ALBERTA
LAW REFORM
INSTITUTE

DOMESTIC ABUSE: TOWARD AN EFFECTIVE LEGAL RESPONSE

Report for Discussion No. 15

June 1995

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SUMMARY

In undertaking this project, the Alberta Law Reform Institute was responding to the increasing awareness of the serious and pervasive nature of the problem of domestic abuse in Canadian society. The problem of domestic abuse is complex. The consequences of abuse in a family may range from educational and behavioral problems in children, to inability of both the perpetrator and the victim of the abuse to function competently at work, to difficulties in obtaining medical and counselling treatment for physical and emotional injuries caused by abuse. Of course, the ultimate consequence of abuse may be death. The proliferation of effects often require many different professionals and services to manage the situation. In addition to lawyers, police officers and judges, doctors, dentists, nurses, social workers, clergy, shelter workers, probation officers, parole boards, therapists, and teachers may all be involved in the response to a situation of domestic abuse.

It is clear that the law does not hold an exclusive position in the either the response to, or the prevention of, domestic abuse. However, it is equally clear that many victims of domestic abuse will reasonably turn to the law for protection. When that occurs, the law should be effective and efficient in its response, and should seek with the greatest sensitivity possible to extend protection to victims and to create and enforce barriers to the continuation of domestic abuse. While the law alone cannot provide a comprehensive solution to the problem of domestic abuse, the law should, nonetheless, be vigilant in ensuring that its substance and procedures are well tailored to the needs of those suffering in abusive households. The community as a whole should seek to provide a web of supportive services to victims of domestic abuse. We are of the view that the law has a significant role to play in the creation of this web. The law cannot play its part in a meaningful way in isolation from the larger community of services. It is our aspiration that those persons and groups interested in solutions to the problem of domestic abuse will provide the Alberta Law Reform Institute with comments on the recommendations and the questions posed in this report for discussion.

At the inception of the project we consulted with numerous groups and individuals. Some were working in the area of domestic abuse, and others were involved in abusive relationships. As a provincial law reform

body we were concerned to direct our efforts to an area of the law under provincial jurisdiction. Our consultation focused on the administration of justice and the efficacy of civil protection for victims of domestic violence. The results of our consultation are set our at further length in Part I Section D of this report. However, a very brief summary of the problems identified is warranted here. In the area of civil protection it was noted that the cost of obtaining a restraining order is often prohibitive. Further we discovered that legal arrangements relating to custody and access arrived at without an awareness of the existing abuse were often sources of difficulty and danger. Victims also reported not being able to gain access to their personal property once they had left an abusive situation. They also reported dissipation of joint assets and destruction of property in response to the victim leaving the residence. In general, victims and shelter workers reported that many professionals and actors in the justice system did not have an awareness of the reality of the physical danger that victims of domestic abuse were in. Victims also often felt that the justice system was unwilling to recognize the effects of emotional abuse.

With these findings in hand, we decided to focus on the area of civil protection orders for victims of domestic abuse. A detailed discussion of our reasons for adopting this focus are set out in Part I Section F of this Report. We were of the view that we could achieve maximum impact by concentrating our resources in this area. While protection orders will not be useful or desired in all cases of domestic abuse, they will be both desired and useful in many others. We were of the view that the task of reforming the law so that such orders would be quick and inexpensive to obtain, and easy to enforce was worthwhile. Our focus on this area should not be misinterpreted as an endorsement of the view that civil remedies are a comprehensive solution to the problem of domestic violence. In most cases, a legal response will not be a sufficient solution on its own, and will need to be buttressed by other services of counselling and support. Even within the legal arena, the area of civil protection is not all encompassing. In many cases, civil remedies will be undertaken in conjunction with criminal proceedings. In other cases criminal proceedings on their own will be appropriate and sufficient. In other cases still, processes and solutions constructed outside the legal arena may be most effective. Notwithstanding this, however, the legal remedies in this area should be as good as they can be to provide effective protection and relief for those for whom they are appropriate.

Having settled on this focus, we then proceeded to identify three main substantive areas that needed to be addressed. The first question that arose was: what sort of abusive conduct should we be concerned with? In other words: what sort of conduct should entitle the applicant to apply for protection? This discussion is contained in Chapter 1 entitled "Conduct". There, we took the view that in identifying the kind of conduct that should ground an entitlement to apply for a protection order, the law should be aware of and sensitive to the realities of the kind of conduct that takes place in abusive relationships. Section A of Chapter 1 of the Report discusses the dynamics of abusive relationships. In this description of the sort of conduct common in abusive relationships we have relied upon both our own consultation and on the research conducted by the Duluth Domestic Abuse Intervention Project on the dynamics of power and control in abusive relationships. From there we have proceeded to identify physical integrity, sexual integrity, autonomy, privacy, and property as the interests of the individual to be protected by the civil law. We were not seeking to identify new and innovative interest to be protected, but rather we were seeking to acknowledge and give fuller protection to those interests already traditionally recognized by the legal system. From there we examined the types of conduct found to be prevalent in abusive relationships to determine whether that conduct threatened any of the interests we had identified as appropriate for legal protection. The results of this analysis are set out in Chapter 1 Section C and are reflected in recommendation 1.

In Chapter 2, entitled "Scope of the Legislation", we faced the task of identifying those persons who should be entitled to bring an application for a protection order. This required the creation of a definition of the domestic sphere. We recognized that the legislation would be seeking to increase accessibility and to reduce the complexity of obtaining civil protection from domestic abuse. The impetus for the creation of simplified and expedited procedures is, of course, the recognition that victims of domestic abuse suffer particular barriers and difficulties in accessing the legal system. These barriers may include cost (and this factor may be exacerbated by the victim's financial dependency on the abuser), low self-esteem and low confidence existing as a result of the abuse, and the perception, which is too often a reality, that the justice system will not respond effectively to the situation of the victim. A major purpose of legislation in this area is to lessen or eliminate these barriers. Recognition of these barriers must drive the agenda for reform.

It is important to ensure that the scope of the legislation does not exceed its purpose. The qualifier 'domestic' must be given some real meaning within the legislative scheme. On the other hand, however, we did not wish to exclude from the protection of the legislation those individuals whose domestic arrangements do not reflect the norm. We do not wish to create artificial categories that will have the effect of excluding legitimate victims from the protection of the legislation. Therefore, in attempting to define the realm of the domestic, we identified the essential indicia of vulnerability that would frequently lead to difficulty in accessing the legal system. These included:

- the intimate nature of the relationship,
- the potential in the relationship for emotional intensity,
- the reasonableness of the inference that the relationship would be presumed by the parties to be one of trust,
- the reduced visibility of the relationship to others or the element of privacy which keeps the goings-on in the relationship unknown to others,
- dependency or lack of ability of one or both of the parties to unilaterally leave the relationship, and
- the ongoing physical proximity of the parties.

Our recommendations on the scope of the legislation have these indicia of vulnerability at their core. For clarification, however, we also identified some specific relationships that ought to be explicitly brought within the scope of the legislation.

In Chapter 3, entitled "Types of Relief", we addressed the difficult question of the nature of the remedies that should be created by the legislation. Our discussion of remedies is broken down into three parts: protection remedies, property remedies, and prevention remedies. The first section entitled "Protection Remedies" and appears as part A of Chapter 3. This section includes our discussion of the core remedy - the no-contact order. The purpose of the no-contact order is to secure, in the most efficient and effective manner possible, the basic safety needs of the applicant victim of domestic abuse.

Part (2) of the section on protection remedies is entitled "Custody and Access" and deals with various situations in which there is a need for issues

of custody and access to be addressed in the protection order. In this section we were responding as best we could to the concerns raised by victims of domestic abuse that inadequate arrangements with respect to custody and access often give rise to continuing opportunities for abusive and controlling behaviour and deprive the victim of abuse of the safety sought to be secured by a no-contact order. One question which arose in this context was whether the legislation, in granting a power to make a limited order as to custody and access, should also create a presumption that the best interests of the child are served by granting custody to the non-abusive parent. Responses of interested persons on this issue would be welcomed by the Institute.

The two other protection remedies considered, but on which no recommendation was ultimately made are first, the seizure and storage of firearms and second, the exclusive possession of a joint residence. In these sections arguments for and against the granting of such remedies are considered. Here again, the institute requests the responses of interested persons and groups.

In addition to the protection remedies, we have gone on to consider other kinds of remedies that could potentially be beneficial, first, in reinforcing the safety focus of the protection order as a safety provision and, second, in ensuring that the applicant is given a reasonable chance to make real choices (not coerced by the demands of the abusive party) about the future. Thus, we have considered remedies relating to property. The problem of victims of domestic abuse having to abandon their basic personal possessions in order to reach safety was seen as giving rise to a need for legally enforceable mechanisms for retrieving that property in safety. Here we have recommended that the legislation grant broad powers to make orders relating to personal property and to order that a police officer aid in the execution of that order. Issues of maintenance and support, costs of litigation, as well as compensation for out-of-pocket expenses incurred as a result of the abuse are also dealt with in this section.

The section on Prevention Remedies considers the possibility of granting the power to order the respondent to take counselling to deal with and eliminate the causes of abusive behaviour. We have also considered here the possibility of requiring the respondent to pay for counselling for the applicant or children affected by the abuse. Here the rationale would be that the respondent created the need for the counselling through the

abusive behaviour and therefore, ought to be required to bear the cost of the assistance needed to heal those scars. The section on Prevention Remedies canvasses the arguments for and against the creation of such a remedy. Here again, the institute would welcome comments and responses on this issue.

The final Chapter 4 entitled "Jurisdiction of the Provincial Court and Justices of the Peace to Grant Relief Under the Legislation" deals with the constitutional issues arising out of s. 96 of the Constitution Act, 1867 which restricts the powers which may be granted to a provincially appointed tribunal. This issue arises because access to the remedies created by the legislation is a central concern of the project. We are seeking to craft substantive remedies that effectively address the real needs of victims of domestic violence. However, we are also seeking to ensure that those remedies are made available to all victims of domestic violence including those of limited means. Thus, it is important to determine whether or not it is constitutionally permissible to place the power to grant these remedies within the jurisdiction of a provincial court or justice of the peace. In Chapter four we analyze the jurisprudence on s. 96 of the Constitution Act, 1867 and conclude that s. 96 does not create an insurmountable barrier to the placing the remedies contemplated in the jurisdiction of provincially appointed tribunals. We have reserved the issue of which tribunal is ultimately the most appropriate one to grant the remedies until such time as final recommendations have been made on the list of appropriate remedies to be created and the procedural aspects of the legislation have been addressed.

Clearly, the issues covered in the four chapters described briefly here do not encompass all of the relevant considerations that will ultimately need to be discussed in a final report on civil remedies for domestic abuse. Notably, the recommendations and questions set forth here will need to be supplemented by recommendations on both procedural and enforcement issues. The balance to be struck in developing recommendations on procedural issues will involve ensuring that unnecessary procedural complexity does not stand in the way of effective access to the remedies created, while at the same time ensuring that procedural safeguards are maintained to protect the rights of the respondent. A brief summary of the procedural issues that will need to be addressed is contained in Part I

Section F(2). On the issue of enforcement questions of the appropriate penalties for breach of an order will have to be considered.

The Institute has deferred the consideration of these further procedural and enforcement issues to such future time when responses have been receive on the substantive issues contained in this report for discussion. We welcome those responses.

PART I — INTRODUCTION

A. Domestic Abuse in Canadian Society

In recent years the problem of domestic abuse has received increasing public attention. The prevalence of domestic abuse, as well as the inappropriateness of viewing it as a private matter, are now generally well recognized. In 1980 it was estimated that one in ten women are assaulted by their spouses in Canada.[1] The Final Report of the Canadian Panel on Violence Against Women In Canada, *Changing The Landscape: Ending Violence — Achieving Equality*[2] reports that 27% of women have experienced a physical assault in an intimate relationship.

In 1993, Statistics Canada did a national survey on male violence against women.[3] Of the women surveyed, 25% reported that they had been assaulted by a current or past marital partner.[4] Further, ongoing violence is often part of the lives of women. Of those women that had been victims of marital violence, 63% had been assaulted on more than one occasion, and 32% had been assaulted more than ten times.[5]

For many women surveyed, the spousal violence either occurred or increased during the time of separation from an abusive partner. For one-fifth of the women, violence occurred following or during separation, and for one-third of the women the violence increased in severity at the time of separation.[6]

The survey also found that spousal assaults were more likely than other assaults to involve weapons or something used as a weapon. Violent

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[1] Linda MacLeod, *Wife Battering in Canada: The Vicious Circle* (Hull: Canadian Government Publishing Centre, 1980).

[2] (Ottawa: Minister of Supply and Services Canada, 1993).

[3] "The Violence Against Women Survey", (Ottawa: Minister of Industry, Science and Technology, 1993).

[4] *Ibid.* at 2.

[5] *Ibid.* at 3.

[6] *Ibid.* at 4.

spouses used weapons 44% of the time, compared to only 6% for other violent offenders. It is worth noting that, according to this national survey, "women face the greatest risk of violence from men they know",[7] and this conclusion is consistently supported by other research.[8] An astonishing 45% of all women surveyed by Statistics Canada reported that they had "experienced violence by men known to them (dates, boyfriends, marital partners, friends, family, neighbours, etc.)".[9] With respect to dating violence in particular, 16% of the women reported they had been assaulted by a date or boyfriend.[10]

It is also distressing to note that domestic abuse appears to be particularly prevalent in Native communities. In a survey done by the Ontario Native Women's Association in 1989, 80 per cent of the respondent Native women indicated that they had personally experienced family violence.[11]

According to the Alberta Office for the Prevention of Family Violence, a department of Alberta Family and Social Services, "over 4,000 women and over 5,000 children took refuge in Alberta's women's emergency shelters and satellite shelters in 1992".[12] More specifically, Alberta shelters admitted 4,532 women and 5,652 children in 1993.[13] What is more shocking, however, is that 3,802 women and their children were turned away in 1993

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[7] *Ibid.* at 2.

[8] See: R. Gunn & C. Minch, *Sexual Assault: The Dilemma of Disclosure, the Question of Conviction* (Winnipeg: University of Manitoba Press, 1988); C. Muehlenhard, D. Friedman, & C. Thomas, "Is Date Rape Justifiable: The Effects of Dating Activity, Who Initiated, Who Paid and Men's Attitudes Toward Women" (1985) 9:3 Psychology of Women Quarterly 297; D. Finkelhor & K. Yllo, *Licence to Rape: Sexual Abuse of Wives* (New York: The Free Press, 1985); K. Rappaport & B. Burkhart, "Personality and Attitudinal Characteristics of Sexually Coercive College Males" (1984) 93:2 Journal of Abnormal Psychology 216.

[9] "The Violence Against Women Survey", *supra*, note 3 at 2.

[10] *Ibid.*

[11] *Breaking Free: A Proposal for Change to Aboriginal Family Violence* (Thunder Bay: Ontario Native Women's Association, 1989).

[12] Alberta, Office for the Prevention of Family Violence, "Wife Abuse — Fact Sheet", 1993 at 1.

[13] Family Violence Prevention Division, Health and Welfare Canada, "The Women's Shelter Information System — Annual Report — Provincial Summary", 1993.

by Alberta shelters that were full.[14] Further, a total of 42,488 crisis calls were received by Alberta shelters in 1993, an increase from the 34,365 crisis calls received in 1992.[15]

Alberta Justice reports that 1,262 cases of violence between a married, estranged or cohabiting couple occurred in the first quarter of 1993, 55% of which resulted in charges being laid (94.8% of the accused were male).[16] It is worth noting, however, that police estimate that they are involved in only one-tenth of all wife-battering incidents that actually occur.[17]

The problem of domestic violence and the legal response to it have also been studied and discussed in the context of gender bias in the court system. The Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System Summary Document (April 1992) reports that:

> Women generally encounter violence in the context of intimate ongoing relationships. Women's reluctance to seek help from police stems from the stigma still attached to ... wife assault, and from economic dependence on, or fear of revenge from their attackers. These factors distinguish women from most male crime victims. These women victims have special service needs requiring a broad range of strategies and services suited to their unique needs. (p. 15)

The Lake Louise Declaration on Violence Against Women signed by the Federal/Provincial/Territorial Ministers responsible for the Status of Women declares that:

> Women are entitled to a safe environment ... The elimination of violence against women requires a response including prevention, public education, services and enforcement of the law ... Every

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[14] *Ibid.*

[15] *Ibid.*

[16] Alberta Justice, "Family Violence Quarterly Statistics", 1993.

[17] Office for the Prevention of Family Violence, *supra*, note 12 at 1.

> individual, community and government in Canada must do everything possible to help the women, children and families affected by violence; we must all work together to achieve a society free from violence.

The statistics supporting the widespread existence of domestic abuse as well as the evidence of a broadly based commitment on the part of all levels of government to do something about domestic abuse should be taken to be conclusive. This project will assume the desirability of creating effective legal tools for combatting the problem.

B. History of the Legal Response to Domestic Abuse

In approaching reform in the area of domestic abuse it is important to be aware of the history of the law surrounding domestic assault. In particular it is important to recognize that the law in Canada at one time viewed assault by a husband on his wife to be acceptable and perhaps even desirable. The view of domestic assault by a husband on his wife as serving a social purpose stemmed from an idea that the state had to some extent 'privatized' the discipline and punishment of women leaving it in the hands of husbands and fathers. The view that domestic abuse was reasonably necessary to achieve this end was expressed by Blackstone when he said:

> The husband also (by the old law) might give his wife moderate correction. For as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with the power of restraining her, by domestic chastisement.[18]

We can find distressing reflections of this view in the Canadian case law in the nineteenth century. For example, in the 1826 case of *Hawley* v. *Ham*, the Chief Justice of the Midland District Assizes held that a father could not recover from his daughter's husband for maintenance of the daughter in circumstances where the daughter was forced to leave the home of her husband and return to her father's home because of the husband's

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[18] Blackstone, *Commentaries*, Vol. 1 at 432-33.

violent treatment of her.[19] In that case the evidence of violence was extensive and the court did not deny that there had been numerous assaults upon Ester Hawley Ham by her husband George Ham.[20] However, the court was of the view that such assaults, which included horse-whipping, did not justify the wife's leaving her marriage. In discussing the father's conduct in giving his daughter shelter the court said:

> It once upon a time so happened that a person who had some dispute with his wife gave her a moderate chastisement—upon which the fair one complained to her father.
>
> The father pretending to be in a desperate rage at the husband said—what! has the scoundrel really had the impudence to beat my daughter—, well says he, I shall be revenged upon him, for I am determined to beat his wife, which he did, and sent her home and was no more troubled with the quarrels of the parties—and Mr. Hawley should have done the same.[21]

Other subsequent cases reaffirmed the view that a woman was required to tolerate physical abuse in a marriage and was not justified in leaving her marriage unless the violence was so severe as to endanger her life.[22] Thus, it is clear that the law's attitude toward domestic abuse has not always been one of condemnation or concern.

The historical willingness of the law to tolerate a husband's violent behaviour toward his wife stemmed from the view that the husband, as the head of the household, had the right to control his wife. It also, in part, stemmed from the idea that a man's home was his private domain and that the state had no business interfering in dealings between a man and his wife behind closed doors. This attitude of tolerance is now, thankfully,

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[19] *[Kingston] Chronicle* (15 September 1826); see also Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991) at 174-75.

[20] *Ibid.*

[21] *Ibid.*

[22] Backhouse, *supra*, note 19 at 176; and see *Severn* v. *Severn* (1852), 1 Chy. R. 431 at 448; *Rodman* v. *Rodman* (1873), 20 Chy. R. 428 (U.C.) at 430-31, and at 439; *Bavin* v. *Bavin* (1896), 27 O.R. 571 (Div. Ct.).

repudiated by the law. However, we are of the view that this historical context remains of significance in approaching the project of reform in the area of domestic abuse. We shall turn now, however, to examine the current law in relation to domestic abuse.

C. The Current Law with Respect to Domestic Abuse

(1) Restraining orders

Victims of domestic abuse in Alberta have two available civil remedies. First, they may apply for a restraining order as interlocutory relief in other proceedings. Second, if they are married to their abusers, they may apply for exclusive possession of the matrimonial home under the Matrimonial Property Act.[23] Both remedies are currently available only upon application to the Court of Queen's Bench.

(a) Jurisdiction

In order to obtain a restraining order, a victim of domestic abuse must first bring an action against the perpetrator. Such action may be by way of petition for divorce or statement of claim in assault and battery. The power to grant a restraining order is generally seen as flowing from the court's "inherent jurisdiction to protect its litigants from harassment, intimidation and injury pending completion of their suit".[24] In *Hastings* v. *Hastings* the Saskatchewan Court of Queen's Bench held:

> ... an inherent power exists in the Court to ensure that a party may exercise the right to come to it for relief free from threats or pressures or intimidation by a Respondent or Defendant or anyone else who seeks to have the action abandoned or modified.[25]

Another potential source of the power to grant a restraining order is section 13(2) of the Judicature Act which reads:

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[23] R.S.A. 1980, c. M-9, s. 19.

[24] Marie Gordon & Leonard J. Pollock Q.C., "Matrimonial Pre-emptive Litigation" (April 1987) [unpublished] at D-23.

[25] (1972), 5 R.F.L. 247 (Sask. Q.B.) at 247.

> 13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.[26]

The jurisdiction to grant the order appears to arise directly out of court's power to safeguard the process of the court and to protect the individuals *qua* litigants before the court. Thus, the fact that the application is an interlocutory one takes on an unwarranted significance in the discussion of jurisdiction. Our consultation suggests that in many instances, the applicant who is seeking a restraining order wants only that order and, unless the primary action is in divorce, it is almost invariably abandoned after the interlocutory relief is obtained.[27]

Our consultation suggests that the courts often include the names of parties other than the applicant, such as the applicant's parents or friends, within the terms of the restraining order where such other parties are also found to have been threatened by the respondent. While this is clearly an efficient and benevolent practice it is likely lacking in jurisdictional foundation since the other parties named in the order are not parties to the primary action.

(b) *Ex parte* restraining orders

To obtain a restraining order *ex parte*, the applicant must clearly demonstrate a situation of urgency. It must be established that taking the time to give notice would compromise the safety of the applicant or the applicant's children.[28] In order to succeed in obtaining an order on an *ex parte* basis the applicant's affidavit must give the details of the times,

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[26] Judicature Act, R.S.A. 1980, c. J-1, s. 13(2). A similar section was cited as the source of the power of the superior court to grant restraining orders in *Peterson* v. *MacPherson*, [1991] N.W.T.R. 178 (S.C.).

[27] For this reason we view the analogy between the jurisdiction to grant a restraining order and the jurisdiction to grant an interlocutory injunction to be problematic. We find the analogy between jurisdiction to grant a restraining order and the jurisdiction to bind over to keep the peace to be more meaningful. See below, Chapter 4.

[28] Gordon & Pollock, *supra*, note 24 at D-24.

places, and manner of abuse or threats of abuse.[29] The inference of an apprehension of immediate danger must be borne out by the information contained in the affidavit.

(c) Terms of a restraining order

Terms of restraining orders vary widely. Some include provisions authorizing the police to arrest the respondent upon it appearing that there has been a breach of the order. Others do not. Some orders contain blanket exceptions for the exercise of access or for contact with the children of the applicant, and others set out in detail the terms and conditions upon which access is to be exercised. Some orders prohibit the respondent from going within a certain distance from a particular municipal address.

In Edmonton, the form of an *ex parte* order has been recently standardized by a notice of the Court of Queen's Bench dated May 20, 1994. This notice provides that *ex parte* orders will only be given where they conform to the form of order set out in the directive. The form of order contains:

- a clause prohibiting the respondent from attending at or near the petitioner's place of residence or place of employment;

- a clause restraining the respondent from harassing, molesting, telephoning or otherwise interfering with or contacting the petitioner, either directly or indirectly, and either personally or by agent;

- a clause authorizing the police, where the respondent has notice of the order, to arrest the respondent for a breach of the order and bring the respondent before the court to show cause why he should not be held in contempt;

- a clause setting out the duration of the order which, in the form of order provided, is 14 days;

- a clause requiring that the order be reviewed by a Justice of the Court of Queen's Bench on the date of expiration of the order and requiring the respondent to file such affidavits as he intends to rely on three days before the date of the review;

- a clause noting that if the review date is adjourned at the request of the respondent, the order will remain in effect until the new date of review;

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[29] *Ibid.*

- a clause allowing either party to apply on two clear days notice to have the order varied or struck out;

- a clause allowing that if the order is confirmed at the date of review that it will remain in force for a total of three months; and

- a clause requiring a copy of the order to be served on the respondent.

(d) Upon breach

Section 127 of the Criminal Code[30] provides that breach of a court order is a criminal offence unless otherwise provided by law. With respect to the breach of civil restraining orders, this section is displaced by Part 52 of the Alberta Rules of Court, which creates the alternative consequence of civil contempt. Rule 703 provides:

> Every person is in civil contempt who
>
> (a) fails, without adequate excuse, to obey any order of the court, other than an order for the payment of money, or ...

Punishment is detailed in Rule 704(1):

> Every person in civil contempt is liable to any one or more of the following:
>
> (a) imprisonment until he has purged his contempt;
>
> (b) imprisonment for not more than 2 years;
>
> (c) a fine and in default of paying the fine to imprisonment for not more than 2 years; ...

An order for costs may be made under Rule 704(2).

As a provision of the restraining order, the court may order that the police, upon it appearing that the order has been breached, may arrest and bring the respondent before the Court of Queen's Bench to show why he should not be committed for civil contempt. Without this provision, the

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[30] R.S.C. 1985, c. C-46.

applicant, upon breach of the order, would bring an action for contempt, serving notice on the respondent. In either case, the applicant incurs additional costs for enforcement.

(e) Duration

Restraining orders are typically granted for only a three-month period, at the expiration of which further action must be taken to ensure protection. This limitation arises out of a notice dated December, 1974 to the members of the Law Society of Alberta outlining the form of restraining orders acceptable to Judges of the Trial Division of the Supreme Court of Alberta as it then was. The notice of the Edmonton Queen's Bench referred to above is consistent with the requirement that the order have only a three-month duration.

This is not, however, the universal practice in granting injunctions. In *Motherwell* v. *Motherwell*[31] the court considered the circumstances appropriate for the granting of an interim permanent injunction. This case involved a claim in nuisance for damages and an injunction against the defendant for harassing the plaintiffs in their home by abuse of the telephone system. A permanent injunction was granted and upheld on appeal.

(f) Cost

Because restraining orders are currently only available in the Court of Queen's Bench, the cost to the applicant can be prohibitive. Our consultation suggests that with the court's filing fee plus the lawyer's fees, the original cost of a restraining order can range anywhere between $1,000 and $2000. If the order is breached, additional costs are then incurred to enforce the order through contempt proceedings. And finally, because restraining orders are granted for only three months, additional costs are incurred to extend or renew the order once this period expires.

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[31] (1976), 1 A.R. 47 (C.A.).

(2) Exclusive possession of the matrimonial home

(a) Legislation

Under section 19 of the Matrimonial Property Act[32] a spouse can apply for exclusive possession of the matrimonial home. Section 19(1) reads as follows:

> 19(1) The Court, on application by a spouse, may by order do any one or more of the following:
>
> (a) direct that a spouse be given exclusive possession of the matrimonial home;
>
> (b) direct that a spouse be evicted from the matrimonial home;
>
> (c) restrain a spouse from entering or attending at or near the matrimonial home.

"Matrimonial home" is defined in section 1(c) of the Act to include a house or part of a house, a part of business premises used as living accommodation, a mobile home, a condominium, or a suite. The property must be owned or leased by one or both spouses, and must have been occupied by the spouses as their family home. This legislation applies only to legally married spouses.

An exclusive possession order only protects a spouse from unwanted contact at or near the home and therefore, in a case of domestic abuse, may be inadequate on its own as a remedy. If a restraining order is also necessary it must be obtained in separate proceedings.

Section 19(2) allows the court to include "as much of the property surrounding the matrimonial home as is necessary, in the opinion of the court, for the use and enjoyment of the matrimonial home". Further, section 25 allows the court to order "exclusive use and enjoyment of any or all of the household goods".

In *Hickey* v. *Hickey*, Prowse J. stated that the court's power to order exclusive possession:

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[32] *Supra*, note 23.

> is an extreme infringement of the rights of an owner of property and therefore the discretion granted should be exercised sparingly and only on full disclosure of all matters referred to in s. 20.[33]

Section 20 outlines the matters to be considered upon a section 19 application. The wording of the section indicates that these are mandatory factors which must be considered. The section reads as follows:

> 20. In exercising its powers under this Part, the Court shall have regard to
>
> (a) the availability of other accommodation within the means of both spouses,
>
> (b) the needs of any children residing in the matrimonial home,
>
> (c) the financial position of each of the spouses, and
>
> (d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.

The court is not required to consider the applicant's personal safety or the respondent's past abusive or violent conduct. It is unclear from the cases whether it is improper for the court to consider domestic abuse in making an order under section 19 of the Act.

The most recent Alberta case discussing this issue is *Verburg* v. *Verburg*.[34] There, the applicant alleged she had been slapped and kicked by the respondent, the respondent had emotionally abused her, and she was depressed and suicidal as a result of his conduct. Madame Justice Veit of the Court of Queen's Bench of Alberta granted the order for exclusive possession of the matrimonial home in favour of the applicant. However, she was of the view that the conduct of the respondent was not relevant to the outcome of the case and the factors to be considered in making the order were limited to those outlined in the statute. Thus, it was the financial

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[33] (1980), 18 R.F.L. (2d) 74 (Alta. Q.B.) at 79.

[34] [1994] A.J. No. 77 (Q.L.).

position of the spouses and not the respondent's violent conduct, that was determinative of the case.

In *Brenneis* v. *Brenneis*,[35] however, the absence of physical abuse was cited as a reason for refusing an application for exclusive possession of the matrimonial home. There, Madame Justice McFadyen stated:

> Nothing in the respondent's conduct warrants an order dispossessing him of the matrimonial home pending trial of the action. He has not been violent and has not threatened violence.[36]

It would seem, then, that there is ambivalence in the judiciary about whether the remedy of exclusive possession of the matrimonial home is one which should be directed toward relief and protection from domestic abuse or whether it is the sort of matrimonial cause that should be decided without reference to the conduct of the parties. This being the case, it is clear that it cannot be assumed that the courts will view this remedy as properly employed in a situation of domestic abuse.

(b) *Ex parte* application

Section 30(2) of the Matrimonial Property Act authorizes:

> an *ex parte* application if the Court is satisfied that there is a danger of injury to the applicant spouse or a child residing in the matrimonial home as a result of the conduct of the respondent spouse.

In order for an applicant to be successful under this section, the court must be convinced that the circumstances warrant emergency measures. This section would appear to contradict the assumption that the abuse should not be considered as a factor in assessing an application for an order under section 19. Our consultation suggests that it is not uncommon for such an order to be requested as a remedy in a situation of immediate risk of abuse.

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[35] (1990), 109 A.R. 24 (Q.B.).

[36] *Ibid.* at 25.

As with *ex parte* restraining orders, such orders are given only for a very short period of time pending notice to the respondent and a proper hearing.[37]

(3) The criminal law with respect to domestic abuse

While we are not dealing with the criminal law relating to domestic abuse, we are of the view that it is instructive to take a brief look at the reasoning of the Alberta Court of Appeal in its decisions on the issue of domestic abuse. The strongly worded opinions of the court send a clear message that there is a deeply held commitment on the part of the court to take an active role in combatting the problem of domestic abuse in our society.

The leading case on sentencing in domestic assault cases is *R.* v. *Brown (C.R.) et al.*[38] There, the appeals of three cases of domestic abuse were heard together by the Alberta Court of Appeal. In all three cases, the accused had assaulted his common-law wife, and all three accused had committed more than one such assault.

In outlining its opinion on the issue of domestic violence, the court states:

> ... the phenomenon of repeated beatings of a wife by a husband is a serious problem in our society. ... It is a broad social problem which should be addressed by society outside the courts ... But when such cases do result in prosecution and conviction, then the courts do have an opportunity, by their sentencing policy, to denounce wife-beating in clear terms and to attempt to deter its recurrence on the part of the accused man and its occurrence on the part of other men.[39]

The court made no distinction between an assault in the context of a married relationship and a relationship of cohabitation, and held that the

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[37] Gordon and Pollock, *supra*, note 24 at D-21.

[38] (1992), 125 A.R. 150 (C.A.).

[39] *Ibid.* at 155.

starting point in sentencing cases of domestic assault is the same as for an assault against a stranger.

Once a starting point is determined, the next step is to consider circumstances peculiar to the relationship. The court referred to the breach of a position of trust in such assaults, and recognized the difficult financial and emotional situations in which victims of domestic abuse may find themselves:

> When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.[40]

The most important goals of sentencing in these cases were stated to be general deterrence and denunciation. While rehabilitation and individual deterrence were also cited as goals of the sentencing process, they were seen to be of secondary importance.[41] The judgment then went on to state that one must consider whether the assault is:

> relatively minor in nature, or is an isolated incident, or whether there are other circumstances which make it desirable that the sentence not be such as to be counterproductive to the possibility that the family relationship will be preserved.[42]

The first two points are considered in arriving at a starting point for the sentence, i.e., a fit sentence for an assault between strangers. The court then offers words of caution with respect to the latter point:

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[40] *Ibid.* at 156.

[41] *Ibid.* at 156.

[42] *Ibid.* at 157.

> The third point must be applied with care, because the plea of the wife that her husband be returned to her and that she not be further victimized by being deprived of his income should not readily be permitted to prevail over the general sentencing policy that envisages imprisonment of the man as not only an instrument of the deterrence of other men, but also as an instrument of breaking the cycle of violence in that man's family even at the risk of the relationship coming to an end during the enforced separation ....[43]
>
> To yield unduly to that plea is to invite situations in which the man prevails upon the woman to authorize his counsel to make that submission to the sentencing judge.[44]

Thus, a plea for leniency by the partner of the accused should not prevail over the primary goals of deterrence and denunciation. The court recognizes that the accused, who has already abused a position of power and control in the relationship, may do so again in order to get the accused's partner to plead for a lighter sentence.[45]

In *R.* v. *Crazybull*,[46] the Court of Appeal rendered a strongly worded judgment in which the trial judge was virtually reprimanded for allowing considerations of rehabilitation of the offender to supersede considerations of general deterrence. In that case the trial judge had imposed a suspended sentence with three years probation on terms requiring the accused to attend treatment for alcoholism in respect of a conviction for assault causing bodily harm where the victim was the accused's common-law wife. The Court of Appeal acknowledged the importance of the goal of rehabilitation but reiterated that the decision in *Brown* had clearly established that in cases of domestic abuse that goal ought not to be

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[43] *Ibid.*

[44] *Ibid.* at 159.

[45] See also *R.* v. *Chimko* (1993), 145 A.R. 8 (C.A.) in which the Court of Appeal increased the respondent's sentence to a term of nine months imprisonment. In that case the victims were the respondent's child and wife. The Court of Appeal noted that the argument that the assault on the child was in the context of disciplinary action was not credible in the circumstances of the case and that a discussion of discipline of the wife had no place whatsoever in sentencing of domestic assault cases.

[46] (1993), 141 A.R. 69 (C.A.).

pursued to the exclusion of the goal of deterrence. The court took a dim view of the trial judge's disregard of the decision in *Brown*, saying of the trial judge that:

> By refusing to acknowledge that an appellate pronouncement in this jurisdiction is binding upon him, he not only erred but engaged in judicial mischief.[47]

The Court of Appeal would have imposed a term of imprisonment of 12 months.

In *R.* v. *Piche*,[48] after the accused pleaded guilty to assaulting his wife, the trial judge expressed an intention to sentence him to 20 months imprisonment. However, because of the victim's desire to reconcile with the accused, the trial judge ordered a sentence of only three months intermittent imprisonment, allowing the accused to keep his job and to reconcile with his wife.

This sentence was impliedly upheld when the Court of Appeal denied the Crown leave to appeal expressing faith in the trial judge's sensitivity to sentencing needs.

However, in *R.* v. *Ollenberger*[49] the Court of Appeal reaffirmed its position in *Brown*. *Ollenberger* involved a very serious domestic assault with a butcher knife. At the time of the assault, the accused and his wife had just agreed to a trial separation after a 12-year marriage. At trial, the accused pleaded guilty to aggravated assault. On appeal, the sentence was at issue.

In a unanimous decision, the court allowed the appeal and increased the sentence, applying *Brown*. The Court of Appeal commented on two aspects of the trial judgment. Firstly, the trial judge had stated that if it had not been for the difficulties in the home, the victim's wish to see another man, and the general events of the evening leading up to the

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[47] *Ibid.* at 73.

[48] (1993), 145 A.R. 233 (C.A.).

[49] [1994] A.J. No. 153 (Q.L.).

incident, the accused would not likely have ever been violent toward a woman. On appeal, Hetherington J.A. was critical of this remark and stated:

> I trust, however, that the trial judge did not mean to suggest that it was Mrs. Ollenberger's fault that Mr. Ollenberger assaulted her. Mrs. Ollenberger did not provoke the assault, nor did she do anything that justified it. Even if she had been unfaithful, a fact never established, her husband would not have been justified in assaulting her.[50]

Secondly, by the time of the trial, the victim expressed a desire to reconcile with the accused, and in sentencing, the trial judge considered the preservation of the family to be an important factor. The Court of Appeal, however, held that general deterrence and denunciation are to be the paramount considerations in sentencing, and that the trial judge erred in viewing the preservation of the family as a factor of equal weight with general deterrence.[51] Madame Justice Hetherington clearly states the position of the Court of Appeal on domestic abuse as follows:

> The message which this court wishes to send out, however, is that domestic violence is a serious problem, and that it will not be tolerated by this court. We are prepared to do everything within our power to help society deal with this social problem. The only way we can do this is to impose sentences on those convicted of domestic assaults which will deter them and others from committing such offences. Those sentences must also denounce domestic violence and express the condemnation of such conduct by society.[52]

(4) Protection provisions under the criminal law

(a) Peace bonds

Under section 810 of the Criminal Code, a victim of domestic abuse, or another person on their behalf, can apply for a peace bond as a form of

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[50] *Ibid.* at para. 21.

[51] *Ibid.* at para. 29.

[52] *Ibid.* at para. 33.

protection from the abuser. The process of obtaining a peace bond begins with the victim or representative laying an information before a justice of the peace. Section 810(1) provides:

> An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or child or will damage his or her property.

Then, according to subsection (2), the justice "shall cause the parties to appear before him or before a summary conviction court ... ." A hearing is then conducted under subsection (3) in accordance with Part XXVII of the Criminal Code dealing with summary convictions. If reasonable grounds are adduced for the informant's fears, the justice or the court may:

> (a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance including the conditions set out in subsections 3.1 and 3.2, as the court considers desirable for securing the good conduct of the defendant; or
>
> (b) commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.[53]

Further, according to subsection (3.1), the justice or court may:

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[53] *Supra*, note 30 at s. 810(3) as am. by the Criminal Law Amendment Act, S.C. 1994, c. 44, ss 83, 84.

> include as a condition of the recognizance that the defendant be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the recognizance and that the defendant surrender any firearms acquisition certificate that the accused possesses ....

Section 810(3.2) further provides that:

> Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of that person's spouse or child, as the case may be, to add either or both of the following conditions to the recognizance, namely, a condition
>
> > (a) prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or child, as the case may be, is regularly found; and
> >
> > (b) prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or child, as the case may be.

Section 811 of the Criminal Code now provides that the breach of a recognizance ordered under section 810 is a hybrid offence.

(5) Protection provisions as conditions of bail or probation

(a) Bail

Section 515 of the Criminal Code deals with judicial interim release. This section mandates release of the accused upon giving an undertaking without conditions, unless the prosecutor shows cause why some other order under the section should be made. If cause is shown, subsection (2)(a) provides for the accused's release "on his giving an undertaking with such

conditions as the justice directs". The conditions which may be specified under subsection (2) are listed in subsection (3) and include:

> (d) abstain from communicating with any witness or other person expressly named in the order except in accordance with such conditions specified in the order as the justice deems necessary;
>
> (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

It is with these conditions that protection provisions with respect to a victim of domestic abuse may be included as conditions of the abuser's bail. In addition, subsection (4.1) provides that in cases where the accused is charged with an offence involving violence being used, threatened or attempted against a person, the justice may order as a condition of the interim release that the accused be prohibited from possessing any firearm, ammunition or explosive substance and that the accused surrender any firearms acquisition certificate that the accused possesses.

Section 524 provides for the arrest of an accused in breach of the provisions of the interim release order. Under subsection (1), a justice may issue a warrant for the arrest of the accused, and under subsection (2), a peace officer may arrest the accused without warrant. Under subsection (8), a justice must then cancel the original release and order that the accused be held in custody, unless the accused shows cause why detention is not justified.

(b) Probation

Section 737(2) of the Criminal Code deems certain conditions "to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour ...". In addition, section 737(2) allows the court to prescribe additional conditions in the probation order, including that the accused:

> (b) provide for the support of his spouse or any other dependants whom he is liable to support;
>
> (d) abstain from owning, possessing or carrying a weapon;

> (h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.

Subsection (h) provides the authority for including protection provisions as a condition of probation. Under section 740(1), failure to comply with the terms of a probation order is an offence punishable on summary conviction. Again, such provisions may be used by a judge to attempt to secure the protection of a victim of domestic abuse in the context of criminal proceedings.

D. Results of Consultation

In preparation for the writing of this report, the Alberta Law Reform Institute (ALRI) conducted a wide variety of interviews with individuals and groups affected by the law in relation to domestic abuse in order to obtain information about the difficulties in this area. Interviews were conducted with victims of domestic abuse as well as professionals working in the area of domestic abuse in a number of different services. Representatives from immigrant communities as well as the aboriginal community were consulted. Similarly, professionals working with perpetrators of domestic abuse were canvassed. Interviews were done with perpetrators of domestic abuse. Interviews were also conducted with actors working within the legal system: lawyers, judges, police officers and Crown prosecutors. Numerous interviews were held with individuals working in the area of domestic abuse in the various levels of government.

The results of these interviews inform both the scope of the report itself as well as the specifics of the discussion on numerous substantive issues. Where the information obtained from these interviews is relevant to the discussion set out in this report, we have made reference to the results of this consultation. Space does not permit a full recounting of the results of all of the interviews conducted. However, given that the overriding purpose of the project is to help make the legal system more responsive to the needs of victims of domestic abuse, we are of the view that a summary of the results of our consultation with victims of domestic abuse is warranted in this introduction.

In interviewing victims of domestic abuse our aim was to obtain information about their experience and view of the law and the legal process. All of the victims were women and they had all accessed services for victims of domestic abuse in the Edmonton area. A few were aboriginal and some were immigrant women of visible minorities. However, the vast majority of victims interviewed were white and had been born in Canada. These interviews were done in groups of seven or more women. The discussions covered a number of topics and a summary of the information obtained is set out below.

(1) Custody and access

(a) Inadequately worded orders and the use of access as a means of continuing the cycle of abuse

A number of women reported that there were serious problems with inadequately worded access orders. Orders allowing the abusive husband access to the children often did not provide sufficient clarity in setting out what the police could do if the access order was not complied with. Thus, a number of women had experienced situations in which the order simply allowed the husband access every two weeks. The order did not provide for a specific time at which the children were to be returned. Thus, when the children were not returned at the time agreed, the police would not get involved. A number of the women identified the need for access orders to be drafted more specifically in cases where there is a history of abuse on the part of the parent exercising access so that police would be able to intervene to protect children at risk in the event of a breach.

Many women said they felt that the court orders of access were a significant roadblock in the way of their breaking free from the abusive relationship and putting it behind them. They found it was often the case that the exercise of access provided their former partners with an opportunity to continue the cycle of abuse and they were often in danger as a result of having to see their abusers to exchange the children.

(b) Perception that the courts view a history of abuse in the family as irrelevant to the issue of custody and access

Another difficulty identified was that the courts were seen as very reluctant to find that a history of abuse toward the wife was relevant to the issue of custody and access. The women perceived a belief on the part of the

judiciary that abuse toward the mother was not an indication of being a bad father. In the experience of the women their husbands were not necessarily violent towards the children but they were verbally and emotionally abusive towards the children. One woman noted that her children had witnessed her husband dragging her up the stairs and choking her and that this experience had been extremely damaging to the children's emotional well-being. Another woman reported that her husband had held her children at gunpoint during an incident of abuse. She was told by her lawyer that this was irrelevant to the issue of custody and access and that it did not affect his ability as a good father.

Many of the women felt that there should be a presumption that if the husband had a violent history in the family, he would be likely to abuse the children during visitations or if he were given custody. They felt that the onus should be on the violent person to prove that he was not abusive toward the children rather than the non-violent parent having to prove that he was.

Some women also felt that they had agreed to access provisions against their own better judgment and in spite of their real fears that their husbands would abuse their children. They had done so because their lawyers had told them that they had to be reasonable and be nice or the court would not look favourably on their case.

A number of women raised the point that they felt that the lawyers for their husbands had raised the fact of their being in a shelter as a factor going to show that she was inappropriate as a custodial parent. They felt that lawyers and judges view the fact of living in a shelter as a weakness and as a reason for being sceptical about granting custody to the woman.

(c) Use of emotional ties to the children as a means of manipulation and control

A number of the women also felt that their partners had used threats of custody battles and the taking away of children as means of manipulation and control. One woman had been told by her husband that if she did not drop the charges against him in respect of his assaults on her, he would ensure that she would never see the children again.

The women were all of the view that manipulation around the children was a very serious problem in getting out of their abusive relationships.

(d) Problems with orders requiring supervision of access

There was also considerable difficulty in finding someone to supervise access where supervised access had been ordered. Many women did not trust the person that their husband would provide as the supervisor. Also, many did not have any relatives or friends who were willing to participate in supervising the access. This left the possibility of hiring someone to supervise the access but some women were not in a position to afford to hire a supervisor and also felt that it was unfair that they should be required to pay for the supervision when it was the violent parent who was the source of the need for supervision.

The women also felt that the courts needed to take the need for supervision of access more seriously in situations of domestic abuse. It was noted that this was a particular problem where there was evidence of sexual abuse of a child by the father. A few women had experiences of the court lifting stipulations as to supervision of access where there was evidence that the father was sexually abusive toward the child.

Another problem that gave rise to a perceived need for supervision of access was substance abuse or alcoholism on the part of the father. Many of the women were married to alcoholic men whose ability to care for the children during visitations was severely impaired when drunk. Particular concern was had for very young children or babies being cared for by impaired parents. A number of women also had experienced a reluctance on the part of their lawyers to raise this issue. The lawyers were reported to have said that alcoholism is too difficult to prove to warrant the raising of the issue.

(e) The onerous burden placed on victims of domestic abuse to provide protection for their children

The women agreed that although an abusive marriage or relationship demands of someone that they work very hard to get help for themselves and to help themselves, it was also very demanding to be required to get help for the children living in the relationship.

One woman noted that while there was a crown prosecutor handling the assault charges, there was no lawyer provided by the government to help her to protect her children who were also at risk as a result of the husband's abuse. She did not understand why it should be the case that the onus would be on her privately to pay to protect her children from their violent father.

A number of women had had experiences in trying to get help from child welfare where their husbands were abusing the children. It was noted that the province's Child Welfare Division's policy to refuse to get involved when there is a pending custody dispute since that is viewed as private litigation between the parties that the state should not be intervening in. This was seen to be extremely unfair by women who were leaving their husbands and trying to get custody in order to protect their children from a physically and sometimes sexually abusive parent.

(f) Suggestion of procedure for psychiatric assessment

A number of woman believed their husbands were suffering from severe mental problems and wished that there could be a psychiatric assessment of a violent individual before the court made a determination about custody and access.

(2) Lawyers, prosecutors and Legal Aid

(a) Inadequate communication

Many of the women felt that their relationship with their legal aid lawyers was completely unsatisfactory since their lawyers were rushed and had only a certain amount of time that they could spend on the case. One woman said that her legal aid lawyer did not have any time to talk to her at all and that eventually they had worked out a system in which she sent weekly updated notes to her lawyer by fax. This was the only communication between the two of them because the lawyer did not have time for anything else.

The women also felt that prosecutors barely had any knowledge of their cases. They felt that prosecutors were impossible to get a hold of if they needed to ask questions about the conduct of the case or the court process. They felt that prosecutors were irritable and short, simply from being so over-extended. A number of the women noted that because their

relationships with the prosecutors were so distant, they often did not know what they should or should not be reporting to the prosecutors. One woman said that she had been receiving threatening letters from her husband between the time of the charge and the time of the trial. She said she felt that the prosecutor was so overwhelmed that she did not know whether to bother him with this information. She said that she had no way of assessing whether or not it was relevant to the case but that she was reluctant to mention it to the prosecutor for fear that he would get angry with her.

The women also felt that there was very little information given to them about the court process. Many of them reported that they did not know who or what a prosecutor was at the beginning of the process. They also reported that it was virtually impossible to get a hold of a prosecutor to get any information about the conduct of the case. They felt that they did not know when or how they were going to be asked to contribute in the court proceedings. They felt excluded and in the dark about everything that was going on in court.

(b) Inability to pay fees

A number of women noted that they had very few funds to pay for a lawyer. Because their husbands were generally in possession of greater funds, they felt that their husbands were able to run them out of funds in the court process.

Many of the women felt that they should not have to pay for the legal costs of the divorce and the restraining order when the proceedings had been made necessary because of their husbands' conduct.

They felt it was unfair that all of the onus was on them to get their own divorce, to protect their children and to get the restraining order, and that they were not supported by the community in those endeavours even when the conduct of the batterer was criminal conduct and the community was supposed to have an interest in protecting children. They felt that community response to the problem should exist and that in that response there should be a recognition that when someone is assaulted and abused, they are sometimes confused and unable to negotiate complex and troubling situations.

In the experience of a number of women, the courts were very reluctant to order solicitor\client costs in applications for restraining orders or proceedings for divorce.

(c) Focus on physical manifestations of abuse

Many women raised the concern that all the actors in the legal system: police, prosecutors and judges, were often focused on the question of whether there was proof of abuse in the form of broken bones and bruises. They felt that this was a frustrating aspect of the legal system because they were constantly having to try to muster convincing physical evidence of the abuse which in some cases was not available even though the abuse was extensive and serious.

(d) Imbalance in the adversarial system and intimidation by defence counsel

Many of the women said they felt there was a serious imbalance in the adversarial system in dealing with issues of domestic abuse. This was seen to be the case because the prosecutors appeared to be extremely overworked and appeared to know very little about the cases they were handling. They also felt the same way about legal aid lawyers who were dealing with matrimonial causes. By contrast the defence counsel appeared to be very powerful.

They felt intimidated by defence counsel and by their husbands' lawyers in the matrimonial proceedings. They felt that their husbands had been able to afford better lawyers and to drag out the proceedings.

(3) In-court experiences

(a) Judicial attitudes and stereotypes: the art of presentation

Many women felt that judicial attitudes toward battered women still reflected some stereotypes about women. They felt that men are presumed to be sane, intelligent and innocent, and women are presumed to be crazy, stupid and vindictive.

The women also felt that they were required to engage in the art of presentation in order to win in court. They felt that they were required to present themselves as typical nice middle-class mothers in their dress and their manner of speaking or that their husbands would be found to be not

guilty of assault. They felt that any flaw in their manner of dress or their demeanour was used as a reason to believe that their partners were not guilty of assault. They were also frustrated by their lawyers saying that they are not supposed to say anything other than yes or no in court. They felt very intimidated and anxious as a result of this advice about how to behave in court.

One woman was extremely frustrated and disillusioned with the legal system when she was told by her lawyer that she (her lawyer) did not want to raise the issue of the husband's abuse in the divorce case because she knew that the judge was sick of that issue and that he would not respond well to it being raised.

(b) Fear about being in the presence of the abuser

Many women felt intimidated by the presence of their abusers in court. They were also intimidated by the aggressive manner of their husband's lawyer. Because they felt intimidated and afraid, they felt that they were not in control of their own stories when they were on the stand.

A number of the women noted that they felt real physical anxiety about going to court. One woman said that she was very afraid to testify against her husband. She said that she was very afraid about the fact that he was only about six feet away from her during the time that she was testifying against him. He was not in custody at the time and she felt that it would be very easy for him to retaliate against her.

One woman said that her husband had threatened to kill her if she testified against him in court. He had been extremely violent in the past and she believed his threats. She said she felt that the judge was aware that she was very intimidated about testifying and had told her when she was on the stand that she should tell the truth and that she would be protected. She did not believe him and so she lied and denied the assault. After that had happened she felt that she could no longer call the police when her husband was beating her since she felt that she had already "cried wolf" once. She said her husband would remind her of this when he was beating her and she was threatening to call the police.

(c) Intimidation by the atmosphere in the court

A number of women felt that because of the court's hurried and intimidating atmosphere, the court was unwilling to hear them out. They felt they needed more time and a less intimidating environment to be able to tell their stories effectively. Many felt that this was a particular problem in situations where there was child sexual abuse involved.

(4) Police

(a) Lack of understanding of the serious nature of safety issues

The experience of women dealing with the police in situations of domestic abuse was mixed. Many had had positive and supportive experiences with the police while others had had negative ones. The major complaint of many of the women, however, was that some police lacked a basic comprehension of safety issues involved in domestic abuse. In other words, they did not seem to be aware of the serious risk to the safety of the women and children involved.

One woman said that she was given a police escort to pick up her belongings after leaving her husband and fleeing to a shelter. The police went with her to the apartment. When they arrived he was there. The police did not accompany her into the bedroom to get her things. Thus, the husband was able to follow her into the bedroom where he made threatening gestures toward her thereby intimidating her and rendering her too afraid to take the things that were hers. She said she felt that the police assumed that because they were there she was safe and could not be intimidated. They did not realize that the husband was able to threaten her unless they remained with her and in view of him at all times.

(b) Stereotypes and police attitudes

Many women felt that the police viewed them as hysterical and untrustworthy. Native women in particular had been disproportionately subjected to inappropriate comments from police responding to complaints of domestic abuse. Such comments reflected both sexist and racist stereotypes.

(c) Focus on physical evidence

Again, women noted that they were also frustrated by the overriding concern of the police that physical evidence of an assault be demonstrable before they would take the allegations of abuse seriously.

(5) Harassment

The women were concerned that the time after having left the relationship was the most dangerous and the most problematic. Many of them had experienced their former partners turning up at their new places of residence and demanding entry. Similarly, many had experienced telephone harassment and had received numerous threatening letters from their partners after they had left the relationship.

Many of the women were concerned with creating effective measures for dealing with harassment by their former spouses after they had left the relationship. They felt that their safety was often more at risk once they had left the relationship than when they were in it. They felt that their partners were often intent upon getting revenge on them after they had left the relationship and they felt unsafe even though they were now living in a shelter on a semi-permanent basis.

Women whose partners had been through the criminal process said that there was a particular need for protection from harassment during the time between the laying of the charge and the incarceration. One woman whose former common-law spouse was in jail was being harassed by him by telephone at the time of the interview.

(6) Restraining orders

(a) Vagueness of orders and specific concerns around custody and access

It was noted by a number of women that restraining orders needed to be more specific and that vagueness in restraining orders gave rise to numerous problems.

One woman noted that the restraining order she had been given allowed her husband to have access to their daughter. She said it was agreed the access would be exercised at the daughter's school. However, the order was not sufficiently clear about exactly what the school was supposed

to allow and how they were required to help in carrying out the order. This evidently caused a number of problems with the school administration.

They also felt that restraining orders with an exception for the exercise of access rights were extremely problematic. In the experience of a number of women, such orders provided opportunities for their partners to continue the abuse.

(b) Enforcement

Some women noted they felt that the penalties for the breach of a restraining order were too light to be any real deterrent. They felt that if restraining orders were to carry penalties of incarceration or serious financial consequences, the orders might be more useful. They also felt that the enforcement of restraining orders was often difficult because the orders had holes in them.

(c) Cost

They also noted that a restraining order costs about $1,000-$2,000 to get and many do not have the funds to obtain one. They felt that if someone were charged with assault in a domestic context, it would be better if the restraining order could be made as a matter of course at the time of the charge rather than putting the onus on the victim of the assault to institute separate proceedings.

(d) Filing

It was noted that the system of filing restraining orders with the police is at present inadequate. One woman said that she had taken her restraining order to the police station nearest her home so that they would be aware of it. She said that the people at the police station did not seem to think this was appropriate or necessary.

(e) The problem of a two-tiered response to calls for help in cases of domestic abuse

In general the women felt that the real use of a restraining order was not so much to keep the man away but to prove to the police that they were not crazy. They felt that police were much more responsive and respectful where the restraining order existed. Thus they felt that there was really a two-tiered system of response to calls of domestic abuse and that in order to get onto the first tier where a call would be taken more seriously, one needed to get a restraining order.

(f) Voluntary contact

It was mentioned that there was a serious problem with restraining orders which were invalid if the applicants saw their partners voluntarily. They said that it is often the case that they end up seeing their partner in circumstances that appear to be voluntary but that in fact are not. Sometimes the women were having to see the partner as the result of some emergency with the children. They felt that it was often beyond their control as to whether they would have to see him. Another example that was given was that the partner would leave a message for her to call him urgently around some matter regarding the children. When she called back he would document her calling in order to provide evidence that she had breached the restraining order.

One woman's husband, against whom a restraining order had been granted, was calling her to try to get her to come to counselling at the prison in which he was incarcerated. She felt that his motives in asking her to come to counselling were to improve his chances at his parole hearing that was coming up in November and to vacate the restraining order.

(7) Sentencing

(a) Inadequacy of fines

Many of the women were of the view that fines were useless as a sentence or penalty for either assault or the breach of a restraining order. They felt that the men, on balance, enjoyed going to court and that a fine was no deterrent whatsoever.

(b) Counselling

A number of the women expressed the view that short-term court-mandated counselling was useless in stopping the abuse. Other women felt that it could be extremely beneficial. Many were of the view that abusers who are in jail should receive counselling there.

(c) Victim impact statements

A number of women noted that they felt that victim impact statements in sentencing were a good thing.

(d) Incarceration

Most women felt that incarceration was the appropriate response to criminal sentencing or enforcement of restraining orders. Interestingly, however, their main interest in incarceration seemed not to be related to a desire for punishment for its own sake but rather as a way of giving them an opportunity to rebuild their lives without the destructive intervention of their abusive partners. So, when questioned about what length of sentencing was appropriate, they responded that the sentence needed to be long enough for the woman to get herself back on her feet and into a stable situation where she would have some security and some protection from further abuse.

On the whole, they felt that the consequences to their abusers had been minimal.

(e) Parole

A number of women were of the view that it would be an improvement if the victim of domestic abuse were notified when the perpetrator was going to be let out on parole. One woman also felt that she would have liked to have had the option to be present and to make representations at the parole hearing.

(8) Property issues

(a) Retrieval of property left in an emergency situation

The need for a better system for getting back one's property after having left the batterer was raised. A number of women noted that when they had left for the shelters, they had left everything they owned in the home. Thus, they had left all their dishes, clothing, photos and other personal effects in the home. Once they were in the shelter and he was occupying the home it was very difficult to get in and get one's things.

Some of the women felt that the police had been very helpful in escorting them to their homes to collect their belongings. They were appreciative that the police had explained to them that they should be very sure not to take anything that was not clearly theirs.

(b) Costs of leaving an abusive relationship

They noted that the demands upon their resources in leaving an abusive situation were great. They said that the amount of money that was needed for them to set up a new household after going to a shelter for immediate protection was significant and in some cases had been a bar to being able to leave even though they were emotionally and physically ready to do so.

(c) Dissipation of joint assets and destruction of property

It was noted that the batterer should be stopped from dissipating joint assets while the victim is seeking refuge in a shelter. A number of the women reported that upon their leaving the abusive situation their husbands destroy their property as a way of getting revenge against them.

Some of the women said their husbands had sold off assets when the women had gone into the shelter. Others reported that their husbands had closed out joint accounts and sold off spousal R.R.S.P.'s when the women had left. They felt that there should be some way of stopping him from dissipating assets.

(9) Firearms

A number of women had been threatened with weapons during episodes of domestic abuse. Some of the women's husbands kept guns. They felt that persons who were guilty of assault should not be allowed to keep a handgun. Most women felt that the issue of firearms should be addressed by the court in both criminal and civil proceedings where domestic abuse was involved.

(10) Emotional abuse

(a) Failure of the legal system to recognize and respond to the harms of emotional abuse

It was noted that the emotional abuse one suffers within the violent relationship is extremely damaging, and that the effects of this kind of abuse often are felt long after the physical abuse has stopped and the relationship is over. It was noted that the emotional abuse can often deprive a person of their sense of self and that this is tremendously difficult to rebuild.

People felt that the law should be more cognizant of this kind of abuse and that the legal system should recognize this damage. Most women felt that the legal system had absolutely no idea about what emotional abuse was and what its harms were. The fact that an abuser has engaged in mental torture as well as physical assault, they said, is seen by the legal system as irrelevant or basically unimportant.

(11) Information

The women were in very strong agreement that one thing they really needed was information about the legal system, the various branches of it and actors in it, and what to expect in going through the legal process. They felt that one of the most frustrating aspects of going through the legal system was that they felt constantly in the dark about what was going on.

E. Problems with the Current Legal Response to Domestic Abuse

In the following section we shall outline the basic problems that were found to exist in the area of domestic abuse. Our conclusions in this regard are drawn from the full range of our consultations as well as from an examination of the literature in the area of problems with the legal response to domestic abuse in Canada.

(1) Protection issues

In general it can be said that the law does not provide for adequate protection remedies for victims of domestic abuse. The difficulties with the present law respecting protection orders can be summed up by saying that they need to be cheaper, quicker and easier to get; they need to be clearer and easier to interpret; they need to be more enforceable; and they need to be drafted with a greater awareness of the real needs of the victim.

Often it is the case that a victim of domestic abuse lives with the very real threat of physical violence from an abuser. Likewise, many victims of domestic abuse are virtually deprived of their autonomy, privacy or property by the actions of an abusive partner. The present inadequacy of the law in providing protection from these sorts of threats exists as a result of a number of factors. First, the cost of obtaining civil protection is often prohibitive. This is, in part, as a result of the fact that an application for a restraining order must be brought in interlocutory proceedings in a superior court. Legal counsel is required to bring the proceedings and a separate

action in tort or divorce must be brought. This, of course, increases costs because filing fees with the Court of Queen's Bench must be paid in order to commence the action. In many cases the primary action itself is completely superfluous and the only relief that is desired is that which is being asked for in the interlocutory motion. This requirement has the effect of escalating the cost of protection proceedings. Our consultation shows that the cost of a restraining order is between $1000 and $2,000. Clearly, this cost is prohibitive in many instances.

A further difficulty with the present state of the law is that restraining orders are almost invariably of only a three-month duration. This requires the victim to return to court to renew the order every three months even where evidence of a long-term ongoing threat is apparent. The present practice does not allow for long-term orders even in cases where the circumstances would warrant such action. In many cases it is difficult for the victim to prove an ongoing threat even where one exists. This is, of course, particularly true where an existing restraining order has been effective in protecting the victim but where the threat to the victim continues after the three-month time period.

A further problem identified with the present situation is that the protection orders take too long to obtain in situations of danger. While in some cases the process was reasonably swift, in others, time delays in getting an order were identified as major problems. Likewise, difficulties of enforcement of restraining orders were identified. Such difficulties arise, to some degree, out of uncertainty on the part of police officers in interpreting the terms of orders. This points to a need for standardization of the terms of protection orders to ensure that police officers are not given an unduly difficult task of interpreting the order upon arrival at the scene of a complaint of breach. The lack of sufficient specificity in the drafting of orders was also identified as a concern, exacerbating difficulties of enforcement of orders.

Furthermore, the lack of awareness of safety issues within the procedural framework of the legal system was identified as a concern. For example, the lack of confidentiality about the victim's whereabouts in court proceedings was identified as a problem.

The complexity of the procedure for obtaining a restraining order is also a serious problem under the present law. Ideally, victims should be able to get protection from the law on their own without requiring the services of a lawyer. While a peace bond may be obtained without the services of a lawyer, it was noted in the course of consultation that peace bonds take a long time to get and that the enforcement of them is problematic since a breach of a peace bond is only a summary conviction offence.

(2) Lack of awareness or recognition of non-physical aspects of control and abuse

It was stressed over and over again in the course of consultation that the legal system did not have a sufficient awareness of the debilitating effects of emotional abuse and other aspects of non-physical control, humiliation and domination within an abusive relationship. The legal system at present appears to be overly focused on the physical manifestations of abuse such as bruises and broken bones. This focus often obscures serious protection issues.

(3) Failure to provide supporting remedies that would give effect to protection remedies

The failure of the present legal system to provide adequate remedies supporting protection remedies was also consistently identified as a problem. The availability of protection remedies is in many cases illusory where the victim is unable to set up a residence independently of the abuser because of lack of financial resources. Such a situation can arise either where the victim is financially dependent upon the abuser or where the abuser is exercising control over the finances and property of the victim.

Furthermore, at present the remedy of exclusive possession of a residence is only available to married persons and the remedy is not one which was created to be an effective tool to deal with cases of domestic abuse.

(4) Failure to examine custody and access in light of needs created by domestic abuse

Difficulties around custody and access were consistently identified as serious problems under the present legal system which seems to be failing to deal with the relationship between custody and access and domestic abuse in an effective way. Arrangements with respect to custody and access

which are arrived at in a compartmentalized way without regard to the existence of domestic abuse in a situation can seriously compromise the safety of a victim of domestic violence and can render protection provisions ineffective. It would seem that at present the legal system is not sufficiently aware of this.

(5) Complexity of the court system and lack of an accessible source of information and advocacy services for victims of domestic abuse

The complexity and lack of coherence of the court system was identified as a significant problem giving rise to a great deal of confusion in victims of abuse. The failure of the legal system to provide victims with the means of understanding the legal process is a serious concern. Furthermore, the legal system does not provide victims of domestic abuse with adequate advocacy and support services while going through the legal system.

The inaccessibility of the Court of Queen's Bench was also identified as a problem. The goal of accessibility of legal remedies to victims of domestic abuse would be better served by making relief obtainable outside of the superior court.

(6) Attitudes of actors in the legal system

Victims of domestic abuse at times encounter persons exercising power in the legal system who hold stereotypical attitudes about race and gender. Police, judges or lawyers who hold such attitudes may be less than helpful to victims of domestic abuse. Encounters with such individuals may also discourage victims of domestic abuse from seeking help from the legal system in the future.

(7) Victims who are committed to remaining in an abusive relationship

The law is particularly unhelpful to those victims who are committed, for whatever reason, to remaining in an abusive relationship. The legal system's response to such individuals is highly inadequate in that all that the law has to offer appears to be contingent upon the victim separating from the abuser. The criminal process, of course, contemplates incarceration which separates the victim and the abuser. Likewise, the only real benefits that the civil law has to offer a victim of domestic abuse, such as divorce or separation with a resulting property settlement, a restraining order, damages for personal injury, or an order for exclusive possession of a home,

all presume separation. The law then particularly fails those victims of domestic abuse who have a deep conviction that they ought not to leave their abusers. In some immigrant cultures, for example, divorce is simply not an option for victims of domestic abuse given the overriding importance placed upon the preservation of the family. Even absent superadded cultural pressures to remain within the family unit, some victims of domestic abuse may be committed to continuing to try to heal the relationship that is scarred by abusive behaviour. In such cases the law offers little if anything and essentially takes the view that asking for the protection of the law is "blowing hot"; remaining with an abusive individual is "blowing cold"; and the law cannot help those who "blow hot and cold at the same time".

F. Purpose of the Project

Having identified numerous problems and failings of the legal system in the area of domestic abuse, the Alberta Law Reform Institute was then concerned to ensure that the terms of reference of its project were drawn so as to focus on the areas of maximum concern and impact on the lives of victims of domestic abuse. There are, of course, constitutional limitations on the scope of the Institute's project. Thus, an inquiry into the reform in the area of the criminal law as it relates to domestic abuse, which is within the power of the Federal Government under section 91(27) of the Constitution Act, 1867, would clearly be outside of the mandate of the Institute as a body set up to consider law reform within areas of provincial jurisdiction. However, leaving the criminal law aside, there was still much to be considered in the way of reform of the law in the area of domestic abuse.

In trying to identify the area of maximum potential impact we focused on our perception that those victims of domestic abuse who had left the abusive relationship and who were seeking protection from their abusers were the individuals for whom the legal system as it is presently constructed had the most to offer. Our consultation suggested, furthermore, that these individuals were not being served well by the legal system and that their protection needs were not being met by a sympathetic and accessible legal process.

As we have noted, we also perceived a serious failure of the legal system to help those individuals who wished to remain in an abusive

relationship. However, after much deliberation, we decided that the legal system was not ideally suited to providing maximum impact in such situations. We were of the view, rather, that maximum impact could be achieved by focusing our efforts at reform on the problems being faced by those victims of domestic abuse who were seeking protection from the abuser at a stage of separation. In choosing this as our focus, we have made no normative judgment about what course of action a victim of domestic abuse "ought" to take. We do not mean to imply that victims of domestic abuse should leave their abusers and that victims who do not are not worthy of concern, or that the project of attempting to heal and salvage an abusive relationship is misguided.

A further problem that we identified but did not choose as the focus of the project was that of the lack of accessible information about the law and legal process available to victims of domestic abuse. We saw a very real need for a public legal education project to be undertaken in this area. We were of the view that a video explaining the legal process to victims of domestic abuse could be an extremely useful resource. However, we were ultimately of the view that such a project was not within the mandate of the Institute.

Therefore, we decided that the focus of the project should be on civil remedies for domestic abuse. The primary aspect of this focus has been the protection remedy. However, in fleshing out the details of an effective protection remedy it became clear that in many instances protection remedies could only be effective where they were buttressed by other related remedies. The nature of the legal relations between victim and abuser can be extremely complex, involving property issues, matrimonial issues, other financial issues as well as issues of custody and access to children. Inattention to other facets of the legal relationship between the victim and the abuser proved to be a persistent source of compromise of protection remedies. Thus, we expanded the project by attempting to construct a legal framework within which the problem of domestic abuse could be dealt with in such a way as to, at least temporarily, deal with the impact of abuse on the numerous aspects of the legal relations between the victim and the abuser. We have, therefore, included within this paper discussion of property remedies, financial remedies, remedies relating to the possession of firearms, custody and access, and remedies mandating counselling or payment for counselling.

In so doing we have envisaged a legislative scheme. The purposes of such legislation are set out below:

- The main purpose of the legislation is the protection through the civil law of victims of domestic abuse by:

  · making available to victims of domestic abuse orders of no-contact which will be effective in securing a safe space for the victim away from the abuser,

  · providing further civil law remedies that will enhance the effectiveness of the protection remedies and will give victims of domestic abuse a better chance of succeeding in breaking free from the control of their abusers,

  · ensuring that civil remedies are made accessible to all victims of domestic abuse and eliminating lack of financial resources as a barrier to accessing civil protection remedies,

  · providing a legal structure that is both understandable and sympathetic to victims of domestic abuse and a legal process that allows applicants to obtain relief without representation by counsel,

  · ensuring that civil protection from domestic abuse be obtainable quickly for those victims who are in emergency situations, and

  · creating a system of enforcement of civil remedies that is effective.

(1) Scope and limitations of this phase of the project

The discussion found here does not cover the full plethora of issues that would need to be discussed in developing a statute relating to domestic abuse. In particular, a detailed discussion of the issues of procedure and enforcement is not included. What this paper does however, is discuss the kinds of preliminary substantive issues which would form the foundation of a statute on domestic abuse. Thus, the paper deals with the kinds of conduct that ought to be seen as giving rise to an entitlement to apply for an order of protection. In this we have sought to go beyond the traditional

conception of domestic violence in order to name and identify the reality of controlling and abusive behaviour that can be debilitating and destructive of the lives of its victims. Secondly, we have discussed the ways in which a statute might begin to define the domestic sphere. Here we have sought to circumscribe a realm of "the domestic" without imposing a traditional or stereotypical conception of the identifying characteristics of domestic relationships. Thirdly, we have discussed the manner in which an effective protection remedy could be crafted as well as the ways in which other supporting remedies could be crafted to ensure the effectiveness of protection and to provide the victim with a just response in a case of abuse. Lastly, we have considered the constitutional issues surrounding the placing of jurisdiction to grant protection remedies in an accessible provincially appointed tribunal.

Clearly, issues of fair procedure and effective enforcement are tremendously important and must be addressed. To some degree, there is a difficulty in discussing the substantive provisions of the legislation without a full conception of how procedural and enforcement provisions would be structured. However, it has been our view that, notwithstanding these difficulties, it will be beneficial to put forward this discussion on the substantive aspects of domestic abuse legislation at this time and to receive feedback from interested groups on our discussion in this regard. In this way we will be able to proceed to a discussion of procedures and enforcement on the basis of a clearer understanding of the substantive needs of victims of domestic abuse.

(2) Procedural issues to be addressed

(a) General goals in discussing procedural reform

While we do not intend to go into procedural issues in any depth in this paper, we are of the view that we should at least flag some of the procedural issues that will have to be dealt with in proposing reform in the area of domestic abuse. Clearly, the overriding concern in the area of procedure is to ensure that unnecessary barriers or complexities are not put in the way of the applicant in accessing legal remedies, while ensuring that fairness is accorded to the respondent.

(b) Commencement of the proceedings

Initial procedural choices must be made in relation to the commencement of the proceedings. First, thought must be given to the question of how a petition is to be filed. This of course would represent the first direct contact between the applicant and the court system and, therefore, there is a great concern that the initial filing procedure be simple and easy. Plain language forms which set out checklists of relevant information and possible remedies could be devised to make it easy for applicants to organize their narratives as well as their statements of their needs in a way that is accessible to the person hearing the application.[54] Ultimately all procedures should be structured with a view to ensuring that victims will not require legal counsel in order to obtain relief.[55]

At this stage a further question that arises is whether court workers ought to be employed to aid victims of domestic abuse in filling out and filing applications for protection orders.[56] Such court workers could also potentially provide more extensive advocacy and support services for victims of domestic abuse seeking help from the legal system. The extent of the information required to be disclosed by the applicant is another issue that ought to be addressed. Sensitivity to the victim's need for confidentiality of certain information such as address of residence or place of employment is necessary.[57]

A further question that must be addressed in relation to the commencement of the proceedings is who should be able to apply for an

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[54] A form of petition is set out in Lisa G. Lerman, "A Model State Act: Remedies for Domestic Abuse" (1984) 21 Harvard Journal on Legislation 61 at 79-81. See also Barbara J. Hart, "State Codes on Domestic Violence: Analysis, Commentary and Recommendations" (1992) 43:4 Juvenile & Family Court Journal at 8, where the author states: "Numbers of [U.S. state] codes specify that the court is to develop and make available standard petition forms with instructions for completion."

[55] See: P. Finn & S. Colson, "Civil Protection Orders: Legislation, Current Court Practice, and Enforcement", *Issues and Practices in Criminal Justice* (Washington, DC: National Institute of Justice, 1990) at 11, where the authors state that two-thirds of U.S. jurisdictions allow victims of domestic abuse to pursue protection order proceedings *pro se*. See also: Hart, *supra*, note 54 at 86.

[56] See: Lerman, *supra*, note 54 at 86-88; Hart, *supra*, note 54 at 9.

[57] See: Lerman, *supra*, note 54 at 83; Hart, *supra*, note 54 at 8.

order? In some instances it might be beneficial to allow for a shelter worker or other victim's advocate to apply for an order on behalf of a victim.[58]

If filing fees are required, some procedure for waiving such fees in cases of indigent applicants should likely be created to ensure that cost is not a barrier to obtaining relief.[59] Because of the very real possibility of the applicant not having access to the financial resources of the respondent, the respondent's income should likely not be considered in making the determination of whether the applicant is indigent.[60]

The issue of how notice of the application should be served upon the respondent must be addressed. Consideration should likely be given to the possibility of public assistance in the service of documents on the respondent.[61] The possibility of a fixed time within which a court date must be set after the making of the application should also be considered.

(c) *Ex parte* orders

Consideration must be given to the question of what circumstances will justify the granting of an *ex parte* order. Obviously, emergency conditions would have to be present before an order would be given on an *ex parte* basis. However, the standard for what is to constitute an emergency would have to be defined.[62] Further questions that arise in relation to the granting of *ex parte* orders are: first, whether all types of relief under the statute could be granted on an *ex parte* basis or whether certain remedies under the statute would be given on notice only.[63] Secondly, the question of the duration of *ex parte* orders would have to be addressed.[64] A related and important question is whether there should be an automatic review of

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[58] See: Lerman, *supra*, note 54 at 83-85.

[59] See: Lerman, *supra*, note 54 at 89-90; Hart, *supra*, note 54 at 9-10.

[60] This approach is used in Wyoming: Wyo. Stat., s. 35-21-103.

[61] See: Lerman, *supra*, note 54 at 115-16; Hart, *supra*, note 54 at 10-11.

[62] See: Lerman, *supra*, note 54 at 90-91 for a proposed definition of an "emergency".

[63] See: Lerman, *supra*, note 54 at 95; Hart, *supra*, note 54 at 12-13.

[64] See: Hart, *supra*, note 54 at 13.

an *ex parte* order or whether such an order could stand until such time as the respondent brought an application for review.[65]

Further consideration should be given to whether there ought to be a requirement that *ex parte* applications should be heard on the same day that they are made.[66] Procedures for telephone access in situations of emergency at odd hours or in remote areas where tribunals are inaccessible should also be considered.[67]

(d) Registration of orders

The procedure for registration of orders with law enforcement agencies would have to be addressed. Clearly, an ideal system of registration would be one which gave police officers ready access to the terms of existing protection orders.

(e) Follow-up hearings

It would also be important to consider whether there should be a procedure created whereby a judge could require that the parties return for a follow-up hearing. Such a procedure could be beneficial in creating a sense of accountability in the respondent.

(f) Duration of orders

Issues relating to the duration of orders should also be addressed.[68] Clearly, there may be concerns about limiting the duration of *ex parte* orders. However, such considerations might not apply in the case of final orders. In some instances a very long-term or permanent order might be fair and desirable. Consideration should be given to the circumstances in which the duration of orders should be limited. The issue of what should be required for an applicant to obtain a renewal of an order should also be addressed. A low threshold of proof should be considered here. Procedures should also be created for modification of an order as a result of a change in circumstances.

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[65] See: Lerman, *supra*, note 54 at 94-97.

[66] See: Lerman, *supra*, note 54 at 92-93; Hart, *supra*, note 54 at 8.

[67] See: Hart, *supra*, note 54 at 7.

[68] See: Hart, *supra*, note 54 at 17, where the author outlines the duration of civil protection orders authorized by various states in the U.S.

(g) Enforcement

Consideration should be given to whether orders should contain mandatory arrest provisions in the event of a breach. Possible penalties attending breach should also be considered; some alternatives are incarceration, fines, as well as the posting of bonds. The issue of how to provide a detailed description of the respondent to law enforcement agencies should be addressed since the provision of such information could aid in the enforcement of orders. It should also be considered how notice of the consequences of breach of an order should be communicated to the respondent to ensure the maximum chance of compliance with the order. The question of how to enforce terms of orders requiring the respondent to take counselling will also require detailed consideration.

(3) Terminology: gender neutrality and abuse vs. violence

Today, in the vast majority of reported cases of domestic abuse the victim is a woman and the perpetrator is a man. In the first quarter of 1993, 94.81% of the charges laid in Alberta in situations of violence between a married, estranged or cohabiting couple were against men. 3.32% of the charges were against women. In 1.88% of the cases, charges were laid against both the man and the woman.[69]

In response to statistics such as these showing the gendered nature of the problem of domestic abuse, a number of reform initiatives in the area have chosen to deal with the problem in a gender specific way. That is to say they explicitly refer to perpetrators as men and victims as women. The Law Reform Commission of Nova Scotia consciously made a choice to avoid the use of gender neutral language in its discussion of domestic abuse in order to ensure that the nature of the problem as one of violence against women was not papered over.[70] Thus, in their Report for Discussion on domestic violence the Commission states:

> Although violence may occur between couples of the same sex, the majority of reported cases involve women who have been assaulted by their male partner. Given this, throughout this

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[69] Alberta Justice, *supra*, note 16.

[70] See *Violence in a Domestic Context: A Discussion Paper*, Law Reform Commission of Nova Scotia, March 1993; and *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia*, Law Reform Commission of Nova Scotia, February 1995 at 9.

> Discussion Paper, 'she' will be used to describe the assaulted person and 'he' will be used to describe the assaulter.[71]

This same choice in relation to the use of gender specific language was made by the Duluth Domestic Abuse Intervention Program.[72]

Having reflected upon these potential reasons for using gender specific terms in this Report for Discussion we have decided not to do so. We are of the view that it is extremely important, in developing strategies for law reform in the area of domestic abuse, to remain aware that the problem is one in which the vast majority of victims are women. Solutions must be crafted with an awareness of the needs of these women **as women** and we have attempted to maintain such an awareness in drafting our recommendations throughout this Report.

However, we are of the view that it is ultimately exclusionary to assume that victims are **universally** female and perpetrators are **universally** male. Thus, while we are seeking to recognize at the outset that domestic abuse is a gendered problem, we are also seeking to avoid excluding victims of domestic abuse who do not fit the norm. We have therefore chosen to use gender neutral language throughout this Report for Discussion. This gender neutrality is not intended to obscure the fact that the problem of domestic abuse is gender specific.

Another important terminological choice that we have made relates to the naming of the conduct from which we are concerned to extend protection. We have chosen to use the term "domestic abuse" throughout this paper rather than the more narrow term "domestic violence". Our research and our consultation show that physical violence is only one aspect of the relation of domination and control that characterizes many battering relationships. We are of the view that an understanding of the needs of victims of domestic abuse requires an appreciation of the whole panoply of controlling and degrading behaviours that are brought to bear in such a relationship. To approach the problem of domestic abuse as though we were

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[71] *Ibid.* at 2.

[72] Ellen Pence, *et al.*, *The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development* (Duluth: Minnesota Program Development, Inc., 1989) at 1. See below at pp. 59-67 for a discussion of the Duluth model.

only concerned with physical manifestations of that abuse is to assume that the only interest that the law should be protecting in the domestic situation is that of physical integrity. We, however, are of the view that in order to create a legal response to domestic abuse that is responsive and sensitive to the real needs of victims, the law must go further and protect and take seriously not just the physical integrity of the individual in a domestic situation but also the sexual integrity, the autonomy, the privacy and the property of individuals who are caught in abusive domestic relations.[73] Abusive behaviour which threatens these interests is more complex and varied than simple physical assault. Throughout this report we have tried to be sensitive to this reality and have tried to create legal tools which are informed by a sophisticated understanding of the kinds of controlling and degrading behaviours commonly used in abusive domestic relations.[74]

(4) Other legislative models

It is noted that in looking to other legislative models in our discussion throughout this report we have chosen to focus on examples from American jurisdictions which we think draw attention to significant distinctions or which we think are particularly good or innovative legislative models. Domestic abuse statutes in different U.S. jurisdictions vary widely. A thorough general discussion of American legislation in this area can be found in a very useful publication by Barbara J. Hart entitled "State Codes on Domestic Violence: Analysis, Commentary and Recommendations"[75] as well as an article in the *Harvard Journal on Legislation* entitled "A Model State Act: Remedies for Domestic Abuse".[76] We have also referred extensively to the two Canadian legislative models. One is a proposal for legislation in Nova Scotia[77] and the other is Saskatchewan's Victims of Domestic Violence Act.[78]

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[73] See below: Chapter 1(B) "Protected Interests of the Applicant".

[74] See below: Chapter 1(A) "Dynamics of Abusive Relationships".

[75] *Supra*, note 54.

[76] *Supra*, note 54.

[77] An Act to Prevent Domestic Violence and to Provide Relief Therefrom, Proposed in a Discussion Paper by the Nova Scotia Department of the Attorney General, March 1993.

[78] S.S. 1994, c. V-6.02. We refer as well to the British Columbia Bill M 217, Domestic Violence Prevention Act, 3rd Sess., 35 Parl., 1st reading June 29, 1994.

PART II — SUBSTANTIVE ISSUES

CHAPTER 1 — CONDUCT

The first question that arises in structuring legislation to protect against domestic abuse is: from what sort of conduct are we concerned to protect an individual? In addressing this issue we have attempted to gain an understanding of the dynamics of abusive relationships. We are of the view that an understanding of the nature of abusive relationships is necessary to begin to make effective and reasonable decisions about what sort of conduct should be seen as giving rise to a need for protection. In going about this task we have separated our inquiry into three parts. In Part A, entitled "Dynamics of Abusive Relationships", we have examined the sorts of behaviours that have been found to be common in abusive domestic relationships. In Part B, entitled "Protected Interests", we have identified those interests of the individual that we conclude the legislation ought to protect against interference. In Part C, entitled "Types of Conduct", we have attempted to link our discussion of common types of abuse with our discussion of the interests we have identified as deserving of protection in order to generate a list of behaviours that we recommend as giving rise to an entitlement to apply for an order for protection.

A. Dynamics of Abusive Relationships

In order to create effective legal tools for dealing with the problem of domestic abuse it is essential that we have a full understanding of the dynamics of abuse. Without an awareness of these dynamics we will be unable to make informed, clear and conscious decisions about what sort of conduct gives rise to the need for protection. In order to gain a clearer understanding of the nature of the dynamics of abusive domestic relations it is useful to examine the materials on domestic abuse developed by the Duluth Domestic Abuse Intervention Project.[79] In particular the "Power

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[79] The D.D.A.I.P is an inter-agency program created in Duluth, Minnesota and is designed to stop domestic abuse by protecting and giving support to victims of domestic abuse, holding offenders accountable and rehabilitating offenders through intensive court mandated counselling. See: Ellen Pence and Michael Paymar, *Power and Control: Tactics of Men Who Batter—An Educational Curriculum* (Duluth: Minnesota Program Development, Inc., 1986) (hereinafter referred to as *An Educational Curriculum)*; and Ellen Pence *et al.*, *The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development*

(continued...)

and Control Wheel" shown on page 63 outlines common patterns of behaviour in abusive relationships. The behaviours of abusers are shown as pieces of a pie bound at the circumference and held together by sexual and physical violence. The wheel is used in explaining domestic abuse and in structuring programs for counselling and rehabilitation of domestic offenders.[80]

The Duluth program is widely accepted both in Alberta and internationally. In Edmonton the Duluth Program is employed by The Family Centre and by Changing Ways. These programs are estimated to provide 70-80% of the community-based intervention with men who batter in the Edmonton area.[81] In 1983, for its work in the domestic abuse field, the Duluth Domestic Abuse Intervention Project was selected for the

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[79](...continued)
(Duluth: Minnesota Program Development, Inc., 1989) (hereinafter referred to as *A Guide for Policy Development*). The *Educational Curriculum* for perpetrators of spousal assault was developed by The Domestic Abuse Intervention Project, Duluth, Minnesota. Its basic philosophy is described as follows: "In 1984, the Domestic Abuse Intervention Project shifted its program for men who batter from an anger-management approach to an educational process. This process challenges men to move from controlling tactics depicted on the Power & Control Wheel, to egalitarian relationships, maintained by the behaviours shown on [the] Equality Wheel"; *Creating a Process of Change for Men Who Batter*, National Training Project, Duluth Domestic Abuse Intervention Project at 1. The Duluth Program, and others like it, focus upon the batterer's personal responsibility for battering and upon social change. This approach differs from programs which focus upon individual characteristics of the batterer, such as excessive anger or stress. It is now commonly accepted that battering behaviour is not motivated solely by outbursts of anger. Even when the physical violence stops, the victim will likely experience an escalation in non-physical forms of abuse. Therefore, it is critical to attend to these non-physical aspects in order to fully deal with the problem. See also, Richard M. Tolman, "The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners" (1989) 4 Violence and Victims 159; Melanie Shepard and James Campbell, "The Abusive Behavior Inventory: A Measure of Psychological and Physical Abuse" (1992) 7:3 Journal of Interpersonal Violence 291. The psychological factors examined by Tolman parallel the psychological factors incorporated in the Duluth Program. Those selected by Shepard and Campbell were selected directly from aspects of the Duluth program.

[80] In the course of consultation one battered woman suggested that the law should develop a legal classification of an "abusive husband". She felt that once such individuals were identified that the law and the legal system should operate with an awareness of the sorts of patterns of behaviour to which such individuals were prone. While this suggestion is impractical for a number of reasons it does indicate that there is a failure in the law and the legal system to take cognizance of and respond to the reality of the relation of domination and control between the batterer and the victim.

[81] This information was obtained in consultation with Ms. Karen Neilsen, Director of Program Development, The Family Centre, Edmonton; Ms. Anne Mohl, Program Coordinator, Changing Ways, Edmonton; and Mr. Michael Hoyt, Chairman of the Board, Changing Ways.

"President's Award" from the Minnesota Corrections Association.[82] In 1988, The John F. Kennedy School of Government at Harvard University and the Ford Foundation gave the City of Duluth and the Duluth Project the "Innovations in State and Local Government" award in recognition of the pioneering role of the Duluth Model.[83] Between 1989-93 the National Training Project provided over 600 training sessions and seminars in all 50 of the United States and in 6 other countries.[84] More than 300 programs in North America, Europe and the South Pacific have been trained in the model.[85] In the past 10 years, the Duluth Program has responded to thousands of requests asking for information and guidance.[86] Finally, the effectiveness of the Duluth Program has been empirically demonstrated by Dr. Melanie Shepard.[87]

The wheel was developed to describe behaviours common to male perpetrators. The philosophy of the Duluth project is based on the assumption that effective policies for intervention can only be developed with a recognition that domestic abuse is a gendered problem in the sense that the vast majority of assailants are men and the vast majority of victims are women and those men and women often live in situations where social and economic structures reinforce the man's power and dominance over the woman. Further it is stressed by the Duluth project that the practice of domestic abuse by husbands toward wives must be viewed in its history of explicit endorsement by the law in the husband's right to chastise his wife.[88] Thus, the Duluth project has made a very conscious decision to avoid the use of gender-neutral language in their discussion of domestic abuse.[89]

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[82] See *History of the Duluth Program and the National Training Project*, National Training Project, Duluth Domestic Abuse Intervention Project at 3.

[83] *Ibid.* at 4; and see *Creating a Public Response to Private Violence*, National Training Project, Duluth Domestic Abuse Intervention Project at 1.

[84] *Creating a Public Response to Private Violence, supra*, note 83 at 1.

[85] *Creating a Process of Change for Men Who Batter, supra*, note 79 at 1.

[86] *History of the Duluth Program and the National Training Project, supra*, note 82 at 5.

[87] See Dr. Melanie Shepard, "Intervention With Men Who Batter: Evaluation of the Duluth Domestic Abuse Intervention Project" (1986) 47:1 Dissertation — Abstracts — International 316-A.

[88] *A Guide for Policy Development, supra*, note 79 at 1.

[89] *Ibid.*

The statistics in Alberta would seem to bear out the conclusion that the vast majority of the domestic abuse offenders are male. In the first quarter of 1993, 94.81% of the charges laid in Alberta in situations of violence between a married, estranged or cohabiting couple were against men. 3.32% of the charges were against women. In 1.88% of the cases charges were laid against both the man and the woman.[90] The findings of the Duluth project were that female violence was most commonly characterized by self-defense or retaliation from abuse.[91] Some women did use violence and abuse to gain power and control in a domestic relationship in a manner similar to male abusers. It is noted that some of these women were in lesbian relationships and others were in heterosexual relationships.[92]

The purpose of the wheel is to highlight the relationship of physical and sexual violence to other forms of controlling and abusive behaviour in domestic relationships. Further explanation is given as to the specific forms that sexual and physical violence commonly take in abusive domestic relationships.

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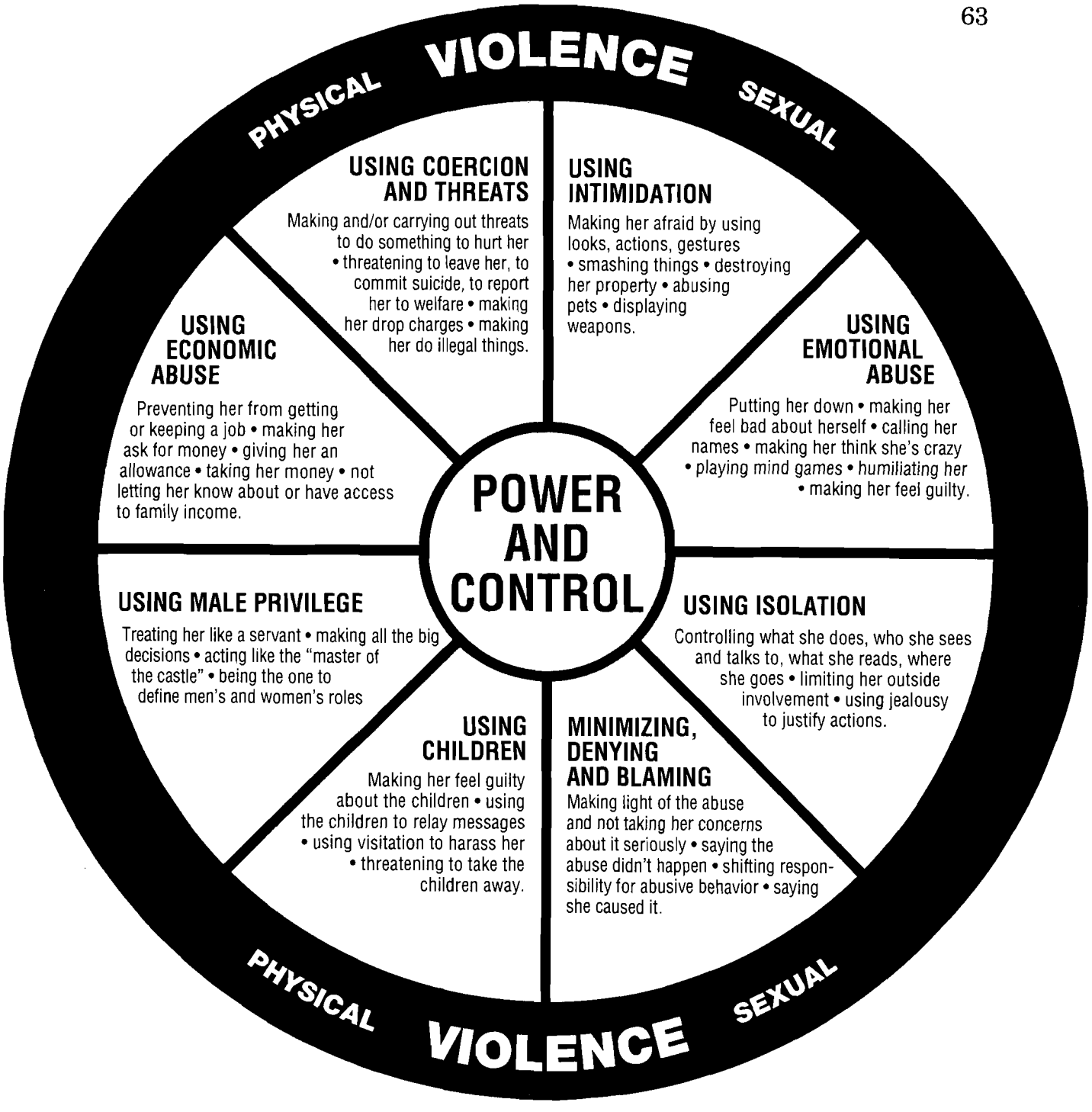
[90] See: Alberta Justice, *supra*, note 16.

[91] *A Guide for Policy Development, supra*, note 79 at 8.

[92] The Alberta statistics do not include same-sex relationships.



DOMESTIC ABUSE INTERVENTION PROJECT
206 West Fourth Street
Duluth, Minnesota 55806
218-722-4134

(1) Physical abuse

Common examples of physical abuse in the domestic context are identified in the Duluth materials as:

> kicking,
> hitting,
> pushing,
> shoving,
> grabbing,
> slapping,
> punching,
> choking,
> forcibly holding a hand over the mouth of the victim,
> forcing the victim to do something against her will,
> throwing things at the victim,
> pointing or using a gun, knife, or other weapon against the victim,
> chasing the victim in a car or trying to run her off the road.[93]

(2) Sexual abuse

Common examples of sexual abuse in the domestic context are identified by the Duluth materials as:

> forced sexual intercourse,
> forced sex while the victim is asleep,
> violent sex without the consent of the victim,
> forcing the victim to have sex in a way that she does not want to,
> inserting objects into the vagina or anus of the victim without her consent,
> forcing the victim to view pornography and to act out scenes from pornography,
> forcing the victim to have sex with other men or women,
> assaulting breasts or genitals,
> forcing the victim to wear clothing that she does not want to wear,
> forcing the victim to engage in prostitution,
> forcing the victim to pose for sexual pictures,
> demanding to check the victim's underwear,
> not disclosing sexually transmitted disease.[94]

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[93] See *A Guide for Policy Development, supra*, note 79 at 28; *An Educational Curriculum, supra*, note 79 at 44.

[94] See *A Guide for Policy Development, supra*, note 79 at 28; *An Educational Curriculum, supra*, note 79 at 106-07.

(3) Emotional abuse

The Duluth materials give further elaboration of common behaviours involved in emotional abuse in the domestic context. It is noted that emotional abuse commonly includes:

> using names such as slut, whore, cunt, and bitch;
> telling the victim that she is dumb, ugly, fat, stupid, lazy and so on;
> forcing the victim to engage in humiliating acts such as
> licking the floor,
> barking,
> kneeling,
> begging,
> eating cigarettes;
> making threats to take the children away;
> making threats to commit suicide;
> putting the victim down in front of family or friends;
> throwing or rubbing food or beverages in her hair or face.[95]

It is noted in the *Guide for Policy Development* that "battering is almost always accompanied by constant attacks against the victim's integrity and self-concept".[96]

(4) Isolation

Specific examples of isolation identified by Duluth as common in domestic abuse cases are:

> preventing the victim from seeing or talking to her family and friends;
> reading her mail;
> listening in on her phone calls;
> demanding an account of her daily activities;
> trying to keep her from going to school or work;
> preventing her from having access to means of transportation or communication.[97]

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[95] See: *A Guide for Policy Development*, *supra*, note 79 at 28; *An Educational Curriculum*, *supra*, note 79 at 68.

[96] *A Guide for Policy Development*, *supra*, note 79 at 6.

[97] *A Guide for Policy Development*, *supra*, note 79 at 28; *An Educational Curriculum*, *supra*, note 79 at 80. Neither *A Guide for Policy Development* nor *An Educational Curriculum* gives further elaboration or examples of "financial abuse" or "using male privilege" or "minimizing, denying and blaming", all of which are shown in the wheel.

(5) Intimidation

Intimidation is also further elaborated in the Duluth materials as including:

> throwing objects;
> slamming doors;
> punching fists through or kicking walls, doors, windows, or furniture;
> yelling and screaming;
> being physically threatening without actually touching the victim by standing in a way to crowd her or stand over her;
> injuring or killing pets.[98]

(6) Understanding the cumulative effects of abusive conduct

It is noted in the Duluth *Guide for Policy Development* that "the combination of these behaviours strengthens the power of a single blow. Thus, the impact of a shove up against the wall or a slap in the face cannot be understood outside the context in which it occurred. If police and probation officers, social workers or judges are forced to measure the danger or impact of the battering on the victim solely by the severity of the victim's injury, effective intervention is impossible."[99] The legal system must, therefore, begin to widen its lens in order to bring into its field of vision the full panoply of techniques of abusive behaviour that may characterize any particular relationship. Further, it must come to be cognizant of the effects that an accumulation of such controlling behaviour may have on an individual.

This is not to say that every action mentioned in the Duluth materials taken on its own should be seen as giving rise to a need for protection. Clearly, many of these behaviours, such as slamming doors, yelling, giving angry looks, asking for an account of a day's activities, or blaming the partner for one's sexual dissatisfaction might be single incidents that occur in non-abusive relationships. By the same token, however, any of these acts taken in the context of a generally abusive and controlling relationship take on new meaning. Taken in an abusive and controlling context such behaviours could instill a legitimate fear of imminent harm in the recipient of the conduct. A pattern of controlling behaviour may create a situation in which an individual is dehumanized

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[98] See *A Guide for Policy Development*, *supra*, note 79 at 28; *An Educational Curriculum*, *supra*, note 79 at 56.

[99] *A Guide for Policy Development, supra*, note 79 at 28.

and deprived of basic agency and ability to function on a day-to-day level and in particular may create an inability in the victim to break out of the abusive situation without assistance.

We must, then, identify the sort of conduct that ought to give rise to an inference of a need for protection with an awareness of both the reality of the sort of behaviour common in abusive relationships and the debilitating effects that such behaviour may have on the victim. In so doing, however, we must not set up the legislation so that it would give rise to unjustifiable and unnecessary orders. Nor should the legislation create an array of unenforceable and ineffective remedies. In order to strike an appropriate balance here we must identify the sorts of interests on the part of the applicant that the law and legal system have a legitimate role in protecting. By identifying these interests we can then assess types of controlling conduct with a view to determining whether the conduct threatens an interest that the state is prepared to protect.

B. Protected Interests of the Applicant

In identifying the interests to be protected by the legislation we have drawn on traditional notions of the sorts of basic freedoms an individual is entitled to in a liberal democratic society. In setting out these interests we do not seek to go beyond the sorts of things that have historically been viewed as within the scope of the state's duty to protect. The liberal tradition on which our legal system is based holds that the state must not, without justification, interfere with these interests as they are enjoyed by the individual. Likewise, it is up to the state to protect each individual in these interests as against intrusion by other private individuals. None of these statements is controversial. What has been avoided in our legal tradition, however, is a full exploration of the ways in which these interests may be threatened in the private sphere among intimates. This is what we now undertake to do, not with a purpose of identifying new interests formerly seen as outside of the scope of state protection, but rather with a view to recognizing that full protection of the interests that we have long held to be fundamental requires an examination of the ways in which those interests may be threatened in the private sphere. The balance, therefore, is crucial.

(1) Physical integrity

Clearly the physical integrity of the individual ought to be protected by the law. Each person should be free from physical threat by another. Physical integrity of the person is fundamental to one's well-being and indeed to one's life. Without security from physical assault an individual's life is uncertain, anxious and painful. In the famous words of Thomas Hobbes without security of one's physical integrity life is "solitary, poore, nasty, brutish and short".[100] Of course, these words reflect now, as they did then, the belief that the fundamental purpose of the state and the basic reason that individuals consent to being governed is to gain protection of their physical integrity. The freedom of each individual has always been seen as limited first and foremost by the requirement that they respect the physical integrity of others. Thus, one of the state's fundamental obligations is to protect its citizens from violations of their physical integrity. This principle is well established in the law and requires no extensive elaboration to justify its espousal.

(2) Sexual integrity

Sexual integrity is an aspect of physical integrity and should be protected along with it. An individual's sexual integrity is fundamental to that person's well-being. Individuals are entitled to choose their sexual partners and to decide for themselves what sort of sexual conduct they are and are not prepared to engage in. Where individuals are coercively deprived of that decision-making power, they are violated and dehumanized in a way that may be extremely damaging to their sense of self. Therefore, all individuals should be free from coercive sexual violation by others and should be entitled to protection from the state if they are unable to secure that freedom on their own.

It has not always been the case under the law that all individuals were accorded a right to sexual integrity. Until 1983 the law implied an absence of the right to sexual integrity on the part of married women by defining rape so as to exclude the act of a husband forcing his wife to engage in sexual intercourse.[101] The idea that a woman gives up her right

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[100] *Leviathan* (Harmondsworth: Penguin Books, 1980, 1651) at 186.

[101] Section 278 of the Criminal Code, *supra*, note 30, permits a husband or wife to be charged with sexual assault with respect to a spouse whether or not the spouses were living together at the time of the alleged offence. This section originally appeared in S.C. 1980-81-82-83, c. 125, s. 19.

to refuse to consent to sexual conduct with her husband upon marriage is now widely discredited and all individuals are now seen as having the right to sexual integrity. Because sexual integrity is essential to the individual's well-being, it should be identified as an interest that will be protected by the legislation.

(3) Autonomy

Each individual has an important interest in autonomy. Autonomy is the ability to make one's own life decisions and to exercise freedom of choice in daily life. Coercive interference with that ability is deeply undermining of the individual. The importance of autonomy to personhood is widely recognized in our political and legal culture. Indeed, we view the state of being autonomous or free in one's choice of projects, movements, and ideas about what is valuable as synonymous with being a person. Thus, where an individual's interest in autonomy is threatened by the actions of another, and that individual is not able to escape that interference without assistance, the state should be prepared to aid in the protection of that interest. We recognize that decisions about the precise legal consequences of a commitment to protect autonomy are difficult and complex and give rise to much debate and difference of opinion as to how far the state should go in protecting this interest and to what degree the individual should be responsible for their own autonomy interest. However, our recognition of the complexity and difficulty of this issue does not lead us to abandon our fundamental commitment to advocating protection of the autonomy interest of victims of domestic violence.

(4) Privacy

Each person has a fundamental interest in privacy. An individual must be able to secure a desired space away from surveillance, intrusion, or harassment by unwanted others in order to develop freely as an autonomous individual. Thus, the interest in privacy is instrumental to the interest in autonomy — some modicum of privacy being necessary to the enjoyment of autonomy. People are entitled to peace and quiet away from those other individuals with whom they choose not to associate. Where individuals' interest in privacy is being threatened by the invasive actions of others and those individuals are not able to prevent those others from continuing the invasion, the state should be willing to step in to aid the individuals in securing their enjoyment of the right to privacy.

(5) Property

It has long been recognized that a fundamental function and purpose of the liberal state is to define and protect individuals' interests in property. This was perhaps put most strongly by John Locke in *The Second Treatise on Government* when he said: "The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the preservation of their property." Thus, Locke saw the purpose of law as being, first, the creation of a set of rules to define the entitlement to property, second, the setting up of an impartial authority to make determinations about such entitlements in individual cases and, third, the creation of a coercive state apparatus able to enforce lawful decisions about those entitlements.[102]

While the individual does not have constitutionally recognized property rights as against the state under the Canadian Charter of Rights and Freedoms, it is clear that the Canadian state at both the provincial and federal levels is deeply committed to protecting the property rights of individuals against incursion by other individuals. This commitment is reflected in the law of theft, the law of contract, the law of corporations, land titles, personal property security and so on. Questions of entitlement to property in domestic situations are often complex and fraught with conflict. While we recognize this to be the case, we conclude that property interests of the individual should be protected from threats arising in the domestic sphere. It is important to recognize that threats to interests in property are not limited to the public sphere. Furthermore, security in property is often instrumentally necessary to the ability to live autonomously. Thus, were we to exclude the individual's interest in property from the protected interests with which we are concerned we might inadvertently hamper our ability to effectively protect the individual's interest in autonomy.

(6) Conclusion

Conduct that creates a need for protection should be identified by reference to the threat that it poses to the interests identified above. Therefore, we will proceed on the assumption that where individuals' physical integrity, sexual integrity, autonomy, privacy or property is

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[102] John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill Educational Publishing, 1977 (1690)) at 71. Note here that Locke is referring to property very broadly to include what he refers to as the interests of "life, liberty and estate". Thus along with material property Locke is probably also meaning to include what we have defined as physical and sexual integrity, autonomy, and privacy.

threatened by the actions of others,[103] and those individuals are unable to escape the threat of those actions on their own, they should be entitled to protection from the law. Not every sort of action identified in the "Power and Control Wheel" will threaten one of these interests. However, an understanding of the patterns identified in the "Power and Control Wheel" is necessary in order to evaluate the potential of various types of behaviour to threaten the individual's enjoyment of the interests identified.

C. Types of Conduct

We shall now begin to identify the types of conduct that should give rise to an entitlement to apply for an order of protection under the legislation. In so doing it is important to bear in mind at all times that what we are seeking to establish is a legal process which makes space for an understanding of the cumulative effect of abusive and controlling behaviour. In order to be in a position to craft effective remedies the court must be able to have access to sufficient information to provide an understanding of the full context of an abusive relationship. Any of the behaviours described below, taken in isolation might not reasonably be seen as giving rise to a need for extensive or even perhaps any legal remedies. However, taken together the conclusion might well be different.

What we are seeking to create is legislation which encourages and allows for information revealing a context of domination and control in a domestic relationship to be before the court to assist in devising a sympathetic and effective legal response to the situation. Ultimately, we are of the view that an individual should be entitled to apply for an order in any circumstance where the court is of the view that controlling and abusive behaviour is such as to justify the granting of a right to apply. In what follows we shall identify examples of what ought to be specified as included in an understanding of abusive and controlling behaviour. These examples, however, should not be taken as limiting the notion of controlling and abusive behaviour that the court might properly take into consideration in making a just determination of whether an application should be allowed.[104]

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[103] The relationships included within the scope of the legislation are set out in Chapter 2.

[104] See Recommendation 1 below at p. 73.

In any given case it might be that a single type of conduct might be sufficient to warrant the granting of an order. For example, severe harassment on its own without any physical or sexual assault or other sort of abusive conduct might in the circumstances of a particular case be sufficient to lead to the conclusion that the making of an order would be appropriate. Thus, the legislation ought not to require that multiple types of conduct be present before an individual be entitled to apply for an order. However, in many cases, we anticipate that there will be different kinds of abuse the accumulated effect of which gives rise to the need for the order. So, it should not be required that multiple types of abuse be present before an order would be appropriate. However, where multiple types of abuse are present, the legal process should allow for a broad contextual view of that abuse to be taken by the court in assessing the nature of a need for protection.

(1) General category of controlling and abusive conduct

The legislation should specify that, in assessing what the appropriate terms of the order would be, the court should take into consideration the presence of controlling and abusive behaviours. This will allow for a contextual approach to be taken in the court and will respond to victims' concerns about the present rigidly narrow focus of the courts in assessing the need for protection.

As we have noted, the important process that ought to be undertaken by the court is to look at the accumulated effect of these various types of behaviours in crafting an appropriate legal response to the situation. Any of the behaviours considered taken in isolation might lead the court to conclude that protection is unnecessary or that limited remedies will suffice to meet the needs of the applicant. However, the court must at all times consider the full context of the abusive relationship with a view to understanding the effect and threat posed by any accumulation of abusive and controlling conduct. **We stress again that it is only with a full understanding of the context of a relation of power and control that the court can craft effective and appropriate legal remedies.**

We therefore take the view that the legislation should begin by setting out a general section which entitles an individual to apply for an order where they can demonstrate controlling and abusive behaviour. The legislation should give examples of such behaviour that would justify the

right to apply. However, the examples which are singled out should not be exclusive and other conduct that does not fall within the identified categories of abuse should not be precluded from being raised.

RECOMMENDATION 1

The legislation should specify that an individual should be entitled to apply for an order where the court is of the view that the controlling and abusive behaviour demonstrated justifies the right to apply. The following examples of controlling and abusive behaviour:

- **physical assault,**
- **sexual assault,**
- **destruction of property,**
- **forcible or unauthorized entry into the residence of the applicant,**
- **coercive action,**
- **harassment,**
- **emotional abuse**

should be seen as examples illustrative of the category of controlling and abusive behaviour but not limiting of the definition of that category.

(2) Physical assault

Physical assault clearly threatens an individual's physical integrity and should therefore trigger the entitlement to apply for an order. For the purposes of the legislation physical assault should be defined so as to include both actual physical contact as well as actions or statements which create a threat of assault. A threat of physical assault results in distress and fear. The purpose of a threat of physical assault is to bring about uncertainty as to the security of the victim's physical integrity.

By including threat of physical assault in the definition of assault, many of the behaviours included under the notion of intimidation in the "Power and Control Wheel" such as making threatening gestures and

punching through walls and so on would be included in the sort of conduct that would entitle an individual to apply for an order. Again, this is an appropriate result since both actual assault and threatened assault violate the physical integrity of the individual.

In the proposed Nova Scotia legislation, domestic violence is defined as any of the following done by one cohabitant to another:

> 3(f)(i) Any intentional or reckless act that causes physical injury,
>
> (ii) Any threatened course of action that causes another to have reasonable fear of serious personal injury, or
>
> (iii) forced confinement.[105]

This provision appears to qualify the notion of physical assault so as to require some degree of physical injury. We regard this as an unnecessary limitation on the notion of physical assault and as requiring an unwarranted additional element of proof on the part of the applicant. Such an approach may be interpreted so as to reflect the view that domestic abuse is not sufficiently serious to justify protective measures unless the victim's body has been put in evidence and it has been demonstrated that the abuse has resulted in broken bones, bruises or other visible physical wounds. This approach to domestic abuse was strongly criticized by the victims of domestic abuse consulted. One of the major concerns of victims of domestic abuse was that lawyers and judges tended to take a very narrow focus on physical injury as the most, and sometimes the only, significant factor in structuring a legal response to the problem. They were of the view that the legal system put far too much emphasis on the proof of physical manifestations of abuse than was justifiable in determining whether a victim was in need of protection.

The Saskatchewan Act defines domestic violence as:

> (i) any intentional or reckless act or omission that causes bodily harm or damage to property;

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[105] *Supra*, note 77 at s. 3(f).

(ii) any act or threatened act that causes a reasonable fear of bodily harm or damage to property;

(iii) forced confinement; or

(iv) sexual abuse.[106]

Again, the qualifier of "bodily harm" is unnecessary and troublesome. The jurisprudence around the notion of bodily harm in the criminal law and the distinction between "assault"[107] and "assault causing bodily harm"[108] is complex. It is a distinction that has as its primary purpose the gradation of severity of punishment of offenders. It is inappropriate, then, to introduce such a distinction into domestic abuse legislation which is concerned with protecting the physical integrity of the victim of assault.

RECOMMENDATION 2

Physical assault should be identified as the sort of conduct which entitles an applicant to apply for an order. It should be broadly defined and should include threat of physical assault and conduct which creates a reasonable apprehension of imminent physical harm. There should be no qualification that the assault cause a specific degree of physical harm.

(3) Sexual assault

Sexual assault should be viewed as a violation of the person sufficient to ground a need for protection. Clearly, such conduct threatens one's sexual integrity as well as one's physical integrity. The harm to the individual occasioned by sexual assault in a domestic environment should be recognized as real and serious. It should be recognized that coercive sexual

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[106] *Supra*, note 78 at s. 2(d).

[107] Criminal Code, *supra*, note 30 at s. 266.

[108] *Ibid.* at section 267. For an overview of the jurisprudence interpreting the distinction, see Edward L. Greenspan, *Martin's Annotated Criminal Code 1994* (Aurora: Canada Law Book, 1994) at 437.

conduct may be used as a tool of domination and control by individuals in intimate domestic relationships. It should also be noted that sexualization of violence is common in many abusive relationships.[109]

The threat of sexual assault should also trigger the entitlement to apply for an order. Again, threats of sexual violation should be sufficient to lead to an inference of a need for protection and the legislation should not require that the threat be carried out before an applicant may apply for an order. As with physical assault, no degree of physical harm should be required in order for the entitlement to apply for an order to come into effect in the event of sexual assault.

The Saskatchewan legislation refers to sexual abuse rather than sexual assault. This term might cause difficulty since sexual abuse is a term different from "sexual assault" used in the criminal context.[110] Thus, there is a connotation that something different is meant by the term sexual abuse. However, that term is not defined more specifically, nor is there any other judicial interpretation of the term to look to in another context. It is therefore, ambiguous as to whether the term is meant to be broader or more narrow than the established understanding of sexual assault in the criminal and civil contexts. To avoid confusion, the sort of conduct that we are concerned with should be described in the legislation.

It was noted in the discussion of sexual abuse under the "Power and Control Wheel" that many of the acts identified as sexual abuse would not constitute criminal offences. Indeed, many of the actions described there, such as blaming the other for a lack of sexual satisfaction, or withholding affection if the victim will not engage in sex, are on their own insufficiently serious or violative to lead to a reasonable inference of a need for protection.

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[109] This was learned in consultation with Anne Marie Dewhurst: Project Coordinator, Edmonton Council Against Family Violence Coordination Project; Term Psychologist, Correctional Services Canada; Associate Psychologist, The Family Centre; facilitator of a sexual offenses program; author in the area of sexual abuse and domestic abuse.

[110] Criminal Code, *supra*, note 30 at ss 271-273.2.

RECOMMENDATION 3

The legislation should specify that sexual contact of any kind that is coerced by force or threat of force should be included in the kind of conduct that triggers the entitlement to apply for an order. Threats to make unwanted sexual contact by force should also be included.[111]

(4) Destruction of property

Damage to property obviously threatens the individual's interest in property. The Saskatchewan legislation includes "any intentional act or omission that causes damage to property" and "any threatened act that causes a reasonable fear of damage to property".[112] It is clear from the "Power and Control Wheel" that destruction of property is a technique of intimidation in an abusive domestic relationship. This is illustrated by examples of behaviour such as punching through walls or breaking furniture in order to frighten another. Destroying the property of a spouse might also be a method of abuse in and of itself rather than simply a gesture to communicate a threat of future physical assault.

Our consultation with victims suggests that the destruction or threat of destruction of property belonging to the victim is often used as a reprisal for the victim leaving an abusive relationship, or for doing something against the abuser's will. Destruction of property was of particular concern to victims who were fleeing a violent household in an emergency situation and were having to leave their own property behind in the possession of the perpetrator.

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[111] There are some behaviours described under the notion of sexual violence in the "Power and Control Wheel" which will not be included in this definition of sexual assault or abuse because they do not involve sexual contact between the applicant and the respondent. Examples of such behaviours are: coercing one's spouse by threat of force to have sex with another person or coercing one's spouse to pose for sexual pictures. These behaviours would potentially give rise to the need for protection and should be included in the sort of conduct that triggers the entitlement to apply. They will, however, fall within the definition of coercive conduct discussed below.

[112] *Supra*, note 78 at ss 2(d)(i), 2(d)(ii).

The Tennessee Spousal Abuse Act includes "malicious damage to the personal property of the abused party" within the definition of abuse.[113] This attempt to qualify the inclusion of destruction of property in some way is sensible. The Saskatchewan definition would potentially include destruction of property belonging to the respondent in circumstances that would not indicate a threat to the interests of the applicant.[114] This is excessively broad. However, the mere fact that the property belongs to the respondent does not in itself give sufficient information to conclude that its destruction is not threatening to the applicant, since such destruction may be done with an intention to intimidate and frighten the applicant. Where destruction of property is meant to communicate a threat to physical integrity of another it should be included in the sort of conduct from which the legislation is seeking to provide protection. Damage to property which is done as a means of instilling fear in another or depriving another of the means of exercising autonomy should also be included in the legislation.

Another abusive behaviour noted in the "Power and Control Wheel" which could accurately be described as destruction of property is the killing or injuring of pets kept in the household or belonging to the victim. Given that the killing of pets might not, however, be understood as falling within a definition of destruction or damage to property, specific mention should be made of pets.

RECOMMENDATION 4

Damage to any property that is done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant should also be included as giving rise to an entitlement to apply for an order.

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[113] Tenn. Code. Ann., s. 36-3-601(1).

[114] Examples of other legislative provisions which simply define abuse as including damage to property are: Ga. Code Ann., s. 19-13-1(2); Ind. Code, s. 34-4-5.1-1(2).

(5) Forcible or unauthorized entry into the residence of the applicant

The Nevada Code identifies "Unlawful entry of the other's residence, or forcible entry against the other's will if there is a reasonably foreseeable risk of harm to the other from the entry" as included in the definition of domestic violence.[115] Clearly, the forcible entry into one's residence of an unwanted former intimate would be threatening to one's interest in privacy and would also potentially communicate a threat to physical or sexual integrity.

The Nevada legislation seems to create a distinction between unlawful entry and entry against another's will. The latter is qualified by the requirement that it be accompanied by a foreseeable risk of harm. It is unclear as to what the Nevada legislature would have been trying to protect in constructing this distinction. We can see no reason for adopting such a distinction. The provision should make clear, however, that it only applies where the respondent and the applicant do not occupy the same residence. Thus, it would primarily be applicable in relation to former spouses or cohabitants. We are concerned to include not just forcible entry but also any unauthorized entry which may or may not require force to be effected.

RECOMMENDATION 5

The sort of conduct which entitles an individual to apply for an order should include the forcible or unauthorized entry of the respondent into the residence of the applicant without the applicant's consent where the respondent and the applicant do not occupy the same residence.

(6) Coercive actions

Many of the behaviours in the "Power and Control Wheel" are coercive — forcing an individual to do or refrain from doing a particular action. These types of actions threaten both an individual's autonomy and also potentially threaten the individual's physical and sexual integrity.

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[115] Nev. Rev. Stat., s. 33.018(7).

There are many examples of coercive conduct under a number of the headings in the "Power and Control Wheel".

Under the heading of sexual abuse we see examples such as: forcing the victim to have sex with other men or women, forcing the victim to pose for sexual photographs and so on. Under emotional abuse we have further examples of coercive conduct such as: forcing the victim to lick the floor, bark, beg or eat cigarettes. Examples of isolation include: forcing the victim to remain in a particular room, disallowing communication with others and so on. These behaviours ought to be recognized as potentially giving rise to a need for protection since they are evidence of a high degree of domination and violation of the victim and present a serious threat to the victim's autonomy.

This sort of threat to autonomy can also arise out of behaviour that is directed toward prohibiting an individual from doing those things that they are lawfully entitled to do. For example, under the heading of Isolation in the "Power and Control Wheel" we see that it includes such tactics as not allowing the victim to go out or not allowing the victim to speak to family or friends. One of the actions identified in the Duluth model as financial abuse is not allowing the victim to get a job. Clearly, this sort of behaviour is completely destructive of individual autonomy and ought to be seen as grounding an entitlement to apply for an order.

The Nevada code includes in the definition of abuse: "compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform".[116] Such a definition of coercive action would bring within its scope the sorts of behaviours that would give rise to a need for protection.

[116] Nev. Rev. Stat., s. 33.018(3).

RECOMMENDATION 6

Compelling another against their will to perform an act which that person has the right not to perform or compelling another against their will to refrain from doing an act which that person has a right to perform should be included in the conduct which entitles an individual to apply for an order under the legislation.

(7) Harassment

Harassment is a behaviour that does not appear on the "Power and Control Wheel". This is due to the fact that the wheel describes behaviour that takes place while individuals are in the domestic relationship. However, our consultation shows that once an abused person leaves an abusive domestic relationship the abuser will often continue the abuse through techniques of harassment. This may consist of persistently telephoning the victim's home or place of employment, repeatedly coming to the victim's residence and demanding entry, watching the victim from a distance, sending harassing letters to the victim, sitting outside the victim's residence, or following the victim in public places. These behaviours threaten the victim's autonomy and privacy. They threaten autonomy in that they may circumscribe the sorts of things that the victim feels safe and free to do. They threaten privacy in that they present a serious invasion into the victim's daily activities which makes normal life impossible.

Illinois has defined abuse to include harassment which is defined as:

> i) creating a disturbance at petitioner's place of employment;
>
> ii) repeatedly telephoning petitioner's place of employment, home or residence;
>
> iii) repeatedly following petitioner about in a public place or places,
>
> iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or

> other place occupied by petitioner or by peering in petitioner's window;
>
> v) repeatedly threatening to improperly remove a child of the petitioner's from the jurisdiction, improperly concealing that child from petitioner or making a single such threat following an actual or attempted improper removal or concealment; or
>
> vi) threatening physical force, confinement or restraint on one or more occasions.[117]

The proposed Nova Scotia legislation defines harassment as including:

> 3(g)(i) insulting, taunting or challenging another in a manner likely to cause substantial emotional distress,
>
> (ii) making repeated communications anonymously or at extremely inconvenient hours, or in offensive language,
>
> (iii) making a telephone call without purpose of legitimate communication, or
>
> (iv) engaging in any other course of alarming or abusive conduct that causes or is likely to cause substantial emotional distress.

Thus, this Nova Scotia provision incorporates some aspects of what the Duluth project would term as emotional abuse in subsections 3(g)(i) and (iv) along with the sort of harassing behaviours that many victims of domestic abuse experience after having left the relationship in subsections 3(g)(ii) and (iii).

The Alberta case law would seem to indicate that simple harassment of the sort referred to in the Nova Scotia legislation is a sufficient ground for granting a restraining order under the present law. In *Motherwell* v. *Motherwell*[118] the defendant woman was found to have harassed the plaintiffs (her father, brother and sister-in-law) by making repeated

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[117] Il. C.S., c. 750, act 60, ss 103(1), 103(6).

[118] *Supra*, note 31.

telephone calls in which she made false allegations of impropriety against the plaintiffs as well as writing numerous letters to the plaintiffs making similar allegations. The Court of Appeal upheld an order of the Court of Queen's Bench granting a permanent injunction against the defendant or anyone acting on her behalf enjoining any communication with the plaintiffs or their children. The court found the defendant's conduct to constitute "nuisance by invasion of privacy through abuse of the system of telephone communications". Given that there is a clear statement from the Court of Appeal that such conduct (even where it does not induce fear of personal injury) justifies permanent injunction, it would seem that legislation providing for the granting of such orders has a clear basis in the existing law. Since telephone harassment was included in that which was seen as justifying a permanent order, it would seem that more invasive forms of harassment such as disturbing the applicant at the workplace or following the applicant or keeping the applicant under surveillance ought, *a fortiori* to be included in the definition of harassment.

RECOMMENDATION 7

Harassment consisting of making repeated telephone calls to the applicant's home or workplace; keeping a person under surveillance by following them or looking in their windows; repeatedly coming to the applicant's house, workplace or school; following the applicant in public places and so on should be included in the sort of conduct that gives rise to the entitlement to apply.

(8) Emotional abuse

In the course of consultation it was noted by a number of victims of domestic abuse that the emotional abuse suffered was in many ways worse and more damaging than the physical abuse. Many of the victims consulted were frustrated by their perception that police, prosecutors and judges were inclined to measure the severity of their situations on the basis of the extent of their wounds. Many victims felt angered by what they perceived as the legal system's requirement that bruises, cuts, or broken bones be shown before the reality of the abuse would be given legal validation.

By and large, emotional abuse that was described by the victims consulted as being of major concern consisted of acts that are set out in the centre of the "Power and Control Wheel". Specific acts that were of concern were repeated and persistent insults. Many victims expressed the view that the emotional harm they suffered from being constantly told that they were stupid, ugly, worthless, repulsive or sexually dirty, or by constantly being called a whore, bitch, slut, cunt and so on was extremely debilitating. They felt that this kind of persistent, continuous verbal abuse was the most damaging and undermining of a victim's personal well-being and the most effective in creating a sense of immobility. Victims who were subject to emotional abuse felt worthless and paralysed.

Researchers in psychology at the University of South Carolina have noted that "Although physical forms of violence have certainly been more compelling to address in the research, psychological forms of abuse can also be devastating. Indeed, some battered women described psychological degradation, fear, and humiliation as constituting the most painful abuse they experienced. This type of emotional abuse is seen as having long-term debilitating effects on a woman's self esteem, which in turn diminishes her ability to cope with the abuse".[119] In that study, the authors identified patterns of emotional abuse as falling into six categories. The category of emotional abuse having the highest negative impact on victims was ridicule which included verbal harassment and insult.[120] This was followed by threats of physical abuse as the second most damaging psychologically abusive behaviour.[121] Obsessively jealous behaviour, threats to leave the relationship, restrictions on the individual's freedom, and damage to property were the other kinds of emotional abuse identified. These four types of abuse were rated as having similar degrees of negative impact.

In her book, *The Battered Woman Syndrome*,[122] Lenore E. Walker examined the definition of psychological torture developed by Amnesty International which consists of "(1) Isolation of the victims; (2) Induced

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[119] Diane Follingstad *et al.*, "The Role of Emotional Abuse in Physically Abusive Relationships" (1990) 5 J. of Family Violence 107 at 108.

[120] *Ibid.* at 113.

[121] *Ibid.* This is not of concern to us since we have identified threats of physical abuse as falling within the definition of physical assault.

[122] Lenore E. Walker, *The Battered Woman Syndrome* (New York: Springer, 1984) at 27.

debility producing exhaustion such as limited food or interrupted sleep patterns; (3) Monopolization of perception including obsessiveness and possessiveness; (4) Threats such as death of self, death of family and friends, sham executions and other vague threats; (5) Degradation including humiliation, denial of victim's powers, and verbal name-calling; (6) Drug or alcohol administration; (7) Altered states of consciousness produced through hypnotic states; and (8) Occasional indulgences which, when they occur at random and variable times, keep hope alive that the torture will cease." Walker reported that of the 435 battered women that she interviewed all reported having been subjected to all eight forms of psychological abuse identified by Amnesty International.

Emotional abuse should be recognized as posing a significant threat to an individual's autonomy. Fundamentally, such abuse is a systematic attack on autonomy and has as its goal the destruction of the other's sense of agency. It is clear that many victims view this sort of abuse as more damaging and more difficult to escape from than physical abuse. Victims reported coming to believe the messages contained in the emotional abuse which resulted in an inability on their part to act so as to protect themselves from further abuse.[123]

Emotionally abusive behaviour which consists of the display of extreme obsessive jealousy and a desire to keep the other under constant surveillance constitutes an invasion of the individual's privacy and autonomy. The technique of control through obsessively jealous behaviour is discussed in the Duluth materials. Essentially, obsessively jealous behaviour is a technique of isolation because it communicates to the victim that there will be serious reprisals for any kind of communication with other persons. In order to understand the way in which obsessively jealous behaviour can be used as a controlling mechanism to deny a victim autonomy and privacy, it is instructive to examine a woman's story used in the Duluth materials to illustrate this phenomenon:

> I couldn't even talk to a man without him accusing me of flirting. He'd go on and on about some guy who said hi to me at a party. All the way home in the car, he'd be accusing me of checking guys out or wanting somebody. Once we stopped at a 7-11

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[123] Follingstad *et al., supra*, note 119 at 107.

> store on the way home from a wedding reception. It was 2 a.m. I went in to get some cigarettes and candy, and he stayed in the car. The guy at the checkout counter made some comment about how it was nice to have a 24-hour health food store available for people like me. I laughed and took my change and left. As I walked toward the car Steve was staring at me and tapping his fingers on the steering wheel. I knew what he was thinking. Sure enough, I got in the car and he started accusing me of coming on to the clerk. The kid was fifteen years younger than me, probably still in high school. The last thing on my mind is making it with a teenager. Steve kept on and on about this kid. Then he pulled the car over and yelled at me to get out. It was 2 a.m., freezing cold and we were still a mile away from home. I told him to calm down and just think about what he was saying, but he kept calling me names and yelling at me to get out of the car. I was scared he'd hit me so I got out and started walking. He peeled out. After I had walked about a block, he came back with the window lowered saying 'Hey slut, want a ride?' 'Hey whore, get in.' Then he'd peel off again, go around the block and start calling me names again and being really vulgar and dirty.[124]

Clearly, this sort of behaviour is destructive of the victim's autonomy. Furthermore, it is clear that such behaviour is driven by a high degree of emotional intensity and therefore that it is reasonable to anticipate that the victim might require assistance from the law in maintaining a severance of the relationship.

In general, the law should recognize that emotionally abusive conduct can be such that it is completely debilitating and crippling to an individual's ability to cope with daily life. Thus, an individual subjected to such behaviour should be entitled to assistance in getting themselves out from under such a situation.

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[124] *An Educational Curriculum*, *supra*, note 79 at 72.

RECOMMENDATION 8

Emotional abuse should trigger the entitlement to apply for an order. Emotional abuse should be defined so as to include: subjecting an individual to degradation and humiliation including repeated insult, ridicule or name calling, making repeated threats to cause the individual extreme emotional pain, making repeated threats in relation to the individual's children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy in relation to the individual which is such as to constitute a serious invasion of the individual's privacy.

(9) Financial abuse

During the course of consultations it was pointed out to us that financial abuse was also a powerful and destructive form of abuse in the domestic context. Situations were described in which victims who were working outside the home were forced by their abusers to turn over their pay cheques and in which those victims never saw a penny of the money they earned. In other cases the victim was forbidden by the abuser from working and was not given access to any of the family funds.

Financial abuse has the effect of ensuring the complete dependency of the victim on the abuser. It makes it impossible for the victim to break free from the control of the abuser. Thus, in cases where the abuser is determined to maintain control over the victim, financial abuse will be an important part of the arsenal of techniques used to achieve that purpose. The question which arises is whether the commitment to protect the individual's interest in property as well as autonomy demands that financial abuse be recognized as the sort of behaviour that should entitle an individual to apply for protection.

The issue of financial abuse gives rise to different views. Because of the potential complexity of the financial relations between married or co-habiting parties there is a concerned that recognition of a category of financial abuse within a domestic abuse statute may create an

inappropriate alternative legal avenue for the playing out of financial disputes between cohabiting or married couples and would, therefore, give rise to undue opportunities for serious misuses of the legal process. There is little doubt that the legal system should be concerned for those who were experiencing financial control by another that is tantamount to systematic theft of the individual's financial resources. Again, however there are opposing views on the issue of whether a legal definition of such abuse could be drafted sufficiently narrowly to ensure that it would not provide an opportunity for mischief by allowing parties to reframe disputes around the domestic financial relationship in an inappropriate forum.

The essential concern in any attempt to create a legal definition of financial abuse is to capture the situation in which an abuser retains complete control over the means of securing financial independence and where an abuser coercively controls the mechanism of economic life with a view to securing the dependence of the victim and depriving the victim of opportunities for economic self-sufficiency.

<u>QUESTION 1</u>: Should financial abuse consisting of the coercive control over financial assets and means of subsistence with a view to ensuring the financial dependency of the victim be included in the sort of conduct which entitles an individual to apply for protection?

(10) Summary of conclusions

A summary of our conclusions about the types of behaviour that should ground the entitlement to apply for an order is set out below.

Conduct potentially identified by the legislation	**Protected individual interests threatened by conduct**	**Corresponding category in the power and control wheel**	**Examples of conduct**
Physical assault	· Physical integrity · Autonomy	· Physical violence · Coercion and threats · Intimidation	punching, kicking, hitting, using weapons, choking, chasing in a car
Sexual assault	· Sexual integrity · Physical integrity · Autonomy	· Sexual violence · Coercion and threats	forced sexual intercourse or activity, assault to breasts or genitals
Destruction of property	· Property · Physical integrity · Autonomy	· Intimidation · Emotional abuse · Coercion and threats	intentionally breaking the victim's belongings, harming the victim's pets
Forcible or unauthorized entry of the victim's residence	· Physical integrity · Autonomy · Privacy · Sexual integrity	· Intimidation · Coercion and threats	entering into the victim's residence without consent
Coercive action	· Physical integrity · Sexual integrity · Autonomy	· Coercion and threats · Economic abuse · Intimidation · Isolation · Emotional abuse	forcing to perform humiliating acts such as barking or eating cigarettes, forcing to have sex with others, forcible confinement
Harassment	· Autonomy · Privacy	· Coercion and threats · Intimidation	repeatedly telephoning, keeping under surveillance, following
Financial abuse (QUESTION AS TO THE APPROPRIATENESS OF ITS INCLUSION)	· Property · Autonomy	· Economic abuse	demanding that victim hand over all money, refusing to allow victim access to any money, preventing victim from getting a job
Emotional abuse	· Autonomy · Privacy · Physical integrity · Sexual integrity	· Emotional abuse · Isolation · Sexual abuse · Minimizing, denying, and blaming	repeatedly insulting, ridiculing, humiliating and calling names, obsessive jealousy,

CHAPTER 2 — SCOPE OF THE LEGISLATION

A. General Discussion and Other Legislative Models

In structuring protection legislation the next question we must ask is: in relation to whom should an applicant be entitled to bring an application for an order? In answering this question it is our aim to extend the protection of the legislation to all those individuals who are victims of the types of conduct identified in Chapter 1 within domestic relationships. The difficult task, however, is to define the realm of the domestic in such a way as to include all individuals viewed as being in need of the protective provisions of the act while at the same time ensuring that the scope of the act does not become too broad. We are seeking to limit the scope of the legislation to the domestic realm. However, we are also seeking to define the domestic realm in a way that includes those individuals whose intimate and domestic arrangements do not reflect the norm.

Preliminary guidance in identifying the relationships to be included in the legislation may be had from other legislative models. For example, the Pennsylvania legislation includes as potential applicants "Family or household members" which is defined as:

> Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.[125]

This would seem to be a relatively comprehensive definition of the relationships included. This definition, however, does seem to focus on family members and does not address the issue of non-intimate adults sharing common living quarters.

The Alaska Code makes protection orders available to victims who are a:

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[125] 23 Pa. C.S.A., s. 6102(a).

> spouse or former spouse of the respondent; a parent, grandparent, child, or grandchild of the respondent; a member of the social unit comprised of those living together in the same dwelling as the respondent; or a person who is not a spouse or former spouse of the respondent but who previously lived in a spousal relationship with the respondent or is in or has been in a dating, courtship, or engagement relationship with the respondent.[126]

This is a much broader drawing of the scope of protection legislation. It specifically includes dating relationships as well as the relation between household members whether they are sexual partners or not. It also expressly includes children.

Other codes make specific reference to disabled adults.[127] Some make specific reference to foster and step parents and children as eligible for protection.[128]

Domestic violence legislation proposed by the Department of the Attorney General in Nova Scotia provides that applications for relief under the legislation may be made by "cohabitants" which is defined to include:

> 3(c)(i) persons who have resided together or who currently are residing together in a spousal relationship,
>
> (ii) persons who together are the parents of one or more children regardless of their marital status or whether they have lived together at any time, or
>
> (iii) persons sixteen years of age or older who are children of the victim and who are currently residing in the same living quarters or who

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[126] Alaska Stat., s. 25.35.060.

[127] The Illinois code protects: "Any high risk adult with disabilities who is abused, neglected or exploited by a family or household member", 750 I.L.C.S. 60/201(ii).

[128] La. Rev. Stat. Ann., s. 46:2132(4), see also Tex. Fam. Code Ann., s. 71-01(b)(3) which also makes specific reference to foster parents and children.

> normally reside with the victim as a member of the family unit.[129]

Since a restraining order is now available as interlocutory relief in either matrimonial proceedings or personal injury proceedings, it would seem that the present situation is one in which an individual may apply for a restraining order against any respondent irrespective of the relationship between the parties. Statistics compiled by the Alberta Department of Justice show that out of 623 applications for restraining orders in 1992, 314 applications were made in the context of a petition for divorce, and 318 were made in the context of a statement of claim. While it appears to be assumed that the applicants initiating the proceedings by statement of claim are in heterosexual cohabiting relationships there are no statistics to reflect the relationship of the parties in the applications begun by this procedure.

B. The Indicia of Vulnerability

The legislation discussed here seeks to deal specifically with the issue of domestic abuse and not with abuse in general. Therefore, the legislation will be limited in the range of relationships within which one will be entitled to apply for an order. Our reasons for limiting the legislation in this manner are these. We recognize domestic abuse as a serious social problem which has drastic and devastating effects on its victims. We further recognize that there are numerous systemic barriers to victims of domestic abuse accessing the legal system. Therefore, we are seeking to provide for a streamlined, uncomplicated and inexpensive legal process to assist those individuals caught in this particularly vulnerable situation. We are not addressing abuse between individuals generally. We assume that individuals experiencing abuse in non-domestic relationships will not experience the same kinds of barriers to escaping the perpetrator or accessing legal remedies and therefore that such individuals may have recourse to the criminal and civil remedies already in existence.

Heterosexual cohabiting couples constitute the core domestic relationship to which the legislation is seeking to extend protection. Indeed, it is anticipated that many of the applications made under the legislation will arise in this context. It is also clear that this is not the only type of intimate or domestic relationship and, therefore, it is not the only type of

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[129] *Supra*, note 77.

relationship that gives rise to the particular sorts of vulnerabilities that justify the extension of the special legal process being proposed.

In defining the scope of the legislation and the relationships within which orders should potentially be granted we should look to factors that would indicate that some of the systemic barriers to obtaining legal protection are present. Thus, in circumscribing a sphere of the "domestic" to which the legislation will apply we should seek to identify relationships which contain the key factors which give rise to these barriers. The indicia of the sort of vulnerability that gives rise to barriers to access to justice that we have identified are the following:

- the intimate nature of the relationship,
- the potential in the relationship for emotional intensity,
- the reasonableness of the inference that the relationship would be presumed by the parties to be one of trust,
- the reduced visibility of the relationship to others or the element of privacy which keeps the goings-on in the relationship unknown to others,
- dependency or lack of ability of one or both of the parties to unilaterally leave the relationship, and
- ongoing physical proximity of the parties.

In the discussion that follows we shall refer to these factors as the indicia of vulnerability. Not all types of relationships we will want to include within the legislation will have every one of these qualities. However, these are all factors that should be considered in assessing the advisability of including the type of relationship in the legislation.

C. Individuals Sharing the Same Living Quarters

Most relationships that will be of concern will be covered under the general heading of those individuals sharing the same living quarters. These will include heterosexual relationships of cohabitation. Indeed, the vast majority of cases are likely to arise in situations of heterosexual cohabitation whether married or unmarried. Clearly there is no distinction to be made between married and unmarried couples in this regard. Both married and unmarried heterosexual cohabiting relationships may equally be characterized by intimacy, emotional intensity, expectation of trust,

reduced visibility, dependency, and ongoing physical proximity. While the incidents of marriage do not attach to an unmarried cohabiting couple, protection from abuse ought not to be viewed as an incident of marriage. Rather it should be viewed as flowing necessarily from each individual's right to physical and sexual integrity, autonomy, privacy and property.[130]

Homosexual couples may also experience abuse in their cohabiting relationships and may be in need of protection.[131] Clearly, relationships of cohabitation between homosexuals may equally be characterized by the indicia of vulnerability noted above. Homosexual individuals who are experiencing abuse at the hands of their intimate partners may experience even more difficulty than victims of abuse in heterosexual relationships in leaving the situation or accessing existing services for victims of domestic abuse. First, gays and lesbians may be reluctant to seek help in an abusive situation since to do so could require that they reveal their homosexuality which could have serious negative ramifications.[132] Of course, in revealing the abuse, the perpetrator's sexual orientation would be revealed along with the victim's. A victim fearing an abusive partner might be even more afraid of disclosing the abuse if the victim felt that disclosure of any kind could result in the perpetrator's loss of a job or alienation from family and friends. Secondly, homosexual victims are often concerned that revealing abuse within homosexual relationships will result in an increase in the social disapprobation already existing in relation to homosexuality.[133] They may

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[130] See above at pp. 67-70.

[131] See M. Bologna, *et al.*, "Violence in Gay Male and Lesbian Relationships: Implications for Practitioners and Policy Makers" (1987), Paper presented at the Third National Conference for Family Violence Researchers, Durham, N.H. This was a survey of gay and lesbian college students in New York. Its findings were that 18% of gay men and 40% of lesbians reported violence in their current intimate relationship. In a study done by Janice Ristock it was found that 20% of the lesbian women surveyed reported that they were survivors of psychological, physical and/or sexual violence in their lesbian relationships. It is noted that the respondents in this survey were primarily white, middle-class women and therefore that the survey cannot be taken to reflect the experience of working-class lesbians or lesbians of colour. See Janice L. Ristock, "Beyond Ideologies: Understanding Violence in Lesbian Relationships" (1991), 12 Canadian Woman Studies 74 at 75.

[132] See Vivian Smith, "Opening Doors on Gay Partner Abuse" *Globe and Mail* (July 29, 1993) A11; Patricia King, "Not So Different, After All — Justice: The Trials of Gay Domestic Violence" *Newsweek* (Oct. 4, 1993) 75; Donna Laframboise, "Abuse in Same Sex Pairings Overlooked" *The Toronto Star* (June 21, 1993) A17.

[133] This is summed up in the words of a Toronto social worker Nick Mule who notes that homosexuals feel that if they come forward with their experiences of abuse the

(continued...)

also feel that it is a betrayal of the homosexual community generally to reveal abuse.[134] Lesbian women may feel that others will not take allegations of abuse seriously since the popular perception may be that women do not pose any real threat to the physical or sexual integrity of others.[135] Few shelters or services specifically for homosexuals exist in Canada and it is often the case that lesbian women feel uncomfortable in shelters for heterosexual victims of domestic abuse.[136] Likewise, gay victims of domestic abuse feel uncomfortable in hostels for men.[137] Given that there are already so many added difficulties for homosexual victims of domestic abuse in seeking help and protection, it would be wrong to exclude homosexuals from the protection of the legislation.

The important point to bear in mind in this discussion is that all individuals are entitled to protection from violence and abuse. Clearly, the issue of whether homosexual unions should be recognized and supported by the state is a controversial one.[138] However, this basic protection issue does not engage the separate issue of whether homosexual relationships should be recognized by the state and treated in the same manner as heterosexual marriages. Nor does the issue of protection from abuse engage the issue of whether sexual orientation is or should be included in human rights statutes as a prohibited ground of discrimination in employment or the provision of services. To extend protection from abuse to homosexual persons is simply to recognize the inviolability of each individual. Clearly, under the present law there would be no legal impediment to a homosexual person bringing an action in tort against an abusive partner and applying

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[133](...continued)
heterosexual community will respond by saying: "They beat each other up too, that's another thing that's wrong with them" (quoted in Smith, *supra*, note 133). See also Claire M. Renzetti, "Violence in Lesbian Relationships: A Preliminary Analysis of Causal Factors" (1988) 3:4 Journal of Interpersonal Violence 381 at 385.

[134] Renzetti, *supra*, note 133 at 385; and see Ristock, *supra*, note 131 at 74.

[135] King, *supra*, note 132.

[136] *Ibid.*, and see Renzetti, *supra*, note 133 at 395.

[137] *Ibid.*

[138] Recent headlines include the following: Diana Coulter, "Province Challenges Gay Ruling: Courts Shouldn't Make Law — Rostad" *Edmonton Journal* (May 6, 1994) A1; Martin Mittelstaedt, "Ontario to Allow Free Vote on Gays: Spousal Rights Volatile Issue" *Globe and Mail* (May 11, 1994) A1; Edward Greenspon, "Delegates Divided Over Same-Sex Family Question" *Globe and Mail* (May 16, 1994) A5.

for a restraining order as interlocutory relief. Thus, we see no reason why a domestic abuse statute should not include homosexual relationships within the scope of its protection.

Members of an extended family occupying a single residence may also pose a threat of abuse. Such relationships may be characterized by intimacy and emotional intensity, may give rise to an expectation of trust, may take place in situations of ongoing physical proximity, and may not be visible to outside observers. Individuals may not be in a position to unilaterally leave relationships with extended family members and such relationships may be characterized by dependency. Thus, there is a good *prima facie* case for considering the inclusion of extended family relations within the purview of the legislation.

In consultation with members of the immigrant community, a concern was raised about abuse of daughters-in-law by their mothers-in-law when the son and daughter-in-law live with the son's parents.[139] However, it was noted that although such women may have a great deal of power in relation to daughters-in-law living in the parents' home, they are generally disempowered in relation to the general society and therefore do not pose a significant risk to the daughter-in-law once she has managed to leave the residence of the parents.

It was also noted that a victim who rebels against an abusive spouse may face reprisals from members of the couple's extended family. Reports were that this would generally occur in a situation where male members of the extended family perceived that a friend or relative was having difficulty with his wife.[140] Members of an extended family living in the same residence might also pose a risk of sexual abuse. Therefore, we conclude that it is appropriate that extended family members living in the same residence should come within the purview of the legislation.

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[139] The Indo-Canadian Women's Association has produced a video dealing with woman abuse which looks at the problem of abuse of women by their mothers-in-law. See: *The Ground Shook Beneath Her*.

[140] It was also noted that this kind of behaviour could be engaged in by members of the abuser's extended family who were not sharing living quarters, or even by friends or other members of the community. This issue will be dealt with under the heading of "individuals acting as agents of a primary abuser".

There may be individuals suffering from abuse by others occupying the same residence but with whom they do not share any sexual, intimate or family relationship. For example, disabled and elderly individuals may live with other adults who are not sexual partners or family members. Immigrant women are often employed as live-in nannies and may suffer abuse from the other adults living in the household who are again neither sexual partners nor family members. Such individuals may be in situations of extreme vulnerability, dependency, reduced visibility and physical proximity and should, therefore, also be included in the legislation. By including household members within the relationships covered by the legislation protection would be extended in these situations.

D. Relationships Beyond the Shared Residence

(1) Former cohabitants

The threat of abuse in relationships beyond the household may also give rise to the need for protection. There may be abuse between those who share or have shared an intimate relationship but who do not live together. This can be the case in a dating situation or in a situation where the parties were formerly cohabiting. Obviously, the legislation should include persons in intimate relationships who were formerly cohabiting as well as those who are cohabiting at the time of the application. The period of separation and discontinuation of cohabitation may be the time of the most serious threat to a victim of domestic abuse.[141] Furthermore, the very nature of an application for a protective remedy in the form of a no-contact order is such that the parties will either have ceased to cohabit or that the applicant will be seeking help in bringing about a cessation of cohabitation. Thus, it is clear that individuals who have formerly cohabited in an intimate relationship should be included in the legislation.

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[141] Lenore Walker, "Battered Women Syndrome and Self-Defense" (1992) 6 Notre Dame Journal of Law, Ethics & Public Policy 321 at 333; Kathleen Hofeller, *Social, Psychological and Situational Factors in Wife Abuse* (Palo Alto: R. And E. Research Associates, 1982) at 510, the author notes that "The action of leaving to avoid the abuse is often accompanied by increased violence as well as other negative consequences, financial and social". See also, L. MacLeod, *Battered but not Beaten: Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 20; Michael D. Smith, *Woman Abuse: The Case for Surveys by Telephone*, The Lamarsh Research Programme Reports on Violence and Conflict Resolution, Report #12 (Toronto: York University, 1985) at 29.

(2) Dating violence

Those individuals who are victims of violence at the hands of their intimate partners with whom they do not cohabit must also be considered. The seriousness of dating violence is only recently being brought to light. In a national study of abuse in dating relationships in Canada, Walter DeKeseredy and Katharine Kelly surveyed men and women attending universities and colleges. Thirty-five percent of the women reported having been physically assaulted by a dating partner since having left high school.[142] Twenty-two percent of the women reported having been physically assaulted by a dating partner in the 12 months preceding the survey.[143] 13.7% of the men surveyed reported having used physical abuse in a dating relationship in the past 12 months and 17.8% of the men reported having physically abused a dating partner since leaving high school.[144] Physical abuse included: throwing things at the other, pushing, grabbing, shoving, slapping, kicking, biting, punching, hitting with an object, beating the other up, choking, threatening with a knife or gun, and using a knife or gun.[145] The findings led the authors to conclude that "very serious forms of abuse are quite common in campus dating".[146]

Victims of violence in dating relationships may be as vulnerable and as needful of protection as victims who share a residence with their assailant. The elements of intimacy, emotional intensity, expectation of

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[142] Walter DeKeseredy & Katharine Kelly, "The Incidence and Prevalence of Woman Abuse in Canadian University and College Dating Relationships" (1993) 18:2 Canadian Journal of Sociology 137 at 152. For further discussion of this study see: Donn Downey, "Students Fear Abuse on Dates" *Globe and Mail* (Feb. 8, 1993) A1-A2; Peter Hum, "Dating Abuse Rampant" *Calgary Herald* (Feb. 8, 1993).

[143] *Ibid.*

[144] *Ibid.*

[145] *Ibid.* at 153.

[146] *Ibid.* at 155. For further discussion of dating violence see: Gordon E. Barnes, *et al.*, "Courtship Violence in a Canadian Sample of Male College Students" (1991) 40 Family Relations 37; Walter DeKeseredy, "Woman Abuse in Dating Relationships: An Exploratory Study" (1989) 14 Atlantis 55; Walter DeKeseredy, *Woman Abuse in Dating Relationships: The Role of Male Peer Support* (Toronto: Canadian Scholars' Press, 1988); Mary R. Laner & Jeanine Thompson, "Abuse and Aggression in Courting Couples" (1982) 3 Deviant Behaviour 229; Sally Lloyd, "The Dark Side of Courtship: Violence and Sexual Exploitation" (1991) 40 Family Relations 14; David Sugarman, "Dating Violence: Prevalence, Context, and Risk Markers" in Maureen A. Pirog-Good & Jan E. Stets, eds., *Violence in Dating Relationships: Emerging Social Issues* (New York: Praeger, 1989); Fern Shen, "My Boyfriend Beats Me Up" *Montreal Gazette* (Sept 5, 1993) F6; Michele Ingrassia *et al.*, "Boy Meets Girl, Boy Beats Girl" *Newsweek* (December 13, 1993) 66.

trust, and reduced visibility to others potentially characterize dating relationships. Unavoidable physical proximity and ongoing vulnerability may also be present particularly where the victim is young and without independent means of avoiding contact with the perpetrator. Students who are victims of dating abuse may have to leave schools or colleges in order to escape violent dating partners attending the same school if they are not afforded any other means of protection.[147] Peer pressure to be in a dating relationship, perception of a lack of power to exit a peer group shared by the abuser, and lack of independent resources to leave the school which the abuser attends may be real barriers to young persons escaping dating violence.[148]

Recently, social workers in Montreal developed a video on teen dating violence in response to increasing concerns about the prevalence of abuse in teenage dating relationships.[149] The video outlined suggestions for teens who were victims of abuse. These included going to a shelter for victims of domestic abuse, obtaining a peace bond and calling the police. Thus, protection issues are increasingly being recognized in the dating situation.

The issue of including dating relationships in a domestic abuse statute gives rise to differences of opinion. One view is that to fail to give protection to victims of violence in dating relationships may send a very destructive message to young perpetrators of dating violence: that there are few consequences to someone who assaults an intimate partner. This learning may then carry over into an abuser's adult life. A clear message at this time that the law will give protection to victims of abuse from intimates would potentially be an important step in debunking the attitude on the part of young abusers that victims of intimate violence are powerless, vulnerable and unable to do anything about their situations. It will generally be the case the lesser the permanence of a relationship the less the individual will require help from the law in breaking free from that relationship. However, it is argued that the law should be open to evidence which conflicts with and ultimately may displace that assumption.

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[147] Michele Ingrassia *et al.*, *supra*, note 146 at 68.

[148] *Ibid.* at 66.

[149] Valery Labranche, "Taking Control: How Girls Can Deal With Boys Who Abuse" *Globe and Mail* (April 20, 1994) A10.

Thus, one view is that in some cases, dating relationships should be considered by the court to be characterized by the indicia of vulnerability. In such cases it would potentially be appropriate to hear the application and grant any appropriate relief under the statute.

Another view on this issue is that the dating relationship is too far removed from the domestic context and that within an impermanent and non-cohabiting situation, victims ought to have recourse only to the existing legal remedies and ought not to be brought within such a special and extraordinary statute aimed at the pressing social problem of abuse within the home. From this perspective peer pressure to date and the problems that it gives rise to are not within the legitimate scope of domestic abuse legislation.

(3) Individuals acting as agents for a primary abuser

As was noted in the discussion on extended families,[150] our consultation suggests that there is a difficulty with extended family members or friends of an abuser engaging in abusive conduct toward a victim in an attempt to bring the victim back to the abuser or punish the victim for attempting to leave the abuser. This situation will be dealt with in part by the requirement that the no-contact order include a prohibition against the respondent enlisting the help of others to communicate with or contact the applicant.[151] However, such a provision speaks only to the respondent and does not address the situation of individuals acting on behalf of the respondent of their own motion. Thus, where there is a danger of abuse from individuals acting on behalf of a primary abuser, the applicant ought to be able to obtain a no-contact order in relation to them as well as in relation to the primary perpetrator of the abuse. The only remedy that should be made available in relation to such secondary respondents is an order of no-contact.

(4) Others

There also may be a threat of abuse between individuals who neither share an intimate relationship nor live in the same residence. In the course of consultation it was noted by a number of victims of domestic abuse that after an abused spouse had left the abuser, the abuser would harass and

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[150] See above at p. 97.

[151] See Recommendation 10 below at p. 108.

threaten with violence, not only the former spouse but also relatives and friends. Parents and siblings of the former spouse seemed to be at a particular risk. One woman was concerned that she was at risk of violence at the hands of her former brother-in-law who had killed her sister in an incident of domestic violence and who had been released on parole after serving 10 years for second-degree murder. Another woman who had left her husband and was in hiding from him was concerned for her parents since he was beginning to threaten them in his frustration at not being able to find her.

The situation of the abuser who threatens or harms the friends or relatives of a spouse will be accommodated by a provision which allows an applicant to include other consenting parties who are also in danger from the respondent. The situation of the woman who is at risk from her sister's murderer would ideally be included under the following general section which would allow the court to include relationships which are characterized by the indicia of vulnerability.

E. A General Section Setting Out the Indicia of Vulnerability

We are of the view that it is important to specifically identify the relationships listed above that ought to be covered by the legislation. However, we are also concerned that the legislation should not preclude an individual who is in a relationship which is characterized by the indicia of vulnerability identified above from having access to the remedies made available under the legislation. We are of the view that where the indicia of vulnerability are present in a relationship, barriers to accessing legal remedies are likely also to be present. Therefore, we recommend that the court be given the power to make an order in a situation where the parties do not fall within the identified categories but where in consideration of the following factors in the opinion of the court it would be unfair to deny the protection of the legislation to the applicant:

- dependency or lack of ability of one or both of the parties to unilaterally leave the relationship,
- the intimate nature of the relationship,
- the potential in the relationship for emotional intensity,
- the reasonableness of the inference that the relationship would be presumed by the parties to be one of trust,

- the reduced visibility of the relationship to others or the element of privacy which keeps the goings on in the relationship unknown to others, and
- ongoing physical proximity of the parties.

RECOMMENDATION 9

It is recommended that the legislation be drafted to allow that an application may be brought by an individual against anyone with whom the applicant is in a relationship in which the court considers the indicia of vulnerability to be present. These indicia are:

- **dependency or lack of ability of one or both of the parties to unilaterally leave the relationship,**
- **the intimate nature of the relationship,**
- **the potential in the relationship for emotional intensity,**
- **the reasonableness of the inference that the relationship would be presumed by the parties to be one of trust,**
- **the reduced visibility of the relationship to others or the element of privacy which keeps the goings on in the relationship unknown to others, and**
- **ongoing physical proximity of the parties.**

Such relationships of vulnerability include but are not limited to:

- **relationships in which the applicant and the respondent share living quarters,**

- **relationships in which the applicant has formerly cohabited with the respondent as an intimate partner.**

CHAPTER 3 — TYPES OF RELIEF

In this chapter we will discuss the sorts of relief to be made available to an applicant. In respect of each head of relief, a question may arise as to whether the Provincial Court could be given jurisdiction to grant such relief given the constrains imposed by section 96 of the Constitution Act, 1867. It is assumed that it will be desirable to give the Provincial Court as much jurisdiction as possible under the legislation since the goal of accessibility is paramount. However, the details of the discussion of jurisdiction and the limitations imposed by section 96 will be in Chapter 4. The purpose of the discussion at this point is to determine what sort of relief is appropriate and desirable in principle given the purposes of the legislation.

In assessing the sorts of remedies to be made available under the legislation it is useful to examine the sorts of remedies proposed in other Canadian jurisdictions. We have, therefore, set out in full in Appendix A the relevant sections of the legislation from Saskatchewan, the British Columbia bill, and the Nova Scotia proposal.

We have structured our discussion of remedies by breaking it down into three types. The first is "Protection Remedies" which consist of the no-contact provisions, custody and access, exclusion from the residence, as well as the provisions with respect to weapons or firearms. The second category is "Property and Compensation Remedies". This category is made up of remedies concerning the possession or return of personal property, and payment of court costs or other expenses incurred as a result of the abuse. The third category is that of "Prevention Remedies" which centre on orders requiring counselling.

A. Protection Remedies

(1) No-contact provisions

(a) Essential protection provisions

One of the difficulties surrounding restraining orders as they now exist is that the orders may not specify with sufficient precision exactly what sort of conduct is being prohibited. Thus, both the litigants and the police may have difficulty interpreting the terms of the order. The police officers on the Edmonton Family Violence Follow-Up Team noted that the

more a restraining order allowed for some but not other contact the more difficult it was to enforce. Thus, they felt that to be effective, an order ought to prohibit all contact, direct or indirect, with the applicant. They also felt that no-contact orders with exceptions for contact in matters related to the children of the parties were extremely problematic since it was impossible for the police to tell at the time of a complaint whether the order had been breached. Thus, it would seem that the clearer and the more inflexible the primary no-contact provision is, the less difficulty both the police and the litigants have in understanding and complying with the terms of the order.

A typical no-contact provision in a restraining order reads:

> The Respondent is hereby restrained from interfering with, molesting, telephoning or having any contact, either direct or indirect with the Applicant.

Some orders may add that the respondent is prohibited from going within a certain distance of a specified municipal address. Difficulties identified with this sort of order are first, that confidentiality of the applicant's address may be essential to the applicant's safety and second, that the applicant may change residences during the currency of the order rendering it ineffective.

The Nova Scotia, Saskatchewan, and B.C. models couch the no-contact provisions in qualified terms. For example, subsection 7(1)(b) in the Saskatchewan Act dealing with no-contact provisions of a Protection Order provides that the order may restrain the respondent from visiting specified places. Subsection 7(1)(c) allows the court to make an order restraining the respondent from making any communication likely to cause annoyance or alarm to the victim. These are the only sections dealing with no-contact in respect of a protection order. We are of the view that these sections are inadequate for a number of reasons. First, in addition to the difficulties already identified with specifying a municipal address in an order, orders which only require that the respondent stay away from an identified place leave the respondent free to make contact with the applicant at any place other than that specified in the order.

Furthermore, an order which prohibits the respondent from making communications "likely to cause annoyance or alarm" creates two categories

of communication with the applicant: those likely to cause annoyance and alarm, and those not likely to do so. We view the interpretation of this qualification as being fraught with potential difficulties likely to undermine the effectiveness of the order. The determination of whether the order has been breached necessarily becomes an exercise in evaluating the likelihood that a communication would cause annoyance or alarm. It is unclear whether an objective or subjective test is to be applied in making this evaluation. We feel that the requirement to make such a judgment in order to determine whether a breach has taken place is unfair to both the applicant and the respondent, and cumbersome for the police and the courts.

Perhaps the unfairness to the respondent provides the most convincing argument that such an approach ought to be avoided. A respondent who is subject to such an order would reasonably assume that contact with the applicant was allowed by the order so long as the contact was not likely to alarm or annoy the applicant. To determine whether any particular communication would be in violation of the order, respondents must evaluate, on the best of their information and understanding, whether the communication is likely to have such an effect, and further whether a police officer or judge would view the communication as being likely to have such an effect. It may often be genuinely impossible for the respondent to make such an evaluation with any degree of accuracy. Couched in these terms, the order itself does not provide sufficient specificity to allow the respondent to have a firm understanding of what sort of conduct is prohibited by its terms. Of course, the respondent could comply with the terms of the order by avoiding all communication but it is unreasonable to anticipate that respondents in such circumstances would be likely to err on the side of caution in this manner.

As was noted above, orders with qualifications as to what sort of contact or communication is allowed and what sort is prohibited are also a source of frustration and confusion for law enforcement officers. We therefore conclude that in structuring the no-contact provisions the legislation should be very clear and unequivocal in prohibiting all contact whatsoever with the applicant. It is our view that maximum certainty and comprehensiveness in no-contact provisions best serves the goals of protection, enforceability and fairness.

RECOMMENDATION 10

The legislation should empower the court to make an order prohibiting the respondent from making direct or indirect contact with the applicant. For further clarity and to assist in compliance with and enforcement of the order the meaning of "no-contact" should be explained. The order should give examples of the sorts of things that it includes in the meaning of contact. It should not, however, limit the meaning of "no-contact" to the examples set forth in the order. Things listed in the meaning of "no-contact" should include:

- **telephoning the applicant at the applicant's residence, place of employment or school,**
- **going to the applicant's place of employment, school or residence,**
- **approaching the applicant if the respondent accidentally sees the applicant in a public place,**
- **watching the applicant or the applicant's residence, place of employment or school from a distance,**
- **communicating with the applicant in any other way including but not limited to mail, fax, telegram, or any other form of written communication, and**
- **communicating or attempting to communicate with the applicant in any of the above ways by enlisting the help of any other person.**

(b) Parties who have to be in contact as a result of shared parenting responsibilities

While it would seem preferable from an enforcement point of view to have a very comprehensive and inflexible no-contact provision, our consultation suggests that in some instances such an order would not be feasible. Some victims of domestic abuse reported that they shared parenting responsibilities with the respondent. This sometimes required them to be in contact with the abusive party. Day-to-day issues relating to the children did not seem to pose a serious problem. However, emergencies with the children's health or situations in which major decisions had to be made about a child's future resulted in a need for the victim and the perpetrator to make contact. It was noted, however, that such contact often provided an opportunity for further abuse or threats of abuse.

We conclude that it is important to attempt to anticipate and deal with such situations. In such circumstances, it is best to structure the logistics of the anticipated contact in such a way as to minimize the possibility of such contact being used as a means of continuing abuse. It is to be noted that this discussion does not address the issue of the respondent's contact with the children themselves but rather with the applicant in carrying out responsibilities related to the children. The question of the respondent's contact with the children is addressed in the section relating to custody and access below.

(c) Controlled contact

Such a provision could also be used to facilitate some controlled contact between the parties for the purpose of discussing reconciliation. Where the applicant agreed to such a provision in an order, the order could set out a procedure whereby the parties could have contact with each other through an intermediary or in a supervised setting in order to discuss the possibility of reconciliation or other issues relating to the relationship. Such a condition ought not, however, be included in an order without the free and full consent of the applicant.

RECOMMENDATION 11

Where the circumstances of the case lead to the inference that a protection order is needed but where, as a matter of practical necessity or at the request of the applicant, the parties must, or could potentially desire to, have safe contact with one another, the order should be very specific structuring the terms of that contact in order to ensure that it does not:

(a) provide an opportunity for continued abuse or

(b) make it impossible for the police to effectively enforce the order.

Thus, orders should be required to set out in detail the logistics of how and when contact should take place to fulfil parenting or other family responsibilities, or to discuss reconciliation or other aspects of the relationship. Where possible it should be specified that such contact take place through an intermediary.

It should be specified that orders with a blanket exception for contact with the applicant in connection with the children should not be given.

(d) Orders restricting the respondent's use of a residence

Some victims of domestic abuse may not have the desire or the ability to leave their abusers. In such cases, the proposed Nova Scotia legislation allows the court to grant an order permitting the respondent to remain in the same residence as the applicant but which limits the respondent's use of the residence.[152] Such orders are only to be granted upon the express and

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[152] *Supra*, note 77 at s. 4(1)(p).

voluntary request of the applicant. The difficulties surrounding the compliance and enforcement of such an order seem obvious. In a family situation there would generally be no external observer to monitor the respondent's compliance with the order. Unless the breach of the order were also to constitute an offence such as an assault, there would be a great deal of difficulty in determining after the fact whether a breach of the terms of the order had taken place.

Notwithstanding these difficulties, we have considered whether a power to grant such an order would be potentially useful in a narrow set of situations. One such situation that was identified in consultation was that of a group home of disabled adults where all the residents are under an obligation to remain in the group home. Where one resident is being physically or sexually abused by another, the victim could, of course, apply to the court for a restraining order for protection from the abusing resident. However, such an order may be completely ineffectual where the person against whom it is granted does not have the legal right to leave the group home. In such circumstances it might be of benefit to have the power to prescribe the scope of the abusing resident's use of the residence. Those who were in charge of the supervision of the group home could then potentially use the order to protect the other resident. However, it would seem that, given that there is a pre-existing obligation on the part of the supervisors of the group home to protect residents from injury at the hands of others, it would be redundant to reiterate such an obligation on the part of the supervisors by imposing such an order on the resident. Such a situation would perhaps be better dealt with by the enforcement of the obligation on the part of the supervisors of the group home to protect residents from injury inflicted by other residents.

Another argument in favour of granting an order restricting the respondent's use of a joint residence arises out of a concern about the diligence of police response to calls about domestic abuse. Victims of domestic abuse consulted reported they felt that the real usefulness of a restraining order often laid primarily in the effect that it had on the police. They observed that the response of the police to their calls about domestic abuse was significantly different where an order was in place. A number of victims said that where they called the police after an assault and could not provide sufficient physical evidence of the assault, the police would ask whether there was a restraining order in place and if there was not, they

would say that nothing could be done. By contrast, if a restraining order was in place then the police would be more likely to act. Some felt that a restraining order provided an institutionally credible means of proving to the police that they were not crazy. Some felt that this was really the only thing that restraining orders were useful for because they did not affect the conduct of their abusers to any significant degree.

Thus, where the parties are not at the stage of separation but there is a continuing risk of harm to the applicant, the power to make an order restricting the respondent's use of the residence could be beneficial. Such a provision would at least provide an applicant with more to go to the police with in the event of an incident of domestic abuse occurring in the home.

The real problem here, however, may be that the police are not effectively responding to first reports of domestic abuse where no court order is in place. To try to remedy this difficulty by creating the possibility for more orders rather than by remedying the source of the problem is not an advisable strategy for reform.

RECOMMENDATION 12

Because of the difficulties of enforcement of orders restricting the use of a residence, it is recommended that a power to grant such orders should not be created by the legislation.

(e) Orders prohibiting assault or domestic violence

Section 4 of the proposed Nova Scotia legislation contains a provision allowing the court to prohibit the respondent from subjecting the applicant to domestic violence. Likewise section 8 allows the court to order the respondent to refrain from harassing the applicant.[153] Most American codes include provisions allowing the court to order the respondent to refrain from assaulting the applicant.[154] It would seem that the primary purpose of such an order is to send an authoritative message to respondents that they ought not to be engaging in acts of domestic violence or

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[153] *Ibid.* at s. 4(1)(a) & s. 8(3)(a).

[154] Hart, *supra*, note 54 at 15.

harassment. Such an order might be useful in putting the police on notice of the seriousness of the situation and inducing them to respond more quickly to a call reporting domestic violence where such an order was in place. There are, however, opposing views about the desirability of such a provision.

One view is that the existence of a proliferation of such orders might foster a two-tiered system of response to calls of domestic violence, those where an order is in place being given priority over calls by victims who have no order. Secondly, there is a concern that such an order is always redundant since both the civil law of trespass to the person and the criminal law of assault already prohibit assault. On this view, to further prohibit a respondent from assaulting the applicant may be taken to imply that there was previously a freedom to do so. This perspective holds that the law ought not to endorse such an implication and therefore that a provision allowing the court to prohibit assault ought not to be created.

The other view is that there is often great utility in orders which do no more than to state the substance of the law. This view holds that an order prohibiting an abuser from continuing the abuse may indeed be very effective in stopping that abuse by alarming the abusers and alerting them to the serious nature of their conduct.

QUESTION 2: Should the legislation create a power to order the respondent to refrain from assaulting the applicant?

(f) Contact with persons other than the applicant

In some cases of domestic abuse the respondent may be threatening violence to other people having close connections with the applicant. The respondent may threaten the applicant's children, the applicant's parents or the applicant's friends. Such situations pose special difficulties that must be addressed. Our consultation suggests that it is sometimes the case that restraining orders granted under the present system include a provision prohibiting the respondent from making contact with and harassing the applicant's parents or other third parties. It is unclear as to whether the court has jurisdiction to make such an order under the present law when the parents or others are not parties to the action and have not appeared

before the court. While this may be sloppy procedure and of dubious jurisdictional foundation, it may also, in many cases, be necessary and desirable to prevent injury to persons connected to the applicant and, as a result of that connection, threatened by the respondent.

It may be that such persons would be motivated and able to apply in their own right for an order restraining the respondent from harassing them. However, given the expense and trouble of making an independent application in respect of what is essentially the same set of circumstances, it might be preferable to allow for the other parties to consent to being named in the order obtained by the applicant.

Situations in which the respondent poses a risk to children in the care of the applicant will be dealt with under the section on custody and access.

RECOMMENDATION 13

The legislation should provide for the possibility of persons other than the applicant to be included in the order. The best procedure for this would be to allow others to consent to being included in the no-contact provisions of the order where the evidence indicates that they are also at risk of injury or harassment by the respondent.

(g) Mutual orders of no-contact

Mutual orders are orders where both the applicant and the respondent are prohibited from making contact with the other and the penalties for violation of the order are the same for each. The question of whether mutual orders should be granted raises a number of difficulties. First, our consultation with victims of domestic abuse reveals that the mutual restraining provisions are preferred by perpetrators since the mutual provisions give them a number of means of manipulating or intimidating the victim. Generally, the parties' understanding of a mutual order is that if the applicant initiates contact with the respondent that the order will no longer be enforceable as against the respondent and that the applicant will be arrested. It was reported that the tactic of some

respondents was to leave phone messages requesting that the applicant call back, perhaps alleging some emergency with the children. When the applicant called back, the respondent would document the response and tell the applicant that the order was no longer enforceable because the applicant had breached the terms of no-contact. Further, it was reported that perpetrators would persuade victims not to report the respondent's violation of the order by convincing the applicant that she would be arrested if she were to call the police since he would be able to persuade the police that the violation of the order was hers and not his.[155] Other victims of domestic abuse reported that they felt offended by the terms of mutual orders. They felt that it was unfair that they should be stigmatized by the fact of the order against them when they had done nothing wrong.

The granting of mutual orders without evidence of mutual abuse has been roundly criticised by commentators for a number of reasons related to those reported by the victims of domestic abuse with whom we consulted. It has been argued in the American context that the granting of mutual orders without proof that both parties have engaged in abusive conduct violates the non-abusive party's right to due process.[156] It has also been argued that mutual orders send a message to both the abuser and the victim that the victim is equally to blame for the abuse. This may reinforce the victims' beliefs that they are responsible for abuse as well as perpetrators' beliefs that the abuse is caused by external factors.[157] It has also been noted that mutual orders may be used in other proceedings as evidence supporting an inference that a victim of domestic abuse is abusive or violent.[158]

Another difficulty with mutual orders is that they may potentially discourage police enforcement because police officers are often uncertain whom to arrest.[159] Where one party complains of a breach of a mutual

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[155] We are using gendered personal pronouns in these examples since all of the victims that we interviewed were women.

[156] See Elizabeth Topliffe, "Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not" (1992) 67 Indiana L.J. 1039 at 1056 *et seq.*; *Fitzgerald* v. *Fitzgerald*, 406 N.W. 2d. 52 (Minn. App. 1987); *Marco* v. *Superior Court*, 17 Ariz. App. 210 (1972).

[157] Topliffe, *supra*, note 156 at 1060.

[158] *Ibid.* at 1062 *et seq.*

[159] *Ibid.* at 1062; and see Hart, *supra*, note 54 at 19.

protection order, it is often impossible for the police to determine which party is in violation of the order. Thus, the perpetrator in possession of a mutual order may breach the order but claim upon the arrival of the police that it is the abused person who is in breach. Where both parties are subject to the order, the police may feel that they are faced with an impossible assessment of credibility in deciding which person ought to be arrested. The course of action followed may be either to fail to enforce the order at all or to arrest both parties. If the police officer chooses not to enforce the order, effective protection is not being provided. Where the police officer chooses to arrest both parties, the victim may be re-victimized by the system in a way that is both traumatizing and discouraging to the seeking of help in future situations. Such difficulties may be avoided if the court awards the order only as against the perpetrator of the abuse.

In Missouri the Protection From Domestic Abuse Act specifically prohibits the granting of mutual orders unless both parties have filed applications for orders against one another and both parties have shown cause for the granting of the order against the other.[160] The Pennsylvania legislation has been interpreted to require this as well.[161] Thus, mutual restraining orders are not granted unless both parties are shown to have engaged in abusive conduct toward the other. The Alaska Marital and Domestic Relations Act provides that the court may not issue a restraining order that prohibits the petitioner from communicating directly or indirectly with the respondent unless the court finds that:

> 1) the respondent has been subjected to domestic violence by the petitioner; or
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> 2) there is other good cause based on extraordinary circumstances of the case as supported by specific findings of fact by the court.[162]

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[160] Mo. Rev. Stat., s. 455.050.2 reads: "Mutual orders of protection are prohibited unless both parties have properly filed written petitions and proper service has been made in accordance with sections 455.010 to 455.085".

[161] See *Heard* v. *Heard*, No. 1779 Pittsburgh 1990, (Super. Ct. Pittsburgh, 1990).

[162] Alaska Stat., s. 25.35010(e).

A number of other American statutes limit the court's ability to grant mutual orders.[163] The Maine legislation goes so far as to state in the first section outlining the purposes of the act that "a mutual order of protection or restraint undermines the purposes of this chapter".

In any circumstance where mutual orders are granted it is important to note that their effectiveness depends upon their being drafted with sufficient precision that police officers will be able to ascertain who is in breach of the order if a complaint is made. Thus, for example, the order should be required to specify that one respondent is prohibited from coming within a specified distance of a particular residence or place of employment or should not telephone a particular number and so forth, while the other respondent should be prohibited from going to another residence or telephoning another number. Inclusion of this type of specificity in the order will allow sufficient information for the police to make a relatively informed decision about who is in breach of the order where a complaint is made.

The view supporting the granting of mutual orders stresses the concern that such orders are necessary to prevent the abuse of the court process by applicants. The situation envisaged by the order is one in which the applicant has requested and has been given an order prohibiting the respondent from contacting the applicant but after the granting of the order the applicant and the respondent are continuing to have consensual contact with one another and may be continuing to cohabit. The applicant may in such circumstances use the restraining order in situations of stress, alleging a breach of no-contact provisions only when the nature of the contact is not to the applicant's liking. This scenario again underscores the limitations of court orders in situations where the parties are continuing to cohabit. Furthermore, the existence of this type of use of restraining orders may reflect a practical difficulty of getting the police to respond in situations of domestic abuse where there is no restraining order in place. Another argument supporting the granting of mutual orders is that it is unfair to the respondent to allow the applicant to make contact with the respondent or to lure the respondent into the making of a breach with impunity.

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[163] Ariz. Rev. Stat. Ann., s. 13-3602(G); Cal. Civ. Proc. Code Ann., s. 545.5; 750 ILCS 60/215; Me. Rev. Stat. Ann. Title 19, s. 761-A.5; Mass. Gen. Laws Ann., c. 209A, s. 3; N.Y. Fam. Ct. Act, s. 841; N.D. Cent. Code, s. 14-07.1-02.5; Tex. Fam. Code Ann., s. 71.121.

The view which opposes the granting of mutual orders responds to this concern by noting that while such abuses may take place, the possibility of such an abuse is an evil that ought to be tolerated in order to avoid what we view as a greater evil of allowing for a practice of granting mutual orders where misconduct by both parties has not been shown. The Duluth *Guide for Policy Development* notes that "Arresting or charging a woman who has a protection order for 'inviting' him back into the house ignores the nature of relationships in which battering is occurring".[164] Again this view stresses the argument that it is important to remember that the respondent may always remain in compliance with the order by refusing to have contact with the applicant.

QUESTION 3: Should the court be empowered to grant a mutual order where only one party has applied for an order and one party has proved that the other has engaged in the conduct identified by the legislation?

Or, should an application by both parties and proof of abusive conduct by both parties be required before a mutual order may be granted?

(2) Custody and access

During the course of consultation the seriousness of the trauma experienced by children in situations of domestic abuse became very apparent. In some cases the children themselves were at risk of being assaulted by the abuser. In other cases, the children were not at risk but the protection of the adult victim was compromised by inadequate provisions relating to custody and access. Many of the victims of domestic abuse who had children reported that after having left their abusers they were often subject to access orders that required continued contact with the abusive spouse. They found that this continued contact often provided an opportunity for continuing the cycle of abuse and for further violence. They reported that the access visits were used by the abusers to emotionally upset and confuse children by subjecting them to a constant stream of insults directed toward the victim. They often suffered severe anxiety

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[164] *A Guide for Policy Development*, *supra*, note 79 at 11.

around access visits because they were afraid that the spouse would be violent or abusive toward the children.[165] There was also often a concern that children would be injured during access visits because an abusive spouse with no experience or skills in caring for children would be unable to cope with the basic duties of child care. This was particularly the case where the abusive spouse was suffering from alcoholism or where the child had particularly demanding needs as a result of a disability.

Therapists working with violent families also reported that the effects of domestic abuse upon children are severe. There is, of course, also much social science evidence which shows that children who witness family violence suffer serious emotional trauma and behavioral problems.[166]

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[165] For studies on the high rate of abuse toward children by persons who are abusive toward their spouse see: L.H. Bowker, M. Arbitell & J.R. McFerron, "On the Relationship Between Wife Beating and Child Abuse" in K. Yllo & M. Bograd, eds., *Feminist Perspectives on Wife Abuse* (Newbury Park, California: Sage Publications, 1988) at 162; E. Stark & A.H. Flitcraft, "Women and Children at Risk: A Feminist Perspective on Child Abuse" (1988) 18 International Journal of Health Services 97 at 97; L.E. Walker, *The Battered Woman Syndrome* (New York: Springer, 1984) at 59; S. Hill & B.J. Barnes, *Young Children and Their Families* (Lexington, Mass.: D.C. Heath and Company, 1982) at 55-57; S. Prescott & C. Letko, "Battered Women: A Social Psychological Perspective" in M. Roy, ed., *Battered Women: A Psychosociological Study of Domestic Violence* (New York: Van Nostrand Reinhold Company, 1977) at 81; M. Roy, "A Current Survey of 150 Cases" in M. Roy, ed., *Battered Women: A Psychosociological Study of Domestic Violence* (New York: Van Nostrand Reinhold Company, 1977) at 33.

[166] See for example: B.E. Carlson, "Children's Observations of Inter-Parental Violence" in A.R. Roberts (ed.) *Battered Women and their Families* (New York: Springer, 1984); E.M. Cummings, "Coping with Background Anger in Early Childhood" (1987) 58 *Child Development* 976; E.M. Cummings *et al.*, "Influence of Conflict Between Adults on the Emotions and Aggressions of Young Children" (1985) 21 *Developmental Psychology* 495; R.E. Emery, "Children's Perceptions of Marital Discord and Behaviour Problems of Boys and Girls" (1982) 10 *Journal of Abnormal Psychology* 11; J.W. Fantuzzo and C.U. Lindquist, "The Effects of Observing Conjugal Violence on Children: A Review and Analysis of Research Methodology" (1989) 4 *Journal of Family Violence* 77; C.E. Gentry and V.B. Eaddy, "Treatment of Children in Spouse Abusive Families (1982) 5 *Victimology: An International Journal* 240; P. Jaffee, "Are Children Who Witness Wife Battering in Need of Protection?" (1987) 31 *Journal of the Ontario Association of Children's Aid Societies* 3; P. Jaffee, *et al.*, "Promoting Changes in Attitudes and Understanding of Conflict Resolution Among Child Witnesses of Family Violence" (1986) 18 *Canadian Journal of Behavioral Science* 4; P. Jaffee, *et al.*, "Specific Assessment and Intervention Strategies for Children Exposed to Wife Battering: Preliminary Empirical Investigation" (1989) 7 *Canadian Journal of Community Mental Health* 157; P. Jaffee, *et al.*, "Similarities in Behaviour and Social Maladjustment Among Child Victims and Witnesses to Family Violence" (1985) 56 *American Journal of Orthopsychiatry* 142; P. Jaffee, *et al.*, "Critical Issues in the Assessment of Children's Adjustment to Witnessing Family Violence" (1985) 33:4 *Canada's Mental Health* 15; E.N. Jourilles, *et al.*, "Interspousal Aggression, Marital Discord, and Child Problems" (1989) 57 *Journal of Consulting and Clinical Psychology* 435; M.B. Levine, "Inter-Parental Violence and its Effect on the Children: A Study of 50 Families in General

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Indeed, it is interesting to note that the Child Welfare Act defines "exposure to domestic violence or severe domestic disharmony" as a ground for identifying a child as in need of protection.[167] Thus, in developing proposals for reform in this area we should be seeking to minimize the deleterious effects of the situation on children.

It was noted in consultation that orders which prohibited contact with the applicant but did not deal specifically with the issue of contact with children in the care of the applicant were often extremely problematic for the applicant and for the police. Police officers and social workers on the Edmonton Family Violence Follow-Up Team were of the view that orders restraining a respondent from making contact with a victim of domestic abuse that did not also restrict contact with children in the care of that victim were very problematic and that orders that made a blanket exception for contact with children in the care of the applicant were functionally useless. In both cases the orders were extremely difficult to enforce because in a case of breach the respondent would tell the police that the reason that contact had been made was to see the children and that contact with the applicant had been accidental. Where an order allowing access was produced by the respondent, the police were uncertain as to what to do and were frustrated by their perception that they were dealing with inconsistent court orders. They felt that restraining orders that did not speak to the issue of structuring access to children in the care of the applicant proved to be a significant stumbling block to a victim breaking free of an abuser. Such orders were seen to provide a wide berth for the respondent to make excuses to make contact with the victim and to thereby avoid enforcement of an existing order.

On the other hand, however, it was noted by perpetrators of domestic abuse that they felt that it was unnecessarily cruel to retaliate against an

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[166](...continued)
Practice" (1975) 15:3 *Medicine, Science and the Law* 172; A. Rosenbaum and K.D. O'Leary, "Children: The Unintended Victims of Marital Violence" (1981) 51 *American Journal of Orthopsychiatry* 692; L.E. Walker & G.E. Edwall, "Domestic Violence and the Determination of Visitation and Custody in Divorce" in D.J. Sonkin (ed.) *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (New York: Springer, 1987) at 127; M. Watson, *Children of Domestic Violence: Programs and Treatment* (1986 Office for the Prevention of Family Violence, Alberta Social Services, Edmonton, Alberta); D. Wolfe *et al.*, "Child Witnesses to Violence Between Parents: Critical Issues in Behavioral and Social Adjustment" (1986) 14:1 *Journal of Abnormal Child Psychology* 95.

[167] Child Welfare Act, S.A. 1984, c. C-8.1, s. 1(3)(a)(ii)(C).

abusive husband by taking away his right to be with his children. Perpetrators were of the view that the relationship between the spouses could be and should be kept separate from the relationship between the perpetrator and the children. Indeed, it is not an uncommonly held view that an individual can be violent toward a spouse while being a good parent. In consultation with members of the Bench, it was noted that in violent situations it is very important for the court not to be excessive in its intervention. The view was put forward that if a violent respondent is denied access to children as a result of the finding of abuse of a spouse, this may produce a great deal of anger in the respondent which will lead the respondent to behave in a way that exacerbates the situation. Thus, the denial of access may have the unintended effect of increasing the risk of harm to the applicant.

Having considered the various views put forward in the course of consultation, we conclude that there are a number of reasons why the issue of custody and access should be dealt with in the legislation. First, the children may also be at immediate risk of violence from the respondent at the time of hearing the protection application.[168] Second, it may be the case that while the children are not themselves at risk of being assaulted, they may be used as pawns in the conflict between the respondent and the applicant.[169] Third, the absence of well structured access provisions may provide opportunities for contact between an applicant and respondent thereby rendering the order in respect of the applicant ineffective.[170] Thus, in order to guard against these difficulties, we believe that the issue of custody and access must be addressed.

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[168] Rosenbaum & O'Leary, "Children: The Unintended Victims of Marital Violence" (1981) 51 Am. J. Orthopsychiatry 692 at 693. Here a study reported that in 45% of violent couples one or more children were also being physically abused. See generally, Judge Michael J. Voris, "Civil Orders of Protection: Do They Protect Children, the Tag-along Victims of Domestic Violence?" (1991) 17 Ohio Northern U. L. Rev. 599 at 606. See also *supra*, note 167.

[169] Mildred Daley Pagelow, "Children in Violent Families: Direct and Indirect Victims" in S. Hill & B.J. Barnes, eds., *Young Children and Their Families* (Lexington: Lexington Books, 1982) at 47.

[170] See above discussion on consultation, at 31-34.

Most American codes allow for the granting of an order for custody and access along with the order for protection. For example, the New Jersey statute provides that the court may grant:

> An order providing for visitation. The order shall protect the safety and well being of the plaintiff and minor children and shall specify the place and frequency of visitation. Visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for visitation may include a designation of a place of visitation away from the plaintiff, the participation of a third party or supervised visitation.
>
> (a) The court shall consider a request by the plaintiff for an investigation or evaluation by the appropriate agency to assess the risk of harm to the child prior to the entry of a visitation order. Any denial of such a request must be on the record and shall only be made if the judge finds that request to be arbitrary or capricious.
>
> (b) The court shall consider suspension of the visitation order and hold an emergent hearing upon an application made by the plaintiff certifying under oath that the defendant's access to the child pursuant to the visitation order has threatened the safety and well-being of the child.[171]

Thus, the New Jersey legislation addresses the issues of the specificity of the award of visitation as well as the potential need for supervision of visits by a third party. It also alludes to the fact that the effectiveness of the protection provisions of an order may be compromised by an access order which requires or encourages the applicant to have contact with the respondent.

The proposed Nova Scotia legislation provides that the court may make:

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[171] N.J. Stat. Ann., s. 2C:25-29.b(3).

> (n) an order awarding temporary custody of a child and in making such an order the court shall presume that the best interests of the child are served by an award of custody to the nonviolent party;
>
> (o) an order providing for access to children provided that:
>
> (i) the order shall protect the safety and well being of the victim and children and shall specify the place and frequency of visitation,
>
> (ii) visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the victim and the respondent,
>
> (iii) such order may include a designation of a place of visitation away from the victim's residence, the participation of a third party or supervised visitation,
>
> (iv) the court upon motion of the victim considers a request for an investigation or evaluation by an appropriate person or agency to assess the risk of harm to the child where the victim has a sound basis for making the request, and
>
> (v) the court orders that the cost of supervised access and any investigation or evaluation shall be borne by the respondent.

We agree in principle with the goals of these legislative models and we would articulate them as being the following:

- to ensure that children who are at risk are protected from abuse,

- to ensure that the protection of the adult applicant is not compromised by the arrangements relating to the contact between the respondent and any children living with the applicant, and

- to attempt to minimize the trauma to children occurring as a result of domestic abuse.

We would add, however, that other goals ought also to be borne in mind in developing our response to the issue of custody and access. We identify such other goals as the following:

- to ensure that long-term custody and access arrangements are dealt with in an optimal forum with due consideration to all relevant factors, and

- to ensure that provisions in a protection order relating to children do not serve to exacerbate a situation of domestic abuse.

In attempting to meet these various goals there are a number of different situations that we must consider. In particular we must consider the situation where there are existing custody and access rights in place as a result of previous orders made under other legislation. Other legislative provisions which deal with the issue of custody and access are: section 16 of the Divorce Act,[172] section 23 of the Provincial Court Act,[173] and sections 54 to 61 of the Domestic Relations Act.[174] The Divorce Act is, of course, federal legislation and therefore orders made under that legislation will likely be seen to be paramount over orders made under provincial legislation to the extent of any inconsistency.[175]

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[172] R.S.C. 1985, c. 3 (2nd Supp.).

[173] R.S.A. 1980, c. P-20.

[174] R.S.A. 1980, c. D-37.

[175] *Re Hall* v. *Hall* (1976), 70 D.L.R. (3d) 493; and see Peter Hogg, *Constitutional Law of Canada* (3rd ed.) (Toronto: Carswell, 1992) at 655-57. Hogg strongly defends the view that any order under the Divorce Act will be paramount over an inconsistent order made under provincial legislation. However, there is conflicting authority on this point. In *Emerson* v. *Emerson*, [1972] 3 O.R. 5 the Ontario High Court held that an order made under the Divorce Act in one jurisdiction could be varied under provincial legislation in another jurisdiction. The difficulty in this case was that under the old divorce legislation one had to return to the court in which the original order had been made to vary its provisions. Where this was impractical for a litigant there was a big incentive for the court in another province to find a way of taking jurisdiction. In *Ramsay* v. *Ramsay* the court held that although maintenance and support provisions of an order under the Divorce Act could not be varied in an application under provincial legislation the position was different with respect to custody and access. There, the superior court could exercise its *parens patriae* jurisdiction to vary the order. Hogg disagrees with the result of this case but cites a number of articles which argue that the authority of the provisions under the Divorce Act comes from "rational and functional connection" with the divorce and therefore, once the circumstances of the divorce are no longer the operating factor in determining issues around custody and access that the provisions of the order made under that act should no

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In order to tackle this problem it is useful to set out the various types of situations that could arise in a situation of domestic abuse where custody and access are at issue. Essentially the variables that we are considering are:

Types of risk
- risk to the safety of the applicant
- risk to the safety of the children

Possible legal circumstances with respect to custody and access
- no existing order
- existing order under the Divorce Act
- existing order under the Domestic Relations Act
- existing order under the Provincial Court Act

(a) No existing order/Risk to safety of applicant

The first scenario to be addressed here is that in which there is no existing order in relation to custody and access, and in which the exercise of unstructured access would potentially compromise the safety of the applicant by providing the respondent with opportunities to make contact with the applicant. The first thing that would potentially need to be dealt with in such circumstances is the issue of custody itself. The Nova Scotia legislation provides that the court upon hearing an application for a victim's assistance order may make a temporary award of custody. It is then further presumed by the legislation that it is in the best interests of the child to award custody to the nonviolent parent.[176]

The issue of whether there should be a presumption that the best interests of the child are served by granting custody to the non-abusive party gives rise to varying points of view. One view argues that this is a sensible presumption since abusive tendencies are unlikely to be confined to particular relationships and that once an individual has demonstrated a capacity for abusive conduct in one domestic relationship, the onus should

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[175](...continued)
longer be considered paramount. See Eric Colvin, "Custody Orders Under the Constitution" (1978) 56 Can. Bar Rev. 1 at 16. Colvin states: "I have confined my argument on the interpretation of the Divorce Act in this respect to the claim that there should be at least no inference of exclusion of provincial jurisdiction to make temporary orders to deal with emergency situations"; Judith Ryan, "The Overlapping Custody Jurisdiction: Co-existence or Chaos" (1980) 3 Can. J. Fam. L. 95; Karen M. Weiler, "The Exercise of Jurisdiction in Custody Disputes" (1980) 3 Can. J. Fam. L. 281.

[176] *Supra*, note 77 at s. 4(1)(n).

be placed on that individual to show that they are not abusive in other domestic relationships. Furthermore, the extent to which abusive parents may use control over the children to shore up control over the abused spouse also provides a reason for presuming that the best interests of the child are served by granting custody to the non-abusive parent. The concern here is that the abusive parent may be attempting to secure an award of custody, not because of any real concern for or desire to be with the children, but as a result of a desire to secure the emotional control and to punish the victim of abuse for attempting to break out of the cycle.

Again, the opposing view is that abusive conduct in a spousal relationship is not a significant determiner of an individual's capacity to be an effective parent. Because evidence of violence or other abuse in the spousal relationship provides no information as to the individual's ability to function in a caring, supportive and nurturing way in relation to their children, it would be unfair to presume that the best interests of the child were served by an award of custody to the non-abusive party. Because of the existence of strongly opposing views on this matter, we have refrained from making a recommendation in this regard and would defer this matter until we have received responses from various interested groups on this issue.

It is to be noted, however, that in either event, any award of custody made under the legislation should be seen as limited and subsisting only until such time as there is a review under other legislation dealing expressly with custody and access.

QUESTION 4: Should the legislation create a presumption that, where it is necessary to make a temporary and limited order as to custody in the protection order, the best interests of the child are served by an award of custody to the non-abusive parent?

Where custody is awarded to the applicant, the next question that must be dealt with is that of access. Even where there is a potential risk to the applicant arising out of the exercise of access, it may be that the best interests of the child dictate that contact with the respondent should not be prohibited. In many cases the respondent will be the father of the children.

Where there is no risk to the children themselves but where an unstructured situation with respect to access would compromise the safety of the applicant, the court should be able to make an order granting access to the respondent. However, such an order should include specifications as to the logistics of the access so as to ensure that the exercise of access does not pose a risk to the applicant and does not compromise the no-contact provisions with respect to the applicant. Such provisions should be structured with a view to eliminating all opportunity for contact between the respondent and the applicant and should include:

- the precise times that the meeting is to begin and end,

- the precise place where the meeting is to begin and end,

- the manner of transportation and the person or persons to provide transportation of the children to the place where the children meet up with the respondent, and

- wherever possible, it should be stipulated that a third party take the children to the meeting place.

Likewise if the court were to find the best interests of the child were served by an award of access to the abusive party and the applicant was at risk in exercising access the court should specify the logistics of access to the applicant in order to ensure that the protection provisions of the order are not compromised.

Where custody is awarded to the applicant, it might not be appropriate for the court to order access to the respondent. In some cases, the relationship between the children and the respondent might be too tenuous for an order for access to be given. For example, in a case where the respondent was not a parent of the children in the care of the applicant and did not stand in *loco parentis* to them, it would be unlikely that it would be found that it was in the best interests of the child to order access to the respondent. In such a case the court should be empowered to order no-contact with the children in conjunction with the no-contact order in relation to the applicant.

The existence of such an order in relation to custody or access under this legislation should not preclude a fuller hearing of custody matters in the context of the Divorce Act, the Domestic Relations Act or the Provincial Court Act. Thus, it is to be noted again that any determination made about custody and access under the legislation be limited and subsisting only until such time as there is a review of the matter.[177]

(b) No existing order/Risk to safety of children

In the situation in which there is no existing order in relation to custody and access and the court is of the view that children involved are at risk of harm from the respondent, the court should be empowered to make an order of custody in the party who does not pose the threat to the children. In such circumstances, the court should be further empowered to order no-contact between the respondent and the children. Where, however, the court is of the view that it is in the best interests of the children to have some contact with the respondent notwithstanding the risk, the court should be empowered to order supervised access with the respondent. Where supervised access is ordered, the issue of the possibility of using access to threaten the applicant should also be addressed. Therefore, the logistics of the exchange of children set out above should also be set out in such an order. In the case of supervised access, however, the court should specify who is to supervise access.

In the course of consultation many victims noted that orders allowing for supervised access were rarely sufficiently specific. There was often no particular individual identified in the order as the supervisor and respondents would often attempt to bully the applicant into accepting an individual who was subordinate to the respondent to supervise. For example, victims reported that the brother, sister, friend or girlfriend of the respondent was often favoured by the respondent as the supervisor of access. Where the order was silent as to who was to be the supervisor, victims were often unable to veto the respondent's wishes to have someone close to the respondent perform the supervision. Victims also found it difficult to find people they knew and trusted to supervise access. Often the victim's friends and relatives were unwilling or unable to perform this function. There are very few free supervision services available and in cases

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[177] This would be consistent with the Nova Scotia proposal which allows only that the court may make temporary orders in relation to custody and access under the domestic abuse legislation. See *supra*, note 77 at s. 4(1)(n).

where the supervision was done by paid professionals, victims found that they were left paying the bills for supervision. Therefore, it is extremely important that the court be aware that the full specifics of supervision need to be set out in the order. Furthermore, it is our view that the victim should not be required to pay the cost of supervision where the need for supervision arises out of the threatening conduct of the respondent. Therefore, the respondent should be required to pay the costs of supervised access.

In the course of consultation it was pointed out that sometimes the respondent is not intentionally threatening to the children but is a threat to the children's safety as a result of an inability to provide for the needs of the children during access visits. This was identified as a particular problem in instances where children had particularly demanding needs as a result of physical or mental disabilities. Likewise, many victims of domestic abuse whose partners had alcohol or drug dependencies reported that their partners were unable as a result of their addictions to care for children adequately during access visits. Thus, risk to children should not be understood only as risk arising out of intentionally abusive action. In cases where it appears that the children will be at risk as a result of the respondent's inability to fulfil child care responsibilities, the court should be empowered to order that a third party be present during access visits to help the respondent care for the children.

(c) Existing order under the Divorce Act/Risk to safety of the applicant

As we have seen, the existence of an order made pursuant to the Divorce Act limits the scope of what can be done under provincial legislation to alter the terms of the order. Essentially, the difficulty that arises is one of paramountcy. An order made under the federal legislation will override an inconsistent order made under provincial legislation.[178] Thus, if the order made under the Divorce Act were to allow access to the respondent, it would be impossible for the court to order a restriction on that access pursuant to provincial domestic abuse legislation. Rather, to have the terms of that order changed, the party would have to apply under section 17 of the Divorce Act to have the terms of the original order varied.

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[178] See *supra*, note 175; *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161.

It is our view, however, that this does not leave the province utterly unable to create a power to deal with the issue of a threat to an applicant's safety in circumstances of an existing order allowing for access. In order for the doctrine of paramountcy to arise, there must be an inconsistency.[179] If the legislation merely empowered the court to order that the logistics of transfer of the child be specified in order to eliminate contact between the applicant and the respondent so as to ensure the safety of the applicant, there would be no problem of inconsistency between the orders. Such orders could live together without putting any party in a position in which they were unable to comply with both orders at the same time. Substantive rights of custody and access would not be affected by the terms of the order relating to the logistics of the exercise of access.

Therefore, we conclude that in the case of risk to the applicant as a result of the respondent's exercise of access pursuant to an order under the Divorce Act, the court should be empowered to specify the logistics of the carrying out of that access in order to ensure that the protection of the applicant is not compromised. Such an order could not vary the rights granted under the federal order but would speak to the issue of the applicant's safety which is separate and distinct from the issue of the respondent's right to access.

(d) Existing order under the Divorce Act/Risk to safety of the children

The next situation is one in which there has been an order with respect to custody and access made under the Divorce Act and it appears to the court that the children are at risk of harm from one of the parties. This is the situation in which the provinces' hands are most firmly tied by the Constitution. It is *ultra vires* the province to create a power to order the denial or supervision of custody or access granted by a previous court pursuant to federal legislation.[180] If the matter were before a superior court, that court would likely be able to intervene without specific

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[179] *Robinson* v. *Countrywide Factors*, [1977] 2 S.C.R. 753; *Construction Montcalm* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Schneider* v. *The Queen*, [1982] 2 S.C.R. 112; *Multiple Access Ltd.* v. *McCutcheon*, *supra*, note 178; *Rio Hotel* v. *New Brunswick*, [1987] 2 S.C.R. 59; *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927.

[180] See discussion at p. 124 and see note 175.

legislative authorization by using its *parens patriae* jurisdiction.[181] However, such a power would not be available to a provincially appointed court.[182] We conclude that it is unfortunately impossible for the province to create the power to deal with this situation. Parties caught in this situation will continue to have to appear before the Court of Queen's Bench and attempt to rely on the court's exercise of *parens patriae* power, or make an application under section 17 of the Divorce Act to vary the terms of the original order.

It is both ironic and unfortunate that, in this potentially very serious situation of risk, the Constitution imposes limitations on the state's ability to extend protection to children.

(e) Existing order under the Provincial Court Act or the Domestic Relations Act/Risk to safety of the applicant

The next type of case is that in which an order setting out rights of custody and access exists and was made pursuant to provincial legislation. We shall deal with orders made under the Domestic Relations Act and the Provincial Court Act together since they do not raise different issues. Where there is an existing order made under either of these acts the constitutional difficulty of the paramountcy of the initial order does not arise. Where the problem with existing custody and access provisions is simply that they create a risk to the applicant by providing opportunities for contact between the respondent and the applicant, the legislation should allow the court to create an order setting out the logistics of the exercise of access so that the safety of the applicant will not be compromised. In such circumstances, more intrusive interference with an existing order is unnecessary.

Because an existing order under the Domestic Relations Act may have been made by the Court of Queen's Bench, the inferior court will have to be granted specific jurisdiction to vary such an order since it is not within the inherent jurisdiction of the inferior court to do so.

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[181] *Ramsay* v. *Ramsay* (1976), 13 O.R. (2d) 85 (C.A.); *Beson* v. *Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R 716.

[182] *Alberta (Children's Guardian)* v. *Alberta* (1991), 80 D.L.R. (4th) 319.

(f) Existing order under the Provincial Court Act or the Domestic Relations Act/Risk of safety to children

Where children are at risk of abuse and there is an existing custody and access order made pursuant to the Domestic Relations Act or the Provincial Court Act and such risk is brought to light in proceedings under the domestic abuse legislation, the court should be able to act to protect those children. However, we are of the view that the goal of dealing with long-term issues of custody and access in an optimal forum in which all things may be considered militates against creating a power to make a permanent order in proceedings under domestic abuse legislation. Therefore, the legislation should empower the court to make limited orders only. In situations of strong likelihood of serious harm to children at the hands of the respondent, the court should be empowered to make a limited order of no-contact between the respondent and the children. In cases of less serious risk, the court should have the power to modify existing access provisions to require supervision. Again, such an order would be limited and subsisting only until such time as there was a review pursuant to other legislation.

In such situations the court should, of course, also be empowered to order specifications in relation to the logistics of the exercise of supervised access. Because such orders do not affect the actual substance of the rights of custody and access, there is no need for them to be temporary only.

Orders with respect to custody and access made under the domestic abuse legislation should be reviewable upon the application of either party under the Domestic Relations Act or the Provincial Court Act which will provide for a fuller hearing in relation to continuing provisions for custody and access.

Because an existing order under the Domestic Relations Act may have been made by the Court of Queen's Bench, the inferior court will have to be granted specific jurisdiction to vary such an order since it is not within the inherent jurisdiction of the inferior court to do so.

In approaching this difficult area it should be borne in mind that child welfare authorities in Alberta will not get involved in the protection of any child in respect of whom there is an ongoing custody dispute. Therefore, children who are at risk of abuse by one party to custody proceedings have only those proceedings to rely on for protection.

The chart below sets out our preliminary recommendations in the various situations considered. The far left-hand column shows the sorts of difficulties that could give rise to the need to deal with custody and access in a protection order. The top row shows the various possible circumstances of the parties with respect to existing arrangements in relation to custody and access. All of the orders referred to in the table below are to be limited and subsisting only until such time as there is a review under other legislation relating specifically to custody and access.

(g) Summary of conclusions

	No existing order	**Existing order under the Divorce Act**	**Existing order under the D.R.A.**	**Existing order under the Prov. Ct. Act**
Risk to safety of applicant	· allow for award of custody to be made · allow for an award of access with specification of logistics of access to ensure safety of applicant · allow for order of no-contact with children where appropriate	· allow for order consistent with the order under the Divorce Act giving full specification to the logistics of access to ensure the safety of the applicant	· allow for a variation of the order to give full specification for the logistics of access to ensure the safety of the applicant · give specific jurisdiction to the inferior court to affect such limited variation to the order of the Queen's Bench	· allow for a variation of the order to give full specification for the logistics of access to ensure the safety of the applicant
Risk to safety of children	· allow for award of custody to be made · allow for order of no-contact with children where appropriate or supervised access to children · require that logistics of any supervised access be set out in the order	The doctrine of paramountcy prevents the province from creating a power to protect children in this situation. If the parties were before a superior court it could be argued that *parens patriae* jurisdiction could be invoked to extend protection to a child in such an emergency.	· allow for limited variation of the order to require either no-contact with children or supervised access where appropriate · require that logistics of any supervised access be set out in the order · grant specific jurisdiction to the inferior court to make such limited variation of a Queen's Bench order	· allow for limited variation of the order to require either no-contact with children or supervised access where appropriate · require that logistics of any supervised access be set out in the order

RECOMMENDATION 14

(1) Where there is no existing order relating to custody and access the court should be given the power to:

- **make a limited order for custody.**
- **make an award of access,**
- **make an order setting out the logistics of the exercise of access to ensure that the protection of the applicant is not compromised by the provisions relating to access,**
- **make an order requiring supervision of access and setting out the logistics of the exercise of supervised access,**
- **make an order requiring the respondent to pay for the supervision of access,**
- **make an order of no-contact between the respondent and any children in the custody of the applicant where to do so would be appropriate in all the circumstances of the case.**

Any such order is limited and subsists only until such time as there is a review upon the application of either party under the Divorce Act, the Provincial Court Act or the Domestic Relations Act.

(2) Where there is an existing order relating to custody and access made under the Divorce Act the court should be given the power to:

- **make an order consistent with the provisions of the order under the Divorce Act specifying the logistics of any access**

granted to the respondent to children in the custody of the applicant to ensure that the protection of the applicant is not compromised by the exercise of access.

(3) Where there is an existing order in relation to custody and access made under either the Provincial Court Act or the Domestic Relations Act the court should be given the power to:

- **make an order setting out the logistics of any access granted in the existing order to ensure that the protection of the applicant is not compromised by the exercise of such access,**

- **make a limited order of no-contact between the respondent and any children where the children are at serious risk of harm from the respondent,**

- **make a limited order requiring supervision of access by the respondent and setting out the logistics for the exercise of such supervised access where the children are at some risk of harm from the respondent, and**

- **make an order requiring the respondent to pay for the supervision of access.**

All orders referred to above are limited and subsisting only until such time as there is review upon the application of either party under the Divorce Act, the Provincial Court Act or the Domestic Relations Act.

The inferior court should be granted jurisdiction to make such limited variation of orders of the Court of Queen's Bench as may be necessary in the course of granting protection under the legislation.

(3) Seizure and storage of firearms

A number of the victims interviewed said that their partners owned firearms or other weapons that were actually used or were used to threaten during incidents of domestic abuse. One view is that where there is cause for the court to grant a protection order as a result of domestic abuse, it may often also be the case that it would be appropriate to seize any firearms in possession of the respondent during the currency of the order.

Many people view the need for removal of dangerous weapons from situations of domestic violence to be self-evident. The need is seen as arising out of the emotional volatility and intensity of the situation. Further, the need for removal of weapons at the time of granting a protection order is seen to be demonstrated by evidence showing the point of separation as the most dangerous time for a victim of domestic abuse. As we have seen above, the Nova Scotia proposal contains such a provision.[183]

The other view is that the remedy of removal of firearms is an invasive and extreme one. It is thought that given the extent and seriousness of the violation of the property and liberty rights of the individual, such a remedy ought not to be granted except in the most extreme of circumstances. A concern is expressed that a blanket remedy made available in any context of abuse could be seriously exploited by vindictive litigants.

It should be noted at the outset that there is perhaps a constitutional issue in relation to this sort of provision. The Federal Government has, of course, enacted legislation in the Criminal Code to control the use and ownership of weapons. Section 100(4) of the Criminal Code of Canada reads:

> Where a police officer believes on reasonable grounds that it is not desirable in the interests of the safety of any person that a particular person should possess any firearm or any ammunition or explosive substance, he may apply to a provincial court judge for an order prohibiting that particular

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[183] *Supra*, note 77 at s. 4(1)(m). At the time of publication of this report Bill C-68, An Act Respecting Firearms and Other Weapons, 1st Sess., 35th Parl., Canada, 1994-95 was being debated in the Senate. The purpose of the bill is to encourage more responsible use of firearms and to create a database from which conclusions may be drawn about how best to control misuse of firearms.

> person from having in his possession any firearm or any ammunition or explosive substance.

Section 106(7) of the Criminal Code creates a procedure in which an individual who has been denied an acquisition certificate for a firearm on the basis that the firearms officer concluded that it was desirable in the interest of the safety of the applicant or of any other person that the applicant should not acquire a firearm, may have the question referred to a provincial court judge for confirmation or variation of the firearms officer's decision.

On receipt of an application by a police officer under section 100(4) or by an applicant under section 106(7), the provincial court judge must set down a time for a hearing at which time the judge must hear all relevant evidence on the issue of whether it is desirable for the individual to be in possession of a firearm. If a provincial court judge makes a determination that it is not desirable for the individual to be in possession of a firearm, any acquisition certificate held by the individual is automatically revoked.[184] Section 100(13) directs that the order shall specify a reasonable period within which the person against whom the order is made may surrender—to a police officer or firearms officer—firearms in that person's possession.

In *R. v. Pattison*[185] the Alberta Court of Appeal decided that this provision was *intra vires* Parliament as a valid exercise of the federal criminal power under section 91(27) of the Constitution Act, 1867. The accused had argued that the legislation was an infringement on the provincial jurisdiction over property and civil rights since the legislation did not purport to create any criminal offence but rather regulated ownership of a particular kind of property. The court held that the true subject matter of the legislation was criminal law. The late Chief Justice McGillivray wrote:

> When the object is to reduce the incidence of injury or death to the citizens of the country by the type of violence made possible by the destructive power of a firearm, it becomes clearly

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[184] S. 100(7.1).

[185] (1981), 59 C.C.C. (2d) 138; for a similar decision see *Re Motiuk and the Queen* (1982), 127 D.L.R. (3d) 146 (B.C.S.C.).

> within the legislative competence of the Government of Canada under the head of criminal law to so enact.[186]

He further quoted Hogg with approval saying:

> A law may be enacted "in relation to" the criminal law, although the law itself does not have the characteristics of a criminal law.[187]

Thus, while the legislation was found not to resemble the usual form of criminal law creating an offence with a penalty attached to it, it nevertheless was found to be a valid exercise of the federal criminal power because it dealt with the prevention of crime.

The question then arises as to whether it is competent to the provincial legislature to enact legislation that would be, in substance, quite similar to these provisions in the Criminal Code. The answer to this would depend upon whether such legislation would be found to have a double aspect such that it would be competent to the federal government under the criminal power and also competent to the provincial legislature under the power over property and civil rights in the province.[188] The issue of possession of firearms has both a criminal law and a property and civil rights law aspect. Thus, there is a strong argument to be made that the legislation would seek to secure the petitioner's civil rights as against other private individuals and would therefore be pursuing a purpose separate and distinct from the criminal legislation.

The applicant for an order may have better knowledge and more direct incentive to bring the issue of the respondent's possession of firearms than would the police. The state's interest in preventing crime is similar to, but distinct from, the individual's right to protection from tortious assault. Thus, the subject matter of control of possession of weapons is one which has a double aspect, as such, and therefore, it should properly be seen as

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[186] *Pattison, supra*, note 185 at 142.

[187] *Ibid.*

[188] See *Multiple Access Ltd. v. McCutcheon, supra*, note 178; and see Hogg, *supra*, note 175 at 381.

falling within both the federal power under section 91(27) and the provincial power under section 92(13).

There would be no inconsistency in the two pieces of legislation since both would be conferring a power to have firearms seized from an individual. Thus, there would be no cause for the doctrine of paramountcy to be invoked.

QUESTION 5: Where an application for a protection order is made, should the judge be given discretion to order that firearms or other weapons in the respondent's possession be temporarily surrendered to a police officer?

(4) Exclusive possession of the residence

Section 19 of the Matrimonial Property Act[189] provides that a court may, upon the application of a spouse, grant an order giving that spouse exclusive possession of the matrimonial home, an order directing that the respondent be evicted from the matrimonial home, as well as an order restraining the spouse from entering or attending at or near the matrimonial home. Such an order may be made *ex parte* where the court finds that there is a danger of injury to the applicant spouse or to children residing in the matrimonial home as a result of the conduct of the respondent.[190]

Our consultation suggests that the section is used in practice in situations of domestic violence and, while there is no direct statement in the Act that violence is a factor to be considered in granting an order, the Alberta Court of Queen's Bench has made at least one statement that would seem to suggest that violence on the part of the respondent is a major factor to be considered in deciding to award an order under section 19.[191]

While the section provides some protection and some relief in situations of domestic abuse, it must be considered whether there should be

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[189] *Supra*, note 23.

[190] *Ibid.* at s. 30(2).

[191] *Brenneis* v. *Brenneis* (1990), 109 A.R. 24 (Q.B.).

a general power to exclude a perpetrator of domestic abuse from a residence and to give the victim or victims of that abuse possession of the residence. The existence of this section in the Matrimonial Property Act reflects the idea that married spouses have an obligation to share in their property. This obligation arises out of the nature of the matrimonial relationship as a partnership.[192] Other relationships which we are concerned with do not give rise to the same set of obligations. However, the question remains as to whether the legally married status of parties sharing the same living quarters should be a necessary condition of the possibility of ordering the exclusion of a violent person from the residence in a situation of danger to other members of the household.

A factor which would suggest a need for allowing exclusion of abusive individuals from the residence is the demand on public funds created by victims of domestic abuse having to flee from their residences to shelters. Given that these shelters are forced to turn away a large number of the victims who seek refuge there due to lack of funds and lack of space, it would seem that anything that could provide an alternative to the victims having to flee to shelters would be desirable.[193] Also, victims may feel that it is unfair that they should have to incur the cost and expend the energy involved in setting up a new household when the cause of the need for their relocation is the perpetrator's abusive behaviour. Where the perpetrator's abuse has made continuing cohabitation unsafe, it is certainly arguable that it should be the perpetrator, not the victim, who should bear the burden of the upsetting of the status quo brought about by the abuse. Victims reported feeling that the perpetrators of domestic abuse suffered very few consequences as a result of their actions in situations where victims were forced to respond to the abusive situation by fleeing to shelters. Perpetrators were perceived as being able to create an unsafe environment causing major disruption to the lives of the victims and very little disruption to their own lives.

All the American codes, except that of Delaware, make provision for an order excluding the perpetrator of domestic abuse from the residence. Some states simply provide that the court may order a respondent to vacate

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[192] See *Caines* v. *Caines* (1985), 42 R.F.L. (2d) 1 (Ont. Co. Ct.).

[193] See: Family Violence Prevention Division, *supra*, note 13. In 1993, 3,802 women and their children were turned away from Alberta shelters due to lack of space. In that same year, 4,532 women and 5,652 children were admitted to Alberta shelters.

the home.[194] Others note that the order may issue whether the residence is jointly or solely owned or leased by the parties. For example, the New Jersey code provides that the court may make an order:

> granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned by the parties or jointly or solely leased by the parties. This order shall not in any manner affect title or interest to any real property held by either party or both jointly. If it is not possible for the victim to remain in the residence the court may order the defendant to pay the victim's rent at a residence other than the one previously shared by the parties if the defendant is found to have a duty to support the victim and the victim requires alternative housing.[195]

Section 4(1)(b) of the proposed Nova Scotia legislation similarly provides that the court may make an order "granting the victim exclusive occupation of the residence regardless of whether the residence is jointly or solely owned by the parties or jointly or solely leased by the parties". The Saskatchewan Act and the B.C. bill have similar provisions both with respect to an emergency orders and victim's assistance orders.[196]

There are, however, concerns as to the suitability of the remedy of exclusion from the residence. The view which opposes the inclusion of such a remedy within a domestic abuse statute focuses on the invasive nature of the remedy and the extreme consequences that it will have for a respondent both in terms of the violation of property rights and the violation of the individual's right to peaceful and secure enjoyment of their home. Again, such a remedy could give rise to opportunities for vexatious litigation by vindictive applicants. It is argued that the concern to protect victims of abuse could be harnessed by mischievous litigants to obtain the advantage

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[194] For example, see Alaska Stat., s. 25.35.010(2).

[195] N.J. Stat. Ann., s. 2C:25-29b(2).

[196] *Supra*, note 78 at ss 3(3)(a) & 7(1)(a). There has also been support for the idea of removing the batterer from the home voiced by a member of the Cabinet of the Alberta Government. See "Boot Batterer Not His Victim Minister Says" *Vancouver Sun* (March 11, 1993). The article quotes Diane Mirosh, the Minister of Community Development as saying "I want women and children to stay in the family home and have the perpetrator put into a shelter and into counselling".

in property disputes. By allowing such a remedy, we would be allowing public outrage at domestic abuse to be used to create a legal carte blanche to be given to anyone alleging abuse.

A further and different concern with the creation of the remedy is that it could obscure the need for funding to battered women's shelters. The existence of the remedy could create a false perception that safe houses for victims of domestic abuse were no longer necessary.

<u>QUESTION 6</u>: Should the legislation provide that the court may make an order granting the applicant exclusive possession of the residence regardless of whether the residence is owned or leased jointly or solely by one of the parties?

Should the fact that the respondent is the sole owner or lessor of the residence be a bar to the granting of the order?

If it is determined that the legislation should provide for such a remedy, should it be accompanied by a provision allowing the court to order the police to remove the respondent from the residence?

B. Remedies Relating to Property

(1) Personal property orders

Many victims of domestic abuse reported significant difficulties involving possession of personal property. It was often the case that they would have left the residence in an emergency situation, going to a shelter or to the home of a friend, and they would then face the difficulty of having left their personal possessions behind in the residence and would have no way of returning to the residence in safety to collect them. The difficulty of setting up a new home without access to one's clothes and other personal effects in a situation of financial stress was a problem for many. Personal items like cribs and highchairs were often essential to the victims' ability to take proper care of children that they had taken with them when fleeing the residence.

Destruction of the victim's property upon the victim leaving the residence was also identified as a problem. Damage to the victim's property was identified as a way of retaliating against a victim of domestic abuse who had left the abusive situation. An order prohibiting the destruction or conversion of property in which the applicant may have an interest might seem to be redundant. On the other hand, such a provision might serve a useful purpose. Such an order would put the respondent on notice that it was not within the respondent's rights to convert property belonging to the applicant. This could be beneficial in a circumstance in which the respondent was under the misapprehension that the property of the applicant was rightfully under the control of the respondent.

In situations where there is jointly owned property that the applicant needs to function on a day-to-day basis, the court should be able to grant an order giving temporary possession of those items to the applicant. Again, in such a situation, the issue of ownership of personal property would be best determined in other proceedings relating specifically to the division of property between the respondent and the applicant. However, in order to ensure that the applicant is in a position to live independently of the respondent in a time of risk of harm, the court should perhaps be empowered to make such a temporary order. Such an order could be reviewable upon the application of either party in proceedings relating to the division of property between the applicant and the respondent.

The Nova Scotia proposed legislation has three clauses relating to personal property. They are that the court may grant:

> 4(1)(k) an order granting either party temporary possession of specified personal property such as an automobile, checkbook, MSI or supplementary medical insurance card, identification document, key or other necessary personal effects;
>
> (l) an order, restraining the respondent from taking, converting or damaging property in which the victim may have an interest;
>
> (r) an order, which shall be restricted in duration, requiring that a police officer accompany either party to a residence or supervise the removal of personal belongings in order to ensure the personal safety of the victim.

The Kansas code simply has a provision allowing the court to grant an order "making provision for the possession of personal property of the parties and ordering a law enforcement officer to assist in securing possession of that property, if necessary".[197]

Consultation with the Edmonton Police Department showed that the police were often concerned with the lack of specificity presently existing in orders requiring them to aid victims of domestic abuse in collecting their belongings. While the attitude of the police reflected a willingness to aid in the enforcement of such orders, there was also a sense of frustration at not having sufficient certainty as to what was and was not authorized by such orders. The police felt that there was a need to educate lawyers to ensure that the order contained sufficient detail to enable to police to know what they were required to do pursuant to it.

Such orders, if ultimately granted, should be clear that the police officer must remain with the applicant at all times since some victims reported difficulties where the police would take them to pick up their belongings in the residence but would remain at the front door while the victim's assailant was intimidating the victim in the rooms where the personal property was located out of the sight of the police officer.

RECOMMENDATION 15

The legislation should empower the court to order a police officer to accompany the applicant to a specified residence to collect specified personal property.

The court should also be empowered to order that the respondent refrain from converting or damaging the applicant's property or property in which the applicant may have an interest.

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[197] Kan. Civ. Pro. Code Ann., s. 60-3107(8).

The court should also be empowered to grant a temporary order giving the applicant possession of any assets in which the applicant has or may have an interest that are necessary to the applicant's ability to live independently of the respondent.

(2) Financial provision for the applicant and children

In many instances victims of domestic abuse are unable to leave abusive situations as a result of their economic dependency on their abusers. Thus, the question must be addressed as to what financial provision may be necessary to reinforce the applicant's ability to live outside of the abusive relationship. It was noted in consultation by a number of victims of domestic abuse that the initial stages of making a break from an abusive relationship often require cash outlays to pay for moving and setting up a new household. Furthermore, victims of domestic abuse who have been working in the home caring for children or doing housework may have no means of support independent of their abusers and thus to leave the abuser would put them in a situation of financial destitution.

In such situations an order requiring the respondent to pay some financial provision to the applicant and potentially any children of the applicant could be very beneficial as a means of providing the applicant with a better chance of breaking free from the cycle of abuse.

The majority of the American codes provide that the court may order spousal or child support under the terms of the order. The New Jersey code provides that the court may order the respondent to pay rent or mortgage payments for the residence occupied by the applicant where the respondent has a duty to support the applicant or other household members.[198] It also allows that the court may order the respondent to pay emergency monetary relief to the applicant and other dependants noting that any ongoing obligation of support is to be determined at a later date pursuant to

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[198] N.J. Stat. Ann., s. 2C:25-29(8). The section notes that the order may issue "provided that the issue [of support] has not been resolved or is not being litigated between the parties in another action". The section is in some sense a duplication of section 2C:25-29.b(2) but extends the possibility of an obligation to pay rent to the situation where the victim remains in the initial residence.

applicable law.[199] The Nova Scotia proposal contains similar clauses.[200] These legislative efforts seem to be attempting to juggle the desire to require the respondent to give financial support to the applicant in appropriate situations of need and emergency arising out of the violence of the respondent on the one hand, and the pre-existing law relating to support obligations on the other hand.

(a) Situations in which the respondent owes an independent obligation to support the applicant or children in the care of the applicant

In relation to applicants who have a pre-existing right to support from the respondent the purpose of the right to obtain an order for maintenance within an application for a protection order would be to meet the immediate financial needs of the applicant and to fill the gap between the granting of the protection order and the point at which the support obligations could be more permanently defined. The utility of allowing for this would be that it would provide the applicant with immediate financial support that would provide a window of self-sufficiency for the applicant at the moment of the attempt to separate from the abuser. As in the situation of custody and access, it may be that ultimately domestic abuse proceedings are not the optimal forum for long-term determinations of issues of maintenance and support. In order to ensure that long-term arrangements are arrived at in the best forum we would confine our recommendation to allow the court to make only temporary orders of maintenance at the point of making an order for protection. Any order of maintenance made under the protection legislation should be reviewable upon application by either party under the Domestic Relations Act or the Divorce Act.

Apart from providing emergency enforcement of an obligation to support the applicant and children, we consider that the respondent should potentially also be required to pay the reasonable costs associated with

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[199] *Ibid.* at s. 2C:25-29(10).

[200] *Supra*, note 77 at s. 4(1)(g) which reads: "if it is not possible for the victim to remain in the residence, or if the victim chooses alternative housing, the court may make an order requiring the respondent to pay the victim's rent at a residence other than the one previously shared by the parties if the respondent is found to have a duty to support the victim and the victim requires alternative housing". Subsection (h) provides that the court may grant: "an order requiring the respondent to pay emergent monetary relief to the victim and other dependants, if any, until such time as an obligation for support shall be determined pursuant to any other Act of the Legislature or the Parliament of Canada or subsequent agreement of the parties".

separation. Again, in the course of consultation we found that the cost of setting up another household was often so great, relative to the victim's resources, that it precluded the possibility of the victim leaving the abusive situation. This was particularly true where children were involved. We are of the view that in an appropriate case the respondent should be required to pay such costs.

RECOMMENDATION 16

Where the respondent has a duty to support the applicant or any children in the applicant's care, the court should be empowered to make a limited emergency order of financial provision to the applicant subsisting only until such time as the issue is reviewed upon the application of either party under other legislation.

The court should further be empowered to order the respondent to pay a sum, that the court would consider fair, to the applicant which would reflect the cost of separation from the respondent and would reasonably assist the applicant in setting up a household independently of the respondent.

(b) Situations in which the respondent does not owe an independent obligation to support the applicant

In situations where the applicant and the respondent are not married or where the children involved are not potentially entitled to support by the respondent the question of whether payment for support should be made by the respondent is perhaps more complex. On the one hand, it would not be within the purpose of the legislation to expand the sorts of situations in which individuals are required to make support payments to another. On the other hand, if the purpose of the legislation is to give relief to all victims of domestic abuse and, if it is clear that the emergency financial relief may be necessary to put a victim in a position where they are able to successfully remove themselves from the battering situation, then perhaps the court ought to have the power to award such financial relief. The

obligation to pay would then arise out of the violence of the respondent toward the applicant and not out of any other aspect of their relationship.

Again, there are potentially many costs associated with the separation from the abuser and we consider in appropriate cases these costs ought to be borne by the abuser in order to allow the victim the greatest possible chance of surviving outside of the abusive relationship.

The view which opposes the creation of a power to grant such a remedy would hold that it is beyond the legitimate purview of a domestic violence statute to provide for an alternative tort system. Further, the concern here is that allegations of domestic abuse could allow a vexations litigant to extort money from respondents and would allow them the legal tools to force respondents to shoulder financial burdens that are rightfully those of the applicant. In any circumstance where an individual was desirous of leaving a domestic situation, the availability of such a remedy would allow them to plead domestic abuse in order to force the other party to pay the costs of their relocation. The concern then is that the mischief that would be caused by the creation of such a remedy would far outweigh the potential benefit in those legitimate cases where the respondent in justice ought to be under an obligation to pay the cost of such expenses.

<u>QUESTION 7</u>: In situations in which the respondent does not owe an independent obligation to support the applicant, should the court be empowered to make an order requiring the respondent to pay a sum, that the court would consider fair, to the applicant which would reflect the cost of separation from the respondent and would reasonably assist the applicant in setting up a household independently of the respondent?

(3) Compensation for out-of-pocket expenses incurred as a direct result of the abuse

Many of the American statutes also make provision for compensation to be made by the respondent to the applicant for out-of-pocket expenses incurred as a result of the abuse. Such expenditures might include anything from medical expenses and loss of earnings as a result of absences from

work due to injury caused by abuse, to the cost of changing locks or acquiring a non-published phone number. Some U.S. statutes also expressly include moving expenses in the list of items that may be recovered as out-of-pocket expenses.[201] For our purposes, however, moving expenses would be covered under recommendations 20 and 21.

One view is that while the purpose of the legislation is not to establish a specific tort of domestic abuse, it would seem nevertheless that it would be sensible for the court to be able to award expenses to the victim of domestic abuse when such expenses were incurred as a result of the respondent's abusive conduct. The Saskatchewan,[202] Nova Scotia,[203] and B.C.[204] models all contain such provisions.

The other view is that it is beyond the legitimate scope of a domestic abuse statute to go so far as to provide for an alternative tort system. While the goal of protection and prevention of domestic abuse is a legitimate goal for such legislation, the creation of compensation remedies goes beyond this legitimate goal and steps into the realm of the corrective justice which has long been dealt with adequately by our system of tort law. The provision of such a remedy requires that the judge make a finding of liability on the part of the respondent. This goes further than is appropriate for legislation attempting only to prevent domestic abuse and protect its victims. Furthermore, the question of what sort of effect such an award would have on the issue of support payments is a troubling one. Again, this view would hold that the property and financial arrangements as between domestic partners should be dealt with in their appropriate forum and should not be re-configured under the guise of compensation for loss suffered as a result of domestic abuse.

QUESTION 8: Should the court be empowered to order the respondent to pay out-of-pocket expenses incurred by the applicant as a result of the abuse?

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[201] Mass. Gen. Laws Ann., c. 209A, s. 3(e).

[202] *Supra*, note 78 at s. 7(1)(f).

[203] *Supra*, note 77 at s. 4(1)(i).

[204] British Columbia Bill M 217, Domestic Violence Prevention Act (3d Sess., 35 Parliament, 1st reading June 29 1994) s. 7(1)(f).

(4) Costs

It would seem to be reasonable to allow the court to award costs to the applicant. Both the Nova Scotia[205] and the Saskatchewan[206] models contain such provisions.

RECOMMENDATION 17

The court should be empowered to make an order as to costs, including any fees associated with the filing of the application as well as full reimbursement for lawyers fees.

C. Prevention Remedies

(1) Orders requiring counselling

(a) Orders requiring the respondent to take counselling

It may be the case that the respondent's abusive behaviour is caused by psychological problems or personal wounds and the only effective way of preventing further abuse is to get the respondent to reflect in a personal way upon the causes and effects of violent and abusive behaviour. It may also be the case in situations where an order is needed and granted that respondents' only source of emotional sustenance and support will be from the persons with whom they have been prohibited from making contact. The anxiety caused by the separation from those individuals upon whom the respondent is emotionally dependent may cause extreme emotional stress for the respondent and such stress may increase the likelihood of violent conduct.

While some believe that the court should be empowered to mandate counselling for an individual who has engaged in abusive conduct, others feel that this is too extensive an invasion of the autonomy of the individual respondent. The view opposing court requirement for counselling focuses on

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[205] *Supra*, note 77 at ss 4(1)(u) & 8(3)(g).

[206] *Supra*, note 78 at s. 7(1)(f).

the fact that counselling is a deeply personal process requiring the participation of the individual and that therefore it cannot be effectively forced by the justice system. Further, the question of how to enforce a system of court mandated counselling is raised as a significant hurdle.

<u>QUESTION 9</u>: Should the court be empowered to order a respondent to take counselling and to pay for that counselling where it appears that it would be helpful to provide an opportunity for the respondent to reflect upon and attempt to change the abusive behaviour with the aid of professional help, or where it appears that the respondent may need help in coping with the trauma of dealing with separation from those upon whom the respondent may be emotionally dependent?

Where the respondent has sufficient resources to pay for counselling, should the court be empowered to order that the respondent pay the costs of such counselling?

(b) Orders requiring the respondent to pay for counselling for the applicant

It is also often the case that the applicant will require counselling to deal with the damage to the applicant's sense of self as a result of abuse. Indeed, like the respondent, the applicant may also be emotionally dependent upon the respondent, and, notwithstanding the abuse and the threat of harm, may experience severe anxiety as a result of the separation from the respondent brought about by the order. In order to deal with the damage to self-esteem, self-confidence and sense of personal agency caused by the abuse and, in order to deal with potential trauma caused by separation from the respondent, it could be beneficial for the applicant to take counselling.

Where the need for counselling arises out of the respondent's wrongful conduct and where the respondent has the resources to pay for counselling for the applicant, it would seem to be potentially desirable for

the respondent to be ordered to pay for counselling for the applicant to help the applicant deal with emotional issues surrounding the situation of abuse.

The other view is that there should not be a power to order the respondent to pay for counselling of the applicant since emotional problems are the responsibility of each individual. This view focuses on the belief that it is overly invasive and demanding to require a respondent to pay potentially large sums of money for counselling of an individual whose problems may be complex and may not ultimately exist as a result of the abuse. Furthermore, the award of costs of counselling could potentially complicate and inappropriately effect any existing arrangement with respect to maintenance and support as between the parties.

<u>QUESTION 10</u>: Should the court be empowered to grant an order directing the respondent to pay the costs of counselling for the applicant with an appropriate professional service where the applicant has so requested?

(c) Counselling for children in the care of the applicant or the respondent

It is clear that in abusive relationships, often the individuals who suffer most are those who have the least control over the situation: children. As we have noted in the above section on custody and access, children suffer severe emotional scars from their experiences of abusive conflict between their parents. Children often begin either to withdraw or to "act out" the abusive behaviour of abusers to whom they are exposed. Statistics show that domestic abuse is learned behaviour and that children who witness abuse in the home are much more likely to replicate those patterns in adult life than are individuals who are not exposed to violent abusive behaviour in their first family.[207]

The children residing with the applicant and respondent may be in grave need of counselling to deal with their reactions to the abuse that they have witnessed as well as the anxiety and loss caused by the separation from the respondent that may come about as a result of the order. Many of the victims of domestic abuse interviewed were of the view that it was

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[207] *Supra*, note 166.

extremely difficult for them to deal with the process of separating from their abusers, finding a safe place to live, setting up a new home and then trying to cope with the trauma experienced by their children as a result of the situation. Often they did not have enough resources to pay for counselling for their children, nor did they know where to turn to find proper counselling. They also felt that because the dislocation and the need for counselling were results of their abuser's violent behaviour, the violent party should be required to pay for the children to be given help in coping with the situation.

The applicant who has the responsibility of caring for the children will often suffer financial hardship as a result of separation from the respondent. In many cases the domestic situation will be such that the male respondent will have been the primary financial provider for the family while the female applicant will have been the primary caretaker and home maker. Thus, the applicant's financial resources will be severely limited by separation from the respondent.

Again, the other view is that such a remedy would be excessively invasive and would unduly threaten the autonomy interest of respondents. Further, questions arise as to how such an award would effect the existing situation in relation to support payments to children. A concern is expressed in this regard that such an award might inappropriately effect existing arrangements.

<u>QUESTION 11</u>: Should the court be given the power to order the respondent to pay the costs of counselling for children who have been exposed to the respondent's violent and abusive behaviour and who are in need of help in dealing with the emotional issues that the abuse has raised for them?

D. Other Relief

The court should be given the power to grant further relief to ensure the protection of the applicant in a general remedies clause. However, given that the victims of domestic abuse should be recognized as the best experts on what their needs are, such further relief should only be granted with the

consent of the applicant. A number of American statutes contain such clauses. For example, the New Jersey legislation provides that the court may order "any other appropriate relief to the plaintiff and dependent children provided that the plaintiff consents to such relief, including relief requested by the plaintiff at the final hearing whether or not the plaintiff requests such relief at the time of the granting of the initial emergency order".[208] The Saskatchewan,[209] Nova Scotia,[210] and B.C.[211] models contain similar provisions.

The other view in this regard is that such a blanket grant of power is too broad and potentially extremely invasive. While the problem of domestic abuse is recognized a serious one, it is stressed that it does not justify the creation of unlimited and potentially draconian legal powers without regard to the legitimate rights and interests of respondents.

<u>QUESTION 12</u>: Should the court be given the power to grant other relief necessary for the protection of the applicant or the success of the applicant's attempt to become independent of the respondent?

If so, should such further relief be granted at the sole discretion of the court or only with the consent of the applicant?

In the table that follows we have set out the sort of remedies available under the different provisions. We have further set out our recommendation in respect of each remedy.

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[208] N.J. Stat. Ann., s. 2C:25-29.b(14).

[209] *Supra*, note 78 at ss 3(3)(e) & 7(1)(k).

[210] *Supra*, note 77 at ss 4(1)(v) & 8(3)(h).

[211] *Supra*, note 78 at ss 3(3)(e) & 7(1)(k).

	Sask. Emergency Order	Sask. Victim Assistance Order	N.S. Remedies for Domestic Violence	N.S. Remedies for Harassment	B.C. Emergency Intervention Order	B.C. Victim Assistance Order	ALRI Recommendations
No-Contact	3(3)(d)	7(1)(b)(c)	4(1)(e)(f)	8(3)(c)(d)	3(3)(d)	7(1)(c)	Yes
Prohibiting Violence	No	No	4(1)(a)	No	No	No	No
Prohibiting Harassment	No	No	4(1)(c)	8(3)(a)	3(3)(d)	7(1)(b)	No
Relinquish Weapons	No	No	4(1)(m)	No	No	No	Yes
Exclusive Possession of a Residence	3(3)(a)	7(1)(a)	4(1)(b)	No	3(3)(a)	7(1)(a)	Yes
Removal of Resp. from Residence	3(3)(b)	7(1)(d)	4(1)(q)	No	3(3)(b)	7(1)(d)	Yes
Restrict Resp. Use of a Residence	No	No	4(1)(p)(i)-(iii)	No	No	No	No
Compensation for Expenses	No	7(1)(f)	4(1)(i)	No	No	7(1)(f)	Yes
Legal Costs	No	7(1)(f)	4(1)(u)	8(3)(g)	No	7(1)(f)	Yes
Payment of Support to Victim and Children	No	No	4(1)(j), 4(1)(g)	No	No	No	Yes—with limitations noted
Emergency Monetary Relief	No	No	4(1)(h)	No	No	No	Yes—with limitations noted
Custody and Access	No	No	4(1)(n), 4(1)(o)	No	No	No	Yes—with limitations noted
Possession of Personal Property	No	7(1)(g)	4(1)(k)	No	No	7(1)(9)	Yes—with limitations noted
Retrieval of Personal Property	3(3)(c)	7(1)(e)	4(1)(r)	No	3(3)(c)	7(1)(e)	Yes
Prohibiting Destruction of Property	No	7(1)(h)	4(1)(l)	No	No	7(1)(h)	Yes
Posting of Bond	No	7(1)(j)	4(1)(t)	8(3)(f)	No	7(1)(j)	To be discussed in forthcoming section on enforcement
Reporting to Monitor	No	No	4(1)(s)	8(3)(h)	No	No	To be discussed in forthcoming section on enforcement
Requiring Counselling	No	7(1)(i) allows for recommendation	4(1)(d)	8(3)(b)	No	7(1)(i)	Yes
Other Relief to Protect Applicant	3(3)(e)	7(1)(k)	4(1)(v)	8(3)(h)	3(3)(e)	7(1)(k)	Yes

PART III — JURISDICTIONAL ISSUES

CHAPTER 4 — JURISDICTION OF THE PROVINCIAL COURT AND JUSTICES OF THE PEACE TO GRANT RELIEF UNDER THE LEGISLATION

A. Introduction

The goal of accessibility of the remedies provided in the legislation is paramount to our purpose. As we have seen, cost renders civil protection unattainable for many victims of domestic abuse. Our consultation suggests that in many cases, even where the family's standard of living is relatively high, a victim of domestic violence does not have access to funds with which to pay the costs of such an application. It is ultimately the goal of the legislation to create a procedure that is simple and accessible to an individual acting on their own without legal counsel. The Court of Queen's Bench may not be an optimal forum in which to place a *pro se* procedure since its procedures are relatively complex and formalized and since it is unusual for an individual to appear before the court unrepresented. Furthermore, it is to be noted that outside of urban centres the Court of Queen's Bench may not always be sitting and therefore may not provide the kind of accessibility that we are trying to achieve in this legislation. Victims of domestic abuse dealing with the court system may perceive the surroundings and atmosphere in the Court of Queen's Bench to be intimidating and frightening. This perception may have particularly deleterious effects when the individual needing protection is already feeling immobilized by fear.

Therefore, we are seeking to make every attempt possible to put the jurisdiction to grant the remedies in a forum that is friendly, unintimidating and accessible to the applicant. Of course, the surroundings and procedures of the provincial courts are also likely to be unfamiliar and daunting to applicants. However, the cost of bringing an application in the Court of Queen's Bench remains a very significant factor driving the need for a more accessible forum to provide protection to victims of domestic abuse.

We must however, consider the limitations imposed by section 96 of the Constitution Act, 1867.[212] This section reads: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick". The provinces have the power, by virtue of section 92(4)[213] of the Constitution Act, 1867, to create provincial courts and tribunals and to appoint the judges or members thereof. However, section 96 has been interpreted as limiting the provinces' power to give those provincially constituted bodies the sorts of powers traditionally exercised by superior courts.[214]

Therefore, we must examine each remedy to be given under the legislation and determine whether the granting of such jurisdiction is constitutionally permissible.

B. Other Legislative Models

The proposed Nova Scotia legislation appears to place all jurisdiction under the legislation in the superior court. This can be inferred from section 3(e) of the legislation which provides that "'court' means, unless the context otherwise requires, the Supreme Court of Nova Scotia". It is unclear what sort of situation is envisaged where the context would require a different meaning of the word "court". Thus, we may conclude that the legislation makes no attempt to place jurisdiction in a provincially appointed court.

The Saskatchewan Act, as we have seen, creates two categories of order. The first is the "emergency intervention order" available under section 3 of the Act which may be obtained from a Justice of the Peace.[215] Such an order may include: an order for exclusive possession of a residence,

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[212] U.K., 30 & 31 Vict., c. 3.

[213] This section gives the province power over: "The establishment, and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers". See also Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at 164.

[214] *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415; *Reference re: Adoption Act and Other Acts*, [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Limited*, [1949] A.C. 134; *Tomko* v. *Labour Relations Board (Nova Scotia) et al.*, [1977] 1 S.C.R. 122; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62.

an order directing a peace officer to remove a respondent from a residence, an order directing a peace officer to accompany the applicant to retrieve personal property, an order of no-contact, as well as any other order that the designated Justice of the Peace "considers necessary to provide for the immediate protection of the victim".[216]

After making an emergency intervention order the Justice of the Peace is required immediately to forward a copy of the order and supporting documentation to the Court of Queen's Bench.[217] A judge of the Court of Queen's Bench must then review the order within 3 working days of the receipt of the order or as soon thereafter as is possible.[218] The judge of the Court of Queen's Bench may then confirm the order, at which time it is deemed to be an order of the Queen's Bench granted on an *ex parte* basis.[219] If the judge is not satisfied that the order was made on sufficient evidence, the judge may order a rehearing before the Court of Queen's Bench.[220] Upon the rehearing the judge may confirm, vary or terminate the order or any part of it.[221]

Section 7 of the Act provides an alternative procedure whereby the applicant may apply directly to the Court of Queen's Bench for relief. The order of the Queen's Bench is referred to as a victim assistance order and, as we have seen, it contains all of the remedies available in an emergency intervention order as well as a number of others.[222]

It is clear here that the Saskatchewan Act is seeking to provide speedy access to relief under the legislation. A distinction seems to have been made on the basis of the urgency of the order. It would appear that an assumption has been made in the legislation that the jurisdiction of the Justice of the Peace to make an emergency intervention order is dependent

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[216] S. 3(3).

[217] S. 5(1).

[218] S. 5(2).

[219] S. 5(3).

[220] S. 5(4).

[221] S. 5(9).

upon the confirmation of that exercise of power by the Court of Queen's Bench. In other words the underlying assumption of the Act would appear to be that the Justice of the Peace, as a provincially appointed officer, may have jurisdiction over the matters in question on an emergency and temporary basis only.

The view supporting this two step procedure is that it both buttresses the constitutional validity of the grant of power to the Justices of the Peace and also ensures that the power to affect long term relations between the parties is not granted to a body without sufficient legal expertise to adjudicate such matters adequately. This view may be accompanied by a concern that it is indeed inappropriate (both from a constitutional and a practical point of view) for officials without a high degree of legal expertise to hold such broad powers. Of course, the question then arises as to whether the Provincial Court but not the Justices of the Peace could or should be granted such powers given that the judges of the Provincial Court are legally expert.

The other view is that the two step process set out in the Saskatchewan Act is quite unnecessary and reflects an overabundance of caution in relation to the scope of the restrictions imposed by section 96. The two step procedure may be seen as introducing unnecessary complexity and uncertainty into the process of obtaining a protection order. This view might be accompanied by the view that the nature of the problem is one well within the expertise of most Justices of the Peace and that the additional legal qualifications of either the members of the Court of Queen's Bench or the Provincial Court are unnecessary to effectively exercise such powers.

In the analysis that follows, we have avoided making recommendations on where the power should ultimately be placed. We endorse the view that power to grant the remedied created by the legislation should be in the most easily accessible and inexpensive tribunal possible while ensuring that sufficient legal expertise is present to fairly and effectively decide the dispute. Thus, our discussion of this matter focuses primarily on whether it is possible to grant the power to a provincially appointed tribunal. We will leave the question of which tribunal is ultimately most appropriate to a later date once other procedural issues have been discussed. Thus, our recommendations in this regard will address

the question of whether or not jurisdiction to grant the remedy **may** be placed with a provincially appointed tribunal.

C. Summary of Conclusions

A summary of our conclusions on the extent of the restrictions imposed by section 96 of the Constitution Act, 1867 on the ability of the province to grant the powers to be created to a provincially appointed body is as follows:

(1) Protection remedies

- The jurisdiction to order no-contact with the applicant may be given to a court of inferior jurisdiction since this power is analogous to the power of magistrates or Justices of the Peace to bind an individual over to keep the peace. Such a power exists in the Justice of the Peace at present under section 810 of the Criminal Code. This power existed at 1867 in the office of the Justice of the Peace and has existed in the office of the magistrates of England, being officers of inferior jurisdiction, since the twelfth century.[223]

- Jurisdiction over orders of custody and access may be given to courts of inferior jurisdiction. This was clearly established in *Re B.C. Family Relations Act*.[224]

- A court of inferior jurisdiction may be given jurisdiction to order seizure of firearms. Again, the analogous jurisdiction is granted to an court of inferior jurisdiction under the *Criminal Code*.

- Jurisdiction to order exclusion from a residence and non-entry into a residence could be given to a court of inferior jurisdiction only if it were possible to argue that the power, viewed in its institutional context, was no longer analogous to that of the superior court. In *Re B.C. Family Relations Act*,[225] the Supreme Court of Canada held that the power to order exclusive possession of a residence could not be granted to an inferior tribunal as it was a judicial power broadly analogous to the superior court's

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[223] See discussion of orders of no-contact below at p. 169.

[224] *Supra*, note 214.

[225] *Ibid.*

(4) Judicial interpretation of section 96 of the Constitution Act, 1867

The strongest statement of the extent of the restriction imposed by section 96 was made in 1938 by the Privy Council in *Toronto Corporation* v. *York*.[227] There the court held that any function that had been in the power of the superior court at 1867 could never under any circumstances be granted to a provincially appointed body. Later in 1938 the Supreme Court of Canada rendered its decision in *Reference re Adoption Act*.[228] In that case the Supreme Court limited the severity of the judgment of the Privy Council by holding that the summary jurisdiction granted to the Magistrates and Justices of the Peace under the Adoption Act, The Children's Protection Act, The Children of Unmarried Parents and Deserted Wives Act, and the Children's Maintenance Act were *intra vires* the province. Much of the jurisdiction granted was in relation to the making of orders for maintenance of various vulnerable persons in distress. Duff, C.J. focused on the importance of the legislation being considered in its social context in coming to the conclusion that:

> Through out the whole of this country magistrates daily exercise, especially in the towns and cities, judicial powers of the highest importance in relation more particularly to the criminal law, but in relation also to a vast body of law which is contained in provincial statutes and municipal by-laws. The jurisdiction exercised by these functionaries, speaking generally, touches the great mass of the people more intimately and more extensively than do the judgements of the Superior Courts; and it would be an extraordinary supposition that a great community like the Province of Ontario is wanting, either in the will or in the capacity to protect itself against misconduct by these officers whom it appoints for these duties; and any such suggestion would be baseless in fact an altogether fallacious as the foundation of a theory controlling the construction of the B.N.A. Act.[229]

He noted further in upholding the grant of jurisdiction to the justices of the peace that he was:

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[227] *Supra*, note 214.

[228] *Supra*, note 214.

[229] *Ibid.* at 510.

> ... unable to accept the view that the jurisdiction of inferior Courts ... was by the B.N.A. Act fixed forever as it stood at the date of Confederation.[230]

Essentially the Court was of the view that in approaching the question of whether a particular power could be granted to a court of inferior jurisdiction, the test that should be applied was:

> does the jurisdiction conferred upon magistrates... broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96?[231]

In 1965 the Supreme Court held that the power of courts of inferior jurisdiction over financial matters could be increased so as to compensate for inflation. Thus, the monetary limits with respect to inferior courts' jurisdiction have been reviewed and increased over the years to compensate for decreases in the value of the dollar.[232]

The next important statement by the Supreme Court on the issue of the jurisdiction of inferior courts came in 1982 with *Re B.C. Family Relations Act*.[233] There the court considered the constitutional validity of the grant of jurisdiction to the Provincial Courts of the following powers:

- Guardianship of the person of a child,
- Custody of or access to a child,
- Occupancy of the family residence and the use of its contents, and
- The making of orders that a person shall not enter premises while they are occupied by a spouse, parent or child.

The legislation itself also contained a provision which allowed the Provincial Court to make orders of maintenance. That provision was not

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[230] *Ibid.* at 512 (S.C.R.); for a discussion of the relationship between this case and *Toronto v. York* see *Re Residential Tenancies*, *supra*, note 214 at 729.

[231] *Supra*, note 214 at 421 (S.C.R.).

[232] *Re Quebec Magistrate's Court*, [1965] S.C.R. 772, (1965) D.L.R. (2d) 701; Provincial Court Act, R.S.A. 1980, c. P-20, s. 36(1).

[233] *Supra*, note 214.

included in the question put to the Supreme Court by the reference, presumably because the issue was thought to have been already decided by the *Adoption Reference* as well as *Polglase* v. *Polglase et al.*[234]

The Court affirmed the test established in the *Adoption Reference* of broad conformity to a type of jurisdiction generally exercisable by courts of summary jurisdiction and confirmed that the jurisdiction of the inferior courts was not set in stone as of 1867.[235] The court went on to hold that the grant of jurisdiction in relation to guardianship as well as custody and access to the Provincial Court were *intra vires* the province. Estey, J. speaking for the majority of the court noted that a permissive approach to the construction of section 96 was extremely important given the "vast transformation of the Canadian community in every respect since 1867".[236] The court, in describing the importance of "relaxing the judicial outlook on the proper application of section 96", said that:

> The rights and duties created by such statutes frequently are of a kind or are directed to a sector of the community so as to be better and more expeditiously realized and interpreted by the less formal and less demanding procedures of the Provincial Court. It is not to denigrate the role of the superior court or its efficacy in the modern community. It is only to say that the highly refined techniques evolved over centuries for the determination of serious and frequently profound difficulties arising in the community are unnecessary to the disposition of much of the traffic directed to the magisterial courts by contemporary provincial legislation. That traffic can sometimes bear neither the cost not the time which sometimes inevitably must be borne or devoted by the parties to causes in the courts of general jurisdiction (the descendants of the royal courts of justice) and the county courts.[237]

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[234] *Supra*, note 226; and see *Re B.C. Family Relations Act, supra*, note 214 at 66.

[235] *Re B.C. Family Relations Act, supra*, note 214 at 104.

[236] *Ibid.* at 112.

[237] *Ibid.* at 107.

However, the majority of the court concurred in a dissent rendered by Laskin C.J.C. (as he then was) on two issues.[238] Thus, the grant of jurisdiction to the Provincial Court to make orders of occupancy of the family residence and orders prohibiting a person from entering premises occupied by a spouse, parent or child were found to be *ultra vires* the province. Laskin was of the view that the power to grant a right of occupancy was broadly conformable to the power of the superior-court to make determinations of property relations of spouses. He was of the view that the right of occupancy, although it did not affect title to property, was essentially a property right.[239]

With respect to non-entry orders, Laskin was of the view that the power was akin to the power to grant injunctive relief. He did not accept the argument that power was analogous to the power of the magistrate to bind over to keep the peace. His reasons for so holding are important to our discussion here and we will therefore set them out at length:

> Apart from the question of whether binding over a person to keep the peace falls within the federal criminal law power, a question which does not call for decision here, what we have here in section 79 is more akin to injunctive relief than it is to say relief against an apprehended breach of the peace. Moreover, it arises in a different context. There is, moreover, no parallel with the type of injunctive relief (by way of cease and desist order) which was sustained by this Court in *Tomko* v. *Labour Relations Board*. The cease and desist orders there were adjuncts of a valid administrative scheme dealing in its cental features with matters that had not been cognizable, certainly not in their institutional setting, by any court. In short, I cannot find any basis upon which non-entry orders under section 79 can be assigned to the Provincial Courts when other matters respecting spousal relationships, especially concerning property, are beyond the Provincial Court's jurisdiction.[240]

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[238] Laskin would have struck down the whole of the jurisdiction granted to the Provincial Court under the Act.

[239] *Ibid.* at 89.

[240] *Ibid.* at 90-91. The majority of the court did not render separate reasons on this issue.

Thus, in holding that the power to order non-entry of a residence was not exercisable by a court of inferior jurisdiction, Laskin was concerned that the power was not referable to a breach of the peace, rather that it was referable to the relations between spouses and in particular to property relations. It is to be noted that the within the legislation the power to grant an order of non-entry did not depend upon any anticipation of violence nor did it depend upon the existence of an order of exclusive possession.[241]

The limitations imposed by section 96 have also been explored by the courts in the context of administrative tribunals. Essentially, with respect to administrative tribunals, the courts have held that the fact that a particular power was one exercised by the superior courts at 1867 is not determinative of the issue of whether the power may be vested in a provincially constituted board. The grant of jurisdiction may be saved by an examination of the exercise of the power within the broader context of the function and purpose of the board.[242]

In *Tomko* v. *Labour Relations Board*,[243] the Supreme Court considered a challenge to the power of the Board to make cease and desist orders in the context of industrial disputes. There the appellant argued that the conferral of the power upon the Board was *ultra vires* the province since the type of jurisdiction granted was broadly conformable to the jurisdiction of the superior courts to grant injunctions. Hogg summarized the import of the Supreme Court's decision as follows:

> Laskin C.J., for the majority of the Supreme Court of Canada said that the superficially close analogy with superior-court injunctions was not decisive, because it was necessary to consider not the 'detached jurisdiction or power alone', but rather 'its setting in the institutional arrangements in which it appears'.[244]

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[241] *Ibid.* at 89, s. 79 of the B.C. Family Relations Act.

[242] *John East Iron Works*, *supra*, note 214.

[243] *Supra*, note 214.

[244] Hogg, *Constitutional Law of Canada*, *supra*, note 213 at 194, references in the judgment are to p. 120.

In *Re Residential Tenancies*,[245] Dickson J. set out what is now taken to be the definitive test for determining the validity of a grant of power to a provincially constituted tribunal. The first step of the test requires a consideration of "whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of confederation".[246] If it is decided that the power does not broadly conform to the jurisdiction exercised by a section 96 court, then the conferral of power is valid. If, however, the power fails this historical test, the court must then go on to consider the power within its institutional setting: "to determine whether the function itself is different when viewed in that setting".[247] The focus of the inquiry into the institutional setting is on the question of whether the function should still be characterized as a judicial one. The question of whether a function is of a judicial nature is determined primarily on the basis of whether the function requires the tribunal to make decisions about the respective rights of parties in conflict before the tribunal.[248]

Again, if the answer to the second question was in the negative then the conferral of jurisdiction is valid. Only if the court finds that the tribunal is exercising a judicial function broadly conformable to that exercised by the superior courts do they proceed to the third part of the test. Here the court is to re-examine the exercise of jurisdiction in the entire institutional context having regard to the function of the tribunal as a whole.[249] In examining the whole of the institutional context the conclusion to be drawn is that: "The scheme is only invalid when the adjudicative function is the sole or central function of the tribunal".[250]

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[245] *Supra*, note 214.

[246] *Ibid.* at 734.

[247] *Ibid.*

[248] *Ibid.* at 735.

[249] *Ibid.* at 735.

[250] *Ibid.* at 736.

This test has been generally accepted in subsequent interpretations of section 96 by the Supreme Court.[251] Furthermore, while the three part test was developed in relation to administrative tribunals, it has been held to be applicable to the question of the validity of a conferral of jurisdiction on inferior courts.[252] In addition, the Supreme Court has clearly stated that the historical test will be passed and the grant of jurisdiction valid if, at the date of confederation, the power was one exercised by both the superior and the inferior courts.[253] The court has also held that Parliament is equally bound by section 96 and that a federal conferral of jurisdiction upon a provincially constituted body must pass the same scrutiny as that of a provincial legislature.[254]

(5) Orders of no-contact

The granting of power to an inferior court to order no-contact in relation to the applicant is extremely important to the success of the legislative model being proposed. The difficulties to overcome in constructing a successful argument that such a conferral of jurisdiction does not run afoul of section 96 are significant. These difficulties stem primarily from the decision in *Re B.C. Family Relations Act* that the power to grant a order prohibiting an individual from entering a residence occupied by a spouse, parent or child was analogous to injunctive relief and was, therefore, not properly granted to an inferior court.

While we recognize that this judgment could be read as an insurmountable barrier to the giving of jurisdiction to a Provincial Court or Justice of the Peace to grant orders of no-contact, we are of the view that, in the context of domestic abuse legislation, the power to be granted to the court is more analogous to the traditional power of the magistrate in

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[251] *Sobeys Stores* v. *Yeomans*, [1989] 1 S.C.R. 238; *A. G. Quebec* v. *Grondin*, [1983] S.C.R. 364.

[252] *McEvoy* v. *A.-G. N.B. and A.G. Canada* (1983), 148 D.L.R. (3d) 25; *Re Young Offenders Act*, [1991] 1 S.C.R. 252.

[253] *Grondin*, *supra*, note 251; *Sobeys Stores*, *supra*, note 251; *Re Young Offenders Act*, *supra*, note 252; Hogg, *Constitutional Law of Canada*, *supra*, note 213 at 191.

[254] *McEvoy* v. *A.-G. N.B. and A.-G. Canada, supra*, note 252. There the Supreme Court of Canada said that: "Parliament can no more give away federal constitutional powers than a province can usurp them. Section 96 provides that 'The Governor General **shall** appoint the Judges of the Superior, District, and County Courts in **each** province'" [emphasis in the judgment]; cf. *R.* v. *Trimarchi* (1988), 49 D.L.R. (4th) 382 (Ont. C.A.).

relation to preventive justice to bind an individual over to keep the peace. Therefore, we are of the view that the power passes the historical test and does not violate the requirements of section 96. Indeed, it is the very words of Laskin C.J. which distinguished the power granted under the B.C. Family Relations Act from the power of the Justice of the Peace in relation to preventive justice that we rely on in coming to the view that the conferral of jurisdiction is a valid one.

The historic power of the magistrate to bind an individual over to keep the peace is well established in law. The power has existed in the English magistracy since 1361.[255] It is a power that was referred to by Coke and Blackstone as 'preventive justice'.[256] As such, the significant thing about the power to bind over is that its purpose is neither to punish nor to establish rights as between parties but rather to prevent future wrongdoing.[257] In speaking of the power to bind over Frank Milton notes:

> A young man may be convicted of hitting his ex-girl-friend, and it may appear that she wants to have nothing more to do with him and that he keeps pestering her. The magistrates might fine him, and also bind him over for a fixed period in a fixed sum (say, one year and £50) to keep the peace. They could also, though this is done less frequently, order him to find sureties for his good behaviour. If he refused to be bound over, or failed to find sureties, he could be sent to prison; if he broke the condition of the bind-over, he and his sureties would forfeit the money, as in the a case of broken bail.[258]

The power of the Justice of the Peace to bind an individual over to keep the peace existed at the time of confederation. The forms set out in An Act Respecting the duties of the Justices of the Peace, out of Sessions, in relation to summary convictions and Orders found in the Revised Statutes of Canada 1859 provides the procedure for applying to a Justice of the Peace to have another individual bound over to keep the peace. The form requires the complainant to swear to the fact of a threat from the individual

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[255] Frank Milton, *The English Magistracy* (London: Oxford University Press, 1967) at 90.

[256] *Ibid.*

[257] *Ibid.*

[258] *Ibid.*

complained of and to explain the circumstances of such threat. The wording of the form thereafter is as follows:

> that from the above and other threats used by the said A.B. towards the said C.D., he the said C.D. is afraid that the said A.B. will do him some bodily injury, and therefore prays that the said A.B. may be required to find sufficient Sureties to keep the peace and be of good behaviour towards him the said C.D.; and the said C.D. also saith that he doth not make this complaint nor require such sureties from the said A.B. from any malice or ill-will, but merely for the preservation of his person from injury.[259]

The power still exists in the Justice of the Peace to order a peace bond by virtue of section 810 of the Criminal Code which provides that:

> Any person who fears that another person will cause personal injury to him or his spouse or child or will damage his property may lay an information before a justice.[260]

The Justice of the Peace, if satisfied by the evidence, may:

- order the defendant to enter into a recognizance with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months and comply with such other reasonable conditions prescribed in the recognizance as the court considers desirable for securing the good conduct of the defendant[261] or

- commit the defendant to prison for a term not exceeding twelve months if he fails or refuses to entering to the recognizance.[262]

We are of the view that the power to order no-contact with an applicant is broadly conformable to the power of the magistrate to bind an

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[259] Cap. 103, R.S.C. 1859, at 1131-32; section 88 of the Act deems the forms good, valid and sufficient in law.

[260] Criminal Code, c. C-46, s. 810(1).

[261] *Ibid.* at s. 810(3)(a).

[262] *Ibid.* at s. 810(3)(b).

individual over to keep the peace. The essential aspects of the power are that it:

- relates to prevention of future wrongdoing,

- is not directed to the punishment of an individual for past wrongdoing, and

- is concerned with protecting the safety of those individuals threatened in their person by others.

None of these features are shared by the power to order non-entry granted by the B.C. Family Relations Act considered by the Supreme Court. There, as we have seen, the power could be exercised whether or not there was a threat of harm to the applicant and was essentially directed to securing the property rights or rights of occupation of the applicant in relation to other family members. Laskin C.J. did not decide the issue of whether a power to prohibit a respondent from making contact with an individual to prevent future harm to that individual could be given to a court of inferior jurisdiction.

It is of course true that the power to grant an injunction restraining an individual from making contact with another is one which could be exercised by the superior courts as a result of their plenary jurisdiction. However, as we have seen, the fact that there was a similar power held concurrently by a superior court does not result in a conclusion that the power is one broadly conformable to that of the superior court.[263] If the power is one that was held concurrently at the time of confederation the historical test is passed and the conferral of jurisdiction is valid. The fact that such a power is now exercisable by a Justice of the Peace also lends support to the conclusion that the province may make such a grant of jurisdiction. This is to be drawn from the Supreme Court decision in *McEvoy*[264] which established that Parliament is equally bound by the terms of section 96. Thus, if such jurisdiction could not be conferred upon an

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[263] *Grondin, supra*, note 251; *Sobeys Stores, supra*, note 251; *Re Young Offenders Act, supra*, note 252; Hogg, *Constitutional Law of Canada, supra*, note 213 at 191.

[264] *Supra*, note 252.

inferior body, Parliament would not have been able to do so under section 810.

This point brings us to the issue of whether only Parliament could confer this sort of jurisdiction upon a Justice of the Peace. It may be argued that the substantive power to bind over to keep the peace is derived from the federal government's jurisdiction under section 91(27) of the Constitution Act, 1867. From there the argument might proceed to the conclusion that by analogizing the power to order no-contact to the power to bind over to keep the peace we have also necessarily conceptualized the pith and substance of the protection legislation as being in relation to criminal law.

In general, we are of the view that the question of division of powers are to be kept separate from the question of the limitations imposed by section 96 on the ability to confer of jurisdiction. However, we will address the matter of the division of powers briefly at this point. In approaching the question of the constitutional validity of the legislative scheme in general, we must bear in mind that the issue of protection has both a civil and a criminal aspect. The duty of non-interference with the person of the other is both a public one owed to the state and a private one owed to one's fellow individuals. Thus, by virtue of the federal criminal power Parliament may make legislation to prevent crime consisting of a violation of the public duty to refrain from harming others. Likewise, the provincial government may make legislation to aid the individual in securing the prevention of violations of their private right to be secure in their person.

The fact that the substance of the legislation has a double aspect results in the conclusion that both Parliament and the provincial legislatures may legislate in the area.[265] Thus, once it is determined that the province has the power to legislate in relation to civil protection from domestic abuse, we do not then reintroduce the question of division of powers at the stage of inquiry into the validity of the conferral of jurisdiction on an inferior court. The essential point is that the courts of inferior jurisdiction had the power at confederation, and long before confederation, to make orders in relation to preventive justice. The fact that the substance of that preventive justice has both a civil and a criminal

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[265] *Smith* v. *The Queen*, [1960] S.C.R. 776; *Multiple Access* v. *McClutcheon*, [1982] 2 S.C.R. 161.

aspect should not enter into the discussion of whether jurisdiction can be placed with the Provincial Court or Justice of the Peace.

Therefore, we are of the view that the power to make orders of no-contact may be placed in the Provincial Court or Justice of the Peace. Of course, jurisdiction under the legislation may also be given to the Court of Queen's Bench.

RECOMMENDATION 18

Jurisdiction to make orders of no-contact may be granted concurrently to Justices of the Peace, the Provincial Court and the Court of Queen's Bench.

(6) Custody and access

As we have seen the Supreme Court of Canada found in *Re B.C. Family Relations Act*[266] that the a court of inferior jurisdiction could be given power over custody and access. We therefore are of the view that there is no impediment to the legislation vesting this power in the Provincial Court or the Justice of the Peace.

RECOMMENDATION 19

Jurisdiction over custody and access provisions in the legislation may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

(7) Seizure of firearms

Judges of the Provincial Court are presently vested with the power to order seizure of firearms. If, upon the application of an individual or a police officer, a Provincial Court judge makes a determination that it is not desirable for an individual to be in possession of a firearm, any acquisition

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[266] *Supra*, note 214 at 113.

certificate held by the individual is automatically revoked.[267] Section 100(13) of the Criminal Code directs that the order of the Provincial Court shall specify a reasonable period within which the person against whom the order is made may surrender firearms in his possession to a police officer or firearms officer.

While we have been unable to ascertain at this time whether such a power existed in courts of inferior jurisdiction at the time of confederation we would bring to bear many of the same arguments put forward in the section on orders of no-contact to conclude that such jurisdiction may be granted to the inferior courts. Firstly, the jurisdiction in question relates to preventive justice which, as we have seen, has traditionally been seen to be within the preview of the inferior courts. Indeed, section 810(3.1) provides that before making an order binding an individual over to keep the peace:

> the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the recognizance and that the defendant surrender any firearms acquisition certificate that the accused possesses and, where the justice or summary conviction court decides that it is not desirable, in the interests of the safety of the defendant or of any other person, for the defendant to possess any of those things, the justice or summary conviction court may add the appropriate condition to the recognizance.

Thus, the power to order the prohibition of the possession of firearms is seen as an adjunct to the power of the Justice of the Peace to bind over. We would rely again on the decision in *McEvoy* in concluding that Parliament is equally bound by section 96. Thus, we infer that the provincial legislature may grant any sort power to an inferior court that could be so granted by Parliament so long as the subject matter of the type of power being exercised was within provincial jurisdiction. We have already set out our reasons for concluding that the subject matter of possession of firearms has a double aspect and is therefore it is within the power of both

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[267] R.S.C. 1985, s. 100(7.1).

the province and Parliament to legislate in this area.[268] Thus, we would conclude that the jurisdiction to order the seizure and storage of firearms may be given to the Provincial Court or a Justice of the Peace.

RECOMMENDATION 20

Jurisdiction over orders of seizure and storage of firearms may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

(8) Exclusive possession of the residence

The most difficult power to sustain against a section 96 attack is the power to order exclusive possession of a residence. This is as a result of the difficulty of distinguishing this power, as it is contemplated by the proposed legislation, from the power to order exclusive possession that was struck down by the Supreme Court in *Re: B.C. Family Relations Act*.[269] The only way we can see of potentially distinguishing it is to stress the fact that this exercise of power (like the power to make a no-contact order) would be directly referable to a breach of the peace and would have all the characteristics of preventive justice rather than the adjudication of proprietary rights as between the parties. **It would have to be made abundantly clear that the order for exclusive possession was to be undertaken only with reference to the threat to the applicant's safety and not as a remedy that was directed toward adjudication of the parties respective proprietary rights.** Thus, the power would have to be clearly distinguished from the power which presently exists under the Matrimonial Property Act to order exclusive possession of a residence. This power is clearly one which is to be exercised primarily on the basis of the usual principles of fairness of distribution of property between the parties to the marriage.[270]

A further means of facilitating the grant of such a power to a provincially appointed tribunal would be to create a tribunal which was

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[268] See Chapter 3(A)(3).

[269] *Ibid.* at 214.

[270] See below at 19-21.

institutionally designed to resolve conflicts in the domestic sphere through the use of a combination of judicial and non-judicial dispute resolution methods. Were the legislation to create such a tribunal giving it the power to aid in the resolution of domestic conflict through the use of mediation, counselling, conciliation as well as more traditional judicial methods, grants of power such as the power to order exclusion from a residence would have secure constitutional footing.[271]

RECOMMENDATION 21

Jurisdiction over orders of exclusive possession of a residence may be granted concurrently to Justices of the Peace, the Provincial Court, and to the Court of Queen's Bench. In order to accomplish this grant of jurisdiction the legislation will have to make clear that the only legitimate reason for granting the order is to prevent a breach of the peace and that property relations as between the parties are not to be considered.

(9) Maintenance

Upon examination of the authorities we conclude that jurisdiction over maintenance and support may be given to a court of inferior jurisdiction. Again, this is established by the *Adoption Reference*,[272] as well as *Polglase* v. *Polglase et al.*[273] and is reflected in the granting of jurisdiction in such matters to the Provincial Court in section 27(2) of the Domestic Relations Act.[274] The B.C. government excised the section of the B.C. Family Relations Act relating to maintenance in the questions put to the Supreme Court in the reference relating to the legislation because the issue of jurisdiction to make orders of maintenance was taken to be already decided in favour of the inferior court.

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[271] *Reference Re: Residential Tenancies*, *supra*, note 214; *Tomko* v. *Labour Relations Board*, *supra*, note 214.

[272] *Supra*, note 214.

[273] *Supra*, note 226.

[274] R.S.A. 1980, c. D-37.

RECOMMENDATION 22

Jurisdiction over orders of maintenance may be given concurrently to the Justice of the Peace, the Provincial Court and the Court of Queen's Bench.

(10) Personal property and monetary remedies

Upon consideration of the authorities, it is our view that the jurisdiction of the Provincial Court or magistrate to make orders in relation to personal property or money is limited by the monetary ceiling established by section 36(1) of the Provincial Court Act. We consider this to be firmly established by the Supreme Court's decision in *Re Quebec Magistrate's Court*.[275]

In Alberta the Provincial Court's jurisdiction in respect of small claims is limited to $4,000.[276] In British Columbia the provincial court may hear claims in the amount of $10,000.[277] In Saskatchewan the small claims jurisdiction of the inferior court is limited to $5,000.[278] Ontario has a slightly lower limit at $3,000.[279]

Again, were a broadly based domestic dispute resolution centre to be created with diverse powers of a judicial and non-judicial character, such a tribunal could likely be granted full jurisdiction to deal with all aspects of this type of dispute since the power viewed in light of the institutional context would no longer broadly conform to those powers exercised by the superior courts.

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[275] *Supra*, note 232.

[276] Provincial Court Act, R.S.A. c. P-20, s. 36(1).

[277] Attorney General Statutes Amendment Act (No.2) 1990, S.B.C. 1990, c. 34, s. 13 amending the Small Claims Act, S.B.C. 1989, c. 38, s. 3.

[278] The Small Claims Act, S.S. 1988-89, c. S-50.1, s. 3.

[279] Courts of Justice Act, R.S.O. 1990, c. C-43 s. 23; and see Ont. Reg. 335/92, s. 1.

RECOMMENDATION 23

Jurisdiction to make orders requiring

- **the return of personal property**
- **the payment of costs**
- **payment for counselling**
- **compensation for out-of-pocket expenses**

may be granted to concurrently to Justices of the Peace and the Provincial Court where the total value of the property referred to in the order does not exceed an amount reflecting the jurisdiction of the inferior court at 1867 with an increase to reflect the decrease in the value of the dollar since that time.

Where the value of the property exceeds such amount jurisdiction to make an order must be given to the Court of Queen's Bench.

(11) Prevention remedies

The power to order an individual to take counselling clearly did not exist at the date of confederation nor could the reasons for creating such a power have been imagined at that time. Thus, because it is a new power we are of the view that it is not broadly conformable to the type of jurisdiction historically exercised by a superior court.[280] Therefore, we are of the view that the grant of jurisdiction in this regard passes the historical inquiry and is therefore valid.[281] However, even if it were to be found that the power were broadly analogous to some power exercised by the superior court at the time of confederation, in applying the three part test set out in *Residential Tenancies*, the power taken in its institutional context cannot be seen as a judicial function analogous to the sort of power traditionally exercised by the superior courts.

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[280] See *Adoption Reference*, *supra*, note 214; B.C. Family Relations Act, *supra*, note 214.

[281] *Residential Tenancies*, *supra*, note 214.

The power to order counselling does not arise out of any *lis* between the parties. It cannot be considered the private right of the applicant that the respondent be court mandated to obtain counselling. Rather in ordering a respondent to take counselling the court is acting of its own motion in attempting to bring an effective and safe resolution to the situation it is faced with. In making such an order the court is acting in the best interests of all the parties concerned in an attempt to work toward the healing of the difficulties that have cause the violence and abuse in the past. Thus, viewed in the context of the legislative scheme, the power to order an individual to take counselling in order to overcome personal problems that are causing abusive behaviour, cannot be understood as a power to adjudicate rights as between individuals.

RECOMMENDATION 24

Jurisdiction to make orders requiring the respondent to take counselling may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

(12) Other relief

Any other relief granted by the Provincial Court or Justices of the Peace would obviously be constrained by the strictures of section 96. It will have to be left to each individual judge to act within their constitutionally allotted powers.

RECOMMENDATION 25

Justices of the Peace, the Provincial Court and the Court of Queen's Bench may all be granted the power to make other orders to secure the protection of the applicant. That power will, by necessary implication, be limited by the inherent jurisdiction of the court in question.

PART IV — CONCLUSION

At the stage of our consultation for this project we received the encouragement and support of victims of domestic abuse, as well as professionals working in the area, to proceed in the effort to improve the law relating to civil protection of victims of domestic abuse. The results of our consultation and our research of the law and literature in the area have consistently given us strong indications that significant improvements to the law in this area may be made. The discussion set out above contains our initial responses to some of the fundamental issues to be determined in reworking the law of civil protection from domestic abuse. We recognize that no legal response will be a complete response to the problem of domestic abuse. However, we also recognize that the law bears a heavy responsibility to extend meaningful protection from abuse to those who seek it.

In defining the kinds of conduct that should be included as giving rise to an entitlement to apply for an order of protection we have attempted to ground our recommendations in a comprehensive understanding of the dynamics of abusive relationships. We have attempted to stress that in order to respond effectively to the phenomenon of domestic abuse the law must create a space for increasing its awareness of the cumulative effect of abusive behaviours. As long as the legal process focuses on individual abusive incidents viewed in isolation, and overlooks the context of power and control in an abusive relationship, it will fail to achieve the goal of creating effective remedies that protect the interest of the victim in meaningful ways. Thus, it is important for legislation in this area to clearly reinforce the relevance of the context of abusive conduct in a particular relationship. The purpose of civil protection in the area of domestic abuse should ultimately be to ensure that the interests of the individual that have been traditionally protected by the law: physical integrity, sexual integrity, autonomy, property and privacy are protected equally and effectively in the private sphere. Thus, a further goal of such legislation is to ensure that the public/private distinction no longer gives legitimacy to the view that the lesser protection against violation of the person is tolerable if it takes place in the private realm.

In discussing the scope of the legislation we have tried to ensure that we have confined the legislation to the domestic sphere in a manner which recognizes the particular barriers that individuals suffering from violation of the person in the private realm face. Thus, we have sought to single out and give specific definition to the domestic realm. However, we have also attempted to avoid the creation of artificial categories that would exclude legitimate applicants from the protection of the legislation. We have done this by attempting to identify the salient characteristics of domestic relationships which we have then included in the indicia of vulnerability.

In the area of remedies we have attempted first, to create an effective remedy of no-contact which will serve as the primary effort to secure a space of safety for the applicant. Secondly, we have tried to identify other sources of threat to the applicant and to suggest and discuss possible remedies in those areas. We have sought to identify those areas where the no-contact provision was in need of supplementation so that effective protection would be achieved. We have also tried to ensure that the legal remedies created in these areas would be limited and would not supplant the normal process of determination of other family law issues. The section on remedies is perhaps the most tentative one contained in this report and, for that reason we would request that interested persons give detailed attention to the issues there and provide us with your considered responses.

The final chapter reflects our analysis of the limitations imposed by section 96 of the Constitution Act, 1867 on the ability to grant jurisdiction to a provincially appointed tribunal to grant the remedies contemplated. Here, we have avoided a timid approach to the constraints imposed by section 96. It is our view that effectiveness of the remedies created will ultimately be contingent upon whether they are place in an accessible and user -friendly tribunal. We are of the view that there is no clear legal doctrine leading to the conclusion that the powers contemplated could not be given to a provincially appointed body. Thus, we are not willing to assume that the courts would invoke the constitution to tie the hands of government so as to render it unable to meet the pressing social needs of victims of domestic abuse.

The Institute now requests responses from interested persons and groups on both the recommendations contained and the questions posed in this report for discussion. From there firmer recommendations will be made

in a final report. Issues of procedure and enforcement are yet to be addressed. There is also a need for the drafting of a standard form of order in plain language to assist in the enforcement of the orders.

Thus, we would conclude by requesting and welcoming your responses.

PART V — LIST OF RECOMMENDATIONS

RECOMMENDATION 1 (p. 73)
The legislation should specify that an individual should be entitled to apply for an order where the court is of the view that the controlling and abusive behaviour demonstrated justifies the right to apply. The following examples of controlling and abusive behaviour:

- physical assault,
- sexual assault,
- destruction of property,
- forcible or unauthorized entry into the residence of the applicant,
- coercive action,
- harassment,
- emotional abuse

should be seen as examples illustrative of the category of controlling and abusive behaviour but not limiting of the definition of that category.

RECOMMENDATION 2 (p. 75)
Physical assault should be identified as the sort of conduct which entitles an applicant to apply for an order. It should be broadly defined and should include threat of physical assault and conduct which creates a reasonable apprehension of imminent physical harm. There should be no qualification that the assault cause a specific degree of physical harm.

RECOMMENDATION 3 (p. 77)
The legislation should specify that sexual contact of any kind that is coerced by force or threat of force should be included in the kind of conduct that triggers the entitlement to apply for an order. Threats to make unwanted sexual contact by force should also be included.

RECOMMENDATION 4 (p. 78)
Damage to any property that is done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant should also be included as giving rise to an entitlement to apply for an order.

RECOMMENDATION 5 (p. 79)
The sort of conduct which entitles an individual to apply for an order should include the forcible or unauthorized entry of the respondent into the residence of the applicant without the applicant's consent where the respondent and the applicant do not occupy the same residence.

RECOMMENDATION 6 (p. 81)
Compelling another against their will to perform an act which that person has the right not to perform or compelling another against their will to refrain from doing an act which that person has a right to perform should be included in the conduct which entitles an individual to apply for an order under the legislation.

RECOMMENDATION 7 (p. 83)
Harassment consisting of making repeated telephone calls to the applicant's home or workplace; keeping a person under surveillance by following them or looking in their windows; repeatedly coming to the applicant's house, workplace or school; following the applicant in public places and so on should be included in the sort of conduct that gives rise to the entitlement to apply.

RECOMMENDATION 8 (p. 87)
Emotional abuse should trigger the entitlement to apply for an order. Emotional abuse should be defined so as to include: subjecting an individual to degradation and humiliation including repeated insult, ridicule or name calling, making repeated threats to cause the individual extreme emotional pain, making repeated threats in relation to the individual's children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy in relation to the individual which is such as to constitute a serious invasion of the individual's privacy.

RECOMMENDATION 9 (p. 103)
It is recommended that the legislation be drafted to allow that an application may be brought by an individual against anyone with whom the applicant is in a relationship in which the court considers the indicia of vulnerability to be present. These indicia are:

- dependency or lack of ability of one or both of the parties to unilaterally leave the relationship,
- the intimate nature of the relationship,
- the potential in the relationship for emotional intensity,
- the reasonableness of the inference that the relationship would be presumed by the parties to be one of trust,
- the reduced visibility of the relationship to others or the element of privacy which keeps the goings on in the relationship unknown to others, and
- ongoing physical proximity of the parties.

Such relationships of vulnerability include but are not limited to:

- relationships in which the applicant and the respondent share living quarters,
- relationships in which the applicant has formerly cohabited with the respondent as an intimate partner.

RECOMMENDATION 10 (p. 108)
The legislation should empower the court to make an order prohibiting the respondent from making direct or indirect contact with the applicant. For further clarity and to assist in compliance with and enforcement of the order the meaning of "no-contact" should be explained. The order should give examples of the sorts of things that it includes in the meaning of contact. It should not, however, limit the meaning of "no-contact" to the examples set forth in the order. Things listed in the meaning of "no-contact" should include:

- telephoning the applicant at the applicant's residence, place of employment or school,
- going to the applicant's place of employment, school or residence,
- approaching the applicant if the respondent accidentally sees the applicant in a public place,
- watching the applicant or the applicant's residence, place of employment or school from a distance,
- communicating with the applicant in any other way including but not limited to mail, fax, telegram, or any other form of written communication, and
- communicating or attempting to communicate with the applicant in any of the above ways by enlisting the help of any other person.

RECOMMENDATION 11 (p. 110)
Where the circumstances of the case lead to the inference that a protection order is needed but where, as a matter of practical necessity or at the request of the applicant, the parties must, or could potentially desire to, have safe contact with one another, the order should be very specific structuring the terms of that contact in order to ensure that it does not:

(a) provide an opportunity for continued abuse or

(b) make it impossible for the police to effectively enforce the order.

Thus, orders should be required to set out in detail the logistics of how and when contact should take place to fulfil parenting or other family responsibilities, or to discuss reconciliation or other aspects of the relationship. Where possible it should be specified that such contact take place through an intermediary.

It should be specified that orders with a blanket exception for contact with the applicant in connection with the children should not be given.

RECOMMENDATION 12 (p. 112)
Because of the difficulties of enforcement of orders restricting the use of a residence, it is recommended that a power to grant such orders should not be created by the legislation.

RECOMMENDATION 13 (p. 114)
The legislation should provide for the possibility of persons other than the applicant to be included in the order. The best procedure for this would be to allow others to consent to being included in the no-contact provisions of the order where the evidence indicates that they are also at risk of injury or harassment by the respondent.

RECOMMENDATION 14 (p. 135)
(1) Where there is no existing order relating to custody and access the court should be given the power to:

- make a limited order for custody.
- make an award of access,
- make an order setting out the logistics of the exercise of access to ensure that the protection of the applicant is not compromised by the provisions relating to access,
- make an order requiring supervision of access and setting out the logistics of the exercise of supervised access,
- make an order requiring the respondent to pay for the supervision of access,
- make an order of no-contact between the respondent and any children in the custody of the applicant where to do so would be appropriate in all the circumstances of the case.

Any such order is limited and subsists only until such time as there is a review upon the application of either party under the Divorce Act, the Provincial Court Act or the Domestic Relations Act.

(2) Where there is an existing order relating to custody and access made under the Divorce Act the court should be given the power to:

- make an order consistent with the provisions of the order under the Divorce Act specifying the logistics of any access granted to the respondent to children in the custody of the applicant to ensure that the protection of the applicant is not compromised by the exercise of access.

(3) Where there is an existing order in relation to custody and access made under either the Provincial Court Act or the Domestic Relations Act the court should be given the power to:

- make an order setting out the logistics of any access granted in the existing order to ensure that the protection of the applicant is not compromised by the exercise of such access,
- make a limited order of no-contact between the respondent and any children where the children are at serious risk of harm from the respondent,
- make a limited order requiring supervision of access by the respondent and setting out the logistics for the exercise of such

supervised access where the children are at some risk of harm from the respondent, and

- make an order requiring the respondent to pay for the supervision of access.

All orders referred to above are limited and subsisting only until such time as there is review upon the application of either party under the Divorce Act, the Provincial Court Act or the Domestic Relations Act.

The inferior court should be granted jurisdiction to make such limited variation of orders of the Court of Queen's Bench as may be necessary in the course of granting protection under the legislation.

RECOMMENDATION 15 (p. 145)
The legislation should empower the court to order a police officer to accompany the applicant to a specified residence to collect specified personal property.

The court should also be empowered to order that the respondent refrain from converting or damaging the applicant's property or property in which the applicant may have an interest.

The court should also be empowered to grant a temporary order giving the applicant possession of any assets in which the applicant has or may have an interest that are necessary to the applicant's ability to live independently of the respondent.

RECOMMENDATION 16 (p. 147)
Where the respondent has a duty to support the applicant or any children in the applicant's care, the court should be empowered to make a limited emergency order of financial provision to the applicant subsisting only until such time as the issue is reviewed upon the application of either party under other legislation.

The court should further be empowered to order the respondent to pay a sum, that the court would consider fair, to the applicant which would reflect the cost of separation from the respondent and would reasonably assist the applicant in setting up a household independently of the respondent.

RECOMMENDATION 17 (p. 150)
The court should be empowered to make an order as to costs, including any fees associated with the filing of the application as well as full reimbursement for lawyers fees.

RECOMMENDATION 18 (p. 174)
Jurisdiction to make orders of no-contact may be granted concurrently to Justices of the Peace, the Provincial Court and the Court of Queen's Bench.

RECOMMENDATION 19 (p. 174)
Jurisdiction over custody and access provisions in the legislation may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

RECOMMENDATION 20 (p. 176)
Jurisdiction over orders of seizure and storage of firearms may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

RECOMMENDATION 21 (p. 177)
Jurisdiction over orders of exclusive possession of a residence may be granted concurrently to Justices of the Peace, the Provincial Court, and to the Court of Queen's Bench. In order to accomplish this grant of jurisdiction the legislation will have to make clear that the only legitimate reason for granting the order is to prevent a breach of the peace and that property relations as between the parties are not to be considered.

RECOMMENDATION 22 (p. 178)
Jurisdiction over orders of maintenance may be given concurrently to the Justice of the Peace, the Provincial Court and the Court of Queen's Bench.

RECOMMENDATION 23 (p. 179)
Jurisdiction to make orders requiring

- the return of personal property
- the payment of costs
- payment for counselling
- compensation for out-of-pocket expenses

may be granted to concurrently to Justices of the Peace and the Provincial Court where the total value of the property referred to in the order does not exceed an amount reflecting the jurisdiction of the inferior court at 1867 with an increase to reflect the decrease in the value of the dollar since that time.

Where the value of the property exceeds such amount jurisdiction to make an order must be given to the Court of Queen's Bench.

RECOMMENDATION 24 (p. 180)
Jurisdiction to make orders requiring the respondent to take counselling may be granted concurrently to Justices of the Peace, the Provincial Court, and the Court of Queen's Bench.

RECOMMENDATION 25 (p. 180)
Justices of the Peace, the Provincial Court and the Court of Queen's Bench may all be granted the power to make other orders to secure the protection of the applicant. That power will, by necessary implication, be limited by the inherent jurisdiction of the court in question.

QUESTIONS

QUESTION 1: (p. 88)
Should financial abuse consisting of the coercive control over financial assets and means of subsistence with a view to ensuring the financial dependency of the victim be included in the sort of conduct which entitles an individual to apply for protection?

QUESTION 2: (p. 113)
Should the legislation create a power to order the respondent to refrain from assaulting the applicant?

QUESTION 3: (p. 118)
Should the court be empowered to grant a mutual order where only one party has applied for an order and one party has proved that the other has engaged in the conduct identified by the legislation?

Or, should an application by both parties and proof of abusive conduct by both parties be required before a mutual order may be granted?

QUESTION 4: (p. 126)
Should the legislation create a presumption that, where it is necessary to make a temporary and limited order as to custody in the protection order, the best interests of the child are served by an award of custody to the non-abusive parent?

QUESTION 5: (p. 139)
Where an application for a protection order is made, should the judge be given discretion to order that firearms or other weapons in the respondent's possession be temporarily surrendered to a police officer?

QUESTION 6: (p. 142)
Should the legislation provide that the court may make an order granting the applicant exclusive possession of the residence regardless of whether the residence is owned or leased jointly or solely by one of the parties?

Should the fact that the respondent is the sole owner or lessor of the residence be a bar to the granting of the order?

If it is determined that the legislation should provide for such a remedy, should it be accompanied by a provision allowing the court to order the police to remove the respondent from the residence?

QUESTION 7: (p. 148)
In situations in which the respondent does not owe an independent obligation to support the applicant, should the court be empowered to make an order requiring the respondent to pay a sum, that the court would consider fair, to the applicant which would reflect the cost of separation from the respondent and would reasonably assist the applicant in setting up a household independently of the respondent?

QUESTION 8: (p. 149)
Should the court be empowered to order the respondent to pay out-of-pocket expenses incurred by the applicant as a result of the abuse?

QUESTION 9: (p. 151)
Should the court be empowered to order a respondent to take counselling and to pay for that counselling where it appears that it would be helpful to provide an opportunity for the respondent to reflect upon and attempt to change the abusive behaviour with the aid of professional help, or where it appears that the respondent may need help in coping with the trauma of dealing with separation from those upon whom the respondent may be emotionally dependent?

Where the respondent has sufficient resources to pay for counselling, should the court be empowered to order that the respondent pay the costs of such counselling?

QUESTION 10: (p. 152)
Should the court be empowered to grant an order directing the respondent to pay the costs of counselling for the applicant with an appropriate professional service where the applicant has so requested?

QUESTION 11: (p. 153)
Should the court be given the power to order the respondent to pay the costs of counselling for children who have been exposed to the respondent's violent and abusive behaviour and who are in need of help in dealing with the emotional issues that the abuse has raised for them?

QUESTION 12: (p. 154)
Should the court be given the power to grant other relief necessary for the protection of the applicant or the success of the applicant's attempt to become independent of the respondent?

If so, should such further relief be granted at the sole discretion of the court or only with the consent of the applicant?

APPENDIX A
OTHER LEGISLATION MODELS WITH RESPECT TO REMEDIES

I. Emergency intervention order (Saskatchewan)

The Saskatchewan Victims of Domestic Violence Act[1] creates two different types of orders. The first is the "Emergency Intervention Order" which is made available under section 3 of the Act.[2] This type of order may be obtained from a Justice of the Peace on an *ex parte* basis. The remedies available in such an order are listed in section 3(3) which is set out below.

> 3(3) An emergency intervention order may contain any or all of the following provisions:
>
> (a) a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership;
>
> (b) a provision directing a peace officer to remove, immediately or within a specified time, the respondent from the residence;
>
> (c) a provision directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim;
>
> (d) a provision restraining the respondent from communicating with or contacting the victim and other specified persons;
>
> (e) Any other provision that the designated justice of the peace considers necessary to provide for the immediate protection of the victim.

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[1] S.S. 1994, c. V-6.02.

[2] For a recent decision on the appropriate circumstances in which to grant an emergency intervention order see: *Dolgopol v. Dolgopol* (1995), 127 Sask. R. 237 (Q.B.).

II. Victim's assistance order (Saskatchewan)

A "Victim's Assistance Order" under the Saskatchewan Act allows for a wider array of remedies and is available at the Court of Queen's Bench. The list of available remedies is set out in section 7.

> **7**(1) Where, on application, the court determines that domestic violence has occurred, the court may make a victim's assistance order containing any or all of the following provisions:
>
> (a) a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership;
>
> (b) a provision restraining the respondent from attending at or near or entering any specified place that is attended regularly by the victim or other family members, including the residence, property, business, school or place of employment of the victim and other family members;
>
> (c) a provision restraining the respondent from making any communication likely to cause annoyance or alarm to the victim, including personal, written or telephone contact with the victim and other family members or their employers, employees or co-workers or others with whom communication would likely cause annoyance or alarm to the victim;
>
> (d) a provision directing a peace officer to remove the respondent from the residence within a specified time;
>
> (e) a provision directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim;
>
> (f) a provision requiring the respondent to pay the victim compensation for monetary losses suffered by the victim and any child of the victim or any child who is in the care and custody of the victim as a direct result of the domestic violence, including loss of earnings or

> support, medical and dental expenses, out-of-pocket losses for injuries sustained, moving and accommodation expenses, legal expenses and costs of an application pursuant to this Act;
>
> (g) a provision granting either party temporary possession of specified personal property, including a vehicle, chequebook, bank cards, children's clothing, medical insurance cards, identification documents, keys or other necessary personal effects;
>
> (h) a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property that the victim may have an interest in;
>
> (i) a provision recommending that the respondent receive counselling or therapy;
>
> (j) a provision requiring the respondent to post any bond that the court considers appropriate for securing the respondent's compliance with the terms of the order;
>
> (k) any other provision that the court considers appropriate.
>
> (2) A victim's assistance order may be subject to any terms that the court considers appropriate.

III. Protection order (Nova Scotia)

The proposed Nova Scotia legislation also creates two classes of orders. However, here the distinguishing factor between the two types of order is the type of conduct complained of. The Protection Order provided for in section 4 is available upon a determination that domestic violence has occurred and provides for a full array of remedies. The "Non-Harassment Order" provided for in section 8 is available to an individual who has been harassed but where domestic violence as defined in the act has not been proved. The "Non-Harassment Order" allows for a more circumscribed set of remedies. These provisions are set out below.

> **4**(1) Where, upon application, the court finds that domestic violence has occurred, it shall grant such

relief necessary to prevent further domestic violence and in so doing may issue a protection order granting any or all of the following relief:

(a) an order restraining the respondent from subjecting the victim to domestic violence;

(b) an order granting the victim exclusive occupation of the residence regardless of whether the residence is jointly or solely owned by the parties or jointly or solely leased by the parties;

(c) an order prohibiting harassment of the victim;

(d) an order requiring either or both parties to receive professional counselling or therapy;

(e) an order restraining the respondent from entering the residence, property, school or place of employment of the victim or other family or household members of the victim and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members;

(f) an order restraining the respondent from making any communication likely to cause annoyance or alarm including but not limited to personal, written or telephone contact with the victim or other family members or their employers, employees or fellow workers or others with whom communication would be likely to cause annoyance or alarm to the victim;

(g) if it is not possible for the victim to remain in the residence, or if the victim chooses alternative housing, the court may make an order requiring the respondent to pay the victim's rent at a residence other than the one previously shared by the parties if the respondent is found to have a duty to support the victim and the victim requires alternative housing;

(h) an order requiring the respondent to pay emergent monetary relief to the victim and other dependants, if any, until such time as an obligation for support shall be determined pursuant to any other Act of the Legislature or the Parliament of Canada or subsequent agreement of the parties;

(i) where appropriate, an order requiring the respondent to pay the victim compensation for monetary losses suffered as a direct result of the act of domestic violence which may include, but not be limited to, loss of earnings or support, medical and dental expenses, out-of-pocket losses for injuries sustained, moving and shelter expenses, and reasonable legal fees;

(j) an order requiring the respondent to make or continue to make rent or mortgage payments on the residence occupied by the victim if the respondent is found to have duty to support the victim or other household members;

(k) an order granting either party temporary possession of specified personal property such as an automobile, checkbook, MSI or supplementary medical insurance card, identification document, key or other necessary personal effects;

(l) an order, restraining the respondent from taking, converting or damaging property in which the victim may have an interest;

(m) an order, directing the respondent to temporarily relinquish to a peace officer or sheriff any weapons in the control, ownership or possession of the respondent which may have been used, or threatened to be used, in an incident of domestic violence against the plaintiff or any member of plaintiff's household;

(n) an order awarding temporary custody of a child and in making such order the court shall presume that the best interests of the child are served by an award of custody to the nonviolent party;

(o) an order providing for access to children provided that

(i) the order shall protect the safety and well being of the victim and children and shall specify the place and frequency of visitation,

(ii) visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the victim and the respondent,

(iii) such order may include a designation of a place of visitation away from the victim's residence, the participation of a third party or supervised visitation,

(iv) the court upon motion of the victim considers a request for an investigation or evaluation by an appropriate person or agency to assess the risk of harm to the child where the victim has a sound basis for making the request, and

(v) the court orders that the cost of supervised access and any investigation or evaluation shall be borne by the respondent;

(p) an order which permits the victim and respondent to occupy the same premises but limits the respondent's use thereof, provided that the court is satisfied,

(i) that the victim voluntarily requests such an order,

(ii) the victim is informed by the court that the order may not provide the same protection as an order excluding the respondent from the premises and may be difficult to enforce, and

(iii) satisfactory conditions are imposed on the respondent to ensure against the repetition of domestic violence and which are agreed upon by the parties;

(q) an order requiring police to forthwith or at a specified time remove the respondent from the residence;

(r) an order, which shall be restricted in duration, requiring that a police officer accompany either party to a residence or supervise the removal of personal belongings in order to ensure the personal safety of the victim;

(s) an order that requires that the respondent report as specified to the court or an officer thereof or any other person designated by the court for the purpose of monitoring any provision of a protection order;

(t) an order requiring the respondent to enter into a recognizance, with or without sureties, in such amount not to exceed $50,000.00 as the court considers appropriate for securing the compliance of the respondent with the terms of a protection order;

(u) an order requiring the respondent to pay the reasonable legal and other costs or expenses of the application necessarily incurred by the victim; and

(v) such other terms or conditions as a court considers necessary to provide for the protection of the victim.

IV. Non-harassment orders (Nova Scotia)

8(3) Where the court finds that a cohabitant has been harassed by another cohabitant it may issue a non-harassment order granting any or all of the following relief:

(a) an order prohibiting harassment of the applicant;

(b) an order requiring either or both parties to receive professional counselling or therapy;

(c) provided the respondent is not occupying the same residence as the applicant, an order restraining the respondent from entering the residence, property, school or place of employment of the applicant or other family or household members of the applicant and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the applicant or other family or household members;

(d) an order restraining the respondent from making any communication likely to cause annoyance or alarm including but not limited to personal, written or telephone contact with the applicant or other family members or their employers, employees or fellow workers or others with whom communication would be likely to cause annoyance or alarm to the applicant;

(e) an order that requires that the respondent report as specified to the court or an officer thereof or any other person designated by the court for the purpose of monitoring any provisions of a protection order;

(f) an order requiring the respondent to enter into a recognizance, with or without sureties, in such amount not to exceed $5,000.00 as the court considers appropriate for securing the compliance of the respondent with the terms of a protection order;

(g) an order requiring the respondent to pay the reasonable legal and other costs or expenses of the application necessarily incurred by the applicant; and

(h) such other terms or conditions as a court considers necessary to protect the applicant from future harassment.

V. Emergency intervention order (British Columbia)

3.(1) An emergency intervention order may be granted *ex parte* by a designated justice of the peace where that designated justice of the peace determines that:

(a) domestic biolence has occurred; and

(b) by reason of seriousness or urgency, the order should be made without waiting for the next available sitting of a judge of the court in order to ensure immediate protection of the victim.

(2) In determining whether an order should be made, the designated justice of the peace shall consider, but is not limited to considering, the following factors:

(a) the nature of domestic violence;

(b) the history of domestic violence by the respondent towards the victim;

(c) the existence of immediate danger to persons or property;

(d) the best interests of the victim and any child of the victim or any child who is in the care and custody of the victim.

(3) An emergency intervention order may contain any or all of the following provisions:

(a) a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership;

(b) a provision directing a peace officer to remove, immediately or within a specified time, the respondent from the residence;

(c) a provision directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim;

(d) a provision restraining the respondent from communicating with or contacting the victim and other specified persons;

(e) any other provision that the designated justice of the peace considers necessary to provide for the immediate protection of the victim.

(4) An emergency intervention order may be subject to any terms that the designated justice of the peace considers appropriate.

(5) Subject to subsection 4(1), an emergency intervention order shall take effect immediately.

VI. Victim assistance order (British Columbia)

7.(1) Where, upon application, the court determines that domestic violence has occurred, the court may make a victim's assistance order containing any or all of the following provisions:

(a) a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership;

(b) a provision restraining the respondent from attending at or near or entering any specified place that is attended regularly by the victim or other family members, including the residence, property, business, school or place of employment of the victim and other family members;

(c) a provision restraining the respondent from making any communication likely to cause annoyance or alarm to the victim, including personal, written or telephone contact with the victim and other family members or their employers, employees or co-workers or others whom communication would likely cause annoyance or alarm to the victim;

(d) a provision directing a peace officer to remove the respondent from the residence within a specified time;

(e) a provision directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim;

(f) a provision requiring the respondent to pay the victim compensation for monetary losses suffered by the victim and any child of the victim or any child who is in the care and custody of the victim as a direct result of the domestic violence, including loss of earnings or support, medical and dental expenses, out-of-pocket losses for injuries sustained, moving and accommodation expenses, legal expenses and costs of an application pursuant to this Act;

(g) a provision granting either party temporary possession of specified personal property including a vehicle, chequebook, bank cards, children's clothing, medical insurance cards, identification documents, keys or other necessary personal effects;

(h) a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property that the victim may have an interest in;

(i) a provision recommending that the respondent receive counselling or therapy;

(j) a provision requiring the respondent to post any bond that the court considers appropriate for securing the respondent's compliance with the terms of the order and/or:

(k) any other provision that the court considers appropriate.

(2) A victim's assistance order may be subject to any terms that the court considers appropriate.