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PROTECTION AGAINST DOMESTIC ABUSE

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ACKNOWLEDGEMENTS

The basis of this final report is two-fold—the Report for Discussion prepared by Professor Annalise Acorn and the Final Report prepared by Christina Gauk, counsel to the Institute. We would like to acknowledge the work of Annalise Acorn, whose broad research established an excellent working base for continuing the project.

We were greatly helped in the task of moving the initial recommendations along by a number of people who took the time and effort to respond to our Report for Discussion, and helped amplify and clarify some of the issues. As a result, we achieved greater confidence in our recommendations. We list those respondents in Appendix D and thank them. The broad cross section of views reinforced the need to reach an appropriate balance between providing effective protection for claimants and minimally impairing the rights of respondents.

It was important to have up-to-date information on recent initiatives in other provinces and particularly in Saskatchewan. The Department of Justice in that province, through its key personnel, was extremely helpful in providing both current assessments and practical insights into the solutions which had been put in place there.

Similarly, several agencies allowed us a closer look at their involvement in the issue of family violence. In particular, the Edmonton Council Against Family Violence and the Calgary Mayors Task Force drew us into their process and provided very useful factual information.

This report touches on two other areas: matrimonial home possession, and constitutional jurisdiction over protection orders. Professor Bruce Ziff reviewed our proposals and provided beneficial insight into the issue of "home possession." Professor Dale Gibson and Professor Ritu Khullar assisted with our review of the constitutional powers over protective remedies.

It is also important to acknowledge those who have been involved in the introduction of this topic into the legislative process. The first bill was introduced in the spring of 1996 by Miss Alice Hansen, an opposition MLA. In the time between the spring 1996 session and the late summer 1996 session, an informal working group made valiant efforts to prepare the bill for legislative review. As it has become increasingly likely that the initiative will become a government-sponsored initiative, Miss Jocelyn Burgener MLA has taken a substantial part in the discussions.

It is also important to note the way in which the Institute Board responded to the slightly unusual timing of this project. An extra monthly meeting was scheduled for July of 1996, and the project subcommittee held several other special meetings in order to accommodate the anticipated legislative time frame.

The writing and production of this report have been the responsibility of Christina Gauk, who has brought the project to conclusion in a sensitive yet conceptually even-handed way. That the recommendations form a defensible whole is a tribute to her understanding of these very broad issues.

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PART I — SUMMARY OF REPORT

INTRODUCTION

This Report proposes a legal response to the problem of domestic abuse. Our primary goals are two-fold. First, we want to make it easier to obtain and enforce orders to protect persons from domestic abuse. Under the existing law, to obtain a restraining order, the party seeking the order must start an action in the Court of Queen's Bench. The procedure before this Court is formal and expensive, and usually requires the assistance of lawyers. This court has recently taken important steps in the direction of making its restraining orders more accessible. However, in outlying areas, the Court sits infrequently, and it may be inaccessible in any case where an order is required immediately by reason of an emergency. We therefore propose to extend the power to issue protection orders to the Provincial Court. As well, our proposals make it possible, should this be seen necessary, for the recruitment and training of special justices of the peace who may be designated by regulation to issue orders. Under our proposals orders can be sought without bringing any other court action, on an emergency basis where necessary, and public resources can be called upon immediately and directly to assist the person who needs the order.

The second main goal is to make orders more effective by providing remedies to secure the claimant's protection. At present, there is no statutory guidance for the courts as to what the respondent and enforcement officers may be directed to do. The protection orders we propose restrain the respondent from contacting the claimant or children, but can also contain additional components to facilitate the separation of the parties. We include a list of options that may be ordered along with the prohibition of contact.

This Final Report is the final stage of a process that has involved a number of stages unusual for an Institute project. In June of 1995, after a preliminary consultation with affected groups, the Institute issued a Report for Discussion on domestic abuse which solicited comments from the public and interest groups. In the spring of 1996, while responses were still being received, an opposition private member introduced a Bill on the subject of

domestic violence, which relied to a considerable extent on the suggestions and recommendations in the Report for Discussion. This Bill, somewhat unexpectedly, received unanimous approval at second reading. However, the legislative session ended before the Bill could go to Committee of the Whole and on to third reading. The period between legislative sessions was taken by the Institute as an opportunity to apply the results of its consultation and research to respond to the contents of Bill 214. During the summer our Board made recommendations for amendments to the Bill which touched some of its most important aspects. With these recommendations in hand, an informal working group was struck consisting of counsel to the Institute, the opposition caucus researcher who had drafted the Bill, and a number of members of government departments. This group worked through July and August to achieve a consensus and draft the necessary amendments.

In the late summer session, the Bill, together with the amendments, was brought to Committee of the Whole. A brief discussion followed in which several government MLA's declared their support for the principle of the Bill, though expressing some minor reservations about particular matters, and the view that the Bill needed some further work. Following this discussion, a motion was brought to remove the Chairman from the Chair. This motion passed, with the effect of closing the debate and removing Bill 214 from the order paper.

As a result of the events just described, this final document is to some extent a response to legislation that has already been before the legislature — a format that is unusual for an Institute report. The report provides a discussion of the issues raised by the provisions in Bill 214, and of the amendments introduced in the late summer session. It also deals with a number of matters not contained in the Bill or amendments, some of which were raised in the Report for Discussion. The discussion incorporates many of the responses to our Report for Discussion, and comments on Bill 214 that were brought to our attention. It also contains the views of our Board, and the input of the informal working group that revised the Bill through the summer of 1996. It is hoped that this fuller discussion will provide the necessary background information for adoption of the basic approach contained in Bill 214, and the amendments, in any new legislation, and for any further development of the legislation.

CONTENT OF THE REPORT

The Report is divided as follows:

Title and Preamble

The first two sections deals with the title of the proposed Act and with whether there ought to be a preamble that creates a context for the legislation. Our recommendation for a title — the *Protection Against Domestic Abuse Act* — reflects the fact that the legislation is directed not only against physical violence, but against other forms of abusive behaviour to which persons in the domestic sphere can be particularly vulnerable, such as emotional and financial abuse. We considered a preamble that recognized that the proposed legislation is not meant to substitute for full and consistent prosecution of Criminal Code violations against violence and abuse, and is only one of many steps that must be taken to address the problem. However, we recommend against a preamble on the ground that it would not be of sufficient interpretive value to warrant its inclusion in the legislation.

Jurisdiction: which levels of court may issue protection orders?

The next section deals with one of the key elements of our approach to dealing with domestic abuse — the question of jurisdiction over protection orders. As making orders accessible is a critical part of our approach, it is necessary to give the powers to decision makers who are accessible. This is particularly true of emergency situations in which protection is needed immediately. In this section we also deal with the question of jurisdiction over reviews and appeals of orders. This latter question requires us to first address the matter of when such reviews and appeals should be available. This section accordingly deals with all of the following:

- types of orders: routine and emergency; what constitutes an emergency?
- jurisdiction over routine orders; over applications for variation or revocation
- emergency orders
    - special procedures
    - jurisdictions
    - automatic reviews, and jurisdiction over reviews
    - rehearings: availability and jurisdiction
- appeals from orders granted at a hearing

- variation or revocation
- evidence, onus and standard of proof in the various proceedings

Our answers to these questions are, briefly, as follow: We envision two types of circumstances in which orders may be requested: first, emergency situations in which the safety of the claimant or children in the claimant's care is threatened and an immediate response is called for to protect that safety; and second, situations in which though the claimant is in need of protection, the situation is less urgent, and there is time for a fuller hearing than may be possible in an emergency situation.

For situations of emergency, we propose that the power to grant protection orders be extended to the Provincial Court. As well the legislation should make it possible, if this is thought necessary, to designate specially-trained Justices of the Peace to grant emergency orders. The judges (or justices) should be accessible on a twenty-four-hour basis by means of a 1-800 number telecommunication system. It should be possible to convey the evidence for these orders over the telephone, and to grant the order by the same means. We propose that the need for the emergency order, (that is, that domestic abuse (including a threat) has occurred, and the order is needed immediately to protect the safety of the claimant) must be shown on a balance of probabilities, and we include a list of factors to be considered in deciding whether to grant it. We provide that if orders are granted by justices of the peace, the supporting documentation should be automatically reviewed within a period of three days by the Provincial Court, to confirm that there was sufficient evidence for granting the order. (If there was not, the judge is to hold a hearing) On the confirmation of an order, a respondent (or claimant) should have 30 days within which to request a rehearing before the Provincial Court. At this hearing, the evidence in support of the original order may be admitted, and the claimant need not attend, and may be represented by an agent. The court is to determine anew on the basis of all the evidence whether the order or any of its terms are necessary for the effective protection of the claimant. Following the expiration of the thirty-day period, the order can be challenged only in the event of a change in circumstances that warrants variation or revocation, or by way of appeal on a question of law.

For circumstances in which the claimant requests a protection order but there is no emergency, we recommend that the power to issue orders should be be extended to the Provincial Court. In such circumstances, the respondent should be given notice to attend. The order is to be granted where, on a balance of probabilities, it is necessary for the effective protection of the claimant. The list of factors mentioned in the preceding paragraph are also relevant to the question of whether to grant a routine order. An application may be brought by either the claimant or the respondent to revoke or vary the order where this is warranted by a change in circumstances. There should also be an appeal on a question of law.

The recommendations that we make with respect to jurisdiction require us to address whether is it constitutionally permissible to give the powers in question to provincially appointed tribunals (the Provincial Court and justices of the peace). Recent developments in constitutional law, as well as research we have recently undertaken respecting the common law powers of justices of the peace, permit us to reconstruct the argument in favour of the constitutionality of our proposals. We review these arguments in the report, and conclude that there is solid ground for the view that the powers we propose are not in the exclusive domain of superior courts.

Definition of abuse: what type of conduct can ground an order?

The next part of our report is concerned with the definition of domestic abuse — what types of abusive conduct will ground a protection order? In both the preliminary consultation in which we engaged before the issue of the Report for Discussion, and in the comments we received on that Report, there was a powerful message that some forms of non-physical abuse can be as harmful to a claimant as physical assault, and that the various forms of abuse often accompany one another. At the same time, strong concerns were expressed that if non-violent forms of abuse can ground an order, trivial conduct, or conduct common to most relationships, can give rise to an order that seriously compromises the rights of respondents. In our proposed definition of "domestic abuse" we have tried to be responsive to both these messages. Accordingly, we have begun with a limiting statement of principle that is meant to exclude trivial conduct no matter into which specific category it falls. This principle is to restrict abuse under the Act to "conduct that threatens or interferes with the physical, sexual or emotional integrity of the person subjected to it, or that makes that person incapable of independent

functioning". The limiting principle is followed by a list of actions that could constitute abuse. This list extends beyond physical abuse to include both emotional and financial abuse, but the definition of each is worded so as to exclude trivial or justifiable conduct. The list is as follows:

- any intentional or reckless act or omission that causes injury, or causes damage to property the purpose of which is to intimidate a claimant
- any act or threatened act that causes a reasonable fear of injury
- forced confinement
- sexual abuse (sexual contact of any kind that is coerced by force or threat of force)
- emotional abuse (a pattern of behaviour that deliberately undermines the mental or emotional well-being of the claimant, or; making repeated threats to cause extreme emotional pain to the claimant or the claimant's children, family or friends)
- financial abuse (behaviour of any kind that controls, exploits or limits a claimant's access to financial resources so as to ensure the financial dependency of the claimant, or that exploits the claimant's financial resources).

Who is entitled to protection, and who may apply?

This section of the report asks who is to be entitled to protection under the Act, and who may bring an application. In this section we try to include all persons within the domestic sphere who are potentially vulnerable to abuse. We also make provision for who may apply for protection, in person or on behalf of a victim.

Remedies: what relief can be granted?

This part deals with the content of protection orders: what directions can be made to the respondent or others to secure the claimant's protection, and enable the claimant to separate from the respondent? In formulating our proposals about remedies, we were sensitive to the fact that some of the remedies impact on rights of the parties, the *final* resolution of which is beyond the goal of protecting claimants from abuse. We have tried to ensure, therefore, that such rights are affected only to the extent necessary to give the claimant effective protection, leaving the final resolution of matters such as property division, support and custody to the appropriate forum. In some

cases, for the sake of an efficient resolution of issues, we recommend that it be possible to join an application for a protection order with an application for the resolution of particular matters that, though related in the sense that they must be dealt with on separation, are beyond the purpose of our proposed legislation.

1) No-contact

The key remedy is the prohibition against any contact or association with the claimant by the respondent. This is an essential element of any protection order, as orders that contemplate continued contact between the parties give rise to problems in enforcement. The prohibition against contact is coupled with a prohibition against further abuse. Examples are given of the types of contact or association that are restrained. These are:

- attending at or near or entering any specified place that is attended regularly by the claimant, other family members, or other specified persons, including the residence (regardless whether the residence is jointly owned or leased by the claimant and respondent or solely owned or leased by the respondent), property, business, school, or place of employment of the claimant, or the residence, property, business, school, or place of employment of other family members or of other specified persons

- making any communication, including personal, written or telephone contact, or contact by any other communication device, either directly or through the agency of another person, with the claimant, other family members, or other specified persons, or their employers, employees, or co-workers.

Under our proposals, the respondent may be restrained from attending at a residence that he or she owns solely, or jointly with the claimant. It is important for protecting the claimant that the respondent who has been so restrained takes no action based on his or her interest in the property that disturbs the claimant's ability to continue residing there. It may also be necessary to settle the financial implications of this part of the order. Accordingly, we provide that the respondent's right to deal with the property in any way that would interfere with the claimant's occupation (for example by taking action to evict the respondent, or selling or leasing the premises or

the respondent's interest therein, or otherwise encumbering the property) may be postponed for a period fixed by the court, with a default period of three months where none is set. We also provide for an order fixing the obligation to maintain the home for the designated period, and fixing the responsibility to pay for any liabilities that may arise out of the claimant's occupation, (including, where appropriate, payment by the claimant to the respondent).

An exception to the "no-contact" aspect of the order is provided for circumstances where, as a matter of practical necessity, and where the claimant requests it, the parties require safe contact with one another, for example, to fulfill parenting duties or discuss reconciliation.

2) Emergency monetary relief

A claimant who must separate from the respondent to avoid continued abuse may be placed in a position of sudden financial need (for example, a temporary inability to work, or a sudden withdrawal of support). In addition, the separation itself may occasion expenses, such as moving costs or legal costs, and there may be other expenses associated with the abuse, such as medical or counselling costs. In our view it should be possible to require the respondent to reimburse the claimant for expenses occasioned by the abuse or the separation, and, where appropriate, to pay to the claimant a limited monetary amount to cover an emergency financial need arising from the separation. This latter provision is not meant to deal with the respondent's obligation, if any, to provide ongoing support for the claimant. We do provide, however, that where such an obligation exists, the claimant may join an application for interim maintenance or child support under appropriate provincial legislation in a non-emergency hearing for a protection order.

3) Contact with children

Our recommendations on the issue of contact with children in the claimant's care take into account the fact that there may be an existing order as to custody or access under either federal or provincial legislation.

If there is no existing order, a no-contact order can be made in relation to children where contact would create a risk of harm to the child, or where no contact with children is necessary to protect the safety of the claimant. If the risk of harm to a child is minimal, there may be an order of supervised

contact. If a no-contact order is made only in relation to a claimant but not in relation to children, the terms of contact with children may be set so that the contact does not compromise the safety of the claimant

If there is an existing order regarding custody or access to children under the federal *Divorce Act*, it is clear that the logistics of attaining access can be set so as not to compromise the safety of the applicant, so long as this conforms with the original order. We considered whether the existence of a prior custody order under federal law precludes the grant of a no-contact order, or an order setting out logistics of access that does not conform with the original order. Because protecting a claimant or child against harm is a different matter than deciding which of two parents should have custody, we thought it might be possible to grant such subsequent protection orders on a temporary basis, until the issues of custody and protection can be resolved together, under the appropriate legislation, by the court that is appropriate to deal with custody and access.

If there is an existing order made by the Court of Queen's Bench under provincial legislation, in our view, the existing order should not prevent a provincially appointed tribunal from making a no-contact order or an order setting out the logistics of access to ensure the safety of a claimant or child. Though there may no jurisdictional conflict with the original order for the reasons set out in the preceding paragraph, for the sake of certainty, we think the legislation should specify that the subsequent protection order can be made, to subsist until such time as the issues of protection and custody can be reconsidered under the appropriate legislation, by the appropriate court.

We also provide that at a hearing for a protection order, it should be possible for either party to join an application to have custody and access resolved under appropriate provincial legislation.

4) Personal belongings, possession of personal property, and dealings with property in which the claimant has an interest

We make recommendations in respect of a number of property-related matters, to allow the claimant access to personal belongings and to property which may be needed to enable the claimant to live separately from the

respondent. We also provide that the respondent may be restrained from dealing in or damaging property in which the claimant may have an interest.

5) Seizure and storage of firearms

We recommend that firearms in the possession of the respondent can be seized where the firearms have been used or their use has been threatened in the abuse.

6) Availability of remedies in emergency\routine applications

Under our proposals, all of the remedies aforenoted are to be available in both emergency and routine applications for protection, with the single exception of structured safe contact, (which requires the cooperation of the respondent and therefore an opportunity for the respondent to be heard).

Duration of orders

Under our proposals, there is no necessary time limitation for the duration of an order. However, the order, or specific provisions within it, may have a time limitation specified.

Enforcement of orders

Breach of a protection order is a serious matter that requires a serious response. It is important to send a message to perpetrators of domestic abuse that society will not tolerate such behaviour. For these reasons we have recommended that breaches be prosecuted under section 127 of the Criminal Code (which provides that breach of a court order is an indictable offence) rather than pursuant to an offence section in the proposed legislation. Reliance on the Criminal Code provisions would also allow the police to arrest not only persons who are apprehended violating the terms of an order, but also persons whom they believe on reasonable and probable grounds to have done so, or whom they believe will do so. (This is a power that the police themselves think is essential for effective enforcement.)

We include a provision that would allow the collection of money payable under protection orders under the *Maintenance Enforcement Act.*

False or malicious applications

To help allay the concerns of those who regard parts of the proposed legislation as open to abuse, we recommend the inclusion of a provision that makes it an offence to bring a false or malicious application.

Miscellaneous issues and administrative matters

The remainder of our Report deals with administrative matters such as service of notice, dispensing with service, immunity for persons acting under the legislation, filing of copies of the order, forms, and assistance in completing them, and so on. Some of these matters will be more appropriately included in regulations pursuant to the proposed Act.

PART II — REPORT

CHAPTER 1. INTRODUCTION

A. History of the Project

The domestic abuse project has followed an unusual course, and we have had to adapt our usual procedures in a number of ways to respond to events outside our control. Typically our Final Report on a project is issued before, rather than after, legislation relying on our research and recommendations is presented to the legislature.[1] In this case our Final Report follows two events: first, the introduction of a opposition private member's Bill on the topic of domestic violence in the spring 1996 legislative session (Bill 214), which was based in part on the Institute's 1995 Report for Discussion on domestic abuse; and second, the introduction of a series of amendments to the Bill, largely suggested by the Institute, in the late summer sitting.

The Report for Discussion which we issued in June of 1995 contained both tentative recommendations, and some questions with respect to a number of contentious issues. We requested responses to this document by January, 1996. In the spring of 1996, while responses were still being received, Bill 214 was introduced. This Bill relied to a considerable extent on the recommendations in our Report for Discussion, together with portions of Saskatchewan's *Victims of Domestic Violence Act*[2], which came into force in February, 1995.

The Bill received unanimous approval at second reading, but the legislative session ended before the Bill could go to Committee of the Whole and on to third reading. The period between legislative sessions was taken by

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[1] In the normal course, we define the issues in a project, conduct background research and consultation, then make preliminary recommendations. This material is compiled in a consultation document which is distributed to the general public and any special interest groups for comment. Once the responses are received, the Institute Board revisits the policy issues in light of the comments and suggestions contained in them and in light of any new developments. The Board then formulates its final recommendations, and a Final Report is issued. Usually it contains a full discussion of the policy decisions, our final recommendations, and draft legislation.

[2] S.S. 1994, c. V-6.02. This Act is reproduced in Appendix B.

the Institute as an opportunity to apply the results of its consultation and research to respond to the contents of Bill 214. We hastened to define the outstanding issues, compile the responses, and do some additional research regarding developments in Saskatchewan and Prince Edward Island. We also met with a representative from the Court of Queen's Bench who had been appointed to convey to us the concerns of some members of the court, and were provided with a list of suggestions for changes. At a special meeting in July the Board made its recommendations for amendments to the Bill, incorporating many of the court's suggestions. Our recommendations touched some of the most important aspects of the Bill. Amongst other things we provided a better definition for the circumstances for emergency orders, and procedures for obtaining such orders by telephone; limited the definition of emotional abuse; added financial abuse as a ground for obtaining an order; and included a provision making it an offence to bring an application under the Act knowing it to be false or malicious. With these recommendations in hand, an informal working group was struck consisting of counsel to the Institute, the researcher who had drafted Bill 214, and members of a number of government departments.[3] This group worked through July and August to achieve a consensus and draft the necessary amendments. Most of the Institute's suggestions for amendments were adopted by the group, and several others were suggested by members of the group, in some cases after consulting with the appropriate government service providers.

The period between the two legislative sessions also provided a window for further general public discussion of domestic abuse legislation. The most vocal comments on Bill 214 came from individuals and organizations concerned with the rights of men in the context of marriage breakdown. Some of the concerns they expressed were that women are as often violent as men, that the Bill was gender-biased in favour of women, and that it created a vehicle for false allegations of abuse and for the resolution of custody and matrimonial property issues in an inappropriate context. Those concerns that in the view of the informal working group could be addressed by the legislation became the subject of proposed amendments.

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[3] The group included people from the following departments and agencies: Strategic Planning and Operational Coordination, Department of Justice; Legislative Planning, Department of Family and Social Services; Office for the Prevention of Family Violence, Department of Family and Social Services, Government Members' Research; and Office of the Legislative Counsel, Department of Justice.

In the late summer session, the Bill, together with the amendments, was brought to Committee of the Whole. Unfortunately, there had been no opportunity to rework the amendments into a consolidated Bill, and the proposed changes were presented to the legislature as a lengthy, detailed list that was somewhat difficult to follow. In the brief discussion that followed, several government MLA's declared their support for the principle of the Bill, though expressing some minor reservations about particular matters, and the view that the Bill needed some further work. Following this discussion, a motion was brought to remove the Chairman from the Chair. This motion passed, with the effect of closing the debate and removing Bill 214 from the order paper.

It is likely that a Bill respecting domestic abuse will be reintroduced in the legislature in the foreseeable future. The Institute has therefore continued its work on the topic, developing and refining its recommendations.

B. Content of this Report

Bill 214 has provided a focus for the commitment of various constituencies to legislate a response to the problem of domestic abuse. Because this is so, and because the Institute has itself been involved in the development of the Bill, it seems to us to be more useful at this point to work within the context of the Bill than to make an separate report on the subject. This report will therefore provide a discussion of the issues raised by the provisions in Bill 214, and of the amendments introduced in the late summer session. It will also deal with a number of matters not contained in the Bill or amendments, some of which were raised in the Report for Discussion. The discussion will incorporate many of the responses to our Report for Discussion, and comments on Bill 214 that were brought to our attention. It will also contain the views of our Board, and the input of the informal working group that worked through the summer of 1996.

It is our hope that this fuller discussion will provide the necessary background information for adoption of the basic approach contained in Bill 214, and the amendments, in any new legislation, and for any further development of the legislation.

CHAPTER 2. THE ISSUES

A. Title

Our recommendation for a title is the *Protection Against Domestic Abuse Act*. This choice reflects the fact that the legislation is directed against the whole range of abusive behaviours. This includes physical violence, but it also includes other forms of abusive behaviour to which persons in the domestic sphere can be particularly vulnerable, such as emotional and financial abuse.

RECOMMENDATION 1

The title of the proposed legislation should be the *Protection Against Domestic Abuse Act.*

B. Preamble: What the legislation does and does not do

The purpose of the legislation is to provide easier access to protection orders.[4] Though breach of these orders is to be treated as a crime under our proposals[5], the orders themselves are meant to prevent rather than punish abuse, and are more civil than criminal in nature. Many of the respondents in our consultation cautioned that focussing on a non-criminal protection remedy could detract from effective and consistent enforcement of the criminal law, and the provision of adequate resources for victims in the criminal process. This view is also a central concept in the Nova Scotia Law Reform Commission's *Final Report on Domestic Violence*, issued in 1995. Others feared that the legislation could be used to justify cutting funding for shelters.

The Institute recognizes that a coordinated approach among many agencies is required to deal effectively with domestic abuse, and that the remedy in this Report is only one of many steps that must be taken to

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[4] Orders granted under the proposed legislation are meant to protect against abuse. Therefore throughout this Report, we use the term "protection order" to refer to such orders in their entirety. Other terms, such as "no-contact" order and "no-communication" order, are used to refer to distinct remedies that may be contained within the protection order.

[5] See below at 89, where we recommend that breaches of orders be prosecuted under s. 127 of the Criminal Code.

address the problem. We considered whether to include a preamble in the legislation that would emphasize that these proposals are meant only to complement, but not replace, other important approaches to the problem—consistent prosecution of violations of the Criminal Code, support services to help victims through the criminal process, and safe houses and other supports for those seeking refuge from abusers.

However, we have rejected the idea of expressing this point in a preamble, as it would not be of sufficient interpretive value to warrant including it in the legislation. We have chosen to simply state our recognition of the limited nature of our proposed remedy, and the need for other lines of attack on the problem, in this section of the Report. To the extent that this statement can guide legislative interpretation, it may be found here.

RECOMMENDATION 2

There should be no preamble in the proposed legislation.

C. Initial orders, reviews, and appeals: jurisdiction and procedure

What types of orders should be available and how may they be reviewed, appealed or varied? What level of court should have jurisdiction over the various types of proceedings? At the procedural level, what constitutes evidence at the various types of hearings, and what is the onus and standard of proof? In this section, we will consider all these questions.

1. Who may grant the initial order (routine and emergency)?

The primary goal of this project is to make protection orders, and the necessary associated remedies, easier to obtain. As making orders accessible is a critical part of our approach, it is necessary to give the powers to decision makers who are accessible. This is particularly true of emergency situations in which protection is needed immediately. Under the existing law, to obtain a restraining order, the party seeking the order must start an action in the Court of Queen's Bench. The procedure before this court is formal and expensive, and usually requires the assistance of lawyers. This court has recently taken important steps toward make its restraining orders more readily available. However, in outlying areas, the court sits infrequently or

not at all, and it may be inaccessible in any case where an order is required immediately by reason of an emergency. In other provincial jurisdictions, the problem of accessibility has been addressed by extending the power to issue protection orders to provincially appointed officials, specially recruited and trained, and by making orders immediately available for emergency situations by means of telecommunications systems.[6] A key question for this project is whether we should adopt a similar approach. Assuming it to be constitutionally possible, should we extend the jurisdiction to grant protection orders to provincially appointed bodies? Should we make special provision for emergency in contrast to routine applications? And should we provide an additional tier of decision-makers for dealing with emergency orders?

In our Report for Discussion, we recommended that jurisdiction to grant most of the remedies proposed in the Report could be given concurrently to justices of the peace, the Provincial Court, and the Court of Queen's Bench.[7] The Report for Discussion raised the issue of emergency situations and the granting of *ex parte* orders (orders granted without notice to the respondent) as matters that must be addressed. However, for the purposes of our discussion about jurisdiction, we did not distinguish between circumstances of emergency and non-emergency.[8]

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[6] The legislation in Saskatchewan and Prince Edward Island is quoted in Appendices B and C and is described in greater detail throughout this report. See for example, notes 11, 12 and accompanying text.

[7] The exception was where the order would involve the transfer of personal property or the payment of a monetary amount. Where the value of property would exceed a monetary amount that reflects the jurisdiction over property of provincially-appointed courts, we said that it would be necessary to give the power to grant the order to the Court of Queen's Bench.

[8] In our Report for Discussion we chose to make recommendations primarily in relation to the substantive rather than procedural aspects of domestic abuse legislation, leaving the procedural matters to be developed at a later stage. Many of the provisions respecting *ex parte* orders with which we deal in this report were treated in the Report for Discussion as procedural rather than substantive. Accordingly, they were highlighted as matters that must be addressed, but were not discussed in detail. These matters included the circumstances in which *ex parte* orders are to be granted (that is, what constitutes an emergency), whether and how they should be reviewed, telephone access for odd hours or remote areas, who may apply on behalf of the victim, which of the remedies may be granted in *ex parte* orders, duration of such orders, and so on. In this report we will address the afore noted issues related to emergency orders in detail. The Bill, and especially the amendments, have already touched upon them, and to some degree what we termed procedural in the Report for Discussion has substantive implications.

Bill 214 as originally introduced provided in section 3 that the power to issue orders be extended to the Provincial Court. The Bill provided for the granting of orders on an *ex parte* basis, where necessitated "by reason of circumstances of seriousness or urgency or for the purpose of ensuring the safety of the victim".[9] However, while the Bill was based to a considerable extent on recently-enacted Saskatchewan legislation[10], it did not adopt the Saskatchewan approach to the matter of jurisdiction. In Saskatchewan, the power to issue routine orders (called "victim assistance orders"), with notice to the respondent, was retained in the Court of Queen's Bench, whereas the power to issue emergency *ex parte* orders was assigned to specially recruited and trained justices of the peace who are accessible by telephone on a 24-hour basis. In contrast, under Bill 214, the power to grant both routine and *ex parte* orders was to be in judges of the Provincial Court as well as in the Court of Queen's Bench. The parts of the Bill in respect of *ex parte* orders were also far less detailed than those in the Saskatchewan Act.[11]

During the period between the spring and late summer legislative sessions, the Institute had an opportunity to look more closely at the structure and operation of the recently enacted legislation in Saskatchewan. Sufficient time had elapsed since the proclamation of the legislation to allow some assessment of its effectiveness. A key difference in the Saskatchewan approach from what had been suggested in Alberta is the focus on the emergency situation. The grant of emergency powers, exercisable through a telecommunications system in situations where the claimant's safety is under threat, allows the evidence necessary for the order to be transmitted immediately and for the order to be granted in the same manner.[12] This

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[9] Section 3 also provided that when an *ex parte* order had been granted, if the respondent so requested, the court was to arrange a hearing as soon as practicable.

[10] This legislation is cited at note 2.

[11] In Saskatchewan, the Act sets out all of the following: the conditions for an emergency; the matters to be considered in deciding whether an order should be granted; the remedies that may be granted; how notice of the order is to be given; the procedure for automatic review, and possible rehearing, by the Court of Queen's Bench (and provisions regarding evidence and onus of proof on rehearing); and the procedure for revising the order on application of the victim or respondent. Regulations under the Act also provide that emergency orders may be obtained over the telephone, on application by the police, mobile crisis workers or victim services co-ordinators.

[12] In Saskatchewan, as already noted, these powers are exclusively exercisable by specially

(continued...)

permits access to orders in remote areas throughout the province as well as in more settled or urban areas. In response to our inquiries, those responsible for administering the Saskatchewan legislation told us that it had appeared so far that the emergency provisions had been critical to the success of the legislation, particularly for persons in outlying areas.[13]

The absence in Bill 214 of parallel provisions for emergency circumstances that would allow for 24-hour access to orders in all parts of the province was brought to the attention of the Institute Board at its July, 1996 meeting (called for the purpose of responding to Bill 214). The Board agreed that the emergency provisions seemed a vital component of any proposed legislation. This view was conveyed to the informal working group that was drafting amendments to the Bill. This group accordingly amended the draft Bill to include emergency provisions similar to those in Saskatchewan. The amended Bill provided that the power to grant both routine and emergency orders should be conferred on the Provincial Court. It also provided that justices of the peace, specially recruited and trained, could be designated by regulation to issue emergency orders, automatically reviewable, within three days, by the Court of Queen's Bench.[14]

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[12] (..continued)
recruited and trained justices of the peace. Orders issued by these justices are automatically reviewed within 2 working days by the Court of Queen's Bench. That court must determine if there was sufficient evidence before the justice to support the granting of the order. If there was, it is to confirm the order; otherwise, it is to direct a rehearing of the matter.

[13] This has been confirmed. In January, 1997, those responsible for designing and implementing the Saskatchewan legislation presented a recently-released evaluation at a public forum organized by the Calgary Mayor's Task Force on Violence. Analysis of the data that had been collected showed that the vast majority of applications under the legislation were in emergency situations, indeed the "victim assistance order" procedure was very rarely used. Nearly half [43%] of the orders were requested in non-urban areas. See *Victims of Domestic Violence Act: Final Report*, Sept., 1996 (prepared for Saskatchewan Justice).

[14] The recommendations of the working group regarding jurisdiction over emergency orders depended in part on informal discussions within the Department of Justice conducted by some of the members of the group. Based on these discussions, it was thought that adopting the Saskatchewan idea of recruiting people who already have experience in domestic abuse issues on a part-time basis, and providing them with special training about the operation of the legislation, might be an effective as well as economical way of dealing with emergency orders. Accordingly, the amendments to the Bill provided that the power to grant emergency orders could be given by regulation to specially designated justices of the peace.

Our present recommendations on the question of jurisdiction to issue orders include provisions for routine orders, and also create a special procedure for situations of emergency.

a. Routine initial orders

If the power to issue protection orders that are granted on the basis of an originating notice were extended to judges of the Provincial Court, less costly and formal procedures for bringing an application could be created. Equally important is the presence of this court in areas outside the major centres. The experience in Saskatchewan has shown that more than one-half of the orders granted under the legislation so far are sought in smaller centres. Our consultation responses were also overwhelmingly in favour of granting the power to issue orders to the lower levels of court.[15]

RECOMMENDATION 3

The power to issue protection orders that are granted on the basis of an originating notice, giving notice to the Respondent, should be extended to the Provincial Court.

b. Emergency initial orders: special procedures and jurisdiction

We also recognize the importance of providing that orders can be obtained in situations of emergency, on a 24-hour basis. The data from the Saskatchewan evaluation showed that the emergency procedure has been used in most of the orders that have been applied for under the legislation thus far. The commentators from Saskatchewan told us that as the operation of the legislation is entering its second year, the number of applications under the legislation appears to be doubling. The heavy reliance on the novel mechanism suggests that it is one that was badly needed by victims of abuse.

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[15] The Court of Queen's Bench should of course retain its power to issue such orders, particularly for those cases in which a family law matter has already been brought before that Court.

The question of whether it is constitutionally permissible to place powers to deal with protection orders in provincially-appointed tribunals is dealt with below in detail. See at 35 *et seq.*. Our conclusion is that there is a strong basis for the opinion that these powers are not in the exclusive domain of the superior courts.

RECOMMENDATION 4

A structure should be created under which protection orders can be obtained from the site of an emergency call, with the assistance of police or other service providers. It should be possible to obtain these orders without instituting a separate civil action. Evidence for the order; and the order itself should be transmittable by means of a telecommunications system or by some other electronic means.

The matter of jurisdiction over emergency powers requires careful consideration. The first factor to consider is that the types of remedies available to claimants under our proposals affect important rights of both claimants and respondents. The grant of these remedies is in our view an important judicial function, and it is essential to ensure that this function is exercised by suitably trained and experienced decision makers. A second point is that Alberta's family law court structure is different from that in Saskatchewan. Family law powers in Saskatchewan are generally exercised by a unified family court at the Queen's Bench level. In Alberta, in contrast, we have a system of judges of the Provincial Court who are assigned to a separate Family Division.[16] (In addition, the Court of Queen's Bench deals with family law issues under both federal legislation (the *Divorce Act*[17]) and provincial legislation (the *Domestic Relations Act*[18]).) The family law bench in Alberta already has in place a system for dealing with emergencies in child welfare matters on an on-call 24-hour basis. The demographics of the two provinces also differ considerably. It is not clear, therefore, that our proposed system should copy that of our neighbour in every detail.

The Institute is not in the best position to assess whether or not the emergency procedures we recommend could be absorbed into the existing Provincial Court family law system. It is possible that with some adaptation

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[16] These judges deal with child welfare, matrimonial support for separated couples, and child support, custody and access outside the context of divorce.

[17] R.S.C. 1985, c. 3 (2nd supp.).

[18] R.S.A. 1980, c. D37.

the Provincial Court could provide the necessary emergency service. Under the existing system in Saskatchewan, it is not necessarily the justice of the peace who is most physically proximate who receives the application for an order from an outlying area. It may be that the need could be met in Alberta by judges of the Provincial Court who are familiar with domestic abuse issues and are accessible at any time from any part of the province.

In the event that the emergency procedures cannot be adequately dealt with in this manner, it will be necessary to consider a third tier of adjudicators. In that case, close attention must be paid to recruitment and training, to ensure a high-quality level of decision making. As discussed more fully in section C(3) below, we also recommend that if a third-tier approach is adopted, there should be a system of automatic review of the supporting documentation by the Provincial Court, to confirm that there was sufficient evidence for granting the order.

RECOMMENDATION 5

The power to issue emergency orders should be given to the Provincial Court. The legislation should also provide that it be possible to designate a third tier of adjudicators for granting emergency orders.

2. Conditions for granting emergency orders and non-emergency orders; factors to be considered

Because our recommendations distinguish between emergency and non-emergency situations, allowing the emergency *ex parte* procedure to be used only in the former case, it is necessary to define what constitutes an emergency.

A number of persons who responded to Bill 214 rejected the idea of *ex parte* orders altogether. These persons thought it wrong that orders available on an *ex parte* basis could affect important rights of the respondent without providing an opportunity to be heard. Of particular concern were the remedies in the Bill that touched on custody and access to children, and on

property rights. Some commentators were gravely concerned these rights could be affected on the basis of a mere allegation of emotional abuse.

An *ex parte* order by definition does not give the respondent a hearing. However, there is a strong consensus that in some cases the immediate response provided in the emergency procedure is essential to give adequate protection to claimants; to do this it may be impossible to give the respondent an opportunity to be heard. One way of meeting these concerns, however, is to make it clear in the legislation that *ex parte* orders will not be granted routinely but rather only in situations where an immediate response is required to ensure the safety of the victim—in other words where there is an emergency. Another response to the concern, which will be dealt with below relative to particular remedies, is to ensure that where the remedies touching on property or child-related rights are granted *ex parte*, they are granted only to the extent necessary to deal with the emergency situation.[19]

Bill 214 in its original form provided that an *ex parte* order could be granted "if, by reason of circumstances of seriousness or urgency or for the purposes of ensuring the safety of the victim, it is proper to make the order without notice to the respondent". Our Board thought that these conditions for granting an order did not give sufficient emphasis to the need to limit the availability of *ex parte* orders to circumstances in which it was critical to respond immediately by reason of danger to the claimant.

In contrast, in Saskatchewan, the legislation creates as preconditions a finding by the justice of the peace

> a) that domestic violence has occurred, and
> b) that "by reason of seriousness or urgency, the order should be made without waiting for the next available sitting of a judge of the court [of Queen's Bench] in order to insure the immediate protection of the victim".

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[19] Indeed our general approach to the associated remedies, whether in emergency or routine situations, is to provide only what is essential to meet the situation of abuse. Resolution of matters outside this limitation should be left to the appropriate forum. We have recommended modifying some of the remedies to ensure that they are limited according to this principle. See below at 64, 76.

In addition, the Saskatchewan Act sets out a number of factors which the court should consider in deciding whether to grant an emergency order (though it may also consider other factors). These are:

a) the nature of the 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 child of the victim or any child who is in the care and custody of the victim.

The informal working group thought that it was important to specify, as in the Saskatchewan Act, that for an emergency to exist, there must be an apprehension of danger to the claimant, which requires immediate protection. The committee also thought that the list of factors would be useful as a guide to the justice or court deciding whether to grant the order. These provisions were thus incorporated, with appropriate modifications[20], into the amendments to Bill 214.

Our recommendations regarding the preconditions for the granting of an *ex parte* order are substantially similar to those in the Saskatchewan Act and revised version of Bill 214. However, one change is necessary. This concerns the requirement of finding that domestic violence (or in the case of the revised Bill, domestic abuse) has occurred. We recommend that it be sufficient to find that domestic abuse has occurred, or that there has been a threat of abuse. Thus, for example, forced confinement alone, or sexual abuse, or a threat of either of these or of violence, could satisfy subsection (a) above.

RECOMMENDATION 6

It should be possible to grant an emergency *ex parte* order if it has been determined that:

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[20] Two other amendments to the Bill were as follow: first, the term "victim" was replaced with "claimant", to address the concern that the former term is inflammatory and patronizing; second, "violence" was replaced with "abuse", in recognition of the fact that the proposed legislation also provides protection against non-violent forms of abuse such as emotional and financial abuse.

a) domestic abuse has occurred or has been threatened[21], and
b) the order is needed immediately to protect the safety of the claimant or of a child of the claimant or a child for whom the claimant has parental responsibility.

The preconditions for granting emergency order are in contrast to those for granting a protection order in a routine (non-emergency) context. As to the latter, we recommend as follows:

RECOMMENDATION 7

It should be possible to grant a routine (non-emergency) order if it has been determined that:

a) domestic abuse has occurred or has been threatened[22], and
b) the order is needed to effectively protect the claimant against further abuse.

The Saskatchewan legislation contains a list of factors to be considered in deciding in whether to grant an emergency order. This list applies equally to the decision to grant an order following a full hearing. We therefore recommend that the list apply in both emergency and non-emergency settings. However the list requires a slight modification. In our view the existence of danger to property in itself should not be a factor favouring the granting of an order. Only damage to property the purpose of which is to intimidate a claimant is abusive behaviour under our definition.[23]

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[21] See at 52 for our recommendation concerning the definition of domestic abuse.

[22] See at 52 for our recommendation concerning the definition of domestic abuse.

[23] See at 52.

RECOMMENDATION 8

In deciding whether to grant a protection order, the decision maker should consider (but should not be limited to considering) the following factors:

a) the nature of the domestic abuse
b) the history of domestic abuse by the respondent towards the claimant
c) the existence of immediate danger to persons, or of damage to property with the purpose of intimidating the claimant
d) the best interests of the claimant and child of the claimant or a child for whom the claimant has parental responsibility.

3. Reviews of emergency *ex parte* orders: availability and jurisdiction

Under our proposals we extend the power to grant *ex parte* orders to the Provincial Court. We also recommend that the legislation be able to accommodate a decision to designate justices of the peace to grant emergency orders, in case this is necessary to make orders sufficiently accessible. In this section, therefore, we consider the matter of review for both these levels of decision maker.

As already noted, the Saskatchewan legislation gives jurisdiction over the granting of emergency orders exclusively to specially recruited and trained justices of the peace. There are at present approximately 20 such justices, who perform this service on a part-time basis while holding other jobs. These persons were recruited from all areas of the province. The selection criteria required that the appointees have extensive experience in the field of family violence. Efforts were made to find persons from a wide variety of occupational backgrounds and diverse linguistic abilities, with adequate representation of women and aboriginal persons. These persons attended training sessions on the subject of domestic abuse and the new legislation.

People with such backgrounds and training may be expected to have a special understanding of the dynamics and patterns of abuse, and to be able to make informed decisions about what is required to protect a claimant in a given case. At the same time, however, these people may have no previous experience in making decisions that affect individual rights. They may or may not have legal training, and therefore may not be well-equipped to deal with questions of legislative interpretation. The evaluation from Saskatchewan indicates that where orders have not been confirmed, it is because the evidence has not met the definition of domestic violence under the legislation (for example, because the parties are not "cohabitants" as defined in the Act). Similarly, such persons may be insufficiently familiar with legal principles such as the admissibility of evidence or the "principles of fundamental justice" under the *Charter of Rights and Freedoms*. For these reasons, the Saskatchewan legislation gives support from a legal standpoint for the decision-making process. It provides for an automatic review of emergency orders granted by justices of the peace, within three days, by the Court of Queen's Bench. The court is to consider whether there was evidence before the justice of the peace to support the granting of an order. The court may either confirm the order, or if not satisfied that the evidence supported the grant, direct a rehearing[24] of the matter.

Bill 214 as originally introduced gave the power to issue *ex parte* orders to the Provincial Court. There was no provision for automatic review (though there was provision for the respondent to apply for a hearing). The revisions to the Bill, as drawn by the informal committee, provided for *ex parte* orders to be issued by justices of the peace, if designated, and for an automatic review of these by the Court of Queen's Bench.

Our present recommendations on the matter of automatic review are as follow:

We do not think it necessary to have an automatic review of an emergency order granted by the Provincial Court. There is no need to supplement the legal expertise or decision-making experience of the court.

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[24] The term "rehearing" is used even though the initial order, if granted by means of telecommunication, did not have all of the elements that come to mind for a "hearing (for example, the presence of the adjudicator and parties in the same place).

RECOMMENDATION 9

There should not be an automatic review of an emergency order granted by the Provincial Court.

RECOMMENDATION 10

If justices of the peace are designated, emergency orders granted by these officials should be automatically reviewed within three working days.

We considered whether these reviews should be conducted by the Provincial Court, or by the Court of Queen's Bench. Because we have recommended giving the power to grant non-reviewable emergency orders as well as routine orders to the Provincial Court, we see no reason why this level of court should not also have the power of review. In our view protection orders granted by the Provincial Court, would, whether on a routine or confirmation basis, be constitutionally sound.[25] Because this court would itself have jurisdiction over emergency orders as well as routine ones, it would have familiarity with the issues involved in emergency situations. Therefore we recommend that orders granted by justices of the peace should be automatically reviewed by the Provincial Court.

RECOMMENDATION 11

Reviews of emergency orders to confirm that there was sufficient evidence for granting the order should be by the Provincial Court.

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[25] See at 35 *et seq.* for discussion of the constitutionality of our proposals regarding jurisdiction.

If the evidence was insufficient the judge should direct a rehearing.[26]

4. Rehearings of emergency orders where requested by respondent: availability and jurisdiction

Some people who commented on our Report for Discussion and on Bill 214 thought that the respondent should be denied an opportunity to request a hearing after an emergency order has been granted (and, if granted by a justice of the peace, confirmed). This would avoid the prospect of a respondent with greater financial resources bringing an unmeritorious case before the court as a tactic of further abuse.

In contrast, others thought that an *ex parte* order was inherently untrustworthy. The emergency *ex parte* procedure requires an on-the-spot decision by a decision maker who in many cases will not have the parties or the witnesses in his or her presence. The allegations and evidence may be conveyed by a police officer or mobile crisis worker. Neither the claimant nor the respondent will necessarily be questioned.[27] The same points apply even where the evidence for the order has undergone a review (as would be the case for orders issued by the justices of the peace). Some of the commentators in the latter group favoured giving the respondent an opportunity to be heard on request, while others thought that after an emergency had been resolved on a short-term basis, a full hearing on the merits should follow in every case, without application by the respondent.[28]

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[26] The procedures for such rehearings are dealt with in ss. 7 and 8 below.

[27] In Saskatchewan, the evaluation report suggests that typically the evidence is provided by the police officer or other crisis worker who took the call. See *Victims of Domestic Violence Act: Final Report*, Sept., 1996 (prepared for Saskatchewan Justice), at 29.

[28] Bill 214 as originally introduced provided that where an *ex parte* order had been granted (by the Provincial Court) the respondent could apply for a hearing. When the Bill was revised, the provision for a request for a hearing by the respondent was, perhaps inadvertently, deleted. Neither does the revised Bill contain any provision for applications for variation or revocation of the order.

The Saskatchewan Act provides that a respondent or victim wishing to have an order varied or revoked may apply to the Court of Queen's Bench for a review. The new Prince Edward Island statute also allows either party to apply to the Supreme Court for variation or revocation, and the order may be varied or revoked without a formal hearing if both parties consent. See *Victims of Family Violence Act, 1996*, S.P.E.I. 1996, c. 47. Portions of this act are

(continued...)

Our recommendation is to put a relatively short time limit (30 days) on the opportunity to request a rehearing. This takes into account both the interest of the respondent in having an opportunity to respond and in obtaining a sound factual finding based on a full review of the evidence. It also takes into account the interest of the claimant in obtaining a final resolution of the factual issues in the case.

RECOMMENDATION 12

After an emergency order has been granted (or, if granted by a justice of the peace, confirmed by the Provincial Court), the respondent should have thirty days within which to request a rehearing. This rehearing is to be before the Provincial Court. The claimant must be given notice and an opportunity to respond. A claimant who feels that the issues were not satisfactorily resolved may also request a rehearing within the specified time period.

It should not be possible to request a rehearing of a routine (non-emergency) order granted after a hearing.

After the expiration of this period, either party may challenge the order only if there is a change in circumstances that warrants its variation or revocation, or by way of appeal on a question of law.[29]

5. Appeals from orders granted following a hearing

We have considered whether in addition to the safeguards of automatic review and rehearing on request, there should also be a right of appeal from protection orders of the Provincial Court granted after a hearing.[30] As already

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[28] (..continued)
reproduced in Appendix C.

[29] Applications for variation and revocation, and appeals, are discussed below. See sections C(5) and C(6).

[30] Under our proposals a hearing at which such an order was granted could aris in the following circumstances: in a routine (non-emergency) application; where the court has refused to confirm an emergency order and directs a hearing, and; where an emergency order
(continued...)

noted, we want to avoid giving a respondent who has greater financial resources repeated opportunities to revisit the question of whether the conduct was abusive and the protection order was warranted. However, we think that where the correctness of the decision depends on interpretation of the statute or some other question of law, there should be an appeal, but this should not be a trial *de novo*.

RECOMMENDATION 13

It should be possible to appeal a protection order granted by the Provincial Court, based on an error of law, to the to the Court of Queen's Bench. If the original order is granted by the Court of Queen's Bench, it should be possible to appeal the order, based on an error of law, to the Court of Appeal.

6. Applications for revocation or variation

Somewhat different considerations apply where there is a change of circumstances that warrants the variation or revocation of an order or one of its terms. In such a case, either party should be permitted to bring this to the attention of the court that granted the order, and to have an existing order varied accordingly.

RECOMMENDATION 14

Either the respondent or the claimant may make an application for variation or revocation of an order, based on changed circumstances. The application should be made to the court that granted the order. Where such an application is made, the other party should be given notice and an opportunity to respond.

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[30] (...continued)
has been granted and the respondent (or claimant) requests a hearing.

7. Evidence at rehearings and at applications for variation

Both in the original consultation leading to the Report for Discussion, and in the post-Report responses, a concern was often raised that it can be very difficult for victims of violence to face their abusers in the courtroom. The victims may be intimidated, and fearful of reprisals for giving evidence.

To meet this concern, the legislation in Saskatchewan, and the revised Bill 214, provide that where an order is not confirmed and a hearing follows, the evidence that was before the original decision maker shall be considered evidence at the rehearing. The legislation also provides that victims are entitled, but not required, to attend and participate, and that they may participate by an agent. These provisions are meant to ensure that the claimant's position can be put forward even if the claimant is unable to attend the hearing.

The same concerns can arise where the hearing arises as the result of a request from the respondent or claimant, and also where there is an application for variation or revocation based on changed circumstances.[31]

RECOMMENDATION 15

In a hearing that follows an earlier grant of an order, or on an application for variation or revocation, evidence before the court of first instance or the justice of the peace shall be considered as evidence at the hearing, and the claimant need not attend, and may participate by an agent.

8. Nature, standard and onus of proof

a. Original application

We have recommended earlier that what must be proved to obtain a protection order should vary depending on whether or not the application

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[31] Where the claimant rather than the respondent brings an application for variation or revocation based on changed circumstances, it seems unlikely that this protection will be relied on.

arises in an emergency.[32] The standard and onus of proof should be the same in either case.

RECOMMENDATION 16

The standard of proof for showing that an order is needed (whether an emergency order according to the criteria in Recommendation 6, or an non-emergency order according to the criteria in Recommendation 7) should be proof on a balance of probabilities.

The onus should lie in either case on the party alleging the need for the order.

b. Rehearing

Where an emergency order has been granted, a rehearing is to be held in two circumstances: either a reviewing court has refused to confirm the order, or the respondent (or claimant) requests a rehearing.

The revised Bill 214, and the legislation in Saskatchewan, provide that on a rehearing, the onus is on the respondent to demonstrate, on balance of probabilities, why the order should not be confirmed.

We considered whether in the circumstance in which the need for an existing order is being reheard, the onus should shift to the respondent to show that it should not be confirmed. Such a shift hardly seems justified where a reviewing judge has refused to confirm an order on the basis that there was insufficient evidence for granting it. The other type of case is where it has already been decided that an order is warranted, and the respondent requests a rehearing. In this type of case it seems likely that the existing evidence, on which the claimant is entitled to rely, will fulfill the initial onus of showing the need for the order. Thus there is no need to relieve the claimant of the primary burden. We have concluded, therefore, that the shift in onus is not justified.

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[32] See Recommendation 6 and 7.

RECOMMENDATION 17

Where the need for an existing order is being reheard, the court should consider anew, in light of all the evidence before it, whether the order or any of its terms are necessary to give the claimant effective protection against further abuse.

c. Application for variation based on changed circumstances

RECOMMENDATION 18

Where an application to vary or revoke an order is brought based upon a change in circumstances, the applicant must prove, on a balance of probabilities, that the change in circumstances calls for a change to the order.

9. Constitutional issue: does the Constitution permit provincially appointed tribunals to issue protection orders?

The recommendations that we make with respect to jurisdiction require us to address whether the Constitution permits giving the powers to grant "no-contact" orders and associated remedies to provincially appointed tribunals (Provincial Court and, if necessary, specially designated justices of the peace), or whether these powers can reside only in superior (s. 96)[33] courts. The Report for Discussion contained a section dealing with this question.[34] The conclusion in that Report was that the power in provincially appointed tribunals to issue orders prohibiting the respondent from contacting the

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[33] This refers to courts appointed pursuant to s. 96 of the *Constitution Act* (1867), 30 & 31 Vict., c. 3.

[34] See Chapter 4 of the Report. The issue turns on s. 96 of the *Constitution Act, 1867*. This section provides that the Governor General is to appoint the judges of the superior, district and county courts in the provinces. The provinces also have powers under the Constitution to create provincial courts and tribunals and appoint the judges or members. However, s. 96 has been interpreted to restrict the types of powers the provinces can grant. They cannot confer powers on provincially appointed bodies that were traditionally exercised by superior courts.

claimant is sustainable. The same conclusion was reached with respect to the power to grant additional remedies that facilitate separation between the claimant and respondent, so long as certain limitations are observed.[35]

Since the issue of our Report for Discussion, there have been some developments in the law relating to constitutional jurisdiction of courts. These developments, as well as research we have recently undertaken respecting the common law powers of justices of the peace, permit us to reconstruct the argument in favour of the constitutionality of our proposals.

The issue is, again, whether under the Constitution, the powers we propose in this report are restricted to superior courts. The powers under our proposals have several components. For the purpose of the constitutional argument, they may be divided as follows: First, orders may be granted prohibiting the respondent from communicating with or contacting the claimant. Second, orders may be granted restraining the respondent from attending at the residence or exercising any rights that would disturb the claimant's ability to reside there. Finally, orders may be made in relation to the claimant's possession of personal property and the payment of monetary relief by the claimant to the respondent. As will be seen below, we conclude that there is solid ground for the view that none of these powers is in the exclusive domain of superior courts.

a. Reference re Residential Tenancies Act (N.S.)

In October, 1995, the Supreme Court of Canada issued its judgment in *Reference re Amendments to the Residential Tenancies Act (N.S.)*.[36] In that case both the majority and minority set out the tests for determining whether

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[35] The basis of the opinion that a power in provincial tribunals is sustainable is that it is analogous to the power of a justice of the peace to issue a peace bond under the Criminal Code. The limitations are: first, with respect to orders of exclusive possession of a residence, that the legislation must make clear that the only reason for granting the order is to prevent a breach of the peace; and second, that orders requiring the return of personal property or the payment of money must not exceed an amount reflecting the jurisdiction of the inferior courts at 1867 (taking inflation into account).

[36] [1996] 1 S.C.R. 186.

a conferral of power on a inferior tribunal [or court[37]] violates s. 96 of the *Constitution Act*.[38]

i. Majority test

The majority of the court (five members) laid down the following three-step test:

> 1. Does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?
>
> > [If it does not, or if inferior courts exercised the power concurrently, it is permissible to confer it.
> >
> > The court commented that this step should not be a technical analysis of remedies. Rather, the focus is on of the *type of dispute* involved, that is, on the subject matter of adjudication.]
>
> 2. If so, is it a judicial power?
>
> 3. If so, is the power either subsidiary or ancillary to a predominantly administrative function [or legislative scheme[39]] or necessarily incidental to such a function?
>
> > [If it is, it is constitutionally valid.]

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[37] See note 39 for discussion of the applicability of the test to courts as well as to administrative tribunals.

[38] This Act is cited at note 33.

[39] The *Residential Tenancies* case dealt with the conferral of powers upon an administrative body—the Residential Tenancies Board and the Director under the Act. However, the test is equally applicable to powers conferred upon a provincially appointed court in the context of a legislative scheme or institutional setting that deals with a particular subject matter—for example, upon provincial courts under the scheme of the *Young Offenders Act* (R.S.C. 1985, c. Y-1) for dealing with juvenile offenders. The test for the latter was expressed by Wilson J. in the *Young Offenders Act* case ([1991] 1 S.C.R., 252 at 280 as follows:

> At this stage of the test the courts must determine whether the impugned judicial powers of the youth courts, as exercised within the context of the legislative purpose for which they were created, are "necessarily incidental" to broader policy aims set out in the Act ... .

ii. Minority test

The constitutional test set out by the minority of the court (four members) is slightly different. It involves the following steps:

1. Characterization of the jurisdiction in question

> [The court commented that it is wrong to limit the inquiry to *remedies* over which the superior court exercised jurisdiction while ignoring the purpose and subject matter of the legislation. The jurisdiction is to be characterized in terms of the subject matter of the dispute, and is to capture the "raison d'être" of the legislation.]

2. Is the jurisdiction a novel one? does it concern a subject matter that did not exist in 1867?

> [If the jurisdiction did not exist in 1867, it is not one that must be exercised by a s. 96 superior court judge.

The court set out the following additional test for determining if the jurisdiction is novel:

> i) is the legislation an attempt to respond to a new societal interest and approach regarding the subject matter of the legislation?
>
> ii) is the legislation based on principles of law that make it distinct from similar legislation?
>
> iii) is there an identifiable social policy that is different from the policy goals of analogous legislation?

The court gave as an example of a novel jurisdiction the *Young Offenders Act*.[40] This Act is a response to a new interest and approach of society to the illegal conduct and criminality of its younger members (with rehabilitation as the paramount goal).

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[40] See at note 39.

Both the majority and minority tests set out in the *Residential Tenancies Act* case can be applied to our domestic violence proposals.

iii. Application of the majority test

The first question in the majority test is: do the powers in question (to grant "no-contact" orders and associated remedies in domestic violence cases) "broadly conform" to a power or jurisdiction exercised by a superior court at the time of Confederation? To make this comparison, we must first describe the comparable powers exercised by superior courts at Confederation. Next we must characterize the powers under the proposed legislation. To do the latter, we must take the instruction of the court not to engage in a technical analysis of remedies. Rather, we are to focus on of the *type of dispute* involved, that is, on the subject matter of adjudication and "raison d'être" of the legislation.

At the time of Confederation, superior courts did grant injunctions in civil cases; they may have granted restraining orders in civil actions for assault. Did superior courts grant protection orders restraining abusers from contacting their victims in domestic situations? This question may be answered in part by observing that in two of the confederating provinces, courts did not grant divorces.[41] In the other two provinces, courts did grant divorces as well as judicial separations.[42] However, the cases dating from the mid-nineteenth century show that a good deal of violence by a husband against a wife would be tolerated before the court would dissolve a marital union or sanction a wife's departure from a matrimonial home.[43] In extreme

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[41] Marriage was indissoluble under the Civil Code of Lower Canada (enacted in 1865). In Upper Canada, at the time of Confederation, divorce was almost unknown. Though it was possible for the legislature to pass special statutes granting divorces to individuals, only seven such petitions had been heard by 1867. When divorce was turned over to the federal jurisdiction in 1867, the federal government merely assumed the original jurisdiction to pass special statutes of divorce in individual cases Sixty-nine such divorces were granted between 1867 and 1900. (See Backhouse, C., *Petticoats and Prejudice,* Women's Press, 1991, at Chapter 6.)

[42] In Nova Scotia and New Brunswick, legislation provided for the grant of divorces by special matrimonial courts (though cruelty was a ground for divorce only in Nova Scotia). (See Backhouse, C., "Pure Patriarchy: Nineteenth Century Canadian Marriage", [1986] 31 McGill L.J. 264.

[43] In *Petticoats and Prejudice* (*supra, note* 41), the author describes a case in which an abused wife returned to live in her father's home. Ten years after the separation the woman's father tried unsuccessfully to sue the abusive husband for the money the father had

(continued...)

cases where a wife's life was threatened, the courts might grant a divorce or separation, as well as alimony. Allowing a wife to separate from a husband is in a sense a protective measure; however, though one case dating from the time mentions a peace bond[44] (which would have been granted by a justice of the peace), no mention is made in the cases of superior court orders, ancillary to civil actions, restraining an abusive husband from contacting his wife or former wife.

Turning to the powers under our proposed legislation, we are to look beyond the fact that the remedy sought is injunctive in the sense that a person is directed to do or not do something. Rather, the characterization is to be according to the subject matter and rationale of the proposed legislation. Applying this approach, the powers are not just powers to grant injunctions (indeed, the remedy under our proposals is not parallel to injunctions in civil cases because there is no civil action); rather, more specifically, they are powers to protect especially vulnerable persons in a particular sphere. The subject matter of any given adjudication is how to protect a particular person against domestic abuse.

Based on this characterization, it may be argued that the power of superior courts to grant injunctions in civil cases does not "broadly conform" to the powers we propose. If this argument is right, we need not go beyond the first step of the majority test.

Even if it is wrong, however, and the two types of powers are "broadly conformable", the proposed powers may still be sustained under the third step of the majority test. If the proposed powers are either subsidiary or ancillary to a predominantly administrative function (or legislative scheme) or necessarily incidental to such a function, they may still be upheld. It is equally arguable that this part of the test is also met—that the various

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[43] (...continued)
expended supporting his daughter. In rejecting the claim, the judge conceded that there had been violence by the husband against the wife, but that "however ungallant such conduct might be considered, yet a man had a right to chastise his wife *moderately* - and to warrant her leaving her husband, the chastisement must be such as to put her life in jeopardy." (At 174.) See also the cases described by Backhouse in "Pure Patriarchy: Nineteenth Century Canadian Marriage" (cited in note 42). Neither was a wife able to sue her husband for violence in tort, as in law, the couple was regarded as one person.

[44] See *Bavin v. Bavin* (1896), 27 O.R. 571 (Div. Ct.).

remedies that may be granted under our proposals are all ancillary to the main purpose of the legislation. The purpose may be said to be to create an entirely new scheme that responds to the needs of victims of abuse in the peculiar context—the home—in which domestic abuse arises; the remedies are necessary to provide effective protection against abuse for these victims.

iv. Application of the minority test

Under the minority opinion test the first question is whether the jurisdiction is novel. There is a strong argument to say that it is, on the basis of i) to iii) in number 2 above.[45] As already noted, the whole approach is novel relative to injunctions in civil cases because the resources of the state are called on to protect the victim—the matter is not merely between the parties. Protection orders, especially under our proposed scheme, are really somewhere between civil and criminal, and thus are not merely injunctions to support a civil action.

v. Summary

Applying either the majority or minority test set out in *Reference re Residential Tenancies Act (N.S.)*, there is a strong argument first, that the two sets of powers are not "broadly conformable" (or that the proposed powers are "novel"), and second, that even if they "broadly conformable", the proposed powers may be saved as subsidiary or ancillary to a predominantly administrative function or legislative scheme, or necessarily incidental to such a function.

b. Concurrent jurisdiction and the powers of justices of the peace in 1867

Even if the arguments just reviewed fail, and it is held that the two types of powers do "broadly conform", the constitutionality of our proposals may still be upheld, if it can be shown that provincially-appointed tribunals exercised such powers concurrently at the time of Confederation.

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[45] These are, again,
i) is the legislation an attempt to respond to a new societal interest and approach regarding the subject matter of the legislation?
ii) is the legislation based on principles of law that make it distinct from similar legislation?
iii) is there an identifiable social policy that is different from the policy goals of analogous legislation?

In this regard, we will first consider the power to order the respondent not to contact the victim, and then go on to consider the associated remedies.

i. No contact

The basis on which the Report for Discussion rested its opinion that giving the power to provincially appointed courts is constitutionally permissible was that it is analogous to the power in s. 810 of the Criminal Code to bind a person over to keep the peace. This conclusion is perhaps open to question insofar as the Criminal Code power is premised on a threat to the safety of the applicant or to the applicant's property. Our approach goes beyond physical safety to other forms of abuse. It is also arguable that the Criminal Code power is meant to enjoin only crimes.

However, further research shows that powers more closely analogous to the ones sought to be conferred in this report existed in 1867 and continue to exist in justices of the peace in the provinces, quite apart from the provisions of the Criminal Code. These derive from commissions of the peace and/or the *Justices of the Peace Act 1361*.[46] In a 1954 decision of the Supreme Court of Canada[47], the court held that "common law preventive justice" was in force in Ontario (this has likewise been held to be in force in Alberta[48]). In that case a magistrate was held not to have exceeded his jurisdiction in binding a defendant over to prevent his making innumerable annoying telephone calls.[49] The 1994 English Law Commission Report No. 222 entitled "Binding Over" also makes it clear that the powers of justices of the peace in respect of "preventive justice" in England (the same as those possessed by justices in Canada) included the power to bind a person over "to be of good behaviour".

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[46] (U.K.), 34 Edw. 3, c. 1.

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

[48] *Poffenrith*, [1942] 2 W.W.R. 363.

[49] The court concluded that the justice presiding in the case was right to assume jurisdiction even though the information disclosed nothing more than that the respondent had made innumerable annoying telephone calls. There is some ambiguity in the case: the court speaks of a possible "mistake of fact" on the part of the justice without saying what this might have been. In spite of this ambiguity, the court clearly saw no error in law where the justice assumed jurisdiction though the information disclosed no apprehended breach of the peace. This leads to the conclusion that the court regarded it as right in law for a justice to restrain behaviour that though amounting to extreme annoyance, fell short of such an apprehended breach. This analysis of the case is approved in the English Law Commission's survey of the Canadian law in its Working Paper No. 103 on the topic of binding over.

In discussing how the cases have interpreted "good behaviour", the Report quotes a Court of Appeal judgement as follows:

> "What is a good way of life is for the magistrates to decide ... *contra bonos mores* is conduct which has the property of being wrong rather than right in the judgement of the vast majority of contemporary fellow citizens."[50]

This conclusion may be highly questionable in that it places an unjustifiably wide discretion in the hands of magistrates, and it has been criticized for this reason.[51] However, whether or not this power is desirable, its existence does serve our purpose of constructing an argument to answer a constitutional challenge, on the basis that this power, and that to grant "no-contact" orders, are analogous. The argument that a broadly conformable concurrent jurisdiction (or even exclusive jurisdiction) was exercisable by provincially appointed courts at the time of Confederation is greatly strengthened by the common law jurisdiction in justices of the peace to dispense preventive justice by binding persons over to be of good behaviour.

ii. Associated remedies that touch on property rights, especially those restricting entry into the residence

In this section we ask whether provincially appointed tribunals concurrently exercised powers akin to the remaining remedies we propose. To answer this, we must deal with a case decided by the Supreme Court of Canada in 1982—*Re B.C. Family Relations Act*[52]. This case dealt in part with orders of occupancy of the residence and of non-entry into a residence, remedies similar to the proposals we make to temporarily require a respondent to leave the residence and postpone any rights to deal with the property. In support of the non-entry power, it was argued in the *Re B.C. Family Relations Act* case that it was akin to the power of justices to dispense preventive justice. The British Columbia Supreme Court rejected the suggestion that the two types of powers—that to grant non-entry orders in the British Columbia legislation, and powers of justices of the peace to dispense preventive justice—were analogous. However, a closer reading of

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[50] (1988), 86 Cr.App.R. 130 at 139, per Glidewell LJ.

[51] See *English Law Commission Report No. 222*, at 40-42, and *English Law Commission Working Paper No. 103*, at para.5.1.

[52] [1982] 1 S.C.R. 62.

the B.C. legislation reveals an important factual distinction between the provisions relating to the residence there under scrutiny, and our proposed remedy[53], that allows us to distinguish the case.

In the *B.C. Family Relations Act* case, the Supreme Court ruled that non-entry orders under the legislation in question were more akin to injunctions supporting property rights than to relief against apprehended breaches of the peace, and hence were insupportable. However, the legislation before the court in the *Family Relations Act* case made no reference to protecting applicants from abuse. In contrast, our provisions clearly have prevention of abuse as their primary purpose: the powers relating to the residence under our proposals are in fact not supportive of a property right, but rather are one means to ensure that the claimant will be inaccessible to and protected from the abusive respondent. On this basis, we may still contend, despite the ruling in the *Family Relations Act* case, that this means of preventing abusive behaviour is analogous to the common law powers of justices to require persons to keep the peace and be of good behaviour.[54]

c. The Ontario Family Law Act[55]

The Ontario *Family Law Act* has since 1986 conferred on Family Courts the power to issue non-molestation, restraining orders. There has not been a successful constitutional challenge to this provision.[56] This lends support to the view that the "no-contact" and "no-communication" parts of our proposals are constitutionally defensible.

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[53] See at 64 *et seq.* for a discussion of our proposals for remedies that relate to the residence.

[54] Another way of dealing with the *Family Relations Act* case is to apply either the minority or the majority test in the *Residential Tenancies Act (N.S.)* case. Applying either test, the powers to order non-entry and other remedies that touch on property rights are to be characterized according to their subject matter and purpose. So characterized, they are better seen not as property-related injunctions, but as remedies that are necessary to achieve the main purpose of the legislation - that of creating an entirely new scheme responsive to the special needs of victims of domestic abuse, and providing effective protection for these victims.

[55] 1986 S.O., c. 4.

[56] A challenge was tried unsuccessfully in *Re Kleinsteuber an Kleinsteuber* (1980), 113 D.L.R. (3d) 192 (Ont. Prov Ct. (Family Division)).

However, the Ontario Act does reserve the power to grant exclusive possession orders to superior courts.[57] This seems to suggest that the framers of the Act thought this was constitutionally necessary. Again, though, the parts of our proposals that allow the claimant to remain in the home focus directly and exclusively on the protection of victims of abuse. In contrast, the Ontario legislation deals more generally with the rights of the parties in relation to the home, including property rights. There is a strong argument that the additional remedies we propose, insofar as their purpose is clearly to achieve effective protection, are supportable as ancillary to the legislation, even if the powers concerning the home in Ontario are not.

d. Conclusion

The legislation in relation to domestic abuse in other provinces where it has been enacted has not been challenged. There is therefore no definitive statement about the constitutional validity of such laws. There is little doubt that the power to order "no-contact" and "no-communication" is constitutionally sound. The power to remove a respondent from the residence while allowing a claimant to remain poses a bigger challenge. However, our consultation made it very clear that this is an essential element of the remedies. There was also strong support for the view that the other property-related remedies we propose[58] can be very important to allow the claimant to separate from the respondent. Thus there is a strong argument that all these orders, though touching on property, are constitutionally justified as essential elements ancillary to an overall scheme to achieve the primary goal

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[57] *Ontario Family Law Act* (cited at note 55), ss. 1(1) and 17 (defining "court"),and s 24. One of the criteria for granting such orders is family violence, but it is not the only criterion.

[58] See at 72 to 76.

of protection.[59] Our considered opinion is that this argument provides an adequate grounding for enactment of such legislation.

D. What constitutes abusive conduct?

Our Report for Discussion contained a lengthy discussion of the types of abusive conduct that might ground a victim's right to apply for protection. We recommended that any "controlling and abusive" conduct could justify a protection order, and gave a non-exhaustive list of examples of more particular types of conduct. This list was as follows:

- physical assault including threats of assault and conduct that creates a reasonable apprehension of imminent physical harm
- sexual assault, including sexual contact of any kind that is coerced by force or threat of force, and threats to make unwanted sexual contact by force
- damage to property done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant
- forcible or unauthorized entry into the residence of the applicant
- compelling another against their will to perform an act or refrain from doing an act
- harassment consisting of repeated telephone calls to the home or workplace, surveillance, following in public places, and so on

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[59] A constitutional challenge could also be brought on two other grounds: first, that the procedures offend s. 7 of the *Charter of Rights and Freedoms*, which ensures that the restriction of a person's liberty must be in accordance with the principles of fundamental justice; and second, that the proposed legislation relates to criminal law, which is within the exclusive legislative jurisdiction of the federal Parliament. As to the first ground, the proposed remedies are carefully limited so as to intrude on the respondent's liberty only as far as necessary to provide protection for the victim: they impose identifiable limits on behaviour, for a defined period, in relation to identifiable victims or potential victims. There is a strong argument that remedies that are limited in this way conform with the requirements of fundamental justice. With respect to whether the emergency *ex parte* procedure meets the test for fair procedure, the automatic review by the court, and opportunity to request a rehearing if an emergency order is granted, probably combine to meet the fairness test. Even if the remedies and procedures do violate the principles of fairness or fundamental justice, they are probably justifiable under *Charter* s. 1 as "a reasonable limit prescribed by law in a free and democratic society", having regard to the important purpose and the limited scope of protection orders. As to the division of powers argument, the legislation in question seek to restrain non-criminal conduct as well as conduct that could be a crime. It provides a remedy that is more civil than criminal in nature, and is probably valid provincial legislation under "property and civil rights".

- emotional abuse, including subjecting a person to degradation and humiliation including repeated insult, ridicule and name calling, and repeated threats to cause extreme emotional pain, or repeated threats in relation to children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy such as to constitute a serious invasion of privacy.

The Report for Discussion also raised the issue of financial abuse, which we defined as "the coercive control over financial assets and means of subsistence with a view to ensuring the financial dependency of the applicant". We did not make a recommendation on this point. Rather, we asked as a consultation question whether this should be one of the types of conduct that could ground a protection order.

The Saskatchewan legislation defines "domestic violence" as follows:

(i) any intentional or reckless act or omission that causes bodily harm or damage to property
(ii) any act or threatened act that causes a reasonable fear of bodily harm or damage to property
(iii) forced confinement
(iv) sexual abuse.

The definition of domestic violence in the original Bill 214 was patterned on the Saskatchewan legislation. The Bill did not include financial abuse, but did add emotional abuse, defining the latter as "behaviour of any kind the purpose of which is to deliberately humiliate or degrade another individual and includes repeated insults, ridicule and name-calling".

The Prince Edward Island Act includes emotional, but not financial, abuse. The latter Act also deals with vicarious responsibility: "a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute family violence against the victim, is deemed to have done the act personally".

At the Institute's July, 1996 meeting to respond to Bill 214, we dealt with a number of the components of abuse separately. Many of our responses were incorporated into the revisions to the Bill. We will set the separate

issues out below, and then make a final recommendation as to how abuse should be defined.

1. A guiding principle

The Institute Board considered that it was important to develop a guiding or limiting principle to be included in the opening words of the section that defined abusive conduct. This would be followed by a list of illustrations. An example was "domestic abuse is unwarranted controlling and intimidating behaviour, including [list of illustrations]".

At the informal committee stage, it was decided that such opening words did not add to physical or sexual abuse or threats thereof, nor to forced confinement, and that the remaining categories—emotional and financial abuse—contained their own limiting principles.[60] For this reason, the committee rejected the idea of a guiding principle.

However, the Institute Board has opted to retain the idea, in order to make it clear that trivial acts are not caught by the legislation. The principle settled on is "conduct that threatens or interferes with the physical, sexual or emotional integrity of the person subjected to it, or that makes that person incapable of independent functioning". This statement is followed by a non-exhaustive list of illustrations.

2. Bodily harm

In the original Bill 214, one component of abuse was "any intentional or reckless act or omission that causes bodily harm". The Institute Board thought that the reference to "bodily harm" was a term that has a particular meaning under the criminal law. It might give the respondent grounds to argue against a protection order on the basis that the conduct in question did not meet the criminal law standard. We thought that the phrase "act that causes injury", without specifying the degree of injury, would be better. The informal committee accepted this point, and it was incorporated into the amendments.

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[60] See at 52 for a complete list of the components of abusive conduct.

3. Damage to property

Another concern raised by the Board and incorporated into the amendments was that "damage to property" of itself does not necessarily constitute abusive behaviour. It should be specified that only property damage done with the purpose of intimidating the cohabitant is abusive conduct under the legislation.

4. Sexual abuse

Bill 214 contained sexual abuse within the definition of abuse, but did not mention threats thereof. The Institute Board thought that threats of unwanted sexual contact by force should be included in the definition. This change did not find its way into the revised Bill, but should be included.

5. Emotional abuse

A number of commentators, including members of the Court of Queen's Bench, raised the concern that the definition of emotional abuse in Bill 214 was too broad. Some thought that it covered conduct that occasionally arises in many relationships. It was thought important to clarify that the occasional unkind word would not trigger the right to protection; the targeted behaviour is a pattern of controlling and intimidating conduct. During the discussions of the informal working group, it was suggested that

> a pattern of behaviour the purpose of which is to deliberately undermine the mental or emotional well-being of a cohabitant

captures the type of conduct we seek to impugn. This definition of emotional abuse was incorporated into the revisions to the Bill[61], (together with a provision about threats of causing emotional pain to the cohabitant, or children, family or friends).

6. Financial abuse

Many respondents commented on the consultation question in the Report for Discussion that asked whether financial abuse should be one of the types of conduct that can ground a protection order. Respondents who had been

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[61] The existing definition is redundant in that it refers to the act having a particular purpose, and also describes it as deliberate. Either the reference to purpose or the modifier "deliberate" should be removed.

victims of abuse, and those providing services and support for victims of abuse, overwhelmingly supported the inclusion of this type of conduct. The most common reason was that the denial of access to financial resources can make it impossible for a person to break away from another who is subjecting them to control, thus leaving them vulnerable to other forms of abuse.

The opposing view is that including financial abuse could provide an opportunity for misuse of the legislation by allowing a party to seek the resolution of domestic financial issues (presumably this would include support and property-division issues) in an inappropriate forum. It was also suggested that allowing financial abuse to ground an order could be used to tie up legitimate financial transactions.

These concerns can be tested by asking how the inclusion of financial abuse could have such effects. Inclusion of "financial abuse" means that where one person is taking steps to ensure the dependency of another, as by prohibiting them from working, taking their earnings, or denying them access to financial resources to which they have an entitlement, a protection order can be issued that includes certain remedies. The remedies which might be given to respond to the financial abuse could include "no-contact" and "no-communication" orders (which would ensure against the claimant's being prevented from working, and against theft of income). They could also include remedies that would facilitate the claimant's separation from the respondent, including restraining the respondent from attending at or near the residence; emergency monetary relief; reimbursement for monetary losses suffered as a direct result of the abuse or the separation (including moving, accommodation and legal expenses); and temporary possession of specified personal property such as chequebooks, bank cards, and so on. None of these remedies could be characterized as a final resolution of financial issues.[62] The

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[62] As will be seen below, we do recommend that the respondent's rights to deal with a residence owned or leased jointly or solely with the claimant can be temporarily restrained to prevent interference with the claimant's ability to continue to reside there. However, we make it clear that these rights are postponed only, rather than finally resolved. The restriction can be for a designated period only, and (by the terms of Bill 214) does not finally affect property rights. Most respondents thought it critical that in an abusive situation, the abuser and not the victim be required to leave. The importance of this result outweighs a temporary interference with property rights.

With respect to the fear that this remedy will be used inappropriately to resolve maintenance and support, again, our recommendations regarding monetary relief and

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only other possible remedy would be a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property in which the claimant may have an interest. Only under this remedy might the respondent be prevented from entering into financial transactions. However, the remedy is predicated on the claimant's asserting some interest in the property at issue. Under this circumstance, it is appropriate to restrict the respondent from dealing with it until the matter of entitlement can be determined. The remedy is implicitly temporary only, and assumes a final resolution of the entitlement to the property at issue in an appropriate forum.

Both the Institute Board and the working group thought that the limiting words in the definition of financial abuse were an adequate safeguard against its misuse, especially if this were coupled with a provision making it an offence to bring a false or malicious application.[63] The definition was slightly altered by the working group, to read as follows:

> Behaviour the purpose of which is to control, exploit or limit a cohabitant's access to financial resources so as to ensure the financial dependency of the cohabitant.

The Institute has also added the phrase "or that exploits a cohabitant's financial resources", to cover the situation where the abuse consists of simple exploitation, as where, for example, children might keep an aged parent in the home and use the elder's pension or other income for their own purposes.

7. Other illustrations of abusive conduct

The Report for Discussion contained several other illustrations of abusive conduct, including forcible or unauthorized entry into a residence, compelling another to do or refrain from doing acts against their will, and harassment. In our view, each of these categories is already covered by the types of conduct in the list. We also think that the list should not be unduly long. For these reasons, while these items are contained in our report to provide

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[62] (...continued)
reimbursement are clearly not meant to finally resolve the former matters. We recommend that if support issues are raised, an application to deal with them must be joined in a hearing for a protection order.

[63] See section J, *infra*, for a discussion of this provision.

possible guidance for interpretation, they should not be set out in the legislation.

8. Vicarious abuse

The Prince Edward Island Act provides that "a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute family violence against the victim, is deemed to have done the act personally".[64] This provision did not find its way into Bill 214. A similar point is made in Recommendation 10 of the Report for Discussion, where we suggested that "no-contact" should include "communicating or attempting to communicate with the applicant in any of the above ways [that is, by telephoning, watching in public places, places of employment, and so on] by enlisting the help of any other person." In the view of the Institute Board, a provision such as that in P.E.I. should form part of the law.

Based on the preceding discussion, our recommendation for the definition of domestic abuse is as follows:

RECOMMENDATION 19

Domestic abuse should be defined as conduct that threatens or interferes with the physical, sexual or emotional integrity of the person subjected to it, or that makes that person incapable of independent functioning. It includes, but is not limited to, the following:

- **any intentional or reckless act or omission that causes injury, or causes damage to property the purpose of which is to intimidate a claimant**
- **any act or threatened act that causes a reasonable fear of injury**
- **forced confinement**
- **sexual abuse (sexual contact of any kind that is coerced by force or threat of force, or the threat of coerced sexual contact)**

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[64] This Act is cited at note 28.

- **emotional abuse (a pattern of behaviour that deliberately undermines the mental or emotional well-being of the claimant, or; making repeated threats to cause extreme emotional pain to the claimant or the claimant's children, family or friends)**
- **financial abuse (behaviour of any kind that controls, exploits or limits a claimant's access to financial resources so as to ensure the financial dependency of the claimant, or that exploits the claimant's financial resources).**

RECOMMENDATION 20

There should be a provision that a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute domestic abuse against the victim, is deemed to have done the act personally.

E. Who is entitled to protection, and who may apply?

1. Who is entitled to protection?

Under the Report for Discussion, the persons entitled to protection are those who are vulnerable to the respondent according to specified indicators of vulnerability. These indicators 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 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
- ongoing physical proximity of the parties.

Under Bill 214, only cohabitants are entitled to protection against abuse by other cohabitants.. The definition of "cohabitant" in Bill 214 is drawn in

part from the Saskatchewan legislation. Under the Saskatchewan Act, "cohabitants" include:

- persons who have resided together or are residing together in a family relationship, spousal relationship, or intimate relationship
- persons who are parents of one or more children, regardless of their marital status or whether they have lived together at any time.

Bill 214 added a third clause:

- persons who are 16 years of age or older who are children of the victim and who are currently residing, or who normally reside, in the same residence as the victim.

The approach taken in the Report for Discussion is broader than that found in Bill 214 or under the Saskatchewan legislation. Under the Report, the indicators of vulnerability could cover dating relationships, and non-cohabiting relationships where the person to be protected is neither in a family nor in an intimate relationship, but other indicators of vulnerability are present. Though covering more potential claimants, however, this approach would be more difficult to apply, because it does not specify how many indicators of vulnerability need be present.

At its July meeting the Institute Board concluded that the third clause of the provision in Bill 214 was redundant (the children mentioned would be covered by the first clause as residing or having resided together in a family relationship). The working group agreed, and the Bill was revised accordingly.

The Institute Board has since considered whether the phrase "family relationship" in the amended Bill is meant to include extended family members as well as persons in the immediate nuclear family. We were advised by some commentators that from the standpoint of immigrant or minority ethnic groups, it is very important to include extended family members amongst the persons entitled to apply for protection. The fact of recent immigration, or cultural practices within a group, might have the effect of making extended family members particularly vulnerable to abuse.

We also considered whether the word "family" is to be taken to cover persons who reside in a household and are treated as family members though not related by blood to the claimant or respondent.

We concluded with regard to both these questions that it is unnecessary to place a limiting definition on the term "family". Members of the extended family, and non-relatives who are generally regarded as within a family, should be neither specifically included nor excluded. Whether the factors that characterize a family-like relationship are present in a particular case (for example, a position of dependency or of trust) can be decided by reference to the facts of the case.

RECOMMENDATION 21

The persons entitled to protection should be "cohabitants", defined as follows:

- **persons who have resided together or are residing together in a family relationship, spousal relationship, or intimate relationship**
- **persons who are parents of one or more children, regardless of their marital status or whether they have lived together at any time.**

2. Who may apply?

The original Bill 214 did not specify who may apply for an order, but provided that the Lieutenant Governor in Council could make regulations designating who may apply on behalf of a victim with the victim's consent.

The Saskatchewan Act provides that an application may be made by:
- a victim
- a member of a category of persons designated in the regulations[65], on behalf of the victim with the victim's consent

[65] The regulations designate peace officers as well as service providers employed by particular designated agencies.

- any other person on behalf of the victim with leave of the court or justice of the peace.

The Prince Edward Island legislation is similar except that the third category applies only where the victim is incapable of giving consent.[66]

The working group adapted the Saskatchewan legislation by providing that the following persons may apply for an order:

- a person who claims to have been subjected to domestic abuse by a cohabitant
- a member of a category of persons designated in the regulations on behalf of a person in clause (a) with that person's consent, or
- any other person on behalf of a person referred to in clause (a) with leave of the court.

The revised Bill 214 does not deal specifically with the question of applications respecting children. A child that falls into the definition of "cohabitant" and that has been subjected to abuse is entitled to protection under our proposals. Also, under the remedies section, we recommend that a "no-contact" order can be made where there is a risk of harm to a child.[67] The existing provisions regarding applications do not address the situation where a child is not old enough either to personally apply for protection, or to give consent to a service provider to apply on his or her behalf.[68] According to the provision in the amended Bill 214, an application on behalf of a child would require "leave of the court", an awkward and unnecessary extra step. Thus it would be useful to allow a parent, or a person with parental responsibility, to apply on behalf of a child.

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[66] See the *Victims of Family Violence Act*, s. 8. This Act is cited at note 28.

[67] See below at 76, *et seq.*

[68] Under our remedies section, we recommend that "no-contact" with children can also be ordered where, though there may be no risk of harm to a child, the order is necessary to protect the claimant. (See below at 82.) Also, the general "no-contact" and "no-communication" remedies are framed so that such orders can be in relation to other family members or other specified persons, either of which could include children. In such cases, the claimant can apply on his or her own behalf, and the remedy can include no contact (or contact and structured access) with the child.

RECOMMENDATION 22

It should be possible for the following persons to apply for orders:

- **(a) a person who has been subjected to domestic abuse by a cohabitant**
- **(b) a member of a category of persons designated in the regulations on behalf of a person in clause (a), either**
  - **with that person's consent, or**
  - **where that person is incapable of giving consent, with leave of the court (or justice of the peace)**
- **(c) a parent of, or person with parental responsibility for, a child who has been subjected to domestic abuse by a cohabitant or who is at risk of harm from a cohabitant**
- **(d) any other person on behalf of a person in clause (a) with leave of the court (or justice of the peace).**

The involvement of persons other than the claimant in the application process puts these persons at risk of being sued for damages. We therefore recommend immunity for such persons for acts done in good faith.

RECOMMENDATION 23

There should be a provision giving immunity from actions for damages against officials or others for acts done in good faith pursuant to the legislation or regulations.

F. Remedies

Our Report for Discussion set out a list of remedies that we thought should, or in some cases possibly should, be available as part of a protection order.

Those of the remedies that we thought required further consultation were raised in the form of questions rather than recommendations.[69]

Some of the remedies in the original Bill 214 coincided with those contained in the Report for Discussion. For some remedies that are found in both documents, there are minor variations in content; for others there are important differences. The Bill also contained some of the remedies that we raised for discussion only.

In the Saskatchewan Act[70], the available remedies differ depending whether an emergency order has been granted by a justice of the peace, or a victim assistance order has been granted by the Court of Queen's Bench.[71] In the Prince Edward Island legislation[72], all of the available remedies can be made at the emergency order level[73], with the single exception of a provision for access to children. The latter is available only in the case of a victim assistance order.[74]

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[69] See Chapter 3 of the Report for Discussion.

[70] See *Victims of Domestic Violence Act*, cited at note 2.

[71] For the former type of order, the available remedies are: exclusive possession of the residence; removal of the respondent; police supervision of the removal of personal belongings; "no-contact" and "no-communication" with the victim or other persons; and any other necessary provision. The remedies that are available only as part of a victim assistance order are: restraint against attending at specified places; restraint against communication with the victim or other persons that is likely to cause annoyance or alarm; compensation for monetary losses; temporary possession of specified property such as an automobile, cheque book, health services card, etc.; restraint against converting, damaging or otherwise dealing with property in which the victim may have an interest; a recommendation that the respondent receive counselling; and requiring the respondent to post a bond to secure compliance. See ss. 3(3) and 7(1). The remedies under the Act do not include custody or access to children.

[72] See *Victims of Family Violence Act*, cited at note 28.

[73] These remedies include all the remedies available in Saskatchewan in the case of an emergency order, as well as the following: restraint against attending at identified places; temporary custody of children to the victim or some other person; temporary possession of specified personal property; restraint against converting, damaging or otherwise dealing with property; restraint against further acts of violence against the victim; and prohibition of publication of the name and address of the victim. See s. 4(3).

[74] See *Victims of Family Violence Act*, s. 7, cited at note 28.

In this section our discussion about each of the remedies, and our recommendations in relation thereto, will be dealt with individually.

1. Stand-alone prohibition against subjecting the claimant to abuse

The first of the remedies listed in Bill 214 as originally introduced was a provision restraining the respondent from subjecting the victim to domestic violence. One of the concerns brought to our attention by the Court of Queen's Bench was that this remedy should not stand alone (that is, without an accompanying "no-contact" order) because it is too hard to enforce where a respondent continues to reside or communicate with a claimant. In the court's view, every protection order should involve a prohibition on contact. This concern is echoed in the discussion preceding Recommendation 10 in our Report for Discussion. There we noted that orders that prohibit particular contact but not other contact are difficult to enforce, and concluded that "in structuring the "no-contact" provisions, the legislation should be very clear and unequivocal in prohibiting all contact whatsoever with the applicant."[75]

The informal working group decided to deal with this concern by combining the provision restraining the respondent from subjecting the claimant to abuse with a provision restraining the respondent from contacting or associating with the claimant in any way. This was incorporated into the amendments. The resulting provision allows an order "restraining the respondent from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to domestic abuse".

RECOMMENDATION 24

Orders against subjecting the claimant to violence should be combined with "no-contact" orders.

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[75] See the Report for Discussion at 107. Question 2 in the Report questioned the wisdom of allowing the creation of a stand-alone restraint on assaulting the claimant for a different reason. In this part of the Report, we noted that such an order would be redundant, since assault is already prohibited under the law, and the order might imply that there is a freedom to assault in its absence. Another concern was that issuing such orders might create a two-tiered system of police responses to calls: those victims with orders in place might be given priority over those without them.

The latter implies the former in any case, but a prohibition against further abuse could be added for emphasis.

2. Prohibitions on contact and communication

Our Report for Discussion recommended that "no-contact" could be ordered, and in addition recommended that orders should contain examples of the conduct included in the meaning of contact. The list, which was not to be exhaustive, included the following:

- telephoning, watching, or attending at, the claimant's residence, place of employment or school
- approaching the claimant in public places
- communicating with the claimant by mail, fax, telegram or other written communication
- communicating in any of the above ways through another person.

Bill 214 dealt with the "no-contact" issue first by providing for restraint of any contact or association with the claimant, and then by providing more specific examples of types of contact or communication that could be restrained. Thus the Bill provided that the respondent may be restrained from attending at specified places in one provision, and may be restrained from contacting or communicating with the victim, family members, or others in the victim's or family member's workplace in another. These latter provisions, copied from the "victim's assistance order" portion of the Saskatchewan legislation[76], were as follow:

- 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

- 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

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[76] See *Victims of Domestic Violence Act*, ss. 7(1)(b) and 7(1)(c). This Act is cited at note 2.

others with whom communication would likely cause annoyance or alarm to the victim.

The Prince Edward Island legislation deals with communication more simply, by restricting direct or indirect communication with the victim or other specified person. There is no qualifier as to the likely effect of the communication.[77]

The Institute Board thought that the qualifier in Bill 214—that only communication that is likely to cause annoyance or alarm be restrained—might allow for arguments about what is likely to cause alarm. We thought the qualifier should be omitted. The informal working group agreed, and the provision regarding communication was amended accordingly. The revised provision also incorporated a prohibition against communication through the agency of another.

In the view of the Institute Board some further changes are needed to the provisions that restrain contact and communication.

First, the Institute Board has refined its position about the rights of the claimant and respondent with respect to the residence. As will be seen below, our final recommendation in this regard is that where it is preferable to remove a respondent from a residence and allow the claimant to remain, this can be achieved first, by restraining the respondent from attending at or near the residence regardless of by whom it is owned or leased, and second, by postponing any right the respondent has to deal with the residence in such a way as to disturb the claimant's ability to continue to reside there.[78] In light of this recommendation, it is necessary to make clear in the "no-contact" provision that the respondent may be restrained from attending at or near a residence even though it is owned or leased solely by the respondent or jointly by the respondent and the claimant.

Second, the Board has given further consideration to the inclusion of persons other than the claimant in orders that prohibit contact or

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[77] See *Victims of Family Violence Act*, s. 4(3). This Act is cited at note 28.

[78] See at 67 *et seq.*.

communication by the respondent. Persons other than the claimant may be included for two possible reasons. The first is that the other persons are themselves at risk of harm. The second is that contact with the other persons would cause annoyance or alarm to the claimant, or would put the claimant at risk of harm.

The remedies as worded in revised Bill 214 provide that "no-contact" and "no-communication" can be ordered in relation to family members and other specified person as well as in relation to the claimant. The condition originally contained in the provision—that only contact or communication with others that would cause annoyance or alarm to the claimant was to be prohibited[79]—makes it clear that the prohibition on contact was directed at protection of the claimant rather than the protection of the other persons. There is no suggestion that a risk of harm to other persons must be shown before they can be included in the order, presumably because that is not the point of including them.

Our Report for Discussion took a slightly different approach. We recommended that others who are themselves at risk of injury from the respondent may be included in the order, and that before they are included, their consent should be required.

Our present recommendation as to the inclusion of others is that this should occur only in situations where a "no-contact" order covering third parties is needed to ensure the well-being of the claimant. In such cases, consent of the others need not be required, but they should be given notice. Others who are at risk from the respondent must themselves apply for an order (or in the case of children, others may apply on their behalf).

RECOMMENDATION 25

The provisions for restraining personal contact and communication should be as follows:

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[79] As noted above at 61, the Institute recommended removal of this qualifier from the original Bill 214.

The respondent may be restrained from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to domestic abuse.

Examples of the type of conduct that may be restrained include the following[80]:

- **attending at or near or entering any specified place that is attended regularly by the claimant, other family members, or other specified persons, including the residence (regardless whether the residence is jointly owned or leased by the claimant and respondent or solely owned or leased by the respondent), property, business, school, or place of employment of the claimant, or the residence, property, business, school, or place of employment of other family members or of other specified persons**

- **making any communication, including personal, written or telephone contact, or contact by any other communication device, either directly or through the agency of another person, with the claimant, other family members, or other specified persons, or their employers, employees, or co-workers.**

  Persons other than the claimant who are included in the order should be notified of the fact of their inclusion.

3. Structured safe contact

The Report for Discussion included a recommendation that provision be made for structured safe contact. This was to apply where, as a matter of practical

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[80] The provisions restraining particular conduct are redundant when taken together with the first provision for restraining any type of contact or association. To avoid this redundancy (which exists in revised Bill 214), the latter two could be included as examples of the first.

necessity, and where the claimant requests it, the parties require safe contact with one another, for example, to fulfill parenting duties or discuss reconciliation. The Report recommended that such orders contain detailed logistics of contact, to avoid further abuse, and to allow for effective enforcement.

The informal working group felt that a specific provision for this type of order was superfluous, as it could be made under the final clause allowing "any other provision the court considers appropriate".

In the Boards's view, inclusion of such a provision would remind the decision-maker that such an order is possible.

RECOMMENDATION 26

There should be a provision that allows orders that contain the logistics of how and when permissible contact is to take place, whether through an intermediary, and so on.

4. Orders in relation to the residence

The Report for Discussion raised as a question, rather than recommendation, whether there should be a provision for granting exclusive occupation of a residence, regardless whether it is owned or leased jointly, or solely by one of the parties. At present the *Matrimonial Property Act* provides that parties to a divorce or separation may apply for an order for exclusive possession of the residence, and this provision is used as a matter of practice in situations of domestic abuse.[81] However, this provision does not apply to unmarried cohabitees. Bill 214, both in its original and amended version, includes as a possible remedy a provision that any person entitled to protection under the Act may apply for an order of exclusive possession. Similar provisions exist in the Saskatchewan and Prince Edward Island legislation.

A great many of the respondents to our consultation regarded the provision that the abuser rather than victim be required to leave the

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[81] The criteria for granting such orders are set out in note 91.

residence to be absolutely critical. This was seen as often essential to provide the most efficient short-term resolution for the problem, taking into account the needs of the family and the availability of resources as between the parties. It was also regarded as preferable on the grounds of fairness.

Legislation enacted very recently in England gives support to the idea that provision should be made to allow claimants to remain in the residence, regardless of by whom it is owned or leased, in appropriate cases. The *Family Law Act 1996*[82] provides that occupation orders may be granted in favour of all the following categories of applicants:

- spouses or former spouses;
- cohabitants (defined as a man and woman who, although not married to each other, have lived together as husband and wife) or ex-cohabitants; and
- "associated persons" who have an independent right to occupation of the home[83] (this includes the former two categories, as well as: parents or persons who have or have had parental responsibility for a child; persons who have lived in the same household otherwise than by reason of particular commercial arrangements; relatives; persons who have agreed to marry one another; or parties to the same family proceedings.)[84]

According to the English Law Commission Report No. 207, entitled *Family Law, Domestic Violence and Occupation of the Family Home*,

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[82] *Family Law Act 1996* (U.K.), 1996, c. 27.

[83] This entitlement may arise by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving the right to remain in occupation. Under the *Matrimonial Homes Act, 1983*, a person married to the sole owner of a matrimonial home has a right of occupation that can be registered and enforced against third parties.

[84] These categories reveal an important distinction made in the legislation between applicants who do and those who do not have an independent right of occupation of the home. Of the third category, only those who do may apply for an occupation order; if they do not, they may apply only for a non-molestation order. There are also differences as to the duration of the remedy afforded, both as between applicants who do and do not have an independent right of occupation, and, with regard to the first two categories, as between those who have and have not been married.

> The justification for allowing non-entitled applicants [those without an independent occupation right[85]] to use these remedies is their overriding need for short term protection in cases of domestic violence or for short term protection for themselves and their children when a relationship breaks down.[86]

The Commission regarded the remedy of an occupation order as "a short term measure of protection intended to give them [non-entitled persons] time to find alternative accommodation".[87] In the case of claimants who do have a proprietary interest or independent right of possession, the remedy was seen as useful to regulate the occupation of the home "until its medium or long-term destiny has been decided" without disruption of the status quo.[88]

Some of those in our consultation who commented on exclusive possession orders were opposed to providing such a remedy. They cited the following arguments: interference with property rights; the potential for misuse of the legislation to gain an advantage in a property dispute; and the fear that the provision could be used to cut funding to shelters.

The potential for misuse is addressed by the provision making it an offence to bring a false or malicious application.[89] The concern regarding funding for shelters is dealt with in the opening pages of this Chapter: there we state our position that this legislation should not be used as a justification for limiting other resources needed by victims of abuse.

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[85] As noted in the preceding footnote, only spouses, former spouses, cohabitants and ex-cohabitants (the latter including only persons who have lived as husband and wife) can apply for occupation orders if they have no independent right of occupation.

[86] English Law Commission Report No. 207, *Family Law, Domestic Violence and Occupation of the Family Home*, at 31.

[87] *Ibid.*, at 30. The English Law Commission thought that a six-month period was the minimum necessary to allow sufficient time to find alternative accommodation. (*Ibid.* at 39.) A comment on the *Family Law Act 1996* in the Modern Law Review also takes note of the special needs of some potential applicants, such as disabled persons, for whom accommodation must be specially adapted. (See (1996) 59 Mod. L. Rev. 845, at 849.)

[88] *Ibid.*, at 30. The test for determining whether an order should be granted involves a "balance of hardship". This test is set out in several parts of the *Family Law Act, 1996*. See, for example, s. 33(7).

[89] See section J, *infra*, for a discussion of this provision.

The idea that such orders would interfere with property rights is perhaps the strongest objection. However, this concern can be met by ensuring that the respondent's rights in relation to the residence are affected temporarily and only to the extent necessary to protect the claimant, and that the order does not finally resolve those rights. The legislation can specify that orders under the Act do not affect title to or ownership interests in property. Bill 214 contains such a provision. It can also provide that to the extent that the order postpones the respondent's rights in relation to the property, it does so for a specified period only.

The Institute Board recognizes the importance of providing for orders that permit the claimant, rather than the respondent, to remain in the residence. If such a remedy is not available, the alternative will often be that the claimant must leave the residence, and immediately find alternate accommodation in order to avoid continuing harm, while the abuser, whose actions have made continued cohabitation impossible, remains in the home.

However, we have reconsidered whether an order of exclusive possession of the residence is the best way to achieve this goal. As will be seen, this remedy does not necessarily prevent the respondent from dealing with the property in a manner that could disturb the claimant's ability to continue to reside there. Nor does it settle the financial implications of only one of the parties' remaining in the residence. The Board considered if an order restraining the respondent from attending at the residence, whether in person or vicariously through another, together with other directions about how the residence is to be dealt with for the duration of the order, would be a more effective way of achieving the desired protection for the claimant.

To better understand the effect of orders for exclusive possession of the residence, it is useful to consider the provisions relating to this type of order that are contained in the *Matrimonial Property Act*.[90] That Act provides that on application by a spouse the court may direct:

- that a spouse be given exclusive possession of the matrimonial home
- that a spouse be evicted from the matrimonial home

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[90] R.S.A. 1980 c. M-9.

- that a spouse is restrained from entering or attending at or near the matrimonial home.[91]

The court may attach any conditions to the order. An order may be registered at Land Titles, and if so registered, the spouse against whose estate or interest it is registered may not dispose of or encumber the estate or interest without the written consent of the other spouse.[92]

In our Report for Discussion No. 14, entitled The Matrimonial Home, we considered the law relating to grants of exclusive possession. In that Report, as well recommending what factors the court should consider in making such orders[93], we recommended that the court be able to deal with a number of associated matters arising from possession by one of the spouses. Our recommendations would allow the court to:

(a) determine the rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorise the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order.

Reference to the *Matrimonial Property Act* and to our recommendations in Report for Discussion No. 14 makes it clear that an order granting

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[91] The factors to be considered in determining whether the order should be granted include:
- the availability of other accommodation within the means of both spouses
- the needs of children residing within the home
- the financial position of each of the spouses
- any other court orders regarding property or maintenance.

Orders under the *Matrimonial Property Act* may be made *ex parte* 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.

[92] The *Matrimonial Property Act* also provides that the spouse granted possession is deemed to be the tenant of the premises for the purposes of a residence that has been leased by one or both spouses.

[93] The list of factors to be considered included "the health and safety of the family, including the apprehension of violence".

exclusive possession does not in itself resolve all of the matters that arise when only one of the parties remains in the residence. It does not clarify how the respondent may deal with the property for the duration of the order. It does not necessarily preclude a respondent who owns or has an interest in the residence from applying for partition and sale of the residence, disposing of it, or leasing it, acts that might, by reference to the rights thus acquired by third parties, potentially disturb the claimant's possession.[94] Assuming that the goal is to allow the claimant to continue to reside in the residence, it would be better to provide expressly that the respondent may not deal with the property so as to disturb the claimant's ability to remain there.

Nor does an order for exclusive possession resolve the financial implications of possession by only one of the parties. The very fact that certain matters are unresolved might make it impracticable or untenable for the claimant to remain in possession. It is necessary to determine matters such as, for example, who is to make mortgage or rental payments (and whether these must be accepted by the party to whom the payments are to be made), who is to maintain the premises, or whether the claimant is to pay compensation for use of the premises to the respondent. In our Report for Discussion No. 14, we recognized that where only one of the parties is in possession of a residence that was previously shared by both, it would be useful to allow the court to resolve the financial issues. Thus we recommended that the court may also:

- fix the obligation to repair and maintain the matrimonial home

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[94] Some claimants will have an independent interest in the property, or a right to possession (for example, a common law right arising from marriage) while others will not. Those who do may have some protection against the respondent's dealing in the property. For example, if the respondent and claimant were married and the residence were a homestead, the law of dower would prevent sale of the property. However, even for such cases, not all dealings would be precluded. Thus the right of dower would not prevent a lease of the property by a sole-owning respondent for a period of less than three years. Joint ownership would not prevent an order for partition and sale of the respondent's share. Unmarried cohabitants who had no independent interest in the property would not be protected from disposition of any sort. An order for exclusive possession would most likely be ineffective against, for example, a third party purchaser who had no notice of the order. (See the English Law Commission Report No. 207, at para. 4.19, for a discussion of the effect of occupation orders on the rights of third parties. The Commission comments that such orders would not be effective against third party purchasers unless registered, or unless the order expressly enjoined sale or other dealings with the property.)

- fix the responsibility to pay, and the responsibility for, any liabilities that may arise out of the occupation of the matrimonial home
- direct a spouse to whom exclusive possession is given to make any payment to the other spouse
- grant such other orders as are necessary for the proper management and maintenance of the property.

The same matters require resolution where there is temporary possession by the claimant in a case of domestic abuse. We therefore recommend as follows:

RECOMMENDATION 27

Where an order is made in relation to the residence, it should be possible to give directions:

- **restraining the respondent from attending at or near the residence (regardless whether the residence is jointly owned or leased by the parties or solely owned or leased by the respondent)[95]**

- **postponing the rights of the respondent to deal with his or her interest in the residence in such a manner as would disturb the claimant's ability to reside there; the duration of this portion of the order is to be specified; if it is not specified, it is to subsist for a period of three months**

- **fixing the responsibility to pay for any liabilities that may arise out of the occupation of the matrimonial home**

- **granting such other orders as are necessary for the proper management and maintenance of the property.[96]**

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[95] This remedy is contained in the earlier recommendation regarding "no-contact".

[96] The amended Bill 214 also contains provisions that deal with the effect of a protection order on a tenancy. We agree with these provisions.

5. Removal of the respondent from the residence

The Report for Discussion raised as a question whether provision should be made for removal of the respondent from the residence. This issue was considered only in the context of an order for exclusive possession. In other jurisdictions (Saskatchewan and Prince Edward Island) the remedy exists independently. Presumably it could apply equally where there is no exclusive possession order but it is desirable that the respondent be temporarily removed—for example, to allow the claimant time to prepare to leave the residence.

Bill 214 contained such an independent remedy, providing that the respondent may be removed immediately or within a specified time.

The Institute Board debated whether this remedy was redundant, as a respondent who had been restrained from attending at a residence would, if present there, be in breach of the restraining order, and could be removed in any case. However, those in charge of implementing the legislation in Saskatchewan have said that the remedy of removing the respondent is very important. A respondent who is arrested for breach of an order should be brought before a judge and prosecuted. Removal of the respondent under the terms of the order falls short of this. It would also allow for immediate removal on the issuance of the order, temporary removal where necessary to allow the claimant to prepare to leave, and so on. It could also emphasize the seriousness of the order to the respondent from the outset, without waiting for the order to be breached before this point is made.

RECOMMENDATION 28

There should be a provision that the respondent may be removed from the residence.

6. Restricted use of the residence

The Report for Discussion recommended against allowing orders that grant the use of only part of a residence to the respondent, restricting access to other parts. The reason was that it would be too hard to determine when

such an order had been breached, and such orders would therefore be too difficult to enforce.

RECOMMENDATION 29

There should not be a provision that allows the restricted use of the residence.

7. Supervision of the removal of personal belongings

Bill 214 and the legislation of the other jurisdictions contain a provision for directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings.

RECOMMENDATION 30

There should be a provision for directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings.

8. Financial provision for the claimant and children

The responses on this issue from groups of victims of abuse, shelter workers, support workers, and so on, strongly supported this remedy. This type of assistance is often badly needed whether or not there is an independent support obligation, to allow the claimant to escape further abuse. These commentators also said that requiring respondents to be responsible for the results of their actions would send a important message to abusers.

In this section we consider two questions separately: first, support and emergency monetary relief, and second, reimbursement for expenses. We make our recommendations on these issues in subsection c below.

a. Support / emergency monetary relief

The Report for Discussion recommended that where the respondent has an independent duty to support the claimant or any children in the claimant's

care, an emergency order of financial provision can be made, to subsist only until the issue is determined under the appropriate legislation.

The original Bill 214 referred to "emergency monetary relief" and "support" interchangeably, providing that an order for emergency relief could be made until such time as an obligation for support could be determined under the appropriate legislation. The Bill did not expressly distinguish between situations in which an independent support obligation was or was not owed to the claimant, but as the order was to subsist only until the issue could be finally determined, it would seem this provision was meant to apply only where there was an independent support obligation.

The informal working group took a slightly different approach. The group considered that a respondent's abusive actions could give rise to a financial emergency for the claimant. For example, a claimant may have relied on a respondent for support (though there may have been no legal obligation) and, having left the home to escape further abuse, could become suddenly destitute or homeless. In such a case the group thought that the respondent should be required to provide immediate financial relief regardless of whether an independent support obligation is owed. However, this relief should be limited to cover the emergency created by the abuse. This provision is in s. 2(1)(g) of the revised Bill. The group regarded the question of ongoing support as a separate matter. Thus the Bill also contains a provision for ordering interim support and maintenance.

b. Reimbursement for monetary losses, moving expenses

The Report for Discussion recommended that a respondent who has an independent obligation to support the claimant could be required to pay the cost of separation and of setting up an independent household. We did not recommend, but asked, whether the latter order could also be made in relation to a respondent who did not have an independent obligation to support the claimant.

The Report for Discussion also recommended that the respondent could be ordered to pay the costs of an application under the legislation, including filing costs and lawyer's fees. We did not recommend, but asked, whether the respondent could be ordered to pay out-of-pocket expenses incurred as a result of the abuse.

Bill 214 answered all of these questions in the affirmative. The Bill included within the notion of "monetary losses suffered as a direct result of the domestic violence" moving and accommodation expenses, and the legal expenses and costs of an application under the Act.[97] It made no distinction between respondents who do and do not have an independent obligation to support the claimant.

The Court of Queen's Bench raised the concern that out-of-pocket expenses should clearly involve a *reimbursement* rather than *compensation*, to avoid tort-like damage claims under the legislation. The working group incorporated this suggestion into the revisions to Bill 214.

c. Recommendations re: financial provision

The Institute Board thinks it is important to distinguish between the type of financial relief that may be needed as a direct consequence of abuse and the resulting need for separation on the one hand, and an ongoing support obligation on the other.

Where there has been abuse prompting a separation, financial relief may be necessary for a number of reasons. The abuse itself may have occasioned expenses such as medical, dental or counselling costs. The separation may give rise to expenses such as legal costs, and the costs associated with moving. The separation may also place the claimant in a position of sudden financial need (for example, a temporary inability to work, or a sudden withdrawal of support). In the Board's view, provision should be made to require the respondent to reimburse the claimant for the expenses occasioned by the abuse or the separation. We also think that where appropriate, it should be possible to require the respondent to pay to the claimant a limited monetary amount to cover emergency financial need arising from the separation. This relief discussed here should be available regardless of whether the respondent has an obligation to support the claimant and children independently of the abuse issue.

The financial relief discussed in the preceding section is distinct from an ongoing support obligation. If the respondent does have an obligation to

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[97] The other types of expenses listed are: loss of earnings or support; medical and dental expenses; and out-of-pocket losses for injuries sustained.

support the claimant and children, it may be convenient to deal with these matters in the context of a hearing for a protection order, in a coordinated fashion. Thus we recommend that where a hearing is to be held[98], the claimant may join an application for interim maintenance or child support, where this can be done under provincial legislation.

RECOMMENDATION 31

It should be possible to make an order that the respondent pay to the claimant financial relief made necessary by the abuse and resulting separation.

At a non-emergency hearing for a protection order, it should be possible to join an application for maintenance and child support under appropriate provincial legislation.

9. Temporary possession of specified personal property

This remedy may be important to allow a claimant access to property that enables separation from the respondent.

RECOMMENDATION 32

There should be a provision that the claimant may be granted temporary possession of specified personal property.

10. Damaging, or dealing with property in which the claimant may have an interest

As discussed in the section on financial abuse, some commentators were concerned that this remedy could tie up financial transactions.[99] However, this remedy is predicated on the claimant's having at least an apparent

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[98] A hearing may arise in any of the following ways: in a routine (non-emergency) application; where the court has refused to confirm an emergency order and directs a hearing, and; where an emergency order has been granted and the respondent requests a hearing.

[99] See at 49 *et seq.*

interest in the property in question. It seems important to protect the claimant's interest in such property until such time as the disputed property interests can be resolved in an appropriate forum.

RECOMMENDATION 33

There should be a provision that restrains the respondent from damaging or dealing with the claimant's property or property in which the claimant may have an interest.

11. Contact with children

Our Report for Discussion contained a lengthy discussion of the topic of temporary custody and access. The Report considered the justification for granting such orders in the context of a protection order. We made a series of recommendations that took into account the fact that the application for the protection order might be made where orders in relation to custody and access relative to children were already in place. Our recommendations also paid special regard to the potential for the respondent's contact with children to compromise the safety of a claimant.[100]

The provisions in the original Bill 214 respecting custody and access underwent a number of changes at the informal working group stage, some of which were prompted by the recommendations of the Institute's Board.[101]

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[100] See the Report for Discussion at 118-135. The Saskatchewan Act does not make provision for custody and access orders. In Prince Edward Island, the legislation provides that custody may be granted to the victim or some other person. Access may be dealt with only in the context of a victim's assistance order. See *Victims of Family Violence Act*, s. 7. This Act is cited at note 28.

[101] These changes included: removal of the presumption, to be applied for the purpose of making a temporary custody order, that the best interests of the child are served by an award of custody to the non-abusive parent, and replacement with a different criterion, that "in deciding who shall have temporary custody of a child, the paramount consideration shall be the best interests and safety of the child and the claimant"; removal of a provision (seen as impracticable) that risk assessments be done before access orders to children are made; and redrafting of the two sets of provisions relating to access (one set for situations in which there is no existing order as to custody and access, and the other for situations in which there is such an order) to harmonize the wording of the parts that were meant to ensure that the order does not compromise the safety of the claimant or children.

The Board has now reconsidered the matter of custody and access orders in the context of applications for protection orders. Our present recommendations about these questions are in line with our general approach—that of providing the remedies required to protect claimants and children in their care from abuse, without encroaching unnecessarily on matters that are better resolved in another forum. Thus we propose that the respondent may be restrained from contacting the claimant or children where this is necessary to protect them from harm, yet we leave the question of custody (which requires determination of what is in the child's best interests, and thus considerable information, to enable the determination to be made properly), to be resolved in a forum in which such information can be made available to the adjudicator.

We will consider this question with respect to both emergency and routine applications.

a. Emergency applications

In an emergency situation, the safety of the claimant may be ensured first by an order that the respondent not contact the claimant. If there are children, the children may or may not themselves be at risk of harm.[102] If they are, there should also be an order that the respondent not contact the children.[103] However, even where there appears to be no risk of harm to children, contact between the respondent and children may compromise the safety of the claimant. If this is so, it may or may not be possible to structure the logistics of access to the children by the respondent in such a way that contact does not compromise the safety of the claimant. If it is possible, this should be done.[104] If it is not, the "no-contact" order should be made to apply to both the claimant and children.

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[102] The idea of "harm" in this context need not be restricted to physical abuse. It can also refer to neglect of physical needs or other ill-treatment, or to sexual or emotional abuse.

[103] There may also be situations in which there is some, but a less serious, risk of harm to a child. In such a case the order could include directions for the supervision of contact, and payment for supervision by the respondent.

[104] Such an order should specify the logistics of contact with considerable precision to eliminate all opportunities for contact between the respondent and claimant.

Any of the orders just discussed (whether "no-contact" orders concerning children or "structured-access" orders) should subsist only until such time as the issues of custody, access, and protection are more fully examined and resolved.[105] Thus a respondent who objects to an order, or a claimant who feels the issues were not satisfactorily resolved, may request a hearing. At that hearing, it should be possible for either party to join an application for resolution of custody and access issues under provincial legislation (the *Provincial Court Act*[106] or *Domestic Relations Act*[107]) if this would otherwise be appropriate for dealing with these matters.[108] Alternatively, the parties may already have started proceedings for divorce under the *Divorce Act*[109] in the Court of Queen's Bench. In that case, if a protection order has been granted, either party may apply to that court for an award of interim custody and access, or custody may be raised for final resolution in the divorce proceeding. It is to be expected that in any of these circumstances, given that there is a protection order in existence, custody and access will be resolved in a manner that takes the protection of the child and claimant into account. Assuming that this has been done, an order of the Court of Queen's Bench respecting custody and access should override an earlier "no-contact" or "structured-contact" order.[110]

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[105] To avoid confusion on this point an order could be worded to make it clear that it subsists only until the issue is brought before the forum that is appropriate to determine custody and access. Alternatively, to provide incentive to the parties to bring the matter forward, the order could be time-limited. See *Hillborn v. Hillborn* (1977), Alta. L.R. (2d) 52, at 66, where Miller, J. discussed the court's *parens patriae* jurisdiction to grant an order for the protection of a child in an emergency, which conflicted with an order for custody granted under the *Divorce Act* in a different jurisdiction. Mr Justice Miller said: "In fact is seems to me that the interim order should be granted with fixed expiry dates to ensure that the parties will press forward diligently to get the matter resolved on a more permanent basis and reduce the upset and uncertainty suffered by the child involved."

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

[107] See at note 18.

[108] The same could happen where a court has declined to confirm an emergency order and directs a rehearing.

[109] See at note 17.

[110] In the event that the custody or access order does not address the matter of protection, whether the subsequent custody order should be taken to override the protection order will turn on the degree of specificity and particular wording of the orders. A general order dealing with custody should not necessarily be taken to override a specific order dealing with protection. See subsection c below for a discussion of the interrelation between custody and

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b. Routine (non-emergency) applications

An application for protection in a routine (non-emergency) application provides a broader range of options for dealing with child-related issues at first instance. Where a claimant notified a respondent of the intention to seek a protection order, and there are children involved, it should be open to either of the parties to join an application to have custody and access issues resolved at the same hearing if it is appropriate to do so under provincial legislation. If either party brings such an application, the matters of safety of the claimant, protection of the children against harm, and custody and access, can all be dealt with at the same time in a single ruling. It is possible, however, that neither party in a hearing for a protection order will choose to bring an application that will resolve the custody and access issues under other provincial legislation. In that case, it should still be open to the court at a routine hearing to order "no-contact" or structured contact between the respondent and children. Such an order should be made to subsist until such time as either party applies to have the issues resolved under the appropriate legislation.[111]

c. Limitations related to existing custody orders

The recommendations described above are subject to some important limitations where there is an existing custody order in place. The limitations depend on the legislation under which the existing order was made (whether federal or provincial) and the level of court making it.

i. Existing order under the *Divorce Act*

Potentially, the most severe limitation arises where there is an existing child custody and access order under the federal *Divorce Act*[112] (an order which only the Court of Queen's Bench can issue). In our Report for Discussion, we suggested that it may not be possible for provincial legislation to provide that an existing custody or access order made under the *Divorce Act* can be varied

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[110] (...continued)
access orders and protection orders.

[111] It may be that once a "no-contact" or "structured-contract" order has been issued, whether on an emergency basis or after a fuller hearing, neither party will bring an application to have custody and access resolved. In that case, the "no-contact" order should subsist until either party brings an application to vary or revoke it on the basis that circumstances have changed.

[112] This Act is cited at note 17.

to ensure the safety of the child. We said that in order to address the matter of the child's safety in such a case, the claimant must apply to the Court of Queen's Bench, either to vary the existing order under the *Divorce Act*, or to exercise its *parens patriae* jurisdiction to vary the order. However, we thought that a provincially appointed tribunal could set the logistics of obtaining access so that it would not compromise the safety of the applicant, to the extent that such logistics were not inconsistent with the existing custody or access order.

However, though it may be accurate to say that a provincial tribunal is not competent to *vary* an existing custody order issued under the federal *Divorce Act*, it is arguable that a provincial tribunal can still grant a protection order. The argument is based on the idea that protecting a child against harm by granting a "no-contact" order is a different issue than deciding which of two parents should have custody. There is a strong analogy between granting a "no-contact" (or "supervised-contact") order in relation to one parent in a situation of domestic abuse, and granting a protective order in relation to a child in need of protection under the *Child Welfare Act*.[113] Section 37 of the Act provides that such an order takes precedence over the right to custody given by any custody order not made under the Act. There is also clear authority from cases in other jurisdictions that the existence of a custody order under the *Divorce Act*[114] does not preclude an order making a child a ward of the Crown under child welfare legislation. The object in either case is to protect the child, and it is arguably only incidental that the result in the case of a protection order under our proposals is that the child remains in contact only with the other parent. This argument is buttressed by the fact that under our proposals the application for "no-contact" can be made on behalf of the child by the police or an agency official or by the child alone, rather than by the other parent.[115]

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[113] S.A. 1984, c. C-8.1. The order may be a temporary or permanent guardianship order, or an apprehension order.

[114] See at note 17.

[115] See Colvin, E. "Custody Orders Under the Constitution" (1978) 56 Can. Bar Rev. 1, where the author argues that the federal *Divorce Act* does not exclude provincial jurisdiction to make temporary orders to deal with emergency situations. The argument for allowing protection orders under our proposals even in the face of existing *Divorce Act* custody orders also finds some support in a series of cases dealing with superior court jurisdiction. These

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In light of these considerations, there is a strong argument that orders of "no-contact" or of structured contact may be made in spite of existing orders as to custody or access made under the *Divorce Act*.

ii. Existing orders made by the Court of Queen's Bench under provincial legislation

The next situation that can arise involves an existing order granted by the Court of Queen's Bench under the *Domestic Relations Act*.[116] The Provincial Court does not have inherent jurisdiction to vary an order of a superior court, and if it is to do so, it must be empowered expressly. However, as just discussed, it is not clear that a protection order under our proposed legislation necessarily conflicts with, and thus varies, an existing custody order. Nevertheless, for the sake of certainty, our proposed legislation should grant jurisdiction to provincially appointed tribunals to make an order of "no-contact" or an order for supervised contact, despite a Queen's Bench custody order, where this is necessary to protect a child or claimant against harm. The provincial tribunal should also be empowered to set out the logistics of access, whether or not this conforms with the earlier order, where necessary to ensure the safety of the claimant.[117] Orders of either type should subsist only until the issues are reconsidered by the Court of Queen's Bench.

iii. Joining of applications

The jurisdictional limitations just described will also affect which applications may be joined in a protection order hearing before a Provincial Court. For example, if an action for divorce has been brought, it will not be

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[115] (...continued)
cases rule that despite an existing custody order granted under federal law, in an emergency, a superior court may exercise its *parens patriae* jurisdiction to issue an order of protective custody in favour of one parent, to subsist until such time as the custody issue can be resolved under the appropriate legislation. (See *Hillborn v. Hillborn* (1977), 4 Alta. L.R. (2d) 52; *Dubois v. Dubois* (1978), 7 R.F.L. (2d) 182.) This can happen even though the temporary order of protective custody is made under provincial law. (See *Re Abramsen et al.*, [1977] 3 W.W.R. 764, in which the order was made under the British Columbia *Equal Guardianship of Infants Act.*) This latter line of cases emphasizes that a custody order under federal legislation should not insulate a child from protection. The custody order and temporary protection order do not conflict in the sense that they deal with different issues. See also Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1986) 18 Ottawa L. Rev. 121 at 187.

[116] See at note 18.

[117] It may be possible to do this in any case as long as the direction regarding the way in which access is obtained does not conflict with the existing order, but the grant of jurisdiction would broaden the range of options as to how this could be done.

possible to join an application for custody under provincial legislation. If there is an existing Queen's Bench custody order under the *Domestic Relations Act*, it will also not be possible to apply for the custody matter to be resolved by the Provincial Court. However, the existing orders should not prevent the Provincial Court from making or affirming "no-contact" or "supervised-contact" orders in relation to children in the context of a hearing for a protection order, where such orders are necessary to protect the safety of the claimant or children.

RECOMMENDATION 34

It should be possible to make the following orders in respect of children:

- **where there is a risk of harm to a child, an order of "no-contact" with the child; if the risk is minimal, there may be an order of supervised contact**

- **where the respondent's contact with the child would create a risk to a claimant, an order setting out the logistics of the respondent's access to the child so that the claimant's safety is not compromised; if this is not possible, there may be an order of "no-contact" with the child.**

The legislation should specify that the existence of an order as to custody or access made under provincial legislation by a superior court does not prevent a provincially appointed tribunal from making a "no-contact" order, a "supervised-contact" order, or an order setting out the logistics of access.

We recognize that the latter part of the recommendation is superfluous if it is correct to say that the two types of orders do not conflict because they have different purposes. With respect to existing custody orders under the

federal *Divorce Act*[118], we cannot, by means of provincial legislation, confer jurisdiction on Provincial Courts to make protection orders that vary an existing custody order. However, we can offer the opinion that protection orders do not conflict with custody orders because the two types of orders have different purposes. A protection order may temporarily suspend or qualify a respondent's custody order, but it does not re-adjudicate the custody issue. If our opinion is correct, our proposed protection orders (though made under provincial legislation) will operate despite the existence of a superior court order, regardless whether the latter is granted under provincial or federal legislation.

RECOMMENDATION 35

Subsequent custody and access orders that address the protection of the claimant and child should override "no-contact" or "structured-access" orders made under our proposed legislation.

RECOMMENDATION 36

At a non-emergency hearing for a protection order, it should be possible for either party to join an application to have custody and access resolved under the appropriate provincial legislation.

12. Mutual orders

This issued received little comment in our consultation. In the view of the Institute Board, a mutual order should require proof of abusive conduct by both parties.

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[118] See at note 17.

RECOMMENDATION 37

There should not be a provision that allows protection orders where only one party has applied for such an order.

13. Seizure and storage of firearms

The Report for Discussion implicity[119] recommended that there should be a power under the legislation to order seizure and storage of firearms. Bill 214 did not contain such a provision.

RECOMMENDATION 38

There should be a provision that allows for seizure and storage of firearms, where the firearms have been used, or their use has been threatened, in the abusive activity.

14. Counselling

a. Counselling for the respondent

Among the agencies consulted by the Institute were those who provide treatment services for abusive persons. Some members of these agencies told us that simply removing the respondent from a home is an inadequate way to deal with situations of abuse. Some respondents who are removed from one abusive situation simply go on to abuse another partner. Removal of the respondent can also temporarily heighten the risk for the claimant. The provision of treatment services for respondents was seen as a vital avenue for combatting abuse. Though the opinion of treatment providers varied as to whether counselling is effective for respondents who are required to attend by court order, many thought that it is of value so long as the respondent's attendance can be assured. Others spoke of the importance of providing "time-out" emergency shelters for respondents who have been required to leave the home.

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[119] The recommendation actually dealt with jurisdiction over the matter, thus implying that the power should exist under the legislation.

Our approach to this part of the consultation is to recognize that the legislation we propose is not the appropriate place to provide for court-ordered counselling. Mandated treatment may make sense in the context of the criminal process. There, attending counselling can be made a condition of probation, providing an effective sanction against an abuser's ignoring an order. The same cannot be said where court-ordered counselling is included in a protection order.[120] Nor is there any value in the court's simply recommending that the respondent take counselling.[121] Even those whose experience told them that counselling can be effective when ordered by a court, agreed that our proposed legislation was not a suitable place to legislate mandated treatment.

The same applies with respect to the idea of providing shelter and other resources for abusers. While it cannot be doubted that provision of such services would help the problem of abuse, it is beyond the scope of our proposals to make any recommendations about these matters. For the present purpose we can only restate that the legislation we propose is just one of many important avenues of approach to the problem.

RECOMMENDATION 39

There should not be a provision under which it may be recommended or required that the respondent receive counselling.

b. Counselling for claimants and children

Some commentators did support the idea that the respondent should pay for counselling for the victim and children, and some thought that it was important to order this on a long-term basis, given that effective counselling often takes considerable time. This makes sense: however, payment of

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[120] It would be inappropriate to charge a respondent under the Criminal Code with breach of an order to attend counselling.

[121] There was a provision to this effect in the original (unamended) version of Bill 214. See s. 2(1)(k).

counselling for the claimant and children is already covered in the section on financial provision.[122]

RECOMMENDATION 40

There does not need to be a *separate* provision under which the respondent can be required to pay for counselling for the claimant and children.

15. Other appropriate provisions

The Report for Discussion asked whether the granting of other appropriate relief should require the consent of the complainant. This question received little or no response.

RECOMMENDATION 41

The provision for any other relief should be "any other provision that the court considers appropriate".

16. Which of the remedies may be granted in emergency (in contrast to routine) applications?

Both the Institute's Board and the informal working group reviewed all of the remedies available for routine (non-emergency) protection orders. In each case the conclusion was that all of the available remedies may be as necessary for an emergency order as for a routine order. It should therefore be possible for an adjudicator to order any of them that are necessary to ensure the safety of the claimant and children, with a single exception. The exception is the provision for structured safe contact. This remedy requires the cooperation of the respondent and therefore an opportunity for the respondent to be heard; it is therefore inapplicable to emergency orders.

We reached this conclusion recognizing that some consultation responses warned against allowing property-related and child-related

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[122] See section F(8)(c) of this report.

remedies to be granted *ex parte*. In our view we have met these concerns by carefully constructing the remedies to ensure that we do not encroach unnecessarily on matters that are better resolved in another forum.

RECOMMENDATION 42

All of the remedies should be available in both emergency and routine applications for protection, except structured safe contact.

We expect that adjudicators will grant only those of the available remedies that are necessary to ensure the safety of the claimant and children in a given case.

G. Duration of orders

Bill 214 as originally drafted provided that an order is to be made for a specified period, not to exceed three years, and may be extended by further order.[123] The Institute Board thought that there may be circumstances in which there should be no time limitation for an order, and that there should be a default period for those cases in which the duration of the order is not specified. These suggestions were accepted by the working group. Bill 214 was revised to provide that an order may be made for such specified duration as is appropriate in the circumstances (which presumably could be an indefinite period), with a default period of three years.

RECOMMENDATION 43

Orders should be made for a specified period, which may include orders that do not expire. Where no period is specified in the order, it should have effect for three years.

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[123] Some of the individual remedies are specified to be temporary only, or to subsist until such time as the matter is resolved in an appropriate forum, for example, those in relation to emergency monetary relief, possession of specified personal property, and custody of children.

With regard specifically to orders that postpone the rights of a respondent to deal with his or her interest in the residence in such a manner as would disturb the claimant's ability to reside there, the duration of this portion of an order should be specified; where no period is specified, the order should have effect for three months.

We make this recommendation recognizing that in emergency applications, it is likely that orders will be granted with some built-in time limitations.

H. Telecommunication access for emergency applications

In Saskatchewan, the regulations provide that applications may be made by police, mobile crisis workers, or victim services coordinators. A special telephone system links applicants to the justices of the peace who receive the calls by a single telephone number province-wide.

The revised Bill 214 also provides that an application may be made by telecommunication.

The Saskatchewan experience tells us that the existence of such a system is likely to be critical to the success of our proposals.

RECOMMENDATION 44

There should be provisions and regulations such as those in the revised Bill 214 and the Saskatchewan legislation, that would allow for the creation of a telecommunication system similar to that in Saskatchewan, and the necessary training of police and other service providers.

I. Confidentiality

Bill 214 adopted the Saskatchewan provision on this point, under which a complainant must make a request that his or her address be kept

confidential. The Institute Board thought that a claimant may be unaware that this request could be made. Confidentiality should be automatic, as it may be very important to the complainant's safety. The working group agreed, and Bill 214 was amended to provide that the claimant's address is to be kept confidential unless the claimant consents to the giving of the address.

RECOMMENDATION 45

There should be a provision respecting confidentiality and publication as in revised Bill 214.[124]

J. False and malicious applications

The Institute Board thought that a provision making it an offence to bring a false or malicious application would help to allay the concerns of those who regarded parts of the legislation as being open to misuse.[125] The working group agreed, and a provision to this effect was included in the revised Bill.

RECOMMENDATION 46

There should be a provision making it an offence to bring a false or malicious application for a protection order.

K. Enforcement of orders

Members of police services involved with domestic abuse felt strongly that the absence in the original Bill 214 of powers of arrest was a serious omission. This omission meant that it was not possible to arrest on reasonable and probable grounds for believing that an order had been breached, or was about to be breached. Under the Bill's provisions, arrest would be possible only in the rare cases in which the police found an abuser

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[124] The provision dealing with this issue in the revised Bill is the same as that in the version of the legislation in Appendix A (the working group's version). See s. 7 of the Appendix.

[125] This idea was adopted from the Prince Edward Island legislation. See *Victims of Family Violence Act*, s. 16, cited at note 28. It was also suggested by some of the commentators on Bill 214.

committing a breach. The police thought that it was therefore imperative to have arrest powers under the legislation.

Consultation with those responsible for administering the domestic abuse legislation in Saskatchewan revealed that the most effective way of enforcing domestic abuse orders is to treat violation of an order as a breach of s. 127 of the Criminal Code. Such a violation is an indictable offence, and the arrest powers thought necessary by the police are available under this procedure. One of the members of the informal working group consulted with the appropriate government department to determine if such a procedure for enforcement would be workable in this jurisdiction, and was advised that it would be.

The Criminal Code provides that breach of a court order is an offence, but enforcement under this provision is predicated on their being no "punishment or other mode of proceeding...expressly provided by law". Thus to prosecute on this basis there must not be an offence section in the statute at issue. The working group removed the offence provision in Bill 214 to allow enforcement of the legislation under the Criminal Code procedure. It will also be necessary to provide that the civil contempt provisions that apply to breach of court orders in the Alberta Rules of Court do not apply to a breach of an order under the proposed legislation.

RECOMMENDATION 47

Breaches of orders under the legislation should be prosecuted under s. 127 of the Criminal Code. Thus there should be no offence provision in the legislation, and the civil contempt provisions in the Alberta Rules of Court should be made inapplicable.

L. Collection of monetary awards

Many respondents to our consultation mentioned the difficulties faced by claimants trying to collect monetary awards from their abusers. It is clear that the safety of a claimant who approaches the respondent for money could be compromised. The working group therefore included a provision in the

revised Bill that would allow collection of money payable under a protection order under the *Maintenance Enforcement Act*.[126]

RECOMMENDATION 48

There should be a provision that amends the *Maintenance Enforcement Act* to allow an amount payable under a protection order to be collected under that Act.

M. Warrants of entry

A provision in the Saskatchewan legislation that allows warrants permitting entry in circumstances in which a cohabitant is apparently being kept confined was incorporated in Bill 214. There were concerns expressed that this provision infringed the unreasonable search and seizure provisions of the *Charter of Rights*. However, this does not seem to be a problem because the entry is premised on the grant of a warrant by a court.

The working group removed the final clause of this provision, which allowed removal of a cohabitant who may be a victim from the premises, for the purpose of assisting or examining the cohabitant. This was thought to add nothing as the abuser would be unable to prevent this in any case.

The provision has apparently not been used so far in Saskatchewan, as police or others responding to a domestic abuse call are not often refused entry. However, those responsible for implementing the legislation there advised that this could in part be a result of the fact that the warrants can be obtained if needed.

RECOMMENDATION 49

There should be a provision permitting warrants of entry that allow entry and search of premises, and assistance to a cohabitant.

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[126] S.A. 1985, c. M-05.

N. Administrative matters

This section deals with a number of miscellaneous issues.

1. Service of notice

Bill 214 contained a number of provisions borrowed from other jurisdictions respecting service of notice which did not take into account existing procedures in Alberta. The Institute Board thought that these procedures must be adapted appropriately. The Court of Queen's Bench expressed similar concerns. The working group agreed.

RECOMMENDATION 50

Regulations to the legislation should provide for service of notice in a manner that conforms to existing procedures in Alberta.

2. Dispensing with service

The Prince Eward Island legislation allows for dispensing with service of an order, on application, where it appears that a respondent is intentionally avoiding service.[127]

RECOMMENDATION 51

It should be possible to apply to the Provincial Court for dispensing with service of an order where it appears that a respondent is intentionally avoiding service.

3. Filing of orders

The Prince Edward Island legislation contains provisions with regard to who shall receive copies of orders, and how they are to be maintained in police files.[128]

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[127] See *Victims of Family Violence Act*, s, 5(3), cited at note 28.

[128] See *Victims of Family Violence Act*, ss. 8(4) and (5), cited at note 28.

RECOMMENDATION 52

There should be regulations that deal with who should receive copies of orders, and how they are to be maintained in police files.

4. Assistance with forms

Our consultation told us that cost, and the need to retain a lawyer, are significant impediments to obtaining protection orders.

RECOMMENDATION 53

There should be regulations that provide for such forms, and assistance in completing them, as will allow complainants to bring applications without having to retain a lawyer.

This will also allow claimants to apply for orders in a manner that reinforces the independence of their decision.

5. Court scheduling issues

Bill 214 provides that unless the parties consent, a protection order shall not be varied by a judge other than the one who granted the order at first instance, unless the latter judge is not available.

The Institute Board thought it impractical to require the same judge as has originally issued an order to reconsider the matter. This requirement could create severe scheduling problems. The working group agreed, and the Bill was amended accordingly.

RECOMMENDATION 54

There should be no requirement that a protection order is to be varied by the same judge who granted the order at first instance.

O. Conclusion

As noted at the beginning of this report, it is the product of an unusual and involved process, involving input from many commentators and sources. We have tried to incorporate the wealth of information that we have received, and to balance the various viewpoints that we have heard. The main purpose of the changes we have made since the last legislative session (at which Bill 214 was removed from the order paper) is to ensure that we provide all the remedies necessary to secure the protection of victims of abuse, but at the same time do not encroach unnecessarily on matters that it is more appropriate to resolve under other legislation.

Our search for the appropriate balance in the particular context of our proposals serves as a reminder of the need to continue to look for an appropriate balance in the whole array of possible approaches to solving the problem of domestic abuse. The proposed legislation is just one line of attack on a serious societal problem. It is essential to continue to vigorously pursue all of the possible approaches—to consistently and effectively enforce the criminal law, to provide support for victims of abuse though the criminal process, to provide safe houses as refuge from abusers, to make treatment programs available to abusers, and to educate the public that domestic abuse will not be tolerated.

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 8
In deciding whether to grant a protection order, the decision maker should consider (but should not be limited to considering) the following factors:

a) the nature of the domestic abuse
b) the history of domestic abuse by the respondent towards the claimant
c) the existence of immediate danger to persons, or of damage to property with the purpose of intimidating the claimant
d) the best interests of the claimant and child of the claimant or a child for whom the claimant has parental responsibility. 27

RECOMMENDATION 9
There should not be an automatic review of an emergency order granted by the Provincial Court. 29

RECOMMENDATION 10
If justices of the peace are designated, emergency orders granted by these officials should be automatically reviewed within three working days. 29

RECOMMENDATION 11
Reviews of emergency orders to confirm that there was sufficient evidence for granting the order should be by the Provincial Court. If the evidence was insufficient the judge should direct a rehearing. 30

RECOMMENDATION 12
After an emergency order has been granted (or, if granted by a justice of the peace, confirmed by the Provincial Court), the respondent should have thirty days within which to request a rehearing. This rehearing is to be before the Provincial Court. The claimant must be given notice and an opportunity to respond. A claimant who feels that the issues were not satisfactorily resolved may also request a rehearing within the specified time period.

It should not be possible to request a rehearing of a routine (non-emergency) order granted after a hearing. 31

RECOMMENDATION 13
It should be possible to appeal a protection order granted by the Provincial Court, based on an error of law, to the to the Court of Queen's Bench. If the original order is granted by the Court of Queen's Bench, it should be possible to appeal the order, based on an error of law, to the Court of Appeal. 32

RECOMMENDATION 14
Either the respondent or the claimant may make an application for variation or revocation of an order, based on changed circumstances. The application should be made to the court that granted the order. Where such an application is made, the other party should be given notice and an opportunity to respond. 32

RECOMMENDATION 15
In a hearing that follows an earlier grant of an order, or on an application for variation or revocation, evidence before the court of first instance or the justice of the peace shall be considered as evidence at the hearing, and the claimant need not attend, and may participate by an agent. 33

RECOMMENDATION 16
The standard of proof for showing that an order is needed (whether an emergency order according to the criteria in Recommendation 6, or an non-emergency order according to the criteria in Recommendation 7) should be proof on a balance of probabilities.

The onus should lie in either case on the party alleging the need for the order 34

RECOMMENDATION 17
Where the need for an existing order is being reheard, the court should consider anew, in light of all the evidence before it, whether the order or any of its terms are necessary to give the claimant effective protection against further abuse. 35

RECOMMENDATION 18
Where an application to vary or revoke an order is brought based upon a change in circumstances, the applicant must prove, on a balance of probabilities, that the change in circumstances calls for a change to the order. 35

RECOMMENDATION 19
Domestic abuse should be defined as conduct that threatens or interferes with the physical, sexual or emotional integrity of the person subjected to it, or that makes that person incapable of independent functioning. It includes, but is not limited to, the following:

- any intentional or reckless act or omission that causes injury, or causes damage to property the purpose of which is to intimidate a claimant
- any act or threatened act that causes a reasonable fear of injury
- forced confinement
- sexual abuse (sexual contact of any kind that is coerced by force or threat of force, or the threat of coerced sexual contact)
- emotional abuse (a pattern of behaviour that deliberately undermines the mental or emotional well-being of the claimant, or; making repeated threats to cause extreme emotional pain to the claimant or the claimant's children, family or friends)
- financial abuse (behaviour of any kind that controls, exploits or limits a claimant's access to financial resources so as to ensure the financial dependency of the claimant, or that exploits the claimant's financial resources) 53

RECOMMENDATION 20

There should be a provision that a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute domestic abuse against the victim, is deemed to have done the act personally. 53

RECOMMENDATION 21

The persons entitled to protection should be "cohabitants", defined as follows:

- persons who have resided together or are residing together in a family relationship, spousal relationship, or intimate relationship
- persons who are parents of one or more children, regardless of their marital status or whether they have lived together at any time 55

RECOMMENDATION 22

It should be possible for the following persons to apply for orders:

(a) a person who has been subjected to domestic abuse by a cohabitant

(b) a member of a category of persons designated in the regulations on behalf of a person in clause (a), either

- with that person's consent, or
- where that person is incapable of giving consent, with leave of the court (or justice of the peace)

(c) a parent of, or person with parental responsibility for, a child who has been subjected to domestic abuse by a cohabitant or who is at risk of harm from a cohabitant

(d) any other person on behalf of a person in clause (a) with leave of the court (or justice of the peace). 57

RECOMMENDATION 23

There should be a provision giving immunity from actions for damages against officials or others for acts done in good faith pursuant to the legislation or regulations. 57

RECOMMENDATION 24

Orders against subjecting the claimant to violence should be combined with "no-contact" orders. 59

RECOMMENDATION 25

The provisions for restraining personal contact and communication should be as follows:

The respondent may be restrained from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to domestic abuse.

Examples of the type of conduct that may be restrained include the following:

- attending at or near or entering any specified place that is attended regularly by the claimant, other family members, or other specified

persons, including the residence (regardless whether the residence is jointly owned or leased by the claimant and respondent or solely owned or leased by the respondent), property, business, school, or place of employment of the claimant, or the residence, property, business, school, or place of employment of other family members or of other specified persons

- making any communication, including personal, written or telephone contact, or contact by any other communication device, either directly or through the agency of another person, with the claimant, other family members, or other specified persons, or their employers, employees, or co-workers.

Persons other than the claimant who are included in the order should be notified of the fact of their inclusion. 63

RECOMMENDATION 26

There should be a provision that allows orders that contain the logistics of how and when permissible contact is to take place, whether through an intermediary, and so on. 64

RECOMMENDATION 27

Where an order is made in relation to the residence, it should be possible to give directions:

- restraining the respondent from attending at or near the residence (regardless whether the residence is jointly owned or leased by the parties or solely owned or leased by the respondent)
- postponing the rights of the respondent to deal with his or her interest in the residence in such a manner as would disturb the claimant's ability to reside there; the duration of this portion of the order is to be specified; if it is not specified, it is to subsist for a period of three months
- fixing the responsibility to pay for any liabilities that may arise out of the occupation of the matrimonial home
- granting such other orders as are necessary for the proper management and maintenance of the property. 70

RECOMMENDATION 28

There should be a provision that the respondent may be removed from the residence. 71

RECOMMENDATION 29

There should not be a provision that allows the restricted use of the residence. 72

RECOMMENDATION 30

There should be a provision for directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings. 72

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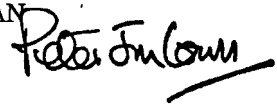

DIRECTOR

February 1997

Appendix A

DOMESTIC ABUSE ACT

[This is the version of our proposed legislation that was agreed to by the informal working group at the conclusion of its meetings.]

Interpretation

1. In this Act,

(a) "clerk" means the clerk of the court;

(b) "cohabitants" means

(i) persons who have resided together or who are residing together in a family relationship, spousal relationship or intimate relationship, or

(ii) persons who are the parents of one or more children, regardless of their marital status or whether they have lived together at any time;

(c) "court" means

(i) the Provincial Court, or

(ii) the Court of Queen's Bench;

(c.1) "claimant" means a cohabitant who claims to have been subjected to domestic violence by another cohabitant and in respect of whom an application for a protection order has been made;

(c.2) "designated Justice of the Peace" means a Justice of the Peace designated by the Chief Judge of the Provincial Court for the purposes of this Act;

(d) "domestic abuse" includes

(i) any intentional or reckless act or omission that causes injury or causes damage to property, the purpose of which is to intimidate a cohabitant,

(ii) any act or threatened act that causes a reasonable fear of injury or of damage to property, the purpose of which is to intimidate a cohabitant,

(iii) forced confinement,

(iv) sexual abuse,

(v) emotional abuse, and

(vi) financial abuse;

(e) "emotional abuse" means

(i) a pattern of behaviour of any kind the purpose of which is to deliberately undermine the mental or emotional well-being of a co-habitant, and

(ii) making repeated threats to cause extreme emotional pain to the cohabitant or to the cohabitant's children, family or friends;

(e.1) "financial abuse" means behaviour of any kind the purpose of which is to control, exploit or limit a cohabitant's access to financial resources so as to ensure the financial dependency of the cohabitant;

(f) "judge" means a judge of the court;

(g) "protection order" means an order made under section 2;

(h) "residence" means a place where a claimant normally resides, and includes a residence that a claimant has vacated due to domestic abuse;

(i) "respondent" means any person against whom an order is sought or made;

(j) "sexual abuse" means sexual contact of any kind that is coerced by force or threat of force.

Protection order

2.(1) Where, on application, the court determines that domestic abuse has occurred, it may grant such relief necessary to prevent further domestic violence and in doing so may issue a protection order containing any or all of the following provisions:

(a) a provision restraining the respondent from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to domestic abuse;

(b) a provision granting the claimant and other family members of the claimant exclusive occupation of the residence for a specified period, regardless of whether the residence is jointly or solely owned by the parties or jointly or solely leased by the parties;

(c) a provision restraining the respondent from attending at or near or entering any specified place that is attended regularly by the claimant or other family members, including the residence, property, business, school or place of employment of the claimant and other family members;

(d) a provision restraining the respondent from making any communication, including personal, written or telephone contact or contact by any other communication device, either directly or through the agency of another person, with the claimant and other family members or their employers, employees, co-workers or other specified persons;

(e) a provision directing a peace officer to remove, immediately or within a specified time, the respondent from the residence;

(f) 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 claimant;

(g) a provision requiring the respondent to pay emergency monetary relief to the claimant and any child of the claimant or any child who is in the care and custody of the claimant,

(g.1) a provision requiring the respondent to pay maintenance on an interim basis to the claimant and any child of the claimant or any child who is in the care and custody of the claimant, until such time as an obligation for maintenance and support may be determined pursuant to any other Act of the Legislature or the Parliament of Canada;

(h) a provision requiring the respondent to pay the victim reimbursement for monetary losses suffered by the claimant and any child of the claimant or any child who is in the care and custody of the claimant as a direct result of the domestic abuse, 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;

(i) 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;

(j) a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property that the claimant may have an interest in;

(l) 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;

(m) any other provision that the court considers appropriate.

(2) Where there is no existing order relating to custody and access of a child of the claimant, then, in addition to the relief that the court may grant under subsection (1), the court may

(a) make an order awarding temporary custody of a child and in making such an order the paramount consideration of the court is the best interests and safety of the child and the claimant;

(b) make an order providing for access to a child provided that

(i) the order protects the safety and well being of the claimant and the child and specifies the place and frequency of visitation, and

(ii) the order does not compromise any other remedy provided by the court by requiring or encouraging contact between the claimant and the respondent,

(3) An order made under subsection (2) may include any or all of the following:

(a) the designation of a place of visitation other than the claimant's residence;

(b) specifying the logistics of any access granted to the respondent to a child in the custody of the claimant to ensure that the protection of the claimant is not compromised by the exercise of such access;

(b.1) make an order prohibiting contact between the respondent and the child where the child is at serious risk of harm from the respondent;

(c) requiring supervision of access by the respondent and setting out the logistics for the exercise of the supervised access where the child is at some risk of harm from the respondent;

(d) requiring the respondent to bear the cost of supervised access.

Ex parte order

3.(1) A protection order may be granted ex parte by a designated Justice of the Peace, if the designated Justice of the Peace determines that

(a) domestic abuse has occurred, and

(b) by reason of seriousness or urgency, the order is required to be made to ensure the immediate protection of the claimant.

(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:

(a) the nature of the domestic abuse;

(b) the history of domestic abuse by the respondent towards the claimant;

(c) the existence of immediate danger to persons or property;

(d) the best interests of the claimant and any child of the claimant or any child who is in the care and custody of the claimant.

(2) A copy of the *ex parte* order is to be served as soon as practicable on the respondent in accordance with the regulations.

3.1(1) If a designated Justice of the Peace makes a protection order, the designated Justice of the peace shall, immediately after making the order, forward a copy of the order and all supporting documentation, including any notes, to the Provincial Court in the prescribed manner.

(2) Within 3 working days of receipt of the order and all supporting documentation by the Provincial Court or, if a judge of that Court is not available within that period, as soon as one can be made available, a judge shall

(a) review the order in chambers, and

(b) confirm the order where the judge is satisfied that there was evidence before the designated Justice of the Peace to support the granting of the order.

(3) For all purposes, including appeal or variation, an order that is confirmed by a judge pursuant to subsection (2) is deemed to be an order of the Provincial Court granted on an ex parte application.

(4) Where, on reviewing the order, the judge is not satisfied that there was evidence before the designated Justice of the Peace to support the granting of the order, the judge shall direct a rehearing of the matter.

(5) Where a judge directs that a matter be reheard

(a) the clerk of the Provincial Court shall issue a summons, in the form and manner prescribed in the regulations, requiring the respondent to appear at a rehearing before the Court, and

(b) the claimant shall be given notice of the rehearing and is entitled, but not required, to attend and may fully participate in the rehearing personally or by an agent.

(6) The evidence that was before the designated Justice of the Peace shall be considered as evidence at the rehearing.

(7) At a rehearing, the onus is on the respondent to demonstrate, on a balance of probabilities, why the order should not be confirmed.

(8) Where the respondent fails to attend the rehearing, the order may be confirmed in the respondent's absence.

(9) At the rehearing, the judge may confirm, terminate or vary the order or any provision in the order.

Notice of order

4.(1) A provision of a protection order is not effective in relation to a person unless the person has actual notice of the provision.

(2) Notice of the provisions of a protection order may be given in accordance with the regulations.

(3) A copy of an order, or any variation of the order, and any subsequent proof of service shall be delivered, in accordance with the regulations.

4.1(1) An application for a protection order may be made by

(a) a person who claims to have been subjected to domestic abuse by a cohabitant,

(b) a member of a category of persons designated in the regulations on behalf of a person referred to in clause (a) with that person's consent, or

(c) any other person on behalf of a person referred to in clause (a) with leave of the court.

(2) An application for an order is to be in the form and manner prescribed by the regulations and may include an application by telecommunication.

Duration of order

6.(1) A protection order shall be made for such specified duration as may be appropriate in the circumstances, unless otherwise terminated or extended by further order.

(1.1) Unless otherwise provided in the order, a protection order has effect for 3 years.

(2) Subject to section 3(1), a protection order may only be varied by a judge of the same court in which the original protection order was granted.

(3) Where one or more terms of a protection order are varied, the order continues in full force and effect with regard to all other provisions.

(4) Any provision in a protection order respecting matrimonial property, maintenance, custody of children and access thereto is subject to and shall be deemed varied by any subsequent order made pursuant to any other Act of the Legislature or the Parliament of Canada.

Confidential information, [private hearings] and publication

7.(1) The clerk of the court and the designated Justice of the Peace shall keep the claimant's address confidential, unless the claimant or a person acting on the claimant's behalf consents to the giving of the address.

(3) On the request of the claimant, the court may make an order prohibiting the publication of a report of a hearing or any part of a hearing if the court believes that the publication of the report

(a) would not be in the best interests of the claimant or any child of the claimant or any child who is in the care and custody of the claimant, or

(b) would be likely to identify, have an adverse effect on or cause hardship to the claimant or any child of the claimant or any child who is in the care and custody of the claimant.

Effect of order on property and leasehold interest

8.(1) An order does not in any manner affect the title to or an ownership interest in any real or personal property jointly held by the parties or solely held by one of the parties.

(2) Where a residence is leased by a respondent pursuant to an oral, written or implied agreement and a claimant who is not a party to the lease is granted exclusive occupation of that residence, no landlord shall evict the claimant solely on the basis that the claimant is not a party to the lease.

(3) On the request of a claimant mentioned in subsection (2), the landlord shall advise the claimant of the status of the lease and serve the claimant with notice of any claim against the respondent arising from the lease and the claimant, at his or her option, may assume the responsibilities of the respondent pursuant to the lease.

Warrant permitting entry

9.(1) A court may issue a warrant where, on an *ex parte* application by a person designated in the regulations, the court is satisfied by information on oath that there are reasonable grounds to believe that

(a) the person who provided the information on oath has been refused access to a cohabitant, and
(b) a cohabitant who may have been subjected to domestic abuse by a cohabitant will be found at the place to be searched.

(2) A warrant issued by a court authorizes the person named in the warrant to
(a) enter, search and examine the place named int he warrant and any connected premises,
(b) assist or examine the cohabitant, and
(c) seize and remove anything that may provide evidence that the cohabitant has been subjected to domestic abuse by a cohabitant.

Appeal

10.(1) With leave of a judge of the Court of Queen's Bench, an appeal from any order made by the Provincial Court pursuant to this Act may be made to the Court of Queen's Bench on a question of law.

(2) With leave of a judge of the Court of Appeal, an appeal from any order made by the Court of Queen's Bench pursuant to this Act may be made to the Court of Appeal on a question of law.

Rights not diminished by Act

11. An application for an order pursuant to this Act is in addition to and does not diminish any existing right of action for a person who has been subjected to domestic abuse by a cohabitant.

Immunity

12. No action lies or shall be instituted against a peace officer, a clerk or any other person for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done by any of them
(a) pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the regulations, or
(b) in the carrying out or supposed carrying out of any decision or order made pursuant to this Act or the regulations or any duty imposed by this Act or the regulations.

12.1 A person who makes an application knowing that it is false or malicious is guilty of an offence and is liable to a fine of not more than $10 000 or to imprisonment for a term not exceeding one year, or to both fine and imprisonment.

Regulations

13. The Lieutenant Governor in Council may make regulations

(a) defining any word or phrase used in this Act but not defined in this Act;

(b) prescribing forms for the purposes of this Act;

(c) prescribing the procedures to be followed for applications, hearings and rehearings pursuant to this Act;

(d) designating persons or categories of persons who may make applications for an order on behalf of a person who claims to have been subjected to domestic abuse by a cohabitant with that person's consent;

(e) designating persons or categories of persons who may apply for a warrant pursuant to section 9;

(f) respecting the form and manner of providing any notice or summons required to be provided pursuant to this Act, including prescribing substitutional service and a rebuttable presumption of service;

(f.1) respecting the form and manner in which copies of a notice referred to in section 4(3) are to be delivered and the persons to whom the notice is to be delivered.

(g) prescribing any other matter or thing required or authorized by this Act to be prescribed in the regulations;

(h) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Act.

14.1 *The Maintenance Enforcement Act is amended in section 1(1)*

(a) in clause (d) by adding the following after subclause (iii):

(iii.1) an amount payable under a protection order under the *Domestic Abuse Act*,

(b) in clause (e) by adding ", a protection order under the *Domestic Abuse Act*" *after* "Alberta".

Coming into force

15. This Act comes into force on Proclamation.

Appendix B

Victims of Domestic Violence Act
S.S. 1994, c. V-6.02

Short title

1 This Act may be cited as *The Victims of Domestic Violence Act*.

Interpretation

2 In this Act:

(a) **"cohabitants"** means:

(i) persons who have resided together or who are residing together in a family relationship, spousal relationship or intimate relationship; or

(ii) persons who are the parents of one or more children, regardless of their marital status or whether they have lived together at any time;

(b) **"court"** means the Court of Queen's Bench;

(c) **"designated justice of the peace"** means a presiding justice of the peace who has been designated for the purposes of this Act;

(d) **"domestic violence"** means:

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

(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;

(e) **"emergency intervention order"** means an order made pursuant to section 3;

(f) **"order"** means an emergency intervention order or a victim's assistance order;

(g) **"residence"** means a place where a victim normally resides, and includes a residence that a victim has vacated due to domestic violence;

(h) **"respondent"** means any person against whom an order is sought or made;

(i) **"victim"** means a cohabitant who has been subjected to domestic violence by another cohabitant;

(j) **"victim assistance order"** means an order made pursuant to section 7. 1994, c.V-6.02, s.2.

Emergency intervention order

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 violence 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 the 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 the 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 takes effect immediately. 1994, c.V-6.02, s.3.

Notice of order

4(1) A respondent is not bound by any provision in an order until he or she has notice of that provision.

(2) Notice of the provisions of an order is to be given in the form and manner prescribed in the regulations. 1994, c.V-6.02, s.4.

Confirmation by judge

5(1) Immediately after making an emergency intervention order, a designated justice of the peace shall forward a copy of the order and all supporting documentation, including his or her notes, to the court in the prescribed manner.

(2) Within three working days of receipt of the order and all supporting documentation by the court, or, if a judge is not available within that period, as soon as one can be made available, a judge shall:

(a) review the order in his or her chambers; and

(b) confirm the order where the judge is satisfied that there was evidence before the designated justice of the peace to support the granting of the order.

(3) For all purposes, including appeal or variation, an order that is confirmed by a judge pursuant to subsection (2) is deemed to be an order of the court granted on an *ex parte* application.

(4) Where, on reviewing the order, the judge is not satisfied that there was evidence before the designated justice of the peace to support the granting of the order, he or she shall direct a rehearing of the matter.

(5) Where a judge directs that a matter be reheard:

(a) the local registrar shall issue a summons, in the form and manner prescribed in the regulations, requiring the respondent to appear at a rehearing before the court; and

(b) the victim shall be given notice of the rehearing and is entitled, but not required, to attend and may fully participate in the rehearing personally or by an agent.

(6) The evidence that was before the designated justice of the peace shall be considered as evidence at the rehearing.

(7) At a rehearing, the onus is on the respondent to demonstrate, on a balance of probabilities, why the order should not be confirmed.

(8) Where the respondent fails to attend the rehearing, the order may be confirmed in the respondent's absence.

(9) At the rehearing, the judge may confirm, terminate or vary the order or any provision in the order. 1994, c.V-6.02, s.5.

Review of order

6(1) At any time after a respondent has been served with an order, the court, on application by a victim or respondent named in the order, may:

(a) make changes in, additions to or deletions from the provisions contained in the order;

(b) decrease or extend the period for which any provision in an order is to remain in force;

(c) terminate any provision in an order; or

(d) revoke the order.

(2) On an application pursuant to subsection (1), the evidence before the designated justice of the peace or the court on previous applications pursuant to this Act shall be considered as evidence.

(3) The variation of one or more provisions of an order does not affect the other provisions in the order.

(4) Notwithstanding any other provision in this Act, an emergency intervention order continues in effect and is not stayed by a direction for a rehearing pursuant to section 5 or an application pursuant to subsection (1).

(5) Any provision in an order is subject to and is varied by any subsequent order made pursuant to any other Act or any Act of the Parliament of Canada. 1994, c.V-6.02, s.6.

Victim's assistance order

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. 1994, c.V-6.02, s.7.

Application for an order

8(1) An application for an order may be made by:

(a) a victim;

(b) a member of a category of persons designated in the regulations on behalf of the victim with the victim's consent; or

(c) any other person on behalf of the victim with leave of the court or the designated justice of the peace.

(2) An application for an emergency intervention order is to be in the form and manner prescribed by the regulations and may include an application by telecommunication.

(3) At the hearing of an application for an order, the standard of proof is to be on a balance of probabilities. 1994, c.V-6.02, s.8.

Confidential information, private hearings and publication

9(1) The local registrar of the court and a designated justice of the peace shall keep the victim's address confidential at the request of the victim or a person acting on the victim's behalf.

(2) The court may order that the hearing of an application or any part of a hearing be held in private.

(3) On the request of the victim, the court may make an order prohibiting the publication of a report of a hearing or any part of a hearing if the court believes that the publication of the report:

(a) would not be in the best interests of the victim or any child of the victim or any child who is in the care and custody of the victim; or

(b) would be likely to identify, have an adverse effect on or cause hardship to the victim or any child of the victim or any

child who is in the care and custody of the victim. 1994, c.V-6.02, s.9.

Effect of order on property and leasehold interest

10(1) An order does not in any manner affect the title to or an ownership interest in any real or personal property jointly held by the parties or solely held by one of the parties.
(2) Where a residence is leased by a respondent pursuant to an oral, written or implied agreement and a victim who is not a party to the lease is granted exclusive occupation of that residence, no landlord shall evict the victim solely on the basis that the victim is not a party to the lease.
(3) On the request of a victim mentioned in subsection (2), the landlord shall advise the victim of the status of the lease and serve the victim with notice of any claim against the respondent arising from the lease and the victim, at his or her option, may assume the responsibilities of the respondent pursuant to the lease. 1994, c.V-6.02, s.10.

Warrant permitting entry

11(1) A designated justice of the peace may issue a warrant where, on an *ex parte* application by a person designated in the regulations, the designated justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that:
(a) the person who provided the information on oath has been refused access to a cohabitant; and
(b) a cohabitant who may be a victim will be found at the place to be searched.

(2) A warrant issued by a designated justice of the peace authorizes the person named in the warrant to:
(a) enter, search and examine the place named in the warrant and any connected premises;
(b) assist or examine the cohabitant; and
(c) seize and remove anything that may provide evidence that the cohabitant is a victim.
(3) Where the person conducting the search believes on reasonable grounds that the cohabitant may be a victim, that person may remove the cohabitant from the premises for the purposes of assisting or examining the cohabitant. 1994, c.V-6.02, s. 1 1.

Appeal

12 With leave of a judge of the Court of Appeal, an appeal from any order made pursuant to this Act may be made to the Court of Appeal on a question of law. 1994, c.V-6.02, s.12.

Rights not diminished by Act

13 An application for an order pursuant to this Act is in addition t does not diminish any existing right of action for a victim. 1994, c.\ s.13.

Designation of presiding justices of the peace

14(1) Notwithstanding subsection 13(2) of *The Justices of the Peace 1988,* the chief judge of the Provincial Court of Saskatchewan may designate a presiding justice of the peace to hear and determine applications pursuant to this Act.

(2) Where the chief judge designates a presiding justice of the peac hear applications pursuant to this Act, the chief judge shall specify place at which and period during which the presiding justice of the may hear those applications.

(3) The chief judge may delegate the exercise of the power to desig presiding justice of the peace to hear applications pursuant to this a supervising justice of the peace appointed pursuant to *The Justic the Peace Act, 1988,* and the exercise of that power by the supervis justice of the peace is deemed to be an exercise by the chief judge. 1 c.V-6.02, s.14.

Immunity

15 No action lies or shall be instituted against a peace officer, a local registrar or any other person for any loss or damage suffered by a pers reason of anything in good faith done, caused, permitted or authorized done, attempted to be done or omitted to be done by any of them:

(a) pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the regulations; or

(b) in the carrying out or supposed carrying out of any decision or or made pursuant to this Act or the regulations or any duty imposed by t Act or the regulations. 1994, c.V-6.02, s.15.

Regulations

16 The Lieutenant Governor in Council may make regulations:

(a) defining, enlarging or restricting the meaning of any word or phrase used in this Act but not defined in this Act;

(b) prescribing forms for the purposes of this Act;

(c) prescribing the procedures to be followed for applications, hea and rehearings pursuant to this Act;

d) prescribing the manner in which a designated justice of the pe to forward a copy of an emergency intervention order and all supporting documentation to the court:

(e) designating persons or categories of persons who may make applications for an order on behalf of a victim with the victim's co

(f) designating persons or categories of persons who may apply fo warrant pursuant to section 11;

(g) prescribing the form and manner of providing any notice or summons required to be provided pursuant to this Act, including prescribing substitutional service and a rebuttable presumption of service;
(h) prescribing any other matter or thing required or authorized by this Act to be prescribed in the regulations;
(i) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Act. 1994, c.V-6.02, s.16.

Coming into force

17 This Act comes into force on proclamation. 1994, c.V-6.02, s.17. **[Proclaimed in force February 1, 1995.]**

Appendix C
Excerpts from:
Victims of Family Violence Act
S.P.E.I. 1996, c. 47

Family violence

2.(1) "Family violence" in relation to a person, is violence against that person by any other person with whom that person is, or has been, in a family relationship.

Violence

(2) In subsection (1), violence includes

(a) any assault of the victim;

(b) any reckless act or omission that causes injury to the victim or damage;

(c) any act or threat that causes a reasonable fear of injury to the victim or damage to property.

(d) forced confinement of the victim;

(e) actions or threats of sexual abuse, physical abuse or emotional abuse of the victim.

Vicarious responsibility

(3) For the purposes of this Act a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute family violence against the victim, is deemed to have done that act personally.

Emergency protection order

4.(1) A justice of the peace, on the application in the prescribed form of any person and without notice to any other person, may make an emergency protection order if he or she determines

(a) family violence has occurred;

(b) the seriousness or urgency of the circumstances merits the making of an order.

Factors considered

(2) In determining whether to make an order the justice of the peace shall consider the following factors:

(a) the nature of the family violence;

(b) the history of family violence by the respondent towards the victim and whether it is more probable than not that the respondent will continue the family violence;

(c) the existence of immediate danger to the victim, other persons or property;

(d) the best interests of the victim or any child or other person in the care of the victim.

Contents of emergency protection order

(3) An emergency protection order may contain any or all of the following provisions

(a) a provision granting the victim or other family members exclusive occupation of the residence for a defined period regardless of any legal rights of possession or ownership;

(b) a provision directing a peace officer to remove the respondent from the residence immediately or within a specified time;
(c) a provision directing a peace officer to accompany a specified person, within a specified time, to the residence to supervise the removal of personal belongings;
(d) a provision restraining the respondent from directly or indirectly communicating with the victim or other specified person;
(e) a provision requiring the respondent to stay away from any place identified specifically or generally in the order;
(f) a provision awarding temporary care and custody of a child to the victim or some other person;
(g) a provision granting temporary possession of specified personal property, including an automobile, cheque book, health services card or supplementary medical insurance cards, identification documents, keys, or other personal effects;
(h) a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property;
(i) a provision restraining the respondent from committing any further acts of family violence against the victim;
(j) a provision prohibiting the publication of the name and address of the victim;
(k) any other provision that the justice of the peace considers necessary to provide for the immediate protection of the victim.

Conditions

(4) A justice of the peace may make an emergency protection order subject to such conditions as the justice considers appropriate but the duration of the order shall not exceed 90 days unless otherwise ordered by a judge.

Effective date

(5) Subject to subsection 5(1), an emergency protection order takes effect immediately.

Respondent to have notice

5.(1) A respondent is not bound by any provisions in an emergency protection order until he or she has notice of the order.

Notice

(2) Notice of an emergency protection order shall be given in the prescribed form and manner.

Dispensing with service

(3) If, on application to a justice of the peace, it appears that
(a) attempts at service or substituted service of the notice on the respondent have failed; and
(b) the respondent is intentionally evading service,

the justice of the peace may by order dispense with service of the notice and the respondent shall then be deemed to have notice of the emergency protection order.

Victim assistance order

7.(1) Where, on application by a victim in the prescribed form to a judge of the court, the judge determines that family violence has occurred, the judge, within ten days of receipt of the application or as soon as possible after that, may make a victim assistance order containing any of the following provisions:

(a) a provisions referred to in subsection 4(3);

(b) a provision for access to children on such terms as the judge may determine, but in making such provision the court shall give paramount consideration to the safety and well-being of the victim and the children;

(c) any other provision the judge considers appropriate.

Conditions

(2) The judge may make a victim assistance order subject to such conditions as the judge considers appropriate.

Other proceedings

(3) The existence of other proceedings between the victim and the respondent does not preclude the judge from making a victim assistance order.

Application for order

8.(1) An application for an emergency protection order may be made by

(a) a victim;

(b) a member of a category of persons designated in the regulations on behalf of, and with the consent of, the victim; or

(c) if a victim is incapable of giving consent, any person on behalf of the victim with leave of the justice of the peace.

Telecommunication

(2) An application for an emergency protection order may be made by telecommunication.

Standard of proof

(3) At a hearing or rehearing of an application for an order or review of an order, the standard of proof shall be on a balance of probabilities.

Copy to police and Victim Services

(4) The justice of the peace or Registrar shall provide a copy of any orders made by the justice of the peace or by the court to a peace officer and to Victim Services in the areas where the family violence occurred and in which the victim and respondent reside.

File retention

(5) The peace officer who receives an order shall cause it to be maintained in the files of his or her employer for the duration of the order.

Offences

16. Any person who

(a) fails to comply with the provisions of an order;

(b) falsely and maliciously makes an application under this Act;
(c) obstructs any person who is performing any function authorized by an order; or
(d) publishes any information in contravention of an order, is guilty of an offence and upon summary conviction is liable in the case of a first offence, to a fine of not more than $5,000 or to imprisonment for a term of not more than three months, or to both, and in the case of a second or subsequent offence, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both.

Appendix D
Individuals and Agencies who Provided Responses to our Consultation and to Bill 214

1. Petrina Chan; Elaine Hancheruk, B.S.W., L.L.B., Edmonton Community and Family Services Social Worker.

2. Interagency Committee on Spousal Abuse of Women.

3. Movement to Establish Real Gender Equality.

4. Edmonton Community and Family Services / Edmonton Police Service Spousal Violence Follow-up Team.

5. Sergeant Dean Albrecht, Crime Prevention Unit, Edmonton Police Service.

6. Edmonton Women's Shelter Inc.

7. Peace River Regional Women's Shelter.

8. Medicine Hat Women's Shelter Society.

9. Law Society of Alberta.

10. Edmonton Support and Advocacy Association for Abused Women.

11. Men's Educational Support Association (MESA).

12. D. Bruce Hepburn, Barrister and Solicitor, Lethbridge, Alberta.

13. Francis Cearns, Program Planner, Office for the Prevention of Family Violence, Alberta Social Services.

14. Rhonda Breitkreuz, Program Director, Lurana Shelter.

15. Edmonton Council Against Family Violence.

16. Men's Education Network.

17. Children and Parents' Equality Society.