Coordinated Court Research Report

Collaborative Design of a Research-Informed, Coordinated Provincial / Queen's Bench Family Violence Court Model

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PART ONE

Collaborative Design of a Research-Informed, Coordinated Provincial / Queen's Bench Family Violence Court Model (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research)

1.1 Research Goals and Objectives:

The *Collaborative Design of a Research-Informed, Coordinated Provincial / Queen's Bench Family Violence Court Model* project was a collaborative academic, judicial and New Brunswick government project designed to document, assess and improve the sharing of information about risk and danger (adult and child) and to improve the sharing and consistency of agreements and orders across legal systems in family violence cases. The ultimate goal was to design and pilot a coordinated court model to ensure due process while managing safe, research and evidence-informed information exchanges in family violence cases across the criminal, civil-intimate-partner protection, family-law and child-protection legal systems. The anticipated outcomes were enhancement of adult and child safety, reduction of duplication of information and evidence, and improved coordination of court orders and agreements.

As a result of Covid - 19 and repetitive public health lockdowns throughout the whole of the project, particularly in Moncton, we were able to meet some but not all of our objectives. We were able to collect and assess court file data from multiple court systems and connect the court data from multiple systems to those accused of domestic violence crimes. We were also able to collect and document focus group data. We presented our data to the judiciary, the project's advisory committee, directors of child protection services, and to pertinent professionals and service providers in the Moncton region. We will be able to propose the model and identify obstacles requiring a response in order to implement the model. We will also propose potential solutions.

1.2 Definitions:

CCR Committees: CCR stands for Co-ordinated Community Response (CCR) to high risk and high danger domestic violence/intimate partner violence cases in New Brunswick. The CCR Committees are the result of a partnership between government and community services. The committees bring together police and relevant community services to share

information about risk, and to work together with victims[1] to develop risk management plans designed to keep families safe. The committees use two research verified risk assessment tools to assess the level of risk and danger: the DA and ODARA (defined below). The CCR Committee risk management model has been successfully pilot tested, evaluated and is currently being implemented throughout the Province.

DA (Danger Assessment): The Danger Assessment (DA) is a research verified assessment tool designed for use with victims of family violence to identify the risk that the person targeted by family violence may be killed by her intimate or former intimate partner. It is specifically designed to assess the potential for lethal outcome. The tool was developed by Dr. Jacquelyn Campbell of the Johns Hopkins School of Nursing in the United States. Although all risk assessment tools have limitations, the DA has considerable research support. It is well respected and has been implemented in many jurisdictions. Victim Services and a number of other service providers in the Province of New Brunswick have received training on application and interpretation of the DA. It is one of two research verified risk assessment tools in use in the Province of New Brunswick. The results are considered by CCR Committees when assisting men and women in high risk family violence cases.

Domestic, Intimate Partner & Family Violence: The terms ‘domestic violence’ (DV), ‘intimate partner violence’ (IPV) and ‘family violence’ (FV) are often used interchangeably

1 The term ‘victim’ is not without controversy. Many prefer the term ‘survivor’ because the term better reflects the fact that those subjected to domestic violence, are not helpless or powerless. Many, perhaps most, women engage in considerable effort, requiring considerable courage, to leave these relationships. (See, for example, Edward Gondolf and Ellen Rubenstein Fisher Battered Women as Survivors: An Alternative to Treating Learned Helplessness (Lexington Books, 1988). M. Randall (2004) notes in (2004) “Domestic Violence and the Construction of ‘Ideal victims’: Assaulted Women’s ‘Image Problems’ in Law” *Saint Louis University Public Law Review* 23:107-154 that a number of women who have been abused have objected to the victim label. See also J. Moldon “Rewriting Stories: Women’s Responses to the Safe Journey Group” in L. Tutty, C. Goard (eds.) *Reclaiming Self issues and resources for women abused by intimate partners* (Halifax: Fernwood, 2002), particularly the author’s discussion of women in treatment who, as they overcome difficulty, stop identifying themselves as abused women and begin identifying themselves as women who have been abused and have survived. These are important concerns and, from a domestic violence research point of view, valid arguments. Nonetheless the term ‘victim’ is used in this report, for a number of conceptual and practical reasons. One difficulty with the term ‘survivor of domestic violence’ is that it creates its own exclusions. While many women, children, and men subjected to domestic violence do ‘survive’, many do not. Many carry and continue to react to emotional scars from domestic violence indefinitely. Others die. The term ‘survivor’ excludes those who have not survived. The term is also helpful when distinguishing (without resorting to considerable explanation) those who are at the receiving end of domestic violence from those who perpetrate domestic violence. Finally, courts deal with perpetrators and ‘victims’ of domestic violence at a time when the effects of domestic violence are at their height (at separation or when criminal acts of violence are being prosecuted). In such circumstance, the term ‘victim’ may better depict vulnerabilities at that particular time than the term ‘survivor’.

in this report for a number of reasons. New Brunswick's specialized criminal provincial court in Moncton is referred to as the Domestic Violence Court. The Canadian *Divorce Act* and provincial family law legislation use the term 'family violence'. And indeed, the term 'family violence' appropriately reflects the fact that any abuse and violence in a child's home causes harm to every member of the family who resides there. When an adult engages in intimate partner violence, also known as DV, against a child's parent or guardian, that adult causes direct psychological harm to the child and is engaging in abuse of the child. Nonetheless, the term 'family violence' (FV) is potentially broader in scope than the terms 'domestic violence' (DV) or 'intimate partner violence (IPV) in that the former can include types of abuse and violence directed at a child in addition to IPV-related child abuse. While DV/IPV and other forms of child abuse do often occur together, when it is necessary to distinguish other forms of child abuse from IPV-related child abuse, the report will clarify 'abuse directed at the child or children'.

Family Law: In this report, family law refers to *Divorce Act*, RSC 1985, c 3 (2nd Supp), *Family Law Act*, SNB 2020, c 23 and *Marital Property Act*, RSNB 2012, c 107 civil proceedings between litigants who are members of families (sometimes referred to as private family law). Social Development cases, including child protection cases, as well as *Intimate Partner Violence Intervention Act*, SNB 2017, c 5 civil protection cases are identified separately.

IPV: IPV refers to intimate partner violence, also called DV. New Brunswick's legislation offering civil protection to adults in DV cases is called the *Intimate Partner Violence Intervention Act*, SNB 2017, c 5.

ODARA is an actuarial risk assessment tool designed in Ontario to rate the risk that a person who has already engaged in IPV will assault a partner again. Although the tool has limitations, it has considerable research support for use in intimate partner assault cases. All police forces in New Brunswick use ODARA in applicable DV/IPV-assault cases. The adoption of one risk assessment tool by all police forces in the province helps to promote consistent application and interpretation throughout the province.

1.3 Data Collected:

During periods of relief from lockdowns associated with the Covid - 19 epidemic, we were able to collect and assess the following data:

- The contents of three hundred and thirty nine court files - 216 criminal (Queen's Bench & Provincial Court) many of which contained multiple criminal charges, 55[2]

2 One of the criminally accused was associated with two family law court files.

family law (Queen's Bench, Family Division (FD)), 38 Social Development (Queen's Bench, FD), and 30 intimate partner civil protection (Queen's Bench) court files - associated with 95[3] criminally accused of domestic-violence-related crimes in Provincial Court in the Judicial District of Moncton. One hundred and seventy eight children were involved in these cases (169 directly).[4]

- Danger assessment data not normally made available to courts: Non identifying attendance, safety plan and DA assessment data was collected from Victim Services on the 141 adult victims targeted by the 95 persons criminally accused of domestic-violence crimes.[5]
- Discussions from a Judicial (Provincial and Queen's Bench, FD) virtual meeting following a presentation of data.
- Focus Group session in Moncton with police; Criminal crown; Family child protection crown; Provincial court adminstration; Legal aid services (family); Child protection services; Victim services, including First Nations; Probation; DV intervention services for perpetrators; Shelters for women; Criminal defense bar; Province of New Brunswick's Community Risk Management Program (in addition to Dr. Neilson, who is also a member of the Provincial CCR Policy Committee).
- Discussions with the Provincial Advisory Committee

1.4 Research Team:

The Research Project's two principal investigators were Dr. Linda C Neilson, a legal system, family violence expert, and Joanne Boucher, Provincial Court, Domestic Violence Stream Coordinator, Judicial District of Moncton. Joanne is an expert on coordinating information flow from communities to and from the criminal court and across court systems (Criminal Provincial Court and Queen's Bench Courts - criminal, family, child protection and civil protection court matters).

The project had the support of and advice from two supernumerary judicial advisers: Court of Queen's Bench, FD Justice Brigitte Robichaud and Judge Anne Dugas-Horsman. Justice

3 We counted one accused per family. In one case the father and the mother each faced criminal domestic violence crime charges at different times. Nonetheless, this was counted as one case.

4 One of the accused was known to have fathered over a dozen children, two were directly involved in the court files examined during the project.

5 A few of the victims included in this figure were children directly targeted by abuse and violence separately from the adult victim. We created and used a code to avoid collection of identifying information. The code allowed us to connect offender and victim codes to non identifying Victim Services and court file data.

Robichaud is a family law and child protection judicial expert. Judge Dugas Horsman is a criminal law and family violence judicial expert. Judge Dugas Horsman was the first judge of the specialized Provincial Criminal Court, Domestic Violence stream, in Moncton. She served on the Cross Sector Committee which designed and created the court (as did both Principal Investigators). Both judges are nationally recognized experts in their fields.

The data collection component of the project was supported by the work of two bilingual research assistants: Julie Arsenault and Marie-Pier Lebreton Noel. Despite delays and challenges posed by Covid -19, the assistants, trained by Dr. Neilson, supervised by Joanne Boucher, were able to collect data from court files in the Judicial District of Monton on court-file-data collection instruments designed for the project. In addition to collecting data from court files, research assistant Marie-Pier Lebreton Noel was centrally involved in the creation of a 99 page *Cross Court Sector Spreadsheet* tracking information about DV cases across multiple legal systems.

The Court file spreadsheet was provided to Justice Canada on a confidential basis for purpose of reporting on this project. Although paper copies were made available to judges and justices in New Brunswick on a confidential basis, copies of this document cannot be made public because the data in the spreadsheet are organized on a case by case basis. Although care was taken throughout the project to refrain from collecting any identifying information, research ethics prohibit us from publically reporting our data on a case by case basis for the reasons set out below. Public reports and publications will comment on trends and patterns but will not document fully the collection of court files associated with individual cases.

The project also had a cross-sector Provincial policy advisory committee chaired by Dr. Catherine Holtmann, Director of the Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick, where the project was housed. The purpose of the Committee, which met three times during the project, was to align the project with New Brunswick government policy objectives, initiatives and practices.

1.5 Research Ethics:

The project was carefully designed to avoid collection and or dissemination of identifying information. Data collected from court files were collected, catalogued and stored by code not by name. In addition, only non-identifying classifications - such as lawyer, police officer, witness, service sector, expert – were recorded during data collection from court files and/or transcription of Focus Group sessions. In connection with the court-files, we randomly assigned number codes to letters of the alphabet to allow us to identify and to link court file

data to accused and complainants. Every court file and Victim Services data collection instrument was precoded by Court Coordinator, Joanne Boucher, before data were collected or shared, using a code designed by Dr. Neilson. This prevented any recording of names or indentities during data collection, retention and dissemination. All data were collected and stored using the identification code. Identifying information such as residential location, children's birthdates, names of professionals and services associated with the litigants, was excluded during data collection and retention processes. In addition, risk and and danger data was collected and recorded by type of risk or danger category rather than by detailed description of events. No one except the two Principal Investigators[6] had access to the identification codes used in the project. All copies of the code itself are to be destroyed such that it will not be possible for anyone, including the two Principal Investigators, to connect court file data and or information from Victim Services to any accused, family member, professional, or individual.

The project was vetted and approved by the research ethics processes at the University of New Brunswick, File 2019-10. In addition, the project was vetted by the Province of New Brunswick for compliance with privacy legislation and associated policies by the Departments of: Justice, Public Safety (Victim Services), and Social Development.

1.6 Application for Bulk Access to Court File Records

Access to court file records for research purposes required the project to make formal application to the Department of Justice, New Brunswick, for bulk access to court files.

1.7 Choice of Location & Jurisdiction:

The Judicial District of Moncton was chosen for this project for a number of reasons:

1) the Provincial Court, Domestic Violence Stream, Judicial District of Moncton, has had considerable success already in coordinating the flow of information among community services and court systems.

2) Criminal charges associated with family violence are clearly identified as such in the Judicial District of Moncton. For particulars, refer to ***Appendix 1***. There are few other Canadian jurisdictions that flag criminal charges in this way. This meant that the project did not have to scan a large number of court files in order to identify criminal cases associated with family violence. We could begin the project with confidence that the DV cases correctly were identified.

6 Joanne Boucher precoded all data collection instruments. This allowed us to collect and link data without sharing the coding system with the research assistants.

3) New Brunswick has a unified family court that operates at the superior court, Queen's Bench level. Most *Intimate Partner Violence Intervention Act* civil protection cases and all family law and child protection cases are decided in the Court of Queen's Bench, family division (FD) at the superior court level. Most criminal family violence cases are heard by the Provincial Court, Domestic Violence stream. Thus the Moncton jurisdiction offered a cross-legal-sector court structure that is less complex than that found in many Canadian jurisdictions. This structure made research navigation less cumbersome.

4) The number of family violence related criminal cases heard in the jurisdiction each year, involving approximately 320 to 350 accused per year, was small enough to allow manageability of data collection and analysis.

5) The Moncton Jurisdiction is bilingual.

1.8 Identification of cases & Limitations in Court File data:

Domestic violence criminal cases are identified in the Moncton jurisdiction according to established criteria set out in ***Appendix 1***. In addition to setting out the Province-wide accepted definition of DV, *Appendix 1* includes a discussion of some of the challenges that arise, despite clear definitions, when deciding whether to classify a case as DV or as another type of crime.[7]

Joanne Boucher's access to court records allowed her to identify 104 persons, charged with DV related crimes in the Judicial District of Moncton between April 1 2017 and August 2019, who were also involved in related family law, child protection, or *Intimate Partner Violence Intervention Act* court cases. We were not able to access complete court file information for a number of the cases as a result of misplaced or inaccessible court files, for example as a result of misplacement in the numerical filing system, archiving policies or Covid - 19 restrictions when the associated court files were located in jurisdictions outside of the Moncton Judicial District. Consequently our final sample was 339 court files associated with 95 accused (80 male and 15 female). Many of the criminal files contained multiple criminal charges. A number of the accused during the study period (10) had criminal charges associated with multiple victims.

We stopped updating court file data associated with the 95 accused on December 15, 2020.

The criminal court data from the Provincial Court, Domestic Violence Stream enabled the project to begin data collection with confidence that the DV cases resulting in a criminal charge already had been identified. Nonetheless restricting data collection to cases involving

7 The criteria used to identify DV cases has evolved since the specialized domestic violence stream of the criminal court in Moncton began operation in 2007.

criminal DV charges produced a number of data limitations. Not included in our sample are DV cases filed with courts in family law, child protection and or *Intimate Partner Violence Intervention Act* cases that were not connected to any criminal charge. It is quite possible for cases involving high levels of risk and danger to be filed and to be heard in family, child protection and or intimate partner violence civil proceedings without any criminal charge being laid. We are also missing cross sector data for accused whose criminal charges were filed prior to April 1, 2017 even if the related family law, child protection and or Intimate Partner Violence matters were ongoing during the data collection stage of the project. The other limitation is that, as a result of the fact that family violence cases are flagged only in the criminal system, and not in the family law, child protection, or IPV court systems, the court coordinator was only able to identify criminal cases with related family, child protection and IPV court files if the related proceedings were filed and in existence prior to the conclusion of the criminal case. In other words, we may be missing from our sample, court file data of those who were criminally accused during the study period but whose related family, child protection, or IPV court case was initiated after the criminal case was concluded. Those who were criminally accused of a domestic violence crime during the study period were included in the research sample only if they were also involved in a non-criminal (family, IPV civil protection, or child protection) court file. This restriction was intentional as we wished to focus on family violence cases involved in multiple legal systems.

PART TWO: DISCUSSION OF RESEARCH FINDINGS

2.1 Risk and Danger Assessment

Dr. Neilson conducted an expert evaluation of the levels of risk and danger associated with each accused by analyzing the risk and danger indicators found in every court file (criminal, family, child protection, Intimate Partner Violence Intervention) associated with each accused as well as Victim Services DA assessments[8] and offender risk assessments (ODARAs) conducted by police.

Detailed evaluations of the levels or risk and danger in these cases, drawing from multiple sources of data, are seldom available to courts in the absence of testimony from a family-

8 Victim Services throughout New Brunswick receive training and use a research-verified danger (potential for lethal outcome) DA assessment tool developed by Dr. Jacqueline Campbell in the United States. DA conclusions were conveyed by Victim Services to the research team using a code rather than by name. The code allowed us to link the non identifying data to victims associated with each offender without disclosure by Victim Services of identifying information.

violence-risk-assessment expert, for a variety of reasons such as those set out in the footnote.[9] Dr. Neilson's assessment allowed the research team to connect risk and danger assessment information, most of which would normally not be available to courts, to the data found in the court files.

2.2 Introduction: Exaggerated Claims or Limited access to Evidence?

The data we collected allowed us to shed empirical light on the validity of the common assumption among lawyers and within legal systems that reports of DV and FV commonly are exaggerated in order to secure litigation advantage. In fact, empirical research has repeatedly demonstrated the opposite: that problems in the legal system are the result of limited access to complete information as a result of fact filtering and settlement processes that prevent FV evidence from reaching courts before decisions are made.[10] Our data corroborates the empirical studies and not the common assumption.

During the project, we were able to compare the levels of risk and danger, when indicators are known, to the limited information about risk and danger that is made available to courts. In terms of settlement, high rates of withdrawn charges resulted in criminal evidence not being presented to criminal courts in the majority of the criminal charge cases, despite pre-charge policies in New Brunswick and the specialized criminal court in Moncton. Finally, we are able to outline what information was shared and not shared across court systems and to compare and contrast child outcomes when courts were responding to the same family members in criminal, family, child protection, and family law matters.

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9 Courts will seldom have access to comprehensive information about the levels of risk and danger families face in these cases for a number of reasons: 1) family-violence-expert risk and danger assessment evidence is rarely presented to courts in practice (for example as a result of lack of resources and or limited access to experts); 2) courts seldom have access to risk and danger information found in other court files associated with persons accused, for example criminal courts will seldom be fully aware of the facts in associated family law, child protection or civil protection matters; 3) risk assessments by police (in New Brunswick police use ODARA to assess risk) and danger assessments by Victim Services are not always conducted for a variety of reasons associated with consent and or type of charge; 4) Even if risk and danger assessments are conducted, the results are seldom presented to courts; 5) evidence and other legal rules that prevent courts from considering risk and danger factors at various stages in the court process, for example in connection with trials to assess criminal responsibility; and 6) the lack of legal authority and established mechanisms enabling courts to obtain and share information among courts.

10 Linda C Neilson (2020, 2nd ed.) *Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases* (Ottawa: Canadian Legal Information Institute, CanLII) at 4.3.1 and 4.5.2 in Chapter 4; Dr. Neilson et al. (2001) *Spousal Abuse, Children and the Legal System* (Fredericton: Muriel McQueen Fegusson Centre for Family Violence research) on line; Refer as well to the 2020 edition of the Australian *National Domestic and Family Violence Bench Book* on line at 4.1.

2.3 Court File Data: Discussion and Analysis (Overview):

2.3.1 Risk and Danger Analysis

Our multiple court file Spreadsheet documented, in a quick reference and summary fashion, information about risk and danger indicators known to community services, recorded in court files, and or documented in validated risk (ODARA) and or danger (DA) assessments together with court responses and outcomes associated with 95 accused across related legal systems (criminal, family, child protection, civil protection). It is important to note that Dr. Neilson had access to a much broader range of risk and danger information than would normally be available to any court making a decision in these cases.

The 95 accused (80 male, 15 female) in our court file sample generated 572 crown approved initial criminal charges.[11] The associated risk and danger levels to family members targeted by the 95 accused were:

- high to extreme risk and danger: 47 accused (51 %)
- medium to high medium risk: 30 accused (33 %)
- low to low medium risk: 15 accused (16 %).

In one case both intimate partners had been criminally charged with a DV crime during the study period. The risk danger levels for both targeted adults were included (above) for that case. One very high risk case was excluded because the high to extreme risk indicators were the risk to the person criminally accused (reflecting a criminal charge against an adult who was clearly the targeted party in the relationship). Three cases could not be assessed because the indicators were contradictory.

2.3.2 Criminal Court Data

Despite pre-charge crown prosecutor approval practices in New Brunswick and specialized DV crown prosecutors in the judicial district, 48.4 % of the original charges were withdrawn. Of these (36.7 %) were withdrawn fully and (11.7%) were withdrawn in favor of a peace bond. A little under half (272, 47.6 %) of the 572 original charges resulted in a finding of criminal responsibility. The vast majority (257, 94.5 %) of findings of criminal responsibility were the result of guilty pleas. Only 4.8 % of the 272 charges that resulted in a finding of guilt were the result of a judicial finding. Two or 0.7% resulted in absolute discharge; 19 or 7 % resulted in a conditional discharge. Four of the charges without findings of criminal responsibility were the result of judicial findings of mental health

11 In New Brunswick crown prosecutors preapprove criminal charges.

issues. Three charges were associated with criminal judicial findings of not guilty; two of the 3 findings were appealed. No evidence was presented in response to 4 charges (for a female accused) resulting in acquittal. Warrants were issued and or the case was not yet decided for 9 of the original charges. When we think about this in connection with the extent to which judges receive full and complete information about patterns of intimate partner violence, the data tell us that, even in a specialized court jurisdiction, criminal court judges will become aware of facts and particulars of merely 50 % of preapproved DV related charges.

Please note that it should not be assumed from the paragraph above that crown prosecutors in the study jurisdiction were securing lower rates of conviction for IPV crime than the Canadian norm. In 2015, on behalf of Statistics Canada, Pascale Beaupré reported in *Cases in adult criminal courts involving intimate parent violence* (Ottawa: Statistics Canada) that IPV charges led to a guilty verdict on at least one charge in the majority of completed cases (albeit a lower rate than for non IPV cases). Direct comparisons should not be made, however, between that Statistics Canada data and the data reported in the former paragraph because Statistics Canada reported guilty verdicts when at least one of the charges resulted in a guilty verdict. In this report we are reporting guilty verdicts on a per charge basis because one of our goals is to document the extent to which judges are presented with full particulars of IPV crimes. When we re-examine our data on a criminal-court-file basis (as opposed to on a criminal charge basis) we find that 137 of the 213 (64.4 %) completed criminal files (files often contain multiple IPV related charges) resulted in at least one guilty verdict. Thus the Moncton conviction rate is somewhat higher than that reported by Statistics Canada, probably reflecting, in part, the professional reputations and expertise of the specialized crown prosecutors in the Moncton study jurisdiction.

When we connect the criminal outcomes to risk and danger levels, we find that, of the 47 accused who were high-risk-and-danger-to targeted-victims, 22 were probably well-known to the police. These 22 accused had multiple criminal files with multiple criminal charges resulting in criminal penalties. The remaining 25 of the 47 high risk / danger offenders, however, had criminal files that resulted only in withdrawn charges, with or without peace bond provisions, and or conditional discharges. While there can be many valid reasons for this (such as lack of victim cooperation, problems with accessing and presenting evidence), in the absence of DA and or ODARA assessments and knowledge of the facts associated with high risk found in the family, child protection, or intimate violence protection court files associated with these accused, criminal crown prosecutors and criminal court judges would have had little knowledge of the serious levels of danger the victims of these accused were facing.

Although the Province of New Brunswick has implemented risk and danger assessment policies to promote family safety in FV cases - for example, as indicated earlier, all police forces in New Brunswick use the research validated risk assessment tool ODARA and Victim Services throughout the Province administer validated DA danger assessments with victims - in practice these tools are not used in the majority of criminal DV cases. One of the reasons for this is that victims are voluntary clients of Victim Services in New Brunswick. They must decide to attend victim services offices and consent to participating in DA assessments. Of the 101 adult victims involved in the cases,[12] only 41 (40.1%) completed danger assessments with Victim Services.[13] Some of the court files reported that Victim Services had lost contact with the victims. Our data do not allow us to document other reasons victims did not participate in DA assessments (such as reconciliation, perpetrator retaliation, victim intimidation or fear, or victim relocation).

Similarly, in connection with police administered ODARA risk assessments,[14] we found that merely 92 (44.1%) of criminal files (many of which contained multiple criminal charges) recorded any ODARA risk assessment. Again, there are valid reasons for this, such as the fact that ODARA has been research-validated for specific types of DV criminal charges and many criminal DV charges do not involve assault or threat of assault. Nonetheless, from a court access to risk and danger information point of view, the data tell us that police risk assessments are not conducted in most criminal DV cases. During the focus group discussions police reported grave concerns that they did not have a DV risk assessment tool that could be used in response to some of the most serious, dangerous DV cases they were encountering. A related problem, in terms of reliance on the risk assessment scores, is that ODARA assessments are situational. The assessments must be administered repeatedly in order to remain valid. For example, an ODARA conducted early in a criminal DV 'career' will no longer be a reliable indicator of the level of risk after new DV crimes have occurred. In the Moncton jurisdiction, 26 % of the 95 accused had no ODARA risk assessment administered at any time. Of these, 14 (56%) were associated with high risk to extreme danger (potential for lethal outcome) victim indicators.

The fact that fewer than one half of preapproved criminal DV charges are presented to criminal court judges for hearing or sentencing and the fact that, of the cases that are

12 We collected victim services data on 141 victims associated with the criminal charges. Some of the 'victims' were directly targeted as children. One hundred and one were adult victims. At the moment DA assessments are limited to adult victims.

13 We anticipate a positive change in this percentage in the Moncton region with the implementation of CCR risk assessment committees (which is occurring now) along with the education and training associated with implementation.

14 ODARA assessment results are found in criminal court file data but are not usually directly presented to courts. Nonetheless ODARA scores provide useful information to criminal crown prosecutors in connection with settlement and crown submissions in connection interim release and sentencing.

presented to criminal court judges, many are presented with limited information about the levels of risk and danger, support assertions among family-violence-legal system experts that there is far more empirical support for concerns about evidence not reaching judges than support for assumptions that courts are routinely faced with false or inflated DV reports.[15]

In order to shed a little bit of light on this issue, we explored the possibility that the withdrawn charges may have reflected charges laid in error and/or DV charges that were a one-time-minor occurrences, not associated with a pattern of DV. To explore this issue, we looked at how many of the accused, whose criminal files resulted in withdrawn charges (with or without a peace bond) or discharges, had additional criminal files with additional DV criminal charges.[16] Thirty five of the accused with withdrawn charges had no other criminal files with additional DV charges during the study period. While it is not possible to conclude from this that all of these accused were either charged in error or were minor or first, one-time DV offenders (because our data would not have captured charges laid outside of the court file study period and because most DV crime is not reported to police) it is quite possible that at least some of these accused committed only minor criminal acts or did not engage in a repetitive pattern of DV. Women were over represented in this category. Seven of the 35 accused with withdrawn charges who did not have additional criminal files were women. Given that 15 of the accused were women and 80 were male, this represents close to half (46.7%) of the women charged with DV crime and 35% of the charged men. Most (38) of the accused with withdrawn charges, however, had additional criminal files opened during the study period containing additional criminal DV charges. Other criminal files with additional DV charges indicate repetitive DV criminal behavior.[17] While, as discussed earlier, there are numerous reasons charges may be withdrawn (and thus decisions to withdraw charges are not necessarily incorrect or wrong), it is also important to recognize that it was not uncommon for those with withdrawn criminal charges to be associated with repetitive DV crime.

15 Heather Douglas et al. (2022) National Domestic and Family Violence Bench Book was published on line in 2017 and is updated regularly; Linda C Neilson (2020) note 10. The siphoning of charges and evidence process outlined in this report is not necessarily the result of crown prosecutor error or neglect. There are many valid legal reasons evidence of related charges and risk/danger evidence are not presented to criminal judges, including legal rules that prohibit consideration of such evidence at various stages in the legal process; lack of victim-witness cooperation; evidence rules that make the presentation of risk and danger evidence cumbersome, complex or cost prohibitive; limited access to expert witnesses; problems with evidence and proof. Nonetheless, while there are many legally valid reasons full particulars of DV do not reach judges, the fact remains that there is far more empirical support on a legal system analysis basis for the assertion that information about DV is filtered out of the legal system than there is empirical support for the assertion that problems in the legal system are associated with inflated or exaggerated DV reports.

16 We would not necessarily have been aware of criminal charges unrelated to DV crimes.

17 We did not count accused in the withdrawn charges category when the withdrawn charge was part of a single criminal file that also contained additional charges resulting in a guilty plea or finding.

Jail time was imposed in response to 157 (57.7%) of the 272 DV charges resulting in criminal responsibility (guilty finding or plea). Jail terms varied from one day to 8 years (the later in one case involving a female offender). Jail terms of one to two months (not uncommonly followed by periods of probation) were fairly common. From a family violence, as opposed to a legal perspective, one wonders how the legal system can expect women and children attempting to escape relationships characterized by, in some cases, years of family violence, to achieve safety (court orders protecting themselves and the children, economic independence, residential safety and safe transportation) in merely one to two months.

The longest jail term imposed on any male DV offender was 23.5 months. The longest jail term imposed on any female DV offender was 8 years (96 months, minus credit for time served) imposed on a female offender by the Court of Appeal. The charges differed in that the male offender plead guilty to aggravated assault using a knife while the female accused was charged with attempted murder of the father's new intimate partner using a knife. On the other hand, the files indicated a repetitive pattern of DV on the part of the male offender in contrast to the absence of prior criminal activity on the part of the female offender and an ODARA score of 6 for the male offender in comparison with a much lower ODARA score of 3 for the female offender.[18]

Fifty three (33.8%) of the jail terms imposed were time-served only; 64 (40.8%) were concurrent sentences.[19] Merely 27 (17.2%) of the jail terms imposed were ordered to run consecutively. Probation orders, with or without jail time, were imposed in response to 171 (62.9%) of the 272 charges that resulted in a finding of guilt (guilty plea or finding). Probation durations varied from 6 months to 3 years. Durations of 12 months to 24 months were fairly common. Presumably, scrutiny of offenders by probation officers during these periods would have offered some degree of protection to family members.

The research team was interested in orders directly affecting children. We were particularly concerned about criminal courts explicitly authorizing parenting time with children prior to determinations of criminal responsibility (as a result of concerns about manipulation of children during this time to encourage 'victims' to recant criminal complaints). While this was not common (8 of the 95 accused), most, 62%, of these accused, were high risk / danger to their 'victims'. Criminal undertakings authorizing offenders to make arrangements for contact with children through third parties or lawyers prior to findings of quilt, as alternatives to Queen's Bench FD orders, were more common (17 of 95 accused). Of these,

18 The lower ODARA score for the mother reflects, in part, the fact that ODARA assessments take into account past patterns of behavior to assess the risk of future DV assault.

19 In a few cases, when sentences were both concurrent and time served, both were counted. The remaining sentences for charges were either consecutive or responses to single charges.

close to 1/2 (47.1%) had high to extreme risk indicators. Once again these data indicate limitations in the information that is reaching courts. It is highly unlikely that criminal court judges would expressly authorize those accused of DV crimes, who posed a high level of risk to family members, to make arrangements to see their children informally through lawyers or third parties prior to hearings to assess criminal responsibility (without a Queen's Bench, Family Division (FD) assessment of best interest of the child evidence).

The most frequent undertakings authorizing contact with victims in order to arrange 'visitation rights' prior to findings of guilt or acceptance of responsibility, however, specified that the contact had to be in accordance with a family court, Queen's Bench FD order. While such undertakings are preferrable to criminal undertakings authorizing informal arrangements in that they accord jurisdiction over children to the Queen's Bench FD, which has far more capacity than criminal courts do to assess patterns of abuse and violence and children's best interests, the wording was of concern to the research team. Framing access to children as a right held by those accused of DV crimes sends a message that continuing perpetrator control of the family is appropriate. Inadvertently the message could produce anger, aggression and further DV against victim parents or children when children resist continuing contact.

Another problem, from a family violence safety point of view, is concern about routine use of such provisions. A Queen's Bench FD order granted in the past may no longer be safe for women and children if the circumstances have changed since the FD order was issued (such as new criminal charges, the escalation of violence, a new intimate partner in the targeted parent's life, loss of employment or loss of an intimate relationship on the part of the offender). In order to make accurate decisions, criminal courts require knowledge of the facts considered by the FD court at the time the order was issued along with knowledge of new facts, if any, affecting the level of risk since the date of the order.[20] This is one of the reasons criminal and FD courts require capacity to exchange and share admitted evidence in DV cases.[21]

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20 Joseph Li Luca, Erin Dunn and Breese Davies emphasize the importance of criminal lawyers and criminal courts having knowledge of family law and child protection proceedings in (2012) *Best Practices where there is Family Violence (Criminal Law Perspective)* (Ottawa: Justice Canada).

21 L. C. Neilson (2014) *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective (Ottawa: Department of Justice); Renforcement de la sécuité: Affaires de violence conjugale faisant intervenir plusieurs systèmes juridiques (en matière de droit pénal, de droit de la famille et de protection de la jeunesse) Perspective du droit de la famille sur la violence conjugale* (Ottawa: Ministère de la Justice); Department of Justice (2014) *Making the Links in Family Violence Cases*: Collaboration among the Family, Child Protection and Criminal Justice Systems.

Following findings of guilt (as a result of a guilty plea or court finding) or acceptance of responsibility in a Peace Bond, provisions authorizing contact with 'victims' in order to arrange access to children were relatively common (granted to 40 of the 87 offenders with completed criminal or peace bond files). It is important to note that the remaining 47 cases, and indeed most criminal cases, did not include any provisions relating to children. In part this is because, in practice crown prosecutors and criminal courts may have little to no information on whether or not children are involved in these cases. The research team learned during the Focus Group sessions that police do not always notify crown prosecutors when children are involved. The research project had access to related family, IPV civil protection and child protection files so the project had more information than the criminal courts did about the involvement of children. As was the case in orders granted prior to findings of responsibility, the vast majority of the child provisions were framed as offenders' rights to exercise access to the child or children.[22] Only one of the final criminal orders or peace bond provisions specified protections for the children. In Case 33, a case associated with extreme danger on the Victim Services DA, the criminal court specified that no contact would be permitted "except in accordance with a supervisory order from the Court of Queen's Bench, Family Division." Criminal orders and peace bonds seldom imposed prohibitions or restrictions on contact with children.

While some of the child related orders or agreements may have been requested by 'victim' complainants, it is likely that, in some cases, women with children were accorded lower levels of protection than women without children in order to enable men, despite FV convictions or agreements, to continue to parent children.[23] In 21 of the 40 offender cases that contained child provisions, the exceptions to contact in order to arrange access to the children were limited to that authorized by a FD order and/or as directed social development/child protection. In 16 other cases offenders were authorized to to make arrangements for contact with the children through third parties and/or lawyers as alternatives to a FD order.[24] In 5 cases the criminal court directly ordered contact with

22 As an alternative to using "rights of access" to children terminology, the research team recommends neutral terminology such as that granted in several criminal cases such as "no contact except in accordance with a Department of Social Development direction or Queen's Bench, Family Division order granted after this decision" or "no contact except in accordance with a Department of Social Development or Queen's Bench, Family Division order granted on" a specified date, if after examining the circumstances of the social development/child protection or the Queen's Bench order, the criminal court concludes that the risk levels did not change.

23 The research team does not know how many of these orders and agreements were requested by targeted parents and how many were imposed.

24 Two of the offenders were counted as authorizing arrangements through third parties or lawyers when one of the criminal files authorized such arrangements and an earlier criminal file or files limited exceptions to contact to that authorized by a FD order or as authorized by child protection.

children, for example, “you will be allowed to exercise visitation rights through a third party.”

When we looked at the risk and danger levels associated with the 40 offenders who had orders relating to children from the criminal court, we found that 23 posed a high to extreme risk of continuing DV and/or potential for lethal outcome (14 of the 23 were associated with victims whose Victim Services DA was extreme danger, the highest possible score on a potential for lethal outcome assessment); 13 represented a medium to high medium and 4 low risk. In some of these cases crown prosecutors may have consulted victims prior to making recommendations to the criminal court in connection with these provisions. We do not know how often this occurred as we did not collect data on crown-complainant communications. It is unlikely, however, that crown prosecutors, defense lawyers, or the criminal courts had direct access to the children’s views on contact with these DV offenders (despite children’s rights pursuant to article 12 of the United Nations *Convention on the Rights of the Child*, ratified by Canada in 1991, to have their views heard and given due weight in all matters that affect them). Given that children have a legal right to be heard and to have their views considered and given due weight, and that Queen’s Bench, FD courts have more access to information from children in family law and child protection cases than criminal courts do,[25] it is hoped that attention will be directed to this matter.

2.3.3 Child Protection Data

We were interested in the extent to which Social Development investigated and or intervened when family members were charged criminally for DV crimes for a number of reasons. Direct harm to children as a result of living with DV in the home is well documented. In addition, the research tells us that, when risk factors indicate a child’s parent is in danger, the child is in danger too.[26]

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25 United Nations *Convention on the Rights of the Child;* Hon. Donna Martinson and Hon. Rose Raven (2021) Implementing Children’s Participation Rights in All Family Court Proceedings. *Family Violence & Family Law Brief (9)* (Vancouver: The FREDA Centre for Research on Violence Against Women and Children).

26 K. Scott et al. “Child Homicides in the context of domestic violence: when the plight of children is overlooked” Chapter 8 of Peter Jaffe, K. Scott and A. Straatman (2020, eds.) *Preventing Domestic Violence Homicides Lessons Learned From Tragedies* (Academic Press); David Olszowy et al. (2017) *Children and Domestic Homicide: Understanding the Risks Domestic Homicide Brief* (3) London, ON: Canadian Domestic Homicide Prevention Initiative; Leslie Hamilton, Peter Jaffe and Marcie Campbell (2013) Assessing Children's Risk for Homicide in the Context of Domestic Violence in 28 *J. Fam Viol* 179-189; Laura Olszowy et al (2013) Effectiveness of Risk Assessment Tools in Differentiating Child Homicides From Other Domestic Homicide Cases in 10(2) *Journal of Child Custody 185-206;* Peter Jaffe et al. (2014) Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce (Ottawa: Department of Justice); Hilary Saunders (2014) Twenty-nine child homicides: Lessons still be be learned on domestic violence and child protection (United Kingdom).

Thirty five of the 95 criminally accused were associated with Social Development involvement in a court file relating to their children.[27] Fourteen of the Social Development court files were applications on the part of the Minister of Social Development for child support.[28] As a general rule these court files contained very little information about family violence. Most of the files contained only the child support agreements and orders. This issue warrants additional research attention. The data in these court files did not tell us whether or not the parents in the child support application cases had been pre-screened for DV and FV. If not, this raises a safety concern because applications for child support can put abusers in contact with targeted family members and can result in retaliation against a parent or child. Pre-screening with implementation of precautionary measures could help to preserve safety in DV and other FV cases.

Twenty one of the court files were Social Development initiated child protection court files. All of these cases, with the exception of one case which made use of a protective intervention order to remove the perpetrator of DV from the home, resulted in the removal of the child or children from the home and from the primary care of the targeted parent pursuant to a custody or permanent guardianship order.

In New Brunswick, the department of Social Development/child protection is alerted, pursuant to section 7 of the *Family Services Act*, SNB 1980, c F2.2 when family law cases involve applications for custody of children and, pursuant to section 2 of the *Family Law Act*, SNB 2020, c 23, when family law proceedings concern the exercise of parenting time or decision-making responsibility. The provisions allow child protection / Social Development authorities to intervene in family law cases in order to ensure that the interests and concerns of the child are properly represented and or to intervene to protect children. Child protection authorities may intervene when parental claims presented in a family law case are contrary to child protection orders and agreements, and, potentially, notifications could lead to investigations and possible child protection proceedings. The notifications themselves, however, were seldom recorded in the family law court files so we cannot report on the effects of this provision because our study was limited to court files and victim services data. We did find evidence of Social Development/child protection involvement (such as a letter

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27 In one of the cases the child protection file focused on the mother and a new partner. The criminally accused father was not involved in the parenting of the children. Others (in addition to the 35 accused) who were criminally accused of DV crimes may have been involved with child protection services without a court file. We did not access Social Development data not recorded in court files (such as a child protection investigation or mediation or family conferencing proceedings). The data generated during this project was limited to collection and analysis of court files.

28 Sections 10 to 12 of the *Family Income Security Act*, RSNB 2011, c 154 authorize the Minister of Social Development to recover compensatory benefits and payments made to a person in need.

filed in the court file or a record of an appearance of a social worker as a witness) in 6 of the family law court files. Family law files are discussed below.

Of particular interest was Social Development court involvement in cases presenting high risk or danger to family members. Moncton's court coordinator initiated information protocols that enable some sharing of information between the criminal DV court in Moncton and child protection services. More particularly, the court coordinator alerts child protection when criminal cases are associated with very high risk scores on police administered ODARA risk assessments. In addition, Victim Services alerts Social Development/child protection services when victims are shown to be in extreme danger of lethal outcome on DA assessments conducted by Victim Services. Copies of Victim Services alerts are sent to the DV court coordinator.[29]

We found some level of court involvement (as a witness in an associated family law case, in an application for child support, or in a child protection proceeding) on the part of Social Development in merely 31% (15/49) of the high to extreme risk/danger cases. Four of the cases were Minister of Social Development child support applications. As reported earlier, these court files contain limited information about family violence or the best interests of children and no record of DV screening or assessments.[30] Only 8 of the 15 high risk/danger cases with Social Development involvement (8 of the 49 high risk cases, 16 %) were applications to a court for a child's protection. In an additional 2 high risk/danger cases, while social Social Development did not intervene as a party, it did provide evidence supporting one of the parents in the family law case (family law cases are discussed below). Social Development applied for a protective intervention order to protect the victim and children by removing the abusing parent from the home (pursuant to section 33(3) and/or 58 of the *Family Services Act)* in only one case (recorded as extreme danger on the DA administered by Victim Services).[31] As indicated earlier, this was the only child protection case in our sample that did not result in the children being removed from the home and the care of the targeted parent. This issue warrants DV education and additional research to see if increased use of protective intervention orders could reduce the need to remove children from their homes and from the care of targeted parents in DV and other FV cases.

When we looked at the high risk and danger cases that did not have any record of Social Development involvement in the court files, we found that 19 of the victim/complainants

29 In practice, the DA assessments themselves are seldom presented to any of the courts.

30 While it is possible that family violence assessments were conducted and not placed in the court files, practitioners informed us, during Focus Group discussions, that Social Development in the Province of New Brunswick do not conduct risk assessments specific to DV. One of the project's recommendations is to implement the use of research verified DV and FV risk assessments in all Social Development cases.

31 Practitioners reported a number of reasons for this such as non compliance, problems with monitoring, difficulty obtaining the orders, and problems with police enforcement.

scored extreme danger of potential lethal outcome, the highest danger assessment possible, on the Victim Services DA.

Certainly, expectations and assumptions that, when DV and FV does in fact pose a serious threat to family members, child protection services will intervene to ensure that Queen's Bench FD courts are informed about the risk and danger in private family law cases are not borne out by our court file data. Some of the possible reasons are explored below.

In response to questions from the Department of Social Development, we went back to our data to see if we could shed additional light on the low rates of Social Development involvement in the high risk/danger DV cases. We found that, despite the protocols mentioned earlier, Social Development would probably not have been made aware of about 40 % of the high risk/danger cases because Victim Services does not regularly convey alerts in Severe Danger (as opposed to Extreme Danger) DA cases.[32] In addition, as reported earlier, many high risk/danger cases do not generate ODARA scores. Nonetheless, our data indicated that Social Development would have been notified of extreme danger in 57.6% of the high risk/ extreme danger cases, assuming that the information exchange policies mentioned earlier were being followed. A number of explanations are possible: 1) those receiving the high risk/danger alerts only passed along the information if the case was already a Social Development/child protection matter; 2) the information conveyed was not always reaching the appropriate social workers and/or 3) identification of extreme levels of danger to targeted parents was not triggering concerns within the child protection systems about dangers to children.

During the course of the project, the criminal DV court coordinator made a number of changes to improve the flow of information between the criminal DV courts[33] and child protection services. Many of the DV cases listed in the criminal dockets identify offenders who are already in the legal system who are scheduled for hearings on issues such as breaches of criminal orders or peace bond conditions. Consequently, in order to highlight new cases, the coordinator began to circulate a list of new DV cases to child protection in addition to the criminal DV docket. The purpose was and is to ensure that child protection is aware of all criminal DV cases. In addition, the coordinator instituted contact with a child welfare clinical specialist within child protection services, along with a back up supervisor, to ensure that information would reach the appropriate social worker involved in each related child protection case. Now, when the clinical specialist (or a supervisor within Social

32 Victim Services personnel have discretion, following discussion with supervisors, to report Severe Danger cases to child protection but, unlike the situation with Extreme Danger, are not required to do so.

33 New Brunswick's specialized DV coordinated criminal model spans the Provincial and Queen's Bench court systems. This allows specialized DV criminal crown prosecutors to prosecute all DV crime, including cases before Queen's Bench Courts.

Development who has been designated the back up to the clinical specialist) verifies child protection's involvement in a case, an email is sent to the relevant social worker and the relevant social worker's supervisor within child protection services to ensure that the information is conveyed to the appropriate professional. Another change is that the court coordinator informs social workers in child protection cases when requests are made to vary criminal court ordered conditions so that appropriate protective measures can be initiated if necessary. The third explanation set out above suggests the need for DV education and policy reform. A few child protection officials told us that notice of extreme danger to a parent would not necessarily trigger child protection concerns about the safety of children and would not necessarily generate an investigation. Given that we know that when a parent is in danger of being killed in DV cases, the children are in danger too,[34] this issue warrants additional education and policy attention as well as further research.[35]

The project also found evidence of what appears to be a continuing problem in the approach taken by child protection officials in DV cases. Social Development court files and the Focus Group discussions both revealed a tendency to place the onus on victims of DV, primarily mothers, to protect children from abusive men (as opposed to an onus on authorities to protect mothers with children from abusive men and to hold those who engage in DV and FV responsible and accountable). For example, when we examined the primary concerns generating child protection court applications in the 22 child protection court files associated with those charged criminally with DV (all of the cases, not merely the high to extreme danger cases), we found that only in 5 cases did child protection services focus primarily on the abuse and violence of the accused parent charged criminally with DV crime. While it is important to note that child protection court files are often initiated in response to parenting concerns other than DV/FV (such as substance misuse, mental health issues, abuse directed at children), all of the court files examined during this project were associated with a criminal DV charge. We found that, in most cases, family violence and associated parenting problems were characterized in the court files as mutual. In 7 cases blame was placed on the parent targeted by IPV (the mother) for mental health or addiction problems or for having failed the children by having become involved with violent men. The same theme (blaming mother for failures to protect children from abusive fathers) emerged in Focus Group discussions. Blaming parents targeted by DV for failure to protect children from the parent's own abuser ignores psychological harm, trauma, and patterns of coercive control produced by DV. It also results in child protection services becoming an adversary rather than a solution for families in DV cases. Nonetheless, imposing blame on victims of

34 See note 26.

35 The project distributed a list of educational materials to support current Social Development initiatives in policy reform and education.

DV has a long standing tradition in child protection cases throughout North America.[36] The problem is persistent, is resistant to change, and is not exclusive to New Brunswick.[37]

Numerous research studies have established a strong correlation between perpetrators subjecting an intimate partner to DV and perpetrators engaging in abuse and violence directed at children (physical, sexual, psychological and financial). The more frequent and severe the DV, the more likely child abuse directed at children.[38] Moreover, abusive behaviors against partners and parents are commonly replicated in abusive parenting of the children after the parents or guardians separate.[39] Yet specialized risk assessments and service interventions designed with the complexities of domestic violence in mind have not been a regular feature of child welfare cases.[40] Joan Meier and Vivek Sankaran (2021) explore some of the reasons: domestic violence experts and child protection educational experts operating in separate silos; family law lawyers and courts assuming, incorrectly, that the failure of child protection systems to intervene to protect children indicates that DV and FV reports were false or exaggerated or do not have a serious impact on children; lack of understanding in both the child protection and family law systems that DV directed at a parent in the child's home causes direct harm to children and is a form of child abuse such that children require support and protection.[41]

The child protection data generated during this study support the Meier and Sankaran assertions.[42] Indeed key informants acknowledged, and the court files confirmed, that Child Protection Social Workers in New Brunswick do not use specialized tools to screen cases for DV/IPV or to assess such cases for risk and danger to family members. A major study in the United States by Ijeoma Ogbonnaya and Patrica Kohl documented continuing problems with

36 T. Black, N. Trocmé, B. Fallon & B. MacLaurin (2008) "The Canadian child welfare system response to exposure to domestic violence investigations" (Centre of Excellence for Child Welfare); Joan Meier & Vivek Sankaran (2021) "Breaking Down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals" 28(3) *Virginia Journal of Social Policy & Law* 275-304; Judith Mosoff et a. (2017) "Intersecting Challenges" Mothers and Child Protection Law in BC" 50(2) UBC L Rev 435; Kendra Nixon (2001) *Domestic Violence and Child Welfare Policy: An Examination of Alberta's Child Welfare Legislation and the Impact on Child Welfare Practice*. MSW Thesis. University of Calgary; Rosemary Carlton et al. Eds. (2013) *Failure to Protect. Moving Beyond Gendered Responses* (Halifax: Fernwood Publishing).

37 Rosemary Carlton et al. eds. (2013) ibid.; Meier & Sankaran (2021) ibid.

38 Neilson (2020, 2nd ed.) note 10 chapters 6 and 17.

39 Ibid,, Chapter 6 and Chapter 11, particularly the red flag parenting practices documented at 11.1.10. In New Brunswick, see also Linda C. Neilson et al. (2001) Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund *(*Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, 2001).

40 Ibid., chapter 17.

41 Joan Meier & Vivek Sankaran (2021) note 36.

42 Norma Jean Profitt documented to same problem in child protection practices in New Brunswick more than a decade ago in (2010) in a report titled *In the Best Interests of Women and Children: Exploring the Issue of "Failure to Protect"*.

identification of domestic violence in the child protection systems in the United States in the absence of use of specialized domestic-violence-assessment tools. Moreover, the researchers found that caregivers subjected to active domestic violence who were involved with an agency that used domestic-violence-assessment tools were 7.03 times more likely to receive external domestic violence services than those associated with agencies that did not use specialized domestic-violence-assessment tools.[43] Even more worrying in terms of child safety is that some of the child protection officials in New Brunswick did not recognize the potential danger to children when children's mothers scored extreme danger, the highest possible indicator of potential for lethal outcome, on Victim Services IPV/DV danger assessments.

On the one hand, from a policy and management of limited resources point of view, states should not interfere in family life when parents are able to offer safety and adhere to the rights of children (see, for example, Article 5 of the United Nations *Convention on the Rights of the Child*). On the other hand, states have a legal duty to protect children from family abuse and violence (Article 19). Offering protection instead of blame and holding abusers responsible and accountable helps to ensure that child protection services become an essential part of the solution in DV cases while also supporting children's rights within their own families. Extensive educational efforts have been devoted in the last ten years to refocusing child protection practices on protecting targeted adults with their children and holding abusers responsible and accountable in DV cases.[44] Extensive use of the educational materials listed in note 44 could help to support both DV and child protection objectives. Meier and Sankaran (2021) recommend DV child protection collaboration and mutual education.[45]

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43 Ijeoma Ogbonnaya and Patrica Kohl (2016) Profiles of Child-Welfare-Involved Caregivers Identified by Caseworkers as Having a Domestic Violence Problem Then and Now in February 2016 *Journal of Interpersonal Violence*

44 National Council of Juvenile and Family Court Judges (2017) Questions Every Judge and Lawyer Should Ask About Infants and Children in the Child Welfare System; National Council of Juvenile and Family Court Judges (2008) Reasonable Efforts Checklist for Dependency Cases Involving Domestic ; National Council of Juvenile and Family Court Judges – an evaluation — (2014) Reasonable Efforts in Child Abuse and Neglect Cases that Involve Domestic Violence; The Greenbook initiative remains a well-respected classic reference in the child-protection-domestic-violence field; Candice Maze, Sharon Aaron, and Hon. Cindy Lederman (2005) Domestic Violence Advocacy in Dependency Court: the Miami Dade Dependency Court Intervention Program for Family Violence Handbook; Lynn Schafran (2014) Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience in 53(3) *Judges' Journal* 32; Center on the Developing Child at Harvard University (2015) Supportive Relationships and Active Skill Building Strengthen the Foundations of Resilience: Working Paper 13; (2016) Applying the Science of Child Development in Child Welfare Systems.Although most of these publications are American, the sociolegal context information is as applicable in Canada as in the US, See also Neilson (2020, 2nd ed.) note 10, chapter 17.

45 Meier and Sankaran (2021) note 36.

When we think about the child protection data on a cross-sector, legal-system-access to information basis, a related concern is that Social Development's lack of involvement may be preventing dependable information about the needs of children in DV cases from reaching FD courts in private matters when families lack resources to hire assessors and experts. The research team is not suggesting that child protection services should be removing children from targeted parents in DV cases more often. Quite the contrary. Instead, the research team is recommending additional DV education and a shift in focus from blame to protection of abused women with their children along with far more attention to binding perpetrators of FV in order to ensure accountability and family safety.[46] With education and policy enhancement, child protection services can and should be a critically important and central part of the solution, not the problem, for families in DV cases.

2.3.4 Intimate Partner Violence Intervention Files

New Brunswick's *Intimate Partner Violence Intervention Act*, SNB, c 5 was proclaimed on May 1, 2018. The legislation enables 'victims' of IPV/DV to apply for Emergency Protection Orders (EPOs). The possible remedies include: exclusive occupation of a residence, temporary possession of personal property, no contact provisions, temporary custody of children, seizure of weapons, prohibitions on further acts of violence and termination of basic utilities. The orders may be granted for a period of not more than 180 days. Applications by victims, or on victim's behalf by prescribed persons, can be made to designated authorities by telephone or in person. Within two days of granting EPOs, the designated authorities must forward copies of the EPOs to justices of the Court of Queen's Bench, who may confirm or vary the order or hold a hearing. In practice, these reviews are conducted by the FD of the Court of Queen's Bench.

A comparative analysis of the data collected during this research study with an earlier Queen's Bench FD court file and interview study in New Brunswick (conducted by the author with government and academic colleagues, discussed in the family law section of this report) suggests that implementation of the *Intimate Partner Violence Intervention Act* may be having a positive effect on Queen's Bench FD access to evidence of DV/FV in family law cases (when IPV applications have been made). This issue is discussed further during the discussion of family law data at 2.3.5.

Thirty of the 95 criminally accused had IPV court files. The majority of the accused with IPV files (74 %) were associated with high to extreme risk/danger indicators.[47] While a

46 For example, Chapter 17 of Neilson (2020, 2nd ed.) note 10, Chapters 6 and 17.

47 As indicated earlier, the risk/danger analyses were based on ODARA, DA and facts found in all associated court files.

number of other jurisdictions have reported judicial reluctance to grant orders shielding children from contact with DV perpetrators in emergency civil protection orders,[48] this was not the case in the Moncton jurisdiction. Twenty five (83 %) of the EPOs contained provisions granting applicants temporary sole custody of children often with other provisions shielding children, temporarily, from perpetrators. Three files contained no claim for temporary custody or restrictions on contact with children (in two of these cases, no children were involved in the case). In an additional two cases, applications for temporary sole custody/parenting of the children were denied. Oddly, no application was made for weapons restrictions in 63 % of the IPV emergency order cases. Our data do not allow us to ascertain the reasons.

The vast majority of Emergency Protection Order (EPO) remedies were confirmed on judicial review. This indicates that the legislation is working well and as intended. Nonetheless, the duration of the orders were reduced on review in 4 cases. Following judicial review and confirmation, EPOs were vacated in 3 cases or were varied to allow contact with children in 3 cases. In one case, the order was subsequently varied to add a provision denying all contact with the children and extending the duration of the order. Although the legislation authorizes orders of up to 180 days, 180 day orders were granted on judicial review in only two cases (both were high risk). Despite that the majority of the cases were high to extreme risk, orders of 100 days or longer were granted in only 19 % of the cases. We have connected the risk/danger levels to the durations of EPOs in the chart below. As was the case in connection with criminal jail terms, a practical FV safety concern is that the duration of the orders suggests that concerns about restricting the freedom of perpetrators of DV may be overshadowing offering adult and child victims safety and protection. (For further discussion of these competing issues on a national level with references, see 9.2.2.1 and the concerns raised at 9.3.3.23 to 9.3.3.25 of L. C. Neilson (2020, 2nd ed.) *Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases* (Ottawa: Canadian Legal Information Institute, CanLII).

#1 High risk/danger	3 months	#44 Extreme danger	5 months
#4 Severe danger	6 weeks	#49 Medium risk/danger	107 days
#5 Extreme danger	20 days	#52 Severe danger	60 days
#8 High risk/danger	1 month	#53 Medium risk/danger	30 days

48 See, for example: Christine Brune et al. “Domestic Violence Protection Orders A Qualitative Examination of Judges' Decision-Making Processes” in 2015 *Journal of Interpersonal Violence 32(13)*.

#13 Low to moderate	30 days	#56 Medium risk/danger	90 days
#18 Extreme danger	80 days	#59 Extreme danger	2 months
#21 Extreme danger	2 months	#67 Severe danger	90 days
#22 Very high danger	90 days	#71 Medium risk/danger	30 days
#24 High danger	180 days	#76 Extreme danger	30 days
#27 Medium risk/danger	90 days	#78 Very high risk/danger	3 months
#34 High risk/danger	30 days	#84 High danger	180 days
#35 Extreme danger	60 days	#86 Very high risk/danger	60 days
#37 Extreme danger	90 days	#90 Unable to assess risk/danger level	90 days
#41 Extreme danger	5 months	#85 Medium risk/danger	60 days

The durations recorded in the chart above were the durations of orders confirmed or as varied on judicial review. The extreme and severe danger categories are the two most serious categories of potential for lethal outcome on a DA. The categories were used when the case could be connected to a DA assessment. The very high and high risk categories categorize high risk and high danger cases when no DA data was available but the facts and/or a police administered ODARA demonstrated high risk to family members. It is important to note that the justices reviewing these EPOs would seldom have had access to either the risk (ODARA) or the danger of lethal outcome (DA) assessments.

In terms of the legal system as a whole, we find again that the empirical data support concerns among FV legal system experts about incomplete information reaching decision-makers rather than support for assertions and assumptions prevalent in the legal system that judges and other decisions makers should be sceptical about DV and FV reports because the reports are often inflated or exaggerated in order to secure litigation advantage. Instead, we find that the empirical data tell us that the central problem is incomplete FV information reaching judges and other decision makers when decisions are made.

2.3.5 Queen's Bench FD Family law data

Earlier, we suggested that implementation of *Intimate Partner Violence Intervention Act* may be having a positive impact on judicial access to DV/FV information.

In an earlier victim and perpetrator interview and Queen's Bench FD court file study (Linda C. Neilson et al. (2001) Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, 2001), we[49] examined FD court files in three New Brunswick jurisdictions and conducted interviews with the parents involved in the family law cases in order to assess legal system responses to parents and children in DV cases. Moncton was one of the jurisdictions included in the study. Our research methods allowed us to connect interview data to court file data via a code.[50] We were also able to examine the effects on evidence, agreements and orders, of family law processes, including mediation and other settlement processes. We also conducted a national cross-Canada analysis of reported family law DV cases, and a survey of family law practitioners in New Brunswick. Our methods allowed us to consider procedural and settlement matters that affect what evidence gets documented and ultimately presented and considered by justices when deciding FV cases. Perhaps the most important finding of that study is that while judicial decisions offer dependable information about the application of legal rules and principles to evidence presented and considered by justices, it is not possible to draw any conclusions from judicial decisions about the actual experiences of families or about truth or falsehood because filtering processes in the legal system have a profound limiting effect on what facts, information and evidence judges and justices actually see.

We found, in the earlier study, that the experiences of parents with mediators and lawyers were as, if not more important, to understanding of law in practice in abuse cases than legal rules and principles. Basically, evidence of DV and FV was filtered from legal processes at every stage of the legal process (documentation of abuse by lawyers, during negotiation and settlement processes, when evidence was presenting to judges during hearings and trial) such that the full particulars and details of patterns of coercion and control and of the FV in these cases were seldom fully presented to judges for consideration. We did not find evidence of false or inflated reports. Instead, the information the targeted parents conveyed

49 Dr. Neilson was the primary investigator. The research team included government professionals from the New Brunswick Departments of Justice and Social Development/child protection, including mediators and educators as well as law practitioners, a psychologist, and fellow academics.

50 In order to avoid potential interviewer bias and or contamination of the interview data, the interviews were conducted without prior resort to the court file data. After the interviews were conducted the two sources of data were connected. Information disclosed during interviews with targeted parents (primarily but not exclusively mothers) was consistent with court file data. Information disclosed during interviews with perpetrators was not.

during interviews either expanded on or was consistent with original reports in the court files even when the claims were subsequently abandoned. We also found that the FV seldom had an appreciable effect on child outcomes. The vast majority of the cases resulted in abusive fathers, and in one case an abusive mother, being granted unsupervised parenting of children. Supervised access was ordered temporarily in only 9 of the 182 family FV court file cases. Yet post separation contact with children in the DV cases was often accompanied by patterns of continuing abuse and coercive and controling parenting that the parents targeted by FV could no longer buffer or prevent as a result of the separation or divorce and the court endorsed agreements and orders.

Settlement, however, rather than judicial decision was the norm. Applications for restraining orders and for provisions to protect children were usually abandoned over time as the cases proceeded through family law litigation processes. Instead of false or exaggerated claims, however, the actual reasons included lack of resources, emotional exhaustion, intimidation, and professional settlement pressure. Many of the targeted parents we interviewed spoke of serious concerns about the safety of their children as a result of court custody and access agreements and orders, despite, in many cases, having agreed to the provisions.[51] From a family violence perspective, we know that resisting pressure to settle during negotiation and mediation processes is particularly difficult for traumatized abused parents who are trying, sometimes desperately, to leave abusive relationships as quickly as possible.[52]

When we contrast the 2001 data with the Queen's Bench FD court file data twenty years later, we find similarities but also some important differences in judicial responses to children in FV cases. It is likely that the changes reflect, in part, enhanced judicial access to full particulars of FV as a result of implementation of *Intimate Partner Violence Intervention Act* as well as judicial education.

Fifty four of the criminally accused had an associated Queen's Bench FD divorce, separation, child parenting, marital property, and or support court file. As previously noted at the beginning of our report, court policies limited our identification of associated court files to files that were in existence prior to the criminal files being closed (completion of the

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51 In addition to Neilson et al. (2001) note 10, see also: Linda C Neilson (2004) "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases", *Family Court Review* 42 (3) 411-438; (2004) "Children and Family Violence in the New Brunswick Law: How Responsibilities Get Lost In Rights" in *Understanding Abuse: Partnering for Change (*University of Toronto Press); (2002) "A Comparative Analysis of Law in Theory and Law in Action in Partner Abuse Cases: What Do the Data Tell Us?" *Studies in Law, Politics and Society* 26: 141-87; (2000) " Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" *Windsor Yearbook on Access to Justice* 18: 115-152; (1997) "Spousal Abuse, Children and the Courts: The Case For Social Rather than Legal Change". *Canadian Journal of Law and Society* 12(1): 101-145.

52 Neilson (2020) note 10, Chapters 12 and 18.

criminal sentence, withdrawal of charges). Files opened after that time would not have been included in our data.

The majority of the family law cases (56 %) had high to extreme risk or danger indicators. Keeping in mind that only 41 % of the 101 victims of the 95 criminally accused completed DAs with Victim Services, nine of the family law cases were associated with extreme danger and another three with severe danger on DA assessments. The remaining 19 high risk/danger cases did not have a completed DA but did include facts and or ODARA risk assessments that indicated high risk of continuing violence or high danger of lethal outcome. Research-generated indicators of risk and potential for lethal family member outcome are discussed in Chapter 8 Neilson (2020, 2nd ed.).[53]

Generally, on the whole, we were pleased to find that the family law orders were responding to the levels of risk to family members involved in the family law cases. This is a credit to the Queen's Bench, FD justices and Masters handling these cases in the Moncton jurisdiction. Protections for children (supervised contact, no contact, no over night contact or contact limited to a specific location, for example, a grandparent's home) were ordered in 57 % of the family law cases. Nonetheless the data did raise some concerns discussed below.

When we looked at the 55 family law court files (one offender was associated with two family law court files), we found that the targeted parent was awarded sole custody (parenting responsibility) in 25 cases with no parenting time awarded to the DV offender in 8 cases; sole custody with supervised parenting on the part of DV perpetrator in 8 cases; and sole custody with unsupervised parenting time to the DV perpetrator in 9 cases. Joint legal custody orders were issued in an additional 20 cases, usually with primary care and control being awarded to the targeted parent. Unsupervised access (parenting time) to the children was awarded to the DV perpetrator in 14 of the joint legal custody cases and supervised contact in 2 cases. Joint legal custody with shared parenting time was ordered in 4 cases. In all four of the joint legal custody with shared parenting cases, the risk levels were low to low medium. Primary care of the children was awarded to the dominant FV aggressor parent in 2 cases, in one case as a result of the mother's abduction of the children and mental health concerns, in the other case as a result of concerns about the mother's use of drugs. Of concern, from a FV perspective, is that the risk and danger indicators associated with the father in one of these two cases were very high and that substance misuse of the part of the targeted parent can be the result of trauma and harm from DV. Domestic violence research tells us that domestic violators may initiate, control and encourage intimate partner substance abuse as a means to dominate and control and that excessive use of alcohol or

53 Ibid., note 10.

drugs on the part of the targeted adults may, in fact, reflect harm from domestic violence and an attempt to withstand harm.[54]

The remaining cases did not involve children, were withdrawn or were not yet decided.

When we focus attention on the 31 high risk cases (severe or extreme danger on the DA or facts and/or ODARA indicating high levels of risk and danger) we found that the primary aggressor parent[55] was denied or not awarded contact (parenting time) with the children in 8 cases; was granted supervised contact in 4 cases, but was granted unsupervised access (parenting) of the child or children in 36 % of the high risk/danger cases. It is important to note, however, that one half of the cases resulting in unsupervised contact awards were consent orders rather than judicially imposed orders. If we focus on the 9 cases associated with extreme danger on a Victim Services DA, the results were variable:

- sole custody care and control (now called parenting time and sole responsibility) was awarded to the targeted parent with the accused's contact with the children supervised in 3 cases
- sole custody care and control awarded to the targeted parent with the accused's contact with the children unsupervised in 1 case
- joint legal custody with primary care and control granted to the targeted parent and the accused's parenting without supervision in 2 cases.

One of the extreme danger cases was withdrawn, one was ongoing, the other did not involve children. While justices issuing or endorsing the child orders in the extreme danger cases would have had at least some degree of awareness of at least some of the facts indicating risk and danger, in only one extreme danger case was there any record in the court file that the FD justice could have been aware of the extreme danger conclusion on the DA as well as the police administered ODARA score. That case had not been decided when collection of data was concluded.[56]

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54 Carole Warshaw and Erin Tinnon (2018) Coercion Related to Mental Health and Substance Use in the Context of Intimate Partner Violence (National Center on Domestic Violence, Trauma and Mental Health); National Center on Domestic Violence, Trauma and Mental Health (2014) Mental Health and Substance Use Coercion Surveys; Lisa Najavits, "Psychotherapies for Trauma and Substance Abuse in Women: Review and Policy Implications" in July 2009, 10(3) *Trauma, Violence, & Abuse*: 290 to 298; Sandra Martin, Kathryn Moracco et al. "Substance Abuse Issues Among Women in Domestic Violence Programs: Findings From North Carolina" in September 2008 14(9) *Violence Against Women*: 985-997.

55 When both parents made FV against each other, we examined the patterns of violence and coercive control identified in the court files as well as the sequence of reports and, when available, court findings of credibility to identify the primary, dominant aggressor parent.

56 Subsequent analysis while writing this report revealed that the case was still ongoing and appeared to reflect extensive cross sector litigation tactics on the part of dominant aggressor including manipulation of criminal charges against the targeted parent.

Of concern is that joint legal custody was ordered 8 high risk/danger cases (usually with primary parenting awarded to the targeted parent). The problem with joint legal custody (now referred to as joint parental decision making in family law legislation) in high risk cases is that such orders sentence the targeted parent to the abusive parent's continuing coercion and control. Joint legal custody or joint parenting responsibility orders require the targeted parent to cooperate, to report on family matters, to remain in contact with, and to consult with their abuser when making parenting decisions about the children. These orders can reduce targeted parent safety as a result of court ordered contact and may encourage litigation because the orders authorize complaints to courts when the abusive or formerly abusive parent perceives that the targeted parent is not sufficiently reporting to or consulting with him or her.

2.3.6 Court file combinations with levels of risk / danger

As previously indicated, we identified DV criminal charge cases that also had a court file in another legal system (IPV, Social Development child support, Social Development child protection, IPV protection, and/or a family law Queen's Bench FD court file). It is important to keep in mind that our cross sector court file analysis is limited to DV cases that had one or more DV criminal charges. We have set out below the court file combinations by DV risk and danger level. Every case had one or more criminal charges and one of more criminal files. Each case number represents one, or in one case two intimate partners,[57] who were criminally charged with one or more DV crimes. Approximately one half (47) of the criminally accused had multiple criminal files during the data collection period. None of the female accused and 10 of the male accused (12%) had criminal DV charges associated with two or more separate adult complainants. (Please refer to the footnote in connection with interpretation of this finding.)[58]

When we turn to an examination of criminal cases with court files in other legal systems, we find that the court file combinations did not necessarily reflect the levels of risk and danger to family members. For example, the child protection files were not necessarily the most

57 In one case the male partner was criminal charged followed by, on a later date, the female intimate partner being charged.

58 **Please note** that these figures should not be relied upon to suggest that merely 12 % of men and no women who were criminally accused in Moncton targeted more than one intimate parter. While the figures do tell us that it is not uncommon for male accused to target multiple female intimate partners in succession, the figures probably do not reflect the actual number of intimate partners targeted by each accused. Very little intimate partner violence in Canada is reported to police or to anyone. Even fewer cases result in a criminal charge. In addition, the court file data excludes new criminal charges (including new criminal charges involving new complainants) laid after the court file data were collected. Consequently is is likely that the figures seriously underreport the number of accused who targeted multiple victims in succession.

dangerous DV cases[59] and many high danger family law cases did not have an associated IPV application for civil protection. That said, most applications for IPV protection demonstrated high risk, an indication that the statute is operating as intended in high risk cases.[60]

Social Development, application for child support & criminal court file or files only:

- Extreme Danger: 2 cases (14, 64)
- High to very high: 2 cases (65, 92)
- Medium to high medium: 3 cases (2, 6, 32)
- Low to low medium: 5 cases (3, 46, 55, 63, 75)
- Unable to assess: 1 case (93)

Social Development Child Protection & criminal court files only:

- Extreme danger: 2 cases (33, 60)
- High to very high: 3 cases (17, 26, 47)
- Medium to high medium: 7 cases (10, 15, 29, 42, 54, 79, 91)
- Low to low medium: 2 cases (31, 61)

IPV application for protection & criminal court file or files only

- Extreme Danger: 4 cases (35, 36, 44, 59)
- Severe, high and very high: 3 cases (4, 24, 86)
- Medium to high medium: 2 cases (49, 53)
- Low to Low medium: no cases
- Unable to assess 1 case (90)

Family Law & criminal court file or files only

- Extreme Danger: 9 cases (7, 12, 38, 48, 50, 58, 62, 66, 85)
- Severe, high, very high: 4 cases (11, 16, 20, 70)
- Medium to high medium: 10 cases (19, 40, 43, 57, 69, 72, 74, 77, 80, 81)
- Low to low medium: 6 cases (9, 25, 30, 39, 82, 88)

IPV application & Family law & criminal court file or files:

- Extreme Danger: 6 cases (5, 18, 21, 41, 52, 76)
- High severe very high: 7 cases (1,34, 67, 71, 78, 84, 89)
- Medium to high medium: 3 cases (37, 56, 95)

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59 Presumably the other cases were initiated for reasons other than the DV/FV.

60 As indicated earlier, many adult victims of DV did not complete a Victim Services administered DA. The Extreme Danger category is used in these materials when the adult targeted by DV did complete a DA which indicated extreme danger of lethal outcome. When no DA was administered but the facts and or the police administered ODARA risk assessment indicated very high potential for lethal outcome, the high and very high risk category was used.

- Low to low medium: no cases

Social Development child support & Family Law & criminal court file or files:

- Extreme Danger: 1 case (51)
- Medium Danger: 1 case (87)

Social Development child Protection & Family Law & criminal court file or files

- Extreme Danger: 1 case (45)
- High Medium: 1 case (28)

Social Development child Protection & IPV& Family Law & criminal court file or files:

- High danger: 1 case (22)

2.3.7 Information sharing among courts

It is important to note that our cross-sector court file data was collected prior to implementation of changes to the federal *Divorce Act*, RSC 1985, c 3 (2nd Supp) which came into effect on March 1, 2021 and the coming into force of New Brunswick's *Family Law Act*, SNB 2020, c 23 which came into force on the same date.

The *Divorce Act*, section 7.8 (2) now states:

> (2) In a proceeding for corollary relief and in relation to any party to that proceeding, the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:
>
> (a) a civil protection order or a proceeding in relation to such an order;
>
> (b) a child protection order, proceeding, agreement or measure; or
>
> (c) an order, proceeding, undertaking or recognizance in relation to any matter of a criminal nature
>
> In order to carry out the duty, the court may make inquiries of the parties or review information that is readily available and that has been obtained through a search carried out in accordance the provincial law, including the rules made under subsection 25(2).

Subsection 7 (2) of the *Family Law Act*, SNB 2020, c 23 is similar except that, pursuant to subsection 7 (3), courts are only directed to "make inquiries of the parties or review

information that is readily available." Yet subsection 50 (2)(k) obligates courts to consider all factors related to the circumstances of the child, including:

> (k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.[61]

And 50 (3) of the *Family Law Act* requires primary consideration to the child's safety, security and well-being (as does the *Divorce Act*).

In Divorce Act Changes Explained, Justice Canada states that in order to properly consider an issue the court must be aware of all relevant information, including legal orders and proceedings. The explanation states (November 1, 2021) that civil protection orders (such as orders granted under New Brunswick's *Intimate Partner Violence Intervention Act*, SNB 2017, c 5) can be relevant when considering a parenting matter and that child protection proceedings, measures, or orders can be relevant when determining parenting matters, and that criminal matters (pending or existing), including undertakings or recognizances can be relevant for example, an order that an accused have no contact with a specific person.

It is likely that, in compliance with the new legislation, family law Queen's Bench FD court files now contain more information about court orders and agreements from other court files (criminal, IPV civil protection, and child protection files) including copies of court agreements and orders than was the case when the project's court file data were collected. At the time of our study the family law court files contained no information from other courts in 20 % of the cases despite that every case in our sample was associated with a criminal DV charge. When information from other courts was noted in the family law court files at the time of the study, the information was often incomplete – for example information about criminal charges or convictions without copies of orders. Presumably, this is no longer the case when clients are represented by lawyers who are aware of the agreements and orders in other systems.[62] (On the whole child protection files contained more detailed information from the other court systems than the family law files did.)

While we may assume, when litigants in family law cases are represented by lawyers who understand the complexities of FV cases when family members are or have been involved in multiple legal systems, the lawyers will ensure that justices of the Queen's Bench FD are

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61 From a family violence expert perspective all of the information discussed in this report is relevant to risk and danger assessment and to the safety, security and well-being of the child. The family violence perspective is set out in the reminder of the report.

62 Many lawyers specialize and work in only one legal system. Each family member may have multiple lawyers (one lawyer for the criminal case, another to respond to child protection concerns and yet another family law lawyer). Lawyers who work in one legal system may not fully have knowledge proceedings, orders, or the impact of orders imposed in other legal systems. An added complexity is that many family law litigants are not represented by lawyers throughout family law proceedings.

fully informed about agreements and orders from other legal proceedings affecting the family, a number issues remain that will continue to limit court access to pertinent evidence:

- Lawyers who work in the family law field will not always be fully aware of agreements and orders in other legal systems (such as agreements reached outside of court in connection with child protection matters, criminal release provisions and variations thereof, criminal findings of guilt and sentencing provisions, peace bond provisions), particularly when representing vulnerable, traumatized and/or ill-informed clients who may not understand the importance of such issues;
- Many family law litigants who appear before Queens Bench FD justices appear in person without lawyers and will have legal difficulty identifying and obtaining pertinent agreements and orders;
- Court systems (criminal, family, child protection; Provincial Court, Court of Queen's Bench) function separately in silos and maintain separate court record keeping systems;
- Lack of legislative or other authority in New Brunswick enabling compliance with Queen's Bench FD decision-making obligations mandated by sections 7.8 (2) and 16 to 17.1 of the *Divorce Act,* and sections 49 through 67, taking into account section 50 (2) (k), of the *Family Law Act*.
- Limited access in all courts to relevant risk and danger assessments; and
- Lack of evidence exchange protocols enabling the timely sharing of evidence among courts when evidence pertains to the same parties, related issues, and the evidence has been admitted and considered by a judge or justice in another court system (Attending to this issue could reduce unnecessary duplication of evidence while also enhancing safety.)

These issues are discussed in more detail in PART THREE.

2.3.8 Judicial Settlement Processes

It is extremely important to pay close attention to the significant, even fundamental, procedural and structural changes that are occurring in the way in which family law, IPV civil protection and child protection matters are resolved in the legal system in New Brunswick and throughout Canada. Judicial settlement processes are now a central feature of the litigation process and of court systems. Many family law litigants are not represented by lawyers throughout family law proceedings; litigants often appear before judges and justices

in settlement processes in person without any legal assistance.[63] Hearings and trials are now the exception, not the rule. Indeed, judge-led settlement is now a "respectable, even esteemed, feature of judicial work."[64] The Canadian Judicial Council endorses judicial settlement processes as an important and expanding aspect of judicial work at 5.A.10 of *Ethical Principles for Judges.*[65] The goal is to resolve cases quickly since early resolution is thought to benefit families, children and the legal system by reducing conflict, avoiding extensive adversarial litigation, and reducing family cost while saving court time.

When we examined the processes in the legal system that led to the outcomes in cross-sector court file cases, we found that 18 of the 21 (86 %) Social Development, child protection court file cases were decided by consent agreement or consent order, including 9 decided during or as a result of judicial settlement conferences. Of the 54 family law cases, the majority, 38, were resolved on an interim or final basis by consent order, including 24 cases resolved in a judicial settlement conference (52.2 % of the cases with an interim or final order). Three cases had no resolution during the data collection period, 4 cases did not involve dependent children and 1 case was withdrawn. Only 10 of the cases with an interim or final order (22 % of the family law cases) were resolved by judicial hearing or trial.

This project, unlike the earlier 2001 study in New Brunswick, did not collect interview data from litigants so we cannot comment on litigant experiences during judicial settlement processes or on the effectiveness of the outcomes in protecting vulnerable adults and children. On the positive note, however, as reported earlier, the outcomes in the Moncton jurisdiction did suggest accurate responses, in the majority of cases, to the levels of risk and danger. This suggests that it is possible to generate safe, supportive outcomes in judicial settlement proceedings. We do not know, however, if the positive outcomes in this study

63 Julie Macfarlane (2013) *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (University of Windsor) on line; R. Birhbaum and N. Bala (2012) "Views of Ontario Lawyers on Family Litigants without Representations" *University of New Brunswick Law Journal* 65(1): 99-124; R. Birhbaum, M. Saini and N. Bala (2018) "Growing Concerns about the Impact of Self-Representation in family court: Views of Ontario Judges, Children's Lawyers ad Clinicians" *Canadian Family Law Quarterly* 37(2): 121-127; Jennifer Leitch (2018) "Lawyers and Self-Represented Litigants: An Ethical Change of Role?" *Can Bar Rev* 95(3): 669.

64 See references and presentations at the CIAJ ICAJ (Canadian Institute for the Administration of Justice) (2018) conference titled "Between Us" - XXth Anniversary of Judicial Mediation held in Montreal Quebec on November 22, 2018; Jean-Francis Roberge (2013) "The Future of Judicial Dispute Resolution: A Judge Who Facilitates Participatory Justice" in T. Sourdin & A. Zariski Eds.) *The Multitasking Judge. Comparative Judicial Dispute Resolution* (Australia: Thomson Reuters) 21-32, (2010) "Could Judicial Mediation Deliver a Better Justice? What if we TRAIN judges ad EXPATS?" *Journal of Arbitration and Mediation* 1(1) 3-46; H. F. Landerkin & A. Pirie, "Judge as Mediators: What's The Problem with Judicial Dispute Resolution in Canada?" 82 *Canadian Bar Review* 249 (2003).

65 Canadian Judicial Council (2021) *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council).

reflect the effectiveness of judicial dispute resolution in FV cases or the particular expertise of the Masters and Queen's Bench FD Justices in the Moncton jurisdiction.

On a cautionary note, as the legal system moves away from hearings and trials, where evidence is presented to judges to be assessed and weighed in accordance with legal rules and principles, to a system of judicial dispute resolution, social context knowledge and subject matter expertise become increasingly important in addition to legal knowledge. Unlike court hearings, judicial dispute resolution processes are private and confidential. Research monitoring options and appeal court judicial oversight are reduced.

DV/FV cases are extremely complex. The more specialized expertise one has, the greater one's understanding of the complexities of these cases and of the need for screening, assessment, and procedural protections to respond to trauma and power imbalances among litigants. Assessment of whether or not domestic violence has negatively affected a person's ability to participate equitably in a settlement process can require considerable knowledge of the complexity and impact of domestic violence. For example, harm from domestic violence such as continuing fear responses, post-traumatic stress, traumatic brain injury (discussed in Chapter 5 of Neilson, 2020 2nd ed.)[66] can have a major negative impact on the targeted adult's capacity to participate equitably in a JDR process. Some, but not all judges and justices, have a specialized understanding of the social and interpersonal complexities of DV and FV. At minimum, in addition to an understanding of dispute resolution techniques, judicial dispute resolvers participating in FV cases will wish to acquire detailed understandings of: types of DV/FV and particularly the influences of coercive control; indicators of risk and danger for family members; the impact of domestic violence on children; correlations between engaging in DV and harmful post-separation parenting practices; trauma and the impact of DV and FV on the the targeted adult's negotiation capacity, demeanour and behaviour; and perpetrator characteristics and litigation tactics in order to interpret and respond to these issues during dispute resolution processes.[67]

While dispute resolution processes can offer benefits to families, in the absence of subject matter expertise, the use of settlement processes in DV and other FV cases is controversial. Evaluations of dispute resolution processes are generally positive but evaluations of dispute resolution in domestic violence cases have been less promising and on occasion negative.

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66 Note 10.

67 Neilson (2020 2nd ed.) note 10 discusses types of DV and coercive control in Chapter 4 as well as in Supplementary Reference Chapter 1. Research connected to an understanding of the manifestations of victim harm is found in Chapter 5. Research on the impact on children is discussed in Chapter 6 and perpetrator parenting practices in Chapter 11. Research on identification of risk and danger to family members is discussed in Chapter 8. Perpetrator characteristics and 36 litigation tactics are outlined in Chapter 7. Chapter 17 discusses screening, assessment and procedural processes that can be used in judicial dispute resolution processes to enhance due process.

Numerous studies of the legal system have documented vulnerability to settlement pressure as a result of harm from DV resulting in agreements on the part of those targeted by DV despite continuing concerns that the provisions may not be safe for the children.[68] Thus the United Nations, Status of Women, 57th session, March 4-12, 2013, recommended against mandatory dispute resolution processes in violence against women cases and the Supreme Court of Canada reserved the Court's endorsement of the use of out-of-court dispute resolution processes at paragraph 69 of *Colucci v Colucci*, 2021 SCC 24 (CanLII) to cases that are "absent family violence or significant power imbalances." Some suggestions, assessments and procedural options to enhance screening, assessment, due process and safety during judicial dispute resolution in DV/FV cases are offered in Chapter 18 of Neilson (2020, 2nd ed.).[69]

2.3.9 Child orders in cross sector cases

During the Moncton coordinated court project, we were particularly interested in documenting how various courts respond to safety and parenting issues affecting the same family, with a focus on children and on contradictory agreements and orders. Six of the accused did not have dependent children. Thirteen of the criminal cases were associated with Social Development child support agreements and orders associated with social assistance payments. As previously mentioned, these files contained little information about FV, children or parenting arrangements. If we exclude court files associated with these 19 criminally accused, we encounter child relevant agreements and orders that were clearly contradictory in 13 (17 %) of the cases. In other cases (court files associated with 28 criminally accused), the criminal court employed wording designed to prevent contradictory orders such as no contact "except in accordance with a QB court order" and or "at the direction of Ministry of Social Development".

Let us look first at a few of the contradictory child provision cases and then at efforts to prevent contradictory orders. We found contradictory child provisions in 13 cases. Examples

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68 Parental agreements in domestic violence cases do not necessarily indicate that the 'consenting' parents have put to rest concerns about children's safety. See, for example Linda C. Neilson et al. (2001) Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, 2001); Haley Hrymak and Kim Hawkins, Rise Women's Legal Centre (2021) *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger online* (Vancouver: Rise Women's Legal Centre); Michelle Toews and Autumn Bermea (2015) "I Was Naive in Thinking, I Divorce The Man, He is Out of my Life" *J. Interpers. Violence* June 18, 2015; Rae Kaspiew et al. (2009) *Evaluation of the 2006 Family Law Reforms* (Australian government); Dale Bagshaw and Thea Brown et al. (2010) Family Violence and Family Law in Australia The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006 (Monash University for the Australian Attorney-General's Department).

69 Neilson (2020) note 10.

include a criminal order granting the biological father an exception to no contact with the victim in order to exercise his “visitation rights” to his children in accordance with a family court order or as arranged by lawyers or through a third party. The child protection file made clear, however, that the accused biological father had no involvement with the children and that child protection services were involved with the mother and step father in delivery of services and in connection with custody of the children. Another example was associated with a mother whose Victim Services DA indicated severe danger of lethal outcome. The criminal undertaking stated that the father would be allowed to exercise visitation rights as arranged by a third party yet an IPV order specified no contact with the children for 6 weeks. In another case the Peace Bond and the probation order in two separate criminal files associated with one of the criminally accused specified no contact with the victim except through a third party, or lawyers or the family court for access to the child. The Queen’s Bench FD order specified sole custody to the mother with no access to the children on the part of the father unless his contact was supervised. The father in this case had five criminal files. The facts across the court files included death threats, repetitive DV with criminal convictions, verbal abuse of the child, destruction of property, self harm, break and entry into the home, assaults with weapons, failures to comply with court orders, mental health and substance misuse. The victim in this case had completed a Victim Services administered DA resulting in an extreme danger of potential for lethal outcome conclusion. In this case, not only were the criminal and family provisions contradictory, attempts on the part of the offender to make arrangements for contact with the children through third parties could well have placed the targeted parent and child in danger. In a few cases the criminal provisions authorized the making of arrangements for contact with the children when the child protection file denied that parent’s contact with the children. During the Focus Group discussions, child protection authorities mentioned the occasional need to initiate child protection proceedings in order to protect children from parental contact granted in court orders. That said it is important to realize that, at the time of granting these orders, the criminal court system (the defence lawyers and the crowns making recommendations to the criminal court) would not necessarily have had access to complete information from Victim Services about the serious levels of risk and danger these offenders posed to family members. In addition, the court, defense lawyers and the crown prosecutors, have very little access to dependable information about the best interests of the children. This is one of the reasons we are recommending that in DV cases child orders be reserved to QB family law courts or child protection authorities so that FV coercion and control and parenting patterns along with child best interests can be more thoroughly assessed.

It is also important to mention, from a family violence research perspective, that ‘victims’ consent to parenting arrangements, is not a reliable indicator of child safety. Jacqueline

Campbell and colleagues found that close to 50% of women fail to appreciate dangerous levels of risk in attempted DV homicide cases.[70] In addition, as mentioned earlier, in connection with settlement processes, numerous studies have documented vulnerability to settlement as a result of psychological harm from DV and the psychological need to 'escape' from DV relationships resulting in targeted parents agreeing to parenting arrangements despite continuing concerns about child safety.[71] Peter Jaffe and colleagues tell us that when dangers of lethal outcome for targeted adults are present, the children are in danger too.[72] Targeted parents will not always be aware of this. Although studies of child homicide (with or without parental suicide) in DV cases are small in size, the findings reported by Dr. Jaffe and colleagues are consistent with child death review studies across North America and Australia.

An earlier research study of family law responses to children in domestic abuse cases in New Brunswick titled, Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund, was dedicated to a mother and the memory of her two boys. Approximately twenty years ago two boys were murdered by their father in Moncton, the jurisdiction of the present study. The mother and family lawyers in the case, not recognizing that the indicators of danger to the mother were also applicable to the children, signed a consent order for the father's unsupervised access to the children. Presumably, it was thought that reassuring the father that he would have continuing contact with the children would reduce the tension and thus the level of danger. Instead, the father murdered the children and then committed suicide. News reports at the time indicated that the outcome could not have been predicted but, from a FV expert point of view, many of the facts associated with the case pointed to a high potential for lethal outcome. Presumably, had the lawyers and the court been aware of those indicators, precautionary measures would have been implemented. Discussion of research on indicators of potential for lethal outcome can be found at 8.14 of Neilson (2020).[73]

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70 Jacqueline Campbell, Daniel Webster, Nancy Glass (2009) "The Danger Assessment Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide" 24(4) *Journal of Interpersonal Violence* 653-674 at page 670; J. Roehl, C. O'Sullivan, D. Webster, J. Campbell (2005) *Intimate Partner Violence Risk Assessment Validation Study Final Report (NCJRS 209731)*. See also: N. Dietz and P. Y. Martin (2007) "Women Who Are Stalked: Questioning the Fear Standard" in *Violence Against Women* 13(7): 750-776.

71 See note 68.

72 Leslie Hamilton, Peter Jaffe, Marcie Campbell (2013) Assessing Children's Risk for Homicide in the Context of Domestic Violence in 28 *J. Fam. Viol*. 179-189; Peter Jaffe et al. (2012) Children in danger of domestic homicide in 36 *Child Abuse & Neglect* 71-74; Peter Jaffe et al. (2015) Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce (Ottawa: Department of Justice); Kathryn Ford and Peter Jaffe webinar "In Practice: Recognizing Risks to Children as Victims of Domestic Homicide" Center for Court Innovation on line; K. Scott et al. (2020) note 26.

73 Neilson (2020, 2nd ed.) note 10.

Returning to the court file data collected during the current study, on a positive note, a number of criminal court judges had taken steps to prevent contradictory provisions and orders. Earlier we mentioned two concerns that could be readily addressed with minor changes in wording (when judges consider the suggestions appropriate in the circumstances of the case). The first is associated with FV concerns, mentioned earlier, about framing access to children as a right of the accused. Many of the reasons for the concern are related to the DV context. Coercive control, entitlement, lack of empathy, possessiveness, manipulation, denial and minimization patterns are characteristic of those who engage in DV.[74] In this context, any ambiguity in a court order may be used to justify negative behavior and/or as authority to continue to exert coercive control. When a criminal court frames contact with children as an accused's right, any attempt by others to 'interfere' with that right will be perceived as an affront to rights acknowledged by the criminal court, potentially sparking outrage and retaliation. This could be easily addressed by removing 'visitation' and 'parenting rights' terminology and making criminal no contact orders subject to the terms of any subsequent Queen's Bench FD order or subsequent direction by Social Development in connection with parenting. Inclusion of the word 'subsequent' or a direct reference to the date of the applicable Queen's Bench order could help to prevent confusion about which order prevails when circumstances change.

2.4 Focus Group Data:

Participants outlined risk and danger assessment and information exchange practices as those practices existed in 2020. Generally, with the exception of Victim Services and police in the criminal system, few family law services or professionals were using specialized screening assessment processes to detect types and patterns of DV or research verified risk and danger assessments.

Basically, however, all key community and legal system professionals were in favor of improving collaboration and the exchange of information among community partners and among courts to improve the effectiveness of services and orders to support offender rehabilitation and to promote adult and child safety. Participants pointed out the benefits as well as the professional risks and challenges associated with sharing information. Benefits of complete information included capacity to:

- Resist perpetrator minimization, manipulation and misinformation
- Improve links with programs to support and intervene with offenders
- Promote front-line worker, police and social worker safety

74 Chapter 7 of Neilson (2020) note 10.

- Provide effective legal assistance and support services to children and adults in family law and/or child protection proceedings, particularly when the ability to convey information in an effective manner has been negatively compromised by trauma and harm from DV
- Ensure that courts, decision makers and service providers have the information necessary to address the safety and the best interests of targeted adults and children.

Professional challenges associated with sharing information included:

- Maintaining confidentiality and trust in professional-client relationships
- Supporting client decision making and choice
- Working with clients to assess what information should be shared and shielded in order to prevent retaliation and harm
- Avoiding the unnecessary sharing of personal information not associated with reducing risk or promoting safety
- Keeping in mind legal disclosure obligations that could result in shared information reaching perpetrators and putting family members at risk
- Limiting the sharing of information to those who understand the complexities of DV and who have the educational and professional capacity to use the information to enhance safety
- Preventing misuse of evidence in the legal system.

Generally, participants believed that the benefits of enhanced information sharing outweighed risks, subject to the implementation of precautionary measures. Participants were strongly in favor of improving the sharing of information among court systems (subject to due process and evidentiary rules).

PART THREE: INFORMATION OPTIONS AND OBSTACLES

3.1 Legal Theory & the Legislative Landscape: Queen's Bench FD consideration of Orders and Agreements from other courts and legal systems[75]

The court file data considered during this project confirms that problems in the legal system in FV cases are caused less by exaggerated or false reports by litigants than by professional

75 Justice Brigitte Robichaud and Judge Anne Dugas Horsman, the project's judicial advisers, contributed to this report and particularly to this section. Errors and omissions, however, should be attributed to Linda C Neilson.

practices, court and legal structures (courts and legal systems operating in separate silos) and rules that prevent complete facts about FV from reaching decision makers. In theoretical terms, concerns about the consequences of FV facts not reaching judges is consistent with the assertions of well-known legal theorist and former American judge, Jerome Frank (1889-1957). Frank argued that it is not the content of legal rules, or even how legal rules are applied, that produces injustice. Instead, the cause is the fact finding process itself which predates the choice and application of the legal rule. In connection with this issue and its influence on judging at the appeal level Frank argued:

> *Yet trial-court fact finding is the toughest part of the judicial function. It is there that court-house government if the least satisfactory. It is there that most of the very considerable amount of judicial injustice occurs.*[76]

Frank identified the institutional structure of law as a compounding factor in the legal system's limited capacity to remedy the problem. He stated, for example, that appeal courts can "seldom do anything to correct a trial court's mistaken belief about facts".[77] Refer as well to discussion of the separate roles of trial judge and appellate courts in the majority judgement of the Supreme Court of Canada in *Barendregt v. Grebliunas,* 2022 SCC 22 https://canlii.ca/t/jpbbg:

> *Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contract, are designed to review trial decisions for errors. The admission of additional evidence on appel blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.*[78]

Thus the errors trial courts make as a result of not having full and complete access to pertinent facts or that result from misinterpretation of facts - will tend to be reinforced when cases are decided by appeal courts because appeal courts have limited capacity to generate and consider facts that were not presented or were not considered when the legal trial decision was made.[79] In FV cases the problem of court structures becomes particularly acute. As the court file data confirms, family members involved in FV cases are commonly involved in multiple legal systems (criminal, family law, child protection, civil Intimate Partner Violence prevention) each functioning separately without efficient mechanisms to access and share facts, including judicially adjudicated facts from other courts. If we wish to ensure equitable access to justice for Canadian families in DV/FV cases, it is imperative to

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76 Jerome Frank (1973) *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press) p. 4.
77 Ibid p. 23.
78 *Barendregt v. Grebliunas,* 2022 SCC 22 at paragraph 40.
79 Ibid., Frank (1973) note 76.

examine and improve upon how facts and legal claims associated with those facts are collected, processed and considered (or not considered) across the legal systems when legal rules are applied.

The federal Department of Justice, and then the Provincial Department of Justice, attempted to improve the sharing of adjudicated facts in orders and agreements across legal systems. More particularly, as indicated earlier, provincial and federal legislation that came into effect on March 1st, 2021 imposes obligations on Queen's Bench FD courts to obtain and consider information from child protection, Intimate Partner Violence (IPV) and criminal proceedings.

The *Divorce Act*, subsections 7.8 (1) and (2) state:

> (1) The purpose of this section is to facilitate:
> (a) the identification of orders, undertakings, recognizances, agreements or measures that my conflict with an order under this Act; and
> (b) the coordination of proceedings.
>
> (2) In a proceeding for corollary relief and in relation to any party to that proceeding, the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:
> (a) a civil protection order or a proceeding in relation to such an order;
> (b) a child protection order, proceeding, agreement or measure; or
> (c) an order, proceeding, undertaking or recognizance in relation to any matter of a criminal nature
> In order to carry out the duty, the court may make inquiries of the parties or review information that is readily available and that has been obtained through a search carried out in accordance the provincial law, including the rules made under subsection 25(2).

Subsection 25(2) of the *Act* states that competent authorities (defined in subsection 25(1) as the body, person or group of persons ordinarily competent under the laws of that province to make rules regulating the practice and procedure of the applicable court) may (subject to subsection (3)) make rules applicable to any proceedings under the Act, including rules regulating the practice and procedure in the court ...(e) prescribing and regulating the duties of officers of the court; ... (g) prescribing and regulating any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act. Thus the *Divorce Act* authorizes provincial rules and laws to give procedural and expedient effect to the intentions of the federal legislation.

Subsection 7 (2) of the *Family Law Act*, SNB 2020, c 23 includes similar provisions except that, pursuant to subsection 7 (3), courts are only mandated to "make inquiries of the parties or review information that is readily available." Nonetheless subsection 50 (2)(k) obligates courts to consider all factors related to the circumstances of the child, including:

> (k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child[80]

without limiting or qualifying the source of the information and subsection.

Courts have an obligation, pursuant to section 16 of the *Divorce Act*, subsection (3) (j), when determining the best interests of the child, to consider (j) family violence and (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the Safety, security and well- being of the child. Subsection 16(4) sets out factors relating to family violence that must be considered. In other words, both family law statutes, federal and provincial, require courts to consider proceedings, orders, agreements and measures affecting the child scheduled, decided or granted in other court systems.

Moreover, in Divorce Act Changes Explained, Justice Canada states that in order to properly consider an issue the court must be aware of all relevant information, including legal orders and proceedings. The explanation states (November 1, 2021) that civil protection orders (such as orders granted under New Brunswick's *Intimate Partner Violence Intervention Act*, SNB 2017, c 5) can be relevant when considering a parenting matter or how the parties are to provide up to date information relating to support, that child protection proceedings, measures, or orders can be relevant when determining parenting matters, and that criminal matters (pending or existing), including undertakings or recognizances can be relevant for example, an order that an accused have no contact with a specific person.

In terms of admissibility and reliance, as previously reported in Neilson (2020, 2nd edition),[81] Canadian case law tells us that, in the interests of promoting efficiency and reducing costs to the parties and of avoiding duplicative litigation, inconsistent results and inconclusive proceedings,[82] judicial orders, statements of agreed facts, and judicial findings or reasons for decisions and orders from other courts (criminal and civil) are admissible and may be relied on for truth in subsequent civil cases when the cases involve the same parties and the issues to be decided are the same or very similar (subject to the guidelines set out in *British*

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80 From a family violence expert perspective all of the information discussed in this report is relevant to risk and danger assessment and to the safety, security and well-being of the child. The family violence perspective is set out in the reminder of the report.

81 Neilson (2020) note 87.

82 See *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 (CanLII) at paragraphs 37 - 40.

Columbia (Attorney General) v. Malik, 2011 SCC 18). Refer as well to paragraph 135 of *Ontario (Attorney General) v. Clark*, 2021 SCC 18 (CanLII).

Although *Malik* was concerned with admissibility and reliance on such evidence in a subsequent interlocutory proceeding, court decisions tell us that *Malik* reasoning is not restricted to interlocutory proceedings (paragraph 54 of *Plate v. Atlas Copco Canada Inc.*, 2019 ONCA 196 (CanLII). See also: *Belong v. Her Majesty the Queen in Right of the Attorney General of Canada and Timothy Quigley,* 2013 NBCA 68, application for leave to appeal dismissed with costs in *Norman Gerard Belong v. Her Majesty the Queen in Right of the Attorney General of Canada, et al.*, 2014 CanLII 7170 (SCC). Evidence drawn from criminal transcripts was admitted and considered in a civil context in *Belong* despite an acquittal on the three criminal charges. The Court of Appeal for Saskatchewan discusses how a criminal sentencing transcript may and may not be relied on for truth in subsequent civil proceedings in *Thomas v. Quinlan*, 2020 SKCA 82 (CanLII), leave to appeal dismissed with costs *Darryl Quinlan et al. v. Kirby Keith Thomas*, 2021 CanLII 6705 (SCC). Detailed discussion of when and how, following admission, transcripts and rulings from other courts may and may not be relied on for truth is beyond the scope of this report. Canadian case law on the issue is evolving. Informative appeal decisions on admissibility and reliance and non-reliance of evidence and rulings from other courts include: *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services),* 2013 NLCA 27*; MacRury v Keybase Financial Group Inc.*, 2017 NSCA 8*; BL v. Saskatchewan (Social Services),* 2012 SKCA 38*; Wong v. Giannacopoulos,* 2011 ABCA 277 at paragraph 6*; Phillips v. Law Society of Saskatchewan*, 2021 SKCA 16 (CanLII), *Clayson-Martin v. Martin*, 2015 ONCA 596 and *Delichte v. Rogers, 2011 MBCA 50 at paragraph 35.*

I.K.K. v. M.P., 2018 ONSC 2473 includes a discussion of the applicability of *Malik* in a family law case. The question in this case was whether or not the court deciding the family law case could consider the reasoning of the judge hearing evidence on a summary judgement motion in another case (a child protection case involving the same parties). *Malik* was applied. *Malik v. Malik*, 2019 ONSC 5959 (CanLII) includes an interesting illustration of a court's consideration of earlier civil and criminal decisions and findings in connection with assessing the reasonableness of fear in connection with an application for a restraining order in a DV case. While not a family law case, lawyers in New Brunswick may also wish to cite the application of *Malik* in *Tingley v. Canada (Attorney General),* 2019 NBQB 179.

The cases as a whole stress the importance of allowing the party affected to present evidence to challenge earlier findings and or orders and/or to lessen their weight (when not precluded

by the doctrine of *res judicata*, estoppel or abuse of process): *British Columbia (Attorney General) v. Malik*, 2011 SCC 18; *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 27; *Clayson-Martin v. Martin*, 2015 ONCA 596.

Nonetheless, despite the legislative direction to consider such evidence and appellate case law authority on admission of such evidence, the Queen's Bench FD courts confront a number of obstacles that can prevent timely court access to the information in practice. One of the obstacles is lack of clarity or authority in provincial court rules or legislation enabling Queen's Bench FD justices and or court officials in the FD court system to comply with mandatory court obligations under the federal *Divorce Act* and the Provincial *Family Law Act*. While both statutes require the Court of Queen's Bench, FD to consider information specified in legislation, the research team is not aware of any provincial laws or rules (authorized by section 25 of the federal *Divorce Act*) that enable Queen's Bench FD justices to obtain the mandatory information in a timely, efficient manner.

Reliance on the parties to obtain and present the information is not a viable option in DV and FV cases because, as outlined earlier:

- lawyers who work in the family law field will not always be fully aware of proceedings, agreements and orders in other legal systems (such as new charges laid or withdrawn; child protection investigations initiated, agreements reached outside of court in child protection matters, for example during family conferences or mediation proceedings; criminal release provisions and variations thereof; criminal sentencing provisions; peace bond provisions), particularly when representing vulnerable, traumatized and/or ill-informed clients who may not be fully aware of or understand these matters;
- litigants who are attempting to escape coercive and controlling relationships are often grappling with acute stress, trauma and other forms of psychological harm while, at the same time, the litigants on the other side of these cases have vested interests in reducing access to information in order to minimize responsibility;
- many family law litigants who appear before Queens Bench FD justices appear in person without lawyers and will have difficulty identifying and obtaining pertinent information about related proceedings, agreements and orders;
- Many child protection and family law cases are settled in judicial dispute resolution processes rather than decided by judicial decision following the formal presentation of evidence in a formal hearing or trial and it goes without saying that accurate settlement depends on full and complete access to the relevant facts and information;

- legal systems (criminal, family, child protection, civil protection; Provincial Court, Court of Queen's Bench) function separately, seldom exchange information and maintain separate court records.

Although the wording of Family Division section 11.4 of the *Judicature Act*, RSNB 1973, c J-2 set out below might appear to offer options, traditionally the section has been used to obtain expert reports such as custody/parenting capacity assessments, psychiatric assessments, psychological assessments, voice of the child reports.[83]

> *11.4 (1) upon ex parte application or on his own motion a judge of the Family Division may direct a family counsellor, social worker, probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.*

It is far from clear that section 11.4 could be used by Queen's Bench justices to order information from other courts and legal systems given that it is not likely that information sharing across legal systems was envisioned at the time the provision was enacted.[84]

The practical reality of self representation, discussed in the following section, compounds the problem of timely, efficient access to evidence.

3.2 Queen's Bench, Family Division: Self Represented Parties

When considering judicial access to mandatory information, it is important to consider the practical realities of family courts and specifically of Queen's Bench FD courts in New Brunswick today. Many litigants appearing in Queen's Bench FD courts in New Brunswick appear without lawyers. So common is the occurrence and so great is the need that Public Legal Education and Information Service of New Brunswick has developed workshops for self-represented litigants who are attempting to navigate the family justice system and nationally the Canadian Judicial Council has designed and published a *Family Law Handbook for Self-Represented Litigants*. About ten years ago Julie MacFarlane conducted a national study of self represented litigants (SRLs) in Canada.[85] The study collected empirical

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83 Judicial advisor comments.

84 In addition, it is likely that preparation of reports of this nature would have considerable workload and cost implications for court staff and officials.

85 Julie Macfarlane (2013) *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (University of Windsor) on line. See also Canadian Bar Association, Access to Justice Committee (2013) *reaching equal justice: an invitation to envision and act*

data directly from self represented litigants (SRLs) as well as from justice officials.[86] She reported in (2013) that nationally 60 % of the SRLs in Canada were litigating family law matters and were evenly divided between men (52 %) and women (48%). More than 1/2 had retained a lawyer at some point but reported that legal aid allocations and or their private economic resources had run out prior to the case being fully resolved.[87] The rates of self representation have continued to climb. Justice Canada reported rates of between 50 and 80 % self representation in 2016 as well as litigant difficulties navigating the family justice system.[88] Lyndsay C. Burns reported on behalf of Statistics Canada that during 2019 and 2020 the majority of family law litigants (58%) represented themselves and that those numbers in family law cases, excluding child protection cases which have higher rates of representation as a result of access to legal aid, are continuing to climb.[89]

If we put this into a DV/FV context, is it appropriate for Queen's Bench FD Justices to rely on traumatized targeted parties or on perpetrators of coercive controling family violence to produce mandatory evidence, despite that many are appearing before courts without lawyers and do not understand legislation, court records, evidence rules or proceedings in multiple court systems? The litigants may not even be fully aware of the existence much less legal significance of legal proceedings, agreements and orders in other legal systems. For example, in a DV context, the targeted adult/complainant grappling with harm from DV is not a party in the criminal case. The court records we examined in the Moncton jurisdiction told us that loss of crown and victim services contact with many DV criminal complainants was a practical reality in many criminal cases. These complainants are unlikely to be fully aware of what happened in the criminal case or cases. Yet criminal conduct is directly related to risk of harm and criminal court orders must be considered by Queen's Bench justices pursuant to legislation. And, in a DV context, the perpetrator of DV, with criminal convictions and orders in the criminal system, will often have a personal interest in shielding the Queen's Bench, FD court from complete information about findings of guilt or criminal findings adverse to his or her interests.

(Ottawa: Canadian Bar Association) on line, p. 44. This is an excellent report summarizing pertinent research. Members of the Committee: Dr. Melinda Buckely, John Sims, QC, Sheila Cameron, QC, Amanda Dodge, Patricia Hebert, Sarah Lugtig, Gillan Marriott, QC, and Gaylene Schellenberg.

86 Julie Macfarlane (2013) *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (University of Windsor) on line

87 Ibid.

88 Department of Justice "Self-Represented Litigants in Family Law" in *Just Facts* (Ottawa: Government of Canada)

89 Lyndsay Ciavaglia Burns (2021) "Profile of family law cases in Canada, 2019/2020" *The Daily Release* (Ottawa: Statistics Canada) on line.

In the absence of legislation and rules authorizing judicial access to mandated evidence, it may be next to impossible, in practice, for Queen's Bench FD justices to comply fully with judicial obligations pursuant to federal and provincial family law legislation. A related problem is that, in the absence of enabling rules and or legislation, judicial searches for the information could raise questions or create perceptions of judicial bias when the evidence is beneficial to one party and not to the other. At the moment, there is no timely, readily accessible method Queen's Bench FD courts may use to access Provincial court records.

3.3 Queen's Bench FD: evidence from prior proceedings

Family law and child protection legislation in New Brunswick, more particularly section 3 of the *Family Law Act*, SNB 2020, c 23 and section 9 of the *Family Services Act*, SNB 1980, c F-2.2, both state that the court may, on notice to the parties, read into the record as evidence or take into consideration without reading into the record "*any evidence taken on any previous proceeding, if that evidence is informative in any way as to the ... development of the child, his parent or any other person living with the child*" or in a position to influence the care or control of the child when the evidence is relevant to any matter under consideration by the court. The provisions are in some respects broader than the mandatory evidence to be considered (set out in legislation) and discussed earlier at 3.1 in that the provisions enable consideration of evidence from prior prior proceedings without qualification.

In a family violence context such evidence is important because identification of the primary aggressor in the most recent incident or series of incidents can be misleading and can result in falsely identifying the victim of family violence as a perpetrator of FV.[90] Expired orders and evidence from prior proceedings can be helpful when assessing patterns of behavior and responsibility. In addition, records of compliance and non compliance with court orders could help to prevent courts from being misled by documented litigation tactics, also called systems abuse patterns, that are common in family violence cases[91] (such as provoking violence on the part of the targeted intimate partner, recording it and calling the police; making spurious claims to child protection authorities; intimidating or making promises to the victim resulting in a recant in the criminal case followed by subsequent threats such as

90 See Chapter 4 and particularly 4.4 as well as Supplementary Reference Chapter 4:Mutual Claims in Linda Claire Neilson (2020, 2nd ed.) *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (Ottawa: Canadian Legal Information Institute, CanLII).

91 Ibid., Chapter 7 on line. Chapter 7 identifies and describes, at 7.4, thirty seven litigation tactics perpetrators of family violence commonly use to confuse courts, evaluators, service providers and professionals associated with courts. Refer as well to David Mandel, Anne Mitchell and Ruth Stearns Mandel (2021) *How Domestic Violence Perpetrators Manipulate Systems* (Safe and Together Institute).

'informing' her that she could be convicted of perjury if she presents the recanted information about family violence in a collateral or subsequent family law or child protection proceeding (refer to *Canadian Criminal Code*, sections 131 through 139).[92]

Nonetheless, legislation enabling admission and consideration of evidence from prior proceedings does not address the practical problems discussed earlier 3.1 or problems with reliance on parties and particularly self represented parties in DV/FV cases or the need for mechanisms to enable efficient and timely access to evidence. Moreover, the federal *Divorce Act* does not contain a similar provision.

3.4 Conclusion: Queen's Bench FD consideration of Orders and Agreements from other courts and legal systems

For numerous reasons, including:

- court obligations pursuant to legislation
- case law rulings on admissibility
- prevention of injustice
- court efficiency
- reduction of the costs of litigation
- responses to vulnerabilities and the lack of legal expertise among litigants in FV cases
- obligations to self represented parties
- attention to obstacles preventing access to other courts' records

the research team recommends a new Family Division provision or provisions in the *Judicature Act* and/or new rules in the Rules of Court enabling Queens Bench FD Justices and the court officials in the FD to obtain mandated information from other courts and to make such information "readily accessible."[93] (It goes without saying that the courts will ensure that parties are informed and offered an opportunity to explain, endorse or contest such court records.)

3.5 Criminal Courts: Consideration of Orders, Evidence and Findings from other courts

Direct consideration of the judicial findings and the contents of agreements and orders from Queen's Bench FD courts by criminal courts in FV cases presents additional challenges and evidentiary obstacles, particularly if the orders or agreements are tendered by crown prosecutors in connection with proof of criminal responsibility or aggravating circumstances that increase restrictions on freedom. Basically, there are three well known reasons for this.

92 This is one of the documented perpetrator litigation, court systems abuse, litigation tactics.
93 The quote is from subsection 7 (3) of the *Family Law Act*.

Civil courts, including Queen's Bench FD courts, decide cases on the balance of probability (*F.H. v. McDougall*, 2008 SCC 53) while criminal courts must determine criminal responsibility on the basis of proof beyond a reasonable doubt. In addition is the presumption in the criminal system that the criminally accused are innocent until proven guilty. Also, unlike the provisions discussed earlier in connection with judicial obligations in family law cases, there is no explicit legislative imperative directing criminal courts to consider Queen's Bench agreements and orders in criminal DV or FV cases when the accused was a participant in the Queen's Bench FD case.

Nonetheless, it is also worthy of note that not all criminal proceedings are decided on the basis of proof beyond reasonable doubt. Some issues in the criminal system are decided on balance of probability (such as proof of facts supporting sentencing decisions - subsection 724 (3) (d) of the *Criminal Code* - subject to an onus, when the facts are disputed, to prove the existence of aggravating facts and previous convictions beyond reasonable doubt,[94] bail decisions and peace bonds). Evolving case law is indicating that the principles in *Malik*, discussed earlier in connection with civil cases, are not necessarily restricted to civil cases: *R. v. Jesse*, 2021 SCC 21 (CanLII); *R. v. Jahanrakshan*, 2012 BCCA 341. While discussion of when criminal courts may or may not consider and rely on judicial orders and findings from civil courts is far beyond the scope of this report, a few comments with specific application to FV cases are in order.

In connection with judicial interim release, subsection 515 (3) of the *Criminal Code* requires justices to consider whether violence was used, threatened or attempted against an intimate partner. Subsection (4), (4.1) and (4.2) identify potential conditions of release. Many of those conditions are associated with preserving victim safety. Subsection (6) (b.1) creates a presumption that the accused will be held in custody if violence was used, threatened or attempted against an intimate partner and the accused was previously convicted of an offence involving violence against an intimate partner. Subsection 515 (10) sets out grounds justifying detention, including:

> *(b) where the detention is necessary for the protection of the public, including any victim or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice..*

94 *R. v. Gardner*, 1982 CanLII 30 (SCC) and subsection 724 (3) (e) of the *Criminal Code.*

Pursuant to subsection (12) a detention order may include an order that the accused abstain from a communicating, directly or indirectly, with any victim, witness or other person except in accordance with provisions specified in the order.

In *R. v. Jahanrakshan*, 2012 BCCA 341, a unanimous decision of the Court of Appeal for British Columbia in connection with an application for interim release pending appeal,[95] the applicant argued that the crown was not entitled to rely on findings of fact or conclusions made by the judge in a related *civil* case in Washington state. The appellate court (paragraphs 57 to 59) disagreed with that argument and applied *Malik*:

> *A judgement in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties shall have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of res judicata, issue estopple or abuse of process).*[96]

The Court of Appeal for British Columbia held that the *Malik* decision was "dispositive." It would appear, therefore, applying the same reasoning, that Queen's Bench FD civil orders and judicial findings in support of those orders can be admitted and considered as evidence, subject to assessments of weight, in connection with interim release proceedings in DV/FV cases.

In connection with criminal sentencing, section 718.2 requires consideration of whether the offender:

- abused an intimate partner, or member of the victim or offender's family;
- abused a person under 18;
- abused a position of trust in relation to the victim; as well as
- evidence that the offence had a significant impact on the victim

in connection with aggravating circumstances.[97]

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95 While the cases are clear that considerations for interim release prior to conviction differ from those in connection with appeal because after conviction there is no presumption of innocence, the evidence considerations discussed in this case relate to the authority of a court in a criminal case to admit and consider findings of fact from a civil case as evidence and proof of those findings on the basis Malik principles in interim release (bail) proceedings.

96 *R. v. Jahanrakshan*, 2012 BCCA 341, paragraph 58.

97 Note that proof of aggravating circumstances requires proof beyond reasonable doubt, unlike proof of other facts in support of sentencing decisions. The case law is not yet clear on whether or not *Malik* applies, subject to determinations of weight, when the subsequent matter requires proof beyond a reasonable doubt and the evidence to be considered was decided on balance of probabilities. The trial decision, *Sakab Daubi Holding Company v. Al Jabri*, 2021 ONSC 7681 questioned the probative value and thus the admissibility of prior civil rulings decided on the basis of balance of probabilities in a case with a

Section 720, subsection (2) requires consideration of the "interests of justice and of any victim of the offence" when deciding whether to delay sentencing to enable the offender's attendance in a domestic violence counselling program. Moreover, section 722 (9) states:

> *Whether or not a statement has been prepared and filed in accordance with this section,. (*the section refers to victim impact statements[98]*), the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.*

Also, in connection with sentencing, section 723 (3) states that the court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

As is made clear throughout this report, those who are criminally accused in DV cases are also often parties or participants in other legal proceedings involving the same or related issues in other courts. It is without question that Queen's Bench, FD judicial findings and orders connected to the safety of victims and children in child protection, Intimate Partner Intervention, and family law cases are both relevent and informative to assessments of the need for "the protection of the public, including any victim or witness to the offence, or any person under the age of 18 years" and to no communication provisions in bail decision making. Similarly, in connection with sentencing, Queen's Bench FD orders and findings are relevent and informative in terms of the needs, interests and safety of the victims of crime, including children. Arguably, therefore, in a FV context, Queen's Bench FD orders could be admitted and considered as evidence, subject to judicial assessments of weight, during bail and sentencing hearings.

In addition to safety considerations associated with bail and sentencing, consideration of Queen's Bench orders and findings associated with each accused and offender could help to ensure that criminal court bail and sentencing decisions complement rather than contradict Queen's Bench FD orders (thus promoting efficiency and avoiding duplicative litigation, inconsistent results and inconclusive proceedings, objectives clearly identified in *Malik).*[99]

Consequently, we recommend consultations and collaborations between the criminal and Queen's Bench court systems to identify and develop information exchange protocols setting

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higher criminal standard of proof. The decision has, however, been appealed: *Sakab Saudi Hol Sakab Daubi Holding Company v. Al Jabri*, 2022 ONSC 150 (CanLII).

98 The explanatory comments in the brackets were added by Linda C Neilson.

99 *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 (CanLII) at paragraphs 37 - 40.

out efficient and timely mechanisms to enable the sharing of orders and judicial findings from Queen's Bench FD courts with criminal crown prosecutors for potential use when making submissions in connection with bail and or criminal sentencing in FV cases.

In addition, we recommend explicit recognition in the *Criminal Code* that, subject to judicial assessments of weight, Queen's Bench FD orders and rulings associated with victims and children may be considered during bail and peace bond proceedings when criminal charges or peace bond claims involve FV against family members bound by the Queen's Bench orders, and may also be considered, subject to weight, during sentencing proceedings when the criminal offense(s) are connected to FV.

3.6 Timely access to Facts is central to Justice: A FV, court systems perspective

It is not possible accurately to assess safety, risk of continuing violence or the potential for lethal outcome (Neilson, 2020 2nd edition, Chapter 8), child best interests and safety (Neilson, 2020 2nd edition, Chapter 11), civil IPV protection (Neilson, 2020 2nd edition, Chapter 9) or child protection issues (Neilson, 2020 2nd, Chapter 17)[100] in any court system without complete access to facts about the pattern of DV and FV in the case, including the dynamics of coercive control (Neilson, 2020 2nd edition, Chapter 5).[101] In addition is the need for court access to records from all court systems about criminal and harmful conduct, the parties' litigation practices, and records of compliance or non-compliance with court orders. The court files analyzed during this project document the need to improve court access to evidence. We know that court-system structural silos and fragmentation have been central to the failure of legal systems to protect targeted adults and children in family violence cases.[102]

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100 Neilson, 2020 note 10.

101 Ibid.

102 Margaret Jackson and Hon. Donna Martinson (2015) Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts; Mary Ellen Turpel-Lafond (2009) *Honouring Christine Lee - No Private Matter: Protecting Children Living With Domestic Violence* (Legislative Assembly British Columbia); Office of the Chief Coroner Province of Ontario (2010) *Eighth Annual Report of the Domestic Violence Death Review Committee*; Law Reform Commission of Nova Scotia (1997) From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (Law Reform Commission); Linda C. Neilson (2002) "A Comparative Analysis of Law in Theory and Law in Action in Partner Abuse Cases: What Do the Data Tell Us?" *Studies in Law, Politics and Society* 26: 141-87; Deputy Ministers' Leadership Committee on Family Violence (2009) *Report of the Domestic Violence Prevention Committee*; E. Pence & M. McMahon (2003) "Working from Inside Outside Institutions: How Safety Audits Can Help Courts' Decision Making Around Domestic Violence and Child Maltreatment" in *Juvenile and Family Court Journal* 54(4): 133-47; Judicial Council of California, Administrative Office of the Courts, Centre for Families, Children and the Courts Unified Courts for Families *Improving Coordination of Cases Involving Families and Children*, online.

The federal Department of Justice and a collection of Canadian domestic-violence-legal-system experts have written a series of lengthy reports in an effort to address some of the cross-legal-system access to evidence problems.[103] The very complexity of the legal system enables perpetrators to make use of litigation tactics[104] to maintain contact and control over victims and family members, to cause confusion, and to exert financial and procedural control over litigation processes that might otherwise have been able to offer help. Many perpetrators will attempt to enlist the legal system (FD courts, criminal courts, appeal courts, child protection agencies, police, civil protection systems) in the crusade to coerce, control, harass, undermine and dominate.[105] The phenomenon, known as 'systems abuse,' is well

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103 Department of Justice (2014) *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* (Ottawa; Department of Justice*);* Joseph Di Luca, Erin Dann and Breese Davies *Best Practices where there is Family Violence* (Criminal Law Perspective) (Ottawa: Department of Justice); Margaret Jackson and Hon. Donna Martinson (2015) *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts;* Hon. Donna Martinson (2012*) Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases and Department of Justice (2014) Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems;* Linda C. Neilson (2013) Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective (Ottawa: Department of Justice).

104 Refer to Neilson (2020) note 10 at 7.4 (7.4.1 through 7.4.36) for a discussion of some of the litigation tactics employed by perpetrators of coercive and controlling domestic violence to confuse and control courts. Heather Douglas, primary author of the Australian national domestic violence bench book (note 15), refers to the phenomenon as 'systems abuse'. In essence what happens is the complexity of the legal systems allows perpetrators of DV/FV to use the same techniques (coercive control, deflection of responsibility, minimization, denial, manipulation) used to confuse and control intimate partners and children to exert continuing control via the legal system.

105 Hon. Jerry Bowles, Hon. Kaye Christian et al. (2009) *A Judicial Guide to Child Safety in Custody Cases* (National Council of Juvenile and Family Court Judges); Mo Theresse Hannah and Barry Goldstein (Eds.) (2010) *Domestic Violence, Abuse, and Child Custody* (Civic Research Institute); Kimberly Abshoff and Stephanie Lanthier (2008) *Family Action Court Team (F.A.C.T.) Court Watch Project 2008 Background Paper*; S. Goundry *et al.* (1998) *Court-Related Harassment and Family Law "Justice"* (Vancouver: National Association of Women and the Law, 1998); L. Kenan "Domestic Violence and Custody Litigation: The Need for Statutory Reform" *Hofstra Law Review* 13: 407-441; L. Neilson (2002) "A Comparative Analysis of Law in Theory and Law in Action in Partner Abuse Cases: What Do the Data Tell Us?" *Studies in Law, Politics and Society* 26: 141-87; N. Robertson, R. Busch, R. D'Souza and F. L. Sheung (2007) *Living at the Cutting Edge: Women's Experiences of Protection Orders (New Zealand: University of Waikato)*; Wellesley Centres for Women (2002) *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* at pages 59-60. Researchers working with the author at the University of New Brunswick found that abusive men who engaged in high rates of litigation against former partners claimed they had no choice but to keep returning to court because their partners would not agree to their joint custody 'entitlements'.

documented in Australia,[106] the United States[107] as well as in Canada.[108] This is one of the reasons the new *Divorce Act*, section 7.8 (2) and the *Family Law Act,* section 7 (2) provisions, discussed earlier in 3.1, were enacted. When courts do not have full and complete access to facts, changing the legal rules and principles within court systems will not offer justice. Legal rules and principles must rest on proof of facts in evidence. Consequently, it is less reform of legal rules that will improve access to justice in FV/DV cases than attending to structural divisions and improving capacity to access and share facts.

3.7 Addressing Structural Problems in the Legal System

Earlier, in 3.1, we suggested that court structures can have an appreciable effect on access to facts and evidence in the legal system. We also suggested a few options in response (at 3.1 through 3.5). Nonetheless, addressing access to evidence without also attending to the structural problems that limit access to facts is unlikely to resolve access to justice problems in DV/FV cases on a permanent basis.

In order to understand this issue, it is necessary to wade, at least briefly, into a discussion of institutions and structures. In ‘Structuration Theory,' Lord Anthony Giddens (a prominent Sociologist) tells us that it is important to move beyond analyses of social institutions (including the legal system) based on the paramouncy of institutional structures or human agency. Clearly, according to Giddens, social structures are both the cause and the outcome of human social action.[109] While human action (individual or collective) both shapes and is shaped by social institutions, social institutions acquire an ascertainable life span, a continuity and a social existence that, while dependent on collective human action, become distinct and separate over time. Once a social institution is established, it develops rules and norms of behavior that guide and constrain human behavior within it. In connection with this issue in domestic violence cases, Ellen Pence and Terri Taylor of Praxis International (2003) documented, in the classic report *Building Safety for Battered Women and their Children into the Child Protection System,* how institutional structures within the child protection

106 Australia’s National Domestic Violence Bench Book refers to and defines the phenomenon as “systems abuse.” See also Heather Douglas (2017) “Legal systems abuse and coercive control”, *Criminology & Criminal Justice*.

107 David Mandel, Anna Mitchell and Ruth Stearns Mandal (2021) *How Domestic Violence Perpetrators Manipulate Systems . Why Systems & Professionals Are So Vulnerable & 5 Steps to Perpetrator-Proof Your System* (Canton, Connecticut: Safe and Together Institute).

108 At 7.4 of Chapter 7 Neilson (2020) note 10 discusses 36 litigation tactics commonly used by perpetrators of domestic violence to exert control, attempt to prevail and to cause confusion in family law cases.

109 Anthony Giddens *The Constitution of Society* (Berkeley and Los Angeles: University of California Press, 1984).

field constrain human responses to domestic violence.[110] We encounter the same theme – an empirically generated conclusion that social structures constrain human behavior - in the conflict resolution field. Conflict resolution experts have long recognized that human conflicts associated with institutional structures cannot be resolved through human action alone. Conflicts will continue to resurface unless the structures themselves are altered.[111] While this does not mean that human action has no continuing role in reinforcing, shaping or even changing social institutions, it does mean that we cannot ignore the considerable influence and constraints that the structures of social institutions, including structures within the legal system, place on human, including judicial action.

In the family and domestic violence field, structural problems in the legal system have been documented repeatedly.[112] Families, who turn to the legal system for help, encounter complex institutional structures that divide family problems, and the work of lawyers and courts, into distinct legal categories that reflect the interests of separate parts of the legal system (criminal, family, civil and child protection). As a result, the legal system fails to respond to family problems as an integrated whole. In the DV/FV field, empirical research tells us that legal systems fail those who are targeted by DV/FV, including children, as a result, in part, of separate legal jurisdictions. From the perspective of the family, the complexity of legal institutions can seem unintelligible. Families must grapple with a complex array of appointments with different sets of assessors, different sets of experts, and different sets of lawyers each collecting facts and evidence about aspects of the same family problem for the distinct, separate and sometimes inconsistent objectives of separate parts of the legal system. The result is duplication of evidence as well as orders and services operating in an inconsistent manner and indeed sometimes at cross purposes. When legal

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110 Praxis International, Ellen Pence and Terri Taylot (2003) *Building Safety for Battered Women and their Children into the Child Protection System* (Duluth, Minnesota: Praxis International) published http://www.thegreenbook.info/documents/buildingsafety.pdf#_blank.

111 Andrew Pirie *Alternative Dispute Resolution Skills, Science and the Law* (Toronto: Irwin Law, 2000); Christopher Moore *The Mediation Process Practical Strategies for Resolving Conflict, 2nd edition* (San Fransisco: Jossey Bass, 1996)

112 Department of Justice Canada. (2013). *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice System*. Report of the federal-provincial-territorial (FPT) ad hoc working group on family violence; Linda C Neilson (2013) *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems* (Criminal, family, child protection) A Family Law, Domestic Violence Perspective *2nd Edition*. Presented to Family, Children and Youth Section, Department of Justice Canada. (ISBN 978-1-100-24230-9); Hon. Donna Martinson and Dr. Margaret Jackson in the 2015 discussion paper Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts; Joseph Luca, Erin Dann and Breese Davies (2012) *Best Practices where there is Family Violence (Criminal Law Perspective)* (Ottawa: Department of Justice); Holly Johnson (2011) Specialized Domestic Violence Courts: Do they Make Women Safer? On line; Mary Ellen Turpel-Lafond (2009) *Honouring Christine Lee - No Private Matter: Protecting Children Living With Domestic Violence* (Legislative Assembly British Columbia).

systems and the services associated with them (mental health, drug and alcohol, domestic violence intervention, police, parent-child evaluators, family violence services) do not operate in a coordinated fashion, costs go up, safety nets fail and the risk of harm increases. Thus court-system fragmentation has been a primary cause of the failure of the legal system to help targeted adults and children in domestic violence cases.[113] Changing the legal rules that are applied within each part of the legal system – changing the statutes, the case law and/or the procedural rules – will not produce lasting tangible positive change until the institutional structures that create the problems in the first place are altered.

In recognition of structural problems, efforts have been made in the legal system to address court structural problems in DV/FV cases. In addition to recent legislative changes discussed earlier, a well respected example is the creation of the integrated domestic violence court in Toronto.[114] Despite enthusiasm and positive empirical results,[115] full integration was not possible, however, as a result of several related issues:

- The divided jurisdiction allocated to provincial courts and section 96 powers which, pursuant to *The Constitution Act*, 1987, 30 & 31 Vict, c 3, are reserved to superior court judges. The result is that integrated FV/DV courts that operate at the provincial court level do not have jurisdiction over the most serious DV/FV crimes and lack complete jurisdiction over family law and marital property matters.[116]
- In addition, only a limited number of DV cases are able to make use of integrated court processes. Criminal, family, child protection and civil protection matters involving the same family commonly enter the legal system at different times, often years apart, so that it is often not possible to integrate or combine proceedings.

113 Ibid.

114 Rachel Birnbaum, Nicholas Bala and Peter Jaffe (2014) "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes and Lessons Learned" 29 (1) *Canadian Journal of Family Law* 117-171. The integrated court system in New York is another example: Jennifer Koshan (2014) "Investigating Integrated Domestic Violence Courts: Lessons from New York" 2014 51(3) *Osgoode Hall Law Journal* 989, 2014 *CanLIIDocs* 334464.

115 Rachel Birnbaum, Michael Saini, Nicholas Bala (2017) "Canada's first integrated domestic violence court: Examining family and criminal court outcomes at the Toronto I.D.V.C." *Journal of Family Violence*, 36(6): 621-631.

116 Ontario Court of Justice "Integrated Domestic Violence Court (IDV Court)" "Overview" accessed May 3, 2022 on line.

PART FOUR: COORDINATED COURT STRUCTURE, OPTIONS & CHALLENGES

4.1 Advantages of a Coordinated Court Model

In response to structural problems outlined earlier in 3.7, Linda Neilson (2013) Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective (Ottawa: Department of Justice) suggested the development of a coordinated DV court model as an alternative to unified or integrated-domestic-violence courts. The following are the reasons:

- A court model supported by the coordination of evidence and information across court systems when family members are involved in more than one legal system would preserve the advantages of specialization offered by separate criminal, family, civil protection and child protection jurisdictions in terms of legal expertise, the expertise of assessors and expert witnesses, procedural checks and balances, and evidence rules.[117]
- A coordinated information-flow-court-model does not require constitutional change. In order to design a fully integrated court model, constitutional changes would be needed to alter the separate jurisdictions of provincial and superior courts (section 96 to the Constitution Act , 1867 (UK), 30 & 31 Victoria, c 3). A coordinated model would avoid the need for constitutional change as the provincial and superior courts would continue to operate as they do now, except that they would operate in a coordinated way supported by shared (and in some circumstances shielded) access to evidence.
- A coordinated court model supports and shields the judicial role.
- Finally, a coordinated court model would not be faced with low numbers of applicable cases.[118]

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117 A number of experts have expressed concerns about potential problems that could result in DV cases with implementation of integrated courts. Elizabeth MacDowell (2011) "When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism" Vol. 20 *Texas Journal of women and the Law* 95; Erika Rickard (2011) "Civil Protection Orders in Integrated Domestic Violence Court: An Empirical Study" Digital Access to Scholarship at Harvard: http://nrs.harvard.edu/urn-3:HUL.InstRepos:4772900

118 In the family violence field many of the related cases involving family members will not occur at the same time and may not overlap at all. Tamara Baluja (2011) "A bumpy start for a new style of family court" in August 01, 2011 *Globe and Mail*; Marianne Hester, Julia Pearce and Nicole Westmarland (2008) *Early evaluation of the Integrated Domestic Violence Court, Croydon* (Ministry of Justice, England).

We know, from our analyses of court file data during this project as well as from Neilson's scrutiny of DV case law across Canada over several decades, that those charged with DV crime in the criminal system will not necessarily be involved in the associated family law or civil or child protection case between the time criminal charges are laid and the criminal case is closed. Nonetheless, even after the criminal case is concluded (for example as a result of completion of the criminal sentence), information from the criminal proceedings (such judicial findings of criminal conduct, findings in expert reports admitted into evidence, evidence of compliance and non compliance with criminal court orders and peace bond agreements) can be relevent, even central, when a subsequent family law, civil protection, or child protection case involves the same person. Please note, however, the potential need to alter criminal court archiving policies and practices in New Brunswick to ensure that archiving policies associated with closed criminal files do not makes these records difficult for Queen's Bench FD courts to obtain.[119] Similarly, new criminal charges may be laid after the civil protection, child protection and or family law case is resolved. Yet evidence from the associated civil case, such as judicial findings of DV/FV, evidence of parenting practices, evidence of child views and preferences, facts associated with risk and danger, records of compliance and non compliance with civil court orders, can be relevent when criminal bail/interim release and sentencing proceedings involve the parties. A coordinated system could enhance court access to pertinent admissible evidence from related prior as well as current court proceedings.

While the model we are proposing requires the addition of one or more specialized cross-court-coordinators to monitor, access and coordinate the flow of information into and among court systems, it is likely that family safety would be enhanced and legal resources saved by shared evidence and coordinated services operating toward a common purpose. In addition, installation of court coordinators could help to save judicial time while protecting the judicial role, particularly "confidence in ... impartiality and that of the judiciary."[120] A coordinator can support access to evidence in court systems without the need for judges or justices to search for evidence that must, pursuant to statute, be considered that might favor one party over another.

Under the guidance of the courts, coordinator(s) may also serve as policy and practice educators to ensure that court-connected services (such as police, transition houses, child

119 Family violence crime tends to be patterned and to operate in a cumulative manner while most crimes operate on a criminal incident basis. Thus while adjudicated evidence and facts in closed criminal cases may not be relevant in other non-criminal cases for most types of crime, the evidence is relevant and will often have considerable probative value when FV cases before civil Queen's Bench FD courts involve the same person as the criminal offender. Thus we recommend implementation of archiving policies that are specific to FV/DV crime.

120 Canadian Judicial Council (2021) note 65, page 38.

protection services, FV intervention services, mental health, probation, FV counselling services) are informed of court policies and practices. (It goes without saying that the educational role in the community would not include discussion of cases.) Court coordinators can become the information link between courts and community, as well as among various professionals who work within the legal systems. The current court coordinator in Moncton already acts in such capacities in connection with the specialized DV criminal court. She serves on the Provincial DV Death Review Committee. She also offers educational sessions to community services to inform them of the specialized criminal court's operations, policies and practices. She also supports the smooth flow of information among professionals who work within the criminal system. The proposed model would extend the successful court coordination role already established in the Moncton jurisdiction to the Queen's Bench FD courts (which hear IPV civil protection, child protection and family law cases).

4.1.1 Educational and Professional Requirements

Coordinating the flow of information from court-related community services into court systems and among court systems requires a specialized, nuanced understanding of domestic and family violence, its risk and dangers, and the effects on family members, including children. Bill C-233, which is currently (May, 2022) making its way through the Canadian Parliament, will, assuming the Bill is ultimately passed and implemented, amend the *Judge's Act* to require mandatory judicial education on intimate partner violence and coercive control. In addition to this educational initiative at the national level, we recommend cross sector DV/FV education on a jurisdiction by jurisdiction basis at the local level (judges with justices and judicial officers; community FV service providers with police, and law practice professionals, including crown prosecutors – family and criminal) so that DV/FV education can be translated from professional understanding into concrete practical steps that each person can take to share and shield[121] information across legal systems.

Court coordination requires detailed information exchange protocols designed to ensure due process and the appropriate chaneling, shielding and use of evidence. Thus, in connection with exchanging information among courts, we recommend the extensive involvement of the judiciary (judges, justices and judicial officers) in the design of inter-court information exchange protocols.

Given the level of professional and legal expertise required to coordinate the flow of information among courts and to act as a liason between courts and community, we

121 As the participants in the focus group sessions explained, sharing information to promote safety must be balanced with the obligations 1) to protect against disclosure of personal information unrelated to safety and 2) to shield information that could increase risk and danger.

recommend that court coordinators be appointed at a senior management professional or quasi-judicial level.

Delays associated with Covid-19 lockdowns prevented us from proceeding to implementation of the proposed model. We were however able to identify options and challenges. Consequently, the remaining sections of the report will discuss options and obstacles. Our collective wish is to inspire others (judges, justices, academics, government departments and community services working together) to make use of findings and ideas generated during this project to design other court coordination projects.

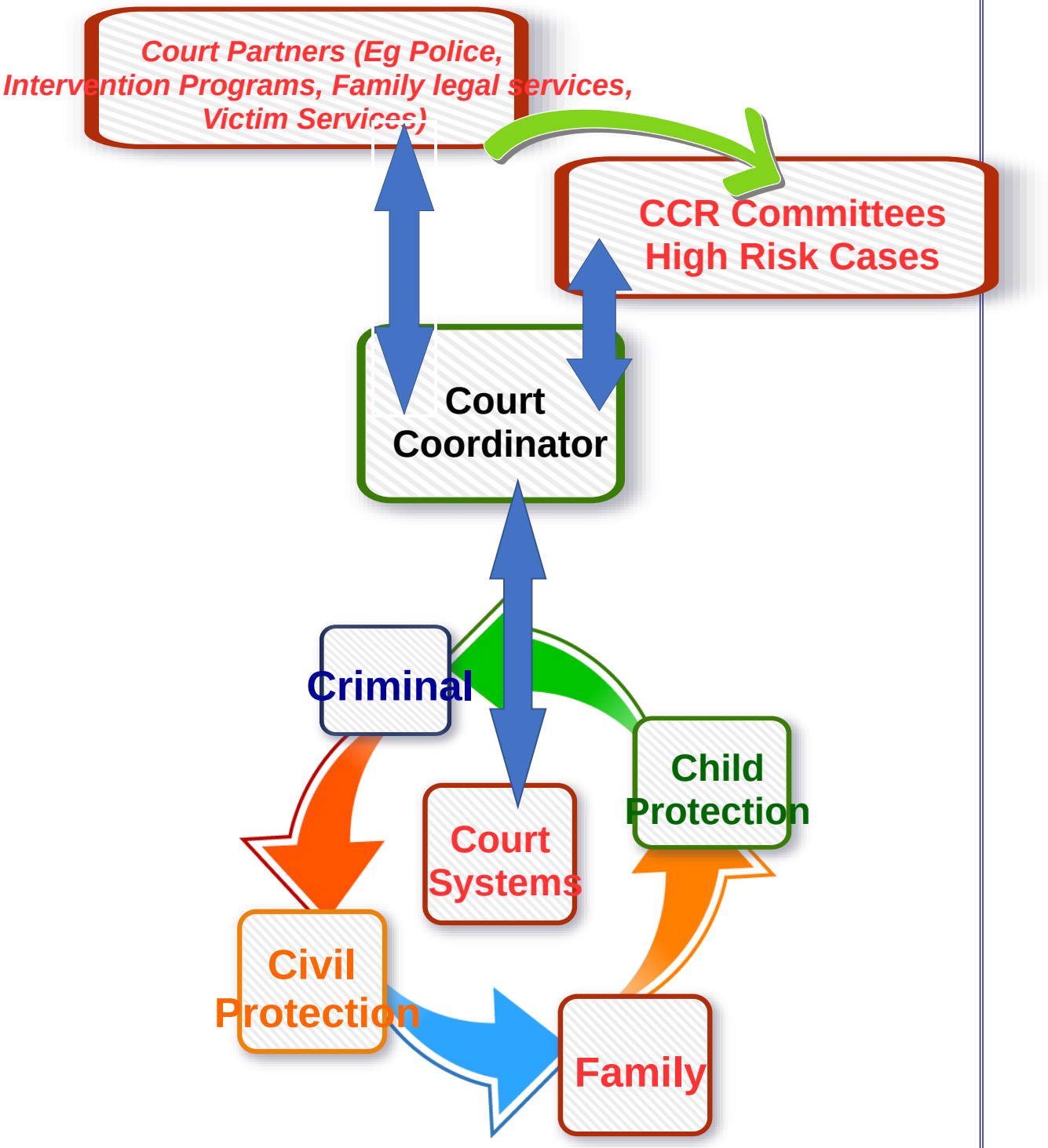
4.1.2 Project Duration Warning

A word of warning is necessary. Although we began this project with an already well-established, successful coordinated DV criminal court model spanning the Provincial and Queen's Bench Courts, three years would not have given us sufficient time to fully implement the coordinated model across all related legal systems, even without Covid-19 lockdowns. Initiatives of this nature require the participation, cooperation and collaboration of:

- Masters, judicial officers, judges, justices in all relevent courts;
- Numerous government departments (in our case, in New Brunswick, Justice, Public Safety, Social Development, Women's Equality Branch) in order to align government policies and practices with the cross-court-sector model and the court model with government policies and practices; and
- DV-related community services (for example, the police, crown and private practice lawyers, FV intervention services, Caring Dads programs, DV counselling programs, Transition Houses, Immigration services, Mental health and drug and alcohol services, educational programs, health providers).

Judicial leadership and involvement in education and in the design of court models is central. The most successful DV criminal court models in Canada were initiated or championed by judicial experts. Effective models must take into account the educational needs and practical judicial and professional realities of all of those who work in the legal system. Attending to trust and professional relationship building across systems is critical in order to respond to institutional structures and barriers. Trust and collaboration take time. We recommend professional facilitation as well as a minimum of five years' duration for projects of this nature.

4.2 Coordinated Court Structure, A Simplified Overview



4.3 Identifying & Flagging DV/FV cases across legal systems

In addition to cross sector education (discussed briefly in 4.1.1) one of the first steps in creating any coordinated court model is adoption of a shared definition with shared criteria to identify DV cases in all applicable legal systems. New Brunswick already has made progress on this issue. As indicated, by Joanne Boucher in *Appendix 1*, the Provincial Court – specialized Domestic Violence stream - in the Moncton jurisdiction, currently defines domestic violence as:

> Domestic Violence occurs when a person who is or who was involved in an intimate personal relationship, uses abusive, threatening, harassing, or violent behaviour as a mean to psychologically, physically, sexually or financially coerce, dominate and/or control their partner/former partner. Furthermore, domestic violence (DV) occurs when an accused resorts to abusive, threatening, harassing or violent behaviour towards the ex-partner's relatives, friends, or new partner to psychologically dominate and control the victim. The term 'intimate personal relationship' refers to current and former married, common-law, and dating relationships.
>
> In cases of DV, the victims are predominantly women. However, DV can involve persons of either gender and can include persons who are, or were, involved in a heterosexual or same sex relationship.
>
> In NB, a unified DV definition was adopted by Police Services and the Office of the Attorney General.[122] The definition of DV is also found in the Province of New Brunswick's Woman Victims of Abuse Protocols.[123]
>
> The criteria to identify a DV matter are focused on the intimate partner relationship or former intimate partner relationship. When deciding if a case is a DV matter, considerations include whether the alleged offense was connected to the relationship or former relationship. Other considerations include who was targeted by the alleged criminal behavior and the relationship between that person or persons and the intimate or former intimate partner. For example, domestic violence perpetrators may engage in criminal conduct against new partners, parents, friends, relatives or children of the intimate or former intimate partner (and in fact anyone who supports or assists the former partner) in an effort to harass, dominate, coerce or control the intimate partner or former partner.

122 Office of the Attorney General, "Intimate Partner Violence" in *Public Prosecutions Operational Manual* (Fredericton: Government of New Brunswick) on line.

123 Province of New Brunswick (2014) *Woman Victims of Abuse Protocols* (Fredericton: Government of New Brunswick) on line. Additional updates are anticipated.

> Specialized DV Crown Prosecutors and police in the jurisdiction are guided by the definition of DV and by detailed analysis of whether or not the elements of abusive, dominating/controlling, or coercive control behaviors are present in the alleged criminal behavior

Currently, only the specialized DV criminal courts in Moncton identify and flag DV cases. We recommend adoption of this shared definition and criteria across all applicable legal systems in the Province so that DV cases consistently are identified and flagged.

Nonetheless, even when courts share common definitions, there will be a need for internal discussions and consultations across systems with the court coordinator(s) when questions about the definition or criteria arise. For example, as Joanne Boucher reports: Is it DV if the criminal behavior is conducted by a third party (for example, a friend or relative of an intimate partner or former intimate partner) in order to harass, dominate, coerce or control the other intimate partner or former partner? If the alleged criminal behavior is conducted against a child to intimidate or control an intimate or former intimate partner, is it DV or should the case be categorized and processed as child abuse? If the alleged violence is committed by a person who is in a position of trust (for example a teacher against a student) and the teacher had an intimate relationship with the student, is it DV or should the criminal case be categorized as a criminal breach of trust?[124] New forms of crime associated with the use of social media add to the complexity of such issues (for example, section 162.1 of the *Criminal Code*). Does the case involve an intimate partner relationship if the alleged complainant and the person to be charged have exchanged intimate communications and/or intimate personal images through social media, there has been no direct physical sexual intimacy, and harassment, intimidation and/or a breach of 162.1 ensues?

Responding to these questions requires considerable knowledge of the dynamics of DV in intimate relationships as well as knowledge of how DV cases are processed in the various legal systems. Thus, in addition to adoption of a common definition, we suggest the design of a consultation process that can be used to resolve such questions when they arise across the legal systems.

4.4 Questions about court orders & Evidence from other courts

While, as indicated earlier, court orders, judicial findings and evidence from earlier court proceedings can often be admitted and considered when a case involves the same parties and similar issues, (subject to judicial assessments of weight), during this project we encountered a number of additional questions and issues that arise when considering the exchange of

124 While the author of this report would identify all of these cases as DV/IPV, it is difficult to anticipate all of the issues that the legal system might be faced with in the future.

information about orders and evidence (in addition to overcoming structural issues discussed earlier). A number of them are outlined in the discussion below.

4.4.1 Court orders & evidence: non-party 'victims'

Domestic violence, family violence and child abuse are not victim specific. The behaviors tell us a great deal about the characteristics and behaviors of perpetrators of family violence but not much, if anything, about the people perpetrators target. We know that many (albeit not all) perpetrators will engage in DV/FV and/or child abuse after separation against new partners and children as new relationships are formed. Indeed, as previously mentioned, even during the limited time frame of the project, we found that ten of the male accused (12%) faced criminal charges associated with two or more female adult complainants. Family violence against any and all 'victims' is relevant to risk to all family members, including children.

Canadian courts have recognized this issue. Listed here are examples of Canadian cases that have recognized the relevance and value of family violence evidence relating to intimate partners other than the complainant in connection with sentencing in criminal cases, for example: *R. v. Hopkins*, 2000 ABCA 23 (CanLII); *R. v. SCC*, 2021 MBCA 1 (CanLII); *R. v. Partridge*, 2005 NSCA 159 (CanLII); *R. v. Prevost*, 2019 ABCA 398 CanLII); *R. v. White*, 2020 ONCA 207 (CanLII). Similarly, evidence of family violence against former or concurrent partners can be relevant when assessing parenting capacity in connection with child best interests: *C.L.M. v. D.G.W.*, [2004] 346 A.R. 381, (2004), 2 R.F.L. (6th) 75, 2004 ABCA 112; *R.C.M.S. v. G.M.K.* (2005), 266 Sask. R. 31, 2005 SKQB 296.

Nonetheless, in connection with mandatory consideration of orders and agreements from other courts and legal systems as set out in legislation, the *Divorce Act. Subsection* 7.8 (2) includes the following phrase: in a proceeding for corollary relief and in relation to any party to that proceeding. Similar wording appears in Subsection 7 (2) of the *Family Law Act*, SNB 2020, c 23. While the phrase would not prevent admission of relevant evidence of DV against former and concurrent partners, *Malik* principles authorizing consideration of evidence from other court proceedings discussed earlier may or may not apply. And the phrase 'in relation to any party' in the legislation may restrict court obligations and authority to obtain criminal, child protection, and civil protection orders and proceedings that relate to non parties. We recommend alignment of the legislation with DV case law outlined earlier. We also recommend government and court policy changes to enable parties and parties' lawyers to access, on request, court orders documenting family violence against non-party family 'victims' perpetrated by any of the parties.

In the child protection field, in connection with screening and DV risk assessment and in connection with child safety, we note the need for risk assessment questions to identify and consider each parent's documented record of violence against current as well as former family members outside of each child's immediate family.

4.4.2 Court records of compliance and non compliance with court orders

Non compliance with court orders is a well-known, empirically documented indicator that a perpetrator of FV presents an enhanced level of risk of harm to family members.[125] Compliance and non compliance records are also helpful to judges and justices when deciding what provisions to include when making decisions and issuing orders. For example, if a court knows that an offender has attended domestic violence programs in the past and has subsequently reoffended, provisions other than ordering attendance at yet another domestic violence intervention program may be required. Similary, when a perpetrator of FV has a documented pattern of breaching criminal or civil no contact orders or weapons prohibitions, reliance on undertakings, agreements, Peace Bonds and consent orders may not be a dependable option for any court. Particularly important in a family law context is Queen's Bench, Family Division access to information about compliance and non compliance with probation orders and breaches of undertakings both in the present and in the past, for example, criminal charges relating to failure to comply with undertakings and orders pursuant to section 145 of the *Criminal Code* and/or failure to comply with a probation order pursuant to section 733.1.

Swift timely access to compliance records from other courts through a court coordinator or directly through shared court records (as suggested in 3.4 and 3.5) is critical information in FV cases. In the family law, civil protection or child protection case the party who was not criminally accused, particularly when self represented, may not be aware of criminal court responses to breaches of agreements and orders and will be unlikely to understand the value of such information to Queen's Bench FD courts. Similarly, in the absence of a court coordinator, criminal crown prosecutors will not necessarily be aware of Queen's Bench FD compliance and non compliance records for consideration in connection with plea discussions, peace bonds agreements, interim release and sentencing provisions. It is unlikely that perpetrators of family violence, particularly self represented perpetrators of family violence, will volunteer such information. This is yet another reason for recommending court rules and or legislation enabling Queen's Bench FD access to records from other courts, as discussed in 3.4, and the need for court coordinators to access and coordinate the flow of information among court systems as discussed in 4.1.

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125 Chapter 8 of Neilson (2020, 2nd edition) note 10.

4.5 Notices of Proceedings and Agreements reached

As discussed earlier at 3.1, the *Divorce Act*, subsection 7.8 (2) imposes a duty on courts to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:

> (a) a civil protection ... proceeding in relation to such an order;
> (b) a child protection ... proceeding, agreement or measure; or
> (c) a ... proceeding, undertaking or recognizance in relation to any matter of a criminal nature

Subsection 7 (2) of the *Family Law Act*, SNB 2020, c 23 includes similar provisions except that, pursuant to subsection 7 (3), courts are obligated to "make inquiries of the parties or review information that is readily available."

As indicated earlier at 3.1 and 3.2, reliance on the parties to obtain and present information about legal proceedings and agreements in other legal systems is not a viable option in DV/FV cases for the reasons discussed earlier. The research team is not aware of any mechanism to ensure that a criminal court judge would be alerted to an accused's involvement in a family, child protection or IPV case or of any mechanism that would ensure that a Queen's Bench FD Justice would be advised of criminal proceedings involving one of the litigants or of agreements or measures adopted by or with child protection authorities. Nor are we aware of any timely, cost effective method Queen's Bench FD courts can use to access this information, despite the legislated requirement to consider it. Thus, in addition to the recommendations in 3.4 and in 4.1, we recommend the implementation of clear policy directives to ensure that such information is shared in a timely and seamless manner with court coordinators and/or with Queen's Bench FD courts without the need for complex, cumbersome applications to obtain the information in each case. In the absence of dedicated, specialized court coordinators, it can be extremely difficult for Queen's Bench FD courts to access up to date records of interim measures, initiated and abandoned proceedings, changes to agreements, release provisions or other court measures across court systems.

4.6 Family violence, Access to evidence of risk and danger: Introduction

The factual indicators of risk and danger in domestic violence cases are both well known and research verified. When a perpetrator's behaviors and the surrounding facts indicate risk

of harm or danger (potential for lethal outcome) everyone in the family,[126] including the children, is at risk and in need of protection. Chapter 8 of Linda C Neilson (2020, 2nd ed.) Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases (Ottawa: Canadian Legal Information Institute, CanLII) explores risk and danger indicator research as well as some of the strengths and limitations of the research verified risk and danger assessment tools. Chapter 8 also provides web links to research and additional educational resources.

4.6.1 Child Protection: DV Risk and danger assessment

While all risk and danger assessment tools have limitations (subchapter 8.9 of Neilson 2020 2nd edition, footnote 10), the research makes clear that research verified DV risk and danger assessment tools are an improvement on professional judgement alone (Neilson, 2020 2nd edition, footnote 10 at 8.9.4). We were informed during the cross-sector-coordinated-court project that child protection services in New Brunswick do not employ a dedicated, research verified tool to assess risk when child protection cases involve DV. We recommend adoption by Social Development of ODARA and DA risk and danger assessments in order to bring child protection services in line with other provincial DV/FV initiatives. We also recommend that social workers who assess child protection matters in New Brunswick receive on-going specialized education on DV/FV.

4.6.2 Evidence of risk and danger

Empirical data tell us that the most serious challenges in family violence cases are ensuring that courts, evaluators, assessors, and lawyers have specialized knowledge and full access to evidence necessary for accurate assessment.

As previously indicated, in New Brunswick, police officers throughout the province use a risk assessment tool known as ODARA to assess potential risk of assault in DV cases. The tool was chosen because it has considerable research support and is not unreasonably time consuming for police to use. ODARA is, however, heavily reliant on the accuracy of police data (yet most intimate partner violence, approximately 70% is not reported to police). The majority of criminal files in Moncton did not include an ODARA score because the tool is research validated for a limited number of specified DV criminal charges. The tool is known to have high reliability in repeat charge cases when police have reasonably complete records of patterns of domestic violence and other criminal behavior associated with the case. Thus a

126 Family structures in Canada are changing. The term family applies not only to male/female nuclear families. The term applies to extended family units, to lesbian, gay, non binary, trans-gender headed families, to single parent families and to families headed by multiple intimate partners.

high ODARA score is a reliable indicator of risk while a low risk score is reliable only to the extent that police have full access to accurate information. Nonetheless, with caution, low risk scores can be helpful. A low risk score can help to identify victims who are criminally accused and/or convicted of criminal DV crime for using violence to resist the relationship.[127] And, when police do have accurate and complete information about the pattern of DV in a relationship, a low ODARA score can be useful in identifying those who engaged in an isolated act of violence without a pattern of coercive control who are unlikely to pose a continuing risk to a child or other family member. It is also important to be clear, however, that ODARA is time and situation limited. For example, an ODARA conclusion early in a criminal career will not be accurate after additional offenses are committed. Risk assessments must be administered repeatedly as circumstances change. It is also important to note that research is ongoing at the Centre for Criminal Justice Studies at UNB Saint John to create and validate a modified family violence risk assessment tool specific to New Brunswick.

In the Judicial District of Moncton, in DV cases, ODARA is placed alongside other evidence in the criminal files submitted to the Crown Prosecutor. Items from ODARA may become part of a “show cause” document. ODARA can provide useful background information to the Crown Prosecutors when seeking release conditions designed to prevent further domestic violence, when considering peace bond agreements and/or when making submissions in connection with sentencing. As indicated earlier the Court Coordinator flags high risk ODARA cases to the Department of Social Development, Child Protection services. ODARA scores are shared within the criminal system with Probation Services after a finding of guilt. ODARA scores can help Probation Officers decide what level of supervision is required and the type of mandatory DV programming the offender should attend. At the moment, however, civil Queen’s Bench FD courts, targeted parties in civil cases, and the lawyers advising or representing them will not necessarily know that an ODARA risk assessment was completed and will seldom have timely assess to the assessment scores or facts supporting the ODARA conclusions.

In addition to ODARA, Victim Services in New Brunswick collects information from victims on a voluntary client basis using a research validated tool to assess the potential for lethal outcome. The assessment tool is commonly referred to as the Danger Assessment or the DA. Except in cases of high danger, sharing DA information requires the victim’s consent. The information collected in support of the DA will often be more comprehensive

127 Because the *Criminal Code* defines prohibited criminal acts in terms of incidents of behavior, it is quite possible for a victim of family violence to be criminally charged and convicted for engaging in victim resistance violence against the dominant aggressor in the relationship. Refer to Part 5 of Neilson (2013) note 112 for a discussion of types of victim resistance violence documented in DV research.

than information supporting the ODARA, because Victim Services collects information known to victims that may not be known to police. Nonetheless, a qualification is in order. Some DAs will be less comprehensive than the information supporting police administered ODARAs when DA assessments are conducted with 'victims' new to intimate relationships, who may not be aware of a perpetrator's pattern of criminal DV/FV conduct against other intimate and former intimate partners. This issue requires additional danger assessment research. It is also important to note concerns that truthful risk and danger information pertinent to DAs may be withheld by 'victims' as a result of pressures exerted by perpetrators or as a result of fears that the children might be removed when child protection services are involved. Danger Assessments are not placed automatically in any court files in Moncton. There are valid reasons for this, some of which are listed in the footnote.[128] Nonetheless, as previously indicated during the discussion of Social Development data, when DA scores indicate extreme danger or severe danger (the latter with the approval of the Regional Director), and a child is involved, Victim Services will alert Social Development (child protection), the police, and the criminal DV court coordinator. The goal is to encourage additional safety measures as well as further investigations to document (and present to courts) the factual evidence necessary to support accurate judicial risk and danger assessment.

It is important to mention here that, as a result of the strengths and limitations of the risk and danger assessment tools and differences in when and what data is collected, conclusions reached by the two tools can differ. We found appreciable differences between ODARA assessments of risk and DA assessments of danger in 16 of the Moncton court file cases. In 13 of those 16 cases, ODARA indicated low to moderate risk while the DA indicated severe to extreme danger of lethal outcome. The ODARA and DA scores were, however, similar in another 16 cases, suggesting the accuracy of both scores in those cases. For all of the reasons discussed in this section, when an assessor is relying on assessment tools to assess risk and danger, access to both tools enhances accuracy.

Nonetheless, risk and danger can also be assessed on the basis of facts. Justices, judges and Masters throughout the legal system have judicial expertise in assessing risk to parties on the basis of facts. Enhancing judicial access to facts enhances the accuracy of judicial assessments.

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128 There are any number of valid reasons for this, such as: fear that disclosure will result in retaliation against the victim, the victim's child, other family members or family pets; the fact that disclosures to victim services are voluntary and confidential; victims may fear the involvement of child protection; some victims seek to protect their abusive partners; others fear that disclosure could result in harmful retaliatory parenting claims. In addition is the issue of expert verification.

In addition to ODARA, the court files (criminal, IPV, Family, and Social Development) often contain factual information that is highly relevant to assessing child best interests and family member risk. Examples include facts set out in admitted family violence expert reports, judicial findings of fact, admitted mental health and substance abuse records, probation records, records of compliance and non compliance with court orders, program completion records, supervised contact with children records, psychological assessments, parenting evaluations, voice of the child reports, school attendance records, records of animal injuries, presentence reports, victim impact statements, judicial assessments of risk associated with interim release. We are recommending enhanced capacity to share relevant findings of fact across court systems in order to enhance accurate judicial assessments of risk and danger while reducing duplication and cost.

Nonetheless, as a result of the need for expert interpretation in order to ensure accuracy and prevent injustice when interpreting ODARA and DA conclusions,[129] as well as the potential risks to targeted adults and children associated with disclosure of information to perpetrators, we are not recommending the automatic sharing of ODARA or DA assessments directly with courts at this time. Nonetheless, we are recommending enhanced use of investigations to document and present facts in response to high risk and danger readings. We also recommend notice that an ODARA was completed across the legal systems. Pursuant to section 7 (a) of the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s.2 victims of crime have the right, on request, to information about "the status and outcome of the investigation into the offence." Presumably, this entitles victims of DV crime to information about ODARA conclusions. We are recommending that parties who have been targeted by DV/FV and/or their lawyers, and possibly Queens Bench FD courts, be informed when an ODARA assessment of a party was completed. This issue requires further cross-sector discussion, however, in order to address and clarify a number of due process and policy-related questions, such as:

- *Should notice that an ODARA was completed by police be sent by the criminal court coordinator to justice officials and Queen's Bench FD justices hearing associated*

129 For example, in one of the court cases examined during this project, the complainant in the original criminal case completed a DA with Victim Services resulting in a conclusion that the victim was in extreme danger of lethal outcome from the perpetrator. Subsequently, the complainant was charged with a DV offense (presumably as a result of manipulation of the targeted adult and the legal system). The original DV offender then completed a DA as 'victim' claiming to be in high danger. DA assessments can be manipulated. Accurate use of risk and danger assessment conclusions, and particularly of DA assessments, requires detailed analysis of the coercion and control patterns in the relationship over time in order to ensure that the assessment tools are being administered with the primary victim rather than with the dominant aggressor. Systems manipulation is well documented in FV cases. Chapter 7 of Neilson (2020 2nd ed) note 10 outlines 36 common litigation tactics employed by perpetrators to gain the upper hand in family law cases at 7.4.

IPV, Family and or Child Protection cases? If so, what policies and practices need to be developed? Given the situational and data limitations of ODARA, while we do recommend that automatic notice of ODARA completion (without particulars) be made available to Queen's Bench FD courts,[130] we also recommend judicial education on the use, strengths and limitations of ODARA prior to implementation of automatic notice. We also recommend similar education for crown prosecutors, judges and justices hearing criminal cases. In connection with criminal courts, however, we are not recommending automatic notice of ODARA completion for due process reasons and because, in the criminal system in Moncton, judges and justices are able to rely on specialized crown prosecutors rather than on targeted parties for evidence.

- *Should notice that an ODARA was completed be automatically conveyed, or conveyed on request, to family crown prosecutors, family legal aid lawyers, Family Law Information Centres, the parties and their lawyers in associated family law, child protection and/or IPV civil protection cases so that the parties or their lawyers may contact the police agency that conducted the ODARA assessment in connection with possible testimony or to seek to have the information admitted on consent?*
- *Are special guidelines needed if the party seeking the information is self represented in the family, IPV protection or child protection case?*
- *What special disclosure and notice rules should apply across legal systems when ODARA scores are very high and a court coordinator is concerned that there is a significant risk of harm to family members (section 33.1) or the disclosure is necessary to protect the mental or physical health or the safety of any individual or group of individuals, (section 46(j) of Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6)?*
- *What if the criminal case has not yet been decided or the charge associated with ODARA score is ultimately discontinued or dismissed? Are special policy rules required to address such circumstances?*

We are not recommending the automatic notice or sharing of DAs with Queen's Bench Courts at this time, for the reasons outlined earlier. This issue is discussed in more detail in the following section in connection with risk and danger information generated by CCR Committees in the Province of New Brunswick.

130 When a QB justice has notice that an ODARA was completed, the justice could, after considering relevance and probative value, request that the parties or their lawyers or the court coordinator make inquiries and, after giving the parties an opportunity to explain, endorse or contest, provide ODARA information to the court.

4.6.3 Risk and Danger Information: CCR Committees, court coordinators, and court systems

The Province of New Brunswick is in the process of implementing a domestic violence coordinated community risk (CCR) management process across New Brunswick, including in the Judicial District of Moncton.

CCR team members work with adult client/survivors in high danger/high risk D/IPV cases[131] to share information about risk and danger. The committees connect victims of family violence with pertinent community partners (such as police, child protection, victim services, mental health, addiction services, transition house staff), share information, create and monitor safety plans. As previously indicated, when assessing risk and danger, the committees rely on the two research-validated DV assessments: ODARA and the DA. The ultimate goal is to enhance victim and child safety. Normally,[132] participation in the CCR program is voluntary and information sharing occurs on the basis of 'victim' consent. CCR team members receive training on administration of tools to assess risk and danger. The CCR committees are generating a wealth of dependable information about the levels of risk and danger victims and family members face in DV cases.

In Moncton, the criminal DV court coordinator currently serves as an information link between the courts and the CCR Committee. While not a direct member of the CCR Committee, the criminal DV court coordinator is available to the Committee to answer questions about how criminal, family, civil IPV protection, and child protection DV cases are processed in the legal system. In addition, on the request of the CCR committee, when a criminal DV case is active,[133] the coordinator may provide copies of active criminal court orders, police undertakings as well as copies of Court of Queen's Bench FD orders (IPV intervention, family law and child protection orders) to the CCR Committee. In addition, the coordinator may confirm dates of hearings, and may alert the Committee to court developments affecting victim risk such as new or altered criminal release provisions, applications for a peace bonds, new or approaching Quee's Bench FD proceedings, approaching trial or sentencing dates, and or court provisions restricting or altering contact with the CCR client or the client's children. This is a very recent (2022) policy initiative. It is anticipated that the exchange of information from courts to the CCR Committee will enhance the CCR Committee's capacity to support victim safety in high risk cases.

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131 The initiative is limited to high risk cases. Contact the Province of New Brunswick for full particulars of CCR implementation and practice policies.

132 CCR committees may share information in high risk cases without victim consent when the sharing of information is necessary to protect personal safety.

133 The criminal court coordinator's role currently ceases once the criminal case is closed, for example, after charges are fully withdrawn or after completion of the criminal sentence.

Nonetheless, while these committees are producing dependable risk and danger information in high risk cases and the information is highly relevant to court decision making, there are no information sharing protocols or legislative provisions in place to govern when, if and how CCR committees might share CCR information with the legal system and/or with the courts. This issue is not straight forward or easy to address. Legal disclosure requirements in the various legal systems produces duties to disclose information to perpetrators of FV. Even notice of a victim's participation in a CCR high risk committee could produce backlash and retaliation. We recommend provincial legislation specific to DV/FV cases to shield CCR committees from obligations to disclose information provided by victims about themselves or their children to perpetrators. We also recommend continuing cross-sector consultations with domestic violence experts on policies and protocols needed to ensure that future sharing of information from CCR committees with court systems enhances safety and does not result in additional risk to victims and children. The author of this report, Linda C. Neilson, has for years recommended detailed information sharing legislation specific to DV/FV cases to ensure safe, timely information sharing while also shielding from disclosure of information that would increase targeted adult and child risk.

4.7 Concluding cautionary comments about information sharing across court systems

While we believe that enhanced sharing of information about risk and danger and the exchange of orders, agreements, processes, and admitted evidence across court systems will enable courts to enhance family well being and safety in DV/FV cases while also reducing duplication and costs, information sharing comes with risks of inappropriate disclosure and misuse.[134] The success of any coordinated court system will depend heavily on knowledgeable court coordinators as well as on educated understandings of DV/FV and of related adult and child safety and child best interests specific to FV cases. Increasing judicial access to facts associated with DV/FV and to information from proceedings in other parts of the legal system will enhance access to justice only if attention is directed to dispelling gender biases that are resulting in unsupported assumptions and scepticism in the legal system and attention to the rights of children to be heard and to be shielded from parents who cause them, their siblings and family members, harm. As indicated earlier, in addition to national initiatives, we highly recommend cross sector specialized DV education at the local

134 Examples of the potential for misuse of cross sector information include: reliance on another court's inappropriate dismissal of DV evidence; reliance on another court's finding of lack of credibility resulting from limited understandings of the effects of trauma in DV and FV cases; erroneous assumptions that claims are false when complainants recant in the criminal system as a result of manipulation or intimidation.

level in each jurisdiction to enable participants to translate knowledge into action in practice. We also recommend continuing research to ensure that cross sector information exchanges, policies and practices are operating as intended so that adjustments may be made, when warranted, to enhance safe, beneficial access to justice for all family members.

PART FIVE: RECOMMENDATIONS

Recommendations generated during the coordinated court project are listed below.

5.1 Legal System

In connection with all court systems (criminal, family, IPV civil protection, child protection), we recommend:

- Adoption of a shared definition of DV/IPV with shared identifying criteria across all legal systems in the Province of New Brunswick so that these cases consistently are identified and flagged (4.3).
- Implementation of a cross-sector consultation and resolution process internal to the legal system in each jurisdiction to respond to questions as they arise about whether or not individual cases fall within the shared definition of DV and the associated identifying criteria (4.3).
- The creation of a province-wide committee to monitor and support consistency in the interpretation of the shared definition among judicial districts.
- Educational efforts to eradicate gender biases and unsupported assumptions about DV/IPV claims.
- Adoption of a fully coordinated-cross-sector-information-flow court model, as an alternative to integrated or combined court models, in DV/IPV cases in New Brunswick for the reasons set out in 3.7 and Part 4 of this report.
- Enlistment of court coordinators (3.7 and Part 4) in each jurisdiction at a senior management or quasi judicial level (4.1.1) to serve as an educational link between courts and communities, and to coordinate the flow of information into, within and across court systems in FV cases (4.1).
- Ongoing research-generated DV education delivered on a cross-legal-sector and a jurisdiction by jurisdiction basis, inclusive of education on:
    - Patterns of DV/FV with a focus on the influences and effects of coercive control on targeted adults and children

- The impact of domestic violence on children, responding to child trauma, connections between engaging in DV and directing abuse at children, connections between engaging in DV and harmful post-separation parenting practices
- Adult trauma and the impact of DV/FV on settlements (2.3.5 and 2.3.8), demeanour and behavior
- The characteristic denial and deflection of responsibility patterns of those who engage in DV/FV
- The litigation tactics perpetrators of DV/FV use in the legal system to confuse and to ensure continuing control
- Facts associated with continuing risk and danger (the potential for lethal adult and child outcome)
- The strengths and limitations of risk and danger assessment tools and their use in the legal system

Specialized subject matter education has become increasingly central as courts move away from applying law to evidence presented by lawyers during hearings and trials to judicial dispute resolution with parties (2.3.8).

- New *Judicature Act* provisions and/or *Rules of Court* enabling Queen's Bench FD access to criminal court and child protection records (3.1 to 3.4).
- Enhanced, timely sharing of court rulings, orders, facts and evidence admitted and considered in one legal system with other legal systems (subject to judicial assessments of relevance and weight), as well as information about processes initiated and discontinued in other courts, when family members are involved in more than one legal system (at the same time or at different times) (3.1 to 3.6). Refer to 4.4.1 in connection with orders associated with 'victims' who are not parties and to 4.4.2 in connection with cross-sector access to court records of compliance and non compliance.
- Automatic notification processes to ensure that all courts are alerted to proceedings in other courts and to the existence of agreements in other court systems when proceedings involve members of the same family (4.5).
- Collaboration and consultation between the criminal and Queen's Bench court systems to develop detailed information exchange protocols in order to create efficient, timely mechanisms to enable the sharing of orders and judicial findings

from Queen's Bench FD courts with criminal crown prosecutors for potential crown consideration and use when making submissions in connection with bail, peace bonds or criminal sentences (3.5).

- A review of court-related government policies and practices (including consultations with judges and justices) to ensure that policies, such as court and Victim Services archiving policies, do not inadvertently restrict court access to pertinent evidence.
- Gender-based analysis to ensure that concerns about restricting the freedoms of those who engage in FV are not overshadowing concerns about victim and child safety and to ensure that concerns about safety do not prevent due process or restrict legal rights, such as presumptions of innocence.
- Continuing DV research to identify what is working well and problems requiring readjustment. The New Brunswick government has a tradition of collaboration and partnership with academic researchers at the Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick as well as with practicing professionals and community service providers in the family violence field. We recommend that the tradition continue.

5.2 Criminal Court

In connection with Criminal courts, we recommend:

- A presumption against criminal courts granting or expressly enabling parenting time with children prior to findings of criminal responsibility or Peace Bond agreements (2.3.2).
- Avoidance of terminology in criminal undertakings, orders and peace bonds suggesting that contact with children is a DV accused or an offender right (2.3.2).
- A presumption that, in most[135] DV criminal cases, decisions about children will be left to Queen's Bench FD courts and or child protection services, given enhanced capacity in those legal systems to consider long term patterns of DV and FV, coercive control, child best interests, and child views and preferences (2.3.2). This recommendation is not intended to prevent criminal courts from imposing restrictions on contact when necessary to address safety concerns.

135 Exceptions, with caution, might include cases in which a complainant independently and separately from the accused, requests that the offender be granted contact with the children, provides assurances of child safety and assurances that the request was not the result of perpetrator manipulation or coercion.

- Creation of cross sector mechanisms to allow criminal courts to access and consider (subject to assessments of weight) Queen's Bench FD findings and orders involving the same family members when making interim release and or sentencing decisions (3.5).

- Review of criminal court file and Victim Services archiving policies and practices to ensure that the policies do not make relevant criminal court evidence and records difficult for Queen's Bench FD courts or civil parties to access when the criminal offender (or former criminal offender) is a party in the civil case.
- Consideration of child and adult trauma and the effects of DV in connection with responses to plea discussions, interim release, peace bond provisions and sentences.
- Subject to addressing the education and policy issues identified in 4.6.2, implementation of notice provisions to ensure that criminal courts notify the Court of Queen's Bench, FD and child protection services when an ODARA was completed in an associated criminal case.
- Implementation of policies to allow 'victim' of crime access to ODARA assessments following findings of guilt or criminal responsibility in the criminal system (4.6.2).

5.3 Social Development

In connection with Social Development, we recommend:

- Creation of information exchange protocols to ensure that Queen's Bench FD courts are notified (and may obtain copies of agreements and orders) when the parties involved in family law or in IPV civil protection cases are or have been involved in child protection proceedings or have entered agreements with child protection services in connection with the children.
- Screening by Social Development of all social development child and adult support and protection cases for the presence of DV, using screening questions endorsed by DV experts (2.3.3).
- Consideration of ODARA and DA risk and danger assessments when child or adult support and child or adult protection cases involve DV.
- Development of safety policies and practices to protect 'victims' and children when applications for child support involve DV/FV in high risk cases (2.3.3).
- Specialized ongoing, mandatory DV education for all social workers handling child protection or support cases, particularly in connection with indicators of risk and

danger to adults and to children, connections between perpetrating DV and child abuse as well as harmful parenting following separation (2.3.3, 4.5).

- Implementation of a shift in philosophy and approach when child protection cases involve DV from holding victims of DV responsible for failure to protect children from perpetrators to an institutional onus on child protection services to offer support and safety to victims and children along with policies and practices to bind perpetrators and to hold them accountable (2.3.3).
- Enhanced use of provisions to remove perpetrators of DV/FV from children's homes as an alternative to removing children and research monitoring to assess such practices (2.3.3).
- Consideration of each parent's record of violence against former family members outside of each child's immediate family in addition to considering records of violence within each child's family (4.4.1).

5.4 Family Law

In connection with Queen's Bench FD family law cases, we recommend:

- In addition to specialized cross sector education, screening for DV (2.3.8) and knowledge of special processes that can be used to enhance equitable participation when judicial settlement processes involve DV (Chapter 18 of Neilson, 2020 2nd edition, note 10)
- Avoidance of joint or shared parenting responsibility agreements and orders in DV cases (2.3.5).
- Creation of cross sector information exchange mechanisms to allow criminal court access to Queen's Bench FD findings and orders when criminal interim release and or sentencing decisions relate to members of the same family (3.5).

5.5 Intimate Partner Violence Intervention Act cases

In connection with IPV Intervention cases, we recommend:

- Research to ascertain the reasons weapons restrictions are not being requested (2.3.4) with educational responses if necessary
- Gender based analysis to ensure that concerns about restricting the freedoms of those who engage in FV are appropriately balanced with addressing concerns about victim and child safety (2.3.4).

- Adoption of mechanisms to ensure that criminal and family crown prosecutors, child protection services, and Queen's Bench FD courts are alerted when IPV proceedings are initiated, abandoned or concluded, along with, on request, findings of fact and particulars of IPV orders 3.1 to 3.7 and Part 4).
- Enquiries to rule out intimidation and or manipulation when 'victims' seek removal of civil protection. A list of suggested questions to rule out intimidation and manipulation can be found at 9.3.1.18 of Neilson 2020 note 10.

5.6 Community services associated with courts

In connection with community services, we recommend:

- Implementation of policies to ensure that police consistently notify criminal crown prosecutors when children are involved in DV/FV criminal charge cases
- Legislation specific to the exchange of information among community services in DV/FV cases
- Legislative provisions explicitly shielding CCR committees and members from responsibilities to disclose information about victims or children conveyed to or discussed within CCR committees.
- Modification of risk and danger assessment tools in accordance with evolving research.
- In connection with information sharing among court-related services, continuing collaboration to address professional challenges associated with sharing information in DV/FV cases including:
    - Maintaining confidentiality and trust in professional-client relationships
    - Supporting, subject to child and adult safety, client choice
    - Working with clients to assess what information should be shared and shielded in order to prevent retaliation and harm
    - Avoiding the unnecessary sharing of personal information not associated with reducing risk or promoting safety
    - Keeping in mind legal disclosure obligations that could result in information reaching perpetrators and putting family members at risk
    - Limiting the sharing of information to those who understand the complexities of DV and who have the educational and professional capacity to use the information to enhance safety

5.7 Creating Coordinated Courts: Project recommendations

Although we began this project with an already well-established, successful coordinated DV criminal court model spanning the Provincial and Queen's Bench Courts, projects of this nature require the participation, cooperation and collaboration of:

- Masters, judicial officers, judges, justices from all relevent courts
- Numerous government departments (in our case, in New Brunswick, Justice, Public Safety, Social Development, Women's Equality Branch) in order to align government policies with cross-court-sector initiatives
- DV-related community services (for example, police, Crown and private practice lawyers, FV intervention services, Caring Dads programs, DV counselling programs, Transition Houses, Immigration services, Mental health and drug and alcohol services, Educational programs, Health providers).

Judicial leadership and involvement is central. Effective models must respond to the practical judicial and professional realities of those who work in the legal system. Attending to trust and professional relationship building across institutional systems that have tended to work in silos is critical in order to overcome institutional structures and barriers. Building trust and collaboration takes time. Consequently, in the future we recommend a minimum of five years' duration for projects of this nature.

Appendix 1

The Criteria Used to Identify Domestic Violence Cases in the Moncton Jurisdiction

(prepared by Joanne Boucher)

The Provincial Court – specialized Domestic Violence stream, in the Moncton NB region, handles cases of domestic violence involving accused age 18 years and older. Given the broad interpretations associated with the term "domestic violence", for the purpose of our work, domestic violence is defined as:

> Domestic Violence occurs when a person who is or who was involved in an intimate personal relationship, uses abusive, threatening, harassing, or violent behaviour as a mean to psychologically, physically, sexually or financially coerce, dominate and/or control their partner/former partner.

Furthermore, domestic violence (DV) occurs when an accused resorts to abusive, threatening, harassing or violent behaviour towards the ex-partner's relatives, friends, or new partner to psychologically dominate and control the victim. The term 'intimate personal relationship' refers to current and former married, common-law, and dating relationships.

In cases of DV, the victims are predominantly women. However, DV can involve persons of either gender and can include persons who are, or were, involved in a heterosexual or same sex relationship.

In NB, a unified DV definition was adopted by Police Services and the Office of the Attorney General.[136] The definition of DV is also found in the Province of New Brunswick's Woman Victims of Abuse Protocols.[137]

The criterion to designate a case DV begins with police. Police are guided by the definition of DV domestic violence and consultations with their supervisor and the Crown Prosecutor designated to the DV Court or DV Crown Prosecutor's unit. When a case is identified as DV in the Moncton jurisdiction, the case is flagged. All of the police forces in the jurisdiction use the same Prosecutor Information Sheet which provides clear identification of DV complaints linked to the applicable provisions of the Criminal Code. Police transmit the Prosecutor Information Sheet and files to the Crown Prosecutors clearly identified as DV to be processed through a charge screening and Crown Prosecutor charge approval process.

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136 Office of the Attorney General, "Intimate Partner Violence" in *Public Prosecutions Operational Manual* (Fredericton: Government of New Brunswick) on line.

137 Province of New Brunswick (2014) *Woman Victims of Abuse Protocols* (Fredericton: Government of New Brunswick). Please note this document was updated after this report was written.

The Crown Prosecutors follow the directions set out in the Intimate Partner Violence provisions of the Public Prosecutions Operational Manual and are guided by the DV definition.

The DV definition itself is broad. This can result in internal police-crown-court-coordinator discussions and consultations about whether or not a case qualifies as DV, particularly when cases involve complex DV relationships that generate multiple potential charges. Some examples are included in the discussion below.

The criteria used to identify a DV matter focus on the intimate partner relationship or former intimate partner relationship. When deciding if a case is a DV matter, considerations include whether the alleged offense was connected to the relationship or former relationship. Other considerations include who was targeted by the alleged criminal behavior and the relationship between that person or persons and the intimate or former intimate partner. For example, domestic violence perpetrators may engage in criminal conduct against new partners, parents, friends, relatives or children of the intimate or former intimate partner (and in fact anyone who supports or assists the former partner) in an effort to harass, dominate, coerce or control the intimate partner or former partner. Other questions are associated with the identity of the alleged perpetrator of the crime. Is it DV if the criminal behavior is conducted by a third party (for example, a friend or relative of an intimate partner or former intimate partner) in order to harass, dominate, coerce or control the other intimate partner or former partner?

Additional questions relate to criminal charge designations and priorities. If the alleged criminal behavior is conducted against a child to intimidate or control an intimate or former intimate partner, is it a DV case or should the case be categorized and processed as child abuse? If the alleged violence is committed by a person who is in a position of trust (for example a teacher against a student) and the teacher had an intimate relationship with the student, is it DV or should the charge be categorized as a criminal breach of trust? New forms of crime associated with the use of social media add to the complexity of assessing such issues (for example, section 162.1 of the Criminal Code). Does the case involve an intimate partner relationship if the alleged complainant and the person to be charged have exchanged intimate communications and/or intimate personal images through social media, there has been no direct physical sexual intimacy, and harassment, intimidation and/or a breach of 162.1 ensues? These and related questions are not easily addressed.

Responding to these questions requires considerable knowledge of the dynamics of DV in intimate relationships. In the Moncton criminal court jurisdiction specialized DV stream, the DV Court Coordinator, the specialized DV Crown Prosecutors and the police are guided by the definition of DV and by detailed analysis of whether or not the elements of abusive, dominating/controlling, or coercive control behaviors are present in the alleged criminal behavior.

After a case is designated DV, the last step is an assessment by the specialized DV Crown Prosecutors who will assess whether the evidence presented by the police is sufficient to support the proposed criminal charge or charges.