September 11, 2017

Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders

By: Jennifer Koshan

Report Commented On: Centre for Public Legal Education Alberta, Domestic Violence: Roles of Landlords and Property Managers

This is the fourth in a series of blog posts examining some of the legal uncertainties facing landlords and property managers who seek to respond to domestic violence on their premises, as identified in the report Domestic Violence: Roles of Landlords and Property Managers (for earlier posts see here, here and here). The report identified several uncertainties that landlords and property managers have about protection orders: lack of knowledge of emergency protection orders and confusion about various types of no-contact orders (at 14), and lack of clarity about how and when tenants may apply for these types of orders (at 45). This post will address these issues, highlighting the differences between various types of no-contact orders provided for by statute and common law and the implications of these different types of orders for landlords, property managers and tenants. It will also include some recommendations for reform of the law around protection orders in Alberta. A more specific issue – when landlords or tenants may change locks in response to these orders – will be dealt with in a subsequent post by Professor Jonnette Watson Hamilton.

Civil Protection Order Legislation – The *Protection Against Family Violence Act*

Alberta's *Protection Against Family Violence Act*, RSA 2000, c P-27 (*PAFVA*), was enacted in 1999 specifically for the purpose of making no contact orders more accessible to victims of family violence (see Alberta Law Reform Institute, Protection Against Domestic Abuse (Report No. 74) (Edmonton: ALRI, 1997) at 1). Although this legislation is more recent than the laws that allow for other forms of no-contact orders to be made, I will deal with it first because it is the most detailed and explicit of the laws providing for no-contact orders and their impact on property interests.

The *PAFVA* enables "family members" to obtain emergency protection orders (EPOs) on an *ex parte* basis (i.e. without notice to the respondent) in circumstances where "family violence" has occurred, the claimant "has reason to believe that the respondent will continue or resume carrying out family violence", and "by reason of seriousness or urgency, the order should be granted to provide for the immediate protection of the claimant and other family members who reside with the claimant" (section 2). Queen's Bench Protection Orders ("QBPOs") are available on an application to the Court of Queen's Bench, when a justice determines that the claimant has been the subject of family violence (section 4).

Family relationships covered by the definition of "family member" in the *PAFVA* include current and former spouses, adult interdependent partners, others residing (or formerly residing) in intimate relationships, persons who are parents of one or more children, regardless of whether they have ever lived together, persons who reside together where one of them has care and custody over the other under a court order, and generally, those related to each other by blood, marriage, adoption, or adult interdependent relationships, as well as children in the care and custody of the above persons (*PAFVA* section 1(1)(d)). The *PAFVA* definition of family member does not include persons who are in intimate relationships but do not reside together – e.g. those in dating relationships. In *Lenz v Sculptoreanu*, 2016 ABCA 111 (CanLII), the Alberta Court of Appeal held that the *PAFVA*:

> was designed and intended to address one subset of abusive relationships – violence among prescribed family members – whereas common law restraining orders are available for broader forms of abusive relationships. The *Act* is a specially designed instrument that seriously abridges the liberty of persons, and its application should be restricted to its intended familial context. (at para 30; see also my post on this case here)

The *PAFVA*'s narrow focus on defined "family members" differs from civil protection legislation in some other provinces and territories. For example, Manitoba's *Domestic Violence and Stalking Act*, CCSM c D93 and Nunavut's *Family Abuse Intervention Act*, SNu 2006, c 18 both cover persons in dating relationships, whether or not they have ever lived together. Recommendations have been made to expand the scope of Alberta's *PAFVA* in a similar way, but so far these recommendations have not been accepted (see Leslie Tutty et al, Alberta's Protection Against Family Violence Act: A summative evaluation (Calgary: RESOLVE Alberta, 2005) at 31; Lana Wells et al, How Public Policy and Legislation Can Support the Prevention of Domestic Violence in Alberta (Calgary: Shift: The Project to End Domestic Violence, 2012) at 39).

Under the *PAFVA*, "family violence" is defined to include acts, omissions, and threats to cause injury or property damage that intimidate or harm family members, as well as physical confinement, sexual abuse and stalking (section 1(1)(e)). Unlike the civil protection order legislation in some other Canadian jurisdictions (see e.g. BC, Manitoba, and Nunavut), and contrary to the recommendation of the Alberta Law Reform Institute (Protection Against Domestic Abuse at 54-55), the *PAFVA* does not include emotional or financial abuse in its definition of family violence. Recommendations have also been made to expand the scope of the *PAFVA* to include these forms of abuse, but have not yet been adopted (see Tutty et al at 30; Wells et al at 38-39).

Importantly, the definitions of "family violence" and "family member" in the *PAFVA* are narrower than the corresponding definitions in the amendments to the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*). Part 4.1 of the *RTA* uses the term "domestic violence", which does include psychological and emotional abuse (see section 47.2(2)). It also includes those living in dating relationships, regardless of whether they have lived together at any time, as well as those in spousal, adult interdependent partner, parental, family, and caregiving relationships (section 47.2(1)). This means that some tenants will be eligible to end their tenancies early under section 47.3 of the *RTA* even if they do not qualify for EPOs or QBPOs under the *PAFVA*. At the same time, where a tenant does obtain an EPO or QBPO under the *PAFVA*, this can be used as

evidence of "domestic violence" under section 47.4(2)) of the *RTA* (as can restraining orders, peace bonds and similar court orders restraining the perpetrator from contacting the victim).

In terms of process, EPOs can be granted by provincial court judges and justices of the peace on an application by the victim in person or by someone on her behalf (e.g. peace officers) by telecommunication, without notice to the respondent (*PAFVA* sections 2(1), 6; *Protection Against Family Violence Regulation*, Alta Reg 80/1999, sections 3, 4(2)). The person hearing the application must consider several factors, and those that might be of particular interest to landlords and property managers include:

- the history of family violence by the respondent,
- the existence of immediate danger to persons or property,
- the best interests of the claimant and her child(ren), and
- the claimant's need for a safe environment to arrange for longer-term protection from family violence. (*PAFVA* section 2(2))

Circumstances that do not preclude granting an EPO include that:

- a no-contact order has been granted previously and has been complied with,
- the respondent is temporarily absent from the residence at the time of the application,
- the claimant is temporarily residing in an emergency shelter or other safe place, and
- the claimant has previously returned to the residence and lived with the respondent after occurrences of family violence. (section 2(2.1))

Where an EPO is granted, it must be served on the respondent as soon as reasonably possible by a peace officer or another person that the judge directs (*PAFVA Regulation*, section 7), and only takes effect upon service (*PAFVA* section 5(1)). If it is impractical for the respondent to be personally served, an application may be made for substitutional service, which could permit service to be made on a person living with the respondent or by leaving the order at the respondent's place of residence, amongst other options (*PAFVA Regulation*, section 8).

Because they are granted without notice to the respondent, EPOs must be reviewed by a justice of the Court of Queen's Bench within 9 working days after the granting of the EPO (*PAFVA* section 2(6)). At the QB hearing, the EPO can be revoked, confirmed, or replaced with a QBPO (section 3(4)). An oral hearing may be directed at this stage, and it is possible that a landlord or property manager with knowledge of the family violence might be called upon to testify.

Under the *PAFVA*, protection orders (both EPOs and QBPOs) can be made for up to one year (and can be extended; see section 7). EPOs may provide for a number of conditions, including:

- no contact or communication with the victim of family violence and her children, including indirect communication through a third party,
- non-attendance at various places (such as her workplace or home, or the children's school),
- exclusive occupation of the residence for a specified period, "regardless of whether the residence is jointly owned or leased by the parties or solely owned or leased by one of the parties",
- an order directing a peace officer to remove the respondent from the residence,

- an order directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings,
- the seizure and storage of weapons where they have been used or threatened to be used to commit family violence, and
- any other provision considered necessary to provide for the immediate protection of the claimant. (*PAFVA* sections 2(3) and (3.1)), emphasis added)

QBPOs may provide for all of these conditions as well, in addition to some other conditions relevant to residential tenancies:

- requiring that the respondent pay the claimant's moving and accommodation expenses,
- restraining either party from taking, converting, damaging or otherwise dealing with property the other party may have an interest in,
- granting either party "temporary possession of specified personal property, including a vehicle, cheque-book, bank cards, children's clothing, medical insurance cards, identification documents, keys or other necessary personal effects", and
- any other provision that the Court considers appropriate. (section 4(2))

Under the *PAFVA*, exclusive occupation orders made as a condition of EPOs or QBPOs do not affect title or ownership interests in property (section 9(1)), and leases are dealt with as follows:

> **s 9(2)** Where a residence is leased by a respondent under an oral, written or implied agreement and a claimant who is not a party to the lease is granted exclusive occupation of that residence, no landlord may evict the claimant solely on the basis that the claimant is not a party to the lease.
>
> **(3)** On the request of a claimant mentioned in subsection (2), the landlord must advise the claimant of the status of the lease and serve the claimant with notice of any claim against the respondent arising from the lease, and the claimant, at the claimant's option, may assume the responsibilities of the respondent under the lease. (emphasis added)

Section 9(2) and (3) thus provide a claimant who has an exclusive occupation order with a limited right not to be evicted simply because they are not a party to the lease, and to take over the lease from the respondent in these circumstances. There is no case law where these sections have been interpreted and applied, but they would appear to give claimants with exclusive occupation orders the ability to remain in the premises as a "tenant" with all of the rights and responsibilities that status entails. Professor Watson Hamilton will review the implications of this section for issues such as changing locks and the payment of rent in her forthcoming post.

Another potentially important provision for landlords and property managers, which again has not been subject to judicial interpretation and appears to be rarely used, is *PAFVA* section 10 allowing for warrants permitting entry. Under this section, a warrant may be issued by a judge following an application by a peace officer, without notice to the respondent, where there are reasonable and probable grounds to believe that a family member may have been the subject of family violence, will be found at the place to be searched, and the person who provided the information has been refused access to the family member. If granted, the warrant permits the person named in it to enter the place named in the warrant, search for, assist and/or examine the family member, and with the person's consent, remove them from the premises.

Pursuant to an amendment made in 2011, the *PAFVA* now creates an explicit offence for failing to comply with a protection order and allows peace officers to arrest without warrant a person whom they reasonably believe to have breached a protection order (sections 13.1, 13.2).

In their evaluation of the *PAFVA* completed in 2005, Tutty et al analyzed data collected from court files with respect to the use of the *PAFVA* from 2002 to 2004. Amongst the findings of this study that may be of interest to landlords and property managers:

- Claimants under the *PAFVA* were predominantly female (92.1%), and respondents were primarily male (94.5%).
- Of the intimate relationships with children associated with them, most applications (75.6%) requested that the order cover the children.
- In a majority of files (85.7%) the respondent had not been charged criminally for the same matter(s) at the time of the EPO application.
- Almost all of the cases (90%) included evidence of previous incidents of violence before the circumstances that were the subject of the EPO application.

Another evaluation is planned of the *PAFVA*, and I will post a comment to ABlawg with more details when they are available.

Common Law Restraining Orders

As noted above, one of the motivations behind the *PAFVA* was to make it easier for victims of family violence to obtain emergency protection than the previous system of common law restraining orders had allowed for. Nevertheless, the practice of issuing restraining orders in circumstances of family violence has not disappeared. This may be explained by the fact that, while an application for a restraining order is more cumbersome and less immediate than an EPO application because it must be made to a superior court (i.e. the Court of Queen's Bench), restraining orders can be made in circumstances that are broader than those in which EPOs and QBPOs can be granted under the *PAFVA*.

Restraining orders are made pursuant to the inherent jurisdiction of superior courts, which is confirmed in section 8 of the *Judicature Act*, RSA 2000, c J-2. Section 13(2) of the *Judicature Act*, which provides for the granting of injunctions, has also been seen as providing superior courts with jurisdiction to grant restraining orders (see *RP v RV*, 2012 ABQB 353 (CanLII)). This means that judges hearing restraining order applications are not restricted to granting orders to "family members" in circumstances of "family violence" as defined in the *PAFVA.* In *Lenz v Sculptoreanu*, *supra* at paras 25-30, the Court of Appeal noted that restraining orders are available to those in dating relationships, who are not covered by the *PAFVA*. In *Boychuk v Boychuk*, 2017 ABQB 428 (CanLII), Justice Veit held that not only are restraining orders available in situations where the applicant has a reasonable and legitimate fear for her safety or that of her children or property, they are also available where the conduct of the respondent threatens the applicant's reputation or privacy, based on a "right to be free from vexatious or harassing conduct" (at para 37; see also *ATC v NS*, 2014 ABQB 132 (CanLII), granting mutual restraining orders to former intimate partners based on threats to each other's reputations).

Like EPOs, restraining orders can also be obtained *ex parte* in urgent circumstances, by filing an originating application with the Court of Queen's Bench or, if a proceeding has already been commenced, by filing a family application (see *Alberta Rules of Court*, Alta Reg 124/2010, rule 12.33(1)). The application must be accompanied by an affidavit or, in the case of an *ex parte* application, by Form FL-14 (Application for a Restraining Order Without Notice in a Family Law Situation (rule 12.33(2))).

Because restraining orders are based on the court's inherent jurisdiction, the conditions that a court might make pursuant to such an order are open-ended. Presumably these could include conditions related to residential tenancies if they were connected to the facts of the case and the grounds for the order. Restraining orders may also include conditions for arrest upon breach of the order, and breaches are considered criminal offences under section 127 of the *Criminal Code*, RSC 1985, c C-46, which creates the offence of disobeying a court order without lawful excuse where no other punishment is expressly provided by law.

Family Law Orders

Exclusive Possession Orders

The *Family Law Act*, SA 2003, c F-4.5 (*FLA*), allows for exclusive possession orders to be made in relation to the family home as part of an order providing for child or spousal support, and can include an order evicting a spouse or adult interdependent partner and restraining them "from entering or attending at or near the family home" (section 68(1)). Under section 67(1), "family home" is defined as property:

> (a) that is owned or leased by one or both spouses or adult interdependent partners,
> (b) that is or has been occupied by the spouses or adult interdependent partners as their home, and
> (c) that is
>
> (i) a house, or part of a house, that is a self-contained dwelling unit,
> (ii) part of business premises used as living accommodation,
> (iii) a mobile home,
> (iv) a residential unit as defined in the Condominium Property Act, or
> (v) a suite. (emphasis added)

Factors relevant to whether an exclusive possession order should be made are enumerated in section 69:

- the availability of other accommodation within the means of both the spouses or adult interdependent partners,
- the needs of any children residing in the family home,
- the financial position of each of the spouses or adult interdependent partners,
- any order made by a court with respect to the property or the support or maintenance of one or both of the spouses or adult interdependent partners, and
- any restrictions or conditions of any lease involving the family home, if applicable.

Although family violence is not explicitly set out as a factor, it is relevant to the best interests of any child (see section 18(2)(b)(vi)), which might bring family violence in as a relevant factor under "the needs of any children residing in the family home".

Exclusive possession orders under the *FLA* have effect notwithstanding a subsequent order in favour of one of the spouses or adult interdependent partners for the disposition of the family home (section 70). These orders may be registered with the Registrar of Land Titles, including in the case of leases that are for longer than three years (section 71(1)(b)). Under section 72 of the *FLA*, "If a family home is leased by one or both of the spouses or adult interdependent partners under an oral or written lease and the court makes an order giving possession of the family home to one spouse or adult interdependent partner, that spouse or adult interdependent partner is deemed to be the tenant for the purposes of the lease" (emphasis added). This provision is even clearer than the *PAFVA* that the party obtaining an exclusive possession order becomes a tenant, leading to corresponding rights and obligations under the *RTA* that Professor Watson Hamilton will discuss.

Almost identical provisions allowing for exclusive possession orders for the "matrimonial home", evicting and restraining spouses, providing for the precedence and registration of such orders, and deeming spouses as tenants exist in the *Matrimonial Property Act*, RSA 2000, c M-8 (*MPA*) (see sections 1(c), 19, 21, 22 and 24). Both Acts also provide for exclusive possession orders for household goods; see *FLA* section 73 and *MPA* section 25.

Only the Court of Queen's Bench has jurisdiction to make exclusive possession orders under the *FLA* and *MPA*. The main difference between the Acts is that the *MPA* only applies to spouses who are or were married, whereas the *FLA* applies more broadly to former spouses and adult interdependent partners.

There is no reported case law applying these provisions in circumstances relevant to domestic violence or residential tenancies.

No-Contact Orders

Alberta's child protection legislation, the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 (*CYFEA*), allows for restraining orders to be made in circumstances where a child has been apprehended or made subject to a supervision order or temporary or permanent guardianship order, and where there are reasonable and probable grounds to believe that a person has or is likely to physically or emotionally injure or sexually abuse the child (section 30). Emotional injury is defined to include "exposure to domestic violence or severe domestic disharmony" (section 3(a)(ii)(C)). Applications for a restraining order in this context are made by a designated director under the *CYFEA* to the Court of Queen's Bench, and can include conditions restraining the person from residing with, contacting or associating with the child, and prescribing contributions to be made for the maintenance of the child (section 30(1) and (3)). This type of no-contact order could be relevant in a residential tenancy situation where the child remains with one of their parents under a supervision order, and the other parent is restrained from contacting the child.

Criminal Code No-Contact Orders

Peace Bonds

Peace bonds are another form of no-contact order, available under section 810 of the *Criminal Code* in circumstances where the applicant fears on reasonable grounds that another person "will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property". Applications for a peace bond involve laying an information before a justice of the peace, who can hear the application or refer it to a summary conviction court for hearing. Peace bonds are granted in the form of a recognizance, with or without sureties, under which the defendant is required "to keep the peace and be of good behaviour for a period of not more than 12 months" (section 810(3)). Other "reasonable conditions … desirable to secure the good conduct of the defendant" can be added to the recognizance, and under subsection (3.2), the justice or summary conviction court "shall consider whether it is desirable, in the interests of the safety" of the defendant's spouse, common-law partner or child, to add to the recognizance either or both of these conditions:

> **(a)** prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be, is regularly found; and
>
> **(b)** prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be.

There are also provisions for peace bonds in the *Criminal Code* for other specific circumstances: fear of forced marriage or marriage under the age of 16 years (section 810.02), fear of commission of a sexual offence (section 810.1), and fear of commission of a serious personal injury offence (section 810.2).

It is common practice for peace bonds to be used in some domestic violence courts in Alberta where the defendant has been charged with a domestic violence-related offence that is relatively minor and there is a low risk of reoffending, if he is willing to accept responsibility for the offence and undergo counselling (see e.g. Leslie Tutty and Jennifer Koshan, "Calgary's Specialized Domestic Violence Court: An Evaluation of a Unique Model" (2013) 50 Alberta Law Review 731 at 745).

Bail/Sentencing Orders

The *Criminal Code* also allows no-communication and no-attendance orders to be made as a condition of the release of an accused person on bail (see sections 499(2), 503(2.1), 515(4) and (4.2), 522) and as a condition of a probation order made when a person is sentenced for a domestic violence-related offence (see section 732.1).

There are no specific provisions in the *Criminal Code* dealing with the impact on residential tenancies of peace bonds or bail/sentencing orders providing for no contact and/or no attendance at the family residence.

Concluding Remarks

This post shows that there is good reason for landlords and property managers to be confused about the various forms of no-contact orders and their impact on residential tenancies. There is currently a hodgepodge of different types of protection orders that are available in domestic violence cases, with differing implications for residential tenancies – sometimes explicit and sometimes implicit. Landlords and property managers are also restricted in their ability to obtain information about whether tenants have protection orders and of what type, in light of privacy protections in the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 and *Personal Information Protection Act*, SA 2003, c P-6.5 (see my earlier post Landlords, Tenants, and Domestic Violence: Clarifying Privacy Issues).

As a practical matter, victims of domestic violence who are granted protection orders providing for conditions such as exclusive occupation or possession of the family home should advise their landlords of such, and preferably provide them with a copy of the order, particularly if they wish to change the locks or make arrangements to take over the residential tenancy agreement. Professor Jonnette Watson Hamilton's forthcoming post will look at these issues in more detail.

The research in this post was supported by a grant from the Social Sciences and Humanities Research Council (SSHRC) for the project Domestic Violence and Access to Justice Within and Across Multiple Legal Systems (Koshan, Chan, Keet, Mosher and Wiegers).

This post may be cited as: Jennifer Koshan "Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders" (11 September, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/09/Blog_JK_Landlords_Protection_Orders.pdf