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Best Practices where there is Family Violence (Criminal Law Perspective)

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Best Practices where there is Family Violence
(Criminal Law Perspective)

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The views expressed in this report are those of the authors and do not necessarily represent the views of the Department of Justice Canada.

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1. EXECUTIVE SUMMARY

Purpose of the Project

This report is intended to focus on best practices related to cases making their way through the criminal justice system, where there are multiple proceedings – including family law and/or child protection proceedings. The goal is to identify practices that promote the safety of all family members while ensuring a fair process for the accused person.

The Research Approach

The best practices highlighted in the report were identified through a literature review, personal experience and interviews with practitioners, judges and child protection authorities. The challenges presented by the intersection of criminal, family and child protection proceedings have been examined and discussed by both academics and practitioners. They have also been highlighted in the case law. In this report, we attempt to review and build on the current research and writing in respect of how the criminal and family justice branches respond to issues of family violence.

Highlights

Practices that best promote the safety of the family while ensuring a fair process for an accused person depend on effective information sharing between criminal and family courts and the availability of appropriate legal advice and/or information for complainants, accused persons, family law litigants and child protection authorities.

- Information about family law and child protection proceedings is viewed as vital to making an appropriate determination about interim release from custody (bail) pending trial but, within the current system, is very difficult to obtain at the early stages of a criminal prosecution. A reliable system for obtaining family court and child protection orders, which does not rely solely on an accused or complainant, best facilitates the crafting of appropriate and fair bail conditions that promote the safety of the family without unduly influencing family law proceedings or restricting a parent's relationship with his or her child.

- Complainants are best served by the criminal justice system where they are informed about the consequences of making a complaint to police, have input on bail conditions and bail variations and understand their legal rights in respect of their private health, counselling and other records. Even where legal advice and information is provided, the dynamics of family violence often result in prosecution witnesses who may be reluctant to testify. Crown policies and guidelines that recognize and respond to the unique challenges that arise in cases of domestic violence best ensure effective prosecutions.

- An individual accused of a criminal offence who is also a party in family law or child protection proceedings needs legal advice with respect to what (and how) evidence provided in one proceeding may be admitted in another proceeding. Absent that information, parallel child protection and family law matters may languish as the accused attempts to avoid incriminating him or herself. Delay – in the criminal and civil proceedings – is best avoided where all parties understand the negative consequences it may have on the outcome of the related proceedings. Similarly, proper coordination between different proceedings will ensure consistent results and court orders which afford maximum protection for the family and ensures fairness to an accused.

2. INTRODUCTION

The criminal justice system has not, traditionally, been well-suited to accommodate the interests and complexities of family relationships. Criminal proceedings involving allegations of family violence often have a disruptive effect on the lives of the complainant and the accused – families may be separated, communication between spouses and parents restricted, residences changed, contact with children limited and financial demands increased.

Furthermore, cases that involve allegations of family violence commonly involve more than one court. There may be parallel criminal, family law and child protection proceedings. The family (including the complainant, the accused and any children) may have contact with numerous agencies, including the police, the Crown, victim support services, health services, and child protection agencies.

Each different court and agency has its own priorities processes, procedures and schedules. The manner in which information is shared (or not shared) among the various stakeholders can have a substantial impact on all parties involved. A lack of coordination may result in confusion, inconsistent court orders and have implications for the safety of family members.

The purpose of this report is to explore "best practices" relating to cases making their way through the criminal justice system where there are parallel family court and child protection proceedings. The intent is to identify practices, which from the criminal law perspective, best promote the safety of family members while also ensuring a fair process for the accused. The report is organized according to the typical steps in a criminal proceeding. It attempts to examine the issues that typically arise in cases of family violence – from pre-charge considerations to possible sentencing outcomes.

3. PRE-CHARGE

3.1 Advising a Potential Complainant

Often allegations of family violence are made in the midst of or immediately after a moment of intense conflict. Where police are called in response to an argument between spouses, for example, neither party will likely have received legal advice before a complaint is made and charges are laid. In some circumstances, however, a potential complainant will seek legal advice about ongoing problems in a family or spousal relationship either from a family lawyer or criminal lawyer. Either way, an allegation of violence in the family can have significant immediate and enduring consequences not just for the person accused, but also for the complainant. An individual who is contemplating making a complaint to the police may wish to consider the following.

3.1.1 Ensuring a Complainant's Safety and Building a Case

Where a potential complainant advises counsel that he or she is being abused by a spouse, or that the spouse is abusing the couple's children, counsel should take immediate steps to protect the client's safety and the safety of any children. Counsel can provide practical advice in respect of developing a "safety plan" and/or "exit plan" including advising the client on:

- arranging for alternative accommodations;
- establishing Internet safety habits to protect privacy;
- gathering personal and financial information that may be relevant in anticipated family law proceedings;
- communicating with children's school/daycare; and
- arranging for emergency financial support.

Clients who are considering making a complaint to police should be advised to record incidents of abuse including the date, time and location of the incidents. The client should also note whether there were any witnesses, what form of violence was used, whether there were any injuries and what action was taken after the incident (e.g. did the victim make a report to family members, friends, colleagues or community support agencies?).

Where abuse is recent, counsel should advise the complainant of the potential benefits of making a report to police immediately and attending at the hospital if necessary or seeking other medical attention. Prompt statements to the police and having pictures taken and documenting injuries by health care professionals can assist in facilitating an effective and efficient prosecution of the abuser (Halpern, et al., 2007: 4-6).

Complainants should also be made aware of their role and rights in the criminal justice system and the protections provided to them by that system, including the resources available from victim assistance programs.

3.1.2 Consequences of Making a Complaint to the Police

Contrary to popular perception, complainants do not "press charges" against accused persons. A victim of domestic abuse can make a complaint to police but it is the police who will decide whether or not to lay a criminal charge. In most jurisdictions across the country, police operate according to directives and policies designed to recognize the dangerous reality facing victims of domestic abuse and to ensure that family violence is treated as a criminal rather than private matter. In general, these directives require the police to lay charges whenever there are reasonable and probable grounds to believe an offence has been committed (Department of Justice, 2003: 9-13). In other words, these directives remove any discretion the police might otherwise have to caution someone or attempt to resolve the dispute without charges.

While outside the scope of this paper, it is important to note that mandatory charge policies are not without criticism. Evidence from the United States suggests that mandatory charge polices can have the unintended effect of resulting in a significant increase in the number of women charged with domestic violence offences. For example, in California, following the introduction of mandatory arrest policies for domestic violence, male arrest rates increased by 136%, while female arrest rates increased more than 500% from 1987 to 2000 (DeLeon-Granados et al., 2006: 359; See also Barbra Schlifer Commemorative Clinic, 2011: 14-16).

Crown offices are similarly guided by "pro-prosecution" policies that require the prosecution of domestic violence cases where there is sufficient evidence to support a conviction, regardless of the complainant's wishes. Crown counsel are instructed to evaluate requests from complainants to discontinue a prosecution with great caution given the "intolerable pressure" a complainant may face to have the charges withdrawn (Ministry of the Attorney General (Ont), 2005: 2; Department of Justice, 2003).

The Crown Policy Manual in Ontario makes clear that the recommended practices with respect to withdrawing and resolving charges apply to cases of family violence just as they do to all other types of charges. In considering whether to continue any prosecution, Crown counsel must consider whether there is a "reasonable prospect of conviction" and whether prosecution is in the public interest (Ministry of the Attorney General (Ont), 2005b). The policy manual notes, however, that public interest factors in the domestic violence cases should be "weighed in light of the predominant need to protect the victim. Given the prevalence and danger of spouse/partner abuse and the dangers inherent in it, it will usually, although not always, be in the public interest to proceed with these prosecutions in cases where there is a reasonable prospect of conviction." (Ministry of the Attorney General (Ont), 2005: 2)

The rationale underlying mandatory charging and prosecution policies is clear and the benefits considerable. Nevertheless, it remains important that complainants, who are the intended beneficiaries of such policies, are made aware of their implications:

> One of the most important concerns about mandatory charging is that many women simply do not know that once they call the police (or, the police are called by a third party, such as a child or a neighbour) they will lose control over what

> happens. Many women call the police because they need assistance in the moment, but have no intention of having their partner charged with a criminal offence. (Barbra Schlifer Commemorative Clinic, 2011: Appendix A, p. 17)

Where there is an opportunity to do so, counsel can address this concern by advising a potential complainant that:

- The accused will be charged where the police believe there are reasonable grounds to believe that an offence has been committed;
- Depending on the jurisdiction, the accused will likely be held in police custody, usually overnight, for a bail hearing;
- If the accused is released on bail pending trial, he or she will be subject to strict conditions;
- Those conditions will likely severely restrict, or even prohibit, contact with the complainant and will likely also restrict access to the family home and may regulate access to the children;
- The bail conditions will remain in place until the matter is resolved – where a trial is involved, that could be a year or more from the date of arrest; and
- The Crown is unlikely to withdraw the criminal charge based only on the wishes of the complainant.

These may be welcome consequences where a complainant wants to put an end to an abusive relationship. They may, however, give a client pause where he or she is contemplating making a complaint to police out of frustration rather than fear or for the purpose of gaining an advantage in the family law proceedings. On this note, counsel must be careful to avoid any suggestion that a client should pursue criminal charges as a strategy to gain advantage in any contemplated or on-going civil proceedings (Law Society of Upper Canada, 2001: Rule 4.01(2)(1); Law Society of British Columbia, 2011: Chapter 4, Rule 2).

3.1.3 Family Law Options

Criminal lawyers who are advising a potential complainant should advise the client to seek advice from a family lawyer. A family lawyer can advise on other options open to the complainant in addition to, or instead of, pursuing a criminal charge. A family lawyer can provide a complainant with advice on the desirability and practicality of obtaining:

- a restraining order[1]
- an order for exclusive possession of the home;[2]
- an interim order for sole custody of the child(ren);
- an order for emergency support when the complainant is financially dependent on the accused; and/or
- a preservation order if there is a concern that the accused may attempt to hide or dissipate assets in the wake of a separation.[3]

[1] In Ontario, see, e.g. s. 35 of the *Children's Law Reform Act* ("*CLRA*") and s. 46 of the *Family Law Act* ("*FLA*").
[2] Section 24(3)(f) of the *Family Law Act*, R.S.O. 1990, Chapter F.3 ("*FLA*") expressly provides that one of the considerations in determining whether a party should have exclusive possession of the matrimonial is "any violence committed by a spouse against the other spouse or children."

3.2 Interviewing Child Complainants

Despite the prevalence of child abuse, this crime remains difficult to prosecute. Children are often hesitant to testify in court against a loved one and, because the abuse occurs in private, there are rarely witnesses or other corroborating evidence. Properly presenting a child's evidence in cases involving family violence requires taking the appropriate steps at the beginning stages of any investigation, even before an arrest is made.

3.2.1 Obtaining Videotaped Statements

Pursuant to s. 715.1 of the *Criminal Code*, courts can admit video-recorded statements as part or all of a child witness' evidence in-chief if (a) the statement was made within a reasonable time after the alleged offence, (b) the witness is available for cross-examination and (c) using the video statement would not interfere with the proper administration of justice. What constitutes a reasonable time will depend on all the circumstances and in making the determination a court will consider that it is not unusual for a child to delay the disclosure of abuse (*R. v. L.(D.O.)*, 1993).

According to the Supreme Court of Canada, the primary goal of this provision is to "create a record of what is probably the best recollection of the event that will be of inestimable assistance in ascertaining the truth." A secondary objective is to "prevent or reduce materially the likelihood of inflicting further injury upon a child as a result of participating in court proceedings." (*R. v. F.(C.C.)*,1997: paras. 21-22)

Taking steps to preserve a child's early account of alleged events can thus have a significant impact both on the effectiveness of any subsequent prosecution and on the well-being of the child.

> *The Criminal Justice Act* (1991) *(England and Wales) allows video-recorded interviews with children to be used as the child's evidence in chief in criminal prosecutions. A 1995 study of 640 trials where an application was made to use a child's video-taped statement showed that there was no significant difference in the proportion of guilty verdicts between video-taped evidence and live examination in chief but children were much less anxious during the video-taped interviews than while giving live evidence at trial.* (G. Davies, et al., 1995)

3.2.2 Child-Centred Facilities

The video recording produced from the initial interview can be used not only in the criminal proceeding but also for child protection proceedings. This reduces the trauma children experience in having to repeatedly talk about painful events. In the course of an investigation of family violence, children may be subjected to multiple interviews over extended periods of time by police, social workers, doctors and prosecutors.

Multiple interviews are potentially harmful both to the child, as he or she is required to repeatedly recount traumatic events, and to the reliability of that child's evidence. "Even when a repeatedly interviewed child is able to give accurate testimony, a belief that the child is giving

[3] See, e.g., s. 12 of the *FLA*.

over-rehearsed or contaminated evidence may diminish the child's credibility in the eyes of the court. Multiple interviews may also diminish the child's confidence and co-operation. In extreme cases, multiple interviews can amount to systems abuse." (Australian Law Reform Commission, 1997: §14.28).

Ideally, the investigative interview will be conducted in a child-centred environment by someone skilled in interviewing children and will be attended by representatives of both the police and any relevant child protection agency. Facilities like the Zebra Child Protection Centre in Edmonton and The Gate House in Toronto offer child friendly environments and provide state-of-the-art video recording equipment for use by police and child protection workers. By allowing for the integration of law enforcement and social service agencies, these types of facilities serve children by permitting the more efficient gathering of information, minimizing the number of interviews and repetition of questions faced by the child and creating greater communication and information sharing between agencies. The objective is twofold; less trauma for the child and better outcomes in criminal and civil proceedings. It should be noted, however, that joint investigative procedures on the part of the police and the child protection authorities will have implications for the Crown's disclosure obligations (see further discussion in section 5.5).

4. ARREST AND BAIL

4.1 Introduction

The dangers faced by victims of domestic violence at the time of separation are well-established. According to psychologist Peter Jaffe, director of the Centre for Research on Violence Against Women and Children at the University of Western Ontario and a member of the Ontario chief coroners' Domestic Violence Death Review Committee, 80% of domestic homicides happen at the point of separation or shortly thereafter. Actual or imminent separation is one of the most common risk factors present in cases of domestic homicides. The abused spouse may be at risk even where a complaint has been made to police and the perpetrator is subject to bail conditions. Indeed, the risk of harm may increase on external intervention by police and/or the criminal courts (Ministry of the Attorney General (BC), 2011: 1).

> *"The inquests into the deaths of Gillian Hadley and Arlene May and the Commission of Inquiry into the death of Rhonda Lavoie provide but three of many horrific examples of what can happen when the cycle of violence is permitted to spin out of control. All three cases involved murder-suicides. All three cases involved a history of domestic violence leading up to the catastrophic event where various anemic bail conditions on release and re-release did not provide appropriate protection to the female spouse. In each case, the recommendations identified the failures of the bail system as a major component in the criminal justice system's failure to adequately address the dynamic apparent in these relationships."* (Saull, 2008: 10-11)

These concerns have informed policies and directives to Crown prosecutors to exercise caution in consenting to the release of an accused charged with an offence involving family violence. The murders of women like Arlene May and Gillian Hadley – both killed by estranged partners on bail at the time of the murders – demonstrate how crucial it is for Crowns and courts to have an adequate understanding of the risk presented by an accused before making a determination about release pending trial.

Balanced against these concerns, however, must be a recognition that in the often emotional context of a family breakdown, allegations of violence made by one spouse against another can be exaggerated or even fabricated. In such cases, restrictive bail conditions may not be necessary. Moreover, as Justice Pugsley described in *Shaw v. Shaw* such conditions can negatively affect the proper adjudication of related family law matters:

> Family courts decide custody and access issues on the basis of statute and case law defining the best interests of the children. The criminal justice system pays no attention to such interests because it is not geared up to do so nor are the participants widely trained in how the actions of the system — from the officer who refuses to release the defendant at the station, to the duty counsel who allows the defendant to agree to inappropriate conditions of release out of expediency — effect the lives of the members of the defendant's family. Similarly the Superior Court is tasked with the duty of adjudicating the respective rights of the parties to remain in the matrimonial home pending the resolution of the matrimonial litigation. Routine orders excluding a party from the

> common home of the parties until the end of the criminal matter without thought to the consequences thereof, and without a remedy short of a bail review, place one party in a position of immediate superiority over the other party for as long as it takes (perhaps a year) for defended criminal charges to be resolved. Such rote treatment of all matters of domestic assault can lead, on the one hand, to concocted or exaggerated claims of criminal behaviour or, on the other hand, to innocent defendants pleading guilty at an early stage out of expediency or a shared desire with the complainant to start to rehabilitate the family unit (*Shaw v. Shaw*, 2008: para. 5).

It is in this context, where legitimate safety concerns must be balanced against unnecessary restrictions on the liberty of an accused and disruptions to his or her family, that bail decisions are made. Below we attempt to identify best practices aimed at balancing these competing concerns.

4.2 Bail Basics

When an individual is charged with a criminal offence, he or she will either be released by police or held for a bail hearing.

Sections 496, 497, 498, 499 and 503 of the *Criminal Code* govern the manner in which the police may release an accused person and compel his or her subsequent appearance in court.

4.2.1 Summons and Appearance Notices

Where the police do not arrest an accused, attendance at court can be compelled by an Appearance Notice (issued by police and later confirmed by a Justice of the Peace, when the charges are laid), or by a summons issued by a Justice of the Peace when the charges are laid. Both an appearance notice and a summons are official documents requiring a person to appear in court at a specific time and place to answer (or respond to) a criminal charge. They will generally only be used in the least serious cases where the police do not believe the accused needs to be subject to any conditions and do not have concerns that the accused will fail to attend court. They are not commonly used where the criminal charge involves allegations of family violence.

The appearance notice or summons will often require an accused to also attend the local police station on a certain date in advance of the first court appearance to have fingerprints and photographs taken. No discussion of the offence takes place at the station and an accused person does not need to be accompanied by a lawyer. Accused individuals should be aware that if they fail to go for fingerprinting or fail to attend court on the date specified, they can be arrested and charged with the criminal offence of failing to appear (s. 145(4)-(10)).

4.2.2 Promise to Appear and Recognizance

If the accused is arrested without a warrant, the *Criminal Code* requires the arresting officer (s. 497) or the Officer-In-Charge of the police custody facility (s. 498) to assess whether detention is required to:

- establish the identity of the person,
- secure or preserve evidence of or relating to the offence, or
- prevent the continuation or repetition of the offence or the commission of another offence.

An officer may also detain an accused where he or she has reason to believe that, if the person is released from custody, the person will fail to attend court.

If detention is not required, police must release the accused from the station. In making this assessment, the police typically consider the personal history of the accused (any prior breaches, education, family, and employment), the circumstances of the specific charge, and the complainant's wishes. An accused person who is not released by the police is to be brought before a court for a judicial interim release ("bail") hearing within 24 hours, or "as soon as possible" thereafter (s. 503). Bail practices are considered in detail below.

An accused person who is arrested without a warrant and not held for a bail hearing may be released by police on 1) an appearance notice or with the intention of having a summons issued; 2) a promise to appear; or 3) on a recognizance. A promise to appear or a recognizance are the only methods available where the arrest is made with a warrant (s. 499).

The appearance notice and summons are described above. The promise to appear is similar to an appearance notice but it must be signed by the accused. A recognizance requires an accused to follow certain conditions with a financial penalty – to a maximum of $500 – if they are not followed. The recognizance may or may not require a deposit of the pledged money.

Both a promise to appear and a recognizance can be accompanied by an undertaking (in Form 11.1) made to the police to abide by certain conditions while the accused person is on a release (s. 499 and 503). An undertaking can have one or more of the following conditions:

- to remain within a territorial jurisdiction,
- to notify the officer of any change of address, employment, or occupation,
- to abstain from communicating directly or indirectly with specified individuals,
- to abstain from attending certain locations,
- to deposit his or her passport,
- to abstain from possessing any firearm and to surrender any firearms licenses,
- to report at certain times to the police,
- to abstain from the consumption of alcohol or other intoxicating substances,
- to abstain from the consumption of drugs except in accordance with a medical prescription, and

- to comply with any other condition the officer in charge considers necessary to ensure the safety and security of any victim or witness.

Failure to comply with the undertaking is a criminal offence (s. 145(5.1)).

4.2.3 Held for Bail Hearing

Many individuals charged with offences relating to allegations of domestic violence are not released from the police station. Instead they are held for a “show cause” hearing. In some jurisdictions, there is an “unwritten policy” within police services that all accused charged with domestic violence related offences will be held for a bail hearing. These sorts of policies do not accord with the obligations of police officers under the *Code* which require the police to consider release pursuant to s. 498 and 499. Notably, in *R. v. Rashid*, 2009, the trial judge found a breach of section 9 of the *Charter* when the arresting officer failed to consider whether a release from the station was appropriate and acted, instead, pursuant to a blanket policy requiring detention in domestic violence cases irrespective of the accused’s personal circumstances or the nature of the office.

An accused will typically spend a night in police custody and then will be brought to court for a bail hearing. The accused may spend more time in custody if he or she is arrested on a weekend or requires time to retain a lawyer and identify sureties.[4] At court, the Crown may either consent to the accused’s release subject to specified conditions or can oppose the accused’s release. Where the Crown is opposed to release, there will be a contested bail hearing that takes place before a justice of the peace.

Pursuant to s. 515 of the *Criminal Code*, an accused will be released pending trial unless the prosecutor “shows cause” why the detention of the accused is necessary. The Crown can seek an accused’s detention on one of three grounds:

1) to ensure the accused’s attendance in court (“primary ground”)
2) for the protection and safety of the public (“secondary ground”)
3) to maintain confidence in the administration of justice (“tertiary ground”)

In certain situations specified in the *Criminal Code,* the onus is reversed and the accused must show cause why he should not be detained. For example, the onus will be on the accused where he is charged with failing to comply with a condition of a recognizance or undertaking, while he was on release for an earlier charge that is still pending (s. 515(6)).

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[4] A surety is someone who makes an agreement with the court to take responsibility for a person accused of a crime. The surety is responsible for making sure the accused person comes to court on time and on the right dates and for ensuring that the accused person obeys each condition of the bail order, also known as a recognizance. Sureties must sign the recognizance and agree to pay a specified amount of money if the accused person fails to obey the court order.

4.3 *Crown Approach to Bail in Cases of Alleged Family Violence*

Public safety grounds are, not surprisingly, of significant concern in the context of allegations of domestic violence. In response to tragic deaths in several high profile cases and a growing understanding of the dynamics of family violence, many Crown offices have developed specific policies in respect of bail practice and procedure in cases of domestic violence. In the exercise of prosecutorial discretion in cases of domestic violence, the safety of the complaint and his or her family will be the paramount factor for the Crown to consider.

In Ontario, Crowns are guided in their exercise of discretion by the guidelines contained in the Crown Policy manual. The manual, like the guidebooks in other provinces, directs Crowns to consider detailed risk assessments conducted by the police at the time of arrest. Factors that will be considered by the Crown include:

- the nature of the offence;
- the extent/presence of injuries;
- the history of the accused;
- the history of the relationship;
- any outstanding charges;
- any prior breach of a court order by the accused;
- concerns of the complainant;
- drug or alcohol abuse on the part of the accused;
- psychiatric issues;
- whether there is any evidence of criminal harassment;
- the strength of the Crown's case; and
- the level of violence alleged by the complainant.

The Crown needs sufficient information about these factors in order to make an informed decision about whether to seek an accused's detention. Similarly, the court will need the same information in order to make a determination as to whether detention is necessary and to craft appropriate conditions in cases where the accused is released (*R. v. E.M.B.*, 2000). Accordingly, it is critical that Crown offices establish protocols with local police services in respect of ensuring Crowns have sufficient information to conduct a bail hearing. In Ontario, that information sharing occurs by way of mandatory "risk assessment checklist" and form. The value of the risk assessment, of course, depends on the reliability of the information that informs it. Police must be trained to properly complete the form (How, 2012).

4.3.1. Collecting Information for Bail Hearings

As Justice Hill explained in *R. v. Villota*, citing the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, Crown counsel have "enormous control over information about the offence and are required to assume a leadership role in bail hearings to secure justice in the bail system." (*R. v. Villota*, 2002: para. 70)

The challenges faced by Crown counsel at bail hearings are significant and the stakes high. The obligation to ensure the court has adequate information to make a decision about release will fall primarily on the Crown. Crown offices in many jurisdictions have developed policy guidelines and directives to assist prosecutors in fulfilling this role in the context of busy bail courts.

Numerous stakeholders interviewed in the course of preparing this report indicated how beneficial it would be for a criminal court – particularly a bail court – to have access to family court and child protection orders. Relying on the accused and the complainant to convey accurate information about the existence and status of civil proceedings was not viewed as sufficient. Helen How, Deputy Crown Attorney in Toronto, believes that the lack of access to court documents between the criminal and civil proceedings is one of the greatest challenges facing domestic prosecutions. Ms. How indicates that she only sees a family court order if it is provided by a complainant (How, 2012). Justice Bovard, who helped to create Toronto's integrated domestic violence court and has written and lectured extensively on the topic of the intersection of criminal and family law, similarly believes it would be beneficial for criminal courts to have access to "FRANK" the case tracking system in Ontario developed to address the management of information in civil cases.

The information management system in Ontario was the subject of recent criticism in the judgment of Justice Brown in *Romspen Investment Corp. v. 6176666 Canada Ltée*. In colourful language, Justice Brown attacked what he called the antiquated document management and case scheduling system of the Ontario courts:

> I suppose that on a sunny, unusually warm, mid-March day one should be mellow and accept, without complaint, the systemic failures and delay of this Court's document management system. The problem is that from the perspective of the members of the public who use this Court, delays caused by our antiquated, wholly-inadequate document management system impose unnecessary, but all too real, costs on them. And yet the entity that operates that part of the Court's administration system – the Court Services Division of the Ministry of the Attorney General – seems completely indifferent to the unnecessary costs it is causing to the members of the public who use our Court (*Romspen*, 2012 at para. 1).

Though made in the context of a decision about a commercial dispute, the short comings of the paper-based document management highlighted by Justice Brown may be equally applicable to cases involving family violence. A court system "under which documents were filed electronically and accessible to judges and others through a web-based system, with sealed documents specially encrypted to limit access to judges only" would no doubt facilitate better informed judicial determinations in family law, criminal and child protection proceedings.

In some jurisdictions, family and criminal courts have developed protocols for information sharing. For example, Lanark County, Ontario, has created a formal protocol for domestic violence cases involving criminal and family courts (Goldberg, 2011: 53). These types of protocols help to ensure the criminal court has accurate information about pending family law proceedings before making a bail order.

4.4 Common Bail Conditions

A court granting bail and deciding on terms of release should be aware of the following:

- any family court orders or proceedings;
- the accused's access to the children related to the complainant;
- the risk assessment and/or safety checklist completed by police;
- any restrictions imposed by a child protection agency; and
- accused's history, or lack of history, of violence.

In cases involving allegations of family violence, the most common terms of release include: "no-contact" conditions in respect of the complainant; a "no-go" term restricting the accused from attending within a specified distance of the complainant's home and work place; restrictions on access to the children of the complainant; an abstain from drugs and alcohol clause and a weapons prohibition.

The terms of release in respect of communication and access to children are the most difficult to draft and often have the most impact on parallel family law proceedings. Justice Bovard explains the difficulties that can arise from restrictive bail conditions imposed in cases where an allegation of domestic violence has been made:

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

In this section of the report, we review typical bail conditions, identify potential problems with the wording chosen and provide suggestions for better practices.

4.4.1 "No contact directly or indirectly with the complainant except through a mutually agreeable third-party or pursuant to a Family Court order and only for purposes of arranging and facilitating child access."

The wording of this condition properly avoids the "blanket" prohibition on communication that Justice Bovard and others have counseled against. For that reason it enjoys significant advantages over a condition that requires spouses to absolutely refrain from contact (e.g. "abstain from communicating directly or indirectly with the complainant"). Absolute prohibitions are likely to prevent any progress being made in parallel family law or child protection proceedings and may be inconsistent with family court orders in respect of custody and access.

However, there remain some difficulties with the wording. First, a bail condition that requires the complainant's consent to appoint a "neutral" third party to assist with contact and access to the children may put pressure on the complainant to agree, could enhance any existing power imbalance and create another source of tension in the relationship. A better solution may involve requiring a surety or officer-in-charge to agree to the third party (Bovard, 2012).

Second, arranging and facilitating access to children may be frustrated even where bail conditions permit communication through a third party. For example, the inability of an accused who is exercising her access rights to the children to notify the complainant of unexpected lateness or emergency situations may result in further tension between the accused and the complainant or even further police involvement. For this reason, in appropriate cases, a court may wish to consider whether a non-communication condition could include an exception for "contact by e-mail or text message, the contents of which are limited to arrangement related to access to children only."

This sort of exception to the non-communication order may not be appropriate in cases involving serious allegations of violence, where the complainant does not feel safe having any contact with the accused. In many more minor cases, however, such an exception may be beneficial.

Third, the condition set out above does not allow for contact between the accused and the complainant through counsel or for any purpose other than facilitating access to the children. Ongoing family law proceedings will be effectively put on hold if the parties are not allowed to communicate in any way, even through their respective family law counsel.

4.4.2 "Contact with children to be exercised under the supervision of the child protection agency or pursuant to the order of a court of competent jurisdiction."

Crafting appropriate terms of release relating to the accused's access to his or her children presents a significant challenge for the criminal courts:

> Termination of contact between parents and children can seriously – and often detrimentally – affect their lifelong relationship. No-contact orders can also impede counselling or other efforts to address the underlying issues facing the family, and can prevent any meaningful assessment of whether regular contact is in the child's best interest. Further, it can be very difficult to change release conditions once they are made; no-contact bail orders can remain in place for a year or more in some cases, despite every effort of child protection agencies to change them. For these reasons, judges may prefer to craft conditions of release that allow for child protection authorities and/or family courts to determine whether access should occur and under what circumstances (Goldberg, 2012: 54).

There are a number of factors to consider in deciding on appropriate terms of release including the circumstances of the offence and whether or not the child is the complainant or a witness in respect of the alleged offence.

In cases where the child is the complainant or a witness, a complete prohibition on communication may be necessary pending trial. Strict no contact provisions are informed by concerns that 1) contact between an accused parent and a child complainant will give rise (even subconsciously) to feelings of guilt or doubt that could affect the child's ability and willingness to testify truthfully; and 2) an accused may attempt to influence the child's evidence. The prosecution may oppose a condition that permits a family court order to allow access to the child. The objective of the family court is the best interests of the child, but that court may not have sufficient information about the underlying criminal charge or the emotional conflict that can ensue from having to testify in court (Witkin, 2007: 2; Joseph & Stangarone, 2009: 2-3). Ms. How explains that she is cautious about relying on family court orders when crafting bail conditions because of the different goals of the family and criminal court proceedings. In her view, civil proceedings are often aimed at reunification of the family while criminal proceedings focus on safety issues and ensuring an effective prosecution (How, 2012).

The concerns of the Crown regarding delegating contact decisions to a family court may be alleviated by a condition in the bail directing the family court to consider the criminal charges when making an order for contact (Goldberg, 2011: 54).

In cases of allegations of spousal assault that do not involve the children as complainants or witnesses, the justification for strict no-contact provisions is attenuated. Where a child is in no danger from the accused parent, separation for a significant length of time can needlessly result in unnecessary damage to the parent-child relationship. In these situations, a requirement that contact be supervised by a child protection agency may not be appropriate or necessary. Child protection agencies have limited resources to supervise parental access visits. Accordingly contact between the accused parent and the child may be restricted not because of any safety concerns but simply because of a lack of resources.

The condition set out above, which would permit contact with children under the supervision of the child protection agency or pursuant to the order of a court of competent jurisdiction is troublesome in that it could result in conflicting orders between the Children's Aid Society (CAS) and the family court.

Moreover, as Justice Bovard explains, CAS may not be willing to act in a supervisory role. Child protection agencies that are not involved with the family may object to being involved in enforcing bail orders and take the position it is not within the agency's mandate to supervise access for all parents involved in the criminal justice system. Even where CAS is prepared to supervise, the access facilitated may be sporadic, at best. There are resource issues which severely limit the amount of supervised access that is available. For these reasons, in Justice Bovard's view, the Family Court is really in the best position to consider all of the circumstances when deciding questions of access and to make a determination that is in the child's best interest. Justice Bovard's sentiments are echoed by Kate Kehoe:

> Child protection authorities have a specific legislative mandate to ensure the safety and well-being of children, and can provide services to the family to alleviate protection concerns. However, orders which only provide for

> access as directed by the child protection authorities do not permit any variation in cases where the family court judge is of the opinion that the child protection authorities are not exercising their discretion in the best interests of the children. Further, orders which provide for access "supervised by the child protection authority" can place the child protection authority in a difficult position. In some cases, the agency may not have grounds to bring the matter before the court or may be of the view that the safety of the child can be ensured without a court order (perhaps with a family member or access centre providing the supervision). However, child protection agencies are often not funded by their governing bodies to supervise access except where such access is court-ordered. The agency will therefore be forced to commence litigation solely for the purpose of carrying out the order made by the criminal court (Kehoe: 4).

There appears to be some consensus that child protection agencies should not be mandated by bail conditions to supervise access. However, where a court nevertheless wishes to impose this sort of condition, it may be beneficial to include a term specifying the minimum amount of access that is to be facilitated (e.g. "contact with children to be exercised under the supervision of the child protection agency and not to occur less than once per week"). While this does not address all of the concerns noted above, it does ensure some consistent access to the children for an accused parent.

4.4.3 "Contact with children pursuant to a Family Court order that post-dates the date of this order""Contact with children pursuant to a Family Court order"

Where the bail includes a condition that contact with children is permitted pursuant to a family court order, the term should specify that the family court order be one that *post dates* the bail order. A family court order made *before* the arrest of the accused may no longer be appropriate in light of the criminal allegations. For example, a family court order allowing for generous access for a non-custodial parent should not continue to govern when the parent has been charged with assaulting the child. Justice Bovard suggests that the term "post-dates" is unnecessarily confusing to many accused persons. This could be replaced with "made after this bail order."

If a court determines that it is necessary to have a condition limiting contact between an accused and his or her children, the condition "Contact with children pursuant to a Family court order that post-dates the date of this order" is likely the best option available. The difficulty with even this sort of provision, however, arises from the practical realities of obtaining a family court order which can impose significant barriers to access for an accused parent. Justice Bovard explains that an application for access made to a family court can take several months to be heard during which time the accused parent and the child cannot have contact. Delays can be even longer if either or both parents are unrepresented. According to Justice Bovard up to 70% of litigants in Ontario Court of Justice family matters are unrepresented (Bovard, 2012). In some cases the resulting delay in contact between parent and child cannot be safely avoided, however a total prohibition on contact will not be necessary in all cases.

A busy justice of the peace in a busy provincial court house is unlikely to have sufficient information at a bail hearing – including reliable information on the dynamics in the family and the historic relationships between parents and children – to make an appropriate access decision. It is in this context that a bail court must undertake the difficult task of assessing the risk presented to children or other family members with little information and little knowledge as to how the family will be dealt with by other courts. Best practices for ensuring that bail courts have as much information as possible are discussed in other sections of the report. Where, having considered the available information, the bail court is satisfied that there is no apparent danger associated with the children having contact with the accused, any decisions about access and custody may be best left to the family court. We note, however, that where the terms of bail do not address access issues there may be a period of time where no court order is in place governing the interaction between an accused parent and a child.

4.5 Defence Counsel / Duty Counsel Approach to Bail

4.5.1 Ensuring Reasonable Bail Conditions

Being detained, particularly for an accused person who has never had any previous experience in the criminal justice system, can impose an intolerable amount of pressure on an individual – and may result in an unwarranted guilty plea. Negotiating a speedy release for a client is therefore critical. It is equally important, however, that the client be willing and able to comply with the bail conditions imposed. It will be difficult to vary conditions agreed to in an effort to get out of custody quickly, particularly where the conditions were negotiated by experienced defence counsel. In *R. v. Bain*, for example, the accused ex-husband was released on the consent of the Crown with conditions including that he not attend within 200 metres of the matrimonial home. This term was included in the recognizance of bail despite the fact that at the time of his arrest, the accused was residing in that home, the complainant was living in another residence and the two were in the process of litigating the issue of possession of the matrimonial home in family court. Justice Shaw held that it was not role of the criminal courts to vary the accused's conditions of bail in order to "level the playing field" in the family court proceedings (*R. v. Bain*, 2009: para. 13).

In addition to the issues addressed above relating to communication with the complainant and access to children, defence counsel should also ensure that the bail conditions do not place an accused at any more of a disadvantage in the family law proceedings than absolutely necessary. Counsel should ensure, for example, that the accused is permitted to return to the matrimonial home, in the company of police, to obtain personal items. If family law proceedings are initiated (including custody, access or support application), the accused will need personal and financial documents, including bank statements, tax returns, pay stubs, passport, etc. Terms of the bail that restrict access to the family home can also amount to *de facto* orders for the exclusive possession of the family home. Similarly, restrictions on contact with children imposed by the bail order can result in the creation of a "status quo" in relation to issues of custody and access.

4.5.2 Checklist for Defence Counsel and Duty Counsel

As set out above, risk assessments play a significant role in the exercise of Crown discretion in domestic violence cases, including bail decisions. Defence counsel must be prepared to deal with this approach and be able to respond to and address Crown counsel's concerns. Defence counsel will be in a better position to negotiate workable terms of release where he or she has the following information:

- Does the client have children?
- How will the bail order affect his or her access to the children?
- What, if any, family court proceedings is your client involved in? Divorce? Custody and access? Child/spousal Support? Child protection?
- When is the next court date?
- Does the client have a family lawyer?
- Are there any existing family court orders regarding: custody and access or exclusive possession of the matrimonial home?
- Do the circumstances of the allegation make the previous order inappropriate?
- Are the circumstances such that counsel can argue that issue of access is better left to the family courts in the circumstances of the case?
- Has a risk assessment been conducted by the Crown or police? If so, can a copy be obtained from the Crown?

An accused at a bail hearing is often being assisted by duty counsel who has no previous relationship with the accused and limited ability to find out the answers to these questions. Duty counsel should find out from the accused whether he or she has a family lawyer or a lawyer in relation to child protection proceedings. Counsel in these matters can be an invaluable source of information on short notice.

It is important to note that in many cases an accused person charged with a domestic violence offence will remain unrepresented by counsel throughout the criminal proceedings. As Ms. How explains, in Ontario, individuals will not qualify for legal aid unless there is a risk they will be sentenced to a term of imprisonment if found guilty *and* they meet strict financial eligibility guidelines (How, 2012).

The Crown, with the assistance of the investigating police force, is likely to have compiled background information including prior incidents, complainant input and risk assessments. Where the Crown wishes to rely on this information in the course of the bail hearing, it must be disclosed to the accused. Duty counsel should examine this material and discuss it with the accused before the hearing if at all possible (Legal Aid Ontario: 49).

Actuarial risk assessment tools, such as the Ontario Domestic Assault Risk Assessment (ODARA), may be completed by police and provided to the Crown in advance of the bail hearing. Risk assessment results and reports are not admissible as evidence unless an expert witness is called who can interpret the report and express an opinion in regard to its validity as a predictor of behaviour. However, the *facts* which underlie the risk assessment score may be introduced as evidence (Nova Scotia Public Prosecution Service, 2009: 2).

In many jurisdictions Crown counsel will take a conservative approach to bail in cases of domestic violence. The Crown may seek detention even where there is no criminal record and no outstanding charges. Where the Crown consents to the accused person's release it is often only where the terms of release require the accused to reside with a surety. The bail handbook developed by Legal Aid Ontario for duty counsel reminds duty counsel that, in this context, it will often to fall to duty counsel to protect the record and "repeatedly remind the court of the requirements of s. 515 of the *Code*" which places the onus on the Crown to show cause for each increasingly restrictive form of release. The range of cases that involve allegations of "domestic violence" varies widely. The tendency to lump all such cases together and insist on the same stringent bail conditions in all cases must be resisted. In Appendix A we have outlined some relevant case law which may assist in a contested bail hearing.

Counsel representing an accused at a bail hearing should ensure, if possible, that the terms of release:

- permit the accused to return to the matrimonial home, in the company of the police, to collect personal effects, including financial documentation;
- do not limit contact between the accused and the complainant that will hamper the accused's ability to resolve his or her family law case (e.g. avoid conditions that prohibit *any contact* between the accused and complainant, without exception);
- specify minimum terms of access to children where a complete prohibition is not warranted; and
- do not restrict the accused's ability to work.

4.5.3 Advising a Client after Release

An individual who is accused of a domestic offence and has spent a night in custody often experiences a certain shock at the reality of his or her situation. That state of shock can make it difficult for the individual to take the necessary steps to address the numerous and pressing issues relating to both the family and criminal proceedings.

Defence counsel should advise the client to retain family law counsel as soon as possible and provide the names of referrals. The accused may need to respond to emergency motions brought without notice by the complainant or may need to bring his or her own applications. For instance, the accused may consider making one of the following emergency applications in order to protect his or her relationship with the children and prevent the creation of a "status quo" in respect of custody and possession of the matrimonial home:

- Emergency order for specified access to the children. This type of application should be made immediately where the criminal court has imposed conditions that do not provide for access;
- Order for supervised access if that is what is required by the bail conditions. Where such a condition is imposed, defence counsel may wish to include a requirement that the access supervisor be required to deliver access reports to counsel or the court, particularly, where

an accused believes such reports will reflect favourably on him or her (and/or could demonstrate attempts at parental alienation by the complainant);

- Order for the non-removal of children from the jurisdiction, if the accused believes the complainant is a flight risk;
- A Preservation order to prevent depletion of a spouse's property (Halpern, et al., 2007: 14-15).[5]

Where an accused is unable to retain counsel for the family law matter, defence counsel may wish to point the client to the resources available for unrepresented litigants.

In order to allow for the effective drafting of applications and responses, family counsel should be made aware of the nature of the criminal allegations against the accused and any bail conditions imposed. Where affidavits are prepared in support of the applications or responses, it is good practice to have the contents reviewed by criminal counsel. As will be discussed in greater detail below, the contents of materials filed in family court proceedings can make exceptional fodder for cross-examination at a criminal trial. An accused and a complainant must ensure that statements made and positions taken in the family law context are not inconsistent with those made and taken in the criminal courts.

4.6 Bail Violations

4.6.1 Advice to Accused

Client management and proper explanation of the consequences of breaching a bail condition are crucial. Clients need to know that if they breach a condition of bail (or an undertaking given to the police), they will end up back in custody and that bail will be significantly more difficult to obtain in the face of breach charges, particularly in light of the reverse onus provisions (s. 145 and s. 515(6)(c)). While the concept seems simple, the dynamics at play in cases of allegations of domestic violence often add complications.

Clients are likely to become frustrated with the slow pace of the criminal justice system and will want to resume communication, and even cohabitation with the complainant. A complainant who shares those desires can exercise considerable pressure on an accused.

Clients should be advised to resist temptation. Anecdotal experience suggests that where the accused and complainant do resume contact, discussions often escalate into disagreements about the pending charges and may result in a breach of bail charge. Clients should be advised that even contact initiated by the complainant will violate the terms of bail and that the accused is obligated to terminate contact immediately. Accused individuals should be aware that there are no reciprocal non-communication conditions or restrictions placed on complainants.

[5] Pursuant to s. 12 of the *Family Law Act* of Ontario, if the court considers it necessary for the protection of the other spouse's interests under this Part, the court may make an interim or final order,(a) restraining the depletion of a spouse's property; and (b) for the possession, delivering up, safekeeping and preservation of the property.

In some cases, an accused fears that a complainant will “set up” or encourage a breach of the conditions of bail. In these situations, an accused should be advised to keep a journal or diary of his/her activities and to record telephone message/texts/emails from the complainant.

Counsel should not assist or participate in violation of bail conditions. That means counsel cannot turn a blind eye when a client who is subject to a non-communication order comes to the lawyer’s office with complainant in tow. Instead, counsel should take immediate steps to address the issue.

In Ontario, the Crown policy manual mandates that where there is a breach of a no-contact order condition of bail in the domestic violence situation, “Crown counsel should apply for revocation [of the original bail] and seek a detention order.” Where a Crown exercises his or her discretion otherwise and does not seek detention, he or she must make a written explanation in the file (Ministry of the Attorney General (Ont), 2005).

Because a breach of a court order is an identified risk factor for future violence, it is important for Crown Counsel to consider laying charges, where appropriate, for breaches of bail orders. The Crown may choose to proceed on these charges even if the substantive charge is ultimately not prosecuted, especially in situations identified as high risk. Convictions for breaches will inform risk assessments at future bail and sentencing hearings (Ministry of the Attorney General (BC), 2011: 3).

4.6.2 Advice to Complainants

Complainants should be made aware of restrictions on the accused – either by the Crown, the police, or victim services. A complainant should be made aware that where there is a “no-contact” term of bail, an accused is not permitted to resume contact with the complainant, even with the complainant’s consent. Complainants who wish to resume communication and/or do not want the criminal court proceedings against their spouse to continue should be advised to seek independent legal advice (see further discussion below in 4.7.1.2).

Complainants should be made aware of what constitutes a breach of recognizance and the importance of reporting breaches to the police. The complainant may wish to keep a diary of any attempted contact or communication by an accused.

4.7 Bail Variations

An accused seeking a bail variation increases his or her chances of success by approaching the Crown with a realistic variation supported by the requisite information (including input from the complainant, confirmation of family court orders, etc.). While best practices for obtaining a bail variation will depend to a large extent on the unique circumstances of each case, for ease of consideration, we have divided domestic assault cases into two types: those where the complainant is cooperative and those where the complainant is adversarial. This division is merely practical but it affects how the case will be addressed at the bail variation stage and what information should be provided to a complainant and accused.

4.7.1 Where the Complainant Supports a Bail Variation

These cases typically involve a domestic relationship where, post-arrest, the complainant and defendant want to reconcile. This type of case is not limited to those where the complainant recants or changes his or her version of events; in some cases, the complainant maintains the accuracy of the allegation, but nonetheless wants to reconcile with the accused.

In these circumstances, bail conditions can cause hardship for both an accused and the complainant. As discussed above, an accused may be removed from his or her house, prevented from seeing and at times speaking with his or her children. Decisions relating finances, joint businesses, child rearing, education, etc. are put on hold.

Bail variations will form part of a plan to resolve these cases. In cases of family violence, there are three general plans to deal with the case: 1) a guilty plea, where the client is prepared to admit guilt; 2) resolution through a peace bond, diversion or withdrawal; or 3) a trial, where the client maintains innocence.[6]

4.7.1.1 Bail Variations in Anticipation of a Guilty Plea

Where the case is dealt with through a guilty plea in association with participation in a treatment program, bail variations are generally standard graduated variations that are tied to progress in the counselling program. Often, a client will plead guilty and have their sentencing adjourned to proceed after the completion of the program. In these cases, a bail variation is often granted that allows full contact between the defendant and the complainant subject to the "written, revocable consent" of the complainant.

The complainant's written revocable consent for contact is to be filed either with the Crown's office or with the Courthouse Probation office. Both the accused and the complainant should be aware that the complainant may revoke his or her consent verbally at any time and that the revocation does not require any grounds, nor does it require the office with which the consent is filed to be notified to take effect. Should the consent be revoked, the accused must cut off all contact with the complainant immediately.

4.7.1.2 Peace bonds and Withdrawals

Generally, Crown Policy is not in favour of withdrawing domestic assault charges or resolving them by way of peace bond apart from cases where there is little prospect of conviction. Clients need to understand that efforts undertaken to seek a withdrawal or peace bond are not guaranteed and the Crown may legitimately decide to continue with a prosecution notwithstanding the efforts undertaken by all parties. Where the complainant is co-operative and the client wishes to seek a peace bond or withdrawal resolution of the charges, counsel may wish to consider the following steps:

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[6] These guidelines discussed in this section are adapted from an earlier paper by Joseph Di Luca, *Bail Variations and Violations in the Domestic Context – The Defence Perspective*, presented at the 2007 Ontario Bar Association Conference on Crime in the Family: Navigating the Intersection between Criminal and Family Law.

- Counsel needs to assess whether the couple is legitimately committed to remaining together and working through their problems. Making domestic assault charges “go away” takes hard work. Successful resolution is most likely to occur in cases where the client and his/her partner are committed to seeking a constructive resolution of the charges and are prepared to make a legitimate effort to better themselves and move forward.
- The complainant should receive independent legal advice (“ILA”). In cases where financial means are a concern, counsel should consider asking a colleague to provide the ILA pro bono or at a reduced rate and offer to do the same when they have a complainant that needs ILA. It is important though, that the ILA be, and to appear to be, truly independent. The complainant’s wishes should be conveyed to the Crown by the counsel providing the ILA on an ongoing basis. The ILA should cover basic information relating to the process. The complainant should be advised of Crown Policy in domestic assault cases. They need to understand that they cannot simply ask for charges to be “dropped”. In fact, the complainant did not “press” charges in the first place. Complainants should be advised about the stages in a criminal proceeding and their role. They should be provided with information relating to their safety. In cases where the complainant indicates that they wish to change or retract their allegation, he or she needs to be advised of the potential consequences. If necessary, counsel providing the ILA may need to assist in drafting an affidavit from the complaint where there is a partial or full recantation. ILA helps to reassure the Crown and the court that a complainant is cooperating with an accused freely and voluntarily and not out of fear or intimidation or because he or she is subject to coercion.
- Counsel should arrange for private individual counselling. Each party should meet with a counsellor individually at least once and discuss their willingness to participate and complete counselling.
- The counsellor should report to counsel who needs to know whether the counsellor feels he or she can help the couple. The counsellor may want to meet with the parties separately for a while and determine whether joint counselling sessions are appropriate. Sometimes a “cool down” period is warranted.
- Get an interim report from the counsellor to provide to the Crown in support of a bail variation request to permit joint counselling. A Crown needs to have something tangible demonstrating that the efforts being undertaken are legitimate and earnest.
- Have the parties attend a number of sessions with the counsellor. Ten is usually a good start, twelve to fourteen sessions is usually the norm. Get a follow up report for the Crown.
- Consider whether the client should also enroll in drug/alcohol/anger management courses in addition to the counselling. If so, get reports for the Crown.
- Bail variations can be sought incrementally and should be supported by counselling reports, etc. At first, just get the couple back together for counselling. As counselling progresses well, further incremental variations for example, permitting telephone communication, then meetings in the presence of third party, then unrestricted contact, can be sought.
- Once all counselling has been successfully completed, the Crown can be approached with a view to seeking a withdrawal or peace bond. In many cases the answer may be no. However, in some cases, given the passage of time, the genuine and extensive efforts made by the parties and the consequences of having an entry (even a discharge) on a person’s record, a Crown can be persuaded to accept the proposed resolution. If not, the case is likely well set-up for an absolute or conditional discharge following a finding of guilt.

- Clients should be advised that this process can be lengthy. Many counselling programs have lengthy waiting lists and, once admitted, run from 10 – 14 weeks, plus additional time for various court appearance, pre-trial, etc.

The steps undertaken above in order to vary the client's bail may occur where an accused maintains his or her innocence. However, the scope of any counselling will necessarily be circumscribed by the fact that the client denies any assaultive behaviour. Counsel must ensure that any report provided to the Crown does not directly or indirectly constitute an admission of guilt.

4.7.2 Where the Complainant Opposes a Bail Variation

Sometimes, the parties have no intention of resuming the relationship and the complainant does not support a bail variation. These cases are generally, though not always, more adversarial in nature.

- In cases where the complainant remains adverse in interest, seeking consent bail variations can be significantly more challenging. In most cases, the Crown will seek input from the complainant prior to considering whether to consent to a variation. While the complainant's input is not determinative, it is often persuasive.

- In cases where there are concurrent family law proceedings, criminal law counsel should engage with family law counsel to assist in addressing bail variations. When the related family law proceedings address issues relating to child custody and access, bail variations may need to be sought to maintain consistency between Court orders. In most cases, Crowns are willing to vary bail conditions to permit concurrence with and/or delegation to family court orders and agreements.

- Counsel should obtain copies of file material from family counsel and should co-ordinate efforts to avoid conflicts and/or uncertainty.

- Similarly, criminal counsel should provide a copy of the bail recognizance to the family lawyer and provide updates on any variations.

4.7.3 Bail Variations versus Bail Reviews

The terms of a bail order do not have to remain fixed throughout the course of the criminal proceedings. However, once bail is granted (or denied), no other judge or justice of the peace at the provincial court level can review that decision or the conditions of bail imposed by the original judge or justice. A provincial court judge or justice can only modify an existing bail condition with the agreement of the Crown prosecutor. Otherwise, an accused person must bring a formal application to review the bail conditions before a judge in the Superior Court of Justice.

As described above, the Crown may agree to vary the conditions of bail to allow for more contact between the accused and complainant in order to facilitate in counseling. Crown counsel may agree to other variations to curfew or house arrest provisions to allow for attendance at school or work.

Obtaining a “consent bail variation” is the least expensive and most efficient way to modify the terms of release. Where the Crown does not agree to change the bail conditions, the only available remedy to an accused is to bring a bail review application before a Superior Court judge.

In order to be successful at the bail review, an accused person must satisfy the Superior Court that the judge or justice who imposed the original bail conditions made either an error of law or that there has been a material change in the accused person’s circumstances to warrant the change of bail conditions.

Applying for a bail review requires the filing of materials at the Superior Court including a copy of the transcript of the original bail hearing. Also required as part of the bail review application are affidavits (sworn statements) from both the accused person and any proposed sureties (in Ontario see Rule 20 of the *Superior Court of Justice Criminal Proceedings Rules*). The time and expense required to prepare these materials means that it can take several weeks before a bail review can be heard and may cost the accused thousands of dollars.

5. PRE-TRIAL DECISIONS AND PROCEDURES

5.1 Introduction

In family court and child protection proceedings, the court is concerned with making decisions that will result in the best outcome for the whole family. There is an expectation of openness and mutual disclosure on the part of the parties in order to allow the court to make the right decision. In relation to proceedings involving children, decisions will be made in accordance with the over-arching principle of what is in the best interests of the child.

The focus in criminal proceedings is considerably narrower – courts are tasked with deciding whether the Crown has proved beyond a reasonable doubt that an offence has been committed. While the welfare of the child and the family may be a relevant consideration on sentencing, it plays no role in determining whether an accused should be convicted.

It is important to keep in mind this difference in approach as a case makes its way through the criminal justice system – as it will impact decisions relating to cooperation with child protection officials, information sharing, and participation in counselling or treatment programs.

5.2 Cooperating with Child Protection Authorities

In many jurisdictions, there is a policy that the child protection authorities are contacted by police or the Crown in all cases involving family violence, even where the alleged victim is not a child. The child protection agency often contacts and seeks to interview the accused. In any case where a child is the complainant, the police and/or Crown must inform the relevant child protection agency who will then likely start its own investigation (Smith, 2004: 6).

Accordingly, many if not most accused will have some interaction with a child protection agency during the course of his or her criminal court proceedings. Cooperation with these authorities is not mandatory, but in most cases is advisable.

5.2.1 The Role of the Child Protection Agency

When concerns are raised about a family's ability to care for a child, a child protection agency may take steps to investigate the care the child is receiving. If the child protection worker determines that the child is in need of protection, the children's aid society may start a court application against the child's parents or caregivers. In Ontario, child protection services are provided by children's aid societies (sometimes called family and child services).

The Children's Aid Society (CAS) will initiate court proceedings where it believes that a child is in need of protection (Glass and Jain, 2007: 9). The agency has the statutory power to apprehend a child and take him or her to a place of safety pending the completion of an investigation if the agency believes that the child is at imminent risk of harm (See, in Ontario, s. 40(10) of the *Child and Family Services Act*, R.S.O 1990, c. C.11 ("*CFSA*"). In Ontario, where a child has been removed by the CAS, the agency must have the matter in front of a judge within five days of the apprehension.

Although procedures and steps differ in jurisdictions across the country, in general child protection proceedings move quickly. In Ontario, there may be multiple case management and settlement conferences. Where no agreement can be reached between the parties, the matter will proceed to trial.

In the course of child protection proceedings, the CAS and the child's parent or caretaker will generally both be represented by lawyers. The court may appoint an independent legal representative for the child pursuant to s. 37 of the *CFSA* where the court believes a lawyer for a child is necessary to represent the child's interests in protection proceedings. The Office of the Children's Lawyer (a branch of the Ministry of the Attorney General) provides the legal representation in these cases.

The grounds under which a child can be found "in need of protection" are set out in s. 37(2) of the *CFSA*. These grounds include physical, emotional and/or sexual abuse**.** The *Act* also allows the court to make a finding that the child is "a child in need of protection" if the child is at risk of suffering abuse. Where a court makes a finding that the child is in need of protection under the *CFSA*, a number of dispositions are available. These dispositions range from placing the child with a parent under the supervision of the CAS to making the child a permanent ward of the Crown without access to the parent.

5.2.2 Working with the Child Protection Agency

A family that finds itself involved with a child protection agency must remember the importance of being cooperative with the Society to the extent that they are able. Refusing to take steps to address the issues that lead to the involvement with the CAS will not end the Society's involvement with the family and will likely be viewed unfavorably by a judge at a child protection proceeding (Law, 2012).

A parent who is charged with a criminal offence in addition to being involved in child protection proceedings may be hesitant to cooperate with the CAS for fear that it will have a negative impact on the criminal proceedings. This can hinder the resolution of the child protection matter. Rather than refusing to cooperate until the completion of the criminal charges, steps can be taken in the child protection context to minimize the risk of self-incrimination by an accused parent.

At the outset of the investigation the CAS will request that one or more of the parents sign consent forms for the release of items of information from third parties, such as teachers, relatives and doctors, to the CAS. While the parent should be amenable to cooperating with the CAS, the release of all such information may not be necessary for the CAS to conduct its investigation. The parent therefore ought to seek the advice of legal counsel experienced in child protection matters, who can narrow the scope of information released to the CAS without compromising the CAS' investigation (Glass and Jain, 2007: 10).

The CAS will inevitably attempt to interview the child or children in the investigation. Steps can be taken to prevent the CAS interviewer entering a fishing expedition for incriminating information during the interview (Glass and Jain, 2007: 11). The parent can request, personally or through their counsel, that the interview not be held at the CAS office; that they be able to observe the interview; and that the interview be videotaped. At the Gatehouse facility (described in section 4.2.2), for example, there are two-way mirrors so that a parent and counsel can observe the interview. Counsel can attempt to obtain an agreement in advance as to the scope of the interview and intervene if the interviewer asks "grossly leading questions or conducts the interview inappropriately." (Glass and Jain, 2007: 11)

The CAS will also attempt to speak to the parent directly. The parent would be wise to retain counsel at the outset of contact with the CAS and advise the CAS of his or her representation. Counsel can then become the direct contract between the CAS and the parent. Furthermore, counsel can request to be present when the CAS attempts to interview or otherwise speak with the parent.

5.2.3 Admissibility of Statements made to Child Protection Authorities

Any statement made to the CAS by an accused likely cannot be used against him or her in the criminal court proceedings unless the trial judge is convinced beyond a reasonable doubt that the statement was made voluntarily.

In criminal law all out-of-court statements by an accused person to a "person in authority" must be made freely and voluntarily. In this context, a statement to a member of the Children's Aid Society will be admissible only if the CAS member is not a "person in authority" or the prosecution proves that the statement was made voluntarily.

The Supreme Court of Canada delineated who constitutes a "person in authority" in *R. v. Hodgson* and reiterated this delineation in *R. v. Grandinetti*. The test of who is a "person in authority" is largely subjective, focusing on the accused person's "perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment." (*Grandinetti*, 2005: para. 38) The test includes an objective element which is concerned with the reasonableness of the accused's belief that he or she is speaking to a person in authority.

Prior to *Hodgson* the Alberta Court of Appeal considered in *R. v. Sweryda* whether a social worker constitutes a person in authority. In *Sweryda*, the Court concluded that the social worker was a "person in authority" because he or she was investigating an alleged criminal act with the power to institute a prosecution against the accused person. *Sweryda* and *Hodgson*, taken together, suggest that a CAS member will constitute a person in authority when his or her role dovetails with the conventional investigatory and prosecutorial agencies of the state. Lorne Glass and Seema Jain note that in considering this issue the governing statute will be an important factor (Glass and Jain, 2007: 15-16). In particular, in Ontario consideration ought to be given to the following statutory powers granted to CAS members under the *Child and Family Services Act*:

- The power to apply to the court to determine whether a child is in need of protection (s. 40(1));
- The power to apply for a warrant to bring a child to a place of safety (s. 40(2));
- The power to enter without a warrant a premise, by force if necessary, to find and remove a child (s. 40(6));
- The power to call for assistance of a police officer in removing a child (s. 40(8));
- The duty to report that a child is in need of protection or may be suffering from abuse (s. 72);
- The creation of an offence for anyone who obstructs a child protection worker (s. 206(2)).

If a determination is made that the CAS worker is a person in authority, the statement will only be admissible against the accused if the court is satisfied beyond a reasonable doubt that the statement was made voluntarily.

The voluntariness test is primarily concerned with whether an accused person was able to make a meaningful choice about whether to speak to the person in authority. The court will consider all of the circumstances in determining whether the conduct of the authorities deprived the suspect of making a meaningful choice by reason of threats, inducements, oppression, coercion, trickery, misinformation, or other abuse (*R. v. Oickle*, 2000). Moreover, if the Crown does prove beyond a reasonable doubt that the statement was made voluntarily, the accused person's concomitant right to silence will be deemed to have been not violated (*R. v. Singh*, 2007: para. 37).

Since the voluntariness test is primarily contextual, a determination of the voluntariness of a parent's statement to a CAS member, presuming that the CAS member is deemed to be a person in authority, will be highly dependent on the circumstances.

5.2.4 Checklist for Interviews with the Children's Aid Society

Given that the CAS is likely to pursue an investigation where a parent refuses to participate in an interview and that a negative inference can be drawn by the refusal to participate, as a practical reality, an accused parent is likely to speak with CAS investigators at some point (Law, 2012). Criminal law counsel can take the following steps to avoid, to some extent, the dangers of self-incrimination, inconsistent statements, etc. associated with providing a statement to the child protection authorities:

- Counsel should speak to the CAS in advance of the interview and find out the potential areas of questioning. The authorities may be willing to provide a detailed outline of the allegations against the client;
- Review the proposed and anticipated areas of questioning with the client in advance of the interview and obtain answers from him or her;
- Conducting a "practice interview" with the client will serve to refresh the client's memory and allow the lawyer to assess the client's performance;
- Counsel should press the client on suspicious statements and remind the client of the importance of telling the truth. This may reduce the possibility of the client lying or making innocent mistakes in the actual interview;

- Ensure that the interview with the CAS is recorded in some manner. It is best if the statement is video recorded. At minimum, an independent note taker should be present;
- Counsel should insist on being present for the interview;
- To assist in any argument at trial that the statement should not be admissible, counsel should ensure that the record clearly reflects that the CAS worker is a person in authority and that the client is only speaking out of a hope for some advantage (avoiding child protection proceedings) or fear of prejudice or most likely, both.

Case Study – *Children's Aid Society of Huron County v. R.G.* (2003), 124 A.C.W.S. (3d) 712
R.G. and S.R.(1) have two children. In July of 2000, R.G. separated from S.R.(1) after he assaulted her. S.R.(1) was charged and later convicted of this assault and the Children's Aid Society became involved with the family. R.G. eventually moved in with another partner. In December of 2000, a neighbour overheard R.G.'s partner abusing one of her children, S.R.(2). The child was brought to the hospital by the neighbour where a number of red welts were found on the child's legs. As a result of those injuries, the CAS went to the mother's home and apprehended her other child, K.R. K.R. was found to have significant injuries to the side of his face including some bleeding in the ear area. Shortly after the children were apprehended, the R.G.'s partner was charged with assaulting S.R.(2) and R.G. was charged with assaulting K.R.

R.G. denied assaulting K.R. Her evidence was that she was out shopping when the injuries occurred.

Ultimately, the partner pleaded guilty to assaulting S.R.(2). The charge against the mother regarding K.R. was withdrawn at the time of the trial in November of 2001. At that time, the mother pleaded guilty to a minor assault on S.R.(2). In the interim, however, child protection proceedings moved forward with the mother reluctant to be fully cooperative for fear that it would prejudice her in the criminal court proceedings. She made almost no progress in terms of addressing the issues that brought her children into care.

In the course of the child protection proceedings, a parental capacity assessment was ordered. At the time it was completed, the mother was still subject to outstanding criminal charges relating to the very reason that the children were apprehended. In assessing the efficacy of the assessment, Justice Glenn noted:

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

> haunted her throughout the rest of the child protection proceedings since it believed that she had poor insight into her failings as a parent. Her apparent lack of insight was one of the important basis on which the psychologist determined that her prognosis for change was poor.

In child protection proceedings, the best tack a parent can take generally involves open discussion of parenting shortcomings and co-operation with the child protection authorities. The dynamics of a criminal case, however, will sometimes dictate the opposite approach. Justice Glenn makes two suggestions for ameliorating this situation and preventing child protection proceedings from coming to a stand still during the resolution of parallel criminal charges:

> First, criminal counsel must become aware of the potential cost of delay and silence in the face of companion protection proceedings. Second, all parties should explore the possibility of holding a combined settlement conference and criminal pre-trial in an effort to resolve the shared facts between each case. If the resolution of a protection issue is delayed because it is tied to a criminal charge, this issue should be flagged for the next status review proceeding and resolved as soon as possible.

5.3 Use of Evidence from Family Law Proceedings in Criminal Proceedings

5.3.1 The Deemed Undertaking Rule

During a family law proceeding, the parties are entitled to specific items of disclosure under provincial family law legislation. In Ontario, for example, the Rule 20 of the *Family Law Rules* affords each party the opportunity to question the other side (on consent or with a court order); Rule 13 provides for the disclosure of each party's financial statements; and Rule 19 governs document disclosure. Rule 20(24) replaces the common law "deemed undertaking" rule and binds the parties and their lawyers with an undertaking to use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained.

The deemed undertaking rule (and its statutory counterparts) was considered by the Supreme Court in *Juman v. Doucette*. The Court noted that statutorily compelled discovery is an invasion of a person's "private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous." (*Juman v. Doucette*, 2008: para. 24) At the same time, the Court recognized that a proper discovery is necessary to "prevent surprise or 'litigation by ambush,' to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable." The Court further noted that a party to litigation who has "some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery." (*Juman v. Doucette*, 2008: para. 26) Accordingly, the Court concluded that "unless a statutory exemption overrides the implied undertaking, the onus will be on the person applying for the exemption or variation to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy, protection against self-incrimination, and the efficient conduct of civil litigation."

The *Family Court Rules*, O. Reg. 383/11 specifically Rule 20(25), provides four limited exceptions to the undertaking:

(a) the person who gave the evidence consents;
(b) the evidence is filed with the court, given at a hearing or referred to at a hearing;
(c) the evidence is used to impeach the testimony of a witness in another case; or
(d) in a later case between the same parties or their successors, if the case in which the evidence was obtained is withdrawn or dismissed.[7]

Accordingly, pursuant to Rule 20(25)(b) and (c) any affidavit or application filed with the family court can be used in the criminal proceedings. So, for example, a complainant can be cross-examined by the accused or his lawyer in respect of affidavits filed in support of emergency motions for access, support or exclusive possession of the home that disclose information in relation to the allegations forming the base of the criminal trial. Family law counsel must ensure that complainants understand the importance of consistency with the statements made to the police in relation to these allegations. False or misleading information, especially in relation to ex-parte motions, are grounds for setting the order aside. Moreover, any inconsistencies or falsehoods contained in the affidavits will likely become the focus of cross-examination of the complainant should the criminal charges proceed to trial.

Similar caution should be exercised by accused. Because evidence filed or utilized in family law proceedings is subject to being produced in criminal proceedings, family law counsel should consider asking criminal counsel to review affidavits before they are filed with the court. This practice ensures consistency and comfort with the level of disclosure being made in the family court proceedings.

5.3.2 Protection from Self-Incrimination

The Supreme Court of Canada recently held, in *R. v. Nedelcu*, that compelled testimony provided in a civil proceeding is admissible against an accused person in a criminal trial, for the purpose of challenging his or her credibility where the evidence is not "incriminating." In that case, Mr. Nedelcu and the victim worked together. One day after work, Mr. Nedeluc took the victim for a ride on his motorcycle. The victim was not wearing a helmet and was ejected from the back of the bike when the vehicle crashed. The victim suffered permanent brain damage. Mr. Nedelcu was charged with dangerous driving and impaired driving causing bodily harm. He was also sued in a civil action by the victim and his family. He was examined for discovery as part of those proceedings. In discovery, he testified that he had no memory of the events that day from 5pm to the following day at 11am when he woke up in hospital. Fourteen months later at his criminal trial, however, he gave a detailed account of the accident and the events preceding it. He testified that he recalled about 90 to 95 percent of what occurred the day of the accident. The Crown sought leave to cross-examine the respondent on his discovery evidence. A *voir dire* followed and the trial judge ruled that the discovery evidence could be put to the respondent for the purpose of impeaching his credibility.

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[7] Manitoba and Prince Edward Island have also enacted rules governing when relief should be given against implied or "deemed" undertakings. See *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba) and *Rules of Civil Procedure*, r. 30.1 (Prince Edward Island).

The Court of Appeal allowed Mr. Nedelcu's appeal. Citing the Supreme Court's decision in *R. v. Henry*, the Court concluded that s. 13 of the *Canadian Charter of Rights and Freedoms* and s. 5(2) of the *Canada Evidence Act* prohibit an accused's compelled evidence in a civil proceeding from being used at the accused's subsequent criminal trial for *any* purpose.

The Crown has appealed the decision in *Nedelcu* to the Supreme Court of Canada. The Crown argues first, that civil discovery evidence should not be considered "compelled" for the purpose of s. 13 of the *Charter*; and second, that even if the evidence was compelled, the Crown should be entitled to use that evidence to impeach the credibility of the accused at a criminal trial.

The Supreme Court of Canada found that evidence given in a discovery in a civil proceeding is "compelled" and that "incriminating evidence" may not be used for any purpose in a criminal proceeding. Where, however, as in *Nedelcu*, the evidence is not "incriminating," in the sense that it does not prove or assist in proving an element of the offence for which the witness is being tried, it can be used to impeach the witness' testimony. More specifically, the Court held that the use of non-incriminating discovery evidence for impeachment does not trigger the application of s. 13.

5.4 Use of Counselling and other Support Services in Criminal Proceedings

As part of the integrated approach to cases of domestic violence in the criminal justice system, complainants and accused are meant to have access to a variety of support services and treatment options. This section explores concerns as to when and what information disclosed during participation in these services may be disclosed or produced either in the criminal or family law proceedings.

5.4.1 Third Party Record Applications

The Crown has a constitutional obligation to provide disclosure to an accused. The Crown is obligated to produce to the defence all relevant, non-privileged information in its possession or control, whether or not the Crown intends to introduce the information as evidence, and whether or not the information is exculpatory or inculpatory (*R. v. Stinchombe*, 1991).

In some instances, an accused person will want to obtain information that falls outside the scope of the Crown's disclosure obligations, for instance, because it is not in the hands of the Crown. Medical, psychiatric, therapeutic, educational, and child welfare records are all examples of materials an accused person may seek in the course of criminal proceedings.

Such records may be useful to an accused in a number of ways. They may provide prior inconsistent statements about the criminal allegations that can be used to impeach the credibility of the complainant. They may reveal evidence of a motive to fabricate. Or they may establish a pattern of false allegations on the part of the complainant.

However, because of the conflicting interests at stake when an accused wishes to delve into the private and potentially very personal records of a complainant or witness, Parliament and the

Supreme Court of Canada have set out specific rules governing the procedure for the production of third party records in the course of a criminal proceeding.

In *R. v. O'Connor*, the Supreme Court set out a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown. A similar, but more restrictive regime set out in ss. 278.1 to 278.91 of the *Criminal Code* governs the production of records where the accused is charged with a sexual offence and the records sought contain personal information over which there is a reasonable expectation of privacy (commonly referred to as the *Mills* regime).

5.4.1.1 The O'Connor Regime

The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the record holder to attend court with the targeted records or materials.

The accused must also bring an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant to the his or her trial. Notice of the application must be given to the prosecuting Crown, the record holder and the person who is the subject of the records (the complainant or witness).

The application is brought before the judge seized with the trial[8] – though the application will often be brought before trial commences – who will determine whether production should be compelled in accordance with a two-stage test that was established by the Supreme Court in *O'Connor*. First the accused person must satisfy the judge that the record is "likely relevant" to the proceedings. The judge may then order production of the record for the court's inspection. At the second stage, with record in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

In *O'Connor* and subsequent cases, the Supreme Court has explained that the burden of establishing "likely relevance" at the first stage of the application is a significant but not onerous hurdle. Under the *O'Connor* regime, likely relevance means that:

> [T]here is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (*O'Connor*, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (*O'Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a

[8] Bill C-53, *An Act to amend the Criminal Code (mega-trials)* (short title: *Fair and Efficient Criminal Trials Act*), was introduced and received first reading in the House of Commons on 2 November 2010. The bill died on the *Order Paper* when the 40th Parliament was dissolved on 26 March 2011. The *Act* would amend the *Criminal Code* to allow for the appointment of a case management judge who could, among other things, hear disclosure and production applications.

> stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position (*R. v. McNeil*, 2009: para. 33).

Likely relevance has "a wide and generous connotation" and includes all information that may reasonably be thought to assist the accused in the exercise of his right to make full answer and defence. At this stage of the inquiry, the only issue is whether the information is "likely" relevant and considerations of privacy should not enter the analysis. (*R. v. O'Connor*, 1995: para. 24; *R. v. McNeil*, 2009: paras. 32 and 44)

If likely relevance is demonstrated by the accused, the third party record holder may be ordered to produce the documents for inspection by the court in order to determine whether production should be ordered to the accused. The following, non-exhaustive, list of factors may be considered in determining whether or not to order production to the accused (*R. v. O'Connor*, 1995: para. 31):

- the extent to which the record is necessary for the accused to make full answer and defence;
- the probative value of the record in question;
- the nature and extent of the reasonable expectation of privacy vested in that record;
- whether production of the record would be premised upon any discriminatory belief or bias"; and
- the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question."

More recently, in *R. v. McNeil*, the Supreme Court has explained that once a court has found that the records sought are relevant to the accused's case, the second stage balancing exercise is "easily performed." Justice Charron held:

> In effect, a finding of true relevance puts the third party records in the same category for disclosure purposes as the fruits of the investigation against the accused in the hands of the prosecuting Crown under *Stinchcombe*. It may be useful to pose the question in this way: If the third party record in question had found its way into the Crown prosecutor's file, would there be any basis under the first party *Stinchcombe* disclosure regime for not disclosing it to the accused? (*R. v. McNeil*, 2009: para. 42)

5.4.1.2 The Mills Regime

Parliament responded to the Supreme Court's decision in *O'Connor* by enacting a statutory regime to deal specifically with the procedure to be followed for the production of third party records in cases involving allegations of sexual offences. The Supreme Court upheld the constitutionality of the legislative scheme in the 1999 decision of *R. v. Mills*.

Notably, the statutory regime enacted by Parliament for sexual offences applies to all records over which a complainant or witness has a reasonable expectation of privacy, whether those records are in the possession or control of a third party or of the prosecutor in the proceedings. Absent an express waiver from the complainant or witness to whom the record relates, production can only be made on application to the court and in accordance with the balancing test set out in the *Code* provisions. As the Supreme Court has explained, this "statutory regime therefore constitutes an exception to the common law regime of Crown disclosure under *Stinchcombe*." (*R. v. McNeil*, 2009: para. 21)

The *Mills* regime reflects the heightened privacy interests presumed to exist in the records targeted by the statutory regime. It maintains the two-stage application procedure set out in *O'Connor* but differs significantly "in that much of the balancing of the competing interests is effected at the first stage in determining whether production should be made to the court for inspection." (*R. v. McNeil*, 2009: para. 32)

Sections 278.3 to 287.7 mandate a multi-stage procedure:

1) First the accused must make a written application for production to the trial judge. Section 278.3(3) provides that a record may be produced if it is relevant to an issue at trial or to the competence of a witness. Section 278.3(4) lists a series of "mere assertions" which, by law, cannot establish "likely relevance." It is not sufficient, for example, for the accused to assert that the record relates to the incident that is the subject-matter of the proceedings or that the record may disclose a prior inconsistent statement of the complainant or a witness.
2) The application must be served on the prosecutor, the person in control of the record and the complainant or witness to whom the records relate.
3) At the same time, the accused must serve a special subpoena on the record holder. This form of subpoena notifies the person that the record does not need to be disclosed to any party or brought to court until a judge has made an order for production.
4) At the first stage, an *in camera* hearing is held in which a judge determines whether the record custodian should be ordered to produce the record to the court for review. The judge may order production if it is established that "the record is likely relevant to an issue at trial or to the competence of a witness to testify," *and* production of the record is "necessary in the interests of justice." (s. 278.5(1)) The test to be applied by the trial judge is set out in s. 278.5(2). In general terms it requires the judge to consider the accused's right to make full answer and defence as well as the privacy and equality rights of the person to whom the records relate. The judge is also directed to consider broader societal concerns including society's interest in encouraging complainants to obtain treatment.
5) If the judge decides that the record should be produced to the judge, the court must then decide whether to disclose the record to the accused. Generally, this determination will be made by the judge in the absence of the parties. However, the judge may hold an *in camera* hearing if it will assist in making the determination. The test for determining whether to order disclosure is set out in s. 287.7(1) and (2) and involves the application of the same factors that the judge applied under s. 278.5. The judge is required to give reasons for his decision.
6) Where the judge decides that a record should be produced to the accused, subsection 278.7(3) permits the judge to impose conditions on the disclosure to protect the interests of justice and the privacy and equality of the complainant. For example, the judge may require that the record be edited.

The courts have made clear that before the test of "likely relevance" will be met, an accused must do more than demonstrate that a complainant or witness has spoken to a counselor or doctor about incidents underlying the criminal charges faced by the accused. Instead, where confidential records are shown to contain statements made by a complainant to a therapist on matters potentially relevant to the complainant's credibility, those records will pass the likely relevance threshold "only if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value." (*R. v. Batte*, 2000: para. 72)

5.4.1.3 Resisting Defence Applications for Production

Where an application for third party records is made by an accused person, the witness or complainant who is the subject of the record should be aware that, like the record holder, he or she is entitled to appear and make submissions at the hearing of the application. They are not compellable witnesses and no order for costs may be made against a record holder, complainant or witness in respect of their participation at the hearing (s. 278.4).

Nevertheless, financial barriers may discourage a complainant from retaining independent counsel to represent his or her interests on the application. State funding for independent counsel for complainants and witnesses on a third party records application differs by province. Legal Aid Ontario has developed a program whereby financially eligible complainants in sexual assault cases whose records are sought can receive funding to obtain advice and assistance from counsel.[9]

Complainants or witnesses considering retaining counsel in relation to a third party record application should be aware that the Crown prosecutor represents the interest of the state and the public – not the complainant. At times the interests of the Crown may differ from the record holder and/or the individual to whom the records refer. It is important for a complainant to understand that Crown counsel is not his or her lawyer.

5.5 Use of Child Protection Files in Criminal Proceedings

The contents of CAS files may be of considerable interest to an accused involved in a criminal trial. The legal principles governing the disclosure and production of those files will depend on the manner in which the investigation unfolded.

5.5.1 Joint CAS and Police Investigations

Where there is a joint CAS and police investigation (e.g. joint interview conducted by the police and CAS of the child and the accused), the CAS investigation file will likely be considered within the control of the Crown and subject to the accompanying disclosure requirements whether the offence is governed by the *Mills* or *O'Connor* regime. Even in cases of sexual offences, the child production records will not fall within the statutory scheme set out in s. 278.1

[9] For discussion, see Saadia Dirie, *O'Connor/Mills Survey Report: Draft Client Satisfaction Evaluation* (Legal Aid Ontario, 2002) at 5, as cited in Lisa Addario, *Six Degrees from Liberation: Legal Needs of Women in Criminal and Other Matters* (Ottawa: Department of Justice, 2002) at Chapter Three, "Women as Witnesses, Complainants and Third Parties in Cases of Intimate Violence and Sexual Assault" http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la20-rr03_aj20/p16.html.

to s. 278.8, if the records are found to be made by "persons responsible for the investigation… of the offence."

5.5.2 CAS Files as Third Party Records

Where the CAS and the police have not conducted a joint investigation and the Crown is not in possession of the child protection file, the CAS materials will be considered a "third party record." It is not uncommon for an accused charged with an offence involving allegations of abuse of a child to bring an application to obtain production of the child protection file. This file may include investigative notes, videotaped interviews, supervision notes, statements from the child, doctors, teachers, and extended family. The file may also include medical, psychological and educational records.

The production of child protection files is governed by the statutory and common law rules (the *Mills* and *O'Connor* regimes) described in the section above and the determination of whether to produce the records to an accused must take into account the high expectation of privacy held in respect of this sort of record. Children may be under a legal compulsion to attend at CAS, they are likely unfamiliar with child protection and criminal proceedings, they are encouraged to communicate highly personal and private information to child protection authorities and they are assured of the confidentiality of the information provided. Courts have also noted the vulnerable position of children who become wards of the CAS and the potentially therapeutic nature of the relationship between the child and CAS.[10]

In *R. v. Mills*, the Supreme Court held that sensitivity to equality and privacy interests is required in the context of third party record applications to ensure that individuals whose lives are heavily documented are not subject to wrongful scrutiny. This concern is particularly relevant in the context of children in the care of a child protection agency (*R. v. Mills*, 1999: para. 92)

Where the records sought by the accused relate to a child protection file, the relevant Children's Aid Society which is the holder of the records, will have standing at the hearing. The primary role of counsel for CAS is to "educate the Court regarding the privacy interests at stake, and the effect that production may have on their ability to meaningfully assist children in need of protection if confidentiality is not assured." (Mandhane, 2007: 4). The child who is the subject of the records sought is also entitled to be represented by independent counsel.

5.5.3 CAS Files in the Possession of an Accused

An accused may have received disclosure of CAS files in the course of a child protection proceeding. Even in this type of case where the accused has already obtained information in a child protection file, that material will not automatically be admissible in criminal proceedings. In *R. v. T.C.*, the Ontario Court of Appeal upheld the trial judge's decision not to allow the accused to cross-examine the complainant on a report prepared by a social worker for the purpose of child protection proceedings. The complainant had received counselling as a result of

[10] See, e.g., *R. v. Jeanveau*, 2007, *R. v. L.G.*, 2003 and *R. v. Hudson*, 2001.

her complaint of sexual abuse by the accused. There was no suggestion that the accused did not have lawful possession of the report.

Nevertheless, the Court of Appeal held that the trial judge was right to exclude the evidence on the basis that its prejudicial effect substantially outweighed its probative value. As the trial judge found, the report had only slight probative value. Most of the matters upon which the accused sought to cross-examine the complainant, such as her animus towards him, had already been fully disclosed through other means, such as her statements to the police and cross-examination at trial. On the other hand "the use of the report in these proceedings did have a substantial prejudicial effect in distorting fact finding and interfering with an important therapeutic relationship." (*R. v. T.C.*, 2004: paras. 29-30)

5.6 Use of an Accused's Counselling Records

Participation in counselling or other services may also raise areas of concern for an accused person. As described above, the Supreme Court of Canada has held that statements made in the course of discovery testimony in a civil action are "compelled" and therefore cannot be used against an accused person at a subsequent criminal trial where they incriminating. The protection against self-incrimination does not apply, however, where the statement of an accused is not compelled. For that reason, utterances made by an accused during marital counselling, for example, may be admissible against him or her during criminal proceedings.

5.6.1 Case Study - *R. v. Pabani* (1994), 89 C.C.C. (3d) 437 (Ont. C.A.)

The case of *R. v. Pabani* provides an example of how statements made in the course of marital counseling can be introduced at a later criminal trial. Mr. Pabani was convicted of the murder of his wife. On appeal, he argued that statements made in the course of counseling sessions intended to assist he and his wife to reconcile should not have been admitted at trial. The Court of Appeal did not accept that argument:

> In June of 1988, the wife moved out of the matrimonial home. Efforts were made, however, to mend the broken marriage. Through the mediation of a mutual friend, Muntaz Merali, the appellant and the deceased agreed to meet in the presence of their priest to discuss the future of their relationship. The priest was Nazim Ali Hirani who occupied the office of Moog, the most senior position of a priest in the Ismaili religion. His wife, Yasmin Hirani, also occupied a high religious position in the Ismaili mosque.
>
> Three meetings took place with the Moog and Mrs. Hirani at the Hirani home. Throughout, the wife placed four terms as pre-conditions to her return: first, the appellant would have to agree to cease the violence, on this she was adamant; second, the payment of the money owed by the appellant to his father-in-law would have to take place; third, the deceased's social insurance number would have to be returned to her; and fourth, the appellant's family would have to agree to stop speaking swahili in the wife's presence because this was a language she did not understand. The appellant

agreed to all of these conditions. He implicitly conceded that there had been violence in the marriage, and although it was not discussed in great length during the meetings with the Moog, the appellant pledged to discontinue this behaviour. The appellant had previously admitted to Merali that there had been violence in the relationship, but said that his wife had made too much of it.

The content of these meetings was allowed as evidence during the trial of the appellant. Defence counsel objected to the admission of this evidence, particularly the appellant's implied admissions of violence; it was, counsel submitted, privileged information, divulged pursuant to an attempted marital reconciliation. Defence counsel submitted that both the *Divorce Act*, 1985, S.C. 1986, c. 4 (now *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)), and the common law created a privilege for such discussions in order to encourage full and frank disclosure during reconciliation. This privilege had not been waived by the appellant, and in the submission of his counsel, the contents of these privileged conversations ought not to have been admitted at trial. Additionally, defence counsel had argued that the statements fulfilled the four conditions for the establishment or recognition of privilege abstracted from the cases by Wigmore, Evidence in Trials at Common Law, McNaughton rev., vol. 8 (Toronto: Little Brown, 1961), para. 2285 and quoted and adopted by Spence J. in Slavutych v. Baker, [1976] 1 S.C.R. 254 at p. 260, but this argument was not made on appeal.

The trial judge found as a fact that at the time of the admissions by the appellant, Muntaz Merali and the Hiranis were acting in the course of marital reconciliation, and in particular that Merali was facilitating the reconciliation of the marriage by acting as a conduit between the couple during their marital complaints. He was satisfied, as well, that the admissions of the appellant as to violence in the marriage, money problems, difficulties with the appellant's family and other minor problems, were made in confidence. Nonetheless, the trial judge found that the privilege invoked by the defence did not bar the admission of the evidence in question. There were no divorce proceedings initiated at the time these conversations took place and the *Divorce Act* could not be invoked. Additionally, Then J. held that it was not the intention of Parliament to allow this privilege to shield an accused from criminal proceedings. Similar reasons led the trial judge to deny the applicability of a common law privilege.

The trial judge's decision was upheld by the Court of Appeal. The Court held that s. 10(5) of the *Divorce Act*, which provides that "evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings," only applies where the statements were made in a divorce proceedings and to a person nominated by the court under s. 10(4) to assist the spouses to achieve reconciliation.

5.6.2 Participation in "PARS"

Where the charge arises from an allegation of domestic violence, the Crown will often insist that the accused complete a Partner Assault Response ("PARS") program before withdrawing the charge (usually accompanied by the accused signing a peace bond). PARS is a counseling and education service offered by various community-based agencies. It is a 16-week program that "gives offenders the opportunity to examine their beliefs and attitudes towards domestic abuse, and to learn non-abusive ways of resolving conflict."[11]

PARS is designed for individuals who have assaulted their partners and the program requires that participants admit responsibility for their actions. Before being accepted into the program, individuals are often required to sign a form acknowledging that their behaviour caused their partner to be afraid. These requirements may cause difficulty for clients who specifically deny the allegations forming the basis of the charge and are agreeing to enter a peace bond as a way of expeditiously resolving the criminal charges. As is discussed further below, in section 7.1.2.1, entering into a peace bond may itself be considered an acknowledgement of wrongdoing in parallel family court proceedings.

5.7 Use of the "Crown Brief" in Family Law and Child Protection Proceedings

A litigant in a family law matter or child protection proceeding may seek to obtain the materials in a "Crown brief" – which contains the materials disclosed by the Crown to an accused person during the course of a criminal matter.

5.7.1 The General Rule – *P.(D.) v. Wagg*

The ability of a family law litigant or the CAS to obtain a Crown brief is governed in large part by the principles articulated in *P.(D.) v. Wagg*, 2004.

In *Wagg*, the Court of Appeal for Ontario held that so long as there is a law which empowers a litigant to seek the production of materials from the opposing party, that litigant can request the Crown's brief. Before production of the brief is made, notice must be given to the appropriate authorities, namely the Attorney General and the relevant police service (*Wagg*, 2004: para. 17). If the appropriate authorities consent to the production of the materials, the materials can be produced to the requesting party. If the appropriate authorities do not consent, a motion can be brought to a Court to adjudicate the production request (*Catholic Children's Aid Society of Toronto v. T.K.*, (2004): paras. 36-40). In its adjudication the Court will examine whether some of the documents are subject to privilege or public interest immunity, and whether disclosure would be in the public interest. The court will consider "whether there is a prevailing social value and public interest in non-disclosure that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information." (*Wagg*, 2004: para. 17)

[11] Ministry of the Attorney General, Programs and Services for Victims of Crime, online: http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#partner

Generally, information that was used in open court during a criminal proceeding should be disclosed, with potential exceptions for materials where privacy interests are particularly high – for example, private records of sexual assault complainants or confidential medical records (Addario, 2011).

The production of materials in a Crown brief in a civil matter raises the vexing issue of how to treat evidence which has been obtained in violation of one of the litigant's *Charter* rights. Indeed, in *Wagg* statements in the Crown's brief were held to be inadmissible at the criminal trial because the criminal trial judge ruled that the admission of these statements would bring the administration of justice into disrepute. Rosenberg J.A. stated in *Wagg* that this type of evidence ought to be produced to the requesting party in the civil matter, presuming, of course, that the evidence satisfies the requisite degree of relevance for production. The trial judge in the civil matter would then determine whether the admission of this evidence would bring the administration of justice into disrepute in the context of a civil trial. The civil trial judge must have particular regard to the "effect of excluding the evidence on the administration of justice bearing in mind, for example, that the plaintiff played no part in the *Charter* violation and that she may require the evidence to assist her in proving her case." (*Wagg*, 2004: 69)

5.7.2 Information Sharing Between Police Services and Child Protection Agencies

5.7.2.1 Joint Protocols

The circumstances giving rise to an investigation by a child protection agency often also give rise to a criminal investigation. In light of this overlap, it makes sense that police and child protection agencies would cooperate in order to 1) obtain all relevant information; 2) protect the integrity of the investigation process; and 3) relieve the burden on the children involved. With these goals in mind, protocols have been developed in many jurisdictions in Canada to guide joint investigations by police and child protection agencies (Murphy, 2007: 1).

These protocols outline best practices for joint investigations. They provide guidance on conducting the initial interview with the child and alleged abusers and any examination of the child by medical professionals. They also generally set out expectations in regard to ongoing communication between the police and the CAS during the course of the criminal and child protection proceedings that follow. The protocol for Kingston, for example, recommends that the CAS and the police discuss what conditions of release would be appropriate if the accused is granted bail in the criminal proceedings. Following the bail hearing, the protocol recommends that police obtain a copy of the recognizance of bail and provide it to the CAS. If a child protection worker notes any breach of bail, the police can be contacted immediately (Child Abuse Protocol for Kingston and Frontenac, 2009).

The protocols may also set out expectations in relation to communication between child protection workers and the Crown prosecutor. For instance, the Kingston protocol provides that where the CAS believes that release conditions should be amended to allow for interaction between the child and the accused, the child protection worker, the police officer and/or assigned

Crown counsel will discuss the matter before taking any steps to allow for access (Child Abuse Protocol for Kingston and Frontenac, 2009: 34)

Despite the existence of these joint protocols, according to Helen Murphy of the Catholic Children's Aid Society (CCAS) of Toronto, "in the information-sharing process between the CAS and the police, the CAS sometimes feels like the disadvantaged partner in a bad marriage." According to Ms. Murphy, who is Chief Counsel at CCAS Toronto:

> The prevailing perspective amongst members of the police services seems to be that what's yours is ours, and what's ours is ours, and you can't have it. CAS counsel often find themselves presented with a situation wherein the police expect to receive any information in the Society's possession that may be relevant to the criminal investigation, and, at the same time, are not prepared to provide any information that the police may have that is also relevant to the child abuse investigation (Murphy, 2007: 2).

The concern from the police perspective is often that untimely disclosure of information to the CAS may compromise the police investigation and the prosecution of criminal charges. This concern arises, in part, because the criminal proceedings and child protection proceedings are unlikely to proceed at the same pace. Information provided to the CAS by police may be disclosed to the accused parent in the course of child protection proceedings that are statutorily mandated to proceed to court very quickly, particularly where a child has been apprehended. Ms. Murphy suggests that resistance to information sharing in these circumstances can often be resolved through discussions between counsel for the CAS and counsel for the Crown. Such discussions, however, require that a Crown is assigned to the criminal matter at an early stage of the proceedings (Murphy, 2007: 3). This may not occur as a matter of course in all jurisdictions.

5.7.2.2 Motion for Production

Like the CAS, Counsel at the Office of the Children's Lawyer will at times require information in the hands of the police in order to make appropriate recommendations as to custody and access and to adequately represent children in child protection proceedings. Counsel at the OCL, Caterina Tempesta, indicates that there is generally little resistance from the police services to providing criminal records and occurrence reports in respect of a parent. However, where the records sought by the OCL are part of an ongoing criminal investigation, counsel for the OCL will typically have to bring a *Wagg* application. OCL counsel will also be involved with, and often supportive of, *Wagg* applications brought by the CAS (Tempesta, 2012).

Pursuant to ss. 74(2), (3) and (3.1) of the *Child and Family Services Act* a child protection agency has the power to bring a motion for the production of a Crown's Brief. Section 74 enables the agency to apply at any time for production of a record that "may be relevant" to the child protection proceedings.[12]

[12] The legislative authority governing disclosure and production in child protection proceedings varies by province. See, e.g. *Children's Act*, R.S.Y. 2002, c. 31, ss. 119(1)(c) and 119(3) in the Yukon; *Child Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 108(1)(b) in Alberta; *Child Family and Community Services Act*, R.S.B.C. 1996, c. C. 46, s. 65(1) in British Columbia; *Child and Family Services Act*, C.C.S.M. c. C.80, s. 4(2)(b.1)

Opposition to these applications most frequently comes from the Attorney General. In *Children's Aid Society of Algoma v. D.P.*, 2007, for example, the Children's Aid Society was seeking records of all police investigations, probation, and correctional services records involving the parents in a situation where domestic abuse was an outstanding issue. The Attorney General for Ontario intervened on behalf of itself, the various police services, probation and parole services and correctional services in order to prevent the disclosure of these records to the agency. The parents took no position in respect to the request for those records. The position of the Attorney General was that it had an obligation, because of the decision in *Wagg*, to protect the privacy of the witnesses and others whose names appeared in the records sought by the agency.

In *Children's Aid Society of Algoma v. D.P.*, the Court held that pursuant to this legislation, materials in a Crown brief which are relevant to the child production proceedings will, in most cases, be produced to the CAS. The Court noted that it was required to balance privacy interests, public policy in maintaining the integrity of criminal investigations, the importance of the information to the Society and to the parents and children implicated in the proceeding. In balancing those interests, the Court noted that "individuals who give police information that raises concerns about the wellbeing of a child, should expect that that information will be transmitted to a children's aid society, as police officers are required to report reasonable suspicions that a child may be at risk to a children's aid society." (*Children's Aid Society of Algoma v. D.P.*, 2007: para. 21) Indeed, section 72 of the *Child and Family Services Act* requires any person to report child abuse or similar harm to the CAS.

With regard to safeguarding the content of the information in the Crown brief, the Court held:

> While there may be records which are exceptionally sensitive and touch upon intensely private matters and should be protected from disclosure even to [a] children's aid society, on the ground that they are of marginal utility to an investigation, in most cases production of relevant police records to a children's aid society will not undermine the reasonable expectations of privacy of a third party referred to in those records (*Children's Aid Society of Algoma v. D.P.*, 2007: para. 27).

In some circumstances, the privacy interests of a third party may require that certain personal or otherwise private information be redacted from the Crown brief prior to production of the documents (*Children's Aid Society of Algoma v. D.P.*, 2007: para. 27-29).

Counsel for the CAS and the OCL confirm that applications brought pursuant to s. 74 of the *CFSA* are generally successful but express concern about the time and expense involved for all parties. These concerns mirror issues flagged by Justice Rosenberg in his decision in *Wagg*. Justice Rosenberg acknowledged that the procedure outlined in *Wagg* is not perfect. The requirement of notifying the appropriate authorities in order to make a production request and the

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in Manitoba; *Youth Protection Act*, R.S.Q. P.34.1, s. 45 in Quebec; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 31(2.6) in New Brunswick; *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 26(1) in Nova Scotia; *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, ss. 12(3)(k) and 12(4) in Prince Edward Island; and *Child, Youth and Family Services Act*, S.N.L. 1998, c. C-12.1, ss. 20(1) and 20(2) in Newfoundland.

possible requirement of an interlocutory procedure creates delay and cost to an already expensive and backlogged litigation process (*Wagg*, 2004: para. 50). Rosenberg J.A. hoped aloud in *Wagg* that most production requests would be resolved on consent without court intervention: "I would expect that the parties and the state agents could usually agree to disclosure of the materials in many circumstances. Where the party in possession of the Crown brief has access to the materials, fairness will generally dictate that they be produced to the other side." (*Wagg*, 2004: para. 51) As well, the parties "should agree to produce any information in the Crown brief that was used in court in the course of the criminal prosecution, subject to some interest of superordinate importance, such as private records of sexual assault complainants or confidential medical records." (*Wagg*, 2004: para. 52)

6. TRIAL STAGE

6.1 The Integrated Domestic Violence Court

In June of 2011, the Integrated Domestic Violence Court (IDVC) opened in Toronto with the goal of providing a more coherent and holistic approach to families involved in both the criminal and family justice systems. The court provides a single judge to hear both the criminal and the family law cases (excluding divorce, family property and child protection cases) that relate to one family where the underlying issue is domestic violence. The goals of this court include increased consistency between family and criminal court orders and quicker resolutions of the judicial proceedings. The court is located at 311 Jarvis Street in Toronto and sits twice a month. Participation in this court was initially voluntary; all parties had to consent before the family and criminal cases will be transferred. Beginning March 16, 2012, however, all domestic violence matters coming out of the Old City Hall court house in downtown Toronto will be scheduled at the IDVC where parallel family law proceedings exist.[13]

The Honourable Justice Waldman explained the need for the integrated court this way:

> Domestic violence or partner abuse is well recognized as a serious and complex issue. The response of the justice system, both family and criminal, is complicated by the fact that domestic violence often gives rise to myriad inter-related family problems involving safety and family separation. Legal proceedings are further complicated by the fact that the criminal and family cases occur separately. The two courts operate as independent silos with virtually no sharing of information between them and very little ability to communicate. This is particularly true in Toronto where the criminal and family courts are housed in separate buildings with a separate judiciary and little crossover by lawyers. The courts must rely on the litigants to provide necessary information. The family court judge has no independent means of obtaining a copy of a bail or probation order to ensure that the terms of a custody or access order does not conflict with the bail or probation terms. Family and child protection cases are often delayed by the progress of the criminal justice system. Families are in some cases precluded from attending counselling because of no contact terms in bail and probation orders. In some cases, litigants are reluctant to address certain important issues in the family case because of the potential impact on their testimony at the criminal trial (Waldman, 2010).

The court is modeled on similar courts operating in several states in the United States including New York, Vermont and Idaho. The court offers numerous potential advantages. The "one-family-one-judge" concept ensures that the presiding jurist has a far more complete picture of the family situation. As defence counsel Edward Prutschi explains:

[13] See practice directive at http://www.ontariocourts.ca/ocj/en/idvc/idvc-practice-direction.htm

> Allegations of domestic violence can be better assessed and addressed in the context of the underlying (and frequently related) stressors that are part of the baggage of many family proceedings. There is the potential for substantial time savings and reduced court appearances which should translate into reduced legal fees for clients mired in the system. An integrated system also completely eliminates the common problem of inconsistent orders where the family court requires access and contact between the parties while the criminal court bail prohibits it (Prutschi, 2011).

Despite the evident advantages of the integrated court, it has had a slow beginning. Two developments may lead to increased participation at the court. First, as described above, appropriates cases will now be automatically scheduled in the IDVC. Second, where the criminal matter is going to proceed to trial, it will no longer need to be moved back to Old City Hall. Instead, the trial will be heard by a judge of the IDVC (although not the judge who managed the case up to the point of trial).

It is expected that more cases will be heard in the IDVC with the introduction of automatic streaming. Justice Bovard believes that some criminal defence counsel are uncertain about the practical benefits of the integrated court and are concerned that evidence that would not otherwise be admissible in the criminal matter will "seep in" through the family side of the process. In his view, defence counsel underestimate the value that an accused person places in keeping his family intact. Justice Bovard hopes that the IDVC will allow accused individuals to resolve criminal matters in a way that protects the family (Bovard, 2012).

6.2 Evidentiary Issues

One of the common complicating factors for prosecutors in domestic violence cases is the frequency with which complainants recant or become uncooperative – not uncommonly because of the cycle violence and intimidation present in abusive relationships. Issues may also arise at trial because of delays in reporting.

A number of evidentiary tools can assist in effective prosecution of allegations of family violence.

6.2.1 Reluctant and Recanting Witnesses

Given the dynamics in which domestic violence occurs, it is not unusual for a complainant to be reluctant about testifying or to recant earlier allegations. Crown counsel should carefully consider these recantations – they may be truthful and sincere or they may be the product of intimidation and coercion.

Enhanced evidence gathering procedures may allow the prosecution of the accused to continue notwithstanding the recantation of the complainant. The Crown Policy manual in Ontario provides that where available and relevant, the following evidence should be included in the Crown brief:

- Audio/video tapes and transcripts of the complainant's statements
- 911 tapes and transcripts
- Photographs of the complainant's injuries
- Photographs of damage to the scene of the incident
- Medical records, relevant waivers and notices under the *Canada Evidence Act*
- Statements of witnesses, including children and neighbours
- Similar fact evidence
- Previous relevant convictions and occurrence reports
- Statement of the offender
- Any *res gestae* statement of the victim (Ministry of the Attorney General (Ont), 2002)

The involvement of victims' services may assist complainants to continue their participation through the court process. Where a witness is reluctant to testify, Crown Counsel should attempt to ascertain the reasons for that reluctance. If a witness has been subjected to threats or interference, Crown Counsel should refer the matter to the police for investigation and protection.

Where a complainant fails to attend court in answer to a subpoena, Crown counsel should make reasonable efforts to find out the reason for the failure to appear. The Newfoundland Crown Policy Manual suggests that on the basis of the information in respect of the failure to attend, the Crown's knowledge of the complainant's personal circumstances and the seriousness of the offence, Crown counsel should consider the following options:

- Requesting an adjournment where the complainant's evidence is crucial to the case and the absence is unlikely to be repeated (e.g. where the complainant is ill);
- Proceeding with the case where the charge can be proven through the evidence of other witnesses;
- Asking for material witness warrant where the complainant's evidence is crucial, no information is available concerning the reasons for non-appearance and the offence is a serious one; and
- Terminating proceedings, where the offence is less serious, the alleged offender is not considered dangerous, and the complainant's arrest would serve only to further victimize that person (Department of Justice (Nfld), 2007: 15-8).

These options are not exhaustive but provide some guidance on the issues to be considered by the Crown in the face of a missing complainant.

Crown counsel should also anticipate that a complainant may attend trial but refuse to give evidence or fail to testify as anticipated. In those situations, the Crown may consider:

- Seeking leave to show the complainant a prior police statement for the purposes of refreshing memory;
- Seeking leave to cross-examine the complainant on a prior inconsistent statement, pursuant to s. 9(2) of the *Canada Evidence Act*;
- Seeking leave to cross-examine the complainant as an adverse witness, pursuant to s. 9(1) of the *Canada Evidence Act*; and/or

- Seeking to admit evidence of a prior inconsistent statement as substantive evidence for the truth of its contents, pursuant to the Supreme Court's judgement in *R. v. K.G.B* (Department of Justice (Nfld), 2007: 15-9).

Pursuant to the principles articulated by the Supreme Court in *R. v. K.G.B.*, 1993, and subsequent cases, a complainant's videotaped statement to the police may be admissible into evidence at trial, absent adoption by the witness, on proof of necessity and reliability on a balance of probabilities. The burden rests with the party seeking to introduce the evidence.

Necessity can be made out where a witness who testifies recants an earlier statement. The necessity criterion is to be applied flexibly. It may be met where evidence of the same value cannot be expected from the recanting witness (*R. v. K.G.B.*, 1993)

Reliability will depend on whether:

1) the statement was made under oath/affirmation following explicit warning re: criminal sanctions for making false statements;
2) the statement was videotaped; and
3) the opposing party has a full opportunity to cross-examine the declarant at trial.

Where the declarant is available to be cross-examined, the admissibility inquiry into threshold reliability is "not so focused on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence." (*R. v. Khelawon*, 2006: para. 76)

6.2.2 Evidence of Prior Discreditable Conduct

There is a general exclusionary rule preventing the Crown from introducing evidence of discreditable conduct that falls outside the scope of the offence charged. The rationale for this rule was explained by the Supreme Court of Canada in *R. v. Handy*:

> The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts" that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence. The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife's testimony ("reasoning prejudice") or by convicting based on bad personhood ("moral prejudice"): Great Britain Law Commission, Consultation Paper No. 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), at § 7.2.

Even where evidence of extrinsic misconduct is relevant to the facts in issue at trial, otherwise than by proof of disposition or bad character, it is still necessary to consider whether its probative value is sufficient to warrant admission when weighed against the very real potential for prejudice that such evidence invites. (*R. v. Handy*, 2002: para. 31)

Despite the general exclusionary rule, evidence of prior discreditable conduct or "bad character evidence" may be admitted in cases involving allegations of physical or sexual abuse in the course of an ongoing relationship.

In *R. v. D.S.F.*, one of the seminal cases on prior discreditable conduct in the context of allegations of family violence, the Court of Appeal for Ontario explained that "courts have frequently admitted evidence of discreditable conduct to assist the court in understanding the relationship between the parties and the context in which the alleged abuse occurred." (*R. v. D.S.F*, 1999: para. 20)

This type of evidence may be admitted for a number of purposes, including:

1) to complete the narrative of the complainant's description of her relationship with the accused;
2) to demonstrate the possible motive or animus of the accused in committing the offences alleged; and
3) to bolster the credibility of the complainant by providing an explanation for her failure to leave the relationship and report the allegations of abuse earlier than she did.

The similar fact evidence rule is another exception to the exclusionary rule related to bad character evidence. It permits the introduction of evidence demonstrating uncharged misconduct on the part of the accused where, due to its particular characteristics, its probative value exceeds the prejudicial effect normally associated with bad character evidence.

In *R. v. Handy*, the Supreme Court of Canada explained the law of similar fact evidence and provided guidance to trial judges on how to determine whether the proposed similar fact evidence is to be admitted under a principled framework. At the core of this framework is a balancing between prejudice and probative value. The Crown bears the burden of establishing, on a balance of probabilities, that the probative value of the similar fact evidence outweighs its prejudicial effect. To meet that burden, the Crown must first identify a matter in issue to which the similar fact evidence is relevant.

In evaluating the probative value of the proposed evidence, the trial judge should consider:

- Proximity in time between the similar acts and the charged conduct;
- Similarity in detail between the similar acts and the charged conduct;
- Number of occurrences of the similar acts;
- The circumstances surrounding the similar acts;
- Any distinctive features that unify the incidents;
- Any intervening events; and
- Any other factor that would tend to support or rebut the underlying unity of the acts.

Even where proposed similar facts are probative, the trial judge must still guard against admitting evidence that is, on balance, overly prejudicial.

Where bad character evidence is admitted – as part of the narrative, to establish motive or as similar fact evidence – defence counsel should ensure that the trial judge instructs the jury in a manner that minimizes the dangers inherent in admitting extrinsic misconduct evidence. In *R. v. Arp*, the Supreme Court of Canada explained the danger that a jury will engage in prohibited reasoning is "avoided by the strict test for admissibility which ensures that the evidence is sufficiently probative to outweigh the risk of prejudicial misuse, coupled with a cautionary instruction against making improper use of the evidence." (*R. v. Arp*, 1998: para. 74)

Specifically, the jury should be told that they *must not* use the evidence of the prior discreditable conduct to conclude or help them conclude that the accused is the *sort of person* who because of his bad character was likely to have committed the offence charged. They also ought to be instructed that, if they are convinced that the accused engaged in the prior discreditable conduct, they *must not* punish him for that conduct by finding him guilty of the offence for which is on trial (*R. v. D. (L.E.)*,1989: 128).

6.2.3 Expert Evidence

Understanding the context in which an incident of spousal or child abuse occurs and is reported can contribute to a fair hearing and proper resolution of these cases. Although not appropriate in every case, Crown counsel may consider calling an expert in the field of domestic violence where:

- The trier of fact may not otherwise understand a delay in reporting the incidents or violence or other abuse;
- The risk to the complainant and/or the complainant's family might not otherwise be appreciated; and/or
- The impact of the abuse on the complainant may not be apparent to a non-expert.

6.3 Delay

Delay in criminal proceedings can be frustrating for all involved parties and can have a significant impact both on the resolution of the criminal charges and in respect of parallel civil proceedings.

6.3.1 "Prejudice" Caused by Delay in the Criminal Context

Section 11(b) of the *Charter* guarantees that any person charged with an offence has the right to be tried within a reasonable time. Where a court finds that the period of delay to trial is unreasonable, the applicable remedy is a stay of proceedings.

The primary purpose of section 11(b) is the protection of the individual rights of the accused, in particular, the right to security of the person, the right to liberty, and the right to a fair trial. (*R. v. Morin*, 1992)

The secondary purpose of section 11(b) is a societal interest. Trials held promptly enjoy the confidence of the public. Further, the failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures (*R. v. Morin*, 1992; *R. v. Askov*, 1990).

The interests protected by the right to a trial within a reasonable time are liberty, security of the person, the presumption of innocence and the right to a fair trial. In terms of liberty, the concept of trial within a reasonable time is designed to prevent unduly lengthy limitations on freedom of movement due to restrictive bail conditions. As well, security of the person is to be guarded as jealously as the liberty of the individual. The concept of security of the person encompasses protection against overlong subjection to vexations and vicissitudes of a pending criminal accusation. These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from factors such as possible disruption of family, social life, and work, legal costs and uncertainty as to outcome and sanction. Accused persons should have the chance to defend themselves and to have their names cleared and reputations re-established at the earliest possible time (*R. v. Morin*, 1992; *R. v. Askov*, 1990).

In assessing whether a delay is unreasonable so as to warrant a remedy, the Supreme Court has stipulated that courts are to examine and balance the following factors:

- the length of the delay
- waiver of time periods
- the reasons for the delay, including
    - inherent time requirements of the case
    - actions of the accused
    - actions of the Crown
    - limits on institutional resources
    - other reasons for delay, and
- prejudice to the accused.

The restrictive nature of the bail conditions that typically appear in domestic violence cases and the impact of those conditions on the accused and his or her family will be considered in assessing the prejudice caused to an accused by delay. The case of *R. v. Campagnaro* is illustrative.

Case Study – *R. v. Campagnaro*, [2004] O.J. No. 1529 (C.J.)

Mr. Campagnaro was charged on April 13, 2003 with a domestic assault in which it was alleged that he caused bodily harm to his wife. The trial judge found that he did everything he could to move the matter forward quickly, but the system was unable to offer a date for trial earlier than one year after the incident.

The facts in *Campagnaro* were described by Justice Pringle as follows:

> Mr. Campagnaro surrendered himself to the police on the morning of the allegation, April 13, 2003. He spent two days in custody before being released with the consent of the Crown on April 14. The terms of his release included conditions often found in a domestic bail, including conditions that he have no contact with the complainant and that he not attend at the family home. He retained Mr. Metzler on April 15.
>
> Mrs. Campagnaro also retained independent counsel in order to express her wish to resume cohabitation and family counselling with her husband. Although the Applicant continued to support the family financially, in the absence of her husband Mrs. Campagnaro was left alone to look after her four children ages 14, 12, 6 and 4, as well as the two year old that she and the Applicant had together. After investigating the request to vary the bail to permit contact between the parties, the Crown refused to consent to a bail variation.
>
> The Applicant was (correctly) advised by Mr. Metzler that the earliest trial in the Metro North jurisdiction would likely be many months in the future. Distraught at the prospect of not seeing his wife for that period, and being concerned that his relationship and family connection would fall apart in the interim, the Applicant obtained a bank loan in order to bring a bail variation application in the Superior Court. This application was successful, and on May 29, 2003, his bail was varied to permit him to resume living with his wife, and to continue counselling with her.

On July 2, 2003, a trial date for the following April was set. No earlier dates were available. While acknowledging that the case fell "near the margins of what is constitutionally acceptable" in terms of delay, the trial judge concluded that the significant prejudice caused to Mr. Campagnaro mandated a stay of proceedings.

Justice Pringle described the prejudice as follows:

> As a result of the charge, the Applicant was required to move out of the family home and have no contact with the complainant. I do not question the reasonableness of those conditions, or even the decision of the Crown in refusing to consent to a bail variation. However, it is obvious that even reasonable bail conditions may give rise to hardship. In this case, the strictness of the bail conditions gave rise to the Applicant's natural concern about how long this state of affairs would last before he could have his day in court. Unfortunately, the answer in this jurisdiction was many

> months. This in turn led to the conclusion that he would have to bring a bail review in Superior Court in order to vary his bail. In the Applicant's particular circumstances, this was a financial hardship but a necessary one in order to assist his family and work on his relationship with his wife. It is fair to say that the prejudice of the restrictive and divisive bail conditions was minimized by the successful application for a bail variation in this case. At the same time, it is unacceptable that the wait for a trial date was so far in the future in this court that the Applicant's family life, his relationship with his wife and children were threatened by the delay. One year is a long wait indeed when the charge strikes at the heart of family life. The Applicant filed an affidavit in which he indicated that he, his wife and family felt that they had been living life under a dark cloud for the past year, and felt that they had been caught up in a force that they could do nothing about. Not surprisingly, the wait has put more stress on the relationship, and he and his wife have had difficulty moving forward with their lives.

In assessing the reasonableness of the delay, Justice Pringle noted that in cases involving allegations of domestic violence where the complainant wishes to reconcile with the accused, both the "complainant and society have a compelling interest in the speedy resolution of the charge too."

> The break up of the family unit, the "no contact" order of bail, the fact that the complainant was left as the sole caretaker with children: all these conditions have an inevitable effect on the family. Although the situation was remedied for this Applicant within six weeks, the interference in family life can take its toll on society at large when domestic assault trials are delayed.

In upholding the stay of proceedings, the Court of Appeal emphasized that the public interest in a trial on the merits applies equally to criminal allegations arising out of domestic disputes as to any other criminal allegation and that the result in the *Campagnaro* case should not be taken as setting a new constitutional timeline for cases involving allegations arising out of domestic disputes where the parties seek to reconcile. Cases involving allegations of violence in the family are to be considered on an individual basis, just like any other case. Nevertheless, the Court of Appeal noted that "where the institutional delay is on the edge of the constitutionally tolerable, the issue of prejudice will be central to the outcome of the s. 11(b) analysis."

6.3.2 Delay and Child Protection Proceedings

Delay in the criminal proceedings causes significant concern where parallel child protection proceedings have been commenced. Child protection cases must be moved forward in a timely fashion, particularly where the children have been apprehended by the child protection authority and removed from their home pending the outcome of the proceedings.

Section 54 of the *Child and Family Services Act* requires that if a child has not been found to be in need of protection within three months of a protection application being brought before the court, the court *shall* set the case down for a hearing on the earliest date that is compatible with the just disposition of the application.

The *CFSA* also establishes time limits for the amount of time children can remain in care before being returned to a family or community member, or being made a permanent ward of the State. For children under the age of six, the time limit is 12 months; for children six and older it is 24 months. Child protection proceedings move quickly in order to satisfy these time lines and because resolution is in the best interests of the children. As Kate Kehoe explains, delay in the criminal proceedings can have a serious impact on the child protection side of the equation:

> In cases where the accused does not plead guilty early in the criminal proceedings, the parents have reunited and the accused refuses to admit to the incident, there is a serious possibility that the family proceeding can lead to the permanent removal of the child from the family. Even relatively short delays in the criminal proceedings can lead to this result, as once the criminal proceedings are resolved, the parents must then take steps, such as counseling and substance abuse treatment, to assure the court that the violence will not reoccur. These programs can take many months and there is often relapse in substance abuse treatment (Kehoe: 6).

Counsel representing parents in child protection proceedings who have also been charged criminally emphasize the importance of communicating with criminal defence counsel. Tammy Law, former counsel for a children's aid society and now a sole practitioner whose practice focuses on child protection matters, indicates that a criminal conviction for child abuse will have, not surprisingly, a negative impact on parallel child protection proceedings. Nevertheless, Ms. Law suggests that where an accused has decided to plead guilty to the criminal charges, the plea should be entered without delay so that the parent can take steps to demonstrate his or her rehabilitation, to enter into programming or counselling to assist in preventing further incidents and to make a plan for the care of the children (Law, 2012).

Delay in the criminal proceedings may also prevent parents from meaningfully participating in the child protection investigation and proceedings. A parent facing criminal charges may refuse to participate in a parental capacity assessment, for example, in order to avoid incriminating him or herself in the criminal proceedings. Unfortunately, non-participation will hinder the progression of the case in the child protection context (See Case Study above in Section 4.2). The judge is likely to draw a negative inference from a failure to comply with the assessments. Ultimately, the refusal to participate may result in the children remaining in care, and separated from their parent, for a longer period than would otherwise be the case.

7. SENTENCING

7.1 Impact of Conviction, Peace Bond or Withdrawal on Parallel Proceedings

The outcome of a criminal prosecution will have a significant, but not always determinative, impact on parallel civil proceedings relating to custody, access, support and child protection. In advising a client about the consequences of guilty plea or other resolution agreement, criminal lawyers should be aware of the potential effect on parallel proceedings.

7.1.1 Conviction

Criminal convictions cannot be “re-litigated” in the course of family law proceedings. Where a finding of guilt has been made in respect of an incident of family violence, the offender cannot use family law or child protection proceedings to attempt to show that he or she was wrongfully convicted. The conviction is binding on the civil courts and so it is important that an accused is aware of the potential consequences of such a conviction.

There is general agreement on the part of family violence and divorce scholars and practitioners that shared parenting or joint physical custody is not appropriate in most cases involving serious and substantiated violence and abuse, either toward a child or a parent, as the witnessing of parental abuse is recognized as a serious form of child abuse (Jaffe, et al., 2005). How this principle is applied in practice is considerably more complicated. As Jaffe, Crooks and Bala explain:

> The cases at the extreme ends of the family violence spectrum are most straightforward. At one end of the continuum, there is probably agreement that a perpetrator of chronic family violence who has demonstrated a pattern of abusive behaviour over time, with little remorse or investment in treatment, and whose main focus is on punishing an ex–partner rather than fulfilling a parenting role should have either no access or very limited access supervised by highly trained professional staff. At the other end of the continuum, an isolated incident of minor family violence (e.g., a shove), which is out of character, accompanied by genuine remorse, responsibility taking, and did not induce fear or trauma in the other parent, would not in and of itself preclude the possibility of a co–parenting arrangement. In between these extremes is a canyon of gray in which matching parenting arrangements to families is challenging, and dependent on analyzing a host of factors. Some of these factors relate to historical relationships and characteristics of individuals, some relate to available resources in a particular community, and others relate to the stage of proceedings and available information (Jaffe, et al., 2005: §5.1).

The case law demonstrates that parental conduct, including domestic violence, is one factor, albeit, a generally significant factor influencing family court’s decision in respect of custody and access decisions. It is not, however, determinative in every case. As the court explained in *MacNeil v. Playford*:

> Family courts decide custody and access based on the governing legislation and case law, and in reference to the best interests of the child. The criminal justice system, on the other hand, pays no heed to the best interests of the child because the criminal justice system is not designed to do so, nor are the participants trained to do so.
>
> Parental conduct, including domestic violence, may affect the ability of a parent to provide proper care, nurture and example to his/her child. Domestic violence demonstrates an inability to problem solve in a healthy manner. Domestic violence shows the absence of respect and dignity for the other parent. Domestic violence demonstrates a reactive personality with poor impulse control. Domestic violence is emblematic of poor parenting skills.
>
> Domestic violence will usually impact on the court's determination as to whom should be assigned primary care of a child. This is one factor, albeit a significant one, which determines the best interests of the child. The seriousness of the assaults, the frequency of the assaults, the circumstances of the parties, and the circumstances of the child, all must be examined and balanced in determining the best interests of the child.
>
> Further, although a criminal conviction does impact on credibility, it is not conclusive. Credibility determinations are fact based and must be assessed in light of all of the evidence (*MacNeil v. Playford*, 2008: paras. 10-13).

The resolution of an allegation of family violence in the criminal justice system does not mean that the family justice system will not be required to grapple with issues of family violence. It is critical that all parties in family law dispute (the litigants, counsel and the court) have sufficient information so that 1) victims of serious violence are not inappropriately pressured by lawyers or order by judges to engage in the non-adversarial approach warranted in other family law cases; and 2) litigants are not inappropriately denied access in situations of mutual abuse or false allegations of abuse. In short, “justice system professionals must have a sophisticated knowledge of issues related to domestic violence, and an ability to respond in a ‘differentiated fashion’ that recognizes the dynamics and issues of each individual case.” (Bala, et al., 2007: 2)

In addition to the impact a conviction may have on custody or access decisions, abusive conduct may also constitute evidence of a “spousal tort.” In *Valenti v. Valenti*, 1996, for example, a guilty plea by the husband to assault causing bodily harm against his wife was admitted into evidence and used as a basis for damages for $10,000 for pain and suffering and $2500 as punitive damages. In awarding the damages for the assault, the court cited the facts as read in at the husband’s guilty plea.

7.1.2 Conditions attached to Peace Bonds and Probation

Criminal lawyers advising clients on the resolution of criminal charges arising from allegations of domestic violence by way of peace bond or probation should be aware of the possible implications in parallel proceedings.

An accused person who is subject to restrictive bail conditions and in the midst of a family crisis may be eager to resolve his or her charges and accept a "good deal" from the Crown. Entering into a peace bond in exchange for the withdrawal of the charges, for example, puts an end to restrictive bail conditions, leaves the accused without a criminal record and avoids the expense of a criminal trial. For many clients, those results are sufficient to balance any potential negative consequences. Nevertheless, potential pitfalls do exist and clients, particularly those in the midst of heated family law disputes, should not enter into a peace bond lightly. In this section of the report, we highlight the impact that a peace bond can have on family law proceedings. Though the focus is on resolution by way of peace bond, the concerns addressed are equally applicable to cases where a conviction for a relatively minor domestic assault is accompanied by a suspended sentence and a period of probation.

The issuance of a peace bond or the imposition of sentence following conviction can affect family law proceedings in at least three ways: first, a peace bond may be taken by a family court judge as proof of wrongdoing; second, the terms of the peace bond or probation order may contribute to the establishment of a "status quo," a factor considered in making custody determinations; and third, the non-communication terms of a peace bond or probation order may interfere with the ability of parents to communicate effectively, a pre-requisite for joint custody.

7.1.2.1 Peace Bonds as Proof of Wrongdoing

The federal *Divorce Act* and Ontario's *Children's Law Reform Act* both provide that in determining custody issues, trial judges must consider only what is in the best interests of the child – not the parents. The past behaviour of a parent is *not* considered unless it makes him or her less able to act effectively as a parent. So, for example, a judge deciding on who will be awarded custody, may not take into account which parent is to blame for the breakup of the relationship. However, where a person who wants custody or access has ever been violent or abusive towards his or her spouse or child, that behaviour *must* be taken into account (*Divorce Act*, s. 16(8) and (9); *CLRA*, s. 24).

As explained above, a civil court must accept a criminal conviction as proof of the conduct underlying the conviction. On the other hand, entering a peace bond is not an admission of guilt and the presumption of innocence remains in place. However, to the extent that entering a peace bond is an acknowledgement that the complainant had reasonable grounds to fear the accused, it may form a relevant part of the analysis of a family judge's determination of whether there has been a past history of violence or abuse. An individual who has signed the "acknowledgement form" necessary to enter the PARS program may have difficulty denying that his or her behaviour caused the complainant to be fearful. There is also a concern that family court judges may be unfamiliar with the legal effect of a peace bond.

In *Otis v. Gregoire*, the trial judge in making a custody and support decision considered the criminal proceedings that arose from an allegation by the wife that her (former) husband was harassing her. The charges were ultimately resolved by way of a 12-month peace bond with conditions that the husband not communicate with the wife or be within 50 metres of her residence. The trial judge wrote that Mr. Gregoire, "reluctantly agreed that he must have entered a plea of 'true' to the charge" of criminal harassment. The trial judge went on to find that the peace bond:

> is convincing evidence that the husband was responsible for criminal behaviour sufficient to support the conditions imposed. I accept that responsibility lay with the husband and that the wife had basis to fear for her safety. Such orders are not made lightly or without sufficient evidentiary foundation (*Otis v. Gregoire*, 2008: paras. 13-14).

In *Otis*, the peace bond entered into by the father did not ultimately impact the custody decision made by the family court judge. Justice Whalen concluded that the misconduct had been adequately addressed through the criminal process. The case nonetheless demonstrates the potential for peace bonds to be used as proof of prior misconduct. In *Otis*, the father was asking for relatively limited access rights permitting the couple's children to stay with him several times a week and not overnight. In a contentious family law trial where both parties are aggressively seeking custody of the child or children and are otherwise similarly situated, the imposition of a peace bond more play a more determinative role.[14]

7.1.2.2 Creation of the "Status Quo"

Among the factors considered in deciding what custody and access arrangements are in the child's best interest is the stability of the child's present home environment and how long the child has been in that home (*CLRA*, s. 24(2)(c)). The "status quo" is a particularly important factor during interim custody proceedings:[15]

> Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible (*Marshall v. Marshall*, 1998).

Where a child's welfare is at issue, courts tend to be cautious and demonstrate a preference for maintaining the status quo where it has proven beneficial to the child. Peace bonds which include conditions that limit the ability of a parent to develop or maintain a normal relationship with his or her child or children can play a significant role in the establishment of a "status quo." In *Otis*, for example, the trial judge found that:

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[14] Clients may also wish to consider whether the complainant might pursue a civil suit and how a peace bond could be used in that context.
[15] Interim custody orders set out the custody and access regime that governs until the matter is finally resolved.

> Although I do not question that the restrictions in the recognizances were warranted, it is clear that they have also interfered with the normalization of relations between the husband and the children by complicating and limiting the exercise of access. Direct communication has been impossible between parents. While this may have given the wife some assurance against further threatening interference, it has done nothing to promote the rebuilding of the trust and co-operation necessary to re-establish, encourage and maintain healthy relations between the children and their father. It has been necessary to involve third parties to facilitate limited access privileges. Communication between the husband and children has also been undermined because he cannot telephone the home out of fear that the wife might answer (*Otis v. Gregoire*, 2008: para. 17).

Like the bail conditions described in *Shaw*, conditions attached to a peace bond or probation order can lead to the establishment of a status quo that did not exist before the laying of criminal charges and that is detrimental to the accused in the family proceedings.[16] Counsel and their clients should also consider that a resolution which requires the accused to complete a PARS program before the charges are resolved will further lengthen the period of time the accused spends subject to restrictive bail conditions. Defence counsel should therefore ensure that the conditions of bail, and those attached to the eventual peace bond or probation order, allow for the maintenance of a normal relationship between the client and his or her children.

7.1.2.3 Communication Between Spouses

A "non-communication" condition with the complainant is a standard term of any peace bond entered into in exchange for the withdrawal of a criminal charge involving an allegation of domestic violence. Such a condition will generally have an exception that allows for contact so long as the complainant provides his or her written revocable consent. Such conditions are also likely to be included in the terms of a probation order or conditional sentence order.

The ability of former spouses to communicate is critical for the imposition of certain custody arrangements – particularly joint custody, designed to preserve both parents' legal responsibility over a child's upbringing. The Ontario Court of Appeal in *Kaplanis v. Kaplanis,* held that a joint custody order can be considered even where one parent professes an inability to communicate with the other parent. However, there must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another (*Kaplanis*, 2005).

Accordingly, it is important to ensure that there are meaningful exceptions to any non-communication condition included in the terms of the peace bond, probation order or conditional sentence order. Counsel may wish to consider proposing a term that allows for communication with the consent of the complainant and/or that contains an exception which allows for contact pursuant to any family court order or separation agreement. Parents must be able to continue to communicate in the best interests of the child, without placing the client in breach of the peace bond, probation terms or conditional sentence order (CSO).

[16] Importantly though a court will not allow a party to take advantage of a dishonestly manufactured "status quo." See, e.g. *LiSanti v. LiSanti* (1990), 24 R.F.L. (3d) 174 (Ont. Fam. Ct.).

As with bail conditions, considerable thought must be placed in crafting “no contact” terms of probation orders so as not tie the hands of the family court or prevent genuine reconciliation attempts within the family. Justice Bovard suggests the following:

You may not contact (name of complainant) except:

- with her written revocable consent filed with your probation officer

OR

- for the purpose of access to your child pursuant to a family court order made after today’s date

OR

- through a lawyer

OR

- through a third party approved of in writing by your probation officer, but ONLY for the purpose of access to your child

7.1.3 Acquittal

An acquittal following a trial in the criminal courts does not guarantee that the allegation underlying the charge will not be used as the basis for damages in a family court or child protection matter. Allegations must be proved beyond a reasonable doubt in criminal proceedings but only a balance of probabilities in civil matters. The different standards of proof and rules with respect to the admissibility of evidence help explain why a claim of family violence that is not substantiated by a criminal conviction may, nevertheless, factor into a decision in respect of custody and access or an application for exclusive possession of the matrimonial home. A finding of assault or battery against a spouse can also be made in a civil proceeding even where the defendant was acquitted of a criminal charge in respect of the same underlying conduct.

In *Shaw v. Burnelle*, for example, Justice Blishen concluded that the husband either pushed or threw the wife from the house and caused a severe fracture to her wrist. These findings were made despite the fact that Mr. Shaw was acquitted of assault in respect of the same allegations. Justice Blishen explained:

> [T]his is not a criminal trial where the Court needs to make a determination beyond a reasonable doubt. The issue is whether or not, on a balance of probabilities, Ms. Brunelle has proven that Mr. Shaw intentionally caused harmful contact, thereby committing the tort of battery. Although there are weaknesses in the evidence of both parties, on balance I prefer the evidence of Ms. Brunelle which is corroborated by Byron Shaw and Constable Elmi. I find that Mr. Shaw either pushed or threw Ms. Brunelle out of the house on August 22, 2007, thereby causing a severe fracture to her right wrist (*Shaw v. Burnelle*, 2012: para. 76).

The wife was awarded general and aggravated damages of $65,000, $25,000 for loss of competitive advantage, and damages for costs of future care to be determined by an actuary. The aggravated damages portion of the award totaled $15,000 and recognized the ejection of the wife from her home in the middle of the day by her husband, and the contribution of the husband's conduct to her ongoing mental health problems. (See also *Ruscinski v. Ruscinki*, 2006: at para. 58.)

7.2 Variation of Orders

7.2.1 Conditional Sentence Orders

The optional conditions imposed as part of a conditional sentence order can be varied in accordance with the procedure set out in s. 742.4 of the *Criminal Code*. The section provides that either a supervisor, the offender or the prosecutor may propose a change to the optional condition. Where the supervisor proposes the change, he or she must give notice to the court, the offender and the prosecutor. If no party requests a hearing within seven days of receiving the notice and the court on its own motion does not require a hearing, then the proposed change takes effect 14 days after the court received notice. On the other hand, where the application for a change is made by the offender or the prosecutor there must be a hearing and the hearing must be held within 30 days after the court receives notice of that application.

In *R. v. Kobsar*, Justice Germain of the Alberta Queen's Bench, expressed some criticism of the powers granted by legislation to the CSO supervisor and held as follows:

> My suggestion to supervisors is that they should follow four fundamental rules when applying under S. 742.4(1) to vary a CSO. This list is not intended to be exhaustive:
>
> 1. They should order and review a transcript of the sentence hearing to determine what information the sentencing judge had, and what the expressed reasons for the sentence were.
>
> 2. The power given to a supervisor under S. 742.4(1) should be used sparingly, given the great risk to the administration of justice inherent in this procedure. A change of circumstance is something that was not reasonably contemplated by the sentencing judge, not simply the behaviour (whether expected or not) of compliance with the order. In particular, the word “desirable” in the subsection should not be equated with “beneficial” to the accused.
>
> 3. Amendments proposed by supervisors should be technical as opposed to substantive. Some examples might be a change of address, a temporary absence to attend important family business, or the relaxation of territorial travel limits to comply with another term of the order, an extension of a territorial limit for employment, or the substitution of any named contacts such as caregivers or legal counsel to whom visits were prescribed as lawful

excuses for absence from the home. A change to the length of the "house arrest" portion of the order is a substantive amendment for which the offender should be referred to the procedure set out in 742.4(5).

4. Subsection 742.4(1) should never be used when it is really the offender who wishes the change and the supervisor simply feels that the proposed change is not a bad idea. The proper approach in such situations is to suggest that the offender invoke ss. 742.4(5) (*R. v. Kobsar*, 2004: para. 26).

7.2.2 Probation Orders

Variations of probation orders are governed by s. 732.2(3) of the *Criminal Code*. A probation order will require the offender to comply with a number of conditions. Some of the conditions are mandatory: the offender must "keep the peace and be of good behaviour", appear in court when required to do so, and notify the court and probation officer of any change of address or employment. There are also a number of optional terms, which include reporting conditions, non-consumption of drug and alcohol conditions, non-possession of weapons conditions, non-attendance conditions, non-association/communication conditions, and treatment conditions.

The court that made the probation order may, on application by the offender, the prosecutor or the probation officer, vary the optional terms, relieve the offender from compliance with the optional terms and decrease the period for which the order is to remain in force.

A victim's input is important in assessing the appropriateness of any variation of a probation order. Obtaining this input is facilitated where the probation officer has maintained some contact with the victim. Regular communication with the victim also provides a probation officer with a way of corroborating information provided by the offender during case supervision and facilitates the enforcement of the probation order.

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APPENDIX A

Case Law Tool Kit for Defence Counsel and Duty Counsel

The grant or denial of bail engages not only s. 11(e) of the *Charter*, which guarantees an accused the right not to be denied reasonable bail without just cause, but also the accused person's liberty and security of the person interests. Bail is not a privilege. Judicial interim release should only be withheld where it is necessary. These principles apply in cases involving domestic violence as they do in cases involving other types of offences. The following cases articulate the relevant principles and may be useful for defence counsel and duty counsel at a contested bail hearing.

General Principles

R. v. Morales, [1992] 3 S.C.R. 711 at para. 11: The Supreme Court describes Part XVI of the *Code* as "a liberal and enlightened system of pre-trial release under which *an accused must normally be released."*

R. v. Hall, [2002] 3 S.C.R. 309

At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.

Individualized Approach to Bail

R. v. Brooks (2001) 153 C.C.C. (3d) 533 (Ont. S.C.J.):

Crown counsel are expected to exercise discretion to consent to bail in appropriate cases and to oppose release where justified. That discretion must be informed, fairly exercised, and respectful of prevailing jurisprudential authorities. *Opposing bail in every case, or without exception where a particular crime is charged, or because of a victim's wishes without regard to individual liberty concerns of the arrestee, derogates from the prosecutor's role as a minister of justice and as a guardian of the civil rights of all persons*.

R. v. J.V. [2002] O.J. No. 1027 (S.C.J.):

As a quasi-judicial officer, Crown counsel, in any adversarial proceeding, is duty-bound to protect the legal and constitutional rights of the arrested person. To this end, *the prosecutor's exercise of discretionary judgment on bail issues cannot be driven by slavish adherence to zero tolerance policies or the recommendations of high profile coroner's inquest recommendations*. This would amount to the exercise of no discretion at all and guarantee arbitrariness on the facts of certain cases.

Bail is not precluded for any type of offence, including domestic violence

R. v. Taylor, [2005] O.J. No. 1789 (S.C.J.): This decision contains helpful passages which make clear that the Crown should not, as a matter of course, oppose release in every case involving allegations of domestic violence.

While prosecutors in domestic assault cases no doubt face challenges that are less frequently encountered in other cases, and while they may need to be particularly adversarial to protect the public interest, they are still required, in my opinion, to be fair and to act with regard to the accused's liberty interests as well.

R. v. A.B., [2006] O.J. No. 394 (S.C.J.):

The granting of bail must be assessed on a case-by-case basis, and an accused person should be released if none of the grounds set out in s. 515(10) is satisfied. *The reasonable person would understand that there are no offences for which bail is automatically prohibited* and that persons charged with offences as serious as sexual assault and murder are often granted bail. Equally important, she or he would understand that the vast majority of those who are charged with criminal offences are granted bail and do not abscond or commit further offences while on release.