been fundamental changes to both the nature of the judicial role – what judges do – and to the way in which they are required to make decisions (see below), which have a direct impact on what a fresh approach might look like. There is a corresponding change in what lawyers do, and how they contribute to the decision-making process. We respectfully suggest that, as a result, for judges dealing with any case which has the potential to raise issues of family violence, they have professional obligations to take an active role, consistent with modern notions of judicial independence and impartiality, at every stage of the process – judicial dispute resolution, interim hearings, case management conferences, pretrial conferences, and

trials – to ensure that relevant information is provided and that it is used effectively in the decision-making process.

We also respectfully suggest that they have professional responsibilities to have/obtain the necessary up-to-date comprehensive specialized knowledge about family violence and its impact. This will allow them to use equality-based principles to both identify what may or may not be relevant, and to analyze the information obtained to achieve equality-based outcomes. These responsibilities arise not only when decisions are being made at interim hearings or trials, but also when settlements are being facilitated by judges in other proceedings. We suggest that it can be done within the framework of what can be described as a constitutionally-enhanced adversary system. We do not suggest that any particular outcome is required in any case. To the contrary, we say decisions about what is relevant, and how relevant information is analyzed in decision-making by lawyers and judges at all stages of the judicial process, must be equality-based and made by decision-makers who are well-equipped to make such decisions.

In this section, we expand upon these suggestions by considering: Substantive Equality as a Fundamental Constitutional Value; The Adversary System in the 21st Century; Core Professional Competencies – The Need for Specialized Knowledge; and, finally, Informed, More Active Judging: Not a Substitute for Effective Legal Representation.

B. Substantive Equality as a Fundamental Constitutional Value

With the advent of the ***Charter of Rights and Freedoms***, and Canada's commitment to international human rights treaties, a mandatory legal analysis, known as contextual legal analysis, has developed. It is, simply put, the way in which equality rights and values are incorporated into legal analysis. It requires an understanding of the reality of the lives of those being judged. We refer to it further below when discussing its application to family violence cases.

In our democratic society, we recognize the importance of judicial independence and impartiality to the rule of law. An equality-based view of the concepts of judicial independence and impartiality has also developed. Judicial independence has long been recognized as not being a right on its own, but rather a means of achieving impartiality. The Canadian Judicial Council has developed decision-making advisory guidelines for judges that discuss equality-based analysis and what it means for the concept of judicial impartiality: see ***Ethical Principles for Judges***.[85] For example, in the section entitled "Equality," is this statement: "Judges should conduct themselves and proceedings before them so as to assure equality according to law." Among the four equality principles is this:

> 2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.

[85] https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

In the Commentary to the Equality statement is the comment that connects equality to impartiality, saying that equality "is not only fundamental to justice, but is strongly linked to judicial impartiality." As noted below, Chief Justice McLachlin has referred to this as "informed" impartiality.

Professor Rosemary Cairns Way, the initial academic advisor to the National Judicial Institute's social context education programming and a professor of law at the University of Ottawa, speaks about what she refers to as the constitutionally entrenched equality value for the process of judging. She explains, in her article ***Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context Education***,[86] how it underpins every aspect of legal practice:

> I use the term "equality value" to describe a normative, systemic and institutionalized commitment to the ideal of substantive equality as a fundamental constitutional value. In my view, the equality value must be understood to underpin every aspect of law and legal practice, in the same way as a commitment to individual liberty undergirds our understanding of the rule of law.

She refers, by way of example, to the comments of the Honourable Justice Frank Iacobacci when he said:[87]

> Understanding the Canadian social context and incorporating this into the process of adjudication requires that we always bear in mind the moral underpinning of our Constitution and in particular the fundamental principle of equality *[emphasis added].*

Professor Cairns Way describes the "transcendence of an account of judicial independence shaped by the entrenched value of equality which acknowledges the significance of context and diversity, and which takes seriously the obligations imposed by public accountability."[88]

C. The Adversary System in the 21st Century

This constitutionally-enhanced view of decision-making has been accompanied by a fundamental change, beginning later in the 20th Century, in the nature of the work done by judges and lawyers. There has been a move from a traditional view of the adversary system to a constitutionally-enhanced adversary system.

1. The Traditional Adversary System

In the traditional adversary system, judges are viewed as neutral arbiters who consider the evidence presented by each side, and the legal arguments made, and make a

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[86] In Lorne Sossin & Adam Dodek, eds., ***Judicial Independence in Context*** (Toronto, Irwin Law, 2010) 220.

[87] Previous note. We also emphasized this point in our discussion about contextual legal analysis in our paper, ***Judicial Leadership in Domestic Violence Cases, Judges Can Make a Difference,*** above, note 5.

[88] Above note 86, at p. 4

decision, applying the relevant legal principles. Judges, because of their experience and wisdom, were viewed as being able to ascertain the "truth" in this way.

The judges were all "generalists," meaning that they heard all cases, no matter what their legal experience as a lawyer was. Any specialized information would be provided by evidence, often expert evidence. Judges conducted trials and presided over contested pre-trial hearings. They did not manage cases; that is, the lawyers – and almost everyone had a lawyer – decided if and when a case should be heard by a judge.

They did not assist the lawyers, or the people who had issues to be resolved, to "settle" the dispute. Those discussions were left to the lawyers. Judicial education programs were very limited and, when they took place, they were confined to judges teaching other judges about judging.

Professor Richard Devlin, Justice Adele Kent and Susan Lightstone have described this traditional approach in ***The Past, Present (and Future ?) of Judicial Ethics Education in Canada***:[89]

> The art of judgment and the pursuit of justice is therefore the rational and objective application of truth by professionals, those (like judges) who have cognitive and practical skills to be experts in the field.

They describe this role of a judge as that of a neutral conduit:[90]

> ...Our sense is that most judges subscribe to a role morality premised upon the dictates of the adversary system. …This system is premised on three constituent elements: a set of procedural rules that determine the collection and presentation of evidence; the articulation of arguments by partisan adversaries; and the determination of truth by a passive neutral arbiter. In this model, it is the responsibility of the judge to adopt a very precise professional role: the neutral conduit.

2. <u>The Evolving Nature of the Roles of Judges and Lawyers</u>

Over time, the roles of judges and lawyers have changed dramatically.[91] Now an important part of the role is to case manage so as to ensure that the court case proceeds in a way that is timely, cost effective and just. Judges spend a significant amount of their time assisting people in reaching a resolution of their dispute without the need for a contested hearing or trial. The role of lawyers has changed accordingly. The role of judges has become much more complex because of the high numbers of people

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[89] **Legal Ethics,** Volume 16, Issue 1 2013 at p. 31.
[90] Above, at p. 48.
[91] For further discussion on the issues relating to the evolving roles of judges and lawyers, see ***Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference*****,** above, note 5, and The Honourable Donna J. Martinson*,* ***Evolving Professional Roles – Lawyers, Judges and the FLA***, Paper 5.6, CLEBC program The Family Law Act: Everything you Always Wanted to Know, 2013.

who do not have a lawyer. Lawyers often have to deal with cases in which the other person involved does not have a lawyer.

As Professor Devlin, Justice Kent and Susan Lightstone put it, judges have become multi-taskers.[92]

> The changing responsibilities of judges – including for example case management, mediation, the duty to provide reasonable assistance to self-represented litigants and specialized courts, means that a judge is no longer simply the traditional umpire but has become a multi-tasker.

These role changes are fundamental in nature; the judge is actually providing advice about what a just outcome might be. In a settlement meeting, the judge may well be recommending a settlement. In a case management meeting, the judge may well be helping the parties to identify the relevant issues and the evidence that may be needed.

3. A Constitutionally-Enhanced Adversary System

The fundamental changes in roles, together with concepts about the nature of decision-making, has led to what might be called a constitutionally-enhanced adversary system. As Richard Devlin and David Layton have described it in their article, ***Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis***:[93]

> The adversary system is a key component of our legal system, but not its only defining feature. Our legal system is also constitutional in nature, and judges are guardians of our constitutional principles and values.

The Canadian Judicial Council captured the dramatic change in the roles and responsibilities of judges and lawyers generally when developing its guidelines for people who are self-represented, called ***Self-Represented Litigants and Self-Represented Accused – Understanding and Responding***.[94] 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 justice, and equal treatment under the law for all persons;
> …

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[92] Previous note at p. 38.
[93] Richard Devlin and David Layton, ***Culturally Incompetent Counsel and the Trial Level Judge; A Legal and Ethical Analysis***, [2014] Vol. 60, Criminal Law Quarterly, 360 at p. 369. The authors state that many Canadian decisions make this point, and provide the example of R. v. Kang-Brown [200]! S.C.R. 217 at para. 7 and 12.
[94] "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 added). In the commentary to that section, the guidelines state "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 persons 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, as explained in the Commentary, "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, judges 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. This more active role for judges in family violence cases is supported by the study leave report prepared by Justice Croll, referred to above.

D. Core Professional Competencies – The Need for Specialized Knowledge

1. Core Competencies in Family Violence Cases

We have referred generally to the importance of social context analysis in the section above on substantive equality. For family violence cases, there are four essential and connected components to such a contextual analysis:[95] (1) comprehensive and up-to-

[95] The Hon. Donna Martinson***, Multiple Court Proceedings and Intimate Partner Violence – A Dangerous Disconnect***, Keynote Address, Integrated Approaches to Intimate Partner Violence: Learning and Innovating Together, Canadian Observatory on the Justice System's Responses to Intimate

date knowledge about family violence generally; (2) in-depth knowledge about equality principles found in both domestic law, including the ***Charter of Rights and Freedoms***, and international human rights laws; (3) the ability to identify and remedy inequality; and (4) making decisions with informed impartiality – understanding and addressing one's own perspectives, convictions and prejudices.

The first component involves having sophisticated knowledge about the complexity and multifaceted nature of family violence and its impact. The second involves in-depth understanding of inequality and disadvantage. The third component goes beyond simply knowing about equality law. That knowledge is necessary because it provides the standard by which inequality is measure; however, more is legally required. Judges and lawyers must be able to identify inequality and know how to remedy it by having an in-depth understanding of the social context – the lived reality – of the women and children in question.

Canada's Chief Justice, Beverley McLachlin, when speaking about judging in a diverse society,[96] explained the importance of a contextual analysis, stating that "…the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose."[97]

She expanded upon the words 'social reality' this way:[98]

> Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions *[Emphasis added].*

With respect to the fourth component, the Chief Justice, in the presentation mentioned above, spoke about the important connection between equality and contextual analysis, and impartiality. She said that not only must judges understand lived reality, but they must make decisions with what she describes as "informed impartiality." This, she stated, requires an understanding that there are subjective elements to judging, making the point that judges can have biases:[99]

Partner Violence National Conference, October 20-22, 2014, Wu Conference Centre, University of New Brunswick, Fredericton, N.B.at pp. 17-22.
http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote.pdf
***Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference*,** above, note 5, at pp. 10 – 23.

[96] ***Judging: the Challenges of Diversity***, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, June 7, 2012, Edinburgh, Scotland:
http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf

[97] Above, at p. 13.

[98] Above, at p. 14

[99] Above, at p. 7.

> "Like everyone else, judges possess preferences, convictions and – yes – prejudices."

She noted that informed impartiality requires that decision-makers have the ability to identify their own preferences, convictions and prejudices and to address them by being introspective, open and empathetic.[100] Acting with informed impartiality is a requirement for all legal and other professionals in family violence cases. It is particularly important when decisions about the credibility of allegations of family violence are being made. Providing thoughtful and comprehensive reasons for decisions that are reached, particularly when credibility must be decided, is an essential part of making decisions with informed impartiality. The process of doing so requires the decision-maker to think carefully about how and why decisions are made.[101] It also provides accountability to the people for whom the decision is being made; they will not only know why a particular decision was reached, but will also be able to challenge the decision through the appeal process if they wish to do so.

2. Professional Responsibilities to Ensure Core Competency

Specialized knowledge is central to the ability to analyze contextually in family violence cases. We have referred to the recommendations for specialized judges in family law proceedings found in ***A Roadmap for Change*** and elsewhere. The same core competencies are required in criminal law cases. We agree with Professor Rosemary Cairns Way's description of the kind of experience and expertise required in criminal law cases generally. Her comments apply with even more force to criminal law cases involving family violence:[102]

> …Criminal law is where the state and the individual citizen come into direct conflict, and, criminal law requires a depth of expertise on a range of constitutional rights as well as empathy for the human condition. It requires a sophisticated understanding of disadvantage and inequality which characterizes most of those caught up in the criminal justice system as accused, victims and members of the broader community…

There are some specialized judges in Canada who work in Unified Family Courts. There are some specialized judges who work in domestic violence criminal law courts. That specialization improves the effectiveness of the processes used and the outcomes reached in the individual proceedings. In addition, having specialized judges in each court enhances the ability of those judges to work together effectively in cases where

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[100] Above, at p. 11.
[101] The Hon. D. Martinson, "The Requirement for Reasons for Decisions", ***The Family Law Act and Family Violence: Independent and Impartial Parenting Assessments***, at pp. 19-21. https://www.cle.bc.ca/PracticePoints/FAM/13-TheFLAandFamilyViolence-IndependentandImpartialParentingAssessments.pdf
[102] ***Deliberate Disregard: Judicial Appointments under the Harper Government*****,** Working Paper Series, Faculty of Law, University of Ottawa, WP 2014 – 08, June 2014, at p. 23.

there are multiple proceedings to create the best outcomes possible for the people involved.

How do we ensure that lawyers and judges have these core competencies, particularly when education for judges is not mandatory, and for lawyers it is not mandatory for all lawyers doing this work? For judges, the National Judicial Institute has, over many years, developed comprehensive in-depth education programming for judges, which includes a major social context education component. Education programming is provided at the national level and for individual courts in each province and territory. Attendance is not mandatory. The nature of this programming, and how it has developed in a way that is consistent with the concepts of judicial independence, impartiality and accountability, is described by Professor Cairns Way in ***Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context***.[103]

For lawyers, continuing legal education institutes do have programming on family violence. The Continuing Legal Education Society of B.C. (CLEBC) is no exception. For example, two-day programming on assessing for the presence of family violence has been developed in response to the education requirements found in the FLA and its regulations. The Law Society of British Columbia has also required such education for lawyers doing mediation, arbitration and acting as parenting coordinators, and strongly encouraged all other lawyers to do the same.

Therefore, the biggest challenge is not that the programming does not exist, though improvements can always be made. Rather, it is ensuring that judges and lawyers who do work involving family violence have the benefit of that education. Accomplishing this goal is particularly challenging in places like British Columbia where the judges who preside over family violence cases are generalist judges and many lawyers who practice in the area also practice in other areas of the law. It is challenging, particularly with very busy work schedules, to participate in education programming in all areas of the law.

We suggest that both judges and lawyers have professional obligations to do their work competently. The professional obligations simply cannot be met without engaging in ongoing education programming which has a focus on family violence. Professor Cairns Way describes the nature of the professional obligations, noting that social context education is linked to judges' "legal obligation to enforce and enhance the quality guarantee writ large."[104] She characterizes this as a matter of judicial responsibility, not judicial choice. Professor Cairns Way also makes the important point that there is a public component to judicial education; the public has an overarching interest in the delivery of fair and impartial justice.[105] Professor Devlin, Justice Kent and Susan Lightstone link this view of judicial professionalism to judges' ethical obligations to do

[103] Above, note 86.
[104] Above, note 86, citing the remarks of retired B.C. Supreme Court Justice Lynn Smith when she was Dean of Law at UBC.
[105] Above, note 86 at p. 34.

their work competently, describing social context responsiveness as an ethical obligation.[106]

E. Informed, More Active Judging: Not a Substitute for Effective Legal Representation

We have suggested that judges should have the kind of specialized knowledge needed to make fair, equality based decisions in these complex cases. We have also suggested that, as part of their professional obligations, judges must, when appropriate, take a more active role in ensuring that relevant information is available. This more active approach is necessary for two reasons. The primary one is the very large numbers of people who appear in our courts without legal representation. The common terminology used is that these people are self-represented. The reality is that they are without legal representation. The other involves some oversight of the competency of counsel, when there is legal representation. A discussion of the latter is beyond the scope of the report.[107]

We have also emphasized that a more active judicial role remains one that is, and must be, consistent with judicial independence and impartiality. As a result, the questions asked must be non-adversarial in nature. They may be questions based on relevant legal principles, such as, in determining whether family violence is an issue, whether the specific factors relating to family violence in the FLA, including the risk factors in section 38, referred to in Part I of the report, are relevant. Doing so would include a specific question about other relevant proceedings.

We wish to emphasize that this more active role for judges is in no way a substitute for effective legal representation. Lawyers act as advocates, advancing the legal rights and interests of the people they represent. Legal representation has many functions that cannot be engaged in by judges. For example, judges cannot obtain confidential information and provide confidential general and strategic advice. Judges cannot advocate for the legal rights of a person before the courts, especially when doing so might be contrary to the interests of others in the court proceedings. They will not be aware of information or circumstances that may make the disclosure of certain information, or the advancement of certain positions, unwise.

In the area of family law generally, as well as in cases where family violence has been identified as an issue, advancing a woman's equality rights under the ***Charter of Rights and Freedoms*** and other domestic legislations, and under international law, is a complex legal undertaking. Lawyers and judges have struggled with identifying the nature of equality rights and remedies. And yet, family law is an area of law in which

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[106] Above, note 89, at p.12. An in-depth discussion of this article is beyond the scope of this report. It contains an important discussion of the evolving nature of judging in a pluralist society, emphasizing the concept of ethical judging by judges as ethical beings. It looks closely at the nature of judicial ethics education in Canada and suggests ways of enhancing that education to capture the evolving challenges faced by judges in the 21st century.

[107] See the discussion of this issues in ***Culturally Incompetent Counsel and the Trial Level Judge: A legal and ethical Analysis*****,** above note 93, pp. 375-378.

women have in the past faced, and continue to face, systemic discrimination. Providing legal information, and even initial legal advice, though always useful as a first step, cannot capture this complexity. The guidelines for self-represented litigants developed by the Canadian Judicial Council, referred to above, reinforce this point, specifically stating in the preamble that "…access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel."

Judging in circumstances where one person, or more than one person, is without effective legal representation can be challenging for judges. In the experience of the researcher who is a retired judge, it is exceedingly difficult to act, and to be seen to be acting, fairly and impartially. The challenges are even more complex when one person has legal representation and another does not. Lawyers carry out the role of assisting the court in understanding the legal principles at play (judges of course do not have all relevant legal principles at their fingertips), the way in which the evidence should be interpreted in the fact finding process, and how the legal principles should be applied to the findings of fact to reach a just result. Lawyers have law degrees, which equip them to do this. That very important assistance is missing when there is no legal representation, leaving the judge to sort it all out.

Being in a judicial process, whether it is a dispute resolution process, case management, hearing or trial, can be intimidating for most people. They can be nervous, and not at their best. Having legal representation assists in that respect. People without lawyers often, and understandably, do not understand what judges can and cannot do, leading to unrealistic expectations about outcomes. Similarly, they may have unrealistic ideas about what is and is not evidence generally, and what is relevant to the matters at issue.

VII. MOVING FORWARD: GOALS, OBJECTIVES AND ESSENTIAL CONCRETE ACTIONS

A. 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."[108]

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 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 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: case management when there are both criminal and family proceedings; the need for specialized knowledge; determining appropriate roles for judges and lawyers in a constitutionally-enhanced adversary system; accessible, effective legal representation; and protection order enforcement.

Our ideas are based on our view that it is important to look for opportunities for change, not obstacles to change.[109] 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:[110]

> …if we want the legal profession to remain relevant into the next century, our only choice is to turn the changes that are already upon us into opportunities to build a new and invigorated legal profession.
>
> The first step is to accept the idea of change. Lawyers and judges need to stop fearing change. Change should not be seen as evil, but rather as the source of new opportunities...
>
> ...Flexibility and innovation, yes. Abandonment of core professional values, never. Therein lies the challenge and the opportunity of the future.

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[108] Above, note 1 at p. 08.
[109] 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 95.
[110] 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

The Third B.C. 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 communities. The historical shift in family law to cooperative values needs to be integrated more deeply into the family justice system. Three elements that are needed for the change are listed as being: (1) a vision based upon the core values; (2) leadership from the judiciary on collaboration and cooperation; and (3) an enforcement mechanism to ensure those values are actually put into place.[111]

Following the recommendations in ***A 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 that has separate court proceedings dealing with the same issues, which can have such a significant impact on their day-to-day lives?

We do not purport to provide all of the right answers. Rather, we provide a framework for analysis, suggesting some overarching family law goals and some specific objectives relating to multiple court proceedings. We then identify four areas that need particular attention and suggest some concrete steps that could be taken. The four areas are: (1) case management; (2) specialized knowledge; (3) appropriate roles for judges and lawyers in family violence cases; and (4) accessible, effective legal representation. We conclude this Part by looking at a specific multiple court proceeding issue arising under the FLA – the enforcement of Protection Orders.

B. Overarching Family Violence Goals

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

1. 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.

2. Equality rights and values

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

[111] http://www.cba.org/CBA/sections_family/newsletters2014/bc.aspx

3. 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
    - in arbitrations
    - in parenting coordinating processes
    - in judicial dispute resolution forums
    - in case management hearings, and
    - in court hearings and trials.

4. 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.

5. 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.***

6. 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.

C. 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:

1. 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.

2. 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."

3. 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.

D. Essential Concrete Actions

1. Case Management

Issues

We have explained that two case management issues arise. The first is management by one judge of individual proceedings. 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,[112] points to several "promising practices" relating to case management, which are described in our Discussion Paper.[113] 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

[112] Above, note 25.
[113] Above, note 9 at pp. 20-26

- 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 that 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 between 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.
- This working group could, as raised as a theme in the Fourth B.C. Justice Summit,[114] consider the privacy questions that arise when considering the sharing of information, taking into account the promising practices of the Federal-Provincial-Territorial report, outlined in our Discussion Paper.[115]
- 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.

2. Specialized Knowledge

Issues - Judges

We have referred to the recommendations in ***A Roadmap for Change*** and ***Meaningful Change for Family Justice: Beyond Wise Words***, recommending specialized judges in family law cases. Among the themes of the Third B.C. Justice Summit was support for an increase in specialized judges and family courts:[116]

[114] Fourth B.C. Justice Summit, above, note 59, at p. 31
[115] Above at pp. 26-29
[116] Third B.C. Justice Summit, above, note 63, at p. 11

> 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.

In the discussion entitled "the family court process should be simplified further," there is a reference to specialized judges:[117]

> 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.

A theme of the Fourth B.C. 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."[118]

The need for specialized knowledge by judges in both family law and criminal law cases 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. In the same fashion, the Court in British Columbia should consider ways to ensure that all judges hearing criminal cases in which family violence is an issue have the specialized knowledge required to do so effectively.

The kind of education required, as we have explained, must be comprehensive, in-depth and ongoing. It must be credible, both from the perspective of the judiciary and the public. It requires a professional commitment to continually be informed and updated. A one-time course or program is completely inadequate to meet these competency requirements. We agree with retired B.C. Supreme Court Justice Lynn Smith when, as Dean of Law at the law school at the University of British Columbia, she described social context education such as this as a life-style change rather than a one-

[117] Above at p. 15
[118] Fourth B.C. Justice Summit p. 31

time "inoculation.[119] Though we have argued that individual judges have professional responsibilities to ensure that they are competent, we also suggest that courts, as institutions, have obligations to ensure that judges have the time necessary to do so effectively.

Access to Justice B.C., the committee described earlier, would be one forum in which to discuss these issues.

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 needed to make sure that representation is based on the required equality-based analysis.

British Columbia has, through the Continuing Legal 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, which took 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 that lawyers participate in legal education programming, it does not require lawyers, whether, in our case, family law lawyers, defence counsel or Crown counsel, to take specific courses that may be essential to the work that they do.

Lawyers – Possible Concrete Action

The Law Society should reconsider its approach to specialization, or at least to having specific course requirements for all lawyers, beyond what is now required, in family law cases and in criminal cases where family violence is or may be an issue. The Ontario Law Commission has created a course on domestic violence for law school curriculums.[120] Other provinces should consider this "early start" approach to specialization/education while maintaining workshops and education on domestic violence for practicing lawyers subsequently as well.

[119] Lynn Smith, ***Statement of Needs and Objectives for Continuing Judicial Education on the Social Context of Judicial Decision Making,*** (Ottawa: National Judicial Institute, 1996) [published, archived at the NJI], cited by Professor Cairns Way, above note 86 at p. 23.
[120] http://www.lco-cdo.org/violence-against-women-modules-final-report.pdf

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

Issues

How do judges and lawyers, as guardians of our constitutionally-based legal system, facilitate, in cases where family violence is or has the potential to be in issue, 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, with multi-disciplinary participation, the kinds of affirmative, non-prejudicial steps judges and lawyers might take. Similarly, lawyers could examine the same questions in a continuing legal education setting. Collaborative education programming with lawyers and judges both attending would also be beneficial.

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.

Any discussion of the roles of lawyers and judges would benefit from broader community involvement. This involvement might be facilitated through the Access to Justice B.C. committee.

4. Accessible, Effective Legal Representation

Issues

We have made the point that the more active role we suggest for judges is not a substitute for the effective legal representation needed to ensure equality-based processes and results. We have pointed out that both the lawyers and judges, in response to our research questions, spoke about the challenges that the lack of effective legal representation can cause in family violence cases in both the family law and criminal law proceedings.

In our broader community consultations, the issue of the lack of legal representation for women in family law cases generally was identified as a significant inequality issue. This view of the importance of the issue was reflected in ***Foundation for Change – Report of the Public Commission on Legal Aid in British Columbia***, which indicates that "women are disproportionately affected by inadequate legal aid in family law because they are frequently in a situation of relative economic disadvantage and they often bear the lion's share of both the short-term and long-term consequences of our failures in this

regard."[121] That report also states that the need for adequate legal aid is "very compelling in situations where a woman is attempting to leave an abusive relationship, and her life and her physical and emotional security are at risk, as is the safety of her children."[122]

We suggest that, with respect to family law proceedings, there are three related factors that have had a negative impact upon the provision of effective legal representation that must be addressed to achieve equality-based outcomes and processes. They are: (1) the view of family law by some in the legal profession as not very complex – not "real law"; (2) the characterization of family law as simply dealing with private disputes; and (3) the significant emphasis that has been placed, by those responsible for funding legal aid, on the need for legal representation to protect the constitutional rights of people accused of a crime.

With respect to the way family law is viewed, ***Meaningful Change for Family Justice: Beyond Wise Words*** looked at the place of family law in the larger justice system, describing it as the poor cousin:[123]

> In trying to set the general context for the problem of access to justice and family law reform, it is important to comment on the place of family law in the larger justice system. While the field of family justice has many dedicated and energetic champions, it is nonetheless the "poor cousin" in the justice system. This is true inside the system where it is subsumed in the larger "civil justice" category and regarded as an undesirable area of practice by some lawyers and law students.

That report also notes how family law has lost its way in most Canadian law schools, stating, specifically that it has been "de-emphasized by law schools, in favour of subjects more attractive to large law firms and global practice."[124] In the context of legal representation, an important adverse consequence of the poor cousin line of thinking, the undervaluing of family law, is that those in a position to make decisions can conclude, and it seems some have concluded, that people in family law cases – and our focus is on women – do not need representation; instead some legal information, or limited advice, will suffice.

For us, this devaluing of family law is difficult to understand for many reasons. We suggest these related ones. It deals with fundamental societal values, requiring us to examine the conceptual underpinning of relevant legal principles such as: what a family is; what significance should be attached to roles within the family; what kind of parenting is and is not in a child's best interests; under what circumstances the state should intervene in significant ways between a child and the child's parents; in such cohabitation relations, to what extent the state should govern the financial relationship

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[121]Commission Leonard T. Doust, Q.C., March 2011 http://www.lawsociety.bc.ca/docs/publications/reports/pcla_report_03_08_11_1_[1].pdf at p. 16.
[122] Previous note, at p. 16.
[123] Above, note 1, at p. 13.
[124] Previous note at p. 28.

between adults; and when the state should intervene when these adults enter into contracts. Next, in addressing those, and other questions, family law engages both the ***Charter of Rights and Freedoms*** and international human rights instruments to which Canada is a signatory. What does substantive equality really mean in the family law context, generally, and in cases where there is family violence in particular? How can historical discriminatory disadvantages, ones that have disproportionately affected women, be ameliorated? How should the law deal with beliefs and values found in a multicultural society that may not be consistent with traditional views?

Family law also invokes issues of fairness and impartiality. The issues it raises are often controversial. It is an area that affects lawyers and judges at a very personal level, as the breakdown of relationships occurs across society. As we have discussed, it requires legal professionals to reflect upon how their own experiences and values can inform the opinions they hold about relevant societal issues. Finally, family law is important to the public view of the justice system. Family law issues are often in the public eye, and it is arguably the area of law where most people come into contact with the legal system. It significantly shapes the way the public views both the fairness of substantive law principles and the fairness of the processes by which the legal system tries to ensure that cases are dealt with in a fair, timely and economical manner. The importance of the public perception of the administration of justice cannot be overstated.

The second factor that has had a negative impact upon the provision of effective legal representation in family law cases is the characterization that it simply deals with private disputes. It is true that the state is not a party. However, there is a very strong public interest in ensuring that our substantive laws and processes operate in a way that protects the safety, security and well-being of the victims of violence. Beyond that, there is an important public interest in ensuring that other human rights, such as financial security, education, and health, to name only a few, are adequately addressed. These rights relate directly to family law decisions about not only parenting decisions, but child support, spousal support and property division. These are all areas in which women have been, and continue to be, disproportionately disadvantaged; they are also inextricably linked to some of the root causes of family violence.

The third factor we have identified is what we suggest is the significant emphasis that has been placed, by those responsible for funding legal aid, on legal representation to protect the constitutional rights of people accused of a crime. People charged with crimes legally have, and should have, constitutionally protected rights to not be wrongfully convicted and to not inappropriately lose their liberty. Providing state-funded representation has meant that significant legal time and energy has gone into developing those protected rights in ways that benefit accused people. Most, though not all, accused people are men.

But women and children also have rights under the ***Charter of Rights and Freedoms***, and international human rights instruments, to be protected from the physical, psychological and emotional harm violence causes, and to the equal benefit and

protection of the law. However, without adequate legal representation, they do not have the ability to obtain the benefit of those rights. Unlike the rights that apply to people accused of crime, the nature and extent of those rights has not been, and cannot be, fully explored by lawyers and the courts in the same way. The opposite has, in fact, happened; we discuss unbundling legal services in family law, and court challenges programs that benefit women have, at least for the last several years, been cancelled. (For more information on the importance of a rights-based report, see West Coast LEAF's helpful reports, ***Putting justice back on the map: The route to equal and accessible family justice*****,** by Laura Track, in collaboration with Shahnaz Rahman and Kasari Govender, and ***Rights-Based Legal Aid: Rebuilding BC's Broken System*****,** by Alison Brewin and Kasari Govender.[125])

We respectfully suggest that the present approach to providing legal representation, one which seeks to address the needs of the criminal justice system first, and then consider family law only to the extent that there are funds left over, is not operating to provide justice for all. It is a significant inequality issue for women. Changes can and should be made to dealing with criminal law cases that are more cost effective, and yet still protect well the important constitutional rights of people charged with crimes. At the same time, we can and must provide the legal representation necessary to protect the constitutional rights of women and children in family law cases.

In the context of family violence, we wish to emphasize that, in our view, it is not an answer to say that the lack of legal aid funding for legal representation is addressed by having an exception for family violence cases. We have mentioned the complex nature of family violence, going well beyond physical violence, the significant impacts that violence can have, and the relevance of trauma to the ways in which women understand and deal with violence. We have discussed the importance of the specialized knowledge judges and lawyers need to have to address it. We have also referred to both the extent of family violence, and the reluctance of many women to report it or discuss it at all. To place the onus on a woman to satisfy someone that issues of family violence arise and may impact her case, right at the outset of her case, so as to qualify for legal representation, inappropriately "puts the cart before the horse."

We also note the concerns raised in our responses related to a "fast justice" approach to criminal law and suggest that an emphasis on more effective legal representation for accused people is needed.

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[125] ***Putting justice back on the map - The route to equal and accessible family justice*****,** February 2014:
http://www.westcoastleaf.org/wp-content/uploads/2014/10/2014-REPORT-Putting-Justice-Back-on-the-Map.pdf
Rights-Based Legal Aid, Rebuilding BC's broken System**,** 2010**:**
http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf

Possible Concrete Action

We will consider each of the three factors we have identified.

The first is the view of family law held by some in the legal profession as not being very complex – not "real law." We suggest that law schools and continuing legal education organizations accept the recommendations of both ***A Roadmap for Change*** and ***Beyond Wise Words*****,** that, in essence, the culture of law schools must change to reflect the importance of such areas of law as family law and poverty law. To the extent that this has not already been done, law schools should, as suggested, hire and develop more full-time professors interested in family law. It would be helpful and appropriate to have law schools report on how they are addressing these and other suggestions found in the access to justice reports.

The second factor is the characterization of family law as simply dealing with private disputes, rather than having an important role to play in meeting the important public policy goal of reducing or eliminating family violence. Much more education programming by all legal educators, including those who develop programs for judges, about the nature, extent, and impact of family violence would go a long way.

The third factor is the significant emphasis that has been placed, by those responsible for funding legal aid, on the need for legal representation to protect the constitutional rights of people accused of a crime. The Government of British Columbia, together with the Legal Services Society, should examine its present allocation of resources, and policies and practices to reflect the needs of women and children in both family law cases and criminal law cases, and to better reflect the needs of those charged with crimes.

1. Protection Order Enforcement

Issue

The Protection from Family Violence Order enforcement scheme in the FLA, one in which Protection Orders granted by judges in a family law proceeding 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 that 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 actually secured for both the involved women and children victims.
- looking at case management options (see below, under the heading Case Management)

VIII. CONCLUDING OBSERVATIONS: A MEANINGFUL JOURNEY

What we began two years ago was a modest exploratory study of the impact the FLA was making on the ways in which the court system obtains and addresses information about family violence and the risk of future harm. As we proceeded with the research, however, the emerging results provided a natural springboard for wider discussion and consideration of integrally related domestic violence issues. The end result forms quite a unique piece of research in which the opinions and perceptions of community and justice system personnel (including judiciary from both the Provincial Court and the Supreme Court who deal with family law and criminal proceedings), defence lawyers and Crown counsel) were heard, analyzed and compared within the same time frame about the same issue of sharing of risk information in individual and multiple proceedings involving family violence cases. With respect to the process involved, we focused primarily on consultations and interviews with community and justice personnel, developing questions for the latter group out of the community consultation findings and a preliminary review of the pre- and post-FLA case law.

Through our iterative examination of the themes that arose, we were struck more by the commonalities of the articulated challenges and proposed solutions in all the groups than the differences. Interestingly enough, those themes were also consistent with the contemporary scholarly literature on domestic violence. Whether the issue was the case management of domestic violence cases, the need for specialized knowledge about family violence among justice and other personnel, legal representation of the parties involved, protection order enforcement, or the appropriate roles for justice personnel, there seemed to be common understandings of the problems and the need to address them through similar suggested solutions – similar concrete actions. We were also struck by the willingness of participants to share their thoughts with us, and their frequent encouragement to pursue and explore yet other relevant avenues. We sincerely thank them for their generosity with their time in that regard.

Our interests and efforts were also stimulated and influenced by the various key government papers and conferences being produced and organized in the area in recent times. The vision and leadership provided by the Ministries through those venues were most encouraging. We give special recognition as well to the National Justice Institute, the Continuing Legal Education Society of B.C., the Canadian Observatory on the Justice System's Response to Intimate Partner Violence, and the Interprovincial Forum on Judicial Treatment of Domestic Violence, for facilitating educational goals in their own events which encouraged networking for collaborative research efforts against domestic violence as well as the sharing of best practices/procedures/protocols for the processing of domestic violence cases.

Finally, we do want to look to the future. In that respect, we find the recent mandate letter from the Prime Minister to the Minister of Justice and Attorney General of Canada encouraging. Whether it is bail reform or the creation of a unified court, the fact that there are now directives from the federal government to seek such concrete actions is heartening. Similarly, an example at the provincial level is the new set of regulations which relate to the preparation and signing of Protection Orders under the FLA – a

tightening of the protocol, which will ensure greater safety for the victim. Significantly, all sectors – government, community, justice personnel, and academia – recommend interdisciplinary education about domestic violence for not just the police and justice personnel but for child protection workers and those who work with abused women as well. We are thankful for Canada's Truth and Reconciliation Commission's calls to action for Aboriginal people,[126] and think that those that focus on justice generally, on the disproportionate victimization of Aboriginal women and children, and on the education of the legal professional, will be particularly useful in this context. These kinds of initiatives and recommendations encourage the potential for more evidence-based research, which can in turn inform further innovative and concrete solutions.

Our last words speak to the hope that our report can also contribute to, and inform, the important collaborative discussions now taking place across the country. There is a sense of a growing social movement that is becoming refreshingly more inclusive and less siloed in effect, directed toward securing equality and justice for family violence victims and their children.

The authors wish to acknowledge and thank Dr. Katherine Rossiter for her editorial assistance on the report.

[126] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

ADDENDUM

Within a week of the release of the current RISK Report, Statistics Canada also released its 2014 report on Family Violence (*Family violence in Canada: A statistical profile, 2014*) on January 21, 2016. The authors felt it would be remiss of them not to make mention of that report in an Addendum, and to include the link to it. Similarly, *a few* of the updated findings relevant to our earlier discussion on the nature of intimate partner violence (in Section D. Focus on Violence against Women, pp. 13-14) are provided below the link:

http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14303-eng.htm

I. *Police-reported* family violence in 2014:

- ****A key finding and difference from the 2009 report** was the fact that from 2009 to 2014, regardless of the type of relationship between the victim and the perpetrator, the rate of police-reported family violence continuously declined, dropping 16% from a rate of 227.0 per 100,000 population in 2009 to 191.2 in 2014 (Table 2.7).
- Similar to previous years, close to seven in ten victims of family violence reported in 2014 were females (68%), either young girls or women (Table 2.1).
- Just under half (48%) of victims of police-reported family violence were victimized by a spouse or an ex-spouse, while nearly one in five were victimized by a parent (18%) (Table 2.1).
- Female victims of family violence (56%) were more likely to be victimized by a spouse than male victims (31%). Among male victims however, a parent (24%) or an extended family member (18%) was more likely to be the perpetrator when compared to female victims (15% and 11%, respectively) (Table 2.1).
- Regardless of age, females were at a greater risk of family violence than males. The rate of family violence against females (327.6 per 100,000 population) was double that of males (157.7). The gap between male and female rates of family violence increased with age until age 30 to 34 years, at which point the difference was greatest, with rates of family violence against females (579.4) more than three times that of males (192.3). Rates of police-reported family violence among female victims are largely attributable to spousal violence. Female victims of police-reported family violence were most commonly victimized by a spouse (56%) rather than by other family members (Table 2.2).
- Most victims of police-reported family violence were victims of physical assault (73%). Among these victims, four out of five were victims of common (level 1) assault (80%). Combined, uttering threats (11%) and sexual offences (8%) were experienced by nearly one in five victims of police-reported family violence in 2014 (Table 2.3).
- In 2014, sexual offences (10%) and criminal harassment (5%) were more than twice as common among female victims of police-reported family violence as male victims (4% and 2%, respectively). Major physical assault (levels 2 and 3) was more common among male victims of police-reported family violence than female victims (19% and 11% respectively) (Table 2.3).

- In 2014, police data recorded the lowest family-related homicide rate over the past three decades (3.7 per 1 million population). However, women continued to be at a higher risk of family-related homicide (4.8) than men (2.6) (Table 2.8).

Data from the 2014 GSS show that individuals self-identifying as Aboriginal were more than twice as likely as non-Aboriginal people to report experiencing spousal violence in the previous five years (9% versus 4%, respectively). In particular, Aboriginal females were more likely to be victimized by current or former partners, as compared to non-Aboriginal women. Rates of self-reported spousal victimization among the Aboriginal population have not changed in a significant way from 2009 (10%) to 2014 (9%).

As was the case a decade earlier, in 2014, there were notable differences between the severity of violence experienced by women compared to men. Women were twice as likely as men to experience being sexually assaulted, beaten, choked or threatened with a gun or a knife (34% versus 16%, respectively). Conversely, men were more than three and one-half times more likely than women to be the victim of kicking, biting, hitting or being hit with something (35% versus 10%, respectively).

- In 2014, victims of intimate partner violence accounted for more than one quarter (27%) of all victims of violent crime reported to police or 88,600 incidents of violent crime. Four out of five victims of police-reported intimate partner violence were women (Table 3.1).
- Intimate partner violence was the most common form of police-reported violent crime committed against females at 42% compared to 12% of male victims
- More than half (52%) of victims of police-reported intimate partner violence were victimized by a dating partner, while a spouse was the perpetrator for 46% of victims.
- Physical assault (77%) was the most common offence experienced by victims of police-reported intimate partner violence, followed by uttering threats (8%), and criminal harassment (6%) (Table 3.3).
- ***Sexual offences were ten times more common among female victims of intimate partner violence (4%) than male victims (0.4%) (Table 3.3).*
- Similar to previous findings, the majority of victims of police-reported intimate partner violence in 2014 were involved in incidents that were cleared by police through the laying or recommendation of a charge (72%). Approximately 15% of victims of intimate partner violence were in incidents which were cleared by means other than the laying of a charge, for example at the request of the complainant that charges not be laid (6%). The remaining 13% of victims were involved in incidents which were not cleared. (Table 3.5).

II. *Self-reported* trends in spousal assault 2014 (from General Social Survey):

- Similar to police-reported family violence, the self-reported spousal assault figures indicated a decline in 2014, 4% of Canadians in the provinces with a current or former spouse or common-law partner reported having been physically or sexually abused by their spouse during the preceding 5 years, according to

the General Social Survey (GSS) on victimization. This represents a drop from a decade earlier, when 7% of respondents reported experiencing spousal violence.

- In 2014, equal proportions of men and women reported being victims of spousal violence during the preceding 5 years (4%, respectively). Similar declines in spousal violence were recorded for both sexes since 2004.
- According to the 2014 GSS, the most commonly-reported type of spousal violence experienced was being pushed, grabbed, shoved or slapped (35%). A quarter of victims (25%) reported having been sexually assaulted, beaten, choked, or threatened with a gun or a knife. A similar proportion (24%) reported having been kicked, bit, hit, or hit with something. As in previous years, women reported the most severe types of spousal violence more often than men.
- Just under one-third (31%) of spousal violence victims in the provinces reported sustaining physical injuries as a result of the violence. Women were proportionally more likely than men to have reported physical injuries, with 4 out of 10 (40%) female victims reporting injuries compared to just under a quarter (24%) of male victims.
- Results from the 2014 GSS indicate that psychological effects consistent with Post Traumatic Stress Disorder (PTSD) are fairly common among spousal violence victims, with about 16% of victims reporting three or more of the long term effects associated with PTSD. Female victims were more likely (22%) to report these effects than male victims (9%).
- For the majority of spousal violence victims, the police were never made aware of the abuse (70%). Male victims were more likely to state that the spousal violence had not been brought to the attention of police (76%) than female victims (64%). When police had been made aware of spousal violence, most victims reported that they were satisfied with police response (65%).
- Data from the 2014 GSS show that individuals self-identifying as Aboriginal were more than twice as likely as non-Aboriginal people to report experiencing spousal violence in the previous five years (9% versus 4%, respectively). In particular, Aboriginal females were more likely to be victimized by current or former partners, as compared to non-Aboriginal women. Rates of self-reported spousal victimization among the Aboriginal population have not changed in a significant way from 2009 (10%) to 2014 (9%).
- According to the 2014 GSS, many Canadians across the provinces reported having been emotionally or financially abused by a current or former spouse or common-law partner at some point during their lifetime. In total, 14% of those with a current or former spouse or partner reported this kind of abuse. Men were slightly more likely than women to report emotional or financial abuse (15% versus 13%).

APPENDIX A: Summary – Meeting With B.C. Provincial Court And Supreme Court Judges

January 21, 2015, Vancouver, British Columbia

Outline:

Part I - Background to the Judges' Meeting

On January 21, 2015, five judges of the B.C. Provincial Court and four judges of the B.C. Supreme Court met with retired judge the Honourable Donna Martinson. The meeting was hosted by and attended by the Chief Judge of the Provincial Court, Tom Crabtree. It took place as part of a qualitative exploratory research project conducted by Donna Martinson and Dr. Margaret Jackson. They made a written request to both the Provincial Court and the Supreme Court for the participation of some judges from each Court. The judges who attended were selected by each court. The nine judges included both men and women, and were judges who had extensive experience in family law, criminal law, or both.

Before attending the meeting the judges reviewed a Discussion Paper prepared for the research project, called ***Risk of Future Harm: Family Violence and Information Sharing between Family and Criminal Courts*.**
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

They also received these five research questions in advance:

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

At the meeting, Donna Martinson asked the five questions and received responses. The summary of the responses follows. The responses represent the views of a small group of judges only. They do not represent the general views of each court. Nor do all the comments contained in the summary necessarily represent the views of all of the judges attending the meeting.

Part II – Information Sharing in Individual Proceedings

Question 1: Is information about risk of future harm generally provided to judges hearing family law cases involving family violence? Criminal law cases?

Question 2: If risk information is being provided, what form, generally, would it take? (Eg. risk instruments, experts)

A. Family Law Cases

It is uncommon to be provided with information about the risk of future harm in family cases. Risk of future harm is sometimes raised in parenting assessment reports prepared based on s. 211 of the *Family Law Act*, but even then the focus is more on parenting capacity generally than it is on the risk of future violence. There is never a formal risk assessment. Judges rely on their own knowledge and experience.

Particular comments included these:

- It can be a challenge to muster even a basic case.
- Rarely, if ever, is accurate information provided about the risk of harm; lawyers stay away from this topic and provide a sanitized version.
- Relies on own experience about risk and has a list of risk factors available, when in court, compiled from various sources.
- In child protection cases, information about risk is sometimes provided by social workers.

B. Criminal Law Cases

1. Judicial Interim Release

At the judicial interim release (bail) stage, formal risk assessments are not used. Four or five years ago, the Crown in Vancouver regularly tried to present expert evidence at the bail hearing, but that does not happen now.

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. The exception is when "dedicated" Crown are involved – those who only do domestic violence cases.

Particular comments included these:

- The Crown is not able to say whether a previous assault conviction relates to the same complainant.
- Not enough information is provided; it is really difficult to “drill down” and find out anything.

2. Sentencing

Pre-sentence reports usually don't focus on risk, specifically. Judges must read between the lines.

The question of risk may be raised in a psychological assessment, but usually does not include a formal risk assessment.

Formal risk assessments are not at all common. They are only seen in "serious" criminal cases, which would attract a substantial jail sentences.

Part III – Information Sharing: Both Criminal and Family Proceedings

Question 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?

A. Family Proceedings and Criminal Proceedings Operating in Silos

The criminal and family proceedings do operate in silos. Judges almost always don't know that other proceedings relating to the same family are taking place. They may get hints that there is another proceeding, but that is all. They don't have information about other court orders. Judges "don't know what they don't know" in this respect.

Information from other proceedings specifically about the risk of future harm is not shared.

The lack of information about other proceedings does not just happen when the cases are in different locations. It can happen when there are two or more proceedings taking place within the same court house.

It was pointed out that when a non-parent, such as a grandparent or aunt/uncle makes an application for guardianship, those files proceed separately and are not cross-referenced with any other files relating the child/ren in question.

Managing multiple proceedings may be a bigger problem in larger places. In smaller communities people involved, such as duty counsel, or probation officers usually know about both/all proceedings.

B. The Role of Lawyers

Lawyers who act in family proceedings are often not well-informed about the status of other criminal proceedings and what other orders might say. This is a significant problem. Some do not seem to think that it is their responsibility to find out, even if asked to do so by a judge. Others provide answers that cannot be accurate, indicating a lack of knowledge about the criminal law process.

C. People Attending Court without Lawyers

If people who do not have lawyers raise the fact that there is an order in another proceedings, they usually don't know what it says. A challenge with self-represented people is that they often do not prepare the necessary formal court order when a judge

makes a decision. This create problems because the "losing" party can try to apply again in front of another judge. It also makes it very difficult to prevent conflicting orders when the judge does not know what the order says. However, if the order is a Protection Order from Family Violence Order under the *Family Law Act* the order will be prepared by the Court registry and placed on the B.C. Protection Order Registry.

D. Lack of Enforcement of Court Orders

There was a concern about the lack of enforcement of the court orders that are granted. This was viewed as a serious problem, described as "massive" one which may make the new *Family Law Act* ineffective – a "broken piece of legislation." Examples were provided of situations where orders were being breached without consequence. Enforcement may be less of an issue in smaller communities.

E. Other Matters

On the issue of multiple proceedings, one judge made the point that there is a real concern when the wife does not go to the police, but it is clear that she is quite frightened of her husband.

An example of the challenges of lack of information was provided. A woman signed a safety plan with the child protection authorities in which she agreed the husband would not have contact with her or the children. The judge hearing a later case in which contact was an issue did not know about that plan.

The challenges that arise in such a case when the people do not have lawyers was also raised. Because it involved a review hearing the legal services society would not provide legal assistance. Yet two to three day hearing was scheduled at which substantive parenting decisions would be made.

Part IV – Benefits and Barriers

Question 4: Are there (a) any benefits that exist for the sharing of such risk information? (b) any barriers, concerns?

A. Benefits

There was a consensus that it is very important to know about other court proceedings and court orders.

There was also agreement that judges want as much relevant information as is admissible in the proceeding over which they preside. They would "like to have the information that is out there" about past behaviour that could be an indicator of future behaviour.

B. Barriers

A number of barriers to information sharing were identified. While judges had no difficulty with receiving information about the existence of other court proceedings and about orders made in those proceedings, more concerns were expressed about sharing other information that may be relevant to the risk of future violence.

A significant concern related to what a judge would do with information that the judge does get. For example, a judge should not get a Report to Crown Counsel generated by a police investigation.

Some judges were concerned about an Australian "promising practice" identified in the Discussion Paper this way: “Statutory amendments in Australia requiring the family court to ask each party about the existence of family violence relating to themselves or their children” (At p. 30)

They pointed out that there is not an "inquisitorial" judicial system in Canada, one in which judges have a role in gathering evidence. Rather, judges in our system make decisions based on the evidence presented to them; it is not their role to gather evidence. Judges have to be really careful about not "descending into the fray." Judges often have to "put blinders on" and decide cases based on the evidence presented. And judges often sign orders called Desk Orders – orders granted based on written material, including affidavits which judges read in their offices. Most of the time additional information is not requested in those cases.

One judge expressed the view that 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 good management.

Another related concern was the limited amount of court time available and the need to make the most effective use of that court time. "Court time is so valuable" It could de-rail a proceeding to intervene and start asking questions about whether there is missing information relating to the risk of future harm.

There is a real difficulty with the lack of legal representation for self-represented people. It is very difficult for them to get information about other proceedings.

Part V – Recommendations

Question 5: What recommendations, if any, could be made to ensure that courts have relevant information about risk in legally permissible ways?

A. Initial Ideas

Several initial ideas were discussed as possibilities:

- A software system that would allow data sharing about other proceedings between/among courts.
- The use of court Rules to facilitate the sharing of information about other court proceedings. (The Provincial Court is in the process of revising its rules and the Rules Committee will consider this issue)
- Carefully worded plain language court forms containing tick boxes which would require people using the court to provide information about other court processes.
- Using, as a starting point, the requirements in the *Family Law Act* that judges and parents must consider other criminal and civil proceedings when deciding the best interests of a child. (S. 37(2)(j) of that *Act* requires that judges, lawyers and parents, when determining the best interests of a child, consider other civil and criminal proceedings affecting the safety, security and well-being of the child.)
- Similarly, using as a starting point as well as the provision in the *Family Law Act* that a non-parent applying for guardianship must file an affidavit providing the relevant information (S. 51(2) of the *Act*).
- A systemic rather than ad hoc cross-referencing of files.
- Judges having the ability to appoint a lawyer for an unrepresented person when appropriate to assist that person in dealing with the challenges created.

B. Ideas for the Future

Both courts should consider the issues raised further, and then consider having a joint education program dealing with multiple proceedings. A discussion followed this suggestion with respect to a plan to have a joint court webinar which both courts are discussing.

One judge said that it is very important, before making recommendations, to have a real understanding of what the existing problems are in each process which have led to the present situation. Otherwise, a solution in one area may have adverse consequences in another.

APPENDIX B: CJB Response to Research Questions

Question #1 – Is information about risk of future harm generally provided to judges hearing family law cases involving family violence? Criminal law cases?

The Criminal Justice Branch (the "Branch") is not able to comment about what information regarding risk of harm is generally provided to judges hearing family cases involving family violence. The comments below are limited to the types of information about risk factors and risk of future harm that is generally provided to judges by Branch Crown Counsel in criminal prosecutions for family violence related offences.

As described in the Branch's "Spousal Violence" (SPO 1) Policy, in spousal violence cases, Crown Counsel consider risk information at various stages in the prosecution. For example, Crown Counsel are required to consider all available information regarding the risk presented by an accused in formulating a position on bail:

> *In formulating a position in regard to bail, Crown Counsel should have particular regard for the safety of victims and other family members, especially children, and must consider all available information regarding the risk presented by the accused. When Crown Counsel has reason to believe that additional relevant information is available, they should request it from the police before making submissions on a bail hearing and ask for a remand if necessary.*

The policy also describes that Crown Counsel are required to consider risk factors at other stages in the prosecution such as "preparation for hearing":

> *Where, after consideration of the relevant risk factors and an objective assessment of the available evidence, Crown Counsel has reason to conclude that there is a significant potential for serious bodily harm or death, Crown Counsel should seek an early trial date whenever possible.*

The information regarding risk factors and risk of harm that Crown Counsel provide to judges in criminal prosecutions involving family violence is determined by Crown Counsel on a case-by-case basis applying disclosure and evidentiary law principles. In all family violence prosecutions Crown Counsel assess the relevance and admissibility of information regarding risk factors and risk of future harm that is provided by the police, other investigative agencies, and other stakeholders such as probation officers, victim service workers, and child protection/social workers. Where appropriate, Crown Counsel provide information to the court regarding risk factors and risk of harm, such as for example in the course of a bail and/or sentencing hearing.

Question #2 – If risk information is being provided, what form, generally would it take? (e.g. risk instruments, experts)

The following provides an overview of the type of information regarding risk factors and risk of future harm that is provided by Crown Counsel to judges in criminal prosecutions that the Branch has conduct of which involve family violence.

Generally, the risk information provided by Crown Counsel to judges at bail hearings and sentencing is provided as part of Crown's submissions as opposed to through expert evidence or filing risk assessment reports.

In July 2013 the Policing Security and Program Branch launched the B.C. Domestic Violence Risk Summary ("DVRS") PRIME template, which includes 19 risk factors. This is a screening tool for the police to identify potential risk factors, and it is not a formal risk assessment. This template is often included in domestic violence RTCCs. Crown Counsel assess on a case-by-case basis whether the information provided in the DVRS PRIME template is relevant to a family violence prosecution (such as for example for the purposes of a bail or sentencing hearing) and as Crown Counsel deem appropriate they may provide information contained in this document to the court as part of Crown's submissions at a bail or sentencing hearing.

It is rare before a bail hearing for Crown Counsel to receive information from the police or other stakeholders contained in a formal risk assessment that is based on a structured professional judgement risk assessment tool such as Brief Spousal Assault Form for the Evaluation of Risk ("B-SAFER") or Spousal Assault Risk Assessment ("SARA"). Rather, the information that Crown Counsel generally receives from the police regarding risk factors or risk of future harm is usually contained in the Report to Crown Counsel ("RTCC"). Crown Counsel may also receive information regarding risk factors prior to a bail hearing from other stakeholders such as victim service workers, provincial corrections (bail supervisors/probation officers) or federal corrections.

Similarly, it is uncommon prior to a sentencing hearing for Crown Counsel to receive information from the police or other stakeholders contained in a risk assessment based on a structured professional judgement risk assessment tool such as B-SAFER or SARA. However, Crown Counsel may receive additional risk information from the police, victim services, provincial or federal corrections, or other stakeholders prior to a sentencing hearing. In addition, in some cases, particularly those identified as being potentially highest risk cases, pre-sentence reports may be ordered, and considered by the court at sentencing, which may contain information regarding risk factors and risk of harm.

In addition, the Branch has a High Risk Offenders Program, for specific offenders described below which may include offenders with a history of committing family violence offences, which acts as a central repository of background information concerning offenders who have been identified as being high risk for re-offending. The program also acts as the B.C. Coordinator for the National Flagging System for high risk violent offenders. Offenders identified with the national program have criminal histories which could make them eligible for a Dangerous or Long Term Offender application upon the further commission of a serious personal injury offence as defined in section 752 of the *Criminal Code*, or have been the subject of a recognizance under sections 810.1 or 810.2 of the *Criminal Code*. Offenders who do not meet the criteria for the national program, but have been identified by the Branch's High Risk Offenders Program as being high risk for re-offending, including offenders who may be subject to an application for a section 810.1 or 810.2 recognizance, are flagged by the program.

The information gathered and maintained by the program includes court ordered pre-sentence reports and psychiatric assessments, and correctional treatment/programming

reports. For the purpose of bail and sentencing hearings and applications for section 810.1 and 810.2 recognizances regarding these offenders, the High Risk Offenders Identification Program requests these types of records from Prosecution Service offices located in other provinces and territories, the Correctional Services of Canada and B.C.'s Ministry of Justice Corrections Branch, and provides them to Crown Counsel. The program also contacts the Forensic Psychiatric Services Commission to determine if there are other psychiatric or clinic records that could be obtained through a court order. The information regarding risk factors and risk of harm contained in these records that Crown Counsel provide to judges in criminal prosecutions involving family violence is determined by Crown Counsel on a case-by-case basis applying disclosure and evidentiary law principles.

Question #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?

The Branch's response to this question is limited to the areas where the Branch has specific knowledge of information being shared.

As previously advised in June 2014, disclosure of information contained in the Branch prosecution files and arising in prosecution proceedings, including risk information, is governed by Branch policies, privacy legislation, including the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"), and case law. As described in the Branch policy entitled "Disclosure of Information to Parties other than the Accused" (DIS 1.1), the information that the Branch receives from the police and other law enforcement agencies is provided solely for the Branch to meet its mandate set out in the *Crown Counsel Act* to approve and conduct prosecutions. As a result, requests by family lawyers for risk information contained in the Branch's family violence prosecution files must be made in writing and submitted to the Branch's Information Access and Privacy Office.

In cases where there are parallel child protection proceedings Crown Counsel may receive information regarding risk factors, the status of child protection proceedings, and orders made under the *Child, Family and Community Service Act,* from child welfare workers with the Ministry of Children and Family Development or Delegated Aboriginal Agency. In cases where there are parallel family law proceedings Crown Counsel may receive information from the parties' family legal counsel regarding the status of the proceedings and outstanding family court orders. There is no formalized information sharing process in place and the onus is on the Ministry of Children and Family Development, Delegated Aboriginal Agency or family lawyer, as they deem appropriate, to provide information to Crown Counsel regarding risk factors or the status of parallel proceedings. As described in Question 1 above, the information regarding risk factors and risk of harm that Crown Counsel provide to judges in criminal prosecutions involving family violence is determined by Crown Counsel on a case-by-case basis applying disclosure and evidentiary law principles.

It is rare for Crown Counsel to be advised about what, if any, risk information is provided to the court during the course of family proceedings. However, as described on page 6 of

the Branch's Spousal Violence policy, RTCCs in spousal violence cases should contain information about family court orders affecting the accused and at a bail hearing Crown Counsel should provide relevant information to the court about these orders.

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

It should be noted that any requests received by the Crown which are outside of the scope of *Stinchcombe* disclosure are not subject to FOIPPA. As noted in section 3(1)(h) of FOIPPA: "This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:... (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed".

Having said that, specific provisions exist within FOIPPA which allow for the collection of information, "for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur..." (section 26(f) of FOIPPA) and to disclose information inside or outside of Canada, "for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur," (section 33.1(1)(m.1) of FOIPPA).

All requests for access are addressed on a case-by-case basis to determine what is appropriate in the specific context of the case and to ensure that the fair trial rights of the accused are protected.

Question #4 – Are there

(a) Any benefits that exist for the sharing of such risk information?

(b) Barriers, concerns?

Question #5 – What recommendations, if any, could be made to ensure that courts have relevant information about risk in legally permissible ways?

The primary responsibility of the Criminal Justice Branch is to conduct and supervise the significant volume of prosecutions and appeals that fall within its statutory mandate. In recognition of the public interest in continuous improvement of the justice system, and to constructively inform the associated dialogue, the Branch will also use its best efforts to respond to research requests about factual matters or the procedures that we follow as part of that mandate.

However, questions 4 and 5 are complex, require in-depth and thoughtful analysis, and engage process and policy considerations that affect other branches of the Ministry of Justice, and potentially other Ministries and the judiciary. We recognize the questions raise serious and important issues, but answers to them would require legal research, consultation, consideration of competing processes and interests, and time and effort that is beyond the scope of our Branch's involvement in this particular research request. As such, the Branch respectfully declines to provide input on these questions.