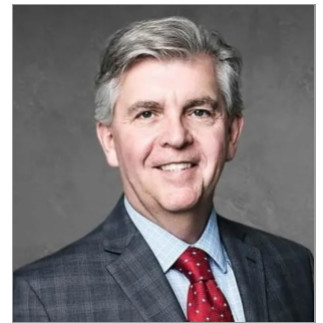


The crime of domestic violence | Michael Cochrane

By **Michael Cochrane**

Law360 Canada (December 18, 2024, 12:13 PM EST) -- In two previous columns I examined the staggering amount of money taxpayers shell out to deal with the consequences of domestic violence and the potential "be careful what you wish for" impact on family law proceedings of a new tort of family violence. In this column I take a look at the proposed changes to the *Criminal Code* with the criminalization of coercive control of an intimate partner. This new crime is being advanced in Bill C-332 and as of this writing is before the Senate for second reading.

Let's take a look at how it is supposed to work.



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Step one: Who is the bill designed to protect?

The law proposes to protect intimate partners, children of an intimate partner, friends and family of an intimate partner and the pets or animals in the care of an intimate partner, when that partner is in a vulnerable position in the relationship. Intimate partner is not defined.

Step two: What conduct is criminalized?

A person will commit an offence if they do certain things to their intimate partner:

1. If a person engages in violence, threatening to use violence or attempting to use violence; (note this is already a crime)
2. If a person coerces or tries to coerce sexual activity; (note this is already a crime)
3. If a person controls or attempts to control or monitor actions, movements, social interactions;
4. If a person controls or attempts to control the way someone parents or cares for a pet or animal in their care;
5. If a person controls or attempts to control employment, or monitor finances, or education;
6. If a person controls or attempts to control expression of gender, appearance, dress, medication, access to health services;
7. If a person controls or attempts to control expression of thoughts, opinions, religious or spiritual beliefs, culture, use of language, access to their community; or
8. If a person threatens to die by suicide or self harm.

Step three: The offence

In order for there to be an offence, the intimate partner must reasonably feel that their safety or the safety of a child, family member, friend or pet is threatened by the accused doing any of those things or threatening to do any of those things. Safety includes physical and psychological.

Step four: What makes the offence different?

The above behaviour is criminalized only if it is part of a pattern of conduct. The pattern can be created by repeating one type of offensive conduct or by doing a combination of the listed actions. But there must be a pattern for it to be seen as coercive to the vulnerable intimate partner.

So, four things — a vulnerable intimate partner, feeling their (or their child's, friend's, family's, pet's) physical or psychological safety is threatened by a pattern of the listed conduct by the accused.

Penalty? Up to 10 years if treated as indictable or alternatively it could proceed by summary conviction offence.

Some realities of family law

All experienced family law lawyers have seen some, if not all, of the above conduct in relationships. We peek through the Judas hole into marriages and common-law relationships and witness all sorts of head-scratching and hair-raising behaviour.

Early on in my career I represented a mother of four daughters who lived under the tyranny of a father who, among other controlling behaviours, counted the squares of toilet paper being used. I have seen people threaten to kill family pets, destroy prized personal possessions, listened to tapes and watched videos of the most vulgar language and behaviour, heard death threats uttered, represented a husband who woke to find his wife standing over him with a shotgun pressed to his forehead, seen not just the photos of cuts, bruises and scars but the actual wounds on wives and mothers, lost clients to suicide, been to their funerals and yes, I have seen my clients murder their spouses. (See the inaugural issue of the OBA's *JUST* magazine and my article *Hearts Broken All Around*.)

And family law lawyers see all of this and other insidious controlling behaviours across a broad multicultural and economic spectrum. But not all homes are equal. Not all cultures are the same. Nor does ugly behaviour have any economic guardrails. Money does not equal civility. And, dare I say it, some cultures are different from others in their marriages and certainly in their separations and divorces. Stop clutching your pearls — any lawyer who denies that simple truth would not pass a lie detector test.

The concerns usually unfold at client intake with answers to questions like, "Where are you from?" or "Where is your husband from?" Certain countries, certain ethnic backgrounds, certain religions are mentioned, and red flags begin to pop up. Gulp, the lawyer now knows that there will be "extra" challenges, increased acrimony and additional dangers. It is a reality.

In the recent *Ahluwalia* trial decision, Madam Justice Mandhane makes the following comment about evidence that she heard during the 11-day trial (*Ahluwalia v. Ahluwalia*, [2022] O.J. No. 908).

The Mother described the incident (an assault in their Brampton home in 2008) as the worst night of her life. When asked in cross examination why she did not complain to police immediately afterwards, the Mother explained that ... she was resigned to the situation because "It happens to every Indian woman." While I do not accept this latter statement for the truth of its contents, it helps to illustrate the Mother's mental state at the time.(Para 101)

Elsewhere, the evidence revealed that her Indian mother's advice had been "Stay quiet, stay happy" (para 99). That suggestion was accompanied by her knowledge that "the respective families expected her to stay in the marriage and neither family would support her if she left." (Para 75.)

Was she a vulnerable intimate partner whose physical and psychological safety was threatened due to a pattern of conduct? Absolutely. Was there a cultural, ethnic component to what was going on in that marriage for 16 years? Absolutely.

I'm not singling out Indian families. Far from it, as I have seen worse from families from other parts of the globe. I am not saying that so-called Anglo-Saxon families are above such conduct. They can be just as bad. But what I am suggesting is that based on what I and other family law lawyers have seen, some individuals from certain cultures are going to find the conduct listed above — especially items 6 and 7 — cutting very close to home. Let's not pretend we didn't know before this law is passed.

I have other questions too.

If a parent challenges a child's expression of gender, dress or appearance to such an extent that the other parent fears for their psychological safety, is this what the proposed law is designed to punish? Is that addressing domestic violence? Is that good for the child? The family? Is that the proper subject matter of criminal court proceedings? I'm left feeling queasy.

Let's assume this law came into force Jan.1, 2025. If a pattern of conduct is required to engage this law then presumably that pattern is one that begins after Jan. 1, 2025. Anything that has happened in that intimate relationship prior to the coming into force could not be classified as criminal on the basis that any person charged with an offence has the right to not be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian law. We cannot begin to tell people that the way they have lived for the past 16 years (as was the case with *Ahluwalia*) — as awful as it may have been — is now a crime. So if enacted this new crime will be dealing with the future, not the past.

We expect enforcement of our criminal laws to deter the behaviour in question, to give an opportunity for rehabilitation and to a lesser extent to show society's repudiation of such behaviour. How are the nuances of this law going to be communicated to families so they can avoid the offensive behaviors? How are the insidious behaviours on that list to be deterred?

We don't want Canadians — vulnerable or otherwise — to be in intimate relationships experiencing the kinds of things listed above. We don't want them to be in relationships where someone is controlling their work, their finances, their education, their thoughts, their dress, their spiritual or religious beliefs, their culture, language, their movements or their opinions. Of course we don't want that, but in criminalizing these behaviours, I hope we are being realistic about the impact this law can have.

The things that lead someone to be in a vulnerable relationship start long before they end up in a lawyer's office looking for an exit. That's where I propose to go in my next column — how do we stop this from ever starting? I have thoughts.

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