

## Domestic Violence Guideline

**DATE:** May 20, 2008

**UPDATE:** November 28, 2008

**SUBJECT:** DOMESTIC VIOLENCE GUIDELINE

### **PURPOSE:**

This Guideline is to be used in conjunction with the Domestic Violence Handbook for Police and Crown Prosecutors in Alberta (the "Handbook"). Crown prosecutors should make reference to the Handbook for definitions and best practices.

### **BACKGROUND:**

The Alberta government is committed to providing safe communities for all Albertans, and that includes freedom from violence within our homes. Domestic violence is a crime, not just a problem or an issue. Alberta Justice is committed to working with government partners, community agencies and stakeholders to help prevent and effectively respond to domestic violence in our communities.

### **The Role of the Crown Prosecutor:**

Within the context of the established role of Crown prosecutors as described in the Code of Conduct for Crown prosecutors, in domestic violence cases, Crown prosecutors should pay particular attention to the following:

- Taking victim safety into account.
- Seeking an appropriate sentence when a conviction is obtained.
- Taking positions that reflect society's desire to stop the violence in the particular case and deter and denounce domestic violence generally.
- Ensuring that decisions are made against a background of all available information and with the safety of the victim and any children at the forefront.
- Utilizing information obtained from the investigating office (such as the Family Violence Investigative Report) that details risk factors regarding lethality and recidivism, to assist in decision-making.
- Obtaining details/information of prior abusive acts where available.
- Working closely with police and others, as set out in the Handbook, to assist in identifying potential evidence sources including K.G.B. statements if appropriate, 911 audiotapes, forensic evidence, photographs, police observations at the scene, independent witness statements and injuries sustained.
- Ensuring that cases progress through the court without avoidable delay.
- Actively considering what other evidence may be available for evidence-based prosecutions that do not rely on a victim's testimony.

It is also incumbent upon Crown prosecutors to be alert to the unique nature of domestic violence, the dysfunctional dynamics of the relationships that result in such violence, and the special needs of the victims and witnesses.

### **Withdrawing or Staying Charge(s) Where There is a Recanting or Hostile Victim:**

In many cases, victims' decisions to stay or leave an abusive relationship, or cooperate in prosecution are based on complex issues including safety and security. As a result, the presence of a recantation is not unusual. In some cases, it is questionable whether or not the victim truly wants to recant. The accused, family and/or friends may have utilized control tactics or threats to insist on the request. Therefore, charges in domestic violence cases should not be withdrawn solely at the request of the victim.

The observations of the Alberta Court of Appeal are relevant to this issue and bear repeating. In *R. v. Tkachuk*[1], the Court noted that victims of crime do not have the authority or the responsibility to decide whether a prosecution should proceed. The Court held:

*"...that responsibility can only be discharged by qualified prosecutors who have the training, judgment and courage to make the necessary decisions inherent in every prosecution. ... Many times these decisions will be difficult and even unpopular, but the responsibility for making them must always rest with the Crown and not with victims of crime, or other interested parties. Abdication of this prosecutorial responsibility to others who are interested in the outcome of the case, but have little or no understanding of the complexities, or even the basic tenets of our justice system, is wrong, and represents a serious threat to the fair administration of criminal justice."*

Where practicable the investigating officer should be asked to interview the victim to obtain further information to assist in assessing the genuineness of the recantation.

A decision to terminate proceedings whether by withdrawing, staying, or calling no evidence should be made in the interest of the proper administration of justice, including whether there is a reasonable likelihood of conviction and the public's interest in the effective enforcement of the criminal law. When deciding whether to terminate proceedings, Crown prosecutors should consider the safety of the victim and the public interest factors set out in the Handbook.

Crown prosecutors must disclose all recantations to defence counsel.

### **Compelling Testimony of Victim:**

If evidence is insufficient to prove a case without the victim's testimony, the circumstances of the offence will dictate a Crown prosecutor's actions. The more serious the offence, the more appropriate it will be to take all reasonable steps to compel testimony, including the use of procedures outlined in *R. v. K.G.B.* and section 9 of the *Canada Evidence Act*.

### **Seeking a witness Warrant:**

Where there is a reasonable likelihood of conviction without the testimony of a reluctant or hostile victim, Crown prosecutors may consider proceeding without requiring the victim to testify and without further sanction.

In some circumstances, Crown prosecutors may have no alternative in the interests of the administration of justice, but to ask the court to issue a bench warrant pursuant to s. 705 of the Criminal Code for a victim who has failed to attend in answer to a subpoena. Please refer to the Handbook to obtain more information regarding victims of domestic violence and the reasons why they may be reluctant to testify against an abuser.

### **Criminal Proceedings Against the Victim:**

Given the complexities faced by most victims of domestic violence, the inclination to recant is widespread. Before recommending proceedings against the complainant, for Public Mischief or Contempt of Court,

Crown prosecutors should examine carefully the entire context within which the alleged criminal behaviour occurred.

Fullest enquiries should be made through police to ensure that the decision is made against a background of all information set out in the “Domestic History Questionnaire” referred to in the Handbook.

### **No Contact Orders:**

Given the enormous complexity of domestic violence, refusing to remove “no contact” orders sometimes fails to help and may even harm those victims at greatest risk and subject them to a range of potential harms. The Crown prosecutor should show flexibility, provided that the safety of the victim and any secondary victim, such as a child exposed to violence, is paramount. Please refer to the *Handbook* for further information regarding the barriers that victims face when leaving abusive relationships.

It is imperative that any change made to a “no contact” order be done on an informed basis. Care should be taken to minimize conflicts between release orders and other types of court orders, including matrimonial, child custody and access, or child welfare-related orders.

### **Breaches of Court Ordered Conditions:**

Crown prosecutors should ensure that alleged violations of Emergency Protection Orders, and violations of conditions of release, probation or parole are prosecuted with the same vigor as other crimes.

A breach of an Emergency Protection Order or a Queen’s Bench Protection Order may elicit either criminal charges or civil contempt proceedings. Section 127 (disobeying a court order) is now a hybrid offence that may be used for a criminal remedy.

A breach of a Civil Restraining Order made by the Court of Queen’s Bench is not a criminal offence. However, the order will usually include a provision ordering police, on a breach of any of the terms, to arrest and bring the respondent before a Queen’s Bench Justice at the earliest time.

### **Expert Witness Testimony:**

Crown prosecutors should consider the use of the testimony of qualified domestic violence experts in court, where the unique circumstances of a case dictate that such evidence will be required to explain the dynamics of the abusive relationship. Such experts can provide explanations as to why a victim may fail to leave an abusive relationship or why a victim may become reluctant or hostile toward the criminal process.

### **Criminal Harassment (Stalking):**

It is recommended that in all domestic violence occurrences Crown prosecutors consider whether there is any evidence of criminal harassment. Provided there would be a reasonable likelihood of conviction and it would be in the public interest to proceed, the Crown would recommend the laying of charges where such evidence exists.

In criminal harassment cases where the accused is self-represented, the Crown can apply for an order appointing counsel to conduct the cross-examination of the victim. This reform reflects the serious nature of criminal harassment including its impact on the safety and well-being of victims by preventing the victim from having to endure further harassment by a self-represented accused. In these cases, counsel must be appointed unless doing so would interfere with the proper administration of justice.

Please refer to the Handbook or the publication, “Criminal Harassment: A Handbook for Crown and Crown Prosecutors” at [http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/ch\\_e-hc\\_a.pdf](http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/ch_e-hc_a.pdf) read more information regarding criminal harassment.

### **Dual Charging and Assessing Mutual Claims of Abuse:**

In assessing how to proceed when charges have been laid against both parties, it is recommended that

Crown prosecutors exercise great caution and focus on:

- Determining who is the principal excessive aggressor (also referred to as the primary or dominant aggressor).
- Distinguishing assault from defensive self-protection or consensual fight.
- Recognizing abusive behaviours/characteristics.

Please refer to the *Handbook* for more information on dominant aggressors and dual charging.

### **Case Management:**

For purposes of show cause hearings, sentencing submissions, and safety planning for victims, Crown prosecutors should thoroughly review any police investigational form provided which details risk factors regarding lethality and recidivism. Please see the "Assessing Risk for Further Violence" section of *Handbook*.

- Crown prosecutors concerned about the risk of repeat victimization should liaise with the investigating officer to ensure the victim has been warned about the potential safety risks, and assist with the Safety Plans and Referrals contained in the *Handbook*.
- Crown prosecutors should take care to ensure that personal information of the victim irrelevant to the charge is not disclosed, recognizing however, that disclosure obligations imposed by law may require the release to the accused of some personal information obtained from the victim.
- Where applicable, in cases flagged as high-risk, the Crown Office should make reasonable efforts to notify the victim of a change in prosecutor handling the case.
- In extremely high-risk cases or cases where there are multiple incidents involving the same persons, referral should be made to the Alberta Relationship Threat Assessment and Management Initiative (ARTAMI). ARTAMI brings together a team of professionals from police, Crown, family law, mental health and social service providers. This multi-disciplinary unit professionally assesses threats and develops risk reduction plans and safety strategies for high-risk relationship violence and stalking situations.
- If a Crown prosecutor believes an accused should be considered for a Dangerous Offender or Long Term Offender designation, contact the Office of General Counsel.

### **BAIL PROCEDURES:**

In speaking to bail on domestic violence cases, the following information should be provided to the court when it has been provided by the police either in a "Risk Factoring Tool" as referenced in the *Handbook* or in the investigation report.

- Whether there is a history of violence
- Whether the victim fears further violence and the basis of that fear
- The victim's opinion on the likelihood that the suspect will obey a term of release, particularly a no contact order
- Whether the suspect has a history of alcohol or drug problems, or mental illness
- Whether the accused has a history of breaches of judicial orders.
- The details of all previous domestic violence charges and convictions

See: *R. v. Bleile*[2]

Crown prosecutors should also:

- Use Bail Hearings as opportunities to disclose the history of abuse by the accused (with this or other victims), the dynamics of the relationship and the impact on victims and children.
- Use 911 recordings and photographs to show the extent of fear and suffering caused by the accused's actions, and to deflect claims by reluctant/recanting victims.
- Where an accused is released from custody, seek conditions that protect victims and children including:
  - Reporting conditions
  - Abstaining from communicating with the victim/children
  - Radius restrictions - residence and workplace
  - Weapons prohibition
  - Abstaining from alcohol and non-prescribed drugs

Please refer to the "Show Cause Hearings" section of the *Handbook* for specific examples of safety conditions.

#### **Bail Notification:**

Crown offices are responsible to ensure a notification of victim protocol is in place for those bail hearings or bail reviews conducted by Crown prosecutors. Such a protocol may require notification of the investigating police agency or a victim service agency, who will be responsible for notifying the victim. The Crown prosecutor conducting the bail hearing or bail review is responsible to engage the notification protocol as soon as possible so that the victim is advised of the release of the accused and any bail conditions imposed. Details should be documented on the file.

If a Crown prosecutor chooses to notify the victim directly, the best methods of notification are:

- Contact by telephone, or
- In person, or
- Where verbal notification is not possible, by mail in an envelope devoid of official markings

All verbal or written notifications or attempts to notify the victim must be recorded on the Crown file.

#### **Sentencing:**

S. 718.2 of the *Criminal Code* mandates that the court shall consider that abuse of the offender's spouse or common-law partner or child, is an aggravating factor, and increase the sentence accordingly and mandate that if the offender abuses a position of trust in committing the offence, it too shall be deemed an aggravating factor.

The Alberta Court of Appeal decision in *R. v. Highway, Brown and Umpherville*[3] is the leading Alberta sentencing authority in domestic violence cases. The Court recognized that spousal assault is a serious problem in our society and that the courts have an opportunity, by their sentencing policy, to denounce domestic violence in clear terms and to attempt to deter its recurrence on the part of the offender as well as other offenders. Such an assault constitutes an abuse of power and control, and the vulnerability of victims is "increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape." The paramount considerations must be general deterrence and denunciation. Rehabilitation and individual deterrence are of secondary importance.

A sentencing court must consider:

- Whether the assault is relatively minor in nature.
- Whether it is an isolated incident.
- Whether there are circumstances which make it desirable that the sentence not be counter-productive to the possibility that the family relationship will be preserved.

Crown prosecutors should:

- Be mindful of the Crown's burden of proof and the parameters set out in *R. v. Roberts*[4]. They should also reference any relevant and previously disclosed history of abuse, dynamics of the relationship, and the impact that abuse has had on victims and children.
- Use 911 recordings and photographs to show the extent of fear and suffering caused by the accused's actions and to deflect claims by reluctant/recanting victims.
- Reference any Victim Impact Statement that is filed with the Court.

Crown prosecutors should recommend a sentence that, among other goals, denounces and deters this kind of offence, and keep in mind the following:

- **Violence after Separation** - Sentences imposed for offences occurring after separation of the parties must still consider the need to deter violence as "this period is characterized by a reluctance on the part of the abuser to give up control over the person". *R. v. Evans*[5].
- **Control Dynamic** - An important factor in domestic violence cases is the control dynamic. Sentencing principles in *R. v. Highway, Brown and Umpherville* will apply regardless of the fact that a complainant is in a new relationship. *R. v. Harris*[6].
- **Isolated Acts of Violence** - It is as necessary to deter isolated instances of domestic violence, as it is to deter repeated instances. A sentencing judge faced with a first assault has no way of knowing whether it will be an isolated incident, or whether it will turn out to be the first of many. *R. v. Ollenberger*[7].

The following are comments on some possible sentences and dispositions in domestic violence cases:

- **Incarceration** - It is clear from the decision of the Alberta Court of Appeal in *R. v. Highway, Brown and Umpherville* that the starting point in sentencing for an act of domestic violence should be a sentence that would have been fit if the offender assaulted a stranger. From there, the sentencing judge should examine the circumstances that are peculiar because of the relationship. This requirement has been codified in ss. 718.2(a)(ii) and 718.2(a)(iii) CC, which deem it aggravating if an offender abused a spouse or common law partner, or abused a position of trust. Often times, the gravity of the offence, the culpability of the offender and other governing sentencing principles will mandate that a jail sentence be imposed (notwithstanding the existence of mitigating circumstances such as prior good character and remorse).
- **Conditional Sentences** - While no offence is automatically excluded from consideration of a conditional sentence (except those with minimum prison sentences) and while there are no presumptions for or against a conditional sentence based solely on the category of offence, *where the circumstances involve a serious or violent offence, prosecutors must consider that a conditional sentence is unlikely to be proportionate to the gravity of the offence or to provide adequate deterrence and denunciation*. In considering the merits of a conditional sentence in cases of domestic violence, prosecutors should consult the guideline on conditional sentencing (Conditional Sentences – Guidelines for Prosecution).
- **Non-custodial sentences** - Crown prosecutors should take full advantage of their discretion, and work with police and community agencies to offer a range of justice system options, tailored to

each case's unique circumstances. For instance, if a non-custodial sentence is appropriate, conditional discharges can be a remedial sentencing option in domestic violence cases, where the offender commits an offence involving minimal violence and lacks a criminal history. This sentence allows an accused person to accept responsibility for committing a criminal act, while allowing him/her an opportunity to change the offending behaviour. The advantage of a conditional discharge over an absolute discharge is that if the offender fails to meet the conditions of his or her probation, or commits another criminal offence during the probation period, he or she may be returned to court where the offender may be convicted and sentenced on the original offence as well as for breach of probation.

- **Fines** - As a general rule, Crown prosecutors should oppose the imposition of fines on the basis that fines can trivialize the seriousness of domestic violence and take financial resources away from victims and children.
- **Absolute Discharge** - As a general rule, Crown prosecutors should oppose recommendations for absolute discharges unless extraordinary and compelling circumstances are present.
- **Alternative Measures** - Alberta Alternative Measures Guidelines expressly exclude spousal abuse cases from diversion set out in Section 717 of the *Criminal Code*.

#### Additional Considerations:

- **Terms of Orders** - Orders for protection should be clear, specific and tailored to the individual circumstances of the case, and should protect the safety and interests of children in the household, and specify locations in addition to the victim's primary residence, such as the homes of family members. Furthermore, abusive partners should be required to enter into counselling, where available, and provide proof of attendance to their probation officers. It may be helpful if the order contains a term requiring the offender to sign all necessary waivers so that his/her probation officer can access his/her counselling information.
- **Other Orders** - Where appropriate, Crown prosecutors should obtain firearms prohibition orders, DNA orders, and should seek to have offenders added to the National Sex Offender Registry.
- **Long Term Offender and Dangerous Offender Applications** - It is strongly recommended that Crown prosecutors consider applying for Long Term Offender and/or Dangerous Offender designations for offenders with a history of serious domestic violence.

### Section 810(1) Orders to Keep the Peace:

When survival and safety strategies employed by victims (such as unwillingness to give information, resistance to testifying, recanting all or part of previous statements) come into conflict with the goals or needs of the justice system, the safety and protection of victims and children becomes of paramount concern.

In such cases, the Crown prosecutor may feel it is appropriate for the accused to enter into a recognizance under section 810 of the *Criminal Code*. Where this resolution is used, it is imperative that the peace bond be tightly structured with terms similar to those of a probation order so that it can be enforced.

While orders made pursuant to s. 810 do not require the accused to accept responsibility for committing a criminal act, such orders do provide the accused with an opportunity to change his or her behaviour. Further, if the accused fails to meet the conditions of the order, he or she may be charged with a breach.

In considering the appropriateness of a recognizance under Section 810, Crown prosecutors must take into account the following considerations:

- Whether the offence itself involves serious injury.

- Whether the accused has a substantial history of abusive behavior against the victim or other intimate partners (even if charges have not previously been laid).
- Whether the accused has a criminal record.
- Whether the accused will admit the particulars of the offence in open court. If an accused denies wrongdoing in the course of treatment, a transcript of the court proceedings should be produced to the treatment agency.
- The terms of the Order should be carefully crafted. Domestic violence treatment will often be appropriate.
- Alcohol/drug abstinence or treatment where appropriate.
- Weapons prohibition where appropriate.
- A reporting condition is necessary so that compliance can be monitored.

### **Children as Witnesses:**

Children of families where domestic violence occurs, including adult children, may be reluctant to testify because of their relationship with both the accused and the victim. Some of the considerations that Crown prosecutors may take into account when dealing with reluctant victims may also be applicable to children called as witnesses in these cases. Particular reference should be made to Sections 486.1, 486.2, and 486.3 of the *Criminal Code*, which provides special provisions for children testifying in court.

Crown prosecutors should also utilize child-friendly courtrooms, where available, and access the Child Witness Court Preparation Program, when appropriate. This program, developed in 1992, responds to the needs of child witnesses who might have to testify in court. The program recognizes that inadequate court preparation may further traumatize child witnesses and their families, and may compromise the court process. The program enhances a child's ability to testify, and affords them the opportunity to meet other children in the same position. There is an in-group program in Calgary and a Web-based Court Preparation Program available on-line across the province. More information about the Online Web-based Court preparation Program can be obtained by visiting: [www.childcourtprep.com](http://www.childcourtprep.com).

### **Support to Victims:**

Crown prosecutors should:

- Refer victims to a Victim Services Program if they appear not to have accessed available services that may be of benefit to them or to a child who has been exposed to violence. Such services include court support, court preparation and accompaniment assistance. In cases where the victim has special needs (i.e. dealing with communication barriers) or requires transportation to court, Victim Services may also be able to assist with these requests. Victim Services Programs can also assist with relevant brochures and information about the Financial Benefits, Requesting Restitution and Victim Impact Statement Programs..
- Utilize the referral form "Crown Prosecutor to Victim Service Unit" to facilitate the referral process. If you receive a referral from "Victim Service Unit to Crown Prosecutor," ensure that it is attached to the file for follow-up.

Testimonial aids (screens, closed circuit television and support persons) are available to facilitate the testimony by vulnerable victims and witnesses such as victims (and their children) of spousal abuse, sexual assault and criminal harassment. For adult victims and witnesses, the aids are available, on application, where it can be demonstrated that because of the surrounding circumstances (including the nature of the offence and any relationship between the victim/witness and the accused), they would be unable to provide a full and candid account without the testimonial aid. In cases where children are testifying, testimonial aids are to be made available to the child once a request has been made.

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## END NOTES

[1] *R. v. Tkachuk* 2001 ABCA 243

[2] *R. v. Bleile* (2000) C.R. 31 (5th), Alta. Q.B.

[3] *R. v. Highway, Brown and Umpherville* (1992) 73 C.C.C., (3d) 242 (AB CA)

[4] *R. v. Roberts* 2006 ABCA 113

[5] *R. v. Evans* (1997), 196 A.R. 207

[6] *R. v. Harris*, 1993 CarswellAlta 176 (CA)

[7] *R. v. Ollenberger* [1994] A.J. No. 153