



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

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

Executive Summary

November, 2013

- Information contained in this publication may be reproduced, in part or in whole, and by any means, for personal or public non-commercial purposes, without charge or further permission, unless otherwise specified.

- You are asked to:
 - exercise due diligence in ensuring the accuracy of the materials reproduced;
 - indicate both the complete title of the materials reproduced, as well as the author organization; and
 - indicate that the reproduction is a copy of an official work that is published by the Government of Canada and that the reproduction has not been produced in affiliation with, or with the endorsement of the Government of Canada.

- Commercial reproduction and distribution is prohibited except with written permission from the Government of Canada's copyright administrator, the Department of Justice Canada. For more information, please contact the Department of Justice Canada at: www.justice.gc.ca.

©Her Majesty the Queen in Right of Canada,
represented by the Minister of Justice and Attorney General of Canada, 2013

ISBN 978-1-100-22728-3
Cat. No. J2-385/2013E-PDF

Making the Links in Family Violence Cases:

Collaboration among the Family, Child Protection and Criminal Justice Systems

Executive Summary

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

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

Why focus on family violence and the justice system?

Family violence is a devastating reality for many Canadians regardless of their social, economic, or cultural backgrounds. It may include various forms of abuse, mistreatment, or neglect experienced by adults or children in their intimate, family, or dependent relationships. In fact, in 2009, almost one fifth (17%) of Canadians indicated that they had experienced physical or sexual violence at the hands of their former marital or common-law partner. Family violence may be the cause, a contributing factor, or the outcome of the family breakdown. Studies have

shown that separation and divorce can exacerbate an already violent relationship and that the period following family rupture represents a period of heightened risk for family members. Evidence indicates that child abuse and exposure to spousal violence can have serious long-term negative impacts on children. In 2011, family violence accounted for just over one quarter (26%) of police-reported violent crime – almost half (49%) the family violence victims were victims of spousal and ex-spousal violence while the other half (51%) were children, siblings or extended family members. In 2011, almost one third (32.6%) of all solved homicides were family homicides – nearly one quarter (22%) of the victims were children.

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

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

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

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

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

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

Risk assessment (Chapter 2)

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

Promising practices include:

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

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

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

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

Promising practices include:

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

Identification of multiple proceedings (Chapter 4)

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

Promising practices include:

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

Coordination of court proceedings (Chapter 5)

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

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

Promising practices include:

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

Evidentiary issues (Chapter 6)

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

Promising practices include:

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

Privacy (Chapter 7)

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

Promising practices include:

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

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

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

Promising practices include:

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

Cross-sector collaboration (Chapter 10)

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

Promising practices include:

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

Conclusion

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