

***Enhancing Civil Protection  
in Domestic Violence Cases:  
Cross Canada Checkup***

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## 1 Author's Comments

This paper, written from a domestic-violence-research perspective,<sup>1</sup> offers information and research-evidence-informed options to enhance civil

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protection in domestic violence cases in Canada. The paper does not offer or purport to offer legal advice. Legal cases involving intimate-partner-violence (hereafter referred to as Domestic Violence or DV) are both extremely complex and case specific. Legal advice is strongly recommended in all DV cases (criminal, civil, family, and child protection). The paper is designed to support the work of lawyers and service providers who offer assistance to families in DV cases. It connects conclusions drawn from domestic-violence research to case law and statutes. It does not, however, connect domestic-violence research, case law, or statutes to individual circumstances or case characteristics. Legal advice is required for such purposes.

## 2 Introduction

Concerns about the operation of civil protection order proceedings in intimate-partner/domestic violence (DV) cases have been raised repeatedly in legal-system research in many jurisdictions, including Canada.<sup>2</sup> Yet effective civil protection orders can make the difference between lives harmed and lives saved. In a search for solutions, this paper connects domestic-violence research, research on the operation of legal systems in domestic violence cases, and civil protection processes and options (case law and statutes) across Canada. The goals are to support the work of professionals and to enhance the health and safety of families and children in DV cases.

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2 For example: Advisory Council on the Status of Women (2004) *Protection for Victims of Domestic Violence*; Ginny Santos, Ontario Women's Justice Network (2006) *A Comparative Look at Protection Orders Across Canada* (OWHN); Australia: Heather Douglas (2007) "Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders" 31(4) *Criminal Law Journal* 200-233; Lesley Laing (2013) "[It's Like this maze that you have to make your way through](#)" (Law and Justice Foundation); United States: National Council of Juvenile and Family Court Judges (2010) *Civil Protection Orders: A Guide for Improving Practice* (Reno, NV: NCJFCJ) Nikki Hawkins (2010) "[Perspectives on Civil Protection Orders in Domestic Violence Cases: The Rural and Urban Divide](#)" 266 *NIJ Journal*; James Ptacek (1999) *Battered Women In the Courtroom* (Northeastern University Press); Australia: Law Reform Commission of Western Australia (2013) *Enhancing Family and Domestic Violence Laws Discussion Paper* Project no. 104.

For purposes of this paper, the term **‘civil protection’** excludes discussion of criminal protection orders, such as peace bonds, and orders pursuant to child protection legislation. Nonetheless the term includes discussion of civil protection options pursuant to:

- federal, provincial and territorial family law legislation
- provincial and territorial marital property legislation
- provincial/territorial DV prevention statutes (listed in [Chapter 16.1](#)).

The report adopts a problem-solving approach. PART ONE identifies principles of practice associated with effective options generated from analysis of sociolegal evaluations of the operation of the legal system in DV cases. PART TWO connects the principles discussed in Part One to particular types of protection proceedings across Canada (DV prevention legislation, restraining order legislation, and protection legislation connected to possession of marital home and personal property). PART THREE identifies gaps in Canadian legislation that, if addressed, could enhance family health and safety.

## **PART ONE: Civil Protection Principles**

### **3 Civil protection in social context**

*“In the act of seeking protection, a victim is placing her trust and safety in the hands of numerous professionals: from the advocates and attorneys who explain the system and assist the victim in obtaining an order; to the judge who crafts an order appropriate to the victim's unique needs; to the law enforcement officers who serve and enforce the order; and to the prosecutor who prosecutes violations. Anywhere along that complex chain, a victim can find that the promise of the civil protections order system is either kept,*

or broken”<sup>3</sup>.

Thus our first collective challenge is systemic: ensuring that every link in the civil protection chain is connected and operating in unison. Empirical research demonstrates clearly that domestic violence cases fail at the weakest links in our systems.<sup>4</sup> Legal systems do not operate in isolation; they depend on dedicated professionals, service providers, judges and communities working together. When any link in the civil protection chain is damaged or broken, the system fails to protect ‘victims’<sup>5</sup> children and families.

The second challenge is both universal and interpersonal. Gender-based violence against women is identified worldwide as one of the world's most pressing human rights concerns.<sup>6</sup> While either men or women can be targeted by DV, and anyone who is targeted and is genuinely fearful is

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3 National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [\*Civil Protection Orders: A Guide for Improving Practice\*](#) at page 1.

4 Linda C. Neilson (2012) *Enhancing Safety: When Domestic Violence Cases are involved in multiple legal systems (criminal, family, child protection). A Family Law Perspective* (London: Centre for Research & Education on Violence Against Women and Children, Western University). Monograph, 151 pages, web publication.

5 The term ‘victim’ is not without controversy. Many experts prefer the term ‘survivor’ because the term better reflects the fact that people targeted by domestic violence are not and should not be viewed as helpless or powerless. Many, perhaps most, people targeted by domestic violence engage in considerable effort, requiring considerable courage, to leave these relationships. This is an important concern. Nonetheless the term ‘victim’ will be used interchangeably in these materials with the term person targeted by domestic violence, 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 legal system, particularly the family law system, responds to people targeted by domestic violence at a time when the implications and effects of domestic violence are at their height. In such circumstance, while the term is imperfect, ‘victim’ does bring to mind stress, vulnerabilities and increased risk that are present at that time.

6 The United Nations has declared violence against women a gender-based, international human rights concern: [\*The United Nations Special Rapporteur on violence against women, its causes and consequences\*](#). See also: December 2014: [Violence Against Women – A Pervasive human rights violation calls for a binding standard of accountability at the international level](#). Columbia Law School (2010) [Human Rights & Domestic Violence An Advocacy Manual](#); World Health Organization (2014) [Violence Against Women Fact Sheet](#); United Nations Development Fund for Women (2003) *Not a Minute More: Violence against women around the world*; The United Nations Special Rapporteur on Violence Against Women (2009) [15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences](#) (Office of the United Nations High Commissioner for Human Rights).

deserving of protection, nuanced understandings of the complexities of DV make it clear that women are, as a result of social and cultural expectations associated with gender, the primary targets of coercive DV.<sup>7</sup> While gender-neutral terms used in the materials are inclusive of men as well as of women, the intention is not to discount or to ignore the clear empirical evidence that coercive DV is primarily directed against women.

The third challenge is pragmatic. We know that many, perhaps most, perpetrators of coercive DV fail to comply fully with civil restraining and civil protection orders. Nonetheless we also know that the orders usually help by:

- reducing the severity and frequency of abuse and violence
- deterring some perpetrators entirely, particularly if intervention is early, before DV is entrenched<sup>8</sup>
- sending a message that the legal system will not tolerate domestic violence (DV)
- encouraging use of safety planning<sup>9</sup> and enhancing public confidence in the legal system<sup>10</sup>

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7 In order to understand this issue, one must begin with a clear understanding of the types, patterns and implications of DV in intimate and formerly intimate partnerships. See, for example, [Part 5](#) of Neilson, Linda C. (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).

8 National Council of Juvenile and Family Court Judges, Family Violence Department (2010) note 3; T.K. Logan, Robert Walker et al. (2009) [The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs](#) (National Center for State Courts). K. Lund et al. (2004) [Her story of woman abuse and the P.E.I. justice system \(Muriel McQueen Fergusson Family Violence Research Centre\)](#).

9 Judith McFarlane et al. (2014) “Is Length of Shelter Stay and Receipt of a Protection Order Associated with Less Violence and Better Functioning for Abused Women? Outcome Data 4 months After Receiving Services” 29(15) *Journal of Interpersonal Violence* 2748-2774.

10 [Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation](#). Prepared for Federal-Provincial-Territorial Ministers Responsible for Justice (2003); J. McFarlane et al. (2004) “Protection Orders and Intimate Partner Violence: An 18-month study of 150 Black, Hispanic and White Women” [American Journal of Public Health 94\(4\) 613-618](#); James Ptacek (1999) note 2; S. L. Keilitz, C. Davis et al. (1998) “Civil Protection Orders: Victims’ Views on Effectiveness” *NIJ Research Preview*; V.L. Holt, M. A. Kernic et al. (2002) “Civil Protection Orders and Risk of Subsequent Police-Reported Violence” [Journal of the American Medical Association 288 \(5\): 589-594](#); V.L. Holt, M. A. Kernic et al. (2003) “Do protection orders affect the likelihood of future partner violence and injury?” *Am. J. Prev. Med.* 24(1): 16-21.

It is important to keep in mind that civil protection orders alone are not always effective in every DV case because:

- Separation can increase risk and danger (particularly for women).<sup>11</sup>
- Service of an application for civil protection can spark violent retaliation;<sup>12</sup>

Risk and danger assessment as well as safety planning are warranted. In connection with risk and danger assessment, see, for example, Parts 6 and 7 of Neilson, Linda C. (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).

- Civil protection orders tend **not** to be effective against violators who:
  - have little respect for the law
  - have underlying mental health or personality disorders and established histories of abuse and violence<sup>13</sup>

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11 Risk refers to the likelihood non-lethal DV will continue; danger refers to potential for lethal outcome. The indicators differ; thus both terms are used here. The risk and danger at separation documented in the research applies particularly to women. Nonetheless statistical discussions relating to domestic violence and gender do not always distinguish patterns associated with opposite sex relationships from patterns associated with same sex relationships. Intimate male partners targeted by male domestic violators may also experience enhanced risk of violence at separation. In connection with enhanced danger at separation, see: Statistics Canada report at p. 10; (2009) [Family Violence in Canada: A Statistical Profile](#) 85-224-x. T. Hotton (2001) Spousal Violence After Marital Separation. [Juristat 21\(7\) Statistics Canada – Catalogue no. 85-002-XIE](#). Jennifer Martin and Rhonda Pritchard (2010) [Learning from Tragedy: Homicide within Families in New Zealand 2002-2006](#) (New Zealand, Ministry of Social Development); D. A. Brownridge (2006) “Violence Against Women post-separation” in *Aggression and Violence Behaviour* 11 (2006) 514-530.

12 *Michigan Domestic Violence Benchbook* (2009, 2010) (Courts Michigan) at 6-6; Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts); S. L. Keilitz, C. Davis *et al.* (1998) “Civil Protection Orders: Victims’ Views on Effectiveness” NIJ Research Preview; N. Robertson, R. Busch *et al.* (2007) [Living at the Cutting Edge Women’s Experiences of Protection Orders](#) (University of Waikato) G. McOscar (2000) “Restraining Orders May Incite Domestic Violence” in T. Roleff (ed.) *Domestic Violence: Opposing Viewpoints* (San Diego: Greenhaven Press) at 134-138; Vera (2006) [Engaging Respondents in Civil Restraining Order Cases: A New Approach to Victim Safety](#) (Vera Institute: [Enhancing Responses to Domestic Violence. Promising Practices from the Judicial Oversight Demonstration Initiative](#)); T. K. Logan, L. Shannon, R. Walker, T. M. Faragher (2006) “Protection Orders: Questions and Conundrums” *Trauma, Violence & Abuse* 7(3): 175-205. See also Washington State Death Review by Jake Fawcett, Kelly Star and Ankita Patel (2008) *Now That We Know Findings and Recommendations from the Washington State Domestic Violence Fatality Review*. Two of the 11 deaths examined occurred as a result of escalating violence following service of notice of application for a protection order. Despite applications for protection before courts, the victim was not referred to a domestic violence advocate or expert for danger assessment and safety planning.

13 *Ibid.* See endnote 12 also: TK Logan and Robert Walker (2009) “Civil Protection Order Outcomes Violations and Perceptions of Effectiveness” 24(4) *Journal of Interpersonal Violence* 675-692; Andrew Klein (2009) [Practical](#)

- have traits associated with a potential for lethal outcome (see Part 6 of *Enhancing Safety* cited above).

In these cases [Criminal Code](#) options with close supervision are needed in addition to civil protection.<sup>14</sup>

People who are targeted by DV are not always aware of their own danger or of the danger those who engage in coercive DV pose to children.

Consequently there is a heavy onus on lawyers, the legal system and associated services to become very familiar with indicators of risk and danger. Nonetheless people who are targeted by intimate partners are often best able to judge whether or not seeking a civil order will reduce or increase their own level of risk or danger. Pressuring someone who has been targeted by DV, who has been made fully aware of their own level of risk, against their will, to seek a civil protection order is not necessarily a safe option.

Depending on the level of risk and danger, intensive safety planning may be a better option in these cases. Civil protection cases require considerable legal-system support as well as serious consideration of the views and perspectives of the predominant 'victim'.<sup>15</sup>

Thus, despite high rates of failure to fully comply, when a targeted adult does seek civil protection, protection should not be refused on the grounds that the violator is unlikely to comply or on the basis that a criminal order has been or can be granted. Civil orders can offer a broad range of protective options in addition to those available in a criminal context.

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[Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges](#) (National Institute of Justice, U.S.).

14 See endnote 8 Civil protection orders in some jurisdictions may be issued for longer periods of time than options for protection pursuant to the [Criminal Code](#) thus providing protection after *Criminal Code* orders expire. Discussion of *Criminal Code* responses to DV is outside the scope of this paper. Multiple protection orders (criminal and civil) offer enhanced protection provided that the provisions are not contradictory.

15 The term 'victim' is not without controversy. See note 5.

## **4 Research-Informed Civil Protection Practice Principles**

### **4.1 Research-informed collection of evidence**

From a research perspective, the first step in any effective civil protection system is securing accurate, full and complete information about the type, pattern and frequency of the DV. Specialized questions and methods of gathering evidence are needed for such purposes. See, for example, [Part 4](#) of Neilson, Linda C. (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)

### **4.2 Keep in mind perpetrator litigation tactics**

In addition to complete information, knowledge of common perpetrator litigation tactics can help to ensure preventative measures and appropriate responses to such tactics if they occur. Some of the more common litigation tactics in civil protection proceedings (derived from DV case law and research) are listed here:

- Attempts to present evidence of child harm from DV in the home as evidence of the other parent's poor parenting.
- Presentation of positive public reputation evidence in an effort to discredit claims associated with private behavior.
- Attempts to deflect attention from evidence of DV by claiming the presentation of evidence of DV is merely the other party's attempt to alienate the children or the other party's attempt to secure advantage in the custody and access case.
- Initiating a claim for civil protection against the targeted party (for

example *Doncaster v. Field*, 2013 NSSC 85 ([CanLII](#)) and *D.E.M. v. J.M.M.*, 2011 PECA 16 ([CanLII](#)), presenting misleading evidence in order to secure tactical advantage and to regain control. See, for example: *Ducharme v. Borden*, 2014 MBCA 5 ([CanLII](#)).

- Intimidation and manipulation, including subtle forms of intimidation, in and outside the court, that only the targeted party or a DV expert can detect, with a view to instilling fear, to producing withdrawal of claims, and or to preventing the presentation of evidence.
- Manipulation of the legal system (for example, by provoking violence and then calling the police, cancelling car insurance and then calling the authorities, or otherwise setting up the other party to engage in negative behavior in order to gain legal advantage). The effects of this pattern are reflected in criminal justice data which, in the absence of specialized dominant-aggressor police charging policies, document high rates of dual charging and intimate-partners, subjected to a pattern of coercive DV in the past, being arrested and convicted criminally for violent acts of resistance.<sup>16</sup>
- Claims that the targeted party is mentally ill or misuses alcohol or drugs. Sometimes these claims reflect genuine concerns; often, however, these behaviors are initiated and controlled by the violator and/or are the targeted party's response to emotional harm from DV.
- Claims the other party was also violent.
  - When both parties have engaged in violent acts, it is important to conduct a detailed examination of social context, pattern and type of DV (see [Part 5](#) of [Neilson, Linda C. \(2014\)](#))

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16 Edward Gondolf (2012) “Physical Tactics of Female Partners Against Male Batterer Program Participants” 18(9) *Violence Against Women* 1027-1044; D. Gardner (2007) “Victim-Defendants in Mandated Treatment, An Ethical Quandary” *Journal of Aggression, Maltreatment and Trauma* 15(3/4): 74-93; N. Graham-Kevan and J. Archer (2003) “Intimate Terrorism and Common Couple Violence: A Test of Johnson’s Predictions in Four British Samples” *Journal of Interpersonal Violence* 18(11): 1247-1270; K. A. McCloskey (2007) “Victims of Intimate Partner Violence: Arrest Rates Across Recent Studies” *Journal of Aggression, Maltreatment and Trauma* 15(3/4): 27-52, “Are Half of All IPV Perpetrators Women?: Putting Context Back Into the Intimate Partner Violence Research Field” *Journal of Aggression, Maltreatment and Trauma* 15(3/4): 7-25; P. Romito (2008) *A Deafening Silence* (Policy Press).

[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), the pattern of coercion and control, and each party's level of fear of the other. Analysis by a DV expert is advisable.<sup>17</sup>

- Legal claims of child abduction and or unilateral relocation with the child. On the one hand, child abduction can be harmful to children and DV is one of the indicators of risk of abduction. On the other hand, relocation (with children) can be a rational response to protect children from the effects of DV (See [8.5](#) of *Enhancing Safety*). In a civil protection context, the case law and research document a pattern of domestic violators claiming child abduction and/or the other parent's unilateral relocation with the child in DV cases and then making use of the legal system to regain control (via a civil protection order, and ex parte application for custody, and/or an order for the return of the child.) It is important, when DV is a factor, to explore fully the surrounding circumstances of unilateral relocation and abduction claims in order to ensure child and adult safety.

### **4.3 During the hearing**

In addition to perpetrator litigation tactics that can mislead, professional in the legal system are faced with behaviors of the targeted person in civil protection proceedings that can be confusing and difficult to interpret. Social-science research tells us that DV can produce traumatic injuries that affect how targeted intimate partners relay evidence and present themselves

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<sup>17</sup> Note that while the presence of fear has been verified to be an accurate predictor of risk, the absence of fear is not an assurance of safety. Note as well that victims of coercive DV commonly engage in violent acts against their abusers. See sources listed in note 16. See also Janet Fanslow et al. (2014) "Hitting back: Women's Use of physical violence against violent male partners, in the context of a violent episode" *Journal of Interpersonal Violence*. There is only way to accurately determine responsibility for DV: collect information on the patterns of abusive and violence behavior over time and assess in social context: L. Neilson (2004) "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" *Family Court Review* 42 (3) 411-438.

to lawyers, service providers and courts. For example, post-traumatic stress, a well-known consequence of DV, can affect 'victim' witness testimony and demeanour by causing: difficulty giving testimony in a linear, time-ordered sequence; difficulty recalling collateral details surrounding the violence; emotional detachment (for example testimony given in an unemotional, flat, detached manner); difficulty offering complete information about abuse and violence, particularly in stressful surroundings (a protective response to avoid memories); and exaggerated startle-and-defense responses that can resemble anger, hostility and aggression. In the absence of analysis by a DV expert, these 'normal' patterns in testimony and demeanour<sup>18</sup> are easily misunderstood. In addition, subtle forms of intimidation may prevent full articulation of evidence and claims.

In response to some of these issues, American Judges Steiner and Kaan developed a checklist for judges hearing civil-protection DV cases. Although the "Best Practice Protection Hearings Checklist" was developed in the United States for American judges, some of the suggestions could prove useful in Canada. Consequently, they are repeated here.<sup>19</sup>

- Ask if there are any criminal charges pending. If yes, and the party is self-represented, warn the respondent that anything he or she says could be used against him or her in the criminal proceeding; advise of options (in Canada, the right to invoke section 5 of the *Canada Evidence Act*, R.S. , c. E-10, s. 1).
- Ask the respondent if (s)he has read or knows of<sup>20</sup> the particulars of the allegations.

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18 Mary Ann Dutton "Pathways Linking Intimate Partner Violence and Posttraumatic Disorder" (2009) 10(3) *Trauma, Violence & Abuse* 211-224; Michelle Dennis, Amanda Flood et al. "Posttraumatic Stress Disorder or Major Depressive Disorder" (2009) 15(5) *Violence Against Women* 618-627

19 See also: National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [\*Civil Protection Orders: A Guide for Improving Practice\*](#). The complete Steiner and Kaan checklist is not presented because some of the issues in the checklist are discussed elsewhere and in part because some of the entries are not applicable in a Canadian context. This checklist was included in materials associated with the National Council of Juvenile and Family Court Judges' (US) *National Conference on Domestic Violence* in Boston Massachusetts, September 2006.

20 People who are blind or illiterate may not have read the particulars yet may still be aware of them.

- Let the parties know that you have read the materials in the court file.
- Ask about particulars and violations of any past or existing protection orders (if any).
- Ask if any violations or intimidation has occurred on or near court premises.
- Inquire about weapons ownership/possession and explain weapons prohibitions (for further discussion of this issue, see discussion of weapons restrictions at 8 below).
- Victims should, if at all possible, be asked about violations and about concerns relating to weapons separately from the other party.<sup>21</sup>
- The best option for questioning victims, if it is available, is questioning by a DV advocate/expert, who can advise the court about safety concerns while shielding confidential information.<sup>22</sup>
- Make a note of the demeanour of the parties – be alert to any subtle signs of intimidation;<sup>23</sup> put a stop to such behaviour.
- If the targeted person’s testimony wanders, redirect the testimony to relevant matters.<sup>24</sup>

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21 Full disclosure is unlikely in the presence of the violator, particularly in cases involving high levels of fear.

22 One difficulty associated with mediator or judicial questioning is associated with neutrality. A survivor of DV can have excellent reasons relating to safety or to the welfare of children for not wanting particulars of complaints about non-compliance and/or about weapons or child abuse disclosed to a violator. For example, when children disclose child abuse to a parent and the abuse is both not readily provable and is known only to the perpetrator and to the child, a protective parent may decide not to disclose in order to prevent the perpetrating parent's retaliation against the child and or to spare the child involvement in the litigation process. A DV advocate/expert could advise on safety issues without necessarily divulging particulars of confidential communications. On the other hand, it is recognized that expert evidence and advice may not always be a viable option, given the need, in many of these cases, to address swiftly immediate safety concerns.

23 Perpetrators of DV employ subtle forms of intimidation that may be known only to the targeted person. For example: a raised eyebrow or a flick of the hand can be a form of intimidation when those gestures accompanied violence in the past. Exercise caution when interpreting gestures from people from other cultures. Check (independently of the violator) the meaning of the gesture for the victim. A cultural expert can be advisable.

24 Exposure to DV can produce traumatic harm and psychological reactions that make it very difficult for the person targeted to recite incidents of abuse in linear time sequence. In addition, severe or repeated DV can produce a psychological avoidance of memories of the abuse and violence and the details surrounding their occurrence. This is one of the reasons victims of DV will often stray from the central facts during testimony. One of the ways judges, lawyers and service providers can help to ensure accurate information is to ask for clarification of time sequence and to respectfully return the witness to the issues. Professionals and judges, particularly male professionals and judges, will want to keep in mind their own authority, gender and power and the fact that these witnesses have been violently targeted by men in the past.

- If the alleged violator is self-represented, redirect the testimony if there is a failure to address the allegations. Do not allow the respondent to control the hearing by discussing issues unrelated to the allegations before the court.
- Explain the reasons for the civil protection ruling and clarify the nature of personal responsibility.
- Explain, using non-technical language, the terms of the order and the potential legal consequences of violation.
- Explain to both the 'protected person' and to the person bound the sorts of incidents, threats, monitoring, intimidation and abuse that would constitute a breach of the order and justify a complaint to police or a return to the court for enforcement (this additional provision was suggested by retired Judge Eugene Hyman, of California).<sup>25</sup>
- Require the respondent to remain in the court room for at least five minutes after the other party leaves.

See also: American Judges Association educational modules, [Effective Adjudication of Domestic Abuse Cases, Education Module 2, on Civil Protection Orders](#).

Additional research-informed practices to enhance civil protection proceedings in DV cases are offered below in [Chapters 4.4 through 4.16](#) below. The suggestions were generated by connecting two lines of research – 1) DV (social-science and medical) research to 2) legal system research (Canada, United States, Australia, United Kingdom, New Zealand) – and then connecting both lines of research to Canadian civil protection legislation and case law. While the suggestions are drawn from multiple sources too numerous to list here, some of the primary sources specific to civil protection processes are listed in the footnote.<sup>26</sup>

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<sup>25</sup> This type of information benefits both the respondent and the protected person since it makes both aware of their respective rights and responsibilities. 'Protected persons' are not always sure what sorts of incidents should be reported to police.

<sup>26</sup> National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#); U.S. Department of Justice, Office of Justice Programs (1998)

## 4.4 Securing case-specific information from other proceedings

Civil proceedings can be made more effective by ensuring consideration of up to date information relating to past and present criminal charges and convictions; police and service provider evidence such as conclusions from risk and danger assessments; child protection orders; existing family, civil, and criminal court orders granted by other courts affecting the family; and information about prior legal proceedings. Potential options to enhance the exchange of information are listed below.<sup>27</sup>

- Court protocols could ensure the automatic exchange of court orders and filed agreements among civil, criminal, child protection and family courts in DV cases in order to reduce the danger of conflicting orders.
- Another potential option,, suggested and being developed by Hon. Donna Martinson, is the implementation of information exchange protocols among judges.<sup>28</sup>

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publication *Legal Intervention in Family Violence: Research Findings and Policy Implications* (National Institute of Justice and ABA) at p.45 and the National Council of Juvenile and Family Court Judges publication: [A Guide for Effective Issuance and Enforcement of Protection Orders and A Passport to Safety Full Faith and Credit A Judge's Bench Card](#). See also: L. Jordan and B. Garlow (2007) *The Civil Law Manual: Protection Orders and Family Law Cases*, 3rd Edition (American Bar Association). Other helpful resources include: Law Reform Commission of Western Australia (2013) [Enhancing Family and Domestic Violence Laws Discussion Paper Project no. 104](#); Judicial Council of California (2014) *Judges Guide to Domestic Violence Cases*. The author added Canadian content and recommendations relating to variation and appeal.

27 Criminal record checks provide important information relating to the pattern of DV, which in turn can provide valuable information relating to parenting and safety. Accurate information about orders affecting the family can prevent multiple orders with conflicting terms. California Judges Association (2007) *The Judicial Role in Improving Outcomes Part Seven: Domestic Violence crossover Issues* p.11, 12 and 14, 342. [Report to the Chief Coroner of British Columbia \(2010\) Findings and Recommendations of the Domestic Violence Death Review Panel \(Government of British Columbia\)](#); Australia Law Reform Commission (2010) *ALRC Consultation Paper 1 (ALRC CPI) Family Violence and Commonwealth Laws – Improving Legal Frameworks (alrc Report 117)*. Ontario has implemented court forms requiring all applicants for child custody or access to notify courts of any other court proceedings involving the same family. See also: Alana Kindness, Ham Kim et al. (2009) “Court Compliance as a Predictor of Postadjudication Recidivism for Domestic Violence Offenders” 24(7) *Journal of Interpersonal Violence* 1222-1238 wherein the authors report that law enforcements reports are reliable as one of the best predictors of domestic violence recidivism.

28 Donna Martinson (2012) [Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases](#); Federal Judicial Center and National Center for State Courts (2013) [Coordinating Multijurisdiction Litigation A Pocket Guide for Judges](#). See also National Centre for State Courts, the U.S. Judicial Panel on Multi-district Litigation, and the Federal Judicial Center listing of judicial resources titled “[Multijurisdiction Litigation](#)”; Ministry of Justice, New Zealand (2014) [Improving information sharing between the family and criminal jurisdictions in](#)

- Full knowledge of the particulars of court orders is particularly important since the case law demonstrates that contradictory court orders can be unenforceable (for an illustration, see: *C.R.P. v. S.A.J.*, 2006 ABQB 685<sup>CanLII</sup>).<sup>29</sup>
- In connection specifically with enhancing victim and child safety, pending legislative reform governing the exchange of information in DV cases, a practical alternative is the development and implementation, in each jurisdiction, of carefully constructed, detailed information exchange protocols to enable the sharing of information about risk and danger while shielding information from victims, witnesses, and children that could increase risk and danger.<sup>30</sup> Effective protocols will require considerable collaborative effort among service providers, policy makers and experts. The protocols will need to take into account case law and statutes in each jurisdiction in order to specify what, when and how information about risk and danger should be circulated among police, probation, Victim Services, crown, mediators, lawyers, child protection authorities, court-connected services, judges, and courts while at the same time shielding privileged information and confidential information that could increase risk. A non-exhaustive list of considerations and challenges includes: the complex realities of DV

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[domestic violence cases](#) .

29 Judge S. Devine (2003) *Some Problems with Competing of Conflicting Orders Affecting Families*. NJI Power Point Presentation. See also National Council of Juvenile and Family Court Judges, Family Violence Department (2010) *Civil Protection Orders: A Guide for Improving Practice*.

30 Hon. Donna Martinson *The Canadian Approach to Direct Judicial Communication* Ministry of Justice, New Zealand (2014) [Improving information sharing between the family and criminal jurisdictions in domestic violence cases](#); Family Law Council (2009) *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (Government of Australia). Australia Law Reform Commission (2010) *ALRC Consultation Paper 1 (ALRC CPI) Family Violence and Commonwealth Laws – Improving Legal Frameworks (alrc Report 117)*; Hon. D. Hitchens and P. Van Horn (2005) “The Court’s Role in Supporting and Protecting Children Exposed to Domestic Violence” *Journal of the Centre for Families, Children and the Courts* 31-52. See particularly Appendix B; J. Davies (2006) *Confidentiality & Information Sharing Issues* (Family Violence Prevention Fund); Home Office (2004) *Safety and Justice: sharing personal information in the context of domestic violence – an overview* (London, England: Home Office Development and Practice Report). Note: many of the cited information-sharing protocols were developed for American, Australian or United Kingdom jurisdictions, particulars would need to be changed to address Canadian legal system needs.

and the manner in which DV cases flow through court systems; the implications of legal disclosure requirements and the ways in which information is used in the various court systems; the need for ready access to orders in emergencies; the balancing of privacy and public safety interests/rights; the implications of rights to information statutes; the need for education to ensure shared understanding of the strengths and limitations of information to be shared; the development of policies governing consent and potential options for exchanging information in the absence of consent in high risk cases involving danger; the development of policies around the exchange of information when the safety and best interests of a child are in conflict with the interests of a targeted parent; and the protection of confidential information that could enhance risk, while ensuring the prompt exchange of information relating to risk and danger, particularly in high risk DV cases. While the challenges are daunting, investing in clear information exchange protocols could help to ensure seamless, swift exchange of information relating to risk and danger, while protecting confidential information, while also ensuring compliance with privacy and freedom of information statutes. In addition to enhancing safety, well designed protocols could enhance procedural efficiency by reducing the need for hearings relating to disclosure and production.

- For additional discussion, see Margaret Jackson and Hon. Donna Martinson (2015) [\*Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts.\*](#)

- In *Rogers v. Rogers*, 2008 MBQB 131<sup>CanLII</sup>, at paragraphs 69 to 77, Justice Little advises Justices of the Peace to take time, particularly when applications are made on an *ex parte* basis, to ask questions, to probe and clarify, and if necessary, to take a brief adjournment to review the evidence prior to granting *ex parte* protection orders. He also recommends a Queen's Bench Registry search to identify orders

and records of proceedings when the case involves on-going litigation.

- Police occurrence reports can provide valuable information about risk and the pattern of DV in the family. See *BL v. Saskatchewan (Social Services)*, 2012 SKCA 38 ([CanLII](#)) in connection with the admissibility of police occurrence records, more particularly Integrated Electronic Information System records as business records, and in connection with the admissibility and use of sentencing transcripts from a criminal proceeding in a child protection context.
- Nonetheless privacy concerns and public interest issues can arise. See footnote for cases that have discussed privacy interests associated with production of police records in civil, child protection and family law cases.<sup>31</sup> One possible option is inclusion of terms to address potential privacy concerns (in connection with production as well as in connection with disclosure to the parties).
- Caution: releasing or disclosing information to perpetrators from victims of DV, their children, supporters, family members, coworkers, or third parties can increase risk and danger. Consequently, it is important to keep in mind the potential effects of disclosure requirements in the various court systems. Many 'Freedom of Information/Protection of Privacy' statutes, for example, [Freedom of Information and Protection of Privacy Act](#), R.S.O., 1990, c. F.31 and [Privacy Act](#), R.S., 1985, c. P-21 contemplate the exercise of discretion in connection with the decision to release or not release law

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<sup>31</sup> See *Imperial Oil v. Jacques*, 2014 SCC 66 ([CanLII](#)). In connection with child protection matters, see *Children's Aid Society of Algoma v. P.(D.)* (2006), 28 R.F.L. (6th) 372, 2006 ONCJ 170 ([CanLII](#)); *Children's Aid Society of Algoma v. P.(D.)* (2006), 28 R.F.L. (6th) 410, 2006 ONCJ 330 ([CanLII](#)); *Children's Aid Society of Algoma v. D.P.* (2007), 42 R.F.L. (6th) 144, 2007 CanLII 39363 (ON S.C.) ([CanLII](#)). In connection with privacy and disclosure during civil litigation, the Supreme Court of Canada commented in *Juman v. Doucette*, 2008 SCC 8 ([CanLII](#)) in connection with the responsibilities of parties during discovery in civil cases: "While the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, the latter is entitled to a measure of protection, and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to do justice in the civil litigation in which the disclosure is made." See also: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 ([CanLII](#)) in connection with government responsibilities in connection with weighing public interest and privacy interests when deciding whether or not to disclose information in connection with law enforcement matters.

enforcement information. The Supreme Court of Canada states at paragraphs 45 to 48 of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 ([CanLII](#)) that such discretion is exercised by weighing the public interests and the purpose of the exemption.

- Legislative reform. A number of jurisdictions have implemented legislation authorizing information exchanges in DV or child abuse cases in connection with risk, danger and/or among designated, coordinated services. Alberta, for example, has enacted legislation enabling service providers (including police services) to share information for the purposes of providing benefits and services to children: *Children First Act*, SA 2013, c C-12.5; British Columbia's [Freedom of Information and Protection of Privacy Act](#), RSBC 1996, c 165 authorizes collection and sharing of information “for the purpose of reducing risk that an individual will be a victim of domestic violence, if the domestic violence is reasonably likely to occur.”<sup>32</sup>

## 4.5 Use of simple language

Seek inclusion of examples of prohibited conduct in simple easily understood language, such as the violator “shall not hit or threaten to hit X; shall not

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32 See sections 27(1)(c)(v) and 33.1(m.1). While a step in the right direction, the wording of the DV provisions in this statute is unfortunate. The provision fails to encompass the realities of forms of gender-related violence in extended families, fails to recognize that DV is often directed, not only against intimate partners and children and immediate family members, but also against anyone who supports the targeted partner or former partner, and, depending on how the DV definition is interpreted, fails to expressly authorize the exchange of information in order to protect the collateral victims of DV: the children. Limitations in protection statutes negatively affect access to protective remedies and justice. See also: [Report to the Chief Coroner of British Columbia \(2010\). Findings and Recommendations of the Domestic Violence Death Review Panel](#) (Government of British Columbia). Critical Components Project Team (2008) *Keeping Women Safe: Eight Critical Components of an Effective Justice Response To Domestic Violence (British Columbia: BC Association of Specialized Victim Assistance and Counseling Programs)* in connection with the central importance of creating information exchange protocols for use in connection with DV cases throughout Canada. Legislative changes to Canadian “Privacy and Freedom of Information Acts” shielding information that could increase risk while enabling the exchange of information among government agencies, victims (when appropriate), courts and court services in domestic violence and child abuse cases, when the exchange of information is reasonably necessary to protect safety, could go a long way to prevent lethal outcomes for family members (victims, perpetrators, and children) in these cases. Note, however, the importance of ensuring broad consultations with experts in order to ensure all forms of DV are considered.

contact X directly or indirectly, by any means, including by telephone, email, mail, computer, by leaving messages and shall not ask anyone else to contact X on his/her behalf” can add clarity. ‘Catch all’ phrases such as: “the violator is restrained from harassing, molesting, annoying, threatening, monitoring, following, stalking, disturbing the peace, destroying or tampering with property, or assaulting” are still necessary, however, to prevent claims that abusive behaviours not explicitly mentioned in the protection order are allowed or not prohibited.<sup>33</sup>

## **4.6 Inclusion of prohibitions specific to social and cultural context**

Prohibitions should be specific to the social context and detailed, taking into account the wide range of domestic violator behaviour, leaving no room for doubt or misinterpretation.

- For example, specifying, in simple, unambiguous and understandable terms, the distance (or geographic area) the perpetrator must maintain between him/herself and locations frequented by the protected person.<sup>34</sup>

In rural and northern areas, where police and other protection services are widely spaced, specifying kilometres and miles or other geographic distance from the protected person’s residence or place of work may be appropriate.

Particulars of DV vary considerably by culture, age, and legal status. People who are elderly or disabled, who hold minority or aboriginal status, or who are involved in same sex relationships or in immigration processes are often

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33 Tampering with cars to make them unsafe to drive is reported regularly by DV survivors. Examples of prohibited behaviour written in the order will have more impact than oral explanations offered in court since oral comments are easily misinterpreted or forgotten with the passage of time.

34 Many male perpetrators (far less is known about female perpetrators) of coercive DV are known to be highly manipulative. Any ambiguity in a court order may be used to justify continuing behaviour. For example, if the order says the abuser may not contact, many perpetrators will attempt to circumvent the spirit of such orders by having someone else contact the victim. Attention to detail can make the difference between enforceable and an unenforceable orders.

subjected to special forms of DV that require special DV prohibitions. For example, people who have physical disabilities may require a prohibition against destruction of, or denial of access to, specified mobility equipment; people who have difficulty hearing may require a prohibition against destruction or denial of access to amplification equipment for telephones; people who are involved in immigration processes may require prohibitions to prevent destruction or withholding of documents needed for the immigration process. Most important is to ensure that targeted party has an opportunity to provide particulars.

Provisions that state explicitly that perpetrators are not to have any contact with the protected person(s) – even if the protected person or anyone on the protected person’s behalf requests or initiates contact – remove any reason for doubt and provide useful guidance for police.<sup>35</sup>

Prohibitions against special forms of intimidation, monitoring or harassment (for example, cyberstalking <sup>36</sup> and other forms of harassment by computer such as sending viruses or malware;<sup>37</sup> monitoring whereabouts by using

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35 The fact that the protected person invited contact does not, of course, justify a breach of the protection order.

36 Aily Shimizu (2013) [Recent Developments Domestic Violence in the Digital Age: Towards the Creations of a Comprehensive Cyberstalking Statute](#) 28 *Berkeley J. Gender L. & Just.* 116-136

37 Harassment and stalking by computer can be difficult to trace. For example, perpetrators have been known to pose as the targeted person in order to solicit threatening or harmful material. For an informative discussion of harassment and stalking by computer in domestic violence cases, see: Western University, Learning Network [Technology Based Violence Against Women: Background Papers and Technical Reports April 2013](#). This web page offers access to a series of reports and research on this issues written between 2011 and 2013. See also: John Ashcroft (Attorney General, US) [Stalking and Domestic Violence Report to Congress \(2001\)](#); Cynthia Fraser, Erica Olsen et al. (2010) The New Age of Stalking Technological Implications For Stalking 61(4) *Juvenile & Family Court Journal* 39-56. Stalking by computer in domestic violence cases is a growing concern. For example: C. Southworth, S. Dawson et al. (2005) [A High-Tech Twist on Abuse: Technology, Intimidation, Partner Stalking and Advocacy \(Violence on Line Against Women\)](#); A. Kranz (2002) [Helpful or Harmful? How Innovative Communication Technology Affects Survivors of Intimate Violence \(Violence Against Women On Line\)](#); Tammy Hand, Donna Chung and Margaret Peters (2009) [The Use of Information and Communication Technologies to coerce and Control in Domestic Violence and Following Separation](#) (Australia Domestic & Family Violence Clearinghouse). Researchers in New Zealand are reporting considerable use of computers to continue to monitor and harass following the granting of DV protection orders in that jurisdiction: N. Robertson, R. Busch et al. (2007) [Living at the Cutting Edge Women’s Experiences of Protection Orders \(University of Waikato\)](#).

modern geo-location or tracking technology; cruelty to animals<sup>38</sup>) can offer much needed protection.

- For information on digital stalking and harassment in DV cases and how to prevent it, see:
  - Jennifer Perry (2012) [Digital stalking: A guide to technology risks for victims](#) (Bristol: Network for Surviving Stalking and Women's Aid Federation of England) and [Digital Trust](#).
  - National Center for Victims of Crime [Stalking Resource Center](#).
  - New Zealand Family Violence Clearinghouse (2015) [Resources to prevent and respond to digital stalking](#).
- Service providers, lawyers, police and crown can teach people targeted by digital harassment or stalking how to document these forms of DV. Helpful suggestions can be found in:
  - [2014 Domestic Violence Handbook for Police and Crown Prosecutors in Alberta](#), online
- For discussion of the importance of orders to protect farm animals and family pets, see endnote 38. For additional information, see [Chapter 18.2.1](#) relating to family pets and farm animals.

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38 American Bar Association Commission on Domestic Violence (2007) *Animal Abuse Issue eNewsletter Summer 2007 Vol. 8*; Woman Abuse and the PEI Justice System Research Team “The Link Between Animal Abuse and Family Violence”. Researchers in Australia, the United States and England are reporting animal abuse as a domestic violence strategy: A. Volant, J. Johnson et al. (2008) “The relationship between domestic violence and animal abuse: an Australian study” in *Journal of Interpersonal Violence* 23(9): 1277-1295; Victoria Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victoria Law Reform Commission); S. McPhedran (2009) “Animal Abuse, Family Violence, and Child Wellbeing: A review” in *J. Fam. Viol.* 24:41-52; F. Ascione and P. Arkow (1999) *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (West Lafayette, Indiana: Purdue University Press); S. MacIntosh (2001) “Research Study: Exploring the Links Between Animal Abuse and Family Violence, as Reported by Women Entering Shelters in Calgary Communities”; F. Ascione and C. V. Weber and D. S. Wood “The Abuse of Animals and Domestic Violence: A National Survey of Shelters Society and Animals” 5(3) 1997. Cruelty to animals is used in DV contexts to intimidate and silence intimate partners and children. In some cases it is strategy to ‘force’ family members to return to the violent home in order to protect pets and farm animals. Many American states are incorporating provisions in DV statutes explicitly authorizing judges to include protection for animals in protection orders. In the Canadian context, numerous Canadian DV prevention and civil protection statutes authorize judicial orders that could be used to protect animals such as: orders granting temporary possession of specific property; directing a police officer to accompany a person to a residence to supervise the removal of personal belongings; restraining a party from damaging, conveying or otherwise dealing with specified property. Where orders protecting companion animals are permitted, they can provide a great deal of comfort to children while enhancing not only animal safety but also the safety of the family members by preventing returns to violent homes. See, for example: See also Judicial Council of California, Administration Office of the Courts (2014) [Judges Guide to Domestic Violence Cases. California Protection Orders](#).

## 4.7 Prevent Financial Coercion

Seek inclusion of prohibitions on financial harassment and intimidation - for example, prohibitions on cancelling essential services (electricity, phone, heating) to the home occupied by the targeted person, provisions requiring payment of rent or mortgage, prohibitions on conduct designed to destroy the targeted person's credit rating, prohibitions on use of credit cards and on increasing or defaulting on loans. The provisions can prevent financial harassment and control.

## 4.8 Leave no room for doubt

It is important to ensure that the order is explained clearly to the targeted person and to the person bound so that the protected person knows how to document and when and who to call for help in the event of a violation and so that the violator understands his or her responsibilities. Taking the time to provide detailed explanations both orally and in writing can prevent inadvertent failure to comply.

## 4.9 Address collateral needs

Orders that empower by enabling independence enhance safety by reducing dependence and the abuser's control. Such orders can help a 'victim'<sup>39</sup> and

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39 Refer to note 5 for discussion of controversies surrounding the term 'victim' and the reasons the term, despite its limitations, is used in these materials in connection with legal processes. Nonetheless it is important to note as well the effort and courage it takes to leave these relationships and to acknowledge that resistance violence is common. See, for example, Edward Gondolf and Ellen Rubinstein Fisher *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (Lexington Books, 1988). See also: M. Randall (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 wherein the author notes that a number of women who have been abused have objected to the victim label. See also The United Nations Special Rapporteur on Violence Against Women (2009) [\*15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences\*](#) (Office of the United Nations High Commissioner for Human Rights), J. Moldon's article "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) discusses women in treatment who, as they overcome difficulty, stop identifying themselves as abused women and begin identifying themselves as women who were abused.

child to find stability and safety, preventing a return to a place of abuse.<sup>40</sup> Thus, to the extent permitted by statute, compensation for expenses and damages associated with DV, provisions for support, provisions for custody of children and exclusive possession of safe housing with timely enforcement mechanisms are highly recommended. Judicial associations in many jurisdictions are recommending comprehensive attention to such issues in civil protection orders, see footnote 40. See also: American Judges Association, [Effective Adjudication of Domestic Abuse Cases](#), [Education Module 2, on Civil Protection Orders](#).

Ensure that 'victims' of DV are aware of potential compensation options pursuant to [Compensation for Victims of Crime Programs](#).

Note, however, statutory and jurisdictional restrictions in some parts of Canada limit what may be included in emergency orders issued by lower courts and/or restrict the granting of new, additional remedies (such as custody or access) during review hearings. See, for example, section 2(3) of Alberta's [Protection Against Family Violence Act](#), R.S.A. 2000, c. P-27 and *L.L. v. D.G.*, 2009 ABCA 387 ([CanLII](#)).

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40 For an empirical analysis of this issue, albeit in an American context, and particularly the value of issuing a custody order as part of a protection order, see: Suzanne Reynolds and Ralph Peeples (2013) “[When Petitioners Seek Custody in Domestic Violence Court and Why We Should Take Them Seriously](#)” in *Wake Forest Law Review*. See also: National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#). In connection with quantum of support in the face of misconduct (such as DV) causing emotional or other harm affecting self sufficiency, see: *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 268 D.L.R. (4th) 577 (2006), 34 R.F.L. (6th) 1 (2006), 62 B.C.L.R. (4th) 197 (2006), 2006 SCC 25 [CanLII](#). Economic security can enable a targeted parent and child to achieve stability and independence from a domestic violator. It can also promote accountability: E. Sussman (2006) “The Civil Protection Order as a Tool for Economic Justice” *The Advocate Quarterly* (2006) 3: 1-6; K. Anderson (2007) “Who Gets Out? Gender as Structure and the Dissolution of Violence Heterosexual Relationships” *Gender & Society* Vol. 21(2): 173-201; Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases Final Report of the Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts); Amnesty International (2008) *Setting the Standard International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence Against Women* (Amnesty International Australia). In Michigan courts are expected to order compensation for expenses caused by domestic violence, such as property damage, compensation for child care: *Michigan Domestic Violence Benchbook* (2009, 2010) (Courts Michigan) at 6-6.

## 4.10 Provide for intervention

From a safety-enhancement and accountability perspective, effective civil protection and restraining orders will include provisions to ensure that perpetrators attend and complete specialized domestic violence intervention programs<sup>41</sup> and, when warranted, specialized parenting, addiction, mental health, and other treatment programs.

- **Qualification:** See K. Weiler, J.A. on behalf of the Ontario Court of Appeal in *Kaplanis v. Kaplanis* (2005), 249 D.L.R. (4th) 620, (2005), 10 R.F.L. (6th) 373, (2005), 194 O.A.C. 106, 2005 Carswell Ont. 266, (ON C.A.), 2005 CanLII 1625 [CanLII](#) at paragraphs 2, 13-15 for discussion of limited authority to order perpetrators into treatment or intervention in the absence of statutory authority. In *Dahlseide v. Dahlseide*, 2009 ABCA 375 ([CanLII](#)) the court held that it was an error for the trial judge to order psychological assessment and treatment in the absence of evidence of concerns about the father’s parenting. See also, however, *Lust v. Lust* (2007), [2008] 417 A.R. 106, 2007 ABCA 202 [CanLII](#) wherein the Court of Appeal of Alberta held (albeit with comments that such orders should be rare) that it was open to a trial judge (in a divorce case) to postpone a final decision and to implement an interim order directing counselling for family members followed by judicial review without mention of any statutory authority.<sup>42</sup>

- Neither *Lust* nor *Kaplanis* firmly decide this issue.

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41 “The term ‘intervention’ is preferable since the term ‘treatment’ implies that domestic violence is an illness. Such terminology tends to absolve violators from personal responsibility.” Review comment: (retired) Judge Eugene Hyman, Superior Court of California.

42 *Kaplanis* and *Lust* differ in perspective on this issue of jurisdiction to order counselling in the absence of statutory authority. In *Lust* the appellate court commented favourably on an order directing counselling without commenting on any applicable statutory authority. In *Kaplanis* the court questioned court authority to order counselling in the absence of statutory authority but also noted that courts have been making such orders. See also *Dahlseide v. Dahlseide*, 2009 ABCA 375 ([CanLII](#)) wherein the court held that it was unreasonable to direct the father to undergo psychological assessment and treatment in the absence of evidence putting the father’s parenting in issue. It may be interesting to note the United Kingdom implemented legislation [Children and Adoption Act 2006, Chapter 22](#), amending the *Children Act* 1989 (c. 41). Family-court judges are able to order, as a contact activity directive, that a parent take part in a program to address DV issues and to monitor compliance with imposed conditions. Note the judicial obligation to ensure that the program is suitable.

- While clear statutory authority is preferable, appellate courts are endorsing orders for psychiatric assessment, risk assessment, counselling or therapy when clearly connected to parenting or child safety concerns: *Werner v Werner*, 2013 NSCA 6 ([CanLII](#)); *Johnson v. Jordan*, 2013 ABCA 233 ([CanLII](#)), leave to appeal dismissed with costs *Shawn Jordan v. Dawn Johnson*, 2014 [CanLII](#) 1211 (SCC) ; *Marquez v. Zapiola*, 2013 BCCA 433 ([CanLII](#)); *Doncaster v. Field*, 2014 NSCA 39 ([CanLII](#)), leave to appeal dismissed with costs in *Ralph Ivan Doncaster v. Jennifer Lynn Field*, 2014 [CanLII](#) 60077 (SCC); *Droit de la famille - 11373*, 2011 QCCA 889 ([CanLII](#)); *Clarke v. Gale*, 2009 NSSC 170 ([CanLII](#)). See also *Dahlseide v. Dahlseide*, 2009 ABCA 375 ([CanLII](#)) at paragraph 29 in connection with the need to ensure that orders directing treatment or therapy are linked directly to evidence of problems with parenting.
- Check the applicable civil protection statute for statutory authority to order intervention or treatment.
- Alternatively, when child welfare and safety is a concern, in the absence of statutory authority, the cases suggest the option of making voluntary completion of intervention and treatment with proof of positive change in behavior a precondition for the granting of supervised or unsupervised access to children. See, for example: *Weiten v. Adair*, 2001 MBCA 128, (2001), 21 R.F.L. (5th) 239, (2001), 156 Man. R. (2d) 308([CanLII](#)); *CM v. SM*, 2012 NLCA 59 ([CanLII](#)), *Cory R. Meadus v. Suzanne Meadus*, 2013 CanLII 33951 (SCC) ([CanLII](#)), *Meadus v. Meadus*, 2014 NLCA 17 ([CanLII](#)); *Doncaster v. Field*, 2012 NSCA 44 ([CanLII](#)), *Doncaster v. Field*, 2014 NSCA 39 ([CanLII](#)) leave to appeal dismissed with costs: *Ralph Ivan Doncaster v. Jennifer Lynn Field*, 2014 [CanLII](#) 60077 (SCC); *Merkand v. Merkand*, 2006 CanLII 3888 (ON C.A.)[CanLII](#)

application for leave to appeal to Supreme Court of Canada dismissed: *Irshad Merkand v. Tallat Merkand*, 2006 CanLII 18512 (S.C.C.)[CanLII](#)..

- **Caveat:** Evaluations of the impact of domestic violence intervention programs on recidivism are inconsistent. The programs are known to help in cases where domestic violence is not firmly entrenched. They can also provide an important monitoring and thus a safety function. Nonetheless domestic violence intervention programs are not suitable for every violator. Moreover DV programs do not necessarily ‘stop’ DV, and drop-out rates are high. Non-completion is a known indicator of enhanced risk of re-offence. Monitoring compliance can help to enhance safety. Risk can go up or down and should be reassessed at the end of such programs before protection orders are removed or altered. The goal is to determine whether or not the program has resulted in changed behaviour or in new circumstances that alter the level of risk.

**Caution:** Face-to-face settlement and counselling processes, such as family counselling and mediation, as well as anger management programs should be used with caution, if at all, after and in addition to specialized DV intervention, as the processes can be counterproductive in DV cases. See, for example, Department of Child Protection (2013) [Perpetrator Accountability in Child-Protection Practice: A resource for child protection workers about engaging and responding to perpetrators of family and domestic violence](#) (Perth Western Australia).

## **4.11 Address access to weapons concerns**

See section 8 below.

## 4.12 Inclusion of Addresses

From a safety perspective, residential addresses should normally remain confidential and should not be included in court orders, particularly when addresses are unknown to perpetrators. People targeted by domestic violence move regularly to escape further violence. Orders that are not specific to residential and or work addresses can offer continuing protection when protected persons change residential or work location.

In some cases, however, inclusion of a specific address, if the address is already known to the violator, could enhance the speed of police enforcement. Moreover inclusion of a specific address provides clarity and clear directions to the violator. Consider other options, however, when there is a likelihood of continuing violence or a potential for lethal outcome (see Parts 6 and 7 of Neilson, Linda C. (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).

**Consider** (when permitted by statute) whether or not to include provisions directing the perpetrator to stay away, not only from the targeted person's residence but also from locations where the targeted person and the children work, engage in recreation, shop, attend school and, or worship.

## 4.13 Include terms to promote enforcement

Clauses that specify the circumstances in which police may arrest prevent police confusion and promote enforcement thus enhancing safety.

Potential options to enhance compliance and enforcement are set out below.

- Requiring, when authorized by statute, the posting of security or a

bond.<sup>43</sup>

- Including an arrest clause.<sup>44</sup>
- Including a no need for service clause (when both parties were present in court when the order was granted and explained), indicating on the face of an order that the perpetrator was present in court when the decision or order was made and stating that further proof of service is not necessary. Alternatively, respondents could acknowledge notice by signing the order. This enables police to enforce the order without having first to locate proof of notice or of service.<sup>45</sup> See *Partridge v. Partridge* (2007), 213 Man. R. (2d) 305, 2007 MBQB 80<sup>CanLII</sup> in connection with contempt for breach of conditions known to the violator, although the acts were committed prior to signature and formal entry of the signed order.
- Setting out clearly the applicable enforcement processes. For

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43 A number of provincial and territorial statutes authorize judges to require a party to post a bond or security to secure compliance with no contact orders. For example: **Alberta:** *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(f); **Manitoba:** *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, s. 14(1)(n); **New Brunswick:** *Family Services Act*, S.N.B. 1980, c. F-2.2, section 128; **Ontario:** *Children's Law Reform Act*, R.S.O. 1990, c. C.12, section 35(1); **Yukon:** *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(j). **Note:** this list is not necessarily exhaustive.

44 Inadequate police enforcement of civil orders is considered one of the central reasons civil orders commonly fail to offer intended protection. Researchers are documenting this as a problem in most western legal jurisdictions. For example, Charles Diviney et al. (2009) "Outcomes of Civil Protective Orders Results from one State" 24(7) *Journal of Interpersonal Violence* 1209-1221; TK Logan and Robert Walker (2009) "Civil Protection Order Outcomes Violations and Perceptions of Effectiveness" 24(4) *Journal of Interpersonal Violence* 675-692; Jorge Contesse and Jeanmarie Fenrich (2009) "Transitional Justice: War Crimes Tribunals and Establishing the Rule of Law in Post-Conflict Countries: Special Report: It's Not OK: New Zealand's Efforts to Eliminate Violence Against Women" 32 *Fordham Int'l L.J.* 1770.. In some Canadian jurisdictions police will not enforce civil protection orders in the absence of an enforcement clause. Many of the problems with enforcement, however, are probably more the result of police confusion about enforcement responsibilities and powers than a result of resistance or lack of concern. Clear guidance on the face of civil protection court orders can help.

45 The requirement that restraining orders must be served before they become binding offers due process to alleged perpetrators but it can also create serious problems for victims and children. Service by professional agencies can be an extra expense for families with limited resources, yet lay service can be dangerous. To complicate matters further, many perpetrators evade service in order to avoid being bound by such orders. In such circumstances some claimants give up. Service problems are less a problem in Canada than in some US states because many of the domestic violence acts specify police responsibility to serve such orders. Nonetheless, in some jurisdictions in Canada service problems have resulted in denial of civil protection. For example, see: *Kusick v. Kusick*, 2007 ABQB 331<sup>CanLII</sup>.

example, when applicable, an order might state that failure to adhere could result in a criminal charge under section 127 of the [Criminal Code](#), an offence under the applicable domestic violence or family law statute; and/or in arrest of the perpetrator to face contempt of court charges.<sup>46</sup> The applicability of these enforcement processes varies by jurisdiction. For discussion, see section 6 below.

- Listing, after taking into account the applicant’s perspective, and preferably with consent, persons or agencies to receive copies of the order. Enforcement and safety can be enhanced when key members of the community are notified of the terms of restraining and other protection orders. For example:<sup>47</sup>
  - police and law enforcement agencies, probation and parole service
  - DV advocates and victim services agencies<sup>48</sup>
  - civil protection order registries, if any<sup>49</sup>
  - landlords and other rental authorities<sup>50</sup>

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46 Comprehensive analysis of law relating to civil and criminal contempt is beyond the scope of this paper.

47 R. M. George, Chief Justice, Supreme Court of California *A Guide for Persons Applying for Domestic Violence Protection Orders (Judicial Council of California)* discusses at p. 45-47 the importance to enforcement of ensuring that persons and organizations, such as those listed in the text, receive a copy of civil protection orders.

48 Notification of victim services is mandatory in **Prince Edward Island**: (*Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2).

49 Registry systems correct many of the current problems associated with enforcement of civil protection orders. Placing the repetitive onus on protected persons to serve, to document proof of service, and to deliver copies of orders with proof of service can result in the legal system’s failure to hold perpetrators accountable and to keep victims safe. Perpetrator manipulation and intimidation combine with lack of access to resources to ensure that many civil protection orders will never be served or registered. British Columbia has developed a promising way to combat this problem. In that province civil protection orders (as well as criminal protection orders) are sent automatically from courts to the central registry to be registered that day. Police throughout the province have access to the registry 24 hours a day. Australian jurisdictions are considering a single national protection order registry.

50 In some circumstances, filing a civil protection order with rental authorities could provide some degree of protection and prevent a victim of DV from facing eviction as a consequence of the DV disturbing other residents. A number of Canadian jurisdictions offer special residential rental considerations to victims of domestic violence. See, for example: Quebec: By-law respecting the allocation of dwellings in low rental housing, R.Q. c. S-8, r.1.1.1 pursuant to *Société d’habitation du Québec*, An *Act* respecting the, R.S.Q. c. S-8.

- security, union, human resources officials (residential & workplace)
- community elders
- religious and spiritual advisors
- employers
- supervisors of access<sup>51</sup>
- child protection authorities<sup>52</sup>
- grandparents<sup>53</sup>
- passport officials in cases of potential child abduction
- chief firearms officers, pursuant to section 5 (2) (c) of the [Canadian Firearms Act](#), 1995 c. 39.
- teachers, schools, child care providers
- DV intervention, mental health, drug and alcohol treatment & counselling agencies<sup>54</sup>

**Caution:** People who are targeted by DV are often best placed to ascertain their own specific risk and safety needs. Thus the targeted party should be empowered to assess whether such notifications will enhance safety or will increase risk or cause retaliation in the individual case.

Note that statutes in some jurisdictions impose obligations to notify and or to

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51 Supervisors of child access should always receive copies of protection and restraining orders..

52 In many jurisdictions notification of child protection authorities, if children are involved, is mandatory. On the one hand, child protection authorities with a specialized understanding of the domestic violence field can offer assistance, services and support. On the other hand child protection agencies in some jurisdictions have been criticized for inappropriate reactions to DV. Notifications may also generate apprehension on the part of a targeted parent, particularly if the parent is in the process of immigrating to Canada.

53 Perpetrators of DV commonly enlist grandparents in the ‘crusade’ against the targeted parent. In these cases, or in cases in which grandparents are involved inappropriately in a crusade to prevent access (for example *J.A.S. v. H.M.*, 2008 BCCA 5 [CanLII](#)), stating expressly on the face of the order that named grandparents are to be served with the civil order ensures that such grandparents receive notice of the order. This could allow contempt proceedings if the grandparents participate in breaching the order.

54 This list is intended to offer guidance; it should not be considered exhaustive.

send copies of civil protection orders to police, protection order registries, victim services and/or child protection authorities.

## **4.14 When safety is an issue, consider inclusion of children**

Prohibiting or imposing conditions on contact with children in civil protection orders can be appropriate:

- When facts indicate a potential for lethal outcome (see [Part 7](#) of Neilson, Linda C. (2014) [Enhancing Safety](#). When indicators of potential adult lethal outcome are present, the children are in danger too. Consider suspension of contact or, where such facilities exist, specialized supervised contact in secure, professionally monitored surroundings until safety can be assessed and assured.
- When indicators of continuing risk of DV are present (for example, [Part 6](#) of Neilson, Linda C. (2014) [Enhancing Safety](#)) or when other safety concerns are a concern, or when there is evidence of negative parenting practices, associated in the research with coercive DV, consider supervised contact until the children have recovered from trauma associated with exposure to DV and the perpetrator has completed and has benefited from a DV intervention program with specialized parenting content, or until the best interests of the children can be more fully assessed and determined (for example by child protection authorities or by a family court).

When child safety is a concern, a prohibition against attendance at the child's school or at the child's recreational or church activities may be warranted. See, for example: *Kanwar v. Kanwar*, 2010 BCCA 407 ([CanLII](#)); *Doncaster v. Field*, 2014 NSCA 39 ([CanLII](#)).

Have the child protection authorities been alerted; should they be involved in the case?

Note as well the importance of considering cross-sector-legal-system implications, such as child protection and or family law proceedings. In addition, changing circumstances can increase or decrease risk. While it is important to protect children, it is also important to do so in a manner that does not prevent child protection authorities from working therapeutically with families. Consequently, it can be helpful to include provisions enabling child protection authorities to arrange contact for therapeutic and other child protection purposes. Similarly, it can be important to the child to ensure that such orders are framed in a way that does not prevent family courts from subsequently allowing a child's access to a parent when risk levels go down or can otherwise be managed.

#### **4.15 Specify conditions for access to children**

If, despite the civil protection order, access to children is to be allowed, it is important to ensure that the types of communication and contact that will and will not be allowed are set out clearly and precisely and to explain how provisions governing access to children will and will not affect other terms of the protection order. For an example, see the provisions relating to the children in *Partridge v Partridge*, 2009 MBQB 196, 242 Man. R. (2d) 249([CanLII](#)).

**Caution:** General provisions such as ‘except for contact with the children’ or ‘except for contact necessary to make arrangements for access to the children’ provide opportunities for continuing monitoring, harassment and intimidation. They also make civil protection orders difficult, if not impossible, to enforce.<sup>55</sup>

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<sup>55</sup> For example, *C.R.P. v. S.A.J.*, 2006 ABQB 685([CanLII](#)). See also: Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victoria Law Reform Commission) at 340-1; American Bar Association (2007) *Standards of Practice in Civil Protection Order Cases for Family Court Proceedings* (with commentary) at p. 8; American Bar Association [Civil Protection Orders](#) (web links to resources); National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving](#)

## 4.16 Attend to details

Careful attention to procedural explanations and to details can prevent confusion and inadvertent breaches of civil protection orders while enhancing the speed of enforcement.

Suggested content, drawn from research on the operation of civil protection orders in DV cases as well as from judicial association publications and from academic journals, includes:

- Setting out requirements for service; termination dates with options for confirmation, extension and renewal; and particulars of further action, if any, required to confirm renew or extend the order
- Encouraging, after consulting the targeted adult and obtaining consent,<sup>56</sup> coordination and collaboration among court, policing, community support, intervention, mental health, substance abuse and other services; establish processes and procedures to protect confidential information while ensuring that police and when applicable, probation, parole, child protection services, firearm's officials, supervised access centres and DV intervention services are informed of the provisions of the civil protection order.
- Ensuring that the order takes into account and avoids conflict with any other orders (civil, family, criminal) affecting the same family.
- Referring targeted persons and children to victim services or domestic advocacy programs for safety planning<sup>57</sup> and for DV counselling.

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*Practice* Michigan Judicial Institute (2014) [\*Domestic Violence Bench Book – Fourth Edition\*](#).

56 Obtaining consent is by far the best option. Note, however, the need for policies to address information exchange and collaboration issues in the absence of consent in high risk and danger cases, particularly when children are in danger.

57 Ordering the targeted person to attend counselling may send the wrong message in custody and access cases. These orders may appear to be blaming and penalizing the targeted person (W. Hulburt and Judge W. Smith (2003) *A Coherent and Principles Response to Family Violence in Alberta Recommendations for Action and Change* (Edmonton: Minister of Children's Services) at p. 23). See also National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [\*Civil Protection Orders: A Guide for Improving Practice\*](#) . Nonetheless providing information and support while assisting with a voluntary referral to victim services and or

- Ensuring, after the coming into force of Bill C- 32, *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts* ([Victims Bill of Rights Act](#)), when a respondent has committed an offence as defined in Bill C- 32, that the civil protection order respects the victim's rights to restitution, protection from intimidation and retaliation, information, privacy, and security.<sup>58</sup>
- Covering the basics:
  - names of the parties
  - date and duration of the order
  - sufficient information to enable identification of the person bound (for example birth date, particulars of identifying documents, photograph, physical description)
  - name of issuing court
  - judicial signature with particulars (date, identification, place)

## 5 Examples of promising new initiatives

Examples of promising initiatives include: judicial, community, and professional oversight committees to encourage, monitor and review compliance with the terms of civil protection orders; obtaining consent and implementing standards to ensure that behavior change programs for domestic violators can and do release information relating to risk (such as failure to attend mandated services); information exchange protocols to ensure prompt notification of victim services, police, lawyers, the court and

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to DV agencies for safety planning can be very beneficial. These services can help the targeted person identify safety measures such as the telephone numbers to call in an emergency; the locations of safe housing, police services, victim services, DV advocates; the documentation and possessions that should be collected and removed on vacating the home in an emergency; the signs of automobile tampering; steps to take to protect against stalking and harassment by geo-location equipment or computer; the signs of escalating danger; the steps to take when exiting the house in an emergency, as well as how to document and report breaches of civil protection orders.

58 The operative sections of this Bill in its current form (section 1 through 44 and 52-54) come into force 90 days after royal assent. The implications of this Bill are yet to be determined. The rights provisions, as they are currently framed, appear to extend beyond immediate criminal court proceedings.

(with consent and advise on safe methods of contact) the targeted partner in the event of non-compliance with the terms of protection orders (for example failure to surrender firearms). Such provisions help to ensure swift enforcement.

Refer as well to promising practices identified by the Department of Justice Canada (2013) [Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems](#).<sup>59</sup>

Empirical research demonstrates a clear association between non-attendance at batterer intervention programs or non-compliance with court orders and increasing risk in DV cases.

Community mobilization, integration of services and coordination in response to management of high risk cases in the community.<sup>60</sup>

Additional safety and accountability ideas:

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59 See also: Alana Kindness, Ham Kim et al. (2009) “Court Compliance as a Predictor of Postadjudication Recidivism for Domestic Violence Offenders” 24(7) *Journal of Interpersonal Violence* 1222-1238; Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts); Michigan Judicial Institute (2014) [Domestic Violence Bench Book – Fourth Edition](#); Karen Wilcox (2010) “[Privacy, information sharing and coordinated practice-dilemmas for practice](#)” Newsletter 42 (Australian Domestic & Family Violence Clearinghouse). While many integrated court oversight and information exchange initiatives have been developed by specialized domestic-violence criminal courts, for example, policies associated with the pilot provincial court initiative in Moncton, New Brunswick, Canada, such policies are readily adaptable to family and child protection court contexts. Indeed the absence of information sharing protections is being identified negatively in domestic violence death review literature. For example: Lauren L. Sabatino (2009) [Looking at Family Court-Involved Domestic Violence and Child Abuse Fatality Cases Through a Lens of Prevention](#) (National Centre for State Courts). *Report to the Chief Coroner of British Columbia (2010) Findings and Recommendations of the Domestic Violence Death Review Panel* (Government of British Columbia). Mary Ellen Turpel-Lafond (2009) [Honouring Christian Lee - No Private Matter: Protection Children Living with Domestic Violence](#). (Legislative Assembly British Columbia).

60 [Safety Circles, A Collaborative Safety Planning Process for Women in Crisis \(2008-2009\) Justice Options for Women; San Diego Family Justice Center](#); Ann Crowe, Linda Sydney et al. (2009) [Community Correction Response to Domestic Violence: Guidelines for Practice](#) (American Probation and Parole Association et al.); Marcus Juodis et al. (2014) “[What Can Be Done About High-Risk Perpetrators of Domestic Violence?](#)” J. Fam. Viol.; Staff Sergeant Sean Armstrong (2014) [High Risk Offender Management](#); Veronica Singer (2014) [Tensions in the High Risk Case Coordination Protocol](#).

- Initiatives to connect litigants targeted by domestic violence with domestic violence advocates who can provide information and advice, assistance, and safety planning.
- A number of jurisdictions in the United States offer video conferencing from Justice Centres to courts and or electronic filing in connection with applications for protection orders.<sup>61</sup>
- In England a Domestic Violence Disclosure Scheme – known as Clare's Law – gives members of the public the right to ask police for information when there are concerns an intimate partner may pose a risk to safety.
- Targeted partners can be taught to anticipate manipulation and intimidation and methods to document and report manipulation and intimidation when attempts are made to prevent applications for civil protection orders.
- In the criminal context, judicial authorizations enabling police to monitor telephone calls - when risk is high, when 'victims' have complained of intimidation and/or become strangely uncooperative – could help to reduce the rates of failure to proceed with applications for civil and criminal protection, by detecting and preventing the success of intimidation. Sections 10 through 13 of *Bill C-32*, the *Victims Bill of Rights Act* will, if enacted as currently worded, offer victims privacy and security rights as well as, pursuant to section 10 *“the right to have reasonable and necessary measures taken the by appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation.”*<sup>62</sup>

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61 For example, [The Montgomery County, Maryland Family Justice Center](#); [San Diego Family Justice Center](#).

- Police, lawyers, service providers and crown can teach targeted partners how to document and how to report breaches of civil and criminal protection orders.
- The Vera Institute in the United States is reporting that court outreach workers can help to enhance the safety of all family members in civil protection cases by providing information and services to violators:
  - Explaining responsibilities and answering questions associated with civil protection orders before violators leave court premises.
  - Providing guidance and making referrals to agencies that can help to address immediate violator needs (access to personal belongings, housing, social assistance, mental health and substance abuse programs, employment).<sup>63</sup>

In connection with judicial educational initiatives in the United States to promote effective practices when civil protection proceedings involve DV see:

- National Center for State Courts: [Domestic Violence Resource Guide](#), resources listed under “Protection Orders”
- National Council of Juvenile and Family Court Judges (2010): [Civil Protection Orders: A guide for Improving Practice](#).

## **6 Enforcement remedies for breach of civil protection orders by Canadian jurisdiction**

Canadian civil order enforcement processes vary by statute and by

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62 For an informative discussion of the problem, see Vera Institute of Justice (2006) [Prosecuting Witness Tampering, Bail Jumping, and Battering From Behind Bars Enhancing Responses to Domestic Violence Promising Practices from the Judicial Oversight Demonstration Initiative](#). See also Part 9.5 of Linda 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).

63 Vera (2006) *ibid*. Perhaps in the future we shall see emergency housing with DV intervention programs, specialized parenting programs and integrated services for violators.

jurisdiction. A notice relating to section [127](#) of the [Criminal Code](#) is appropriate for breaches of no contact orders granted pursuant to some statutes in some jurisdictions, not in others. Failure to adhere to a civil protection order (other than orders for payment of money) may, unless express alternatives are provided for in the applicable Provincial or Territorial statute, result in a charge under section 127 of the [Criminal Code](#). For particulars, refer to:

- *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.R. 901[CanLII](#)
- *R. v. Fairchuk* (2003), 225 D.L.R. (4th) 38, [2003] 8 W.W.R. 35, (2003), 173 C.C.C. (3d) 503, (2003), 13 C.R. (6th) 297, (2003), 173 Man. R. (2d) 274, 2003 MBCA 59[CanLII](#)
- *R. v. Whelan* (2001), [2003] 219 Nfld. & P.E.I.R. 52, (2003), 170 C.C.C. (3d) 151, 2002 NLCA 69[CanLII](#)
- *R. v. Gibbons*, 2012 SCC 28 ([CanLII](#)); *R. v. Gibbons*, 2010 ONCA 77 ([CanLII](#)); *R. v. Abdullah (G.) et al*, 2010 MBCA 79 ([CanLII](#)).
- *R. v. Clark* (2001), 207 D.L.R. (4th) 522, (2001), 160 C.C.C. (2d) 244, 2001 BCCA 706[CanLII](#).

Section 127 applies “unless a punishment or other mode of proceeding is expressly provided by law”.

Case law interpretations of section 127 tell us that it is only when the provincial or territorial legislation governing punishment for contempt of the civil order is comprehensive, that section 127 of the [Criminal Code](#) will not apply. For particulars of the meaning of ‘comprehensive’ see:

- *R. v. Clement*, [1981] 2 S.C.R. 468
- *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.R. 901[CanLII](#)
- *R. v. Gibbons*, 2012 SCC 28 ([CanLII](#)); *R. v. Gibbons*, 2010 ONCA 77 ([CanLII](#)); *R. v. Abdullah (G.) et al*, 2010 MBCA 79 ([CanLII](#))

- *R. v. Fairchuk* (2003), 225 D.L.R. (4th) 38, [2003] 8 W.W.R. 35, (2003), 173 C.C.C. (3d) 503, 2003 MBCA 59 [CanLII](#)
- *R. v. Whelan* (2001), [2003] 219 Nfld. & P.E.I.R. 52, (2003), 170 C.C.C. (3d) 151, 2002 NLCA 69 [CanLII](#)

Until 2012, appellate court rulings were inconsistent on whether or not laws of general application, such as *Rules of Court* relating to civil contempt, excluded the application of section 127. Compare *R. v. Gibbons*, 2010 ONCA 77; *R. v. Abdullah (G.) et al*, 2010 MBCA 79 ([CanLII](#)) and *R. v. Fairchuk*, 2003 MBCA 59 [CanLII](#); *R. v. Whelan*, 2002 NLCA 69 [CanLII](#).

This issue has now been clarified in *R. v. Gibbons*, 2012 SCC 28 ([CanLII](#)). The case states (Fish J.S.C.C. dissenting) that neither the specificity of punishment nor the comprehensiveness of the civil procedure preclude the applicability of section 127 of the *Criminal Code*. Instead, the exception to the applicability of section 127 is triggered only when it is clear that the Parliament or the legislature intended to limit the application of section 127 by “creating an express alternative statutory response to acts amounting to contempt of court.”

Nonetheless a few questions remain. Refer, for example, to *R. v. Nielsen*, 2014 ABCA 173 ([CanLII](#)) wherein Conrad J.A. granted leave to appeal on the question of whether or not the punishment and mode of proceeding prescribed in Alberta's *Rules of Court* are specific enough to create an exception to the applicability of section 127 of the *Criminal Code*.

In sum, the cases are indicating that the potential applicability of section 127 of the *Criminal Code* in response to disobeying a lawful civil protection order will depend on the provisions governing contempt, if any, in the statute authorizing the civil protection order and in the applicable *Rules of Court* and, more specifically, on whether the provisions in either or both statutes satisfy the criteria set out in *R. v. Gibbons*, 2012 SCC 28 ([CanLII](#)).

In connection with the constitutionality of *Criminal Code* section 127, see: *R. v. Gibbons*, 2015 ONCA 47 ([CanLII](#)).

## 7 Inter-provincial enforcement of civil protection orders

### **Divorce Act:**

Section 20 states that orders made under the [Divorce Act, R.S.C. 1985, c. 3 \(2nd Supp.\)](#) are enforceable throughout Canada.

**Provincial and territorial orders:** Prerequisites for the enforcement, in another province or territory, of civil non-monetary orders granted pursuant to provincial or territorial legislation vary considerably by jurisdiction. Recognition statutes in some jurisdictions relate merely to final orders and or to monetary judgments; others apply to civil orders more generally; still others specifically address the inter-jurisdictional enforceability of civil protection orders. For example:

**Alberta:** [Children First Act](#), SA 2013, c C-12.5 section 19 amends the [Protection Against Family Violence Act](#), RSA 2000, c P-27, enabling recognition and enforcement, as set out in the Act, of extra provincial and territorial protection orders.

**British Columbia:** [Enforcement of Canadian Judgments and Decrees Act \[SBC 20003\] Chapter 29](#); [Family Law Act](#), SBC 2011, c 25, Part 9, section 191

**Manitoba:** [Enforcement of Canadian Judgments Act](#), C.C.S.M. C E116. Part 3.<sup>64</sup>

**New Brunswick:** [Canadian Judgments Act](#), RSNB 2011, c 123

**Newfoundland:** [Enforcement of Canadian Judgments Act](#) (awaiting proclamation), SNL 2000, c E-11.1

<sup>64</sup> Canadian civil protection orders from other provinces and territories are enforceable in Manitoba – see part 3 of the *Act*.

<p><b>Nova Scotia:</b> <a href="#">Enforcement of Canadian Judgments and Decrees Act</a>, S.N.S. 2001, c. 30</p> <p><b>Ontario:</b> <a href="#">Children's Law Reform Act</a>, RSO 1990, c C.12, section 41 (enforcement of extra provincial orders relating to child custody and access)</p> <p><b>Prince Edward Island:</b> <a href="#">Canadian Judgments (Enforcement Act)</a>, RSPEI 1988, c C-1.1</p> <p><b>Quebec:</b> Articles 785 and 786, <a href="#">Code of Civil Procedure</a>, CQLR c C-25; Article 3155, <a href="#">Civil Code of Québec</a>, CQLR c C-1991</p> <p><b>Saskatchewan:</b> <a href="#">Enforcement of Canadian Judgments Act</a>, 2002, S.S. 2002, c. E-9.1001</p>
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Refer to the applicable statutes and case law. Change is anticipated. Efforts are underway to standardize recognition and enforcement of civil protection orders throughout Canada<sup>65</sup> and internationally. See, for example: Hague Conference on Private International Law (2012) [Recognition and Enforcement of Foreign Civil Protection Orders: A Preliminary Note](#) as well as current initiatives of the Hague Conferences on Private International Law on this issue: [Recognition and Enforcement of Foreign Civil Protection Orders](#).

## 8 Weapons restrictions in family law cases

### 8.1 Why should careful attention be devoted to weapons in domestic violence cases?

Firearms and other weapons are used in Canadian homes to intimidate adults and children.<sup>66</sup> Many domestic homicides and suicides in Canada are

<sup>65</sup> The Uniform Law Conference of Canada proposes adoption of the *Uniform Enforcement of Canadian Judgments and Decrees Act* to enhance inter-provincial recognition and enforcement of orders granted within Canada. See recommended uniform [Enforcement of Canadian Judgments and Decrees Act](#). See: *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52 [CanLII](#) for discussion of the enforceability of foreign non-monetary judgments.

<sup>66</sup> Statistics Canada (2009) *Family Violence in Canada: A Statistical Profile* 85-224-x. Statistics Canada. Family Violence in Canada. A Statistical Profile (Ottawa: Statistics Canada, 2005) at p. 61; Advisory Council on the Status of Women (2004) *Protection for Victims of Domestic Violence* at p.3-4; D. Doherty (2006) "Domestic Homicide in New Brunswick: An Overview of Some Contributing Factors" *Atlantis* 30.3; D. Doherty and J. Hornosty (2007) *Exploring the Links: Firearms, Family Violence and Animal Abuse in Rural Communities*; Fredericton, New Brunswick, University of New Brunswick Family Violence on the Farm and in Rural

committed with otherwise legally owned rifles and shotguns.<sup>67</sup>

Since weapons (particularly rifles, shotguns and handguns) are used to intimidate and to control (and/or to defend against violence), swift removal of weapons is recommended in DV cases.

For judicial recognition, albeit in a criminal context, of research demonstrating that timely removal of weapons can save lives in domestic violence cases, see *R. v. Hurrell* (2002), 60 O.R. (3d) 161, (2002), 216 D.L.R. (4th) 160, (2002), 166 C.C.C. (3d) 343, (2002), 4 C.R. (6th) 169, (2002), 95 C.R.R. (2d) 189, (2002), 161 O.A.C. 248, 2002 CanLII 45007 (ON C.A.)[CanLII](#) at paragraph 34.<sup>68</sup>

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Communities Project, have documented wide spread use of weapons in rural areas to control and to intimidate women in DV cases. American data suggest that two thirds of DV victims who live in homes where there are guns report use of guns to intimidate and threaten: C. Gwinn *et al.* (2005) Domestic Violence Keeping the Promise Victim Safety and Batterer Accountability Report to the California Attorney General from the Task Force on Local Criminal Justice Response to Domestic Violence (Safe State, California Attorney General's Crime and Violence Prevention Centre) at 4. This report comments on the critical importance of including provisions to ensure weapon restrictions are tracked and enforced. See also: Catherine Barber *et al.* (2008) "Suicides and Suicide Attempts Following Homicide: Victim-Suspect Relationship, Weapon Types, and Presence of Antidepressants" 12(3) *Homicide* 285-297; Washington State Death Review by Jake Fawcett, Kelly Star and Ankita Patel (2008) *Now That We Know Findings and Recommendations from the Washington State Domestic Violence Fatality Review*; D. Mitchell and S. Carbon (2002) "Firearms and Domestic Violence: A Primer for Judges" *Court Review* 32; P. Seave (2006) "Disarming Batterers Through Restraining Orders: The Promise and the Reality in California" *Evaluation Review* 30(3): 245-265; Violence Policy Center (2007) *When Men Murder Women: An Analysis of 2005 Homicide Data* (Washington: Violence Policy Center). Despite legislation in the United States mandating removal of guns in domestic violence cases, researchers continue to report problems with enforcement: Charles Diviney *et al.* (2009) "Outcomes of Civil Protective Orders Results from One State" 24(7) *Journal of Interpersonal Violence* 1209-221. On the positive side, in connection with safety US courts are now upholding gun bans for a broad range of DV behavior: *United States v. Castleman*, 572 U.S., 134 S. Ct. 1405, 188 L. Ed. 2D 426 (Mar. 26, 2014).

67 *Ibid.* In New Brunswick, Canada, researchers D. Doherty and J. Hornosty (2007) have documented wide spread use of weapons in rural areas to control and to intimidate women in DV cases: [Exploring the Links: Firearms, Family Violence and Animal Abuse in Rural Communities](#). Immediate action to remove firearms is recommended: National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#); Michigan Judicial Institute (2014) [Domestic Violence Bench Book – Fourth Edition](#).

68 For statistical information relating to firearms and domestic homicide in Canada, see Royal Canadian Mounted Police (2010) [Canadian Firearms Program Evaluation](#); Deborah Doherty (2006) [Domestic Homicide in New Brunswick: An Overview of Some Contributing Factors](#); Centre for Research & Education on Violence Against Women & Children, [Canadian Domestic Homicide Prevention Initiative](#); United States: National Institute of Justice (2003) *Intimate Partner Homicide Issue* 250. American data indicate that restricting access to guns in domestic violence cases can have an impact on rates of intimate partner homicide: E. Richardson Vigdor & J. Mercy (2003) "Disarming Batterers: The Impact of Domestic Violence Firearm Laws" in P. Cook and J. Ludwig (eds.) *Evaluating Gun Policy: Effects on Crime and Violence* (Brookings Institution) Abstract: NCJRS 203343. See also the United States Supreme Court reasoning in *United States v. Castleman*, 572 U.S., 134 S. Ct. 1405, 188 L. Ed. 2D 426 (Mar. 26, 2014).

**Caution:** Adults targeted by DV will not always be aware of the violator's access to weapons. Moreover adults targeted by DV may not seek provisions restricting weapons, despite serious safety concerns, for cultural reasons or as a result of fear of retaliation<sup>69</sup>

When courts, police, and lawyers make enquires about weapons and take action routinely to restrict access to weapons in DV cases, violators will have less incentive to manipulate or intimidate the targeted party.<sup>70</sup>

## 8.2 Weapons restrictions: SCC principles

The Supreme Court of Canada per Charron J. sets out, in *R. v. Wiles*, [2005] 3 S.C.R. 895, (2005), 240 N.S.R. (2d) 1, (2005), 240 N.S.R. (2e) 1, (2005), 260 D.L.R. (4th) 459, (2005), 203 C.C.C. (3d) 161, (2005), 214 C.C.C. (3d) 373, (2005), 139 C.R.R. (2d) 19, (2005), 34 C.R. (6th) 370, (2005), 3 S.C.R. 895, 2005 SCC 84<sup>CanLII</sup>, the overriding legal principle that in Canada possession of firearms is a privilege, not a right. See also: *R. v. Montague*, 2010 ONCA 141(<sup>CanLII</sup>), application for leave to appeal dismissed without costs *William Bruce Montague et al. v. Her Majesty the Queen*, 2010 SCC 52718 (<sup>CanLII</sup>) and *R. v. Montague*, 2014 ONCA 439 (<sup>CanLII</sup>), application for leave to appeal dismissed without costs: *William Bruce Montague, et al. v. Her Majesty the Queen*, 2014 <sup>CanLII</sup> 68704 (SCC).

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69 Aboriginal litigants may be concerned that complaints about weapons could result in cultural ostracism. Research at the Muriel McQueen Fergusson Centre for Family Violence Research at the University of New Brunswick documents considerable use of guns to intimidate rural women. D. Doherty and J. Hornosty (2007) have documented wide spread use of weapons in rural areas to control and to intimidate women in DV cases: *Exploring the Links: Firearms, Family Violence and Animal Abuse in Rural Communities*. Rural pro-gun culture and limited police presence over large geographic distances are cause for concern. It is important to ensure that orders restricting access to weapons take immediate effect and are readily enforceable. Otherwise such orders can encourage retaliatory violence instead of offering protection.

70 If victims are to be asked questions about concerns about weapons, it is important to question separately from the other party. Fully informed victims of DV are best prepared to attend to issues of safety and risk. Has the victim spoken to a DV advocate/expert about safety issues associated with weapons? Should an adjournment be granted for such purposes? The best option, is questioning of victims by a DV advocate/expert, who can inform the court about concerns while shielding confidential information.

## 8.3 Statutory authority to remove weapons in civil cases

Domestic violence prevention statutes in a number of jurisdictions explicitly authorize judicial orders to seize and or to prohibit access to weapons.

**Alberta:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#)

Section 2(3) pertaining to orders of justices of the peace and provincial court judges and Section 4(2) pertaining to of orders of Queen’s Bench justices.

**British Columbia:** [Family Law Act](#), SBC 2011, c 25, Part 9

Section 183(3)

**Manitoba:** [Domestic Violence and Stalking Act, C.C.S.M. c. D93](#)

Section 7 (1) (g) (h) and 7 (2) with respect to orders of Justices of the Peace and Section 14 (1) (h) and (i) with respect to orders of Queen’s Bench justices. [Domestic Violence and Stalking Regulation, Man. Reg. 117/99](#)

**Newfoundland/Labrador:** [Family Violence Protection Act, SNL 2005, c F-3.1](#), Section 6(j)(k)

**North West Territories:** [Protection Against Family Violence Act, S.N.W.T. 2003, c. 24](#)

Sections 4(3) (g), 4 (4)(5)(6) with respect to emergency protection orders (limited to 90 days) and Section 7 (h) with respect to protection orders. See also s. 19(9).

**Nova Scotia:** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29.](#)

Section 8 (1) (j) with respect to orders of Justices of the Peace, and Sections 11 and 12 with respect to Supreme Court reviews.

**Nunavut:** [Family Abuse Intervention Act, S. Nu., 2006, c.18](#) Refer also to [Nunavut government web site](#).

Emergency order (justice of the peace): s. 7 (4)(5)(6); Review of emergency order (judge): s. 16(3); Assistance orders (judge): s. 18.

**Yukon:** [Family Violence Prevention Act , R.S.Y. 2002, c. 84](#) section 4. .

Domestic violence statutes in **Prince Edward Island** ([Victims of Family Violence Act, R.S.P.E.I. 1988, c. V-3.2](#)) and **Saskatchewan** ([Victims of Domestic Violence Act, S.S. 1994, c. V-6.02](#)) do not currently include specific provisions relating to firearms or weapons but do authorize orders for immediate protection, including provisions relating to temporary possession of specified personal property.

## 8.4 Limited authority to restrict access to weapons in other family law cases

Despite the fact that family law cases frequently involve DV, and that family law cases involving DV are no less dangerous than criminal DV cases,<sup>71</sup> most family law statutes governing private custody and access matters in Canada do not expressly authorize orders for seizure, storage and prohibiting access to weapons. For an exception, see [Family Law Act, SBC 2011, c 25](#), Part 9.

### 8.4.1 Concerns

From a safety perspective, the limited express statutory authority to protect families from weapons in family law cases is a serious concern. As indicated earlier, family law cases involving DV are not necessarily less dangerous than criminal cases.<sup>72</sup> Many of those targeted by serious DV choose, sometimes for reasons associated with safety, not to call police and or not to participate in criminal proceedings.<sup>73</sup> Consequently, many targeted adults and children will only have the protection set out in the family law order. In the absence of statutory authority to restrict access to weapons, see paragraph 8.8.

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71 See footnote below.

72 E. Gondolf (2001) “Civil Protection Orders and Criminal Court Actions: The Extent and Impact of ‘Overlap’ Cases”. Indeed women (and other parents) subjected to the most serious and long-term forms of DV will sometimes initiate family rather than criminal proceedings because they fear retaliation, fear how a conviction might affect an immigration process, or fear the financial consequences of the violator’s loss of employment upon conviction. People who need protection do not always claim it. Findings that civil restraining orders tend not to be effective against persistent perpetrators of DV may help to explain why women subjected to the most severe forms of abuse may be less apt than other women to persist in obtaining civil protection orders: D. Cochran (1998) “From chaos to clarity in understanding domestic violence” *Domestic Violence Report* 3(5); D. Cochran (1995) *The Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders in Massachusetts* (Boston: Office of the Commission of Probation; E. Buzawa *et al.* (1999) *Response to Domestic Violence in a Pro-active court setting* (Rockville, M.D.: National Institute of Justice); Chris Cunneen (2010) *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (Parliament Queensland) Report. See also the discussion of civil protection orders pursuant to DV prevention later in this paper.

73 National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#); Michigan Judicial Institute (2014) [Domestic Violence Bench Book – Fourth Edition](#) Victims of DV who have been through the criminal justice system become disillusioned by light sentences, absence of effective help for violators, limited safety protection and/or by the escalation of DV following conviction. They may not contact police in response to subsequent occurrences. See: National Institute of Justice (US) (2006) “[Victim Satisfaction with the Criminal Justice System](#)” NIJ Journal 253 (January 2006). Note: Discussion of judicial options relating to weapons in a criminal law cases is outside the scope of this paper.

## 8.5 When to restrict access to weapons

Considerations include:

- prior acts or threats of violence
- death threats (direct or indirect)
- imminent or recent separation
- coercion and control
- suicide threats or attempts
- actual or threatened use of weapons to harm persons or pets
- weapons offences
- violence during pregnancy
- attempts to strangle or to choke
- negative dependency (“I cannot live without her”)
- mental health conditions, such as serious depression
- generalized violence
- monitoring or stalking
- drug or alcohol misuse
- escalating pattern of abuse and violence
- non-compliance with court orders

The list should not be considered exhaustive. Nonetheless it is important to recognize that these facts are associated in research evaluations and death reviews with a potential for lethal outcome (adult and child). For additional information on criteria suggesting that lives are in danger, refer to reports and materials posted by the Centre for Research & Education on Violence Against Women & Children [Canadian Domestic Homicide Prevention Initiative](#) and [Part 7](#) of Neilson, Linda C. (2014) [Enhancing Safety](#).

## 8.6 Options to enhance safety in connection with weapons

Practices to enhance safety include:<sup>74</sup>

Making separate enquiries of the applicant and respondent, during and between hearings, and between appointments to assess for recent acquisition, access to and possession of (or recent transfers) of weapons

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<sup>74</sup> Many of these suggestions first appeared in D. Mitchell and S. Carbon (2002) “[Firearms and Domestic Violence: A Primer for Judges](#)” in *Court Review* 32.

(guns, knives, other).<sup>75</sup>

For example: Does the perpetrating party own, possess or have direct or indirect access to weapons? Have weapons been stored or transferred to the care of control of another person (for example family or friends) in the last six months? What are the particulars of the storage or transfer? How likely is it that the domestic violator can gain access to such weapons?

As a result of changes to firearms legislation in Canada, police no longer have particulars of non-restricted firearms owned or possessed by an individual. Consequently, if a weapons prohibition is contemplated, it can be important, when safety is a concern, to prohibit the perpetrating party from ownership or possession of weapons as well as weapons licenses and to include specific information, to the extent that the information can be acquired, about type, number and location of existing weapons to be secured.

Additional suggestions:

- Inquiring about any changes in access to weapons between meetings or proceedings (to enable a response to subsequent acquisitions)
- Creating court protocols and court forms that require continuous disclosure of access, possession and recent transfers of weapons
- Enquiring about any [Firearms Act](#) or *Criminal Code* restrictions or prior and current court orders prohibiting possession of weapons within and outside the jurisdiction, in order to ascertain patterns of compliance and to avoid contradictory provisions
- Considering, if appropriate in the circumstances of the case and authorized by statute, routine prohibitions on the possession of weapons, ammunition, weapons licenses or acquisition documents and applications for weapons certificates for the duration of the protection order.
- Check the applicable provincial or territorial statute as allowable durations of such orders vary.

**Caution:** Careful attention to detail is important. A weapons order that is not immediately enforceable can result in violent retaliation rather than in protection. The targeted parent will often be in the best position to know if

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<sup>75</sup> Domestic violators are known to ‘transfer’ weapons to family members or friends in anticipation of court hearings.

such an order is advisable.

Even if the violator does not possess a weapon or a weapons license at the time of the meeting or hearing, when safety is a concern, consider a prohibition on the future acquisition of weapons, ammunition, or weapons licenses (for the duration of the order) since, unless the order prohibits future acquisition, nothing in the order will prevent the violator from acquiring weapons after the date of the hearing or original order.

### **8.6.1 Contents of restrictions on weapons orders**

The statutes in each jurisdiction set out types of orders courts are authorized to make with allowable durations. Research on the operation of civil protection orders in DV cases makes clear the importance of including provisions that ensure swift enforcement of weapons restrictions. Serious problems with tracking compliance and enforcement of these orders are being reported throughout North America. A known cause has been an absence of clear, detailed directions in orders relating to surrender, seizure, and storage of weapons and the absence of timely reviews to monitor compliance.<sup>76</sup> Unenforceable orders create risk.<sup>77</sup> The [Domestic Violence Handbook for Police and Crown Prosecutors in Alberta](#) offers helpful information for police and crown prosecutors on criminal provisions that authorize removal and seizure of weapons in DV cases.

Specific provisions to promote compliance could include:

- Provisions directing police seizure of weapons (as authorized by

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76 See, for example: [Domestic Violence and Firearms](#); Priscilla de Villiers (2012) [Costs of Gun Violence and the Impact on Victims](#) (Canadian Parliament); National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#); E. Sack (2005) “Confronting the Issue of Gun Seizure in Domestic Violence Cases” *Journal of the Centre For Families Children and the Courts* Vol. 6 3-30 particularly p. 18 and 19.

77 Violators ‘beat the system’; targeted persons learn that court orders provide no protection. The Judicial Council of California is one of many judicial associations recommending action to ensure immediate removal: Judicial Council of California (2012) [Report to the Judicial Council](#). Note, however, documented difficulties with judicial adherence to mandated weapons restrictions in the United States: Benjamin Thomas Greer and Jeffrey Purvis (2012) [Judges Gone Rogue: Constitutional Implications When Mandatory Firearm Restrictions are Removed from Domestic Violence Restraining Orders](#).

statute).<sup>78</sup>

- Detailed instructions on when, where and to what agency weapons are to be surrendered and stored. Immediate surrender is preferable.
- Directions relating to the method and time-line for filing proof of surrender (for example, faxing a form signed by an authorized representative of the agency storing the weapons).
  - Consider the wording needed to avoid the potential for conflict with the federal [Firearms Act, 1995 c. 39](#).
  - Emergency orders restricting weapons pursuant to provincial and territorial DV prevention statutes tend to be short-term. Under the federal [Firearms Act, 1995 c. 39](#) persons who engage in DV can be ineligible to hold a weapons license. Weapons licenses can be revoked on grounds of DV: See section 5 of the [Firearms Act, S.C. 1995, c. 39](#) and [Firearms Licenses Regulations, \[S.O.R./98-199\] section 16](#).
  - Thus a provision in a civil protection order stating, for example, that a person is prohibited from possessing weapons until a specified date could, potentially, result in a civil protection order that is in conflict with continuing ineligibility pursuant to the *Firearms Act* and regulations or a subsequent order pursuant to the *Criminal Code*.
  - **Suggestion:** weapons return and expiry conditions could be made subject to any additional prohibitions or limitations imposed pursuant to the [Firearms Act](#) or the [Criminal Code](#).
- Designation of a review process to review and commend compliance, to respond to non-compliance and or to decide return provisions.
- Designation of a DV professional, agency, case manager or court employee to ensure that proof of compliance is filed on the date specified or to alert the protected party in the event of non-

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<sup>78</sup> Check the applicable statutes. A number of the DV prevention statutes expressly authorize seizure of weapons. Provincial and territorial DV prevention provisions with respect to weapons and personal property are listed in section 8.3.

compliance.

- In the event of non-compliance, ensuring timely charging of the violator pursuant to [section 127](#) of the *Criminal Code* or pursuant to the specific offence provisions set out in the statute authorizing the civil protection order.

## 8.7 Weapons & aboriginal peoples

In connection with constitutionality of the *Firearms Act* and aboriginal peoples, see: *Bellegarde v. Canada (Attorney General)* (2004), 235 D.L.R. (4th) 763, [2004] 2 C.N.L.R. 312, (2004), 247 F.T.R. 314, 2004 FCA 34 [CanLII](#). Special provisions and limitations apply. See: [Firearms Act, 1995 c. 39](#) section 2(3) and 117 and [Aboriginal Peoples of Canada Adaptations Regulations \(Firearms\) S.O.R. 98/205](#).

Note, however, the continuing restrictions on authority to make enforceable orders relating to seizure of personal property (such as weapons) on reserves pursuant to section 89, of the [Indian Act R.S.C. 1985, c. I-5](#) unless the order is made in favor of an Indian or a band. Although section 16(5) (f) of the [Family Homes on Reserves and Matrimonial Interests or Rights Act](#) authorizes provisions required for immediate protection and section 31 authorizes transfers of interests or rights to applicants, the transfer of rights and interest provision is limited to applicants who are First Nations members (unless a First Nations council decides to enforce the order as if the person was a member of the First Nation pursuant to section 52 of [Family Homes on Reserves and Matrimonial Interests or Rights Act](#), SC 2013, c 20). The end result is that courts may not be able to enforce orders for the seizure and securing of weapons on a reserve pursuant to the Act unless the council decides to take action or the protected person (or the protected person's children) are Indian or band members.

## 8.8 What if statutory authority to restrict weapons is absent?

When safety is a concern and statutory authority to seize and secure weapons is lacking, consider, preferably with consent,<sup>79</sup> contacting police and relaying information about the DV and concerns about risk in order to enable police to secure weapons pursuant to the *Criminal Code*. The [Domestic Violence Handbook for Police and Crown Prosecutors in Alberta](#) provides useful information on preventative and other police options to secure weapons.

In addition, consider relaying particulars of DV to the appropriate Chief Firearms Officer.<sup>80</sup>

Section 5 of the [Firearms Act, 1995 c. 39](#) and section 16 of [Firearms Licenses Regulation, SOR/98-1999](#) set out ineligibility criteria. Once Chief Firearms Officers receive notice, action could be taken under the *Act*.<sup>81</sup>

In connection with criminal options, refer to Alberta's (2014) [Domestic Violence Handbook for Police and Crown Prosecutors](#).

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79 [Part 7.4](#) of Neilson (2014) *Enhancing Safety* includes a discussion of professional disclosure options in cases that involve danger.

80 Professional, Judicial or court staff notification of firearms officials is preferable to encouraging the targeted party to notify such officials since the latter course of action creates an incentive and an additional opportunity for potential manipulation, intimidation or retaliation. For an informative article dealing with firearms, DV and judicial considerations, see: D. Mitchell and Judge S. B. Carbon (2002) “[Firearms and Domestic Violence: A primer for judges](#)” in American Judges Association Court Review 39 (2).

81 In a DV context, delays associated with securing weapons pursuant to this Act are a concern. With respect to the constitutionality of the *Act*, see: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, (2000), [2001] 261 A.R. 201, (2000), 185 D.L.R. (4th) 577, [2000] 10 W.W.R. 1, (2000), 144 C.C.C. (3d) 385, (2000), 82 Alta. L.R. (3d) 1, (2000), 34 C.R. (5th) 1 [CanLII](#), and with respect to aboriginal claims: *Bellegarde v. Canada (Attorney General)*, 2004 FCA 34 [CanLII](#).

## 9 Prohibiting modern forms of domestic violence

Monitoring, stalking, intimidation and harassment using modern technology (computers, cellular telephones, geo-positioning equipment and tracking systems) are now a regular feature of DV cases.

Special safety precautions such as the following could help to prevent newer forms of harassment and intimidation.

- Asking questions to assess both parties' familiarity with computers, computer programs, and tracking devices.
- Offering information on how to avoid being monitored/stalked via modern technology. For example, people targeted by domestic violence should be advised to replace cell and smart phones as well as computers. If cell or smart phones or computers are retained, teach methods to prevent harassment and stalking (e.g. ensuring that the phone is not operational except when in secure surroundings; obtaining a new email address; using a friend or colleague's computer until the computer or phone has been checked for 'malware', tracking and monitoring devices; installing 'anti-spyware' and 'anti-virus' programs.)
- Consulting a computer expert who can advise on language to ensure protection from harassment and stalking without causing innocent breaches.
- People who are targeted by DV can be taught how to document and report incidents of digital stalking and harassment. The [\*Domestic Violence Handbook for Police and Crown Prosecutors in Alberta\*](#) offers some helpful suggestions.
- Including provisions to prohibit the possession or distribution of 'spy ware, computer viruses, Trojan horses, malware,' or other computer programs to cause harm or to view the contents of the other person's computer or to monitor the targeted person's or children's use of a

computer.

- Including provisions to prohibit direct and indirect forms of intimidation, harassment or stalking by computer and/or email, and to prohibit arranging contact between the targeted person or children and objectionable third parties or web sites.
- Including provisions to prohibit the domestic violator (an anyone of the violator's behalf) from using geo-positioning and tracking systems or programs associated with cellular phones, computers, and otherwise to determine the whereabouts of the intimate or former intimate partner and or specified family members.
- Prohibiting the domestic violator from installing equipment capable of tracking the whereabouts of the targeted person and or the children on motor vehicles used by the targeted person.<sup>82</sup>

Refer to Jennifer Perry (2012) [Digital stalking: A guide to technology risks for victims](#) (Bristol: Network for Surviving Stalking and Women's Aid Federation of England) and [Digital Trust](#); National Center for Victims of Crime [Stalking Resource Center](#); New Zealand Family Violence Clearinghouse (2015) [Resources to prevent and respond to digital stalking](#) and John Ashcroft (Attorney General, US) [Stalking and Domestic Violence Report to Congress \(US Department of Justice, 2001\)](#) as well as footnote 82 for additional information.

**Caution** is advisable in connection with provisions enabling long-distance access between violators and children using computer programmes. On the

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82 Indirect intimidation and harassment can include behaviours such as: visiting objectionable web sites pretending to be the targeted person and soliciting the sending of objectionable sexual and violent material or inviting violent or offensive sexual contact from others. Direct forms of intimidation, monitoring or stalking can include the sending of threatening email messages; the sending of ‘Trojan horses’ which enable the sender to gain access to the contents of the other person’s computer; or the insertion of spy ware programs that allow monitoring of the other persons’ use of the computer. Geo-positioning technologies associated with cell phones or inserted in cars can enable monitoring in real time of the exact locations of the person targeted. J. Ashcroft (2001) [Stalking and Domestic Violence Report to Congress \(Washington: US Department of Justice, Office of Justice Programs, Violence Against Women Office\)](#); C. Southworth, S. Dawson *et al.* (2005) [A High-Tech Twist on Abuse: Technology, Intimidation, Partner Stalking and Advocacy \(Violence on Line Against Women\)](#).

one hand, when regular contact between the domestic violator and the child is in the best interest of the child, mechanisms that enable low-cost, regular long distance contact and communication can be highly beneficial to children and to the family. On the other hand, it is important to ensure that digital communication does not enable use of digital cameras or monitoring programs to monitor, control, or harass. Cautious attention to such issues is advisable, for the same reasons, in connection provisions directing parents to make arrangements regarding the children via email or other computer communication system.

Nova Scotia's [Cyber-safety Act](#), S.N.S. 2013, c 2 may offer additional remedies in DV cases in Nova Scotia.

## **10 Mutual Protection Orders**

### **10.1 Are mutual civil protection orders ever appropriate in DV cases?**

Mutual protection orders should be avoided.<sup>83</sup>

Potential problems include:

- enhancement of the domestic violator's control and capacity to manipulate, to harass, to intimidate and to 'set up' the targeted person
- absence of clear direction to the police should violence or abuse occur again
- adverse impact on immigration processes<sup>84</sup>

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83 National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#); Michigan Judicial Institute (2014) [Domestic Violence Bench Book – Fourth Edition](#) and the American Bar Association's (2007/2008) *Standards of Practice in Civil Protection Order Cases for Family Court Proceedings* (with commentary) at p. 8. A number of jurisdictions in the United States and elsewhere have implemented legislation to limit the making of mutual protection orders on consent. For discussion see, for example, Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victoria Law Reform Commission). People who are targeted by DV are commonly intimidated or pressured into agreeing to mutual orders.

84 J. Zorza "What is Wrong with Mutual Orders of Protection?" (US: National Crime Prevention Council). Joan Zorza is lawyer and editor of *Sexual Assault Report* and *Domestic Violence Report* and the book *Violence Against Women*. She has been a consultant to the International Association of Chiefs of Police, liaison to the American Bar Association's Commission on Domestic Violence, and served on the board of the National

Some authors state that mutual protection orders are less effective than no order at all. While it is doubtful that the assertion has universal application,<sup>85</sup> attempting to determine responsibility for the onset and control of the pattern of domestic violence over time (identification of the dominant aggressor<sup>86</sup>) is the better course of action.

## **10.2 What is the alternative to a mutual order?**

When both parties have been violent, protection orders should be made in favour of the person who is genuinely dominated by and fearful of the other and against the person who dominated and controlled the onset and dominant pattern of abuse and violence in the relationship.

## **10.3 What methods can be used to ensure orders are issued to protect the right person?**

Methods used to determine responsibility for stranger violence - will not necessarily identify the dominant aggressor/perpetrator in a DV case because:

- The qualities and dynamics of the two types of violence are different
- The instigator (or the person who engaged in the most severe form of violence) in the latest incident of violence may be the targeted party. People targeted by DV commonly engage in resistance violence when

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Coalition Against Domestic Violence for 10 years. She helped draft sections of the original *Violence Against Women Act* in the United States. See also the web links to research and resources on civil protection posted by the National Center on Domestic and Sexual Violence in the United States [Protection Orders and Full Faith Credit](#).

85 Some women are violent and some couples do engage in mutual violence. The limited evidence available to date suggests, however, that the onset of female violence is usually associated, in heterosexual relationships, with a pattern of having been targeted by male intimate-partner violence in the past. M. Crager, M. Cousin & T. Hardy (2003) [Victim Defendants: An Emerging Challenge in Responding to Domestic Violence in the Seattle and King County Region \(MINCAVA\)](#); K. Cavanaugh, E. Dobash, R. Dobash (2001) "Remedial Work: Men's Strategic Responses to their violence against female intimate partners" *Sociology* 35(3) 695-714.

86 For an explanation of this term, see "Dominant Aggressor / Dual Charging" in [Domestic Violence Handbook for Police and Crown Prosecutors in Alberta](#)

attempting to resist DV or to escape from these relationships<sup>87</sup>.

- Perpetrators learn how to 'set up' partners to generate the appearance that violence was mutual or even initiated by the other partner.

Violators have more difficulty, however, disguising responsibility for patterns of abuse and violence over time. Scrutiny of long-term patterns of behaviour and their effects on family members, together with careful attention to responsibility for intimidation and control, can produce accurate assessment.<sup>88</sup>

## **11 Should resumption of cohabitation result in revocation of the civil protection order?**

Not necessarily. Persons targeted by domestic violence have numerous reasons for resuming cohabitation with formerly violent partners. Such reasons (discussed in the footnote) may have little to do with cessation of abuse or violence.<sup>89</sup> In fact, repetitive reconciliation is an expected pattern even in severe domestic violence cases.<sup>90</sup> Continuing support from

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87 For an explanation of the term 'resistance violence', see Part 5 of Neilson, Linda C. (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).

88 L. Neilson (2004) "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" *Family Court Review* 42 (3) 411-438. Family court judges have an advantage over criminal court judges when it comes to accurate assessment because evidence rules in family law cases permit broader consideration of evidence of past conduct. Minor, isolated acts of violence that occur occasionally between intimate partners that are not part of a pattern of violence, that do not cause fear, that are equally engaged in by both parties and that are not associated with a pattern of emotional or financial abuse or with coercion, do not constitute DV as the term is used in this paper. Caution is advised, however, since most violators claim their own violence was minor and isolated.

89 Reasons for deciding to resume cohabitation with an abuser can include love and hope or belief in change, pressure from children to restore the family unit, economic necessity, vulnerable immigration status, lack of availability of alternative housing, even perceptions of safety. Some severely abused women actually say they feel safer living with the perpetrator because it allows them to monitor emotional cycles and thus attempt to anticipate the next episode of violence. **Caveat:** this comment should not be taken as an endorsement of reconciliation, in the absence of demonstrated behavior change, as a safe option.

90 Alberta's *Protection Against Family Violence Act* makes it clear in section 2(2.1) that an applicant's history of resuming residence with a respondent does not preclude the granting of protective order.

professionals, community support services and from the legal system is still warranted, despite patterns of resumed cohabitation.

Nonetheless domestic violators should be advised they may not resume contact or cohabitation even if the protected person seeks contact; the civil protection order must be changed first.

Caution is warranted when facts indicate the likelihood that violence will continue or when there is a potential for lethal outcome. In these cases, encourage immediate consultation with a DV expert or with victim services for risk assessment, advice and safety planning.

Nonetheless the social reality is that many intimate partners do chose to return to formerly violent partners. In such circumstances protective measures during cohabitation can enhance safety.<sup>91</sup> When variation of an order to enable resumption of cohabitation is contemplated, while some provisions (such as no contact, no communication and exclusive possession of the marital home) are obviously inappropriate, provisions such as the following could, in appropriate circumstances, offer a degree of continuing protection:

- completion of DV intervention and parenting programs (and if applicable substance abuse and mental health treatment programs) by the violator<sup>92</sup>
- prohibitions on abuse, stalking, threats, violence or harassment, or use of tracking devices on cars, and prohibitions associated with computer stalking, other forms of computer harassment and tracking equipment
- prohibitions, for a specified period, on access to or possession of

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91 Gaby Marcus (2012) [\*Supporting Women Who Remain in Violence Relationships\*](#) (Australian Domestic & Family Violence Clearinghouse).

92 See 4.10 in connection with statutory authority to order treatment.

weapons and firearms and licenses to possess weapons

- prohibitions on contact at work<sup>93</sup>

In appropriate circumstances, when authorized by statute, the targeted adult could be asked if he or she would like any or all of such provisions to continue.

Note however that civil restraining orders during cohabitation are not possible in every Canadian jurisdiction. For example, section 128 of the [Family Services Act, S.N.B. 1980, c. F-2.2](#) , makes separation a condition of the making of an application.<sup>94</sup>

It is important to ensure that the orders are clearly explained to both parties so that the targeted person knows when and who to call for help and so that the violator knows clearly his or her responsibilities.

## **12 What if the respondent agrees to DV intervention?**

Intervention programs do not necessarily stop DV. Evaluation research is inconclusive and rates of non-completion are high. Protection should not be denied solely because the violator has agreed to participate in or has completed a DV intervention program. Look for changes in belief resulting in changed behavior.

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93 Similar recommendations are found in: American Bar Association (2001) Commission on Domestic Violence. Continuing Legal Education Teleconference *Civil Legal Assistance for Battered Immigrants*.

94 The living separate and apart condition is unfortunate as it creates an obstacle to ensuring safety. Indeed all of Canada's family law statutes could benefit from a review and revision process informed by DV experts in response to new knowledge about domestic violence and the legal system.

## 13 What if there are concerns about potential child abduction?

Discussion of the very complex sociolegal issues at the intersection of DV and child abduction is beyond the scope of this document. Nonetheless it is important to note that DV is associated with risk of child abduction (by either parent) and that preventive measures can be warranted.

## 14 Failure to pursue, confirm or renew protection orders

Claims for civil protection are often abandoned or not renewed despite serious allegations of DV.<sup>95</sup> While some claims are abandoned because violators are no longer perceived as a threat, many claims are abandoned as a consequence of fear, [see for example, *R. v. McCotter*, 2012 BCCA 54 ([CanLII](#))], efforts to protect the children from retaliation, reconciliation,<sup>96</sup> lack of access to legal assistance, limited resources or lack of knowledge that further action is necessary to continue, renew or serve the order.<sup>97</sup> In fact there is some evidence that those who have the greatest need for protection are the least apt to follow through to obtain, renew and confirm such

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95 J. Hornick, M. Boyes *et al.* (2005) *The Domestic Violence Treatment Option (DVTO), Whitehorse Yukon: Final Evaluation* (University of Calgary) at 15, 60; *Technical Report A Further Review of the Saskatchewan Victims of Domestic Violence Act* (1999) Prepared for Department of Justice Canada, Saskatchewan Department of Justice at p. 3; L. Neilson (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, March 2001); D. Russell & D. Gwinn (2001) *Framework for Action Against Family Violence 2001 Review at "Civil Remedies"* (Department of Justice, Nova Scotia).

96 Repeated reconciliation does not indicate lack of danger. The pattern is common even in cases of severe violence.

97 Women who are subjected to continuing abuse and violence despite temporary protection orders may come to believe that seeking further legal action is futile or even dangerous. Other reasons for not pursuing claims for protection include: fear (of retaliation against self or the children); protection of children (for example, agreeing to abandon claims in return for perpetrator's agreement to abandon custody or access claims); lack of confidence in the legal system; lack of knowledge that temporary orders must be renewed; lack of access to legal and economic resources to pursue claims; financial inability to attend court hearings.

orders.<sup>98</sup>

The following practices can help to ensure protection orders are not prematurely abandoned.

- Ensuring that forms and instructions are available in easily understood language, particularly for *pro se* litigants who seek to renew, confirm, vary, rescind or appeal civil protection orders.<sup>99</sup>
- Ensuring that the parties are notified (and reminded) in easily understood language of any steps needed to serve, confirm and renew (or to vary, rescind and appeal) protection orders.
- Keeping in mind the many reasons such claims are not pursued and resisting potentially erroneous conclusions about safety or truthfulness based merely on failure to pursue claims.
- Ensuring that the protected party actually received notices of hearings and review dates (interference with mail and other communication is common in coercive DV cases)
- Ensuring that the protected party has access to child care and safe transportation and thus capacity to attend hearings
- Seeking adjournments and rescheduling 1) to explore the reasons claims are not being pursued in order to rule out manipulation or intimidation<sup>100</sup> and 2) to enable parties targeted by DV to consult a DV

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98 G. Etter & M. Birzer (2007) “Domestic Violence Abusers: A Descriptive Study of the Characteristics of Defenders in Protection form Abuse Orders in Sedgwick County, Kansas” *J. Fam. Viol.* (2007) 22: 113-119. see also; Jane Stoeber (2014) “Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders” 67(4) *Vanderbilt Law Review* 1015-1093; Kelly Driscoll (2014) “*Severing Ties: The Case For indefinite Orders*” in *Montana Law Review* .

99 Some Canadian jurisdiction have attended to this issue.

100 There is considerable debate in the domestic violence field about whether or not judges should accede to the wishes of those targeted by domestic violence not to pursue a claim for protection when indications of risk or danger are present. On the one hand is the importance of safety; on the other hand are issues associated with empowerment and agency as well as the ability of targeted persons to predict the safest course of action. There are no clear answers to this issue. It may be helpful to keep in mind, when making a decision, that people who have been targeted by domestic violence are reliable predictors of danger but not necessarily reliable predictors of safety. The Victoria Law Reform Commission in Australia reports favourably on instances where protections were ordered despite women’s objections: Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victorian Law Reform Commission). Authorities in the United States, however, tend on balance to

advocate, a DV expert or victim services before proceeding.<sup>101</sup>

- Seeking the appointment of legal counsel. See, for example, Justice Veale in *Anhorn v. Scott*, 2000 YKSC 26 ([CanLII](#)).
- Drafting civil protection orders with a view to making safety and accountability the priorities.

See [Chapter 15.16](#) below in connection with applications by protected persons to revoke civil protection orders.

## **PART TWO: Types of Civil Protection**

### **15 Restraining orders**

#### **15.1 Jurisdiction**

Superior courts have inherent jurisdiction to grant injunctions to protect litigants from intimidation, harassment and injury during litigation processes.

- **Query:** Could this jurisdiction allow superior courts to restrict access to weapons to protect litigants during the course of litigation?

Non-molestation orders can be granted pursuant to powers associated with the [Divorce Act, R.S. 1985, c.3 \(2nd Supp.\)](#). Statutes in all provinces and territories authorize some form of protection order.

#### **15.2 Relevant domestic violence information**

Emotional abuse (for example, threatening, intimidating, coercing,

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favor targeted parent's autonomy and decision making.

<sup>101</sup>National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#).

degrading, stalking) or financial abuse for example, interfering with ability to work by harassing employers or sabotaging transportation to work, controlling bank accounts and financial decisions, denying educational options, refusing to pay for necessities of life, cancelling services to the home, hiding or destroying property)<sup>102</sup> and physical/sexual violence are interconnected phenomena. A pattern of emotional or financial abuse, associated with intimidation, domination and control, can cause considerable psychological harm and can escalate into physical or sexual violence.<sup>103</sup>

Civil protective interventions tend to be more effective early, before a pattern of coercion, intimidation and violent behaviour is firmly established.<sup>104</sup>

### **15.3 Parties**

Statutory authority for restraining orders, and the persons who may be protected, varies considerably by statute and jurisdiction. For example, while restraining orders in Alberta can be granted to protect a broad range of persons, restraining orders in New Brunswick and in Ontario are limited to spouses and/or former cohabitants: In New Brunswick see 128 of the [Family Services Act, S.N.B. 1980, c. F-2.2](#). In Ontario, see section 46 of Ontario's [Family Law Act, R.S.O. 1990, c. F.3](#) and section 35 of [Children's Law Reform Act, R.S.O. 1990, c. C.12](#). In British Columbia pursuant to the [Family Law Act, S.B.C. 2011, c 25](#), Part 9, orders may be made in favor and against family

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102 A. Adams, C. Sullivan, D. Bybee & M. Greeson (2008) "Development of the Scale of Economic Abuse" *Violence Against Women* 14(5): 563-588; Western Education, Centre for Research & Education on Violence Against Women & Children, Canadian Labour Congress (2014) [Can Work Be Safe, When Home Isn't Initial Findings of a Pan-Canadian Survey on Domestic Violence and the Workplace](#).

103 Periodic isolated mutual name-calling and expressions of anger between intimate partners, who are relatively equal partners in the relationship, is qualitatively different from the pattern of verbal domination, degradation, intimidation, coercion and control that is associated with emotional DV.

104 Judge S. Van de Veen (2004) "Some Canadian Problem Solving Court Processes" *Canadian Bar Review* Vol. 83 at 134.

members<sup>105</sup> and “need not be made in conjunction with any other proceeding or claim for relief under this Act”.

Limitations on who may be bound and who may be protected pursuant to civil protection legislation are unfortunate and are out of step with the known realities of domestic violence. It is not at all uncommon for those who engage in coercive domestic violence to target anyone who supports the targeted person: children, friends, partners, lawyers, employers, therapists, extended family members, service providers, family pets. In addition, Canada is changing demographically.<sup>106</sup> Extended family relationships and structures are becoming more and more common. Many of the civil protection statutes were originally drafted with nuclear family structures, headed by one man and one woman, in mind. Gender-based forms of DV in extended families can have a pattern that is very different from the 'usual' pattern of DV in nuclear families. Family members other than the intimate partner, who may or may not be members of the nuclear unit and who may or may not reside in the same home, may exercise gender-related power and coercion control over a family member, usually a woman, on behalf of an intimate partner or the head of the extended family.<sup>107</sup> Restrictions on who may be bound and who may be protected by civil protection orders can present obstacles to protection and access to justice for those exposed to DV

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105From a DV and demographic point of view, the definition of 'family member' in this statute is unfortunate. The term appears to be too narrow to encompass parties to gender related violence and power relationships in extended families, who may not always reside together with the intimate partners in the same 'family' residence. As Canadian cultural demographics change, this limitation is likely to cause problems with access to justice. Many of these difficulties could be avoided by enlisting DV experts to review the wording of proposed legislation.

106Statistics Canada (2015) [Tables by Subject: Ethnic groups and generations in Canada](#); Krishna Pendakur: [Visible Minorities in Canada's Workplaces a Perspective on the 2017 Projection](#); Statistics Canada (2014) [Portrait of Families and Living Arrangements in Canada](#).

107Aruna Papp (2010) “[Culturally Driven Violence Against Women A Growing Problem in Canada's Immigrant Communities](#)” July 2010 No. 92 *Policy Series* (Frontier Centre for Public Policy); Baobaid (2012) *Domestic Violence Risks in Families with Collectivist Values*; Maria Dimopoulos (2010) “[Implementing Legal Empowerment Strategies To Prevent Domestic Violence in New and Emerging Communities](#)” *Issues Paper 20*, November 2010 (Australian Domestic & Family Violence Clearinghouse).

in these cases.

*Raymond v. Brauer*, 2012 NSCA 30 ([CanLII](#)) is a reminder of the importance of prior notice if it is proposed that third parties be bound.

When the statute limits court options to bind family members, other than intimate and former intimate partners, an alternative option, albeit less than ideal, is to prohibit the party from indirect forms of harassment such as via the children. See, for example: *C.S. v. M.S.* (2007), 37 R.F.L. (6th) 373, 2007 [CanLII 6240](#).

Note, however, that provisions prohibiting an intimate partner or former intimate partner from engaging in indirect forms of harassment will not necessarily offer sufficient protection in extended families where the gender-based violence and coercive control are directed against women by extended family members other than a spouse or intimate partner (for example, by mothers-or-fathers-in-law, new spouses, brothers or sisters, uncles or aunts). Canadian civil protection statutes would benefit from a thorough overhaul, following consultations with DV experts, including those with expertise relating to gender-based violence in cultural communities, to ensure that the statutes are responsive to the realities of women, targeted adults and children in non-nuclear, extended, and complex family units.

## **15.4 When orders are made**

While appellate decisions on restraining orders for personal protection are relatively rare, decisions across Canada indicate restraining orders may be issued in the following circumstances.

- To offer protection from a broad range of behaviour (not just domestic violence).
- In cases that do not involve physical violence:
  - *Stokaluk v. Stokaluk*, 2003 CanLII 2252 (ON S.C.) ([CanLII](#); *Cole*

*v. Cole*, 1998 Carswell Ont 1566 (C.J.); *Bain v Bain*, 2008 BCCA 49, 49 R.F.L. (6<sup>th</sup>) 17, 78 B.C.L.R. (4<sup>th</sup>) 13 ([CanLII](#)).

- To respond to repetitive emotional abuse, continuing unwanted monitoring, contact or presence:
  - *Weeks v. Weeks* (2000), 282 A.R. 156 (QB).
  - To prevent repetitive abusive communication if there is evidence the communication was threatening or inappropriate:
    - *E. (D.J.) v. E.(P.A.)*, 2002 ABQB 481 [CanLII](#).
  - To prevent further destruction or interference with property or entering the home:
    - *Miller v. Miller* (2000), 257 A.R. 232 (QB); *McLeod v McLeod* (2004), 272 N.B.R. (2nd) 220 (FD); *Young v. Young*, 2003 CanLII 47887 (ON S.C.) [CanLII](#).
  
- To combat situations involving continuing hostility and intimidation where spurious allegations and harassment continue, or to prevent acrimony escalating into physical violence:
  - *Koch v. Mitchell*, 1999 BCCA 16 [CanLII](#); *Murphy v. Murphy*, 2007 BCSC 977 [CanLII](#); *Litman v. Sherman*, 2008 ONCA 485 [CanLII](#) (merely mentions use of a restraining order for this purpose).
  
- To prevent continuing vexatious use of litigation and unwarranted presence in the vicinity of an ex partner:

*Green v Green*, 2010 ONCA 866 ([CanLII](#)) and *Dobson v Green*, 2012 ONSC 4432 ([CanLII](#))
  
- To combat a parent's aggressive and persistent inappropriate conduct and clearly demonstrated attempts to undermine a child's relationship with a parent: *C.S. v. M.S.*, 2010 ONCA 196 ([CanLII](#)).

## 15.5 Requirements for granting

Canadian cases are indicating that restraining orders:

- Must be based on evidence and sound reasons
  
- Should identify the basis for the order: *Griffin v. Bootsma*, 2005 CanLII 35095 (ON C.A.) [CanLII](#); *Tether v. Tether*, 2005 SKQB 531 [CanLII](#).
  
- Should be based on “compelling evidence” and should not be worded

such that normal “innocent” behavior could result in a breach: *Droit de la famille - 14368*, 2014 QCCA 390 ([CanLII](#))

- Should not be granted when unnecessary, particularly when the likely result will be an order that could be used by a perpetrating party to harass or control the other party.<sup>108</sup>
- Must be based on more than trivial concerns.
- Must satisfy a legal requirement for annoyance: *Smith v. Smith*, 2005 ONCJ 474[CanLII](#).
- Must involve a degree of persistence: *Purewal v. Purewal*, 2004 ONCJ 195[CanLII](#).
- Should not be continued indefinitely where there is no evidence of continuing need. See also, however, [Chapter 15.13](#) below in connection with the granting of long-term and permanent restraining orders

### **15.5.1 Reasonableness of Fear**

A number of decisions state that applicant fear or apprehension must be reasonable: *Ducharme v. Borden*, 2014 MBCA 5 ([CanLII](#)); *Azimi v. Mirzaei*, 2010 ONCA 455 ([CanLII](#)) at paragraph 3; *Z.(A.) v. W.(J.)*, 2004 ONCJ 157[CanLII](#); *Ciffolillo v. Nieweglowski*, 2007 ONCJ 469[CanLII](#).

From a DV research perspective, it is important to keep in mind that the nature of ‘reasonable apprehension or fear’ changes in a DV context. Behaviours that seem ‘innocent’ in a non-DV context, such as a twitching eye, a particular look, twisting a ring, shining car lights in a window, can reasonably be expected to cause intense fear, even terror, in a DV context

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<sup>108</sup> This issue was recognized in *Elias v. Elias*, 2006 BCSC 124[CanLII](#). Yet despite a finding that a restraining order against the wife was not needed and probably would be used by the husband against her, the court granted a mutual restraining order. The reasons for doing so are not clear in the judgment.

when such behaviours have been associated with violence in the past. Consider 'reasonableness' in terms of what is reasonable for a person who has been subjected to DV.

This issue is discussed more fully in [Chapter 16.3.1](#) below.

Reminder: the case law is clear that in civil cases the onus and proof are on balance of probabilities, NOT beyond reasonable doubt. For example, *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 ([CanLII](#)).

## **15.6 What if the violence was an isolated incident?**

When violence was minor and isolated and there is no pattern in the relationship of coercion and control or emotional or financial abuse, and the applicant does not fear the respondent, a protective order may be unnecessary.

Nonetheless there is a need for caution and thorough analysis of the pattern of behavior in order to distinguish cases involving a genuine, minor and isolated incident of minor violence from abuse and violence associated with intimidation, monitoring, harassment, emotional domination or control. Perpetrators of on-going coercive DV will *usually* claim that the violence was a first time, isolated occurrence. Yet the normal pattern is for DV to occur repeatedly before it is ever reported by the targeted person to anyone.

People who have been targeted by acts of abuse and violence are often best placed to assess such acts in context and to predict the presence of risk or danger. Fear has been verified in empirical research as one of the reliable predictors of risk and danger.

Thus when a single incident of violence is associated with a pattern of

emotional domination, degradation, intimidation, coercion or control, or when a single incident of violence is severe, the best course of action is to err on the side of caution and offer protection until safety has been fully assessed or can be assured.

Civil protection orders are not punishment for past behaviour; they are preventative, designed to prevent harassment, intimidation, emotional and financial abuse and violence in the future.

## **15.7 What if there is no evidence of recent conduct?**

The case law indicates that past conduct warranting a restraining order does not have to be immediate past conduct but should be close enough in time to indicate ongoing risk:

DV research demonstrates, however, that time elapsed since the last incident of abuse or violence is not always a reliable indicator of safety.<sup>109</sup>

- The perpetrator may have had limited opportunity to abuse or to harass the former partner. (For example: the perpetrator may have been in jail, may have been living in another jurisdiction, may not have known the targeted person's whereabouts, may have been involved in a new intimate relationship,<sup>110</sup> may have been bound by a court order, or may have been under close public or judicial scrutiny.)
- The perpetrator may be continuing to use subtle means to dominate, control, harass, or intimidate the targeted person. Because targeted persons learn to detect subtle signs of danger, perpetrators learn how to 'get away with' intimidating behaviours that only the targeted person understands. When old patterns of harassment that were associated with intimidation, harassment or violence in the past resurface, this can signal a resurfacing of

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<sup>109</sup> National Council of Juvenile and Family Court Judges (1994) [Model Code on Domestic and Family Violence section 304](#); Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report (Victoria Law Reform Commission)* at 364-7.

<sup>110</sup> Abused women commonly report that their abusers stop being abusive and violent when new intimate relationships were formed but began anew when the new relationships end.

coercive DV and may cause considerable apprehension and fear on the part of the targeted party.

While the absence of DV while being monitored or while bound by a court order is a positive sign, it does not necessarily indicate the unreasonableness of continuing fear or that the targeted adult will be safe in the absence of an order or monitoring. Behavior while being monitored can differ appreciably from private behavior in these case. In fact the absence of abuse while being monitored may indicate that the civil protection order is having the desired positive effect and should be continued. See, for example, the informative social context reasoning of the Court of Appeal of the State of California in the American case [Eneaji v. Ubboe, \(Cal. App. Second Dist., Div. 7; March 18, 2014\) 224 Cal.App.4th 1069, \[169 Cal.Rptr.3rd 106\]](#).

## **15.8 What if the perpetrator has completed an intervention program?**

The perpetrator's completion of a treatment program for domestic violence is sometimes taken into account when deciding whether or not to grant or to continue a restraining order.<sup>111</sup>

While domestic violence intervention is certainly positive and important, intervention programs are not always effective. Research evaluations of domestic violence intervention programs do not support assumptions that such programs ensure domestic violence will stop, particularly when there has been repetitive coercion or violence.<sup>112</sup> Intervention followed by an

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111 For example, *Whitlock v. Whitlock*, 2005 ONCJ 266 [CanLII](#); *M.P.J.C.W. v. E.A.D.*, 2005 YKSC 25 [CanLII](#).

112 For example: Edward Gondolf (2012) *The Future of Batterer Programs: Reassessing Evidence-Based Practice* (Northeastern); Leslie Laing (2003) [What is the Evidence for the Effectiveness of Perpetrator Programmes?](#) (Australian Domestic & Family Violence Clearinghouse); S. Bocko and C. Cicchetti (2004) *Restraining Order Violations, Corrective Programming and Recidivism* (Massachusetts Trial Court); A. Cissner and N. Puffett (2006) *Do Batterer Prevention Program Length or Approach Affect Completion or Re-Arrest Rates? A Comparison of Outcomes between Defendants Sentenced to Two Batterer Programs in Brooklin* (New York: Center for Court Innovation); R. Sartin, D. Hansen & M. Huus (2006) "Domestic Violence Treatment response and recidivism: A review and implications for the study of family violence" in *Aggression and Violent Behaviour*

assessment of changes in behavior and reassessment of risk is the preferred course of action.

## 15.9 What if other remedies are available?

In some cases, restraining orders have been refused when the parties have little reason for contact.<sup>113</sup>

If the applicant is living in a secure shelter, see [Chapter 16.8](#) below.

Nonetheless the cases also indicate that criminal remedies do not preclude the granting of a civil remedy.<sup>114</sup>

Indeed family law proceedings, priorities and evidentiary requirements differ from those in criminal cases. A protective remedy available in a civil case on proof of balance of probabilities may not be available in criminal case where the onus of proof is different.

The DV research indicates that multiple protection orders (civil and criminal) can enhance safety, provided that the terms are not contradictory. In many jurisdictions, statutes authorize civil restraining orders to prevent non-criminal as well as criminal conduct and, in some jurisdictions, the orders may be granted for long periods of time, or even permanently, providing protection after criminal remedies expire.<sup>115</sup> Refusal to grant an order

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11: 425-440; Darian Shephard (2009) “Working with men who use violence: the problem of reporting ‘progress’” Australian Domestic & Family Violence Clearinghouse 39 *Newsletter*. On the other hand, emerging data suggest positive responses to RNR (Risk, Need, Responsivity) models of intervention: K. Scott et al (2015) “Intervening to prevent repeat offending among moderate-to high-risk domestic violence offenders: a second-responder program form men” 59(3) *Int. J. Offender Therapy and Comparative Criminology* 273-94.

113For example, *Smith v. Smith*, 2005 ONCJ 474 [CanLII](#) or a criminal remedy is in force, for example, *W. v. D.*, 2004 YKSC 50 [CanLII](#); *C.M.W. v. C.B.*, 2006 BCPC 129 [CanLII](#).

114 For example *Abe v. Abe*, 1995 CanLII 1844 (BC S.C.) [CanLII](#) *Lee v. Orban-Lee*, 2009 SKQB 325 ([CanLII](#)) at paragraphs 23 to 24, *V.P. v. P.P.*, 2011 ONCJ 299 ([CanLII](#)).

115 Persons targeted by DV who obtain orders under the *Criminal Code* for protection are not able to obtain continuing protection when the orders lapse. Instead, he or she must wait to be targeted yet again. Women (or in some cases men) who discover that they must be subjected repeatedly to DV in order to obtain a series of short-

because similar relief is available elsewhere can result in reduced or no protection.<sup>116</sup>

## **15.10 What if the targeted person keeps returning to the abuser?**

Repeated reconciliation is one of the usual patterns in DV Cases. From a DV research-informed perspective, protection orders should not be refused solely on this basis.<sup>117</sup>

It can take considerable time for people who are targeted by DV to acquire the support and the resources (social, psychological and financial) necessary to leave these relationships. Thus British Columbia's [Family Law Act](#), SBC 2011, c 25, section 184 expressly states that a court may make a protection order despite a history of returning to the residence.

## **15.11 What if the targeted adult demonstrates no fear?**

While fear has been verified as a reliable indicator of risk and danger, absence of fear is not a reliable indicator of safety.<sup>118</sup> When facts generate

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term protection orders, may simply give up. Some return to abusers; others find ways to take matters into their own hands. Longer-term civil protection orders provide an alternative.

116 Judge D. Steiner & Judge A. Kaan “Best Practice Protection Hearings Checklist”; National Centre For State Courts (1997) *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*. Legislation in Alberta specifies that a criminal order should not preclude the granting of protection relief – see *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, section 2(2.1).

117 Steiner & Kaan, *ibid*; National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#).

118 Failure to appreciate level of risk is common in DV cases. In connection with civil protection cases in particular, DV experts are concerned that denying civil protection on the basis of absence of fear will result in people who are targeted by DV being denied protection they require. See: N. A. Dietz and P. Y. Martin (2007) “Women Who Are Stalked: Questioning the Fear Standard” *Violence Against Women* 13(7): 750 to 776; L. B. Cattaneo, M. E. Bell, L. A. Goodman & M. A. Dutton (2007) “Intimate Partner Violence Victims’ Accuracy in Assessing their Risk of Re-abuse” *J. Fam. Viol.* (2007) 22:429-440.

concerns about safety, the best course of action is civil protection, despite evidence indicating lack of fear, when the pattern of past and current conduct indicates a need for protection (and the targeted party seeks protection).

## **15.12 Content of orders**

In addition to inclusion of provisions set out in the statute, as indicated earlier, plain easily understood examples can help to enhance understanding.

Canadian case law suggests the need to balance comprehensive coverage of prohibited conduct with obligations not to include prohibitions that are overly broad:

- The Ontario Court of Appeal cautions against the inclusion of provisions that are overly broad and not authorized by statute in *Hamilton v. Hamilton*, 1996 CanLII 599 (ON C.A.)[CanLII](#).
- See also: *Baril v. Obelnicki* (2007), 279 D.L.R. (4th) 304, [2007] 6 W.W.R. 304, (2007), 156 C.R.R. (2d) 181, (2007), 214 Man. R. (2d) 7, (2007), 2007 MBCA 40[CanLII](#) (orders pursuant to domestic violence prevention statutes are discussed at below in section 16).

Nonetheless., when permitted by the applicable statute and warranted by the particulars of the case, requiring a bond or the posting of security can help to encourage compliance.

Reminder: From a safety perspective, it is important to ensure that provisions in civil protection orders do not contradict provisions in agreements or orders in other legal proceedings because, when the terms of family and civil orders are in conflict, the orders can become practically impossible to enforce.

## 15.12.1 Arrest clause

Should an arrest clause be included? Inclusion of an arrest clause offers clarity to police in connection with enforcement. The absence of an arrest clause may offer the protected party few safe, timely options if the order is breached.

Would an arrest clause enhance response time and enforcement by police, as per the reasoning of Justices Cohen and Stromberg-Stein in *Abe v. Abe*, 1995 CanLII 1844 (BC S.C.)[CanLII](#); *Rieder v. Jenei*, 2006 BCSC 153[CanLII](#); *Koch v. Mitchell*, 1996 CanLII 33 (BC S.C.)[CanLII](#)? See also “Order Made” in *Coppola v. Coppola*, 2007 CanLII 21974 (ON S.C.)[CanLII](#).

Alternatively, is there potential for misuse of the arrest clause to intimidate or control the children or the other party?

## 15.13 Duration

In Canada, the general pattern, in practice, has been short-term civil protection orders. Courts are indicating that such orders may not be granted for unnecessarily long duration. From a DV research perspective the preference for short term orders is unfortunate since the research indicates that longer-term orders provide more effective protection,<sup>119</sup> particularly when evidence indicates the conduct is likely to continue

While many restraining orders are granted for brief periods of time (for example, a month or two), some Canadian courts are indicating a willingness

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119 Hon. Dale Koch, National Council of Juvenile and Family Court Judges (2010) [Family Violence Legislative Update](#); Jane Stoeber (2014) “Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders” 67(4) *Vanderbilt Law Review* 1015-1093; Kelly Driscoll (2014) “*Severing Ties: The Case For Indefinite Orders of Protection for Survivors of Domestic Violence*” *Montana Law Review*; V.L. Holt, M. A. Kernic *et al.* (2002) “Civil Protection Orders and Risk of Subsequent Police-Reported Violence” [Journal of the American Medical Association 288 \(5\): 589-594](#); U.S. Department of Justice, Office of Justice Programs (accessed June 2008) “*Intimate Partner Violence: Intervention*”.

(when not restrained by the terms of the applicable statute) to grant restraining orders for longer periods of time or even on a permanent basis:

*Dawson v Dawson*, 2012 BCCA 410 ([CanLII](#)), paragraphs 12 and 16, leave to appeal dismissed with costs on a solicitor client basis; *David Reid Dawson v. Judith Gwenda Dawson*, 2013 [CanLII](#) 15568 (SCC)  
*Weeks v. Weeks* (2000), 282 A.R. 156 (QB)  
*Jakob v. Jakob*, 2010 BCCA 136([CanLII](#))  
*H. v. K.*, 2008 BCSC 660[CanLII](#) *P.(H.) v. P.(S.)*, 2003 BCPC 163[CanLII](#)  
*Shore-Kalo v. Kalo*, 2007 MBQB 197[CanLII](#)  
*French v. Riley-French*, 2012 ONCA 702 ([CanLII](#)); *M.C.J. v. J.J.J.*, 2006 CanLII 23936 (ON S.C.)[CanLII](#) (permanent, subject to the right of the respondent to show cause upon notice to the applicant why the order should be terminated); *J.M.M. v. G.S.M.*, 2006 CanLII 6457 (ON S.C.)[CanLII](#) (5 years); *C.S. v. M.S.* (2007), 37 R.F.L. (6th) 373, 2007 CanLII 6240 (ON S.C.)[CanLII](#) (7 years).

## **15.14 When an application to rescind is a perpetrator tactic**

Perpetrators of DV are known to make use of litigation to maintain contact, control and harass. When an application to rescind is an attempt to manipulate, intimidate or control, or is clearly spurious, clear findings can help to alert courts in subsequent proceedings or may discourage further litigation tactics entirely.

## **15.15 Onus: setting aside restraining orders**

The case law states that the onus, on an application to set aside or vary a restraining order (granted on notice), is on the person seeking to rescind or vary the order:

- *Oldfield v. Olthoff*, 2002 BCSC 616[CanLII](#); *Kanwar v. Kanwar*, 2010 BCCA 407 ([CanLII](#)); *Viner v. Viner*, 2008 MBQB 130[CanLII](#) (in connection with an order pursuant to Manitoba's DV prevention statute.
- In connection with setting aside a DV protection order granted without notice, see, for example: *J.E.B. v. G.B.*, 2007 BCSC 1819[CanLII](#) *Baril v. Obelnicki* (2007), 2007 MBCA 40[CanLII](#) and *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)) paragraph 12(2), *Robert Kotello v. Rita Steinmann*, 2012 [CanLII](#) 56159 (SCC) leave to appeal dismissed with

costs (in connection with an order pursuant to Manitoba's DV prevention statute).

## **15.16 What if the protected party seeks to revoke the order?**

Consider and check for the presence of manipulation, coercion or intimidation. The 2010 version of the 2014 Michigan Judicial Institute, [\*Domestic Violence Benchbook - Fourth Edition\*](#) listed the following circumstances as indicative of manipulation, intimidation or coercion in connection with applications on the part of protected persons to revoke protection orders:

- A lawyer appearing in court who has acted or is acting on behalf of both parties to the relationship
- Prior revocations of protection orders and or prior recanting of evidence of domestic violence in criminal proceedings
- Serious allegations of violence
- A criminal case pending against the respondent
- A brief period of time between the request for protection and the request for dismissal or termination
- Lack of credible reasons for the requested dismissal or termination

In response to suspicious circumstances, the 2010 *Michigan Domestic Violence Benchbook* suggested a number of potential responses for judges, some of which could be useful to lawyers and service providers:

- Schedule a hearing to explore whether or not the application to revoke was truly voluntary and to hear oral evidence relating to whether or not the protection order should be dismissed
- If the protected party fails to appear, reschedule the case, arranging for personal service of notice in a manner designed to prevent possible interference with mail service
- Advise the protected party to speak with a DV expert and or

victim services prior to proceeding, check to ensure that the protected party has safe, independent access to the expert or service provider.

- Modify the protective order rather than terminating it so that prohibitions against abuse and violence remain in place (see, for example, discussion in [Chapter 11](#) above)
- If a variation or revocation is granted, advise the formerly protected party of the right to file for protection in future should new problems arise
- In dangerous circumstances (for example in cases where there is high risk of continuing domestic violence or potential for lethal outcome), and particularly when child safety is involved, the best course of action may be refusal to revoke the order.
- Section 11 of the 2012 [North Carolina Domestic Violence Best Practices Guide for District Court Judges](#) also provides useful information on these issues.

Service providers and lawyers can take action in such circumstances to protect and support protected family members by asking questions to check for and rule out direct and indirect forms of manipulation and intimidation; by teaching the protected party how to document breaches and encouraging legal action when manipulating or intimidating contact has occurred in breach of a protection order; by ensuring that the protected person has had access to safety planning, DV advocacy, and risk and danger assessment prior to proceeding; and by suggesting the possibility of modifying rather than revoking the order (as suggested in [Chapter 11](#)).<sup>120</sup>

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<sup>120</sup>Refer as well to New Mexico Judicial Education Center, Institute of Public Law, UNM School of Law (2005) [New Mexico Domestic Violence Bench Book](#) in connection with steps courts should take to ensure that modifications are safe.

## 15.17 Without-notice *ex parte* orders

### 15.17.1 Court concerns

Many Canadian courts are, understandably (given that information is heard from one party's perspective only) indicating a reluctance to grant restraining orders and other protection orders on a without-notice or *ex parte* basis **unless:**

- the circumstances are unusual
- the situation is urgent
- failure to grant the relief would result in injury.

For example: *Azam v Jan*, 2012 ABCA 197 ([CanLII](#)) at 28; *Johnson v. Jessel*, 2012 BCCA 393 ([CanLII](#)) at paragraph 29, leave to appeal on other issues dismissed with costs: *Behice Jessel v. Douglas Nelson Johnson*, 2013 CanLII 8398 (SCC); *B.W.D.F. v. V.R.R.*, 2010 MBQB 223 ([CanLII](#)); *J.E.J. v. S.L.M.* (2007), 318 N.B.R. (2d) 119, (2007), 284 D.L.R. (4th) 500, 2007 NBCA 33([CanLII](#)); *E.A.W. v. M.J.M.*, 2012 NSSC 216 ([CanLII](#)).

Check the requirements of the applicable statute (for example in Ontario, in addition to family law and child protection legislation, [Courts of Justice Act](#), RSO 1990, c C.43 , [Family Law Rules, O. Reg. 114/99](#) Rule 14, sub rules 12, 13, 14 and 15; and in New Brunswick, [Rules of Court, N.B. Reg. 82-73](#) rule 37.04(2) and (3).)

In connection with protection orders pursuant to DV prevention statutes, most provincial and territorial statutes authorize (and set out conditions for) without-notice claims for civil protection. DV Prevention Statutes are discussed below in Chapter 16.

As a response to concerns about granting orders without giving the other party notice and an opportunity to be heard, courts are imposing a duty to

disclose full particulars, including information adverse to self interest. Examples: *J.E.B. v. G.B.*, 2007 BCSC 1819[CanLII](#); *Rogers v. Rogers*, 2008 MBQB 131[CanLII](#); *J.E.J. v. S.L.M.* (2007), 318 N.B.R. (2d) 119, (2007), 284 D.L.R. (4th) 500, 2007 NBCA 33[CanLII](#); *J.P. c. R.M.1*, 2006 ONCJ 189[CanLII](#); *Isakhani v. Al-Saggaf* (2007), 40 R.F.L. (6th) 284, (2007), 226 O.A.C. 184, 2007 ONCA 539[CanLII](#) at paragraph 6.

Nonetheless, in some cases, courts have continued a restraining order despite lack of full and frank disclosure when continuing protection is warranted:

- *J.E.B. v. G.B.*, 2007 BCSC 1819[CanLII](#).

In connection specifically with *ex parte* civil-protection orders in a DV context, appellate courts are encouraging modified processes when warranted to protect vulnerable persons. Refer to the reasoning of the Court of Appeal of Manitoba in *Baril v. Obelnicki* (2007), 279 D.L.R. (4th) 304, [2007] 6 W.W.R. 304, (2007), 156 C.R.R. (2d) 181, (2007), 214 Man. R. (2d) 7, (2007), 2007 MBCA 40[CanLII](#) at paragraphs 88 to 98 and particularly at paragraphs 90 and 91: “the Supreme Court has said that departure from conventional judicial procedures is fully justified in a statute that focuses on alleviating harm to vulnerable persons”.<sup>121</sup> See also *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)) paragraph 12(2), *Robert Kotello v. Rita Steinmann*, 2012 [CanLII](#) 56159 (SCC) and the reasoning of the Court of Appeal for British Columbia in *Green v. Millar* (2004), 246 D.L.R. (4th) 334, (2004), 125 C.R.R. (2d) 153, 2004 BCCA 590[CanLII](#).

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<sup>121</sup> The court did note in this case that, pursuant to Manitoba’s *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M., c. D93, such orders may only be granted when advisable ‘for the immediate protection’ of the subject – see paragraph 95. Note also, however, the giving of notice can spark violence. Judicial councils in other jurisdictions are recommending against resistance to granting protection orders on a without-notice basis in DV cases: Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases Final Report of the Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts); Michigan (2009, 2010) *Domestic Violence Bench Book* note 29; National Council of Juvenile and Family Court Judges, Family Violence Department (2010) [Civil Protection Orders: A Guide for Improving Practice](#).

A number of courts are indicating a preference for reduced or short notice:

*Green v. Millar*, 2004 BCCA 590 [CanLII](#); *T.C.S. v. T.A.M.*, 2004 BCPC 487 [CanLII](#); *Rauliuk v. Skura*, 2002 ABQB 257 [CanLII](#); *Tong v. Kutu*, 2000 ABQB 642 [CanLII](#).

See also, however, the reasoning of *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at paragraphs 91 to 98 in connection with the constitutional validity of DV prevention legislation. The Court of Appeal of Manitoba notes at paragraph 91 that the Supreme Court of Canada has:

*held that a without notice order is appropriate where “delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice is given”.*

The reasoning in *Baril* is consistent with empirical research and Domestic Violence Death Reviews documenting violent retaliation in response to notice of legal proceedings. Risk assessment and safety planning are warranted.<sup>122</sup> Some non-Canadian jurisdictions are advising judges to order risk assessments before refusing to grant *ex parte* orders when there is a potential for immediate injury or evidence that notice could precipitate violence.<sup>123</sup>

As indicated in *Baril v. Obelnicki*, without-notice orders are appropriate in DV

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122 North Carolina Administrative Office of the Courts (2012) *N.C. Domestic Violence Best Practices Guide for District Court Judges*; Michigan Domestic Violence Benchbook (2009-2010); Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts); N. Robertson, R. Busch *et al.* (2007) [Living at the Cutting Edge Women’s Experiences of Protection Orders \(University of Waikato\)](#) G. McOscar (2000) “Restraining Orders May Incite Domestic Violence” and Washington State Death Review by Jake Fawcett, Kelly Star and Ankita Patel (2008) *Now That We Know Findings and Recommendations from the Washington State Domestic Violence Fatality Review*. Two of the 11 deaths examined occurred as a result of escalating violence following service of notice of application for a protection order.

123 Michigan Domestic Violence Benchbook (2009) (Courts Michigan) at 6-6. When the case involves a pattern of coercive DV, assessment for risk and potential lethal outcome are advisable. Judicial Associations in the United States have taken an initiative to alert judges to the need for risk and danger assessment in order to improve safety responses in civil protection cases when DV is a factor. See, for example, North Carolina Administration Office of the Courts (2012) *N.C. Domestic Violence Best Practices Guide for District Court Judges*.

cases when delay or notice could produce harm.

Pertinent research-informed DV considerations include:

- Has heightened danger at separation in DV cases been considered?
- Has the targeted party's level of fear been assessed and considered?
- Does the court have sufficient information and access to the expertise required to assess the level of risk in order to be assured that notice will not cause retaliatory violence?<sup>124</sup>
- Is there a need for a risk assessment by a DV expert?
- Is there an obligation to ensure that the targeted party has access to victim services and/or to a DV expert/advocate to assist with assessment of risk and safety planning and to ensure access to protective services if the court orders that notice must be given?
- Is the information about timely access to such services reliable and current?
- Can interim protections be offered to the targeted parent and children until the application for civil protection is heard?

See [16](#) below in connection with civil protection pursuant to DV prevention statutes.

## **15.17.2 Balancing rights; fundamental justice issues**

Canadian Judicial Council Ethical principles for Canadian judges state that judges have an ethical duty to provide equality, impartiality, and due process (principles of fundamental justice) to all litigants.<sup>125</sup> On the one hand, protection orders granted needlessly or to gain tactical advantage can contribute to injustice and harm and such orders do limit freedom. On the other hand, as indicated in *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at

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<sup>124</sup>Assessment for risk and potential lethal outcome are advisable. Judicial Associations in the United States have taken an initiative to alert judges to risk and danger assessment in order to improve safety responses in civil protection cases when DV is a factor. For example, North Carolina Administration Office of the Courts (2012), [N.C. Domestic Violence Best Practices Guide for District Court Judges](#); Judicial Council of California (2008) *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases Final Report of the Domestic Violence Practice and Procedure Task Force* (Administrative Office of the Courts) comments on the risk that notice of a civil protection order application can result in retaliatory violence. Researchers in New Zealand are criticizing an increasing judicial reluctance to grant protection orders without notice in that country: N. Robertson, R. Busch *et al.* (2007) [Living at the Cutting Edge Women's Experiences of Protection Orders \(University of Waikato\)](#).

<sup>125</sup> [Ethical Principles for Judges \(Ottawa: Canada Judicial Council\)](#).

paragraphs 80 to 92, litigant safety and freedom from violence in human relationships is also central social issue. Freedom from violence for women has been identified by the United Nations as a fundamental human right that imposes a positive duty on governments to act.<sup>126</sup> When courts attempt to balance objections to restrictions on freedom against the claims for protection of those targeted, the fundamental human rights of women and children to be free from violence should be one of the central considerations.

Additional attention to this issue in Canada is warranted given that, on balance, the pattern of Canadian case law at the trial level seems still (March, 2015) to reflect more emphasis on concerns about not overly restricting the freedoms of perpetrators than on the fundamental human rights of women (and other adults) and children to live lives free from violence.<sup>127</sup>

### **15.17.3 Recording evidence on *ex parte* applications:**

Oral evidence, if any, presented in support of an *ex parte* order for civil protection should be fully recorded. Many *ex parte* orders are subsequently challenged. Reviews of these orders is difficult if evidence presented in

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<sup>126</sup>The United Nations has declared violence against women a gender-based, international human rights concern: *The United Nations Special Rapporteur on violence against women, its causes and consequences*. See also: December 2014: [Violence Against Women – A Pervasive human rights violation calls for a binding standard of accountability at the international level](#). Columbia Law School (2010) [Human Rights & Domestic Violence An Advocacy Manual](#)

<sup>127</sup>At the trial level Canadian courts appear to be reluctant to issues a broad range civil protection remedies. One finds in the case law far more discussion of reasons not to grant or reasons to limit the scope of such orders (for example concerns about restricting freedoms, concerns that orders should only be granted in immediate emergencies, the reading in of additional criterion, such as proof of objective fear, restrictions on the powers of lower courts to grant relief) than one finds of court priority to safety and to respecting the fundamental human right to live life free from abuse and violence. For a critical analysis of the priority often given to procedural due process over due process issues associated with safety and human rights in civil protection DV cases, see for example: Kelly Driscoll (2014) “[Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence](#)” *Montana Law Review*; Suzanne Reynolds and Ralph Peeples (2013) “[When Petitioners Seek Custody in Domestic Violence Court and Why We Should Take them Seriously](#)” *The Wake Forest Law Review* A. Towns & H. Scott (2006) “Accountability, Natural Justice and Safety: The Protection Order Pilot Study of the Domestic Violence Act 1995” *New Zealand Law Journal* 5(7) September 2006: 157-168.

support of the orders is not fully recorded. In connection with *ex parte* applications pursuant to the DV prevention statutes see [16.1](#).

## 16 Domestic violence prevention statutes

### 16.1 The statutes

Nine Canadian jurisdictions have implemented DV protection statutes.

**Alberta:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#)

**Manitoba:** [The Domestic Violence and Stalking Act, C.C.S.M. c. D93.](#)

**Newfoundland/Labrador:** [Family Violence Protection Act, S.N.L., 2005, c. F-3.1](#)

**North West Territories:** [Protection Against Family Violence Act, S.N.W.T. 2003, c. 24](#)

**Nova Scotia:** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29](#)

**Prince Edward Island:** [Victims of Family Violence Act, R.S.P.E.I. 1988, c. V-3.2](#)

**Saskatchewan:** [Victims of Domestic Violence Act, S.S. 1994, c. V-6.02](#)

**Yukon:** [Family Violence Prevention Act](#), RSY 2002, c 84. Refer also to the [Yukon Legislation](#) Website

**Nunavut:** [Family Abuse Intervention Act, S. Nu., 2006, c.18](#) (assented to December 5, 2006, in force March 1, 2008). Refer also to [Nunavut Department of Justice Legislation](#) web page for information about legislation.

British Columbia has incorporated civil protection from family violence provisions in its [Family Law Act](#), SBC 2011, c 25.

## 16.2 Constitutional issues: the arguments (civil)

Basically, two sets of arguments have been advanced to contest the constitutional validity of DV prevention statutes.

- The legislation is *ultra vires* because it confers on lower courts powers reserved to superior courts pursuant to section 96 of the [Constitution Act, 1867 \(U.K.\), 30 & 31 Victoria, c. 3](#).
- Such legislation infringes on rights guaranteed by the [Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(U.K.\), 1982, c. 11, Canadian Charter of Rights and Freedoms](#), particularly sections 2, 7, 9 and 11.

### 16.2.1 Constitutional issues: the rulings (civil)

The Court of Appeal of Manitoba was the first appellate court to rule on the constitutionality of the domestic violence statutes<sup>128</sup> in *Baril v. Obelnicki* (2007), 2007 MBCA 40[CanLII](#). Constitutional validity has been upheld by trial courts and by the Manitoba Court of Appeal with respect to the following:

- Provincial legislative jurisdiction (prevention of crime)
- The validity of the statutes as a whole
- Statutory breadth (inclusion of emotional abuse)
- Authority of Justices of the Peace and Magistrates to:
  - maintain the peace and to prevent criminal behaviour, and
  - make protection orders that temporarily affect occupation or use of property (for example orders to remove a person from the home; orders for exclusive possession of marital homes subject to superior court review).

#### **For particulars, see:**

*MacKenzie v. Martin*, [1954] S.C.R. 361

*Baril v. Obelnicki* (2007), 2007 MBCA 40[CanLII](#) at paragraph

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<sup>128</sup> Few appellate courts have ruled on the domestic violence statutes probably largely because most protection orders are of limited duration and appeal courts are reluctant to entertain appeals of lapsed or lapsing orders: *Wittich v. Wittich*, 2005 NSCA 60[CanLII](#); *Dyck v. Dyck*, 2005 SKCA 77[CanLII](#).

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**Note:** The Court of Appeal of Manitoba comments at paragraph 50 on the distinction between a limited jurisdiction of justices of the peace to grant protection orders that affect property entitlements pursuant to Manitoba legislation and superior court jurisdiction to grant orders for exclusive possession of the marital home, regardless of ownership.

In most provinces (with the exception of Manitoba and Newfoundland/Labrador - where only brief term orders may be granted - and British Columbia where orders are granted pursuant to family law legislation) orders of justices of the peace and provincial court judges are automatically reviewed by superior court judges pursuant to the domestic violence statutes. See *Zalizniak v. Zalizniak et al.*, 2007 MBCA 118 ([CanLII](#)) and *Ontario (Attorney General) v. Victoria Medical*, 1959 [CanLII](#) 20 (SCC), [1960] S.C.R. 32 in connection with the distinction between powers of final adjudication which can offend against the exercise of [section 96](#) powers, pursuant to *The Constitution Act*, 1987, 30 & 31 Vict, c 3 reserved to superior court judges and provisions that enable a superior court reference or that are subject to superior court confirmation.

*Baril v. Obelnicki* (2004), 545 D.L.R. (4th) 238, (2004), [2005] 1 W.W.R. 741, (2004), 118 C.R.R. (2d) 38, (2004), 183 Man. R. (2d) 118, 2004 MBCA 92 [CanLII](#) sets out a three part test:

- The first step is to consider if the power conferred broadly conforms to a power or jurisdiction exercised exclusively by a superior, district or county court at the time of confederation. If it does not conform, then that is the end of the inquiry.
- If it does, then one must ask whether it is a judicial power.
- If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such function?

The deciding factor in *Baril v. Obelnicki* was that concerns about exclusive

superior court section 96 powers were not engaged by Manitoba's [The Domestic Violence and Stalking Act, C.C.S.M. c. D93](#) because, historically, inferior courts have shared with superior courts and have long exercised common law powers relating to preventative justice and to prevention of future criminal behavior. See also: *MacKenzie v. Martin*, [1954] S.C.R. 361, 1954 [CanLII](#) 10 (SCC).

Note, however, the distinction in *Baril v. Obelnicki* (2007), 2007 MBCA 40[CanLII](#) between protection orders (that may be granted by lower courts and that bind the person) and prevention orders (Court of Queen's Bench) pursuant to [The Domestic Violence and Stalking Act, C.C.S.M. c. D93](#) that may more broadly bind and affect property.

The constitutional validity of the DV prevention statutes and or lower court powers with respect to preventative justice is endorsed in court decisions cited below.

- *Dahlseide v. Dahlseide*, 2010 ABCA 220 ([CanLII](#)) – without discussion of constitutional particulars, paragraph 15.
- *A.L.G.C. v. Prince Edward Island (Government of)*, [1998] 160 Nfld. & P.E.I.R. 151, (1998), 157 D.L.R. (4th) 523, (1998), 51 C.R.R. (2d) 163, 1998 [CanLII](#) 5189 (PEI S.C.T.D.)[CanLII](#).
- *Baril v. Obelnicki* (2004), 545 D.L.R. (4th) 238, (2004), [2005] 1 W.W.R. 741, (2004), 118 C.R.R. (2d) 38, (2004), 183 Man. R. (2d) 118, 2004 MBCA 92[CanLII](#).
- *Hitch v. Nickarz* (2005), 191 Man R. (2nd) 131, appeal dismissed *Hitch v. Nickarz* (2005), 201 Man R. (2d) 28, 2005 MBCA 111[CanLII](#).<sup>129</sup>

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<sup>129</sup> In connection with provincial legislative authority, see *obiter* in *R. v. Fairchuk*, 2003 MBCA 59[CanLII](#).

**Constitutional concerns in the case law have been limited to the following matters.**

Jurisdictional issues associated with property (mentioned earlier).

Duration of lower court emergency orders.

The requirement of fundamental justice and procedural fairness and balancing the need for protection “while only restricting the respondent’s liberty as far as is necessary, given the facts of the situation”:

- *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#).

Provisions that limit cross examination on reviews of *ex parte* orders:

- *A.L.G.C. v. Prince Edward Island (Government of)*, 1998 CanLII 5189 (PEI S.C.T.D.) [CanLII](#)
- but see also: *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at paragraphs 100 to 105.

Statutory provisions that place the onus on respondents to demonstrate why *ex parte* protection orders should be set aside:

- *Hitch v. Nickarz* (2005), 191 Man R. (2nd) 131; *Baril v. Obelnicki*, 2004 MBQB 92 [CanLII](#); *Rauliuk v. Skura*, 2002 ABQB 257 [CanLII](#) at paragraph 5.

See also, however:

- *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) wherein the Court of Appeal upheld the constitutional validity of Manitoba’s domestic violence and stalking legislation despite the lack of automatic superior court review and the onus on the respondent to demonstrate that the order granted without notice should be set aside. The Court of Appeal did, however, reduce the onus on the respondent from a legal burden of proof to an

evidentiary burden.<sup>130</sup> For particulars, see paragraphs 109 to 127.<sup>131</sup>

Note as well the widely accepted international recognition of the fundamental-human-rights-of-women to be entitled to live lives free from violence: [Chapter 15.17.2](#).

### **16.2.2 Domestic-violence-research concerns relating to onus**

The repetitive onus on those targeted by domestic violence – to obtain, to confirm and to renew civil protection orders – is reported to be a leading cause of failure to offer victims safety and to hold perpetrators accountable in DV cases. The repetitive onus offers opportunities for manipulation and intimidation; many of those who require protection simply give up. *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) discusses, at paragraphs 91 to 94, the onus of proof to set an order aside after an applicant has met the onus of proof with respect to an *ex parte* order pursuant to Manitoba legislation. See also: *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)) paragraph 12(2), *Robert Kotello v. Rita Steinmann*, 2012 [CanLII](#) 56159 (SCC) leave to appeal dismissed with costs.

### **16.3 When should a DV statute protection order be granted?**

The cases state that DV statute protection orders are discretionary: *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at paragraphs 96; *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)), application for leave to appeal dismissed with costs; *Robert Kotello v. Rita Steinmann*, 2012 [CaLII](#) 56159 (SCC).

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<sup>130</sup> The Court of Appeal of Manitoba opines that a legal burden of proof (a reverse onus requiring a respondent to disprove the facts on which the *ex parte* order was made) would be inconsistent with “*Charter values*” but that the provision could be remedied while still furthering the legislative objective by reading in a reduced onus based on an evidentiary burden (whereby the respondent need only show, on balance of probabilities, that the order should be set aside on the basis of lack of full disclosure or based on the weight of the evidence): paragraphs 117 to 127 of *Baril v. Obelnicki*, 2007 MBCA 40 [CanLII](#).

<sup>131</sup> An appeal of *Hitch v. Nickarz* (2005), 191 Man R. (2nd) 131, 2005 MBCA 111 [CanLII](#).

The statutes vary in how domestic or family violence is defined and in the conditions of granting an order (such as urgency or the need for immediate protection). Thus the fact that a DV protection order is granted in one jurisdiction is not necessarily an assurance that a protection order would be granted in another jurisdiction in similar circumstances. All DV prevention statutes require a finding of domestic or family violence (as defined by the statute). A number of the statutes impose additional conditions for the granting of emergency protection orders, such as seriousness or urgency.

In connection with Manitoba's legislation, see *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at paragraph 95: "necessary or advisable for the immediate protection of the subject" restrictions should not be overly broad.

Domestic violence research tells us that it is important to assess the applicant's fear of the respondent, keeping in mind that while the presence of fear is a reliable indicator of risk, the absence of fear is not necessarily an indicator of safety. See [16.3.1](#) below in connection with the 'reasonableness' of fear.

A number of cases suggest the need to be alert to the possibility of applications for protection being made for a collateral purpose (for example, to obtain an advantageous position in connection with support, custody or access or property, to intimidate and manipulate the relationship):

*D.E.M. V J.M.M.*, 2011 PECA 16 ([CanLII](#))

*Siwiec v. Hlewka*, 2005 ABQB 684 [CanLII](#)

*Ducharme v. Borden*, 2014 MBCA 5 ([CanLII](#))

Note, however, assumptions that false claims of DV are commonly presented in civil protection proceedings to secure tactical legal advantage are not supported by empirical research. See for example Suzanne Reynolds and Ralph Peeples (2013) "[When Petitioners Seek Custody in Domestic Violence](#)

[Court and Why We Should Take Them Seriously](#)” *Wake Forest Law Review*. Instead, non-disclosure and the discounting of claims is more common.<sup>132</sup> Aside from assumptions that are not supported by empirical research, is there actual evidence of false claim?

From a safety perspective, the presence of a collateral purpose should not result in denial if the evidence indicates a need for protection. Thus Justice Lee comments at paragraph 17 of *Echeverria v. Morales*, 2007 ABQB 293 [CanLII](#) : “The motive behind the Claimant seeking an Emergency Protection Order is not directly relevant as long as there is some basis for the issuance of the Emergency Protection Order.”

In connection with non physical forms of DV, statutes in British Columbia, Manitoba, North West Territories, Nunavut Prince Edward Island and the Yukon specifically include provisions relating to emotional or psychological abuse. The remaining domestic violence prevention statutes refer to intimidation (Alberta) or action causing fear.

**Manitoba’s** legislation includes explicit provisions relating to stalking as does legislation in Alberta, British Columbia and Nunavut for example **Alberta's:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#). **Newfoundland/Labrador:** [Family Violence Protection Act](#), includes provisions to enable protection against behaviours associated with stalking – section 3(f) – as does **Nova Scotia’s** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29](#) , 2001, S.N.S., c. 29 section 5(1)(e) – although the term ‘stalking’ is not used in either statute. Provisions in the other DV statutes relating to acts causing fear of harm may be sufficiently broad to enable responses to situations involving monitoring and stalking.

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132 Catherine Naughton et al. (2015) “Ordinary decent domestic violence: A discursive analysis of family law judges' interviews” *Discourse & Society*. The DV research continues to document concerns about reluctance to grant protection in DV cases.

The statutes set out applicable considerations:

**Alberta:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#)

Sections 2 (1)(2) (2.1)

**British Columbia:** [Family Law Act, SBC 2011, c 25, Part 9, Section 183\(2\)](#)

**Manitoba:** [Domestic Violence and Stalking Act, C.C.S.M. c. D93](#)

Sections 6(1)(2)

**Newfoundland/Labrador:** [Family Violence Protection Act , S.N.L. 2005, c.](#)

[F-3.1](#)

Sections 5(1)(2)(3)

**North West Territories:** [Protection Against Family Violence Act, S.N.W.T.](#)

[2003, c. 24](#)

Sections 4 (1)(2)

**Nova Scotia:** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29](#)

Sections 6 (1)(2)(3)

**Nunavut:** [Family Abuse Intervention Act, S. Nu., 2006, c.18](#) The *Family Abuse Intervention Act* in Nunavut identifies specifically financial abuse as form of family abuse.

**Prince Edward Island:** [Victims of Family Violence Act, R.S.P.E.I. 1988, c. V-3.2](#)

Section 4(1)(2)

**Saskatchewan:** [Victims of Domestic Violence Act, S.S. 1994, c. V-6.02](#)

Emergency Intervention Orders: section 3(2);

Review of the Emergency Intervention Order: section 5(7).

**Yukon:** [Family Violence Prevention Act .](#)

### **16.3.1 Is a finding of reasonableness of fear required?**

Courts in Manitoba are reading into legislation of that province a requirement that a complainant's belief that the respondent will continue the DV or stalking must be reasonable:

*Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) at paragraph 94; *Reid v. Spicer*, 2005 MBQB 23 [CanLII](#). See also *Radons v. Radons*, 2006 SKQB

427([CanLII](#))

And trial courts in Alberta are suggested that the test of reasonableness is an objective, not a subjective, reasonable person test: For example: *D.O. v. G. O.*, 2013 ABPC 307 ([CanLII](#)) citing *T. P. v. J.P.*, [2005] A.J. No. 874; *Hunder v. Fox*, 2015 ABQB 79 ([CanLII](#)). See also *D.B. v. H.M.*, 2011 [CanLII](#) 81900 (NL PC).

DV research, on the other hand, tells us that people who are targeted by DV learn, from experience, to detect subtle signs of impending danger from domestic violator behaviour. Violators know how to use subtle behaviours to cause intense intimidation and fear in the targeted person. These behaviours are not necessarily reasonable or understandable to those who interpret the behavior outside a specialized DV context. Arguably, if a research-informed, reasonable fear test is to be applied in DV cases, the test for reasonableness (objective or subjective) should be that reasonable for an abused person, who has been subjected to the pattern of DV behavior experienced by the applicant, as indicated by the Supreme Court of Canada, albeit in a criminal context, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 1990 CanLII 95 (S.C.C.)[CanLII](#). Refer also to *R. v. Craig*, 2011 ONCA 142 ([CanLII](#)) which emphasizes, albeit in a criminal sentencing context, the importance of considering the psychological effects and not merely the type (physical or emotional) of domestic violence.

Once DV has been established in evidence, research-informed questions to assess the reasonableness of continuing fear in a DV context include the following:

- Is the claimant's fear and apprehension reasonable for a person who has been subjected to DV by the other party (taking into account the pattern, particulars, and effects of prior DV in the case)?
- Has the domestic violator accepted responsibility for past DV and

presented clear evidence of a new pattern of changed, non abusive behavior?

- Has the domestic violator accepted the independence of the targeted partner or are aspects of emotional or financial coercion and control continuing?
- Does the evidence indicate the presence (or absence) of monitoring or stalking?
- Is fear generated by the behaviour of the bound party reasonable, taking into account connections, if any, between such behaviour on the onset of abuse or violence in the past?

## **16.4 Mutual orders**

Mutual protection orders should be avoided if possible – see [10](#) above. See also section 184(2) and (3) of British Columbia's [Family Law Act](#), SBC 2011, c 25.

## **16.5 What if the perpetrator completes domestic violence intervention?**

Completion of intervention is a positive step but is not a reliable indicator of changes in behavior or of safety – see [12](#) above.

## **16.6 What if there are no recent incidents of domestic violence?**

Remedies are sometimes denied on this basis. See [15.7](#) for cautionary comments on this issue.

## **16.7 What if another protective order is in existence?**

As indicated at [15.9](#) criminal remedies do not preclude civil remedies. Some

of the DV statutes state expressly that protective action should not be denied solely because criminal charges or orders are available.

**Alberta:** *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27s. 2.1

**British Columbia:** *Family Law Act*, SBC 2011, c 25, Part 9, section 184 (4)(d)

**Newfoundland/Labrador:** *Family Violence Protection Act* : s.3 (2)

**Nova Scotia:** *Domestic Violence Intervention Act (2001)* S.N.S. Chapter 29: s. 5(2)

## **16.8 What if the applicant is resident in a secure shelter?**

Residence in an emergency shelter does not negate the need for emergency protection. Unless parents and children who seek safety in emergency shelters are to be denied total personal freedom, it is to be expected that residents of shelters will venture into the community from time to time. They may require protection when they do so. Furthermore, some emergency shelters may only be able to offer shelter for a brief period of time (for example, one month). It is not uncommon for residents of emergency shelters to be forced to seek alternative accommodation before they are able to present evidence to a court in support of a renewed, extended or longer term protection order. Alberta's *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 s. 2.1 states explicitly that temporary residence in a shelter should not preclude a protection order. See also section 184 (4) of the British Columbia *Family Law Act*, SBC 2011, c 25.<sup>133</sup>

## **16.9 What if the applicant has repeatedly resumed cohabitation with the perpetrator?**

Repeated separation and reconciliation is a common pattern in domestic

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<sup>133</sup>For a contrary view, see: *Baril v. Obelnicki* (2007), 2007 MBCA 40CanLII at paragraph 95, wherein the Court of Appeal comments favourably (or at least without criticism) on a provincial court decision to deny a protection order without notice on the basis that the applicant was residing in a women's shelter and thus not in need of "immediate protection".

violence cases. This pattern does not indicate absence of reasonable fear nor does it suggest safety. See [Chapter 11](#) above for particulars.<sup>134</sup> See also Alberta's [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#) section 2.1 and section 184 of the [Family Law Act](#), SBC 2011, c 25.

## **16.10 Who may be protected by DV prevention statute orders?**

The definitions of persons who may apply for a protective order vary by statute. All of the DV prevention statutes provide protection for persons who cohabit(ed) in a conjugal relationship, including same sex couples, and for persons who are coparents of a child.

Some statutes define applicants more broadly.

- **Alberta's** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#) includes, in the definition of family member, adults who are related to one another by virtue of an interdependent relationship.<sup>135</sup>
- **Manitoba's** statute includes DV by a family member who does not live with the targeted person and includes dating relationships.<sup>136</sup> Relief from stalking in the same legislation is not limited to intimate partners or to family members. See also **Nunavut:** [Family Abuse Intervention Act, S. Nu., 2006, c.18](#)
- **Nova Scotia's** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29](#) on the other hand, is limited to victims who have cohabited or parented a child.

Refer to [Chapter 15.3](#) above for discussion of concerns, from a DV research perspective, about limitations in protection statutes on who may be bound

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<sup>134</sup> See also **Alberta's** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#) section 2.1.

<sup>135</sup> The phrase 'reside together' has been removed. This amendment ought to correct a shortcoming in other domestic violence statutes by allowing enhanced capacity to respond to the circumstances of elderly and disabled persons.

<sup>136</sup> Inclusion of protection for dating violence is welcome. Potentially such legislation ought to allow judges to intervene before patterns of abuse and violence become entrenched, preferably before the intimate partners have children.

and who may be protected in DV contexts, given the realities of patterns of manipulation and intimidation against anyone who supports the targeted adult and the patterns of DV in non-nuclear and extended families.

## **16.11 What types of orders can be made?**

Generally, most DV statutes authorize two types of orders: emergency orders by justices of the peace and/or provincial court judges (usually<sup>137</sup> subject to confirmation by a superior court judge) and orders by superior court judges. British Columbia has taken a different approach by including protection against family violence in the *Family Law Act*, SBC 2011, c 25, Part 9.<sup>138</sup>

## **16.12 What findings of fact are required to support an emergency order?**

Most statutes impose some restrictions on the authority of justices of the peace or provincial court judges to grant emergency protection (or intervention) orders; many statutes include conditions such as “serious or urgent”.<sup>139</sup> For discussion of superior court rulings on this issue, see [16.17](#) below.

In British Columbia, see the *Family Law Act*, SBC 2011, c 25, family violence

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<sup>137</sup> Manitoba’s legislation does not require automatic review by a superior court judge; Newfoundland’s legislation is limited to lower court jurisdiction.

<sup>138</sup>It would be interesting to know the implications of inclusion in family law as opposed to civil DV prevention legislation. For example, one of the concerns about DV prevention legislation, is that police and 'victims' may use prevention legislation instead of resorting to the *Criminal Code* in cases involving criminal behavior, thereby having the effect of reducing perpetrator accountability (by allowing the dominant aggressor to avoid a criminal record and other criminal penalties). Inclusion in family law legislation could enhance the parallel use of family and criminal options thereby reducing deflection of cases from the criminal to the civil protection systems. On the other hand, breaches of family law protection orders may not be taken as 'seriously' in the legal system as breaches of orders granted pursuant to DV crime prevention statutes, resulting in reduced protection for family members. It would be interesting and helpful to know the empirical effect of the decision in British Columbia to include DV civil protection legislation in its family law legislation. Is the result enhanced or reduced protection for women, other targeted adults and children?

<sup>139</sup> In connection with legislation in **Manitoba**, see: *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#). **Nova Scotia**’s statute does not include a ‘serious or urgent’ qualification. It states instead that justice of the peace “may make an emergency protection order to ensure” “immediate protection”.

pursuant to the statute includes psychological or emotional abuse. Such orders can be made when the court finds that “family violence is likely to occur”.

### **16.12.1 May emergency protection orders be granted on the basis of emotional or psychological abuse?**

Decisions are inconsistent. The following selection of cases is not designed to be a comprehensive survey of Canadian decisions pursuant to all of the statutes. Rather the cases are presented as examples or illustrations.

**Alberta:** *M.J.M. v. A.D.*, 2004 ABQB 453 [CanLII](#). There was no physical violence in this case but comments written in a diary caused serious concern. See also: *Echeverria v. Morales*, 2007 ABQB 293 [CanLII](#); *Shipanoff v. Shipanoff*, 2010 ABQB 496 ([CanLII](#)).

**Saskatchewan:** *Dyck v. Dyck*, 2005 SKQB 247 [CanLII](#) : Bodily harm is not necessary to support an emergency protection order by a Justice of the Peace. A pattern of anger that establishes reasonable fear of bodily harm is sufficient.<sup>140</sup>

**Manitoba:** *Hitch v. Nickarz* (2005), 191 Man R. (2nd) 131, 2005 MBCA 111 [CanLII](#): pattern of verbal and emotional abuse (which included, in this case, forced entry into the house) can support an urgent protection order. See also *Partridge v Partridge*, 2009 MBQB 196, 242 Man. R. (2d) 249 ([CanLII](#)). (**Note:** Manitoba legislation does not limit protection orders of justices of the peace to urgent or serious circumstances. The statute includes emotional or psychological abuse in its definition of domestic violence.) See also: *Ducharme v. Borden*, 2014 MBCA 5 ([CanLII](#)); *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#)

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<sup>140</sup> Although an appeal of this case was dismissed in *Dyck v. Dyck*, 2005 SKCA 77 [CanLII](#), no decision was made on the merits.

**Nova Scotia:** Emergency protection orders in Nova Scotia are granted primarily on an *ex parte* basis. Some of the case law at the trial level in Nova Scotia is indicating that Supreme Courts in Nova Scotia are interpreting narrowly emergency jurisdiction and the type of orders that may be granted. See, for example *E.M.G. v. G.R.W.*, 2007 NSSC 356 ([CanLII](#)) and *E.A.W. v. M.J.M.*, 2012 NSSC 216 ([CanLII](#)).

**Newfoundland:** *CM v. SM*, 2012 NLCA 59 ([CanLII](#)): Confirmation of emergency protection orders to protect children and the mother in the face of evidence of threats, negative parenting practices, and mental health issues; *Cory R. Meadus v. Suzanne Meadus*, 2013 [CanLII](#) 33951 (SCC) leave to appeal dismissed with costs.

**Prince Edward Island:** *A.L.G.C. v. Prince Edward Island (Government of)*, [1998] 160 Nfld. & P.E.I.R. 151, (1998), 157 D.L.R. (4th) 523, (1998), 51 C.R.R. (2d) 163, 1998 CanLII 5189 (PEI S.C.T.D.)[CanLII](#) at paragraphs 12 through 16 for a more restricted approach. In *D.E.M. v. J.M.M.*, 2011 PECA 16 ([CanLII](#)) the father's application for an order was denied on the basis that the father had intentionally magnified a single incident that was unrelated to the safety or welfare of the child.

## 16.13 Duration of orders under statutes

### 16.13.1 Orders of justices of the peace, magistrates, provincial court judges

- **Alberta:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#)  
Section 2 (6) orders must be scheduled for Queen's Bench review within 9 working days.
- **British Columbia:** [Family Law Act](#), SBC 2011, c 25  
Section 183(4) unless otherwise ordered, such orders expire one year after the order is made.
- **Manitoba:** The [Domestic Violence and Stalking Act, C.C.S.M. c. D93](#)
  - Protection orders of justices of the peace and magistrates, section 8.1(1)(2)(3):
    - must set out date of expiry

- duration is not more than 3 years unless longer-term protection is warranted.
- **Newfoundland:** [Family Violence Protection Act](#), S.N.L. 2005, c. F-3.1
  - Emergency Protection Orders, section 7(2) (4) are not to exceed 90 days and may not be renewed or extended.
- **North West Territories:** [Protection Against Family Violence Act](#), S.N.W.T. 2003, c. 24
  - Section 5. Duration is not specified. Emergency Protection Orders with supporting documents must be submitted to a Supreme Court and must be reviewed without a hearing within 3 working days of receipt.
- **Nova Scotia:** [Domestic Violence Intervention Act \(2001\)](#) S.N.S. Chapter 29
  - Sections 8(2) and 11(1): orders are not to exceed 30 days and are to be forwarded to a Supreme Court within 2 working days for review.
- **Nunavut:** [Family Abuse Intervention Act](#), S. Nu., 2006, c.18
 

Section 10: emergency orders may not exceed one year and must, pursuant to section 15, be forwarded to a court for review; the judge may confirm the order or direct a hearing

Section 17(6) Community intervention orders may not exceed 3 years
- **Prince Edward Island:** [Victims of Family Violence Act](#), R.S.P.E.I. 1988, c. V-3.2
  - Section 4 (4) orders are not to exceed 90 days unless otherwise ordered by a judge and pursuant to section 6 (1)(2) are to be forwarded to a Supreme Court for review within 2 working days.
- **Saskatchewan:** [Victims of Domestic Violence Act](#), S.S. 1994, c. V-6.02
 

While duration is not specified, Emergency Intervention Orders are to be forwarded immediately to Court of Queen's Bench for review.
- **Yukon:** [Family Violence Prevention Act](#), R.S.Y, c. 84
 

Duration is not specified; justices of the peace may specify duration: section 4 (5).

  - Weapons restrictions are limited to 180 days: section 4 (3) (e).
  - Emergency Intervention Orders granted by justice of the peace (other than territorial judges serving as justices of the peace) are to be forwarded immediately to Territorial or Supreme Court for review: section 5 (1) and 5 (1.1).

## 16.13.2 Orders of superior court judges

- **Alberta:** [Protection Against Family Violence Act](#), R.S.A. 2000, c. P-27

- Section 7(1)(2): duration must be specified, not to exceed one year unless extended by further order.
- **British Columbia:** *Family Law Act*, SBC 2011, c 25
  - Section 183(4) unless otherwise ordered, such orders expire one year after they are made.
- **Manitoba:** *Domestic Violence and Stalking Act*, C.C.S.M. c. D93
  - Queen's Bench Prevention orders: duration is not specified.
- **Newfoundland:** *Family Violence Protection Act*,
  - Not applicable. This statute applies only to provincial courts.
- **North West Territories:** *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24.
  - Duration is not specified.
- **Nova Scotia:** *Domestic Violence Intervention Act (2001) S.N.S. Chapter 29*
  - Emergency orders may be extended for periods not to exceed 30 days.
- **Nunavut:** *Family Abuse Intervention Act*, S. Nu., 2006, c.18
  - Emergency orders must, pursuant to section 15, be forwarded to a court for review; the judge may confirm the order or direct a hearing
  - See also, in connection with assistance orders, sections 18 to 19 and, in connection with compensation orders, section 20, as well as protection from stalking provisions, sections 21 to 24.
- **Prince Edward Island:** *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2
  - Section 6 (1)(2): Emergency Protection Orders are to be reviewed by a Supreme Court within 5 working days.
  - Section 7 applies to Supreme Court Victim Assistance Orders.
- **Saskatchewan:** *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02
  - Emergency Intervention Orders are to be reviewed within 3 working days or as soon as a Queen's Bench judge is available: section 5(2).
  - No duration is specified for Queen's Bench Victim Assistance Orders.
- **Yukon:** *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02
  - Supreme and Territorial Court orders: duration is not specified.

## 16.14 Terms of orders under statutes

- **Alberta:** *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27
  - Emergency Protection Orders: see section 2(3)(4). See *L.L. v. D.G.*, 2009 ABCA 387 ([CanLII](#)) in connection with lack of

jurisdiction in this statute to decide custody or access in an emergency protection order.

Queen's Bench protection orders: see section 4(2)

- **British Columbia:** [Family Law Act](#), SBC 2011, c 25

Section 183(3)(4)(5)

- **Manitoba:** [The Domestic Violence and Stalking Act](#), C.C.S.M. c. D93

Protection orders: see section 7(1);

Queen's Bench Prevention Orders: see sections 14 and 15.

- **Newfoundland/Labrador:** [Family Violence Protection Act](#), S.N.L., 2005, c. F-3.1

See section 6. Section 6(n) authorizes temporary care and custody orders.

- **North West Territories:** [Protection Against Family Violence Act](#), S.N.W.T. 2003, c. 24

Emergency protection orders: see section 4(3).

Protection orders: see section 7(2).

- **Nova Scotia:** [Domestic Violence Intervention Act \(2001\)](#) S.N.S. Chapter 29

See section 8(1).

- **Nunavut:** [Family Abuse Intervention Act](#), S. Nu., 2006, c.18

Emergency protection orders, see section 7 at subsections (2-9)

Community intervention orders, see section 17 at subsections (2 - 9)

Assistance orders, see section 18 at subsections (2-4)

Compensation orders, see section 20

Protection from stalking, see section 23

- **Prince Edward Island:** [Victims of Family Violence Act](#), R.S.P.E.I. 1988, c. V-3.2

Emergency Protection Orders: see section 4(3).

Victim Assistance Orders: see section 7(1)(2).

- **Saskatchewan:** [Victims of Domestic Violence Act, S.S. 1994, c. V-6.02](#)

Emergency Intervention Orders: see section 3(3).

Victim Assistance Orders: see section 7(1).

- **Yukon:** [Family Violence Prevention Act, R.S.Y, c. 84](#)

Emergency Intervention Orders: see section 4(3).

Victims Assistance Orders: see section 7(1).

### **16.14.1 Restrictions on weapons**

For discussion of removal of weapons, see 8 above.

Many of the DV prevention statutes expressly authorize orders to obtain and prohibit possession of weapons. In the absence of statutory authority, consider notifying police so that they may secure weapons pursuant to the *Criminal Code* as well as notice to a firearms official.

If weapons are located on reserve land, refer to [Family Homes on Reserves and Matrimonial Interests or Rights Act](#), SC 2013, c 20. Note that authority is limited if the applicant does not have Indian or First Nations status. Refer to [Chapter 8.7](#) above. For further information, see [Centre of Excellence for Matrimonial Real Property](#).

### **16.15 Requirements for service**

Many provincial and territorial DV prevention statutes set out provisions for service prior to orders becoming enforceable. On the one hand are constitutional concerns about restrictions on liberty becoming enforceable against a party without notice and giving the party an opportunity to be heard. On the other hand are the fundamental human rights of women, aboriginal peoples, other targeted adults and children to live lives free from

DV.<sup>141</sup>

Some domestic violators will evade service so as not to be bound by civil protection orders. Thus many of the statutes authorize remedies when service is being avoided. Note as well that violators may be held accountable if it can be established that they knew of the terms of the protection decision prior to acting: *Partridge v. Partridge* (2007), 213 Man. R. (2d) 305, 2007 MBQB 80 [CanLII](#).

## 16.16 Enforcement clauses

When the statute sets out specific offences and penalties for breach of the civil order **and** the specific offense provisions are clearly intended to oust criminal remedies, the provisions of the statute and not section 127 of the [Criminal Code](#) will apply. For discussion of the criteria needed to oust the applicability of *Criminal Code* section 127, see *R. v. Gibbons*, 2012 SCC 28 ([CanLII](#)).

The following DV statutes include specific offence provisions:

**Alberta:** [Protection Against Family Violence Act, R.S.A. 2000, c. P-27](#) section 13.1

**Newfoundland/Labrador:** [Family Violence Protection Act, S.N.L. 2005, c. F-3.1](#) section s18

**North West Territories:** [Protection Against Family Violence Act, S.N.W.T. 2003, c. 24](#), section 18

**Nova Scotia:** [Domestic Violence Intervention Act \(2001\) S.N.S. Chapter 29](#) section 18

**Prince Edward Island:** [Victims of Family Violence Act, R.S.P.E.I. 1988,](#)

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141 The United Nations has declared violence against women a gender-based, international human rights concern: [The United Nations Special Rapporteur on violence against women, its causes and consequences](#). See also: Inter-American Commission on Human Rights (2014) *Missing and Murdered Indigenous Women in British Columbia, Canada*; 5 December 2014: [Violence Against Women – A Pervasive human rights violation calls for a binding standard of accountability at the international level](#). Columbia Law School (2010) [Human Rights & Domestic Violence An Advocacy Manual](#). One of the more common reasons domestic violence protection statutes fail to protect targeted adults and children is because such orders are not served, for example because the violator evades service.

[c. V-3.2](#)section 16

**Yukon:** *Family Violence Prevention Act, R.S.Y, c. 84*

In other jurisdictions, refer to 6 above.

## **16.17 Superior Court reviews and rehearing of emergency protection orders**

Some, not all, superior courts are interpreting narrowly the authority of justices of the peace and provincial court judges to grant emergency orders, particularly when statutes authorize remedies without notice. Orders are being overturned on review or rehearing<sup>142</sup> on the basis of lack of evidence of immediacy, seriousness or urgency:

*Bella v. Bella* (1995), 132 Sask. R. 17 (Q.B.); *Dolgopol v. Dolgopol* (1995), 127 Sask. R. 237 (Q.B.), 1995 CanLII 5717 (SKQB)[CanLII](#); *T.L.E. v. D.A.E.*, [2005] A.R. 350; *E.A.W. v. M.J.M.*, 2012 NSSC 216 ([CanLII](#))  
*T.L.T. v. P.T.* (2003), 219 N.S.R. (2nd) 388 (SC); *E.M.G. v. G.R.W.*, 2007 NSSC 356[CanLII](#); *M.C.S. v. R.A. S.* (2004), 222 N.S.R. (2nd) 115 (SC); *Siwec v. Hiewka*, 2005 ABQB 684[CanLII](#).

On occasion, superior courts are also vacating collateral provisions (for example, for economic support or child custody and or access provisions) on the basis that the collateral provisions were insufficiently connected to the emergency and need for immediate protection. For example, *E.M.G. v. G.R.W.*, 2007 NSSC 356 ([CanLII](#)); *E.A.W. v. M.J.M.*, 2012 NSSC 216 ([CanLII](#)).

Leaving aside the question of statutory interpretation and whether or not restrictions on capacity to grant collateral relief in emergency situations will be endorsed by appeal courts, it is important to note, from a domestic-violence-research and family-safety perspective, that the research tells us that attending comprehensively to collateral issues can make the difference between empowerment and successful leaving on the one hand and continuing dependence, coercion and control and returning to violent relationships on the other. See 4.9 above.

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<sup>142</sup> Some of the statutes stipulate that superior courts are to review emergency orders; others use the term ‘rehear’.

Moreover, from a DV research perspective, custody orders are particularly important at the time of separation and in emergency situations, because of the following circumstances:

- the documented overlap between coercive forms of DV and negative parenting patterns as well as direct forms of child abuse,
- children's need in high tension, emergency contexts for safety, security and stability,<sup>143</sup>
- the documented overlap between indicators of adult risk and danger and risk and danger to the child,
- the risk of retaliation upon being served with an emergency order, and
- the documented connection between DV and risk of child abduction.<sup>144</sup>

## **16.18 A Comment on narrow interpretations of the powers of justices of the peace and provincial courts judges**

Are narrow interpretations of emergency powers and the authority of justices of the peace and of provincial court judges consistent with the original intentions of these statutes? DV statutes were designed to provide speedy access to preventative assistance in DV cases via readily accessible justices of the peace or provincial court judges. If justices of the peace and provincial court judges may only intervene and grant comprehensive collateral relief in exceptional emergency cases such that the majority of DV matters must be submitted in the first instance to superior court judges, the practical, preventative capacity of these statutes is appreciably reduced.<sup>145</sup>

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<sup>143</sup>Lynn Schafran (2014) *Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience* 53(3) *Judges' Journal* 32-37

<sup>144</sup>Neilson, Linda C. (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).

<sup>145</sup> Superior Court imposed limitations may help to explain limited use of these statutes: *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* at pp. 51-

## 16.19 Considerations on review of an emergency protection order

Superior courts are setting aside civil protection orders when it is thought that the evidence before the Justice of the Peace or Provincial Court Judge was an insufficient emergency pursuant to requirements of the *Act*.

Emergency protection orders are also being set aside on the basis of lack of full disclosure, particularly when full disclosure would have changed the result:

- *T.C.S. v. T.A.M.*, 2004 BCPC 487 [CanLII](#); *Meehan v. Meehan*, 2002 BCSC 427 [CanLII](#); *Baril v. Obelnicki* (2007), 2007 MBCA 40 [CanLII](#) (paragraphs 121 and 128); *Ducharme v. Borden*, 2014 MBCA 5 ([CanLII](#)).

Should a hearing be required prior to revocation or termination?

The DV research literature documents cases of domestic violators preventing the targeted party from receiving mail and other communications. Thus, if revocation is contemplated and the protected party is not present, it can be important to ensure that notice of the proceeding was actually received by the protected party.

From a domestic-violence-research perspective, other concerns relate to access to the DV expertise necessary to assess risk, seriousness and urgency. These cases are extremely complex. Assessment of risk and of danger requires considerable expertise. Is revocation of the emergency civil protection order advisable or is a risk or lethality assessment by a DV expert

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52. See also Karen Wilcox (2010) [Recent Innovations in Australian Protection Order law - A Comparative Discussion](#); Newfoundland's statute does not provide for superior court review but does limit protection orders to 90 days. It will be interesting to see: 1) if all aspects of the legislation survive constitutional challenge and 2) how, in practice, removal of the superior court review process will affect access to remedies. Speed of intervention can be critical. Delays enhance rationalization and opportunities for manipulation or intimidation.

warranted?

- Do the facts indicate a likelihood DV will continue or the potential for lethal outcome?
- the discussion or risk and danger assessment in Parts 6 and 7 of Neilson, Linda C. (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) may offer assistance.

It is important to keep in mind the numerous reasons victims of DV may fail to seek confirmation of a civil protection order. See [14](#) and [15.16](#) above.

On occasion, facts may support confirmation of a protection order despite the absence of the applicant.

- A number of the DV statutes make the applicant's attendance discretionary. This allows confirmation of orders on the basis of evidence presented to obtain the original emergency protection order.

Refer to *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)), leave to appeal dismissed with costs: *Robert Kotello v. Rita Steinmann*, 2012 [CanLII](#) 56159 (SCC) in connection with judicial discretion to correct a justice of the peace's reliance on unsworn evidence.

Compare *A.L.G.C. v. Prince Edward Island (Government of)*, 1998 CanLII 5189 (PEI S.C.T.D.)[CanLII](#) criticism of the confirmation process (when the original order was granted *ex parte*) with the analysis of the Court of Appeal of Manitoba on this issue in *Baril v. Obelnicki* (2007), 2007 MBCA 40[CanLII](#) at paragraphs 99 to 107 and *Steinmann v. Kotello*, 2012 MBCA 30 ([CanLII](#)).

If the emergency order is overturned or terminated, and protection is refused, what message is sent to the person who sought protection from the courts and to the other party? Do the circumstances of the case warrant

alternative remedies to ensure safety and welfare and or to promote perpetrator accountability such as, for example, an expedited process to enable a superior court protection order or non-emergency restraining order?

## **17 Exclusive possession of the family home (civil)**

Marital property, family law or DV prevention statutes in every Canadian jurisdiction authorize court orders for exclusive possession of the marital or family home; statutes in most jurisdictions also authorize orders for exclusive possession of items of personal property.<sup>146</sup>

Family law statutes in **North West Territories**, [Family Law Act, S.N.W.T. 1997, c. 18](#), **Nunavut**, [Family Law Act](#), S.N.W.T. 1997, c. 18; **Prince Edward Island**, [Family Law Act](#), R.S.P.E.I. 1988, c. F-2.1; and **Ontario**, [Family Law Act](#), R.S.O. 1990, c. F.3; and **Canada** [Family Homes on Reserves and Matrimonial Interests or Rights Act](#) explicitly list DV (or family violence) as one of the factors to be considered on an application for exclusive occupation of the home. The **Saskatchewan** [Family Property Act, S.S. 1997, c. F-6.3](#), section 7, lists conduct as a relevant consideration.

Leaving aside the DV prevention statutes discussed earlier, marital property statutes often authorize considerations such as the best interests or needs of children and/or the adequacy of alternative shelter. In connection with shelter, personal safety is an appropriate consideration: *Duguay v. Duguay* (2000), 231 N.B.R. (2nd) 137 (FD).

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<sup>146</sup> Definitions of 'spouse' or applicant varies considerably by statute.

## 17.1 Exclusive occupation of the home: considerations

When the home is located on a reserve, see [Chapter 17.2](#)

In other cases, the particulars of pertinent considerations vary by provincial or territorial statute:

- the best interests of the child
- the financial circumstances of the parties
- any written agreement
- the suitability of alternative accommodation
- the interests of both parties and any other person residing in the home
- domestic violence.

DV has been documented as one of the leading causes of homelessness in North America. Adults and especially children recovering from trauma and from stress as a result of DV in the home require safety, stability and continuity. When remaining in the family home can be made safe for the non-perpetrating parent and the children, children can benefit from continuing stability and not being further uprooted, inconvenienced and disrupted.<sup>147</sup>

When mutual occupation of the home becomes intolerable as a consequence of DV, and conduct or violence is a factor that can be considered pursuant to the applicable statute, should not the party who engaged in the DV bear the emotional and financial costs of establishing a new residence? We now

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<sup>147</sup> For an exploration of this issue see: David Finkelhor and Heather Turner (2015) *A National Profile of Children Exposed to Family Violence: Police Response, Family Response, & Individual Impact*; R. Edwards (2004) [Staying Home Leaving Violence. Promoting Choices for Women Leaving Abusive Partners \(Australia Domestic and Family Violence Clearinghouse\)](#). See also J. Martin and M. Levine (2010) *Safe@home Evaluation* (Ministry of Social Development, Wellington); Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report (Victoria Law Reform Commission)* at 315-331. Recommended reforms in Australia include a presumption that the person targeted by DV will remain in the home: Australian Domestic & Family Violence Clearinghouse (2007) “[Review of the Victorian Crimes \(Family Violence Act 1987\)](#)” Newsletter 28 Autumn 2007 at p. 7; [ALRC Consultation Paper 1 \(ALRC CPI\) Family Violence - Improving Legal Frameworks](#). Note, however, the need for follow up and for longer-term support following the period of immediate crisis, if the emergency provisions enabling exclusive occupation of the home are to have more lasting effect: Jo Watson (2014) [Staying Home after Domestic Violence](#) (Australia: Domestic Violence Crisis Service).

know, from decades of consistent social science research and from more recent medical child development research, the adverse and even long term medical, neurological and psychological effects of toxic stress (such as that produced by repetitive DV in the home) on children.<sup>148</sup> Children require safety, stability, and support for resilience and recovery. Thus, from a research-informed perspective, requiring children whose lives have been disrupted by DV to vacate their own homes seems counterproductive when removal of the perpetrator is a viable option.

- Perpetrator custody is seldom recommended in DV cases that involve coercion and control.
- Children who have been subjected (directly or indirectly) to DV require stability and continuity in their lives as well as safe, supportive bonds with non-abusing adults in order to heal.

Important considerations include whether the home can be made safe (for example, by installing security alarm systems, electronic monitoring, or new windows and locks) and attending to responsibility for timely payment of the cost of extra home security.

In a DV context, other practical considerations include:

- Is the fact that the perpetrator may be familiar with entrances and exits and particulars of the home cause for concern about safety?
- How near is the home to community support, protection, police and enforcement services?
- Could a 'stay away' order offer adequate protection if exclusive possession is granted?
- Has the violator complied with agreements and court orders in the

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<sup>148</sup> See Lynn Schafran (2014) [Domestic Violence, Developing Brains, and the Lifespan New Knowledge](#) from Neuroscience in 53(3) *Judges' Journal* 32. In connection with child safety, one of the most importance breakthroughs in recent years is enhanced scientific understandings of the long term effects of 'Toxic Stress' and repetitive fear on children. Please read materials on Toxic Stress and on Child Fear at the [Center on the Developing Child](#), Harvard University as well as Alison Cunningham and Linda Baker (2004) [What About Me! Seeking to Understand the Child's View of Violence in the Family](#).

past?

- Do the violator's circumstances (such as being in jail) create some assurance of safety?
- Is the person targeted by the DV financially able to obtain equivalent, safe, and suitable housing? If not, who should bear the extra cost of moving, finding suitable housing, and the extra cost of security?
- Is the violator financially able to obtain alternative housing? Does the violator have special circumstances connected to the property that would contraindicate an order to the other party?
- Do either of the parties have an urgent need for resources from sale of the marital home? What impact does this have on the claim for exclusive possession?
- What inquiries and steps should be taken to avoid contradictory agreements or orders?
- Consider also related issues such as provisions to prevent financial abuse (see [4.7](#)) and to attend to collateral economic needs discussed earlier in [4.9](#).

## **17.2 Marital homes and other property on Indian reserves**

Orders for exclusive possession and or occupation of family homes on reserves may now be granted in family violence (and other) cases pursuant to the [Family Homes on Reserves and Matrimonial Interests or Rights Act](#), SC 2013, c 20 and [Emergency Protection Orders Regulations](#), SOR/2014-266. Refer to the Act; special processes and considerations apply. The [Centre of Excellence for Matrimonial Real Property](#) offers additional information as well as educational materials.

Note that there are restrictions on seizure of personal property on reserves if the applicant is not a First Nations member or an Indian, as discussed in

## **18 Orders relating to personal property**

Attention to details such as immediate possession of specific items of personal property, pets and farm animals, may seem insignificant in terms of absolute value yet can make an enormous difference to family members who are attempting to leave violent relationships.

Attention to personal property details can make the difference between putting an end to intimidation, harassment and abuse, and allowing it to continue.

### **18.1 Directing police to accompany persons to obtain personal possessions**

With the exception of the federal [\*Family Homes on Reserves and Matrimonial Interests or Rights Act\*](#), the majority of the DV prevention statutes authorize courts to direct police officers to accompany persons to the home in order to obtain personal belongings. In connection with division of the value and or interests in personal property on reserves, see sections 28 through 33 of the [\*Family Homes on Reserves and Matrimonial Interests or Rights Act\*](#).

Domestic violators are known to make use of legal proceedings to harass or to maintain contact and control. Repetitive applications for personal property (in order to maintain contact or control) can be avoided by ensuring that claims of entitlement to items of personal property are detailed, specific and complete. See for example *C.D.D. v. M.A.U.*, 2006 SKQB 109 [CanLII](#) at paragraph 7.

When the applicable statute authorizes civil protection orders with respect to personal property, provisions specifying exactly what 'personal belongings'

are to be removed can reduce confusion and opportunities for conflict while clarifying police responsibilities.

The presence of both parties and or their representatives may be necessary to ensure compliance with the order as well as an accurate recording of items removed. Police presence can be helpful.

It is important to specify:

- the items to be removed
- the dates and times of removal
- the allowable presence of police (or other third parties) during removal
- the condition that police officers in attendance will only vacate the premises after the removing party
- the entitlement of the targeted party (or a representative of the targeted party) and a support person to be present in order to ensure compliance with the order and to ensure that additional property is not taken
- the extent to which the civil protection order will be altered temporarily (specifying time, date, duration and the types of contact that will and will not be permitted) in order to enable removal of personal property.

Note, however, the restrictions on seizure of personal property on reserves if the applicant is not a First Nations member or an Indian discussed in [Chapter 8.7](#).

## **18.2 Particular items of personal property**

The following list is not exhaustive. It is intended merely to alert professionals and service providers to some of the concerns about personal property identified in the DV literature.

**Vehicles:** If either party requires possession of the family vehicle to access community treatment or other services, to work, or to travel to court, agreements or orders that attend to exclusive possession of the family vehicle can enhance access to courts and can promote safety by allowing timely access to services, particularly for those who reside in rural areas.

**Caution:** Note, however, concerns about car tampering are reported regularly in DV cases. When the violator is a mechanic, the court may wish to consider a special provision prohibiting tampering with the family car. Note as well, the availability of tracking devices that can be attached to vehicles. Consider, if the perpetrator has a record of complying with agreements and or court orders, whether or not provisions, such as those mentioned in 9 are sufficient to ensure safety. Alternative options for transportation are advisable in high-risk situations or in situation involving a potential for lethality.

**Identity papers, visas, passports and immigration documents:**

Attending to possession of such items can help to reduce the potential for child abduction and can prevent forms of intimidation and harassment associated with cases involving immigration.

**Diaries:** Attention to possession of personal records and diaries can prevent invasion of privacy and destruction of evidence.

When an abused person has a **physical or mental disability**, attention to exclusive possession of care items can offer independence while reducing opportunities for continuing control, harassment and abuse. Examples: hearing aids, wheelchairs, specially altered vehicles, special phones or computer programs.

**Personal property of children:** Personal property items belonging to children include school supplies, clothing, toys and pets. Attention to the

safety of family pets can be particularly important in these cases since it is not uncommon for animal pets to ‘disappear’, to be killed or disabled in order to punish former partners and children for the decision to separate. Animal cruelty is used in some of these cases to terrorize intimate partners and to punish, control or silence children.<sup>149</sup> Attention to pet safety can prevent a child from having to carry, into adulthood, guilt associated with the death of a family pet resulting from not being present in the home to offer protection.

### **18.2.1 Family Pets and Farm Animals**

Cruelty to animals is associated with domestic violence.<sup>150</sup> Protection of animals is commonly cited as one of the reasons family members remain or return to abusive homes.<sup>151</sup> Thus securing the safety of pets and companion farm animals (such as horses or pet cows or sheep) can enhance adult safety while offering comfort to children.<sup>152</sup>

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149 For example: *C.S.N. v. A.L.C.*, 2011 ABQB 370 ([CanLII](#)). See also: Judicial Education Centre of New Mexico Domestic Violence Benchbook, Chapter 11; F. Ascione, C. Weber et al. (2007) “Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Non-abused Women” in *Violence Against Women: An International and Interdisciplinary Journal* 13 (4): 354-373; M. Crager, M. Cousin and T. Hardy (2003) *Victim Defendants: An emerging Challenge in Responding to Domestic Violence in Seattle and Kings County Region*.

150D. Doherty and J. Hornosty (2007) [Exploring the Links: Firearms, Family Violence and Animal Abuse in Rural Communities](#); Woman Abuse and the PEI Justice System Research Team “The Link Between Animal Abuse and Family Violence”. Researchers in Australia, the United States and England are reporting animal abuse as a domestic violence strategy: A. Volant, J. Johnson et al. (2008) “The relationship between domestic violence and animal abuse: an Australian study” in *Journal of Interpersonal Violence* 23(9): 1277-1295; Victoria Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victoria Law Reform Commission); S. McPhedran (2009) “Animal Abuse, Family Violence, and Child Wellbeing: A review” in *J. Fam. Viol.* 24:41-52; F. Ascione and P. Arkow (1999) *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (West Lafayette, Indiana: Perdue University Press); S. MacIntosh (2001) “Research Study: Exploring the Links Between Animal Abuse and Family Violence, as Reported by Women Entering Shelters in Calgary Communities”.

151 Ibid. See also: C. A. Faver and E. B. Strand (2003) “To leave or to stay? Battered women’s concern for vulnerable pets.” *Journal of Interpersonal Violence* 18 (2): 1367-13377; C. L. Flynn (2000) “Women’s best friend: pet abuse and the role of companion animals in the lives of battered women.” *Violence Against Women* 6(2): 162-177. The issue here is not whether animal abuse is a predictor of risk of domestic violence or whether animal cruelty occurs in the majority or in an appreciable number of domestic violence cases. Instead the issue is what can be done when information establishes an association between animal cruelty and domestic violence or child abuse. In a judicial and legal system context what matters is the form of abuse, violence, intimidation that is occurring in the particular circumstances of the case. The use of animal cruelty to intimidate and terrorize or to force family members to return to violent homes has been documented repeatedly by abuse victims, their advocates, and by researchers throughout North America and beyond.

Newfoundland/Labrador's [Family Violence Prevention Act](#), S.N.L. 2005, c. F-3.1 expressly includes animals in the statute's definition of property. British Columbia's [Family Law Act](#), SBC 2011, c 25 includes intimidation, harassment and threats with respect to pets in its definition of “family violence”. Nonetheless DV prevention and civil protection statutes across the country could benefit from statutory reform in this area. Many statutes in the United States have been amended to include provisions expressly authorizing orders to protect animals when civil protection cases involve DV.<sup>153</sup>

As an immediate practical matter, service providers, lawyers, and courts can identify safe options for clients. In some parts of the country humane societies are now willing to shelter animals during the separation process in DV cases. In New Brunswick, refer to the program [Safe For Pets Too](#). The program can offer shelter to farm animals as well as to pets.

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152 Newfoundland/Labrador's *Family Violence Prevention Act*, S.N.L. 2005, c. F-3.1 expressly includes animals in the statute's definition of property. See also Judicial Council of California, Administration Office of the Courts (2010) *Judges Guide to Domestic Violence Cases. California Protection Orders*. For references on the importance of considering animal safety in domestic violence cases, see: Alberta Justice and Solicitor General (2014) *Domestic Violence Handbook: for Police and Crown Prosecutors in Alberta*; Stephen Wells (2014) *Legally Brief: Protecting Pets from Domestic Violence*; National Resource Center on Domestic Violence (2014) *Why Pets Mean So Much: The Human-Animal Bond in the Context of Intimate Partner violence* (Violence Against Women); Victorian Law Reform Commission (2006) *Review of Family Violence Laws Report* (Victorian Law Reform Commission. Animal abuse); Michael Roguski (2012) *Pets as Pawns: the Co-existence of Animal Cruelty and Family Violence* (SPCA and Women's Refuge). More than 29 US States have now modified DV protection statutes to enable judges to make orders protecting animals in DV cases. Rebecca Wisch (2014) has posted links to United States legislation on this issue: *Domestic Violence and Pets: List of States That Include Pets in Protection Orders* (Michigan State University, College of law). In addition, Ohio passed new legislation enabling protection for animals in DV cases in December of 2014. Canada could benefit from legislative reform in this area.

153 Thanks are due to Stephanie Allen, Pro Bono Law Student, University of New Brunswick for her research assistance on this issue. On-line resources: Phil Arkow (2007) [Expanding Domestic Violence Protective Orders to Include Companion Animals](#) (American Bar Association Commission on Domestic Violence); Tim Battle, “Including Pets in Protective Orders” in *Law Now* relating law to life in Canada; Animal Law Resource Center [Model Laws: The Domestic Abuse Animal Protection Act](#); Rebecca Wisch (2014) *Domestic Violence and Pets: List of States that Include Pets in Protection Orders* (Michigan State University, Animal Legal & Historical Centre).

## **PART THREE**

### **19 Legislation deficits**

Canada could benefit from enlisting DV experts in a thorough review of family law, marital property and domestic violence prevention statutes throughout Canada in order to ensure timely access to effective processes and remedies in coercive DV cases. Current concerns, from a research perspective, include:

- continuing problems with authority to offer and enforce some types of remedies on First Nations reserves;
- limited express authority, in some family law statutes, to order the violator's participation in DV intervention, specialized parenting, drug and alcohol and mental health treatment programs with provisions to monitor compliance;
- limited authority, in many DV prevention statutes, to respond to dating violence (before patterns become ingrained), to indirect forms of DV against those who support the targeted adult, and to violence among family members who are dependent on each other but who do not reside together (for example in cases involving those who are elderly or disabled);
- limited authority in many family law and some DV prevention statutes to respond to stalking and monitoring (facts that are closely associated with high levels of danger and the potential for lethal outcome);
- limited express authority in DV prevention and family law statutes to respond effectively to modern forms of harassment, stalking, and monitoring using modern technology (such as computer programs and tracking equipment);
- limited express authority in many family law statutes to seize and secure weapons;

- limited express authority in many family law and DV prevention statutes to make orders to protect animals (family pets, companion farm animals);
- restrictions, in some jurisdictions, on the duration of civil protection orders;
- restrictions, in some jurisdictions, on who may be bound and who may be protected by protection orders;
- restrictions on jurisdiction to make collateral orders for support, possession of property and or custody and access to children in emergency orders;
- limited authority in many of the statutes to respond to forms of gender-based violence that occur in extended or complex family structures;
- review provisions and processes that may discourage variation, confirmation, renewal or continuance of protection orders;
- obstacles in some jurisdictions to the enforcement of civil protection orders granted in other provinces, territories, or countries;
- absence (with the exception of British Columbia) of central repository systems in the Provinces and Territories where civil and criminal protection orders are filed and made accessible to police, courts, and designated service providers.
- absence of national legislation and a national registry system to make civil protection orders enforceable throughout Canada;
- absence of a statutory presumption that targeted parents with children should *prima facie*, subject to safety and other considerations, be entitled to exclusive possession of the family home in DV cases
- limited ability to ensure that targeted family members, and especially children, have access to counselling and therapeutic DV services;
- limited availability of specialized supervision of access facilities.

Additionally, those who engage in DV require timely access to services such

as temporary, emergency housing combined with DV intervention with specialized parenting content, mental health and substance abuse services, and specialized supervision of child access centres if we are to put an end to DV while supporting child and family health and safety.

## **20 Additional reference materials**

The National Council of Juvenile and Family Court Judges in the United States has developed educational materials relating to civil protection orders. Although the content on law is not applicable in Canada, some of the core principles are useful: (2005) [A Guide for Effective Issuance and Enforcement of Protection Orders](#) and (2010) [Civil Protection Orders A Guide for Improving Practice](#).

See also: American Judges Association, educational modules: [Effective Adjudication of Domestic Abuse Cases](#), [Education Module 2, on Civil Protection Orders](#) and the National Center for State Courts: [Domestic Violence Resource Guide](#), web links to resources under “Protection Orders.”