

Domestic Violence and Legal Issues Related to COVID-19, Part II

By: Jennifer Koshan

In my last [post](#), I discussed domestic violence dimensions of the responses of the government and judiciary in Alberta to the COVID-19 pandemic, focusing primarily on provincial law and policy. This follow-up post reviews additional provincial laws and policies (including those related to protection orders and employment/occupational health and safety), federal laws (including those governing protection orders on First Nations reserves, immigration, and employment), and the overarching human rights context for responses to domestic violence and COVID-19 by governments and private actors such as employers.

Civil Protection Order Laws

As I indicated in my last post, victims of family violence may obtain emergency protection orders (EPOs) under Alberta's *Protection Against Family Violence Act*, [RSA 2000, c P-27 \(PAFVA\)](#), and EPO applications are now available by telecommunication under [Ministerial Order No 2020-011](#) (Community and Social Services). On April 7, [the government introduced Bill 8: Protecting Survivors of Human Trafficking Act](#). A full analysis of Bill 8 is beyond the scope of this post, but I will note that the NDP opposition has raised concerns about the speed with which the government is attempting to push the Bill through the legislature during the pandemic, which hampers the ability to conduct consultations on the Bill with frontline workers (see Alberta Hansard for April 8, 2020 [here](#) and [here](#); see also Nigel Bankes' post on Bill 12 for a similar example of a rushed bill on orphan well liability).

Bill 8's significance in the domestic violence context is that it would create a regime for "human trafficking protection order" applications similar to EPO applications under *PAFVA*. Bill 8 would allow those applications to be made by telecommunication by survivors themselves (s 2(2)), defined to include "the use of a telephone, email, facsimile or other electronic means of transmission" (s 1(1)(j)). This availability of telecommunication applications under Bill 8 suggests that the temporary availability of such applications under *PAFVA* might be considered on a more permanent basis when [Ministerial Order No 2020-011](#) expires.

Both *PAFVA* (s 10) and Bill 8 (s 7) also include provisions for "warrants permitting entry" into premises where there are reasonable grounds to believe a victim will be found and access to them is being refused by the respondent. It appears that warrants permitting entry are not often used under *PAFVA* – there is no reported case law dealing with s 10. However, these types of provisions may take on a new utility during a pandemic when there is social isolation.

It is critical to note that provincial legislation such as *PAFVA* does not apply fully on First Nations reserves because of federal jurisdiction over "Indians and land reserved for Indians"

under s 91(24) of the *Constitution Act, 1867*. In *Derrickson v Derrickson*, [1986] 1 SCR 285 and *Paul v Paul*, [1986] 1 SCR 306, the Supreme Court of Canada held that provincial legislation providing for exclusive possession orders for the family home was inapplicable on First Nations reserves. While provincial protection order legislation may apply on reserves to the extent that it is only used to prohibit contact and communication with a victim of family violence, rather than access to property, this limited scope of application created a potential gap for First Nations victims of family violence living on reserve.

In 2013, the federal government responded to this situation by passing the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, [SC 2013, c 20](#) (*FHRMIRA*). *FHRMIRA* provides for the recognition of First Nations' laws for the possession of family homes and the division of family property on reserves (s 7). *FHRMIRA* also established provisional rules that apply until First Nations enact their own laws, including the availability of emergency protection orders (EPOs) in situations involving family violence (s 16). Victims of family violence residing on First Nations reserves may obtain EPOs on a without notice basis by applying to a "designated judge" either in person or by telecommunication (see *Emergency Protection Orders Regulations*, [SOR/2014-266](#), s 3, with "telecommunication" defined to include telephone, email and fax in s 1).

It is up to the provinces to designate judges to hear applications for EPOs under *FHRMIRA* (see s 2(1)), and Alberta has not yet done so (see [here](#)). The Alberta government should take this step, not just as a response to COVID-19, but as a longer-term measure under *FHRMIRA*'s provisional rules to ensure that First Nations victims of family violence have full access to EPOs. As noted by Elysa Darling [here](#), the lack of designated judges creates serious access to justice issues for Indigenous women, especially because of the high rates of violence they experience (which may be exacerbated because of COVID-19, social isolation requirements, and lack of housing on reserves).

Failing the designation of judges for EPO applications by Alberta, *FHRMIRA* also makes provision for exclusive occupation orders (EOOs) for family homes on reserve (s 20(1)). Applications for EOOs are made to the Court of Queen's Bench in Alberta, and one of the factors relevant to making an EOO is the existence of family violence (s 20(3)(g)). The Court of Queen's Bench has stated in Amended [Master Order #2 Relating to Court's Response to the COVID-19 Virus](#) that "orders where there is a risk of violence or immediate harm to one of the parties or a child" are to be considered highest priority matters for hearing during the pandemic, and this would presumably include applications for EOOs involving family violence.

Social Assistance Law

As I noted previously, the *Income Support, Training and Health Benefits Regulation*, [Alta Reg 122/2011](#) provides specific benefits for individuals fleeing abuse and for those residing in emergency shelters as a result of escaping abuse (Schedule 4, sections 13, 14, 20, and 26). One important intersection between this legislation and federal legislation is with respect to social benefits for persons with certain types of immigration status under the *Immigration and Refugee Protection Act*, [SC 2001, c 27](#). For sponsored immigrants who are eligible to receive income support and benefits, the usual provisions with respect to the sponsor's assets and financial

resources do not apply where the sponsored immigrant was abused or abandoned by their sponsor (*Income Support, Training and Health Benefits Regulation*, ss 28(2) and 54(2)). This intersection of provincial and federal legislation can be important in providing benefits for immigrant women who are sponsored by spouses who are or become abusive.

Employment and Human Rights Law

As noted in my last post, the *Employment Standards Code*, [RSA 2000, c E-9 \(ESC\)](#), was amended in 2018 to include domestic violence leave of up to unpaid 10 days per calendar year (section 53.981(1)). Similar leave is available to federally regulated employees who are victims of family violence under recent amendments to the *Canada Labour Code*, [RSC 1985, c L-2](#) (see s 206.7, which provides leave of up to 10 days per year, 5 of which are paid if the employee has completed 3 consecutive months of continuous employment with the employer).

One other area of employment law that deals with domestic violence that I have not yet addressed is occupational health and safety (OHS) law. I am grateful to ABlawg reader (and lawyer) Sharon Roberts for raising the issue of employers' obligations under OHS law now that many employees are working from home, where they may be more vulnerable to domestic violence.

In 2017, Alberta passed a new *Occupational Health and Safety Act*, [SA 2017, c O-2.1 \(OHSA\)](#), which obliges employers and supervisors to ensure that their workers are not subjected to and do not participate in harassment or violence at work (ss 3, 4, 5). "Violence" is defined as "whether at a work site or work-related ... the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence" (ss 1(yy)). Employers of 20 or more workers are required to establish – in consultation with their health and safety committee and/or affected workers – a health and safety program that identifies existing and potential hazards to workers, including harassment and violence (s 37(1)(b)). Alberta's [Occupational Health and Safety Code](#), Part 27 (*Code*), requires these employers to develop policies and procedures on potential workplace violence and to train workers on these issues (and training involves not just the provision of information to workers, but also a requirement of "practical demonstration that the worker has acquired knowledge or skill related to the subject-matter" (see *OHSA*, s 1(xx)). The *Code* provides that when an employer is aware that a worker is likely to be exposed to domestic violence at work, the employer "must take reasonable precautions to protect the worker and any other persons at the work site likely to be affected" (*Code*, s 390.33).

Similar provisions exist under the *Canada Labour Code*, which states that federally regulated employers shall "take the prescribed steps to prevent and protect against violence in the work place" (s 125(1)(z.16)). The *Canada Occupational Health and Safety Regulations*, [SOR/86-304](#), were recently amended to add Part XX, Violence Prevention in the Work Place. While domestic violence is not mentioned explicitly in the *Canada Labour Code* or *Regulations*, "work place violence" is defined broadly to include "any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee" (*Regulations*, s 20.2). Under Part XX of the *Regulations*, federal employers are required to develop policies and procedures addressing work place violence.

Ontario, New Brunswick and Newfoundland also create duties for employers to protect against the risk of domestic violence related harms in the workplace, focusing on exposure of workers to physical injury and threats thereof (*Occupational Health and Safety Act*, [RSO 1990, c O.1](#), s 32.0.4; *General Regulation - Occupational Health and Safety Act*, [NB Reg 91-191](#), ss 2, 374.1-374.3; *Occupational Health and Safety Regulations*, 2012, NLR 5/12, ss 22, 23). Other provinces are more like the federal jurisdiction in dealing with workplace violence generally and not domestic violence specifically (see e.g. *Occupational Health and Safety Regulation*, [BC Reg 296/97](#), ss 4.27 – 4.30; *Occupational Health and Safety Regulations*, 1996, [RRS c O-1.1 Reg 1](#), s 37). Alberta’s OHS legislation takes the broadest approach by explicitly referencing domestic violence and including psychological injury and harm in its definition.

These rules were developed in response to the reality that domestic violence issues can affect employees in their non-home-based workplaces. As the [Canadian Labour Congress](#) (CLC) notes, “Abusers may ... excessively call, email, or text victims while they are at work, come into the workplace, or stalk the victim”, and that these (and other) behaviours may have work-related impacts on victims and their co-workers, as well as abusers themselves. The CLC also recognizes, though, that “Work can be a safe haven for someone who is experiencing violence at home.” What are the obligations of employers now that many employees are working in the very place where they may be most vulnerable to violence given social isolation rules due to COVID-19?

Employer obligations flow not only from occupational health and safety legislation, but also from human rights legislation. The *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#), s 7 creates a duty on employers not to refuse to employ or continue to employ any person, or to discriminate against any person regarding terms and conditions of employment, on the basis of a number of protected grounds. Protected grounds include disability, which creates an obligation on employers to accommodate employees with COVID-19 or at risk of contracting COVID-19 (see the detailed analysis of the BC’s Human Rights Commissioner [here](#) on COVID-19 as a disability). Employers are typically facilitating this accommodation by having employees work at home – and indeed that is what governments have effectively required through social isolation rules for non-essential workers.

Protected grounds also include gender and family status. Domestic violence is gendered, and engages family status because it involves intimate partner relationships. An argument can therefore be made that employers have a human rights obligation to not create adverse working conditions for employees who are potential victims of domestic violence. However, employers can also defend their conduct based on a bona fide occupational requirement (see s 7(3) of the *Alberta Human Rights Act*) and their overarching obligation is to reasonably accommodate employees unless it is impossible to do so without undue hardship.

The human rights implications of domestic violence and COVID-19 are recognized by Amnesty International in [A call for human rights oversight of government responses to the COVID-19 pandemic](#) and by the Inter-American Commission on Human Rights in its [statement](#) on COVID-19 and gender-based violence, which calls on governments (including Canada as a member of the Organization of American States) to consider their due diligence obligations in this context. At a more local level, helpful resources on human rights and COVID-19 have been provided for

employers and service providers by human rights commissions across the country (see e.g. the statements of the [Alberta Human Rights Commission](#), [BC's Human Rights Commissioner](#), and [Ontario Human Rights Commission](#)). A consistent message from these sources is the need to think about measures that respond to COVID-19 through lenses that include a focus on human rights and violence against women (and the intersection between the two).

Returning to the question of employer obligations towards employees who may be victims of domestic violence, occupational health and safety legislation spells these out most clearly. Under Alberta's *Occupational Health and Safety Act*, "Every employer shall ensure, as far as it is reasonably practicable for the employer to do so... that none of the employer's workers are subjected to or participate in harassment or violence at the work site" (s 3(1)(c)); the same language is used for "supervisors" – those with charge of a work site or authority over a worker – in s 4(1)(a)(v)). "Work site" is defined to mean "a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation" (s 1 (bbb)). This definition is broad enough to include work that is being done from home.

Under Part 27 of Alberta's *Occupational Health and Safety Code*, a violence prevention policy must:

- express the employer's commitment to eliminating or, if that is not reasonably practicable, controlling the hazard of violence;
- include employer investigation of any incidents of violence and a commitment to take corrective action to address the incidents;
- include confidentiality obligations and disclosure rules (s 390.1, emphasis added).

Violence prevention procedures must include:

- the measures the employer will take to eliminate or, if that is not reasonably practicable, to control the hazard of violence to workers;
- the procedures to be followed by a worker to obtain immediate assistance when an incident of violence occurs, and when reporting violence (s 390.2, emphasis added).

Alberta's *Occupational Health and Safety Code* also includes rules for employees working alone, where "assistance is not readily available if there is an emergency or the worker is injured or ill" (Part 28, s 393(1)). In these conditions, employers must provide an effective communication system that includes regular contact by the employer or their designate (s 394).

Under the *Canada Labour Code*, the key wording is that "every employer shall, in respect of every work place controlled by the employer" as well as "in respect of every work activity carried out by an employee ... to the extent that the employer controls the activity,... take the prescribed steps to prevent and protect against violence in the work place" (s 125(1)(z.16)). "Work place" is defined to mean "any place where an employee is engaged in work for the employee's employer" (s 122(1)), which is again broad enough to include the employee's home if they are working there under the control of the employer. Under the *Canada Occupational Health and Safety Regulations*, federal employers shall:

- develop a work place violence prevention policy (s 20.3),
- identify all factors that contribute to work place violence, including the location of work (s 20.4(c)); assess the potential for work place violence (s 20.5); and implement systems to eliminate or minimize the risk of work place violence, “if feasible” (s 20.6),
- develop and implement written emergency notification procedures where immediate assistance is required in response to work place violence (s 20.8)
- where they become aware of alleged work place violence, try to resolve the matter with the employee as soon as feasible (s 20.9)
- provide information, instruction and training on work place violence to employees (s 2.10)

Some employers may already have workplace policies that address issues related to risks of domestic violence for employees working at home (e.g. procedures for safe reporting and safety planning). If not, employers would do well to include these issues in existing policies and related procedures. Such policies should be developed with the appropriate consultations with workplace safety committees and employees with lived experience of domestic violence. Absent the existence of specific policies, both the Alberta and federal schemes use the language of reasonableness or feasibility when setting out employer obligations to prevent and protect against workplace violence. What might we expect the reasonable employer to do in situations where employees are working at home and might be at particular risk of domestic violence?

First, there are employer obligations around awareness. Alberta has an [OHS Bulletin on Domestic violence in the workplace](#), which provides signs of domestic violence that employers ought to be aware of. While many of these indicators would be more observable in person, others could be seen in the context of working from home, including reduced productivity and engagement, absenteeism (e.g. from online meetings), and obvious injuries. The Alberta Council of Women’s Shelters (ACWS) has provided specific resources on Domestic Violence and COVID-19 (see [here](#)), which include other signs that employers and co-workers should be aware of, for example, when an employee: stops using their camera during check-ins, wears more makeup than usual during online meetings, or stops participating altogether; has had an ex-spouse move back into their home, claiming to have COVID-19 and needing a place to isolate; shares misinformation about the public health requirements that their partner told them, likely as a way of controlling or manipulating them.

OHS also has a fact sheet on [Working from home during a pandemic](#), which does not mention the risk of domestic violence specifically but does recommend that employers implement regular check-ins with employees who are working from home. The [ACWS](#) recommends that co-workers who are concerned about their colleagues also check in on them virtually, when it is safe to do so.

The [OHS Bulletin on Domestic violence in the workplace](#) and the [ACWS](#) both recommend the creation of individual safety plans for employees who are at risk of domestic violence (and their children), and the ACWS lists a number of resources to assist in the development of such plans. The ACWS and Health Sciences Association of Alberta (HSAA) also have brochures for [supervisors](#) and [co-workers](#) that include a simplified assessment tool for risk of domestic violence and possible responses.

What is “reasonable” or “feasible” for individual employers will depend on the circumstances, but the key point is that employers turn their minds to the increased risk of domestic violence for employees who are working at home, and use both an OHS and human rights lens in thinking about how to protect and support these employees.

Outside the specific context of employment, the Alberta government has produced a fact sheet on [Family violence during COVID-19](#), which includes information about a toll-free Family Violence Info Line available 24/7 in over 170 languages (310-1818; the Alberta Women’s Shelters line is 1-866-331-3933) and an anonymous web chat available daily from 8 a.m. to 8 p.m. at alberta.ca/SafetyChat.

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