SPOUSAL VIOLENCE

"Violence is a tool of the ignorant."

-Flip Wilson (1933 - 1998)

Introduction

Although physical abuse of another person has always been a criminal offence, where such violence occurred in a domestic context, it has not always been treated as a crime. Today, the approach is different: spousal violence is recognized as intolerable, and is to be regarded as criminal activity[1]. At the same time, it is important to recognize some special features of spousal violence:

- it is prevalent in all sectors of society[2];
- the degree of violence can be fatal: in Canada more women die at the hands of a domestic partner than by any other violent cause[3];
- it is costly[4] and the physical, emotional, mental and financial effects are long-lasting;
- it tends to be repetitive until the cycle of abuse is arrested by an external factor; and
- a person sustaining physical abuse is often financially and emotionally connected with the offender in such a manner that any sanctions imposed upon the offender may adversely affect the complainant as well.

In the early 1980's policies on the investigation and prosecution of domestic violence were formulated by the Department of Justice, the Royal Newfoundland Constabulary and the RCMP. The policies sought to: remove from complainants the responsibility for initiating and pursuing criminal charges; improve protection and assistance for complainants; and ensure that police investigators and Crown Attorneys would give priority to cases involving spousal violence.

However, despite this commitment to vigorous action, the incidence of spousal violence remains unacceptably high. Further, it must also be recognized that policies themselves, when applied in an inflexible manner,

may have unintended negative consequences for the victims of spousal violence. Accordingly, this policy attempts to draw on more recent experiences in seeking to attain the objective of reducing spousal violence.

Application of the Policy

This policy relates to **"spousal violence",** which may be defined as any criminal offence where violence is used, threatened or attempted by one person against another person in the context of a relationship between domestic partners. "Domestic partners" includes husbands and wives, common law spouses and same sex couples. While many or most of the principles in this policy may be equally applicable to other sorts of domestic violence such as child or elder abuse, the policy is not specifically designed for those situations.

This policy is intended to reflect the special circumstances of the areas in which it is applied. Such circumstances include the fact that in many small communities in Newfoundland and Labrador, the options available to the victims of spousal violence may be limited, because, for example:

a. the victim may have no access to the same types of support often found in larger centers, such as emergency shelters or counselling services;

b. the victim may face pressure in the community not to report the crime; and

c. absolute prohibitions on contact with the alleged abuser may be unrealistic in a small isolated community.

The policy places primary responsibility for decision-making with the police and Crown Attorneys rather than with complainants. At all stages of the criminal process, Crown Attorneys shall engage in appropriate consultation with the police and the complainant to ensure that the complainant is protected, informed and supported.

The policy seeks to guide Crown Attorneys discretion, not remove it. Crown counsel must consider and apply other Guide Book policies, including the "Decision to Prosecute"[5] and "Victims of Crime"[6]policy while bearing in mind the strong public interest in the denunciation and deterrence of spousal violence.[7]

Judicial Interim Release[8]

Crown Attorneys should require from police sufficient information to determine whether releasing the alleged offender from custody would be an unreasonable risk to the safety of the complainant. Counsel should be conscious of the fact that in some instances, if the alleged offender is not kept in custody, the complainant and the children will be forced to leave the family home. Where the court is satisfied that the alleged offender can be released, some restrictions will ordinarily be necessary both to ensure the security of the complainant and preserve the integrity of the prosecution. These may include:

- non-communication with the complainant directly or indirectly[9];
- custody and access arrangements through a neutral third party;
- obligation to provide support for dependants as required by law;
- non-attendance at or near the residence or place of work of the complainant; and
- surrender of all firearms, ammunition, explosives and Firearms Possession and Acquisition Certificates[10].

The complainant in spousal violence cases may express or demonstrate a reluctance to proceed with the arrest and prosecution of the suspect. While the position of the complainant is always relevant, one must bear in mind that responsibility for investigation rests with police, and responsibility for prosecution with the Crown Attorney. Therefore, Crown Attorneys should consider the question of pretrial release without regard to the likelihood that the complainant will continue a relationship with the accused or co-operate in the prosecution of the charges laid, and should consider any and all terms of release which are necessary to preserve the evidence, protect the complainant, and avoid the commission of any further offence.

Generally, Crown Attorneys should not call the complainant as a witness at a judicial interim release hearing. Given that the prosecution process is intrusive and traumatic from the vantage point of the complainant, every reasonable effort should be made by Crown counsel to mitigate such intrusion and trauma. Simultaneously, however, Crown Attorneys must

make every reasonable effort to secure a full and frank hearing of the evidence in respect of spousal violence offences. Therefore, the Crown Attorney may elect to call *viva voce* evidence from the complainant at a judicial interim release hearing where the proper conduct of the case requires it, after due consideration to the interests of the complainant. For example, where Crown counsel opposes release of an accused person charged with a spousal violence offence and the complainant is willing at that time to co-operate with the prosecution of the case, Crown counsel may deem it appropriate to elicit the complainant's evidence on the record, in order to secure a statement from the complainant which might be used at trial as substantive evidence should the legal requirements for its admission be met.

Where the accused is released from custody, reasonable efforts should be made to provide a copy of the release terms to the complainant as soon as practicable. In the event that the complainant has relocated to another community and the prosecutor is aware of it, the police detachment nearest to the complainant shall be informed of the release terms. It is important that the police detachment in both the accused's and the complainant's communities have copies of the terms of release.

Court Brief

Senior Crown Attorneys should discuss with the RNC and RCMP all matters relevant to disclosure and reach agreement on the content and timeliness of disclosure. At a minimum the court brief should contain:

- a summary of the investigation;
- any utterances by the complainant to police or other, and the circumstances in which the utterances were made;
- details or photographs of injuries or property damage related to the investigation;
- details of the manner in which any statement of the complainant was taken: i.e., reduced to writing, signed by the complainant, whether audio or video recorded, whether under oath or after any advice or caution;

- details of any indications that the complainant may be reluctant to co-operate in the investigation and prosecution of the offences charged;

- details of any witnesses to the offences, or to injuries sustained;

- details of any utterances made by the accused person and any notes or transcript of such utterances;

- the criminal record of the accused, including details of any spousal violence offences or other offences of violence;

- summary of past police involvement pertaining to this accused and the investigation of prior spousal violence offences; and

- the details of any attempt by the accused to contact the victim in violation of a court order.

Review of the Court Brief

Where a court brief alleging a spousal violence offence is received, the brief will be reviewed at the earliest opportunity by Crown Attorneys. The reviewing Crown Attorney should:

- assess the brief for completeness;

- meet with the complainant, where possible, or ask the Victim Services Worker to meet with the complainant;

- ensure that the appropriate charges have been laid by the investigating officer; and

- assess whether further investigative measures, such as a videotaped statement, are necessary.

Review of detention or conditions of release

Frequently, the complainant in a spousal violence case will indicate after a bail hearing a desire to resume communication, or even cohabitation, with the accused. Often, the position of the complainant in respect of these matters will change from time to time. The wishes of the complainant in

such situations are to be given significant weight but should not be treated as conclusive. Crown Attorneys should consider:

a. the source of the information about the complainant's wishes – it may be necessary to speak to the complainant personally;

b. any history of violence in the relationship; and

c. whether any specific condition might adequately address the risks of harm to the complainant or to the integrity of the prosecution.

Violation of Release Conditions

Usually, a breach of bail terms imposed with respect to a spousal violence offence will be prosecuted, particularly where the breach involves another spousal violence offence or interference with the security of the initial complainant. This does not restrict the discretion of Crown Attorneys in matters of plea and sentence negotiation. Crown Attorneys shall also consider contesting the release of the accused in respect of the breach offence and, where the accused is detained, should seek an order cancelling the accused's release in respect of the original offence, pursuant to s. 524(8) of the *Criminal Code*. Crown counsel shall also consider seeking a non-communication order under s. 515(12) of the *Criminal Code* where the accused is detained.

Preparation of Witnesses

Witness preparation is a pivotal function of Crown Attorneys prosecuting spousal violence offences, and counsel are often assisted in this task by Victim Services Workers. Crown Attorneys should attempt to provide support, encouragement and understanding; a non-judgmental attitude where the complainant/witness is reluctant, but assurance that it is wise and prudent for a fearful complainant to seek the support and protection of the criminal justice system. After reviewing the court brief with the investigating officer the Crown Attorney should, where possible, meet with the complainant in private and comfortable surroundings and:

- explain the prosecution policy in relation to spousal violence offences;

- explain the role of Crown and defence counsel in such proceedings;

- explain the role of a witness in court;
- assess the complainant's reliability as a witness;
- encourage the complainant to testify truthfully to what occurred;
- inform the complainant of any release conditions imposed on the accused, and determine if the complainant has any concerns with the accused's compliance with those conditions;
- confirm that the complainant has been made aware of available community services, including the services of a Victim Services Worker, where one is available;
- attempt to answer any questions the complainant might have, including discussing any continuing safety concerns; and
- ensure that the complainant has been informed of the opportunity to give a victim impact statement.

Reluctant Witnesses

With respect to spousal violence offences, Crown Attorneys may find that many complainants will be reluctant to testify for a number of complex reasons. Reluctant witnesses in such cases require special consideration.

Research has shown that the greater and the earlier support a complainant receives, the less likely a complainant will recant or be reluctant. Accordingly, and especially where there is fear that the complainant may recant, Crown Attorneys should make every reasonable effort to provide support for the complainant including:

- seeking the early intervention of a victim witness assistant or other support person; and
- applications to the court pursuant to:
    a. subsection 486(1) (exclusion of public)

b. subsection 486.2(1) (use of screen or closed circuit television where complainant is under 18 years of age)

c. subsection 486.4 (prohibition against publication or broadcast of complainant's identity in sexual offence cases).

Where the witness fails to attend Court

Where a complainant fails to attend court in answer to a subpoena, Crown Attorneys should make every reasonable effort to determine why the person has failed to appear. Based on that information, knowledge of the personal circumstances of the complainant and the seriousness of the offence, Crown counsel should consider four options:

- requesting an adjournment if the complainant's evidence is crucial to the case and the absence is unavoidable, e.g. because of the complainant's illness;
- proceeding with the case, where the charge can be proven through the evidence of others;
- asking for a warrant, where the complainant's evidence is crucial, no information is available concerning the reasons for non-appearance and the offence is a serious one; and
- terminating proceedings, where the offence is less serious, the alleged offender is not considered dangerous, and the complainant's arrest would serve only to further victimize that person.

The considerations listed above governing each option should not be considered exhaustive. They are intended to underscore the fact that great care must be taken in reaching a decision.

Where counsel decides to seek arrest, in the vast majority of cases the complainant should be released as soon as possible on terms that he or she attend court as required. In the highly unusual case where detention is deemed necessary, Crown Attorneys should consult with the Senior Crown Attorney.

Where the witness attends, but refuses to give evidence

Witnesses who refuse to answer questions may be cited for contempt. Crown Attorneys should make every reasonable effort to persuade witnesses

to testify and to avoid such a result. If Crown counsel is aware before trial that a witness is likely to refuse to answer questions before the witness testifies, counsel should consider whether it is appropriate to call the person as a witness.

Where the witness fails to describe the events in question as anticipated

If the charge is provable through other evidence, Crown Attorneys may decide to excuse the complainant without the need to testify and without further sanction. Crown counsel with carriage of the case should anticipate the reluctance of the complainant, and should consider other means of presenting the case before the trier of fact, such as:

- seeking leave to show the complainant a prior police statement, for the purpose of refreshing memory;

- seeking to admit evidence of a prior inconsistent statement as substantive evidence, pursuant to the Supreme Court's judgment in *R. v. K.G.B.* (1993), 79 C.C.C.(3d) 257;

- seeking to admit evidence of prior out-of-court utterances of the complainant as *res gestae* evidence (i.e., 911 or police dispatch tapes);

- seeking leave to cross-examine the complainant on a prior inconsistent statement, pursuant to s. 9(2) of the *Canada Evidence Act*; and

- seeking leave to cross-examine the complainant as an adverse witness, pursuant to s. 9(1) of the *Canada Evidence Act*.

The recanting witness

On occasion, the complainant in a spousal violence case will indicate to police or Crown Attorney prior to completion of trial that the offences alleged did not occur, in whole or in part. Crown counsel must inform defence accordingly, in accordance with disclosure policies[11].

Where the Crown Attorney is satisfied that the recantation is true (that is, that no spousal violence offence in fact occurred), then proceedings against the accused should be terminated at once and the matter referred to the police for consideration of criminal action against the complainant with

respect to the initial complaint. Such a step may only be taken after consultation with the Senior Crown Attorney.

Where Crown counsel is not satisfied that the recantation is true but there is no longer a reasonable prospect of conviction, proceedings should be terminated. The fact of recantation does not in and of itself require termination of the proceedings. Crown Attorneys should consider the other means of presenting the case referred to immediately above.

The fact that the complainant has recanted will be a factor used by defence counsel to attack the credibility of the complainant at trial. Generally, this weakens the prospects of conviction and increases the burden of the trial process for the complainant. Further, a recantation clearly demonstrates that the complainant will not co-operate with Crown counsel, and may undermine the Crown's case. Therefore, the propriety of the prosecution must be reconsidered. The principles enunciated in the Decision to Prosecute policy[12] apply.

The fact that the complainant has recanted will likely diminish the strength of the Crown's case, and is therefore relevant to the question of the accused's detention or the propriety of release conditions previously imposed. Once details of the recantation are disclosed to defence, Crown Attorneys should co-operate in any effort by defence to have the question of release or conditions promptly reviewed by a court of competent jurisdiction. However Crown Attorneys must bear in mind that the fact of the recantation may indicate pressure has been exerted on the complainant by the accused or persons associated with the accused.

Child Witnesses

Children of a home where spousal violence offence occurs, including adult children, may be reluctant to testify because of their relationship with the accused or the complainant or both. Some of the considerations that Crown Attorneys may take into account when dealing with reluctant complainant witnesses may also be applicable to children called as witnesses in these cases.

Termination of Proceedings

After reviewing the prosecution brief and, where necessary, consulting with the police and interviewing the complainant, counsel may decide that the

case is not appropriate for prosecution. In these circumstances, proceedings may be terminated but only after careful consideration of all aspects of the case including any alternatives with respect to presentation of evidence, as noted below. Less experienced counsel should terminate proceedings only after consultation with the Senior Crown Attorney.

The question of discontinuing proceedings may require reconsideration by Crown Attorneys at any point in the criminal proceedings. Once Crown counsel determines that there is no *reasonable likelihood of conviction* the prosecution should be terminated. Where the evidence is sufficient to warrant continuation, counsel should consider the following factors in determining whether the prosecution is in the public interest:

- the seriousness of the present assault;
- whether it appears that the complainant has been directly or indirectly threatened or intimidated by the accused or the accused's family or friends in connection with the present prosecution;
- whether it appears that the complainant will be unduly traumatized if required to testify;
- whether the complainant may commit perjury if called to testify;
- whether there is sufficient evidence to prosecute without the co-operation and direct involvement of the complainant;
- whether there is a likelihood of similar offences in the future particularly against the complainant or children in the home;
- whether the accused is addressing the abusive behaviour through counselling or some other treatment or program;
- whether the accused has prior convictions for spousal violence offences or other violent offences; and
- the impact that not prosecuting may have on future cases and on the administration of justice generally.

A decision to terminate proceedings is made in the interest of the proper administration of justice, including the public's interest in the effective enforcement of the criminal law, the safety of the complainant, and respect for the dignity and security of the complainant. When a decision to terminate the prosecution is reached it should be communicated quickly to the police, the complainant, and the defence.[13]

Sentence

If an accused is found guilty Crown Attorneys shall recommend a sentence which, among other goals, reflects public denunciation of spousal violence offences. Crown Attorneys must also bear in mind changes to the *Criminal Code* in 1999 to enhance the role of victims in sentencing proceedings[14]. The following general considerations apply:

- Counsel should oppose recommendations for conditional or absolute discharges unless extraordinary and compelling circumstances are present.

- Counsel should bear in mind that s. 718.2(a)(ii) of the *Criminal Code* makes abuse of one's spouse, common law partner or child an aggravating feature on sentencing.

- Consideration should be given to a guilty plea as a mitigating factor. By their nature, spousal violence offences are largely unpredictable in terms of outcome. Reformation of the offender is more likely where the offence is admitted, and the burden placed upon the complainant through the course of the trial process is significant. Therefore, demonstration of remorse by the tendering of a plea of guilty may be significant.

- Whether or not incarceration is to be imposed, consideration should be given to probation as part of the sentence, with conditions obliging the offender to attend and participate meaningfully in a spousal violence program.

Counsel should oppose recommendations for conditional or non-custodial sentences unless conditions can be imposed that will provide adequate protection for the complainant's safety. Counsel should not

however, consider incarceration the only appropriate solution; for example, counsel should bear in mind the principles in *R* v. *Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.), in relation to the incarceration of aboriginal offenders.

- Counsel should ensure that the complainant has had an opportunity to prepare a Victim Impact Statement and present any such statement to the court in the course of sentencing submissions. Section 722.2 of the *Criminal Code* requires that the complainant be given such an opportunity, and counsel must be able to advise the court in that regard.

- Counsel should consider in all cases representations in support of an order that the offender not possess firearms, ammunition, explosives or a Firearms Possession and Acquisition Licence.

- Counsel should consider representations in support of an order for forfeiture of any weapon or ammunition used in the commission of a spousal violence offence: see s. 491 of the *Criminal Code*.

- Where the sentence imposed is erroneous in principle, an appeal should be considered[15].

Crown Attorneys shall take reasonable steps to ensure the complainant is aware of the sentence imposed and any appeal proceedings undertaken.

The use of the peace bond procedure set out in s. 810 of the *Criminal Code* should not be pursued as an alternative or recommended in cases of spousal violence offences.

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[1] See, generally, Final Report of the AD Hoc Working Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation. Canada: Department of Justice, 2003. (hereinafter "FPT Working Group Report").

[2] Statistics Canada's 1993 Violence Against Women Survey reported that 29% of ever-married women (2.65 million) reported having experienced physical or sexual violence by their current or previous marital/common law partner.

[3] Statistics Canada's Spousal Homicide Juristat (Vol.14, No.8, 1994) reported that 38% of adult female homicide victims were killed by their husbands.

[4] A 1995 study on *only* the health-related costs of violence against women in Canada estimated that in 1992, 28% of battered women sought medical care due to the abuse at an estimated medical cost of $1.5 billion (excluding costs for hospital admissions, and physicians, services): see "The Health-Related Costs of Violence Against Women in Canada: The Tip of the Iceberg" by Tannis Day, Centre for Research on Violence Against Women and Children (London, Ontario) 1995, page 4. This does not address of course the huge emotional costs incurred by the victims of these crimes, costs related to the damage these crimes do to victims' children, or the resources contributed by society each year to investigate and prosecute spousal violence offences.

[5] See materials in this Guide Book related to "The Decision to Prosecute".

[6] See materials in this Guide Book related to "Victims of Crime".

[7] See Criminal Code s. 718.2(a).

[8] See materials in this Guide Book related to "Victims of Crime".

[9] Even where an accused person is detained, non-communication orders may be imposed pursuant to s. 515(12) of the *Criminal Code*.

[10] These conditions should be considered even where no firearms were involved in the incident, due to the tendency of spousal violence to escalate in seriousness.

[11] See materials in this Guide Book related to, "Disclosure".

[12] See materials in this Guide Book related to "The Decision to Prosecute".

[13] Crown Attorneys should have regard to **Directive #4** ; "Termination of Proceedings", in the section of this Guide Book on the "Conduct of Criminal Litigation".

[14] This subject is dealt with more extensively in the, "Victims of Crime" section of this Guide Book.

[15] In accordance with Guide Book materials regarding, "The Decision to Appeal".