

FAMILY VIOLENCE AND INFORMATION SHARING BEETWEEN FAMILY AND CRIMINAL COURTS- A DANGEROUS DISCONNECT

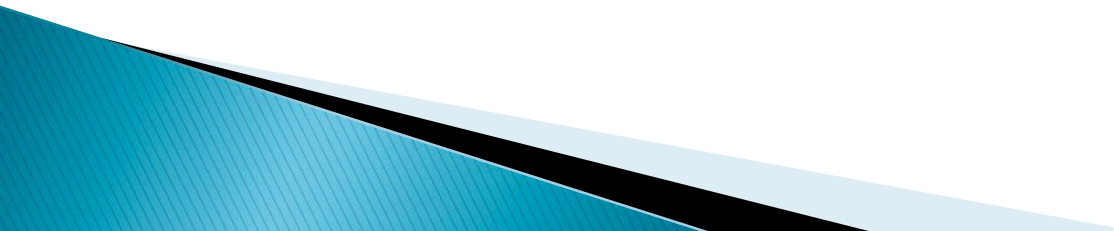
Interprovincial Forum on Judicial Treatment of Domestic Violence

May 11 -12, 2015 Montreal, Quebec

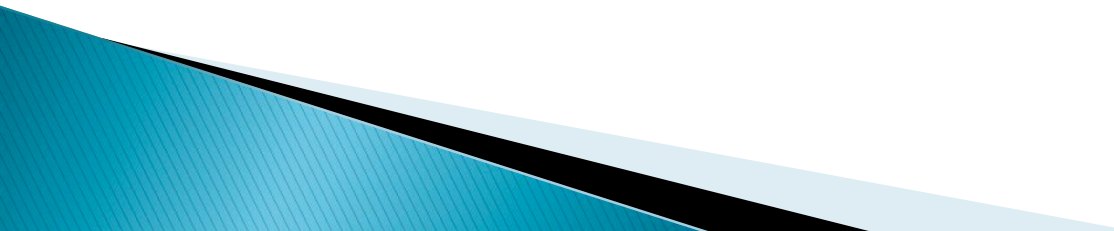
The Honourable Donna Martinson Q.C.

Retired Justice of the B.C. Supreme Court

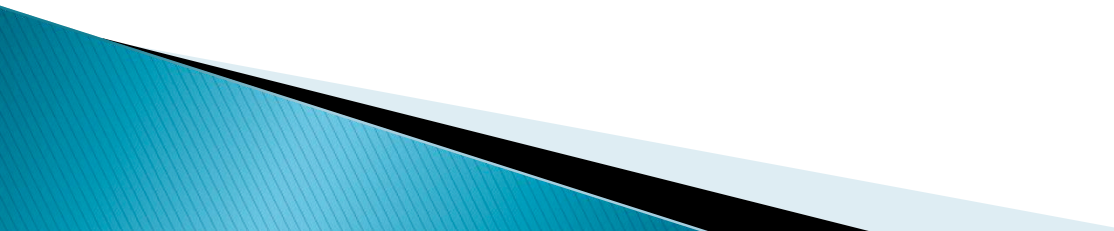
Topics

1. Challenges caused by court silos – B.C. Community Consultation
 2. B.C. Family Law Act
 3. Canadian Observatory B.C. Research Project
 4. Court to court Communication.
 - A. Cross–border cases
 - B. Within Quebec
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Topics

5. Lawyer/judge Access to Justice Reports
 6. B.C. “Better Response to Violence Against Women” Summit
 7. Shift in culture: Looking for opportunities for change, not obstacles to change
 8. Multiple Court Proceedings and Specialization
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1. Challenges Caused by Court Silos – The National Judicial Institute B.C. Community Consultation



Challenges Caused by Traditional Siloed Approach

- ▶ With Dr. Margaret Jackson and Dr. Catherine Murray, Simon Fraser University
- ▶ Purpose: to obtain information from people and organizations who deal with issues of violence against women in their daily work
- ▶ Advised that lack of coordination between or among court proceedings is a significant concern for women

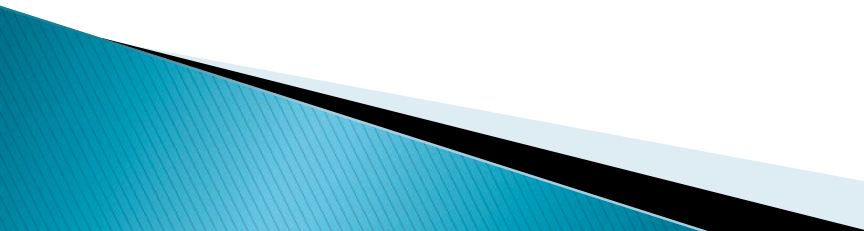
NATIONAL JUDICIAL INSTITUTE

DOMESTIC VIOLENCE PROGRAM DEVELOPMENT FOR JUDGES

APRIL 2012 BRITISH COLUMBIA COMMUNITY CONSULTATION REPORT

<http://fredacentre.com/wp-content/uploads/2012/10/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-B.C.-Community-Consultations-on-Family-Violence-Report.pdf>

Challenges

- Is a dangerous disconnect that increases risk of harm to women and children
 - Little or no information sharing between courts
 - Lack of coordination leads to inconsistencies and gaps in orders relating to contact
 - Criminal cases often given priority
 - which can cause significant delay and
 - adversely affect a timely resolution.
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Dangerous Disconnect

Quote from the NJI Consultation:

“Criminal courts order no contact, child protection authorities say the children will be apprehended if there is contact and family court focusses on the view that contact is in the best interests of children and grants unsupervised access.”

(also in the Federal/Provincial/ Territorial report)

- ▶ The unique and very concerning discriminatory justice system responses faced by indigenous women are exacerbated when there are multiple proceedings.

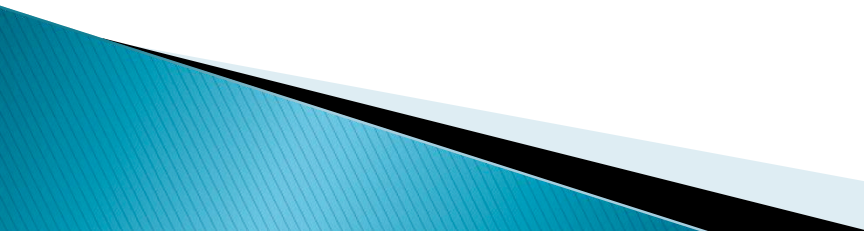
Challenges (Cont'd)

- immigration proceedings for immigrant women, especially those without status:
 - adds another layer of complexity
 - Judges often are not aware of immigration consequences of orders
- Multiple processes cause increased stresses which:
 - may escalate the conflict
 - which can result in an increased risk of harm

Challenges (Cont'd)

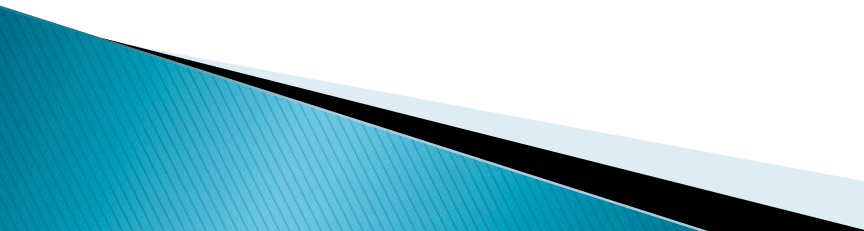
- women are required to “tell their stories” over and over, often to a series of judges both among and within proceedings
- women feel forced to “drop” charges because they “can’t do it any more”, especially while taking care of children
- the more often women are required to be in the same place as their partners, the more opportunities there are for abusive behaviour.

Challenges (Cont'd)

- inaccessibility of legal advice exacerbates the problems
 - litigation harassment and abuse, a significant problem, can be compounded with multiple proceedings
 - added challenges for particularly marginalized, vulnerable women who also face other challenges such as obtaining day care, affordable housing, health care, access to education and the like.
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2. The B.C. Family Law Act


B.C. Family Law Act

- ▶ **requires** judges, lawyers and parents to determine what is in the best interests of a child. In doing so all of the child's needs and circumstances must be considered, including: s. 37(2)
 - ▶ (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - ▶ (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs.
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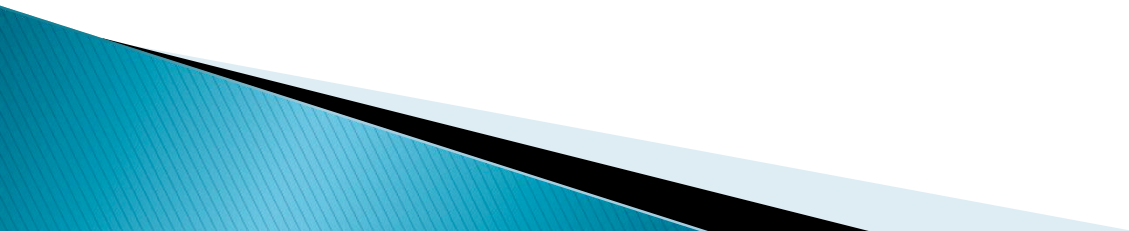
B.C. Family Law Act

- ▶ It also:
- ▶ requires judges, lawyers and parents to consider specific factors relating to domestic violence and risk found in s. 38.
- ▶ includes the requirement that judges, lawyers and parents must, when determining the best interests of a child, consider **other civil and criminal proceedings affecting the safety, security and wellbeing of the child (s. 37(2) (j))**;

B.C. Family Law Act Requires:

- ▶ persons applying for guardianship to provide evidence about **other civil and family proceeding** as well as with respect to all others. 37 factors relating to domestic violence (s. 51(2)).
 - ▶ dispute resolution professionals, including lawyers, to screen for family violence in all family law related cases, not just those involving parenting issues (s. 8);
 - ▶ all mediators, arbitrators and parenting coordinators to take a minimum of 14 hours training in screening for domestic violence.
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3. Canadian Observatory Research Project



Canadian Observatory Research Project

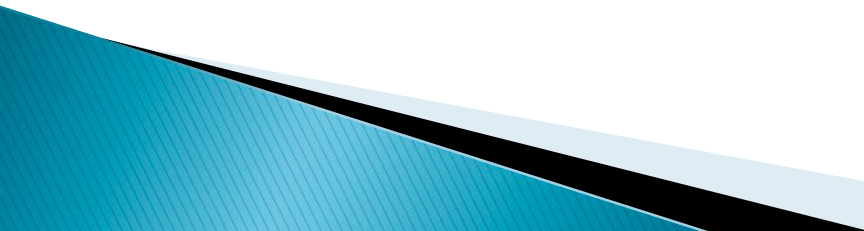
- ▶ With Dr. Margaret Jackson
- ▶ Discussion Paper: Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts, January 2015

<http://fredacentre.com/wp-content/uploads/2010/09/Discussion-Paper-Jackson-Martinson-Risk-Of-Future-Harm-Family-Violence-And-Information-Sharing-Between-Family-and-Criminal-Courts-January-2015.pdf>

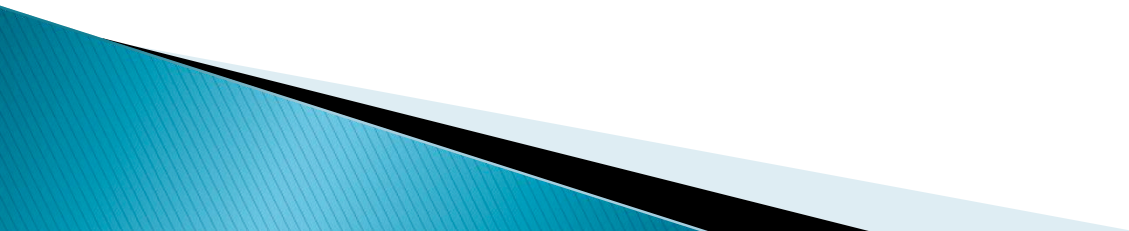
- ▶ Uses the Family Law Act as a focus to consider whether information about risk is:
 - provided in individual family and criminal court proceedings, and if so,
 - shared

Courts in British Columbia

Research Project and Joint Education Program

- ▶ Both the B.C. Provincial Court and the B.C. Supreme Court have participated in the research project by:
 - considering the Discussion Paper,
 - engaging in a roundtable discussion, answering our research questions, and
 - looking at the creation of a joint court webinar dealing with multiple court proceedings
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4. Court to Court Communication



Court to Court Communication

A. Cross – Border Cases

Example: Parental child abduction

- ▶ More than one proceeding, each in a different jurisdiction, involving the same issues and the same parties.
- ▶ Involves sharing information between courts about:
 - The status of each proceeding, and
 - any orders made

Judicial Communication

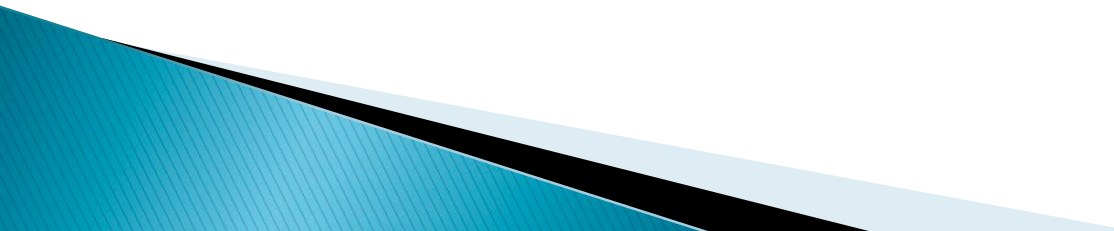
- ▶ Also can involve communication between the judges involved:
 - with the knowledge of the parties;
 - often in a joint hearing – with the parties and their counsel present;
- ▶ Fair process safeguards are in place

What is judicial communication?

- ▶ The purpose is to reach a resolution of all the outstanding issues in a:
 - just,
 - timely, and
 - cost effective way
- ▶ The cases are **kept separate** and disputed issues are decided by the court which has the right to decide.

Cross-border Parental Child Abduction Cases

Canadian Network of Contact Judges

- ▶ Canadian Judicial Council has created the Canadian Network of Contact Judges
 - ▶ The Network has judge members from each province and territory, including Quebec
 - ▶ Each contact judge facilitates communication with other judges within Canada and in other countries
 - ▶ They use Guidelines that incorporate fair process protections.
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B. Court to Court Communication within Quebec

Network Judges Resolution

May 2014

Supports:

- ▶ the extension of judicial communication from communication between judges in different jurisdictions to communication between judges within a province or territory.

5. Lawyer/Judge Access to Justice Reports

Collaborate and Coordinate (Roadmap for Change)

- ▶ The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system – as opposed to many systems and parts of systems...

Collaborate and Coordinate (Roadmap for Change)

...We can and must:

- ▶ improve collaboration and coordination
 - across and within jurisdiction, and across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.)
- ▶ improve collaboration, coordination and service integration with other social service sectors and providers as well.

Put the Public First

The focus must be on the people who need to use the system...

Litigants and especially self-represented litigants are not, as they are too often seen, an inconvenience; they are why the system exists.

...Until we involve those who use the system in the reform process, the system will not really work for those who use it...

Focus on Outcomes

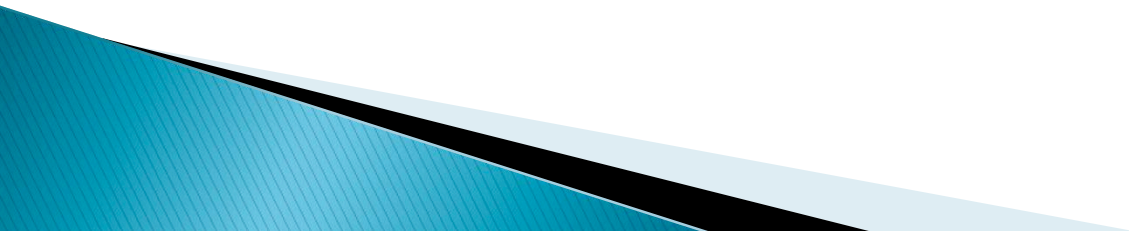
...We should not be preoccupied with fair processes for their own sake, but with achieving fair and just **results** for those who use the system..." (emphasis in original)

...Providing justice – not just in the form of fair and just process but also in the form of fair and just outcomes – must be our primary concern."

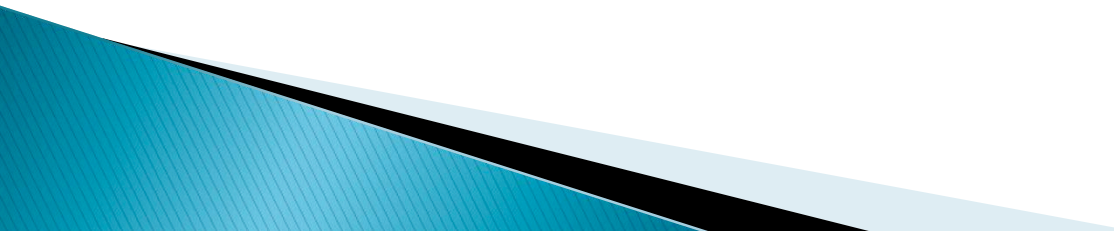
Significant Shift in Culture

We need a fresh approach and a new way of thinking.

In short, we need a significant shift in culture to achieve meaningful improvement to access to justice in Canada – a new culture of reform.

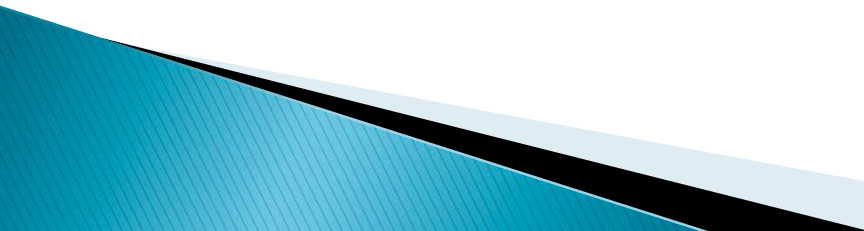


**6. B.C. “Better Response to
Violence Against Women” Summit
November 28–29, 2014**



B.C. “Better Response to Violence
Against Women” Summit,
November 28–29, 2014

[http://www.justicebc.ca/shared/pdfs/
FourthSummitReport.pdf](http://www.justicebc.ca/shared/pdfs/FourthSummitReport.pdf)

- ▶ It a response to Access to Justice Reports
 - ▶ Interdisciplinary
 - ▶ Included anti–violence sector people in the planning committee
 - ▶ Specific session on “Better coordination of criminal justice, family justice and child protection matters”
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B.C. “Better Response to Violence
Against Women” Summit,
November 28–29, 2014

▶ Some conclusions:

- Degree of information sharing across all systems requires significant improvement in the interests of just outcomes
- Court systems are insufficiently coordinated which resulting in various outcomes which:Should be managed more holistically

B.C. “Better Response to Violence
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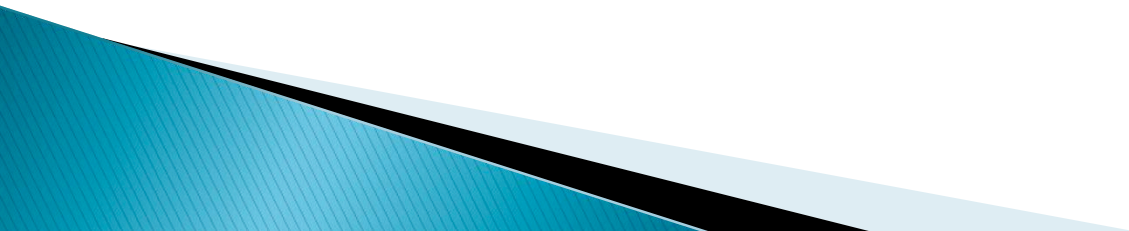
▶ Some suggestions:

- Identifying a “keystone” player responsible for facilitation and/or oversight
- Better mechanisms to share information, including “exploitation of technology
- Designating Crown Counsel with enhanced file ownership to improve file continuity and as appropriate, information sharing
- Will require prior review and thorough understanding of privacy law and other issues – a working group may be needed

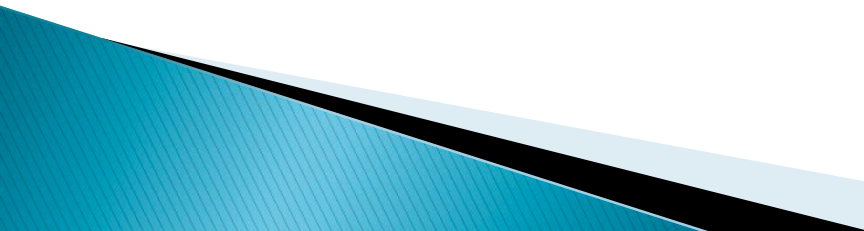
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- A problem solving approach would require policy on coordination of family, criminal and child protection processes with:
 - Clearly specified goals/intended outcomes
 - Associated evaluative procedures

7. A Shift in Culture: Looking for Opportunities for Change not Obstacles to Change



Perceived Barriers to Coordination Between Criminal and Family Law Cases

- ▶ Different nature and purpose
 - ▶ Focus in criminal cases on constitutionally protected rights of accused person
 - ▶ Different burden of proof
 - ▶ Different laws of evidence
 - ▶ Different requirements re pre-trial dispute resolution
 - ▶ Different consequences of conduct
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Common legal questions arise

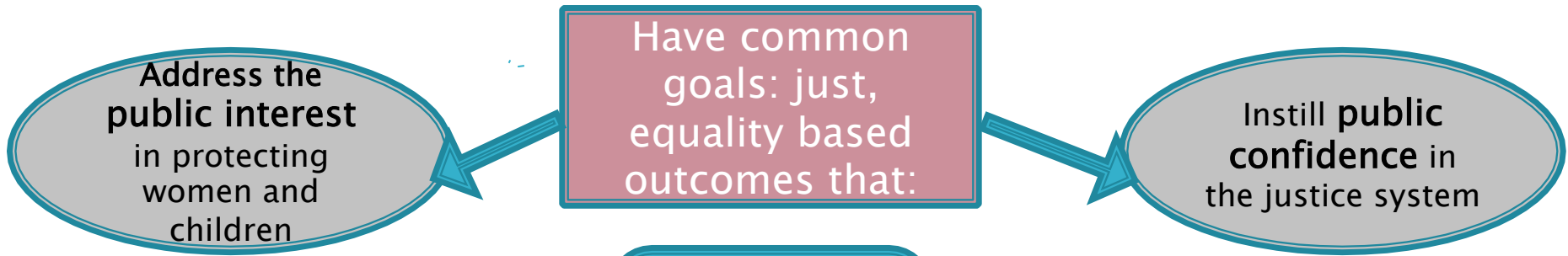
Same support services and resources needed

Same people involved

General Common Features

Common use of Judicial case management

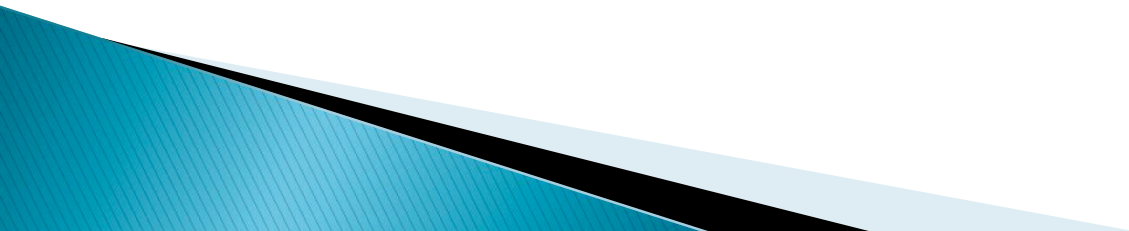
Common evidence, including expert evidence



**Common Features:
Outcomes**

Most outcomes (decisions) are reached without a contested trial or hearing, but without coordination

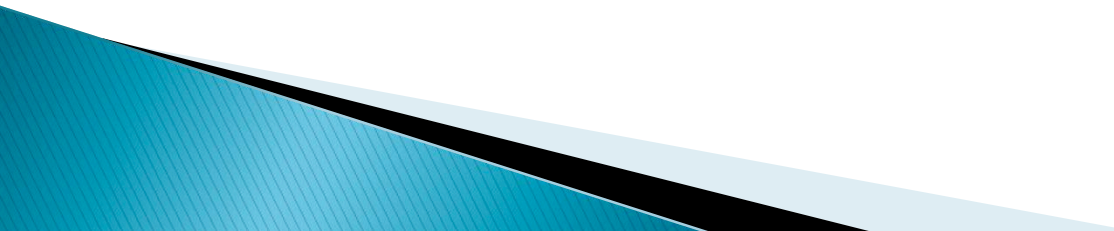
8. Multiple Court Proceedings and Specialization



A. B.C. “Better Response to Violence
Against Women” Summit,
November 28–29, 2014

- ▶ A key recommendation of the Summit:
 - Greater coordination would require substantial awareness and practical training (and **specialization**) of:
 - Judges
 - Crown Counsel
 - Defence bar
 - Other Participants

Contextual Legal Analysis and Women's Equality Rights

- ▶ Contextual Legal Analysis is required in all legal proceedings and processes relating to them: family, criminal and child protection.
 - ▶ It is the legal method by which equality rights are incorporated into decision making.
 - ▶ It applies to the work of **all decision makers** in the justice system.
- 

Contextual Legal Analysis and Women's Equality Rights

- ▶ Those decision makers include all people making decisions that may have **an impact on the ultimate outcome**, such as:
 - lawyers;
 - mediators, arbitrators, and parenting coordinators, whether they are lawyers or not;
 - psychologists and social workers; and
 - police officers.

In All Proceedings Just, Equality Based Outcomes Require Contextual Legal Analysis

i. Comprehensive, up to date knowledge about intimate partner violence and its impact

iv. The ability to understand and address one's own perspectives, convictions and prejudices

Contextual legal analysis requires:

iii. The ability to: identify and remedy women's and children's inequality by understanding their social context – their lived reality.

ii. In-depth knowledge of equality principles important to intimate partner violence cases

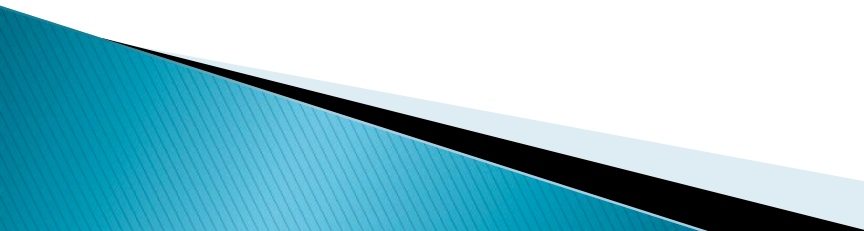
Understanding Lived Reality

Chief Justice McLachlin

“...the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose”

...

“Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions.”



In All Proceedings Just, Equality Based Outcomes Require Contextual Legal Analysis

i. Comprehensive, up to date knowledge about intimate partner violence and its impact

Contextual legal analysis requires:

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iii. The ability to: identify and remedy women's and children's inequality by understanding their social context – their lived reality.

ii. In-depth knowledge of equality principles important to intimate partner violence cases

The Inextricable Link Between Equality and Impartiality

- ▶ “Informed impartiality”, requires :
 1. an understanding that there are subjective elements to judging:

“Like everyone else, judges possess preferences, convictions and – yes – prejudices.”

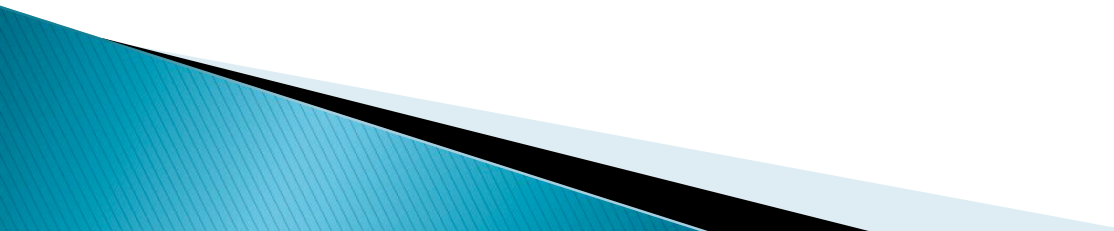
2. the ability to be introspective, open and empathetic.

Mandatory Contextual Legal Analysis

It is necessary in all intimate partner violence cases for:

- ▶ an equality based understanding of
 - what is relevant generally
 - what is relevant to risk of future harm
- ▶ equality based assessments of the credibility of women
- ▶ an equality based analysis of:
 - existing and proposed laws
 - existing and proposed principles of evidence
 - existing and proposed court processes.

Decision-making in IPV Cases

- ALL decision makers, including judges need:
- ▶ specialized knowledge about the complexity of and multifaceted nature of IPV and its impact;
 - ▶ an aptitude for making decisions with informed impartiality; and
 - ▶ a willingness to engage in ongoing professional development about IPV.
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Multiple Court Proceedings and Intimate Partner Violence – a Dangerous Disconnect

- ▶ October 2014 – National Conference – Canadian Observatory on the Justice System’s Responses to IPV National Conference: *Integrated Approaches to Intimate Partner Violence: Learning and Innovating Together*

http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote.pdf