

## COVID-19, Domestic Violence, and Technology-Facilitated Abuse

**By:** Jennifer Koshan, Janet Mosher, and Wanda Wiegers

On 27 May 2020, [UN Women](#) launched the “shadow pandemic” public awareness campaign, drawing attention to the global spike in domestic violence linked to COVID-19. Phumzile Mlambo-Ngcuka, Executive Director of UN Women, describes the idea of a shadow pandemic as follows: “Even before the [COVID-19] pandemic, violence against women was one of the most widespread violations of human rights. Since lockdown restrictions, domestic violence has multiplied, spreading across the world in a shadow pandemic.”

We are in the midst of a multi-year research project on domestic violence and access to justice across Canada, but decided to shift our attention this spring/summer to the legal and policy responses to domestic violence during the COVID-19 pandemic. One aspect of our research examines the responses of courts, including what sorts of matters they consider “urgent” enough to hear during the pandemic, and how urgent cases involving domestic violence are being dealt with on the merits. We found 67 relevant cases reported on Can LII between March 16 and June 1, 2020, with relevance meaning that the cases deal with domestic violence issues that were related to the pandemic in some way. These cases span the areas of family, child protection, criminal, and protection order law. One cross-cutting theme in the case law is surveillance and technology-facilitated abuse, which is the subject of this post. We also provide some comments on access to justice issues raised by our case law sample.

### The Literature

Technology-facilitated abuse is the use of technology – typically electronic devices or platforms – to harass and control another person. This form of abuse is gendered, as [recognized](#) in the Government of Canada’s Strategy to Prevent and Address Gender-Based Violence. It does not always occur in the context of intimate partner relationships, but that is a common context. As noted by [VAWnet](#), an online resource library from the United States National Resource Centre on Domestic Violence, “[t]echnology can be very helpful to survivors of domestic violence... but is also often misused by abusers to harass, threaten, coerce, monitor, exploit, and violate their victims.” Surveillance is one of the common objectives of technology-facilitated abuse, but it can also occur without the use of technology.

Enhanced opportunities for surveillance of women by their abusers and for technology-facilitated abuse more broadly are concerns raised in the literature on the shadow pandemic. Women living with intimate partners during social isolation may experience increased policing of their activities and interactions with others. Whether technology-facilitated or not, this type of surveillance makes it more difficult for survivors to seek domestic violence services and legal remedies. Women may also be subjected to online abuse and harassment at greater levels

because their work, school, or other activities have moved online (see e.g. Luke's Place, [Tech Safety Toolkit: Identify, manage and document tech abuse](#), UN Women, [Online and ICT facilitated violence against women and girls during COVID-19](#)).

These issues engage with multiple areas of law. For example, we might imagine surveillance and the use of technology leading to:

- criminal harassment, an offence under s 264 of the *Criminal Code*, [RSC 1985, c C-46](#);
- emergency protection order applications under legislation such as Alberta's *Protection Against Family Violence Act*, [RSA 2000, c P-27](#), which includes stalking in the definition of family violence (s 1(1)(e)(v)),
- tort actions for the non-consensual sharing of intimate images, which are available in Alberta, Saskatchewan, Manitoba, Nova Scotia, and Newfoundland/Labrador (see [here](#) at note 106), or perhaps criminal charges for the non-consensual publication of intimate images (see s 162.1 of the *Criminal Code*).

Surveillance might also intensify family law disputes, for example, where technology is used to harass survivors during parenting time or access exchanges or to ground child protection complaints (see Jessica Klein, "[Virtual Parental Visitation Could Have Unintended Consequences for Abuse Survivors](#)", *The Atlantic* (23 June 2020)). Most concerning, surveillance and technology can produce safety issues for women and children, including during on-line visitation where the abuser gains clues about their whereabouts. Specific groups of women, such as those with disabilities, may be particularly at risk of these harms (see Sarah Katz, "[Many Deaf Women Aren't Safer at Home](#)", *bitchmedia* (22 June 2020)).

## The Case Law

Surveillance and technology-facilitated abuse that take advantage of social isolation measures are not apparent in the 15 criminal cases in our sample, although there are a few cases where the accused was alleged or found to have used or deprived the victim of technology to harass or abuse them prior to the pandemic:

- *R v Fraser*, [2020 ONSC 2045 \(CanLII\)](#) (accused confined complainant, deprived her of access to cell phone);
- *R v Medeiros*, [2020 ONSC 2890 \(CanLII\)](#) (accused told complainant he had people watching her and that her phone was tapped);
- *R c Swierkot*, [2020 QCCQ 1926 \(CanLII\)](#) (accused charged with criminal harassment based on numerous cell phone calls to complainant, some from jail);
- *R v Reimer*, [2020 BCCA 102 \(CanLII\)](#) (accused sent Facebook messages to the complainant in breach of a no-contact order; the Court of Appeal upheld a probation condition not to publish any information about her on the Internet or social media).

There are also cases involving the distribution of intimate images, but again these are not directly related to the pandemic:

- *R v OK*, [2020 ONCJ 189 \(CanLII\)](#) (accused distributed intimate images of multiple partners “as an additional means of abuse and attempted control” (at para 18));
- *R v Studd*, [2020 ONSC 2810 \(CanLII\)](#) (accused videotaped two sexual assaults against his ex-partner and shared one video to a pornography site).

Although these cases involve pre-pandemic violence, they reveal how surveillance and technology can be and are used as forms of intimate partner violence, with the social isolation of the COVID-19 pandemic only enhancing this possibility. It will be important to continue tracking cases after June 1, 2020 to get a better sense of whether survivors have been able to bring these issues to the attention of law enforcement – which social isolation and surveillance may also impede – and if so, how they are being handled by the courts.

One case in our sample was a review of an emergency protection order (EPO) that included an element of surveillance. In *MP v NJ*, [2020 CanLII 29335](#) (NLPC), MP drove by, photographed, and videotaped the home of his ex-partner, NJ, and their children on multiple occasions in April 2020. The court acknowledged that “[t]he use of videotaping can, in certain circumstances, be used as a means of intimidation” but it can only form the basis for an EPO where it “causes the other person to reasonably fear for their safety” (at paras 59-60; see also the *Family Violence Protection Act*, [SNL 2005, c F-3.1](#) (FVPA), s 3(1)(f), which defines family violence to include “conduct that causes the applicant to reasonably fear for his or her safety, including following, contacting, communicating with, observing or recording a person”). Reasonable fear was found to be absent in this case because the videotaping occurred during scheduled access visits when MP was not prohibited from contacting NJ or their children (at para 62), and the court set aside the EPO. While the surveillance here does not appear to have been directly related to the COVID-19 pandemic, abusers may be able to engage in these sorts of tactics more often during social isolation because they can expect to find their victims at home, or because they are counting on protective legal remedies being more difficult for victims to obtain. Indeed, another reason the court gave for setting aside the EPO was that the original application was deficient because it was prepared and sworn to by counsel for NJ and did not contain a statement made by NJ under oath, as required by the FVPA (at para 13).

In the family law realm, *Triestino v Triestino*, [2020 ONSC 3311 \(CanLII\)](#), [2020 ONSC 3695 \(CanLII\)](#), concerned an application by a mother to vary a temporary order giving the father in-person access to their two children, which was supervised in the paternal grandparents’ home. The father repeatedly texted and emailed the mother while the children were with him on access visits during the COVID-19 pandemic, making this one of the few cases in our sample involving mid-pandemic abuse. The father’s actions led to charges of criminal harassment and breach of a restraining order. The family court granted the mother’s request to suspend in-person access “until supervised access facilities are permitted to re-open safely” and ordered access by the father via videocalls with the children in the interim, to be initiated by the mother (2020 ONSC 3695 at para 16). While this may seem to be a positive decision in some respects, the court might have gone further to require supervision of the videocalls to minimize opportunities for online abuse (though the mother did not request this). Supervision of online access by designated agencies is a measure that has been called for by anti-violence advocates as one way of mitigating the harms of technology-facilitated abuse during the COVID-19 pandemic (see Klein, above).

Another family case, *Thomas v Wohleber*, [2020 ONSC 1965 \(CanLII\)](#), included an allegation made in an ex parte motion that the father was tracking the mother's vehicle and was using spyware on her cell phone. This, combined with the fact that he had drained more than \$750,000 from their joint line of credit (allegedly because he suspected she was having an affair and wanted to prevent her from hiring a lawyer), illustrates how surveillance can be used as a technique of coercive control, economic abuse, and legal bullying. Although these events occurred before the pandemic, the court's finding that the family property issue was worthy of an urgent hearing was based in part on the father's financial control of his ex-partner (at para 43). This is an important recognition in light of the heightened risks of economic abuse during the COVID-19 pandemic (see Natasha Bulowski, "[Economic abuse: hard to spot, harder to recover from](#)", *Canadian Centre for Policy Alternatives* (30 June 2020)).

A final family law case worth noting is *AMD v KG*, [2020 ABQB 325 \(CanLII\)](#). This case involved a father's application for shared parenting, and included an allegation by the mother that he had posted Facebook messages accusing her of criminal and exploitive maltreatment of the children, which led to the children's school contacting her to check on their safety (at para 23). The father also admitted to having engaged in "intrusive camera-monitoring" to "help ensure the mother was not neglecting the children" (at para 28), and was facing multiple criminal charges for uttering threats against and unlawful confinement and assault of the mother, weapons offences, and endangering the lives of the two children (at para 2). In spite of these allegations and admissions, the father was granted an interim order for generous access to the children and joint decision-making with the mother, in part because "the thrust of the mother's complaints is the father's treatment of *her*, not the children" (at para 34, emphasis in original).

This case illustrates how courts can minimize the impacts that abuse against the mother has on the children. The decision does not directly cite the *Family Law Act*, [SA 2003, c F-4.5 \(FLA\)](#), which explicitly includes family violence as a consideration when determining the best interests of the child, including the impact of family violence on the child's safety and well being (s 18(2)(b)(vi)). That being said, it is not clear if this is a case to which the *FLA* applies, or whether the *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), governs the dispute between the parties (amendments to the *Divorce Act* that will add family violence as a factor relevant to the best interests of the child have been postponed to March 2021 as a result of the pandemic; for a critique see [here](#)). In any event, the court's failure to consider the impact of domestic violence on the children is especially troubling in light of the COVID-19 pandemic. Social isolation may impair the ability of potential support networks such as schools to monitor the well-being of victims of violence and their children, contributing to the shadow pandemic – although in this case, the technology-facilitated nature of the abuse actually brought it to the school's attention.

Overall, these cases illustrate the ways in which surveillance and technology can contribute to intimate partner violence, as well as the challenges courts may have in recognizing these forms of abuse. Although the violence and use of technology in most of these cases pre-dated the COVID-19 pandemic, the literature cited above notes how social isolation can amplify these behaviours and their associated risks, including the difficulty in seeking legal remedies for abuse when one is being surveilled.

## Access to Justice

There is another reason why *AMD v KG* is noteworthy: it is the only reported decision from Alberta during our selected timeframe that pertains to domestic violence and COVID-19. Alberta is not the only jurisdiction with minimal case law in our sample: there were only 4 reported decisions from British Columbia, 2 from Nova Scotia and Newfoundland/Labrador, and none at all from Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, or the Territories. The low number of reported cases reinforces the concern that survivors of abuse may experience challenges in seeking legal remedies, particularly during a pandemic such as COVID-19. But it may also be the case that courts are not producing written reasons for decision in the cases they do hear. In a webinar held in April 2020, for example, the Chief Justice and Associate Chief Justice of the Alberta Court of Queen’s Bench indicated that written reasons on “urgency” decisions were unlikely because the Court was in triage mode (see [here](#)).

This is an important issue from an access to justice perspective. Judicial decisions, even on questions of urgency, should be publicly available to provide transparency and accountability. General court pronouncements on what types of cases count as “urgent” (see e.g. [here](#)) are important and helpful, but so too are individual judicial decisions interpreting these criteria. As [noted by Pamela Cross](#), the Legal Director of Luke’s Place (a centre in Oshawa, Ontario with legal resources and support for abused women), “those who have consulted with a lawyer are wary of the urgency threshold imposed by the courts, even though they need a restraining order or exclusive possession of the home.” Written decisions are an important means of combatting these perceptions about lack of access to the courts – or perhaps confirming them, especially in family law cases where the parties are urged to “work it out” before using the courts’ resources. In Alberta, for example, one of the few reported decisions on urgency is *SAS v LMS*, [2020 ABQB 287 \(CanLII\)](#). While this case did not involve domestic violence and is therefore not part of our sample, the court did note that family litigants should engage in “good faith attempts to communicate ... and good faith attempts to arrive at reasonable solutions” before coming to court during the pandemic, “barring a restraining order or Family Protection Order” (at paras 38-39). Exhortations (or perhaps even conditions) to negotiate may disregard the power differentials that characterize abusive relationships and the increased risk factors and reduced options that COVID-19 entails.

Although many courts were scrambling in the early weeks of the pandemic to continue to provide hearings in person or remotely, we hope that the lessons learned in spring 2020 will make for a more seamless and transparent response to urgent legal issues in a future crisis of this sort (or in a second wave of the COVID-19 pandemic). To return to the VAWnet argument noted above, technology can contribute to the risks associated with intimate partner violence and the shadow pandemic, but it can also facilitate access to services and legal remedies for survivors of abuse. However, it must also be recognized that not all women have access to technology, including many women from marginalized communities. Women without such access were identified as having a heightened risk of gender-based violence during the COVID-19 pandemic by [Human Rights Watch](#).

[More broadly](#), survivors of violence need access to housing, shelters, childcare, employment, and financial resources. COVID-19 has laid bare the gendered unravelling of these threads of social

safety nets in Canada and elsewhere, but it has also intensified the impetus for strengthening those nets. As argued by many commentators, including [UN Women](#), the [UN Foundation](#), and the [World Bank](#), and aptly summed up by [UN Secretary General](#), we need to “put women and girls at the centre of efforts to recover from COVID-19.”

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