Fighting Domestic Violence - Canada

1. Legal provisions

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# Introduction

Canada is a country comprised of 10 provinces and three territories. Canada's provinces from west to east are as follows:

British Columbia\*

Alberta\*

Saskatchewan

Manitoba

Ontario\*

Quebec\*

New Brunswick

Nova Scotia

Prince Edward Island

Newfoundland and Labrador

\* Designates the provinces with the largest populations

Canada's territories from west to east are:

Yukons

Northwest Territories

Nunavut

In Canada, addressing the impact of domestic violence is a shared responsibility between the federal government of Canada and the governments of its 13 provinces and territories. COVID-19 has highlighted the problem of domestic violence in Canada and what some are referring to as the "crisis" Canada finds itself in with respect to domestic violence.[1] One report by a United Nations special rapporteur in 2018 argued that violence against women in Canada remains a "serious pervasive and systematic problem" and "unfinished business that requires urgent actions."[2] One Justice Department of Canada report from 2009 estimated that the total cost of "spousal violence" on the Canadian economy (through lost productivity, healthcare, police costs, etc.) was CAD 7.4 billion.[3]

In 2016, more than 25% of all reported violent crime in Canada was the result of family violence.[4] This number is deceptively low, however, because family violence is often under-reported. For example, in 2014, fewer than 19% of victims abused by their spouses reported this abuse to the police.[5] The proportions of those reporting intimate-partner victimization to the police is even lower among immigrant populations in Canada, especially among Indo-Canadian and Muslim women.[6]

Similarly, there are relatively low rates of reporting domestic violence to the police among Aboriginal populations, despite the greater likelihood for violence to be inflicted against Aboriginal women by their partners.[7] In contrast, in 2006, Mihorean reported that the 2004 General Social Survey data indicated that a higher proportion of Aboriginal victims (50%) than non-Aboriginal victims (35%) reported that they called the police, perhaps because the violence tended to be more severe. Moreover, in 2009, slightly less than one-third (31%) of Aboriginal victims of spousal violence reported their victimization to the police,[8] which is generally consistent with reporting rates among Caucasian victims of spousal violence. Thus, the research on the police reporting rates of Aboriginal victims of spousal violence is inconsistent, and is likely affected by a wide range of additional factors, such as rural versus urban locations and overall rates of community violence.

Addressing intimate-partner violence in Canada is made particularly complex by the Canadian federal and provincial systems. We will discuss this in greater detail in Section 1 of this report but, in short, the provinces are responsible for delivering services across the health, justice and social services sectors in their respective province and the federal government is responsible for providing national guidance, leadership and coordination across the jurisdictions. This results in a patchwork of solutions that vary significantly between the provinces and territories. Some of the biggest problems facing Canada are the disparities in provincial and territorial laws (even so far as vastly different definitions of what constitutes domestic violence), unequal access to services nationally (especially between rural and urban communities) and lack of affordable public housing options.[9] Canada has seen some progress in specialized domestic violence units in police forces, specialized courts and public education; however, there is also a disconnect between the way we see and talk about physical intimate-partner violence and controlling coercive behavior. Complicating this is the fact that domestic violence can consist of a variety of behavior, from emotional abuse to withholding money, and some of these cross jurisdictional boundaries. Thankfully, recent amendments to the Divorce Act, RSC 1985, c 3 (2nd Supp) address items of controlling coercive behavior as set out in greater detail in Sections 1 and 6.5 of this report.

Despite the issues in uniformity among Canadian provinces and territories, our research has shown that one province in particular is ahead in many respects when it comes to best practices to address domestic violence and that is British Columbia(BC). BC has the broadest definition of family violence in its Family Law Act, which is relevant to both family law matters and restraining orders. The changes to the Divorce Act, which came into effect in March 2021, are very similar to BC in the definition of family violence, and it is expected that many other provinces will revise their family legislation to follow suit. BC also has requirements for training/screening for domestic violence that the revised Divorce Act does not have. We hope that Canada and its provinces and territories can work to model their laws and policies on the BC model to ensure more uniformity to address domestic violence in Canada.

# 1.1 What are the relevant statutes and codes?

Canada's constitution divides governing power between two levels of government — the federal government and the provincial governments — based on the constitutional classes of subjects assigned to each. Each level of government is supreme in its area of jurisdiction. Federal laws apply to all Canadian jurisdictions, whereas the provincial or territorial laws only apply within that particular province or territory. As a result, the provincial laws vary between the provinces and territories.

Applying this specifically to domestic violence, the division of powers in applicable subject matters is as follows:

**1. The federal government has ultimate power for (i) criminal law, (ii) marriage/divorce, (iii) Indians/Indian reserves, and (iv) citizenship.**

**Criminal law**[10]

The Criminal Code, RSC 1985, c C-46 is a law that [codifies](https://umaine.edu/canam/educator-resources/elementary-middle/where-is-canada/learn-the-provincesterritories-of-canada/quebec/) most [criminal](https://umaine.edu/canam/educator-resources/elementary-middle/where-is-canada/learn-the-provincesterritories-of-canada/alberta/) offenses and procedures in [Canada](https://umaine.edu/canam/educator-resources/elementary-middle/where-is-canada/learn-the-provincesterritories-of-canada/nova-scotia/). Section 91(27) of the [Constitution Act, 1867](https://en.wikipedia.org/wiki/Constitution_Act%2C_1867), establishes the sole jurisdiction of [parliament](https://umaine.edu/canam/educator-resources/elementary-middle/where-is-canada/learn-the-provincesterritories-of-canada/nunavut/) over criminal law in Canada. Canada's criminal law does not contain any specific prohibitions related to domestic violence, but the Criminal Codeincludes several offenses that are applicable in this context. The Criminal Code was amended by Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2019) to include several provisions related to intimate-partner violence including: offenses relevant to domestic violence including Sections 229-239 (murder, manslaughter and attempts); Section 264 and 264.1 (criminal harassment, uttering threats); Section 265–269 (assault and bodily harm); Sections 271–273 (sexual assault and see Section 278, which allows a person to be charged with sexual assault against their spouse whether or not they were living together at the time); Section 430 (mischief to property); Section 810 (peace bonds, which are often used in specialized domestic violence courts). Bill C-75 added choking, suffocation and strangulation to Section 267 and 272 as forms of bodily harm. Cross-examination of the victim by the accused may also be restricted for some of these offenses (see Section 486.3(2)).

The Criminal Codedoes refer to intimate-partner violence explicitly as an aggravating factor for interim release and sentencing purposes, and provides restitution for household expenses for some victims of domestic violence. For example, Sections 515(3)(a) and 515(6)(b.1) (intimate-partner violence is an explicit factor relevant to interim release, and an accused with a previous conviction related to such violence must show cause why they should be released); Sections 718.2(a)(ii), 718.201 and 718.3(8) (sentencing; it is an aggravating factor where the offender abused their intimate partner and sentencing courts must consider the increased vulnerability of female victims, especially Aboriginal women, and may increase the maximum term of imprisonment for repeat offenders); Section 738(1)(c) (restitution for bodily harm or threats thereof to the offender's intimate partner or child, including "actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, childcare and transportation").

Court orders may also provide that offenders have no contact with their intimate partners (and sometimes their children) and that they refrain from attending particular places as a condition of interim release, probation, conditional sentence orders and peace bonds.[11]

Where offenders are convicted of or discharged for an indictable offense in which violence was used, threatened or attempted against their current or former intimate partner, the court must make an order prohibiting the person from possessing any weapon during the period specified in the order.[12]

Section 127 of the Criminal Codeprovides a general offense of breaching a court order, and may be used for breaches of provincial and territorial restraining orders where the legislation does not include specific breach provisions. In other words, if there is a breach of a restraining order, it will be considered a criminal offense punishable under Section 127 of the Criminal Code.

At the enforcement level, since 1983 the federal government has maintained a pro-charging and pro-prosecution policy for offenses in the domestic violence context that applies to the Royal Canadian Mounted Police ((RCMP) Canada's federal police force) and federal prosecutors.[13] Pro-charging policies require the police to lay charges where they have "reasonable" or "reasonable and probable" grounds to do so. Pro-prosecution policies require prosecutions to proceed where there is a reasonable likelihood of conviction and it is in the public interest to do so.

**Divorce**

The federal government makes laws dealing with marriage and divorce.[14] The Divorce Act, RSC 1985, c 3 (2nd Supp) applies across the country and governs married individuals (including both heterosexual and same-sex couples),[15] who are dissolving their marriage through a divorce. As part of the divorce, individuals can ask the court to deal with "corollary relief" for issues such as parenting time, decision-making responsibilities and child and spousal support.[16]

Changes to the Divorce Act that came into effect in March 2021 require, for the first time, that primary consideration be given to achieving physical, emotional and psychological safety and security for children. The changes to the Divorce Act also added family violence as a relevant factor in making orders that allocate parenting time and decision-making responsibility. In particular, the amendments added the following:

a definition of "family violence," which has been reproduced in Section 3.2 of this report

new factors that are to be considered when making parenting and contact orders, these will include:

any family violence and its impact on, among other things:[17]

the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child

the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child

any civil or criminal proceedings, order, condition or measure that is relevant to the safety, security and well-being of the child

 A more detailed discussion on this topic is contained in Section 6.5 of this report.

**Indians/Indian Reserves**[18]

Canada has special federal laws for Indigenous peoples in Canada (listed below) and these laws have family-related aspects that can overlap with other family-related federal and provincial laws. These overlapping laws cause complexity and have caused issues for Canada in complying with its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). See Section 2 for our commentary on this point.

An Act respecting First Nations, Inuit and Metis Children, Youth and Families, SC 2019, c 24 affirms the inherent jurisdiction of Indigenous peoples to legislate in relation to child and family services and sets minimum standards for an assessment of the best interests of Indigenous children in all such matters across Canada. Mandatory considerations include the direct or indirect impact of family violence on the child and "the physical, emotional and psychological harm or risk of harm to the child" and any civil or criminal proceedings, orders or measures relevant to the safety and well-being of the child. Such factors are to be interpreted in accordance with Indigenous laws, "to the extent that it is possible to do so."

Family Homes on Reserves and Matrimonial Interests or Rights Act, SC 2013, c 20, s 7 (FHRMIRA) authorizes First Nations to develop their own laws for the possession of family homes and the division of property interests.

First Nations may also enact family property laws under the First Nation Land Management Act*,* SC 1999, c 24. If they do so, the provisional rules of FHRMIRA will not apply.[19]

**2. The provincial governments have ultimate power within their province for: (i) the formalization of marriage;**[20] **(ii) property and civil rights;**[21] **and (iii) administration of civil/criminal justice.**[22]**.**

Given the presence of 13 provinces and territories in Canada, with broad jurisdiction over matters including the administration of criminal justice, civil protection orders and other civil matters, family law, property and housing, social assistance, and employment laws, the legislative and policy picture (relevant to domestic violence) is complex.[23] The table below was taken from page 21 of the Koshan article and it illustrates the various provincial and territorial legislation, policies and justice system components relevant to domestic violence and compares differences across jurisdictions to give a sense of the complex intersections facing victims and offenders in this context.

**Table 1: Comparison of provincial/territorial laws including domestic violence (1)**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Province or territory** | **Civil protection orders (2)** | **Family: parenting orders (3)** | **Family: child welfare (4)** | **ADR (5)** | **Residential tenancies (6)** | **Social benefits and/or social housing (7)** | **Employment (8)** | **Limitations (9)** |
| **BC** | X | X | X | X | X | X | X | X |
| **AB** | X | X | X |  | X | X | X | X |
| **SK** | X | [X] | X | X | X | X | X | X |
| **MB** | X | X |  | [X] | X | X | X | X |
| **ON** |  | X |  | X | X | X | X | X |
| **QB** |  |  | X | X | X | X | X | X |
| **NB** | X |  | X |  | [X] | X | X | X |
| **NS** | X | X | X |  | X | X | X | X |
| **PEI** | X |  | X |  |  |  | X |   |
| **NL** | X | X | X | X | X | X | X | X |
| **YK** | X |  | X |  |  |  |  | X |
| **NWT** | X | X | X |  | X |  | X | X |
| **NU** | X | X | X |  |  |  |  | X |

This table includes statutes or regulations that explicitly reference domestic or family violence or related terms, but does not include such references in policy documents or where those terms are read in by interpretation. Square brackets indicate that the relevant provisions are not fully in force as of 31 March 2020.

Civil protection order legislation specific to domestic/family/intimate-partner violence.

Domestic violence is a factor regarding the best interests of a child for guardianship, parenting, custody, access and/or contact orders.

Domestic violence is an explicit factor regarding whether a child is in need of protection/intervention.

Domestic violence is identified as a factor in deciding whether ADR is required and/or in requiring training on domestic violence issues for at least some ADR professionals.

Tenants are granted some relief from tenancy obligations in circumstances of domestic violence.

Domestic violence is included as an explicit factor in providing financial supports for moving, transportation and other costs, and/or in assessing income, assets, needs and eligibility for social benefits and/or social housing.

Domestic violence defined as a workplace hazard and/or allows leave from employment.

No limitations periods for claims of sexual assault (including spousal sexual assault) and/or assault and battery in circumstances involving domestic violence.

**Property and civil rights**

Within the provincial scope (under the property and civil rights powers), there are laws dealing with parenting, custody and access orders, child and spousal support orders, and the division of matrimonial or family property (see Section 6.5 of this report). Unmarried and common-law couples or married couples who are not seeking a divorce, can make their claims for relief under these provincial or territorial statutes. There are also laws dealing with property and housing (see Section 6.6 of this report), social assistance and employment laws (see Section 6.2 of this report).

**Administration of civil justice**

The federal government has exclusive authority over the procedure in the courts that try criminal cases. Federal authority for criminal law and procedure ensures fair and consistent treatment of criminal behavior across the country. However, the provinces administer justice in their jurisdictions. This includes organizing and maintaining the civil and criminal provincial courts and civil procedure in those courts.

In the administration of criminal justice, all provinces have pro-charging and pro-prosecution policies for domestic violence offenses that apply to provincially regulated police forces and prosecutors. Most jurisdictions have specialized domestic violence courts that hear criminal matters in some locations, although the scope of these courts differs greatly within and between jurisdictions. The City of Toronto (Canada's largest city) has an integrated domestic violence court (IDVC) that allows some family law cases and criminal charges to be heard by a single judge. The IDVC operates at the provincial court level, excludes divorce, family property and child protection matters, and hears only summary conviction criminal matters.

Most provinces and territories have also removed or extended limitations periods for civil claims relating to sexual assault and/or assault and battery where the claimant was living in an intimate relationship with the person who committed the assault or battery.[24]

**The court system in Canada**

The court system is roughly the same across Canada. Except for Nunavut, each province has three levels: provincial and territorial, or lower, courts; superior courts; and appeal courts. The [Nunavut Court of Justice](https://en.wikipedia.org/wiki/Codification_%28law%29) has a single-level trial court. [25] Although the provinces and territories administer superior courts, the federal government appoints and pays the judges.[26]

**Provincial and territorial courts**

Provincial courts try most criminal offenses, money matters and family matters. In private-law cases involving breach of contract or other claims of harm, the courts apply common-law principles in nine provinces and in the territories. In Quebec, the courts apply the [Quebec Civil Code](https://umaine.edu/canam/educator-resources/elementary-middle/where-is-canada/learn-the-provincesterritories-of-canada/yukon-territory/?type=2&amp;file=/CCQ_1991/CCQ1991_A.html). Provincial courts may also include specialized courts, such as youth courts, family courts and small claims courts. Each provincial government appoints the judges for its own courts. [27]

**Superior courts**

Superior courts are the highest level of courts in a province or territory. They deal with the most serious criminal and civil cases and have the power to review the decisions of the provincial and territorial courts. Superior courts are divided into two levels: trial level and appeal level. The trial-level courts hear civil and criminal cases. They may be called the Supreme Court, the Court of Queen's Bench or the superior court of justice. The appeal-level courts, or courts of appeal, hear civil and criminal appeals from the above superior trial courts.

**Supreme Court of Canada**

[The Supreme Court of Canada](https://en.wikipedia.org/wiki/Parliament_of_Canada) is Canada's final court of appeal. Its nine judges represent the four major regions of the country. Three of them must be from Quebec, to adequately represent the civil law system. The Supreme Court has two main functions:

It hears appeals from decisions of the appeal courts in all the provinces and territories, and from the Federal Court of Appeal. The Supreme Court's judgments are final.

It decides important questions about the constitution and controversial or complicated areas of private and public law. The government can also ask the Supreme Court for its opinion on important legal questions.[28]

**A note on peace bonds, restraining orders and civil protection orders**

A **peace bond** is a protection order made by a judge in a criminal court (administered by the provinces and territories) pursuant to the federal Criminal Code*.* A victim can apply for a peace bond for protection from anyone, including someone they have had only a dating relationship with, such as a boyfriend or ex-boyfriend. A victim should go to the police for a peace bond if they fear for their safety or the safety of their children. A victim does not need a lawyer to apply for a peace bond. The police will apply for them, and Crown counsel (a lawyer employed by the provincial or territorial government) will handle the case in court. A peace bond lasts up to one year. While both peace bonds and restraining orders from a certain province or territory can be enforced anywhere in that province or territory, only a peace bond is guaranteed to be enforceable elsewhere in Canada.[29]

A **restraining order** is a protection order made by a judge in a civil (family) court pursuant to various provincial or territorial legislation. For a restraining order, a victim must have a family connection — they are (or were) married or living together, or they have children together. A victim can apply for a restraining order if they are afraid for their safety, or for less serious problems, for example, to get their partner or ex-partner to stop calling them every day, or to stop him/her from showing up uninvited at their home or their child's school. A victim may apply for a restraining order with or without a lawyer but a lawyer is recommended. The victim will be responsible for paying the lawyer's fees, unless they qualify for legal aid. A restraining order has no time limit, unless the judge includes a specific expiry date. A restraining order from a certain province or territory will most likely not be considered valid in another province or territory.[30]

**NOTE: A restraining order can also be called a civil protection order depending on the province or territory. For the purposes of this report, we will always refer to a protective order obtained under civil statutes (versus the Criminal Code) as a restraining order. A detailed discussion on this topic is contained in Section 4 of this report.**

**3. The federal and provincial governments share the power over immigration.**

Another important federal statute in the domestic violence context is the Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA). A detailed discussion on this topic is contained in Section 6.6 of this report.

**4. Federal, provincial and territorial laws in this report**

The information included in this report makes specific reference to federal legislation; however, the analysis on provincial and territorial laws will include comment on some of the variances between jurisdictions but is not a full and comprehensive summary of all provincial and territorial laws.

# 1.2 What is the controlling case law?

The Canadian legal system is based primarily on the English common-law system except for Quebec, which is based on the French civil law system and applies the Quebec Civil Code. Case law is made up of the written decisions of judges in the leading court cases and tribunals. Given the number of statutes pertaining to domestic violence in Canada, our research has focused on the statutes. We have included important case law pertaining to domestic violence in our report wherever possible.

# 1.3 What are the specific parts of the court system that address domestic violence?

See "Administration of civil justice" and "The court system in Canada" above in Section 1.1.

# 1.4 What are potential causes of action?

In addition to the criminal causes of action we have set out above, survivors of domestic violence may also make a civil claim for the tort of "assault" and "battery" (assault in this context means a threat to harm someone and battery refers to intentional and unwanted physical contact). The plaintiff (victim) would need to prove damages (typically include out-of-pocket expenses, lost income and compensation for pain and suffering).

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