

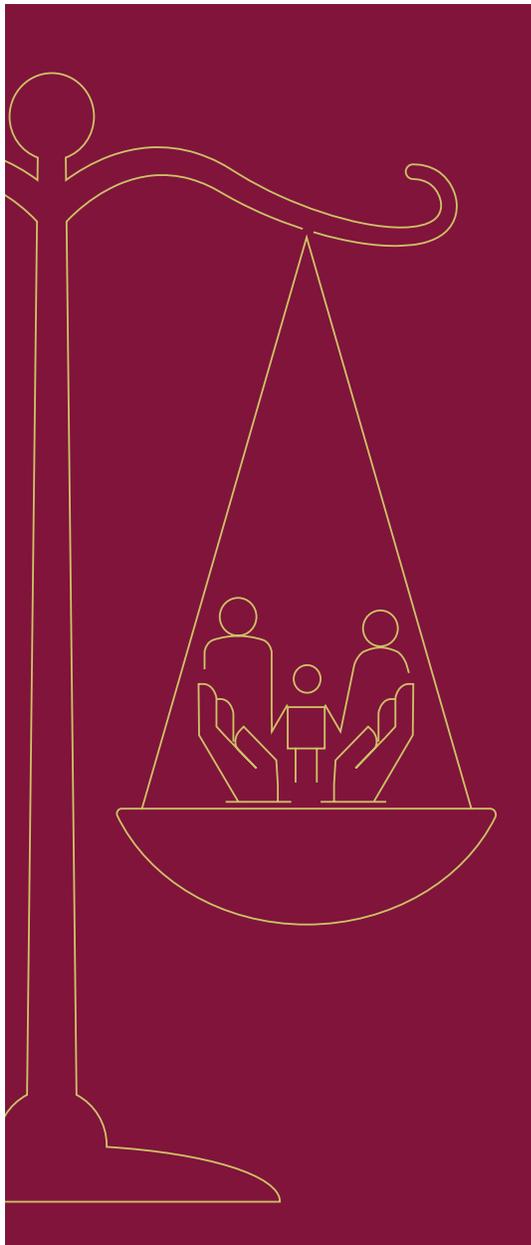
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# LEGAL BULLETIN

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A Bulletin from the Atlantic Chapter of the Family Violence – Family Law Community of Practice

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## Introduction

The Atlantic Community of Practice for *Supporting the Health of Survivors of Family Violence in Family Law* is housed at the Muriel McQueen Fergusson Centre, on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence. Bulletins produced for this project are intended to provide information on current cases, publications and legislative changes that impact the practice of family law where violence is a factor. On December 16, 2022, the New Brunswick legislature passed Bill-17, *Disclosure to Protect Against Intimate Partner Violence Act*, which received Royal Assent but has not yet been proclaimed into force. This legislation parallels that in other Canadian provinces, and is modeled on a UK Act known as “Clare’s Law.”

## Clare’s Law

### Background

Clare Wood was a woman in the UK who was murdered by her ex-boyfriend. Her ex-boyfriend was known to the police, and had a history of violence against intimate partners, and had been previously incarcerated three times. Following Clare’s death, her family became advocates for helping to provide police with the legal means to disclose information about partners’ IPV histories. Despite its name, “Clare’s Law” is not a law, but rather a government policy.

In Canada, five provinces have passed legislation to enact “Clare’s Law.”<sup>1</sup> These provincial laws are intended to be preventative in measure and to provide risk-related information for those seeking to inform their relationship decisions.

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<sup>1</sup> In Ontario, An Act Respecting the Disclosure of Information Related to Intimate Partner Violence did not pass the legislative assembly.

Each version of Clare’s Law has two main elements: the right to ask and the right to know. **The right to ask** allows members of the public and intimate partners to apply for information from police about their partner’s IPV past or potential; **the right to know** provides the police, in certain circumstances, with the opportunity to proactively disclose IPV history information to the public or others on their own initiative.

## Disclosure To Protect Against Intimate Partner Violence Act – Bill-17

The New Brunswick *Disclosure to Protect Against Intimate Partner Violence Act* (“the Act”) is what is called “enabling legislation.” The act itself provides “The Minister or a police force” with the necessary authority to be able to “collect, use or disclose information, including personal information” for purposes defined by the Act.<sup>2</sup>The information would be made available to applicants, i.e. anyone who believes they are at risk of intimate partner violence.<sup>3</sup> In addition to applicants themselves, the Act anticipates regulations permitting others to assist applicants, either by permission or as prescribed by regulation.<sup>4</sup> The Act also enables the police to initiate disclosure of information if the police force reasonably believes that individual could benefit from such disclosure.<sup>5</sup> Anyone to whom information is disclosed is forbidden to share that information.<sup>6</sup> Privacy protections require an applicant to not discuss or disclose information

they receive, although this prohibition does not rise to the level of an offence or carry any punitive weight.

### How Will This Legislation Work?

Before coming into force, regulations will be drafted to accompany the enabling legislation. Unlike Acts, regulations are not debated in the legislature, which means that they can be passed outside of the legislature sitting. There is no requirement for a consultation process with community stakeholders, but the regulations are posted for 28 days for public comment.

In New Brunswick, staff from the Department of Justice will work with police to identify disclosure information and eligibility for the program before preparing the risk assessment. This will ensure consistency across the province rather than leaving assessment to the discretion and judgment of individual officers and police forces. Police will disclose the information to applicants.

IPV is defined in the Act according to the definition in the *Intimate Partner Violence Intervention Act*:<sup>7</sup>

[IPV] means violence committed against a person by another person who is or has been in an intimate personal relationship with the person and includes the following:  
(a) abusive, threatening, harassing or violent

<sup>7</sup> *Intimate Partner Violence Intervention Act*, (SNB 2017, c.5), section 2(1).

<sup>2</sup> *Disclosure to Protect Against Intimate Partner Violence*, Bill-17, sections 3 and 4. The Act obligates the Minister to disclose to the police force handling an application any collected information necessary for the exercise of its powers under the Act (section 5). This provision trumps limitations on disclosure of personal and private information as governed by any other Act, including the *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6.

<sup>3</sup> *Ibid.*, section 9(a); section 9(b) adds “or meet the criteria prescribed by regulation.”

<sup>4</sup> *Ibid.*, section 11(2).

<sup>5</sup> *Ibid.*, section 12.

<sup>6</sup> *Ibid.*, section 14. The Act states that the person receiving the information shall comply with policy and regulation, and not disclose to anyone other than by consent or as obligated to do so under the Act or another law.

behaviour used as a means to psychologically, physically, sexually or financially coerce, dominate and control the other member of the relationship; and  
(b) deprivation of food, clothing, medical attention, shelter, transportation or other necessities of life.

The information disclosed only includes a risk assessment and context information (e.g. timing of any convictions, severity or frequency of incidents) and does not include specifics about the individual's criminal record. Incidents could include reports to the Minister of Social Development regarding child protection concerns, which could potentially cast a wider net than only incidents disclosed to the police. The disclosure is also done entirely verbally with confidentiality and privacy protections around each application.

Part of the application process will require showing that the applicant is at risk of being a victim of IPV.<sup>8</sup> Applicants will be offered and referred to programs and support services at this initial stage of the application even if their level of risk does not reach that required for disclosure of information.

## Other Provinces

Six other provinces – Alberta, Saskatchewan, Newfoundland, Ontario, and Manitoba – have drafted similar legislation.<sup>9</sup> Alberta was the first to enact this type of legislation in 2019, followed by Saskatchewan in 2021. Alberta's legislation was created in partnership with the Police and RCMP, and is run by the same. Newfoundland's legislation is not yet in force, nor is Manitoba's

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<sup>8</sup> Saskatchewan and Alberta explicitly allow for the parents or guardians of children under 18 to apply on their behalf if they believe them to be at risk of IPV.

<sup>9</sup> Disclosure to Protect Against Domestic Violence (Clare's Law) Act, SA 2019, c D-13.5; *Interpersonal Violence Disclosure Protocol (Clare's Law) Act*, SS 2019, c I-10.4; *Interpersonal Violence Disclosure Protocol Act*, SNL 2019, c I-18.1 [not yet in force]; *The Disclosure to Protect Against Intimate Partner Violence Act* [Royal Assent, November 3, 2022]; *An Act Respecting the Disclosure of Information Related to Intimate Partner Violence* [did not pass].

legislation which received Royal Assent on November 3, 2022. Manitoba's Bill deals with the right to know aspect slightly differently than in other provinces, where the police are the point of contact for the Applicant and the distributor of the information. In Manitoba, like New Brunswick, the Application process remains in the hands of the individual at risk.

Police can contact the individual to encourage them to make an application, but do not proceed to make an application on their own initiative.

Noteworthy is that the Ontario bill did not pass in the legislative assembly. Uniquely, it set out what information cannot be used against an Applicant/person at risk in a family court proceeding, or in a proceeding for child protection or child custody.<sup>10</sup> Notwithstanding this additional provision, one of the central concerns raised about the proposed legislation was that the tool might be weaponized against IPV victims who stay with their abusers after receiving disclosure information or being advised of the potential for risk.

## For Further Reflection

New Brunswick's new Act aims to help victims of family violence make more informed decisions regarding their safety and future. Early reports suggest the legislation will be well-used. Since enacting its version of Clare's Law, Alberta has received approximately one application a day, (although notably the disclosure of information could take up to four weeks.)<sup>11</sup> While most family violence is gender based, the legislation is gender-neutral. As such, women with criminal

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<sup>10</sup> "The following cannot be used as evidence against applicant/person at risk in Family Court proceeding or other proceedings relating to child protection and custody:

1. Applicant applied for DI
2. Person at risk did not apply for DI
3. Applicant/person at risk received DI
4. Applicant/person at risk did not act on DI received."

*An Act Respecting the Disclosure of Information Related to Intimate Partner Violence*, section 13.

<sup>11</sup> See Janet French, "Getting info on a partner's criminal history still too hard in Alberta, women's advocates say," CBC News · Posted: Jan 31, 2022 5:00 AM AST

records could be at risk of further violence if the application process were to be used against them.<sup>12</sup>

New Brunswick is a province of small cities and many smaller rural communities, including 15 First Nations. It is also home to a growing newcomer population, who are often in close-knit cultural and religious communities. Accessing information requires the applicant to contact either the police or the Minister of Justice's staff agent. Survivors living in small communities may have a legitimate concern regarding anonymity; for Indigenous individuals, historical conflict with colonial authorities and the police may create significant barriers to the application process. This would be true as well for visible minorities and for members of the LGBTQIA2S+ communities.<sup>13</sup>

Likewise, newcomers who may be at risk for family violence are unlikely to benefit from this legislation. Newcomer women may have linguistic barriers, and be financially and socially dependent on their partner and cultural community. Information for risk assessment purposes would not likely be available regarding recent immigrants. Fear of the police, fear of the Canadian Border Security, fear of censure from their cultural and religious community, are obstacles likely to prevent newcomer women

<sup>12</sup> Disclosure of information regarding past offences could result in a retaliatory response by the applicant.

<sup>13</sup> In New Brunswick, members of the LGBTQIA2S+ communities may be reluctant to disclose violence in their same-sex relationships to the police due to fear of censure; particularly transwomen and gay men.

from engaging in the application process. Clare's Law is most beneficial for applicants for whom their intimate partner's past is an unknown, and who are confident engaging with the police or government agents. Statistically, only 19% of family violence cases are reported to police. While the new Act may allow for the disclosure of information reported to other agencies, such as child protection, the reality of family violence is that it covers a range of behaviors that may not trigger a police or a social development report. As such, it is likely that the Act will serve a very narrow, straight, white and middle-class segment of the population that is comfortable engaging with a law enforcement lens.

Furthermore, the fact that the regulatory process does not require consultation could be seen as a lack of foresight regarding the impact this legislation may have on survivors. The fact that the privacy prohibition does not carry punitive weight could inadvertently put survivors at risk if the perpetrator is "outed" in social media. Escalation during the separation process creates an (often overlooked) increase in intimate partner violence and homicide; consultation about this concern with community stakeholders prior to drafting regulations would be indicated.

#### **This bulletin was prepared by:**

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