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Domestic Violence and Legal Responses to COVID-19 in Alberta

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Matters Commented On: Ministerial Order No 2020-011 (Community and Social Services); Court of Queen's Bench Of Alberta, Amended Master Order #2 Relating to Court's Response to the COVID-19 Virus; Court of Queen's Bench Of Alberta, Pandemic Operations/ FAQ; The Provincial Court of Alberta, COVID-19 Pandemic Planning for the Scheduling of Matters

Many commentators have remarked on how COVID-19 and government orders to self-isolate will lead to increased rates of domestic violence and adversely impact victims of domestic violence seeking protection. Last weekend, for example, UN Secretary General António Guterres remarked that there has already been a "horrifying global surge in domestic violence" and urged "all governments to make the prevention and redress of violence against women a key part of their national response plans for COVID-19." The law clearly has a significant role to play in this context. As noted in a previous post, domestic violence matters engage many legal issues: civil protection order law, criminal law, family and child protection law, residential tenancies law, social assistance and housing law, and employment law, to name a few. This post reviews some of the efforts of lawmakers and courts in Alberta to respond to domestic violence issues in light of the COVID-19 pandemic and identifies some areas where further measures are needed. My focus is on domestic violence – in other words, violence in the context of intimate partner relationships – rather than child or elder abuse. Child and elder abuse cases also present challenging issues in the current pandemic, but they are beyond the scope of my analysis here.

Civil Protection Order Law

Alberta's *Protection Against Family Violence Act*, RSA 2000, c P-27 (*PAFVA*), enables family members who experience family violence to obtain emergency protection orders (EPOs) without notice to the respondent when family violence has occurred, the claimant believes that the respondent will continue or resume the family violence, and immediate protection of the claimant and other family members is required due to seriousness or urgency (section 2(1)). Normally EPO applications must be brought in person by the claimant to a Provincial Court judge or justice of the peace, while designated persons (such as peace officers) can apply for EPOs via telecommunication (*Protection Against Family Violence Regulation*, Alta Reg 80/1999, section 4). Telecommunication is not defined in the *PAFVA* or Regulation, nor in the *Interpretation Act*, RSA 2000, c I-8, but my understanding is that it includes applications by telephone and fax.

Ministerial Order No 2020-011 (Community and Social Services), made on April 7, 2020, now allows applications for EPOs to be made by telecommunication by claimants as well. While this order does not appear to be available yet on the Alberta government's website, it was circulated

in the Law Society of Alberta's COVID-19 update on April 8, 2020. Ministerial Order No 2020-011 will lapse on August 14, 2020 or sooner if the Order is terminated by the Minister of Community and Social Services or the Lieutenant Governor in Council.

Provincial Courts are still hearing urgent matters "as required", including applications for EPOs (see The Provincial Court of Alberta, COVID-19 Pandemic Planning for the Scheduling of Matters; Provincial Court of Alberta Calgary and Edmonton Family & Youth Covid-19 Pandemic Plan; Notice to Self-Represented Litigants in Family Law Matters). Ministerial Order No 2020-011 now appears to allow EPO applications to be made to either the Provincial Court or justices of the peace by telephone or fax rather than in person, including by claimants themselves. The Order explains the rationale for this change as follows: "the requirement for an application for an emergency protection order to be made in person may increase the risk of spread of COVID-19 to all persons involved in an application for such an order, and possibly members of the general public, and significantly impact their health and safety…" This is a positive change that will make EPOs more accessible to victims of family violence during the pandemic.

EPOs must be reviewed by the Court of Queen's Bench within nine working days of the order being granted (*PAFVA* section 2(6)). The Court of Queen's Bench is continuing to hear emergency and urgent matters via telephone and videoconferencing pursuant to Amended Master Order #2 Relating to Court's Response to the COVID-19 Virus, and EPO reviews are included in the list of "Matters of Highest Priority Requiring Immediate Attention". Applications for civil restraining orders, which are also available in domestic violence cases – particularly where the victim does not meet the definition of family member in the *PAFVA* – are also on this "highest priority" list. Master Order #2 directs parties and/or counsel who believe their matter is urgent not to attend the courthouse, but to arrange for the scheduling of a hearing by contacting the Court via email, with regional email addresses provided in the Order.

Criminal Law

Detention and bail review orders are also on the Court of Queen's Bench "highest priority" list, and Provincial Courts continue to hear in-custody and urgent criminal matters. These categories would include an accused person who was detained for domestic violence related offences. Here, it is important to note that recent amendments to the *Criminal Code*, RSC 1985, c C-46 made intimate partner violence an explicit factor relevant to interim release, and an accused with a previous conviction related to intimate partner violence must show cause why they should be released (sections 515(3)(a) and 515(6)(b.1)). The burden of "showing cause" – or making the case for interim release – is normally on the Crown, but it is shifted to the accused where they have a previous conviction for intimate partner violence.

Whether to release an accused person pending the resolution of their matter presents challenging issues during the pandemic due to evidence that prisons and remand centres are sites that easily facilitate the spread of COVID-19. Courts will be required to weigh the need for protection of domestic violence victims against the need to maintain confidence in the administration of justice (see section 515(10) of the *Criminal Code*), which has been interpreted to include

consideration of COVID-19 related impacts on prisoners and prison staff (see *R v. Rajan*, 2020 ONSC 2118 (CanLII)).

One matter that does not appear in the COVID-19 related materials of the Alberta Provincial Court is peace bonds. Peace bonds are a common disposition used by Domestic Violence Courts (DV Courts) to resolve criminal domestic violence related charges where the accused is prepared to accept responsibility for their actions (see *Criminal Code* section 810). All Provincial Court criminal matters scheduled to be heard before May 22, 2020 will be re-scheduled, and this would include matters scheduled for DV Court. In cases involving ongoing safety issues, if the accused was not subject to an interim release order with restrictions on communicating with or being near the complainant, EPOs or restraining orders could be used as an alternative.

Family and Child Protection Law

The *Family Law Act*, SA 2003, c F-4.5 (*FLA*), includes family violence as a consideration when determining the "best interests of the child" for the purposes of guardianship, parenting and contact orders (section 18(2)(b)(vi)). As noted above, Provincial Court is still hearing "urgent" family matters. The Court of Queen's Bench has stipulated that "orders where there is a risk of violence or immediate harm to one of the parties or a child" or "where there is a risk of removal of a child from the jurisdiction" are to be considered highest priority matters. According to the Court's Amended Master Order #2, "urgent orders relating to parenting time, contact or communication with a child (that cannot reasonably be delayed)" are otherwise in the category of "Urgent Matters Requiring Priority Attention".

Applications for an emergency/urgent hearing to the Court of Queen's Bench may be made using forms available on the Court's website and are being handled by justices assigned to "triage" matters. Urgent family applications are still being heard by Provincial Court, with regional details available here. A search on Can LII reveals that there are no reported Alberta decisions dealing with when family matters will meet the criteria for being "highest priority" or "urgent". At a Canadian Bar Association (CBA) Alberta Branch webinar I attended on April 8, 2020, Chief Justice Moreau and Associate Chief Justice Nielson of the Court of Queen's Bench indicated that written reasons from the Court on decisions regarding "urgency" are unlikely right now because the Court is in triage mode. Nor are appeals available from decisions on urgency, but parties can bring matters before the Court again if circumstances change. (A recording of the webinar is available here for CBA members only.)

On the question of urgency, there is very recent case law in Ontario setting out some general principles for parenting disputes in light of COVID-19: see *Ribeiro v. Wright*, 2020 ONSC 1829 (CanLII); *Matour v. Hashemian*, 2020 ONSC 2112 (CanLII)). The latter case involved a father's attempt to withhold parenting time from a mother who was a health care worker at risk of exposure to COVID-19 through her employment. Courts will need to be sensitive to the dynamics of domestic violence in these types of cases, including the ways in which coercive control can be used by abusers. Coercive control has been defined as "an ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control" (Evan Stark, Re-presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (Paper prepared for

Violence Against Women: Complex Realities and New Issues in a Changing World Conference, Montreal, 2012) [unpublished] at 7). As noted by Deanne Sowter here, coercive control "also includes use of the justice system to continue a pattern of abuse." Domestic violence is gendered, and it must also be recognized that women make up a disproportionate number of health care workers, so the potential for gender-based harm in the context of parenting disputes during COVID-19 is significant (see Canadian Centre for Justice Statistics, Family violence in Canada: A statistical profile, 2018; see also Centre for Global Development, Pandemics and Violence Against Women and Children, April 2020).

During the CBA webinar, the Chief Justice and Associate Chief Justice also encouraged parties to settle matters without the need for a hearing whenever possible. While this approach is understandable in light of the pandemic, it is important to note that settlement of family law issues may be very difficult in cases where there has been domestic violence, due to the power and control issues that can be at play in this context. That is the case whether the parties are attempting to settle matters through counsel or through alternative dispute resolution processes (see here for further discussion).

The Court of Queen's Bench's general description of highest priority matters also includes "Emergency matters, in which serious consequences to persons or harm to property may arise if the hearing does not proceed". In Ontario, there is case law indicating that the significant depletion of family property may be an urgent matter requiring priority hearing: see *Thomas v. Wohleber*, 2020 ONSC 1965 (CanLII). The inclusion of this type of case as a high priority matter is an important means of protecting against financial abuse during the pandemic.

Also included in the Court of Queen's Bench list of highest priority matters are "Emergency Adult Guardianship and Trusteeship Orders, where there is a risk of harm to an individual or their property". "Urgent Adult Guardianship and Trusteeship Orders" are included on the urgent matters requiring priority attention list. While the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-42, does not explicitly refer to domestic violence, it does provides for guardianship and trustee orders on an urgent basis for adults who lack the capacity to make decisions about personal matters, where it is necessary for someone to make decisions on their behalf to prevent death or serious physical or mental harm to the adult or serious financial loss in relation to their property (sections 27, 48). It might also be expected that the need for guardianship and trustee orders will increase during the COVID-19 pandemic as domestic violence rates increase, and it is important for the Court to treat these matters as high priorities.

In the area of child protection law, the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, considers "exposure to domestic violence or severe domestic disharmony" in determining appropriate interventions (section 1(3)). At the same time, "intervention services should be provided to the family in a manner that supports the abused family members and prevents the need to remove the child from the custody of an abused family member" (section 2(f)). Urgent child protection matters continue to be heard by the Provincial Court of Alberta (see here).

Residential Tenancies Law

The *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*), allows victims of domestic violence to terminate their residential tenancy agreements with 28 days notice without any penalties imposed by early termination (section 47.3(4)(b)). Victims must obtain a certificate from a designated authority – including health practitioners, social workers, police, shelter and victim support workers (see section 47.4(4)) – confirming that there are grounds for terminating the tenancy. Grounds require finding that the tenant has been subject to domestic violence or has obtained an EPO, restraining order, peace bond or other no-contact order and there is a risk to the safety of the tenant and/or their children if the tenancy continues (section 47.4(2)). This requirement for a certificate may be harder to fulfill in light of social isolation requirements, unless designated authorities are providing certificates without the need for an in-person meeting. While there are a few Ministerial Orders related to COVID-19 regarding residential tenancies – for example on payment of rent and rent increases – there does not appear to be anything regarding a modification of the certificate requirement for early termination because of domestic violence.

Not all jurisdictions require such certificates for early termination of residential tenancies. For example, Ontario does not (see *Residential Tenancies Act, 2006*, SO, 2006, c 17, section 47.3). This is an opportune time to reconsider if a verification requirement is necessary in Alberta, or if we should follow the Ontario approach for access to justice and safety reasons – and not just during the pandemic. For a comparison across jurisdictions, see Jonnette Watson Hamilton, "Reforming Residential Tenancy Law for Victims of Domestic Violence" (2019) 8 Annual Review of Interdisciplinary Justice Research 248, available here.

Social Assistance and Housing Law

The *Income Support, Training and Health Benefits Regulation*, Alta Reg 122/2011, made under the *Income and Employment Supports Act*, SA 2003, c I-0.5, provides specific allowances to individuals dealing with abusive situations, including for moving and household start up, telephone services, and transportation, as well as to individuals residing in recognized emergency shelters as a result of escaping abuse (Schedule 4, sections 13, 14, 20, and 26). The federal government has provided increased financial support to shelters as a result of COVID-19, but they will still not be able to house and protect all potential victims. Even before the pandemic, Alberta shelters have not had the capacity to house everyone fleeing domestic violence and seeking shelter.

Social housing may be another option for domestic violence victims and their children. Under the *Social Housing Accommodation Regulation*, Alta Reg 244/1994 (*SHAR*), made under *Alberta Housing Act*, RSA 2000 c A-25, applicants for social housing as a result of an emergency situation, including family violence, may lose their eligibility if the household repudiated or committed a breach of a tenancy agreement, abandoned the premises, or the tenancy was terminated as a result of a contravention of the *RTA*. As noted in a previous post, it appears that victims of domestic violence must rely on the new early termination provisions in the *RTA* to avoid losing eligibility under the *SHAR*.

Employment Law

The *Employment Standards Code,* RSA 2000, c E-9 (*ESC*), was amended in 2018 to include domestic violence leave of up to 10 days per calendar year (section 53.981(1)). Domestic violence leave is unpaid and is available for obtaining medical attention, victim or legal services, law enforcement assistance, counselling, and relocation. Although many people are working at home as a result of COVID-19, these provisions may still be useful to victims of domestic violence who require time off work to attend to domestic violence related issues. Ministerial Order 18.2020 (Labour and Immigration), issued on April 6, 2020, provides expanded employment leave (also unpaid) for employees caring for family members under quarantine and caring for children who are home as a result of the closure of schools or child care facilities. This expanded leave might be useful for domestic violence victims who need more than the 10 days/year provided under section 53.981(1).

Conclusion

Domestic violence cases present challenges to the legal system in normal times, given the multiple laws, policies and justice system components that intersect in these cases. In times of crisis when social isolation is required, the challenges can only intensify. There are important measures that Alberta courts and government have taken to date that will respond to some of these challenges, some of which I have outlined here. The courts are to be commended for their initiative, as are the Canadian Bar Association (Alberta Branch) and Law Society of Alberta for their efforts to keep lawyers up to date on legal developments related to COVID-19. Individual lawyers also deserve our thanks for their efforts to provide advice and representation during these unprecedented times – especially lawyers who are working with vulnerable clients. For example, while Calgary Legal Guidance has suspended in-person legal services at its office and outreach locations, its volunteer and staff lawyers are still providing free legal advice and assistance by phone and electronically.

More can still be done, and – to return to the advice of UN Secretary General António Guterres – it is critical that decision makers use a domestic violence lens that includes an understanding of gender-based violence when responding to the COVID-19 pandemic and the legal issues it creates.

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