

Canadian Journal of Family Law

Volume 35
Number 1 *Domestic Violence and Access to
Justice Within and Across Legal Systems*

2023

Preventive Justice? Domestic Violence Protection Orders and their Intersections with Family and Other Laws and Legal Systems

Jennifer Koshan

Follow this and additional works at: <https://commons.allard.ubc.ca/can-j-fam-l>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Jennifer Koshan, "Preventive Justice? Domestic Violence Protection Orders and their Intersections with Family and Other Laws and Legal Systems" (2023) 35:1 Can J Fam L 241.

The University of British Columbia (UBC) grants you a license to use this article under the [Creative Commons Attribution- NonCommercial-NoDerivatives 4.0 International \(CC BY-NC-ND 4.0\) licence](#). If you wish to use this article or excerpts of the article for other purposes such as commercial republication, contact UBC via the Canadian Journal of Family Law at cdnjfl@interchange.ubc.ca

**PREVENTIVE JUSTICE?
DOMESTIC VIOLENCE PROTECTION
ORDERS AND THEIR INTERSECTIONS
WITH FAMILY AND OTHER LAWS AND
LEGAL SYSTEMS**

Jennifer Koshan^{*} ^{}**

Civil protection order legislation is a distinctive response to domestic violence with its focus on immediate safety and access to justice. Although the legislation was motivated by the need to broaden protective remedies for domestic violence and make them more accessible, similar remedies continue to exist and be utilized in the family law arena—for example, exclusive possession orders for the family home and restraining orders related to family disputes. Some jurisdictions also allow civil protection orders to contain conditions relevant to family law disputes, such as interim parenting orders. Intersections, overlaps and potential conflicts also exist between civil protection order law, criminal law, and child protection law.

This article examines Alberta as a case study for exploring the intersections of civil protection orders, family law, and other legal areas and systems. It explores several research questions, including: How are family law disputes affected by

^{*} Jennifer Koshan, Professor, Faculty of Law, University of Calgary.

^{**} Many thanks to Irene Oh, Cassidy Newfield, Madyson Schmidt, Tamera Tupou, and Danika Szucs for research assistance, to Janet Mosher, Wanda Wiegers, and anonymous reviewers for comments on an earlier draft, to the editors for all their work on this special volume, and to all the participants who agreed to be interviewed for this project. Funding from the Social Sciences and Humanities Research Council is gratefully acknowledged. All errors are mine.

the presence of civil protection order proceedings, and vice versa? What are the interactions between the criminal, child protection, and civil protection order systems? What are the access to justice concerns that arise at these intersections and under the civil protection order system more broadly? These questions are answered using several methodologies: a comparative analysis of civil protection order legislation, a case law review, interviews with Alberta-based lawyers and service providers, and observations of civil protection order hearings. The article examines the benefits, barriers, and pitfalls of civil protection orders and concludes with recommendations for further research and reform of the legislation and its application in practice.

That is a number one playbook response from a respondent counsel. I mean, that's the greatest hit like you just expect that song is going to be played every time.¹

I. INTRODUCTION

Civil protection order legislation is a distinctive response to domestic violence with its focus on immediate safety and access to justice.² The implementation of this legislation in Canada started in the 1990s and was motivated at least in part by the need to broaden, and make more accessible, preventive remedies for domestic violence beyond those available in the family and criminal law spheres. However, criminal no-contact orders, as well as civil and family law restraining and exclusive possession orders, continue to be utilized, creating some overlaps and intersections with protection order legislation.³ There are

-
- ¹ Interview 9 (referencing the accusation that EPO applications are made to influence the family law system). For a description of the interviews see Part III.A.
- ² While this legislation provides remedies for “family violence” broadly, my focus will be on cases involving violence between intimate partners. For an explanation of terminology, see the Introduction to this volume, Wendy Chan et al, “Introduction: Domestic Violence and Access to Justice within the Family Law and Intersecting Systems,” (2023) 35:1 Can J Fam L 1.
- ³ Civil protection orders may also be used to verify domestic violence for the purposes of other remedies, such as early termination of residential tenancies. See e.g. *Residential Tenancies Act*, SA 2004, c R-17.1, s 47.4(2)(a)(i). This intersection is beyond the scope of this paper.

also concerns expressed in the case law about the scope of protection orders in the context of parenting disputes.

This article considers Alberta as a case study for exploring the intersections of civil protection orders with other areas of law, focusing primarily on family law. Although some of the issues raised here are particular to Alberta, this examination is also useful for other jurisdictions with protection order legislation that are grappling with its interactions with other laws and legal systems. Alberta is a worthwhile selection for a case study in light of the availability of independent evaluations of the *Protection Against Family Violence Act*,⁴ comparative studies of protection order legislation that cover Alberta,⁵ and a previous exploration of the intersections between protection orders and criminal law that includes Alberta.⁶ To date, there appears to be little consideration of the

⁴ See Howard Research, *Implementation and Impact of the Protection Against Family Violence Act: Final Report* (Edmonton, AB: Government of Alberta, 2000); Leslie Tutty et al, *Alberta's Protection Against Family Violence Act: A Summative Evaluation* (Calgary: RESOLVE Alberta, 2005). See also *Protection Against Family Violence Act*, RSA 2000, c P-27 [*PAFVA*].

⁵ See Jennifer Koshan & Wanda Wieggers, "Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces" (2007) 19:1 CJWL 145; Karen Busby et al, "Civil Domestic Violence Legislation in the Prairie Provinces: A Comparative Legal Analysis", in Jane Ursel, Leslie Tutty & Janice LeMaistre, eds., *What's Law Got To Do with It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) 197; Jennifer Koshan, Janet Mosher, & Wanda Wieggers, "A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems" (April 2022), online (pdf): *SSRN*, <ssrn.com/abstract=3995519>.

⁶ Koshan & Wieggers, *ibid.*

interactions of protection order legislation with family law in Canada,⁷ and this case study seeks to contribute to the literature in that regard.

The specific questions addressed in this paper include: How are family law disputes affected by the presence of protection order proceedings, and vice versa? What are the interactions between protection order legislation and other areas of law, and what are the access to justice concerns that arise at these intersections?⁸ These questions are answered using several methodologies. Part II provides a comparative analysis of Alberta's *PAFVA* and other Canadian protection order legislation by examining evaluations of and literature related to specific statutes and their intersections with other legal domains. Part III examines the operation of *PAFVA* and intersecting laws and legal systems in practice through a case law review, interviews with lawyers and domestic violence service providers, and observations of protection order review hearings.

This analysis reveals several concerns with protection order legislation, both on paper and in practice:

⁷ For an exception see Linda C Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed, (CanLIIDocs 2: Canadian Legal Information Institute, 2020) at s 9.2.2.17, online (ebook): *CanLII* <canlii.ca/t/ng>. Chapter 9 was previously published as Linda C Neilson, *Enhancing Civil Protection in Domestic Violence Cases: Cross Canada Checkup* (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick, 2015).

⁸ I take a broad view of access to justice that includes procedural and substantive equality, justice, and fairness. See the Introduction to this volume, *supra* note 2.

accusations and assumptions that survivors—who are mostly women⁹—use protection orders to influence family law disputes; the ubiquity of mutual protection orders due to system-level pressures; the reluctance of judges to include children in protection orders and of police to apply for and enforce protection orders; and other issues that contribute to a lack of access to justice for survivors and their children, particularly those who are members of marginalized groups.¹⁰ Part IV concludes with recommendations for reform of protection order legislation and its application in practice, focusing on the need to better prioritize the safety of survivors and children.

⁹ On the gendered nature of domestic violence, see the Introduction to this volume, *supra* note 2. My interviews indicated that in Alberta, cisgender women constitute the vast majority of EPO claimants, cisgender men are the vast majority of respondents, and the relationships in question are almost always heterosexual (interviews 2, 7, 9, 10, 13). See also Tutty et al, *supra* note 4 at 44.

¹⁰ Children can also be survivors of violence through their exposure to domestic violence or direct abuse, including coercive control. However, given my focus on violence against intimate partners, I use the term “survivor” to reference adults experiencing domestic violence and consider children distinctively. I also use the term “claimant” when referring more specifically to persons seeking protection orders. Similarly, I use the terms perpetrator/respondent depending on the context.

II. AN ANALYSIS OF PROTECTION ORDER LEGISLATION AND ITS INTERSECTIONS¹¹

At the outset, it is important to acknowledge that protection orders—whatever their legal source—do not always have their intended impact in preventing domestic violence.¹² There are numerous instances in Canada of women being killed by (ex)partners who were subject to protection orders.¹³ Moreover, as the National Action Plan to End Gender-Based Violence recognizes, legal remedies such as protection orders are only one tool for preventing and responding to domestic violence.¹⁴ However, in those cases

¹¹ The analysis of legislation in this section draws on the NAP report, see Koshan, Mosher & Wiegers, *supra* note 5. I do not include domestic violence disclosure legislation, the latest initiative to be introduced in Canada. See *ibid*, 8-10 and in Alberta, see the *Disclosure to Protect Against Domestic Violence (Clare's Law) Act*, SA 2019, c D-13.5.

¹² See e.g. Isabel Grant, “Intimate partner criminal harassment through a lens of responsabilization” (2015) 52:2 Osgoode Hall LJ 552 at 560 (noting that protection orders often fail to prevent criminal harassment); Michele Pathé, Rachel Mackenzie & Paul Mullen, “Stalking by law: Damaging victims and rewarding offenders” (2004) 12 JLM 103 at 108 (arguing that protection orders may actually provide opportunities for stalkers to “further their harassment” by forcing contact at court hearings and providing the stalker with an audience and opportunity for revenge).

¹³ See e.g. Grant, *ibid*; Myrna Dawson et al, #CallItFemicide: *Understanding sex/gender-related killings of women and girls in Canada, 2020* at pp 41-46, online (pdf): *Canadian Femicide Observatory for Justice and Accountability* <femicideincanada.ca/callitfemicide2020.pdf>.

¹⁴ Women and Gender Equality Canada, *National Action Plan to End Gender-Based Violence*, Pillar Three, Responsive Justice System (9 November 2022), online: *WAGE* <femmes-egalite-genres.canada.ca>.

where protection orders could make a difference by deterring violent conduct and providing supports to survivors, it is important that they be widely available and easily accessible to have the most potential impact. Indeed, during the “shadow pandemic” of domestic violence that accompanied the COVID-19 pandemic, various international bodies recommended that states should ensure survivors have meaningful access to emergency protection orders.¹⁵

Prior to the introduction of protection order legislation, restraining orders and orders for the exclusive possession of the family home were available as protective remedies either explicitly in family law statutes or implicitly as a matter of superior courts’ inherent jurisdiction. These orders could be obtained *ex parte*, but they typically required an action to be commenced and for the application to be heard during regular court sittings.¹⁶ Issues including delay, cost, and other forms of inaccessibility led most Canadian provinces and territories to introduce civil protection order legislation beginning in the mid-1990s.¹⁷

[/en/ministers-responsible-status-women/national-action-plan-end-gender-based-violence.html](#)>.

¹⁵ Jennifer Koshan, Janet Mosher & Wanda Wiegers, “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2021) 57:3 Osgoode Hall LJ 739 at 790.

¹⁶ See e.g. Alberta’s *Family Law Act*, SA 2003, c F-4.5, s 68(1)(c); *Family Property Act*, RSA 2000, c F-4.7, s 19(1)(c).

¹⁷ Koshan & Wiegers, *supra* note 5 at 152-153. See *Family Law Act*, SBC 2011, c 25, Part 9 [BC *FLA*]; *PAFVA*, *supra* note 4; *Victims of Interpersonal Violence Act*, SS 1994, c V-6.02 [SK *VIVA*]; *The Domestic Violence and Stalking Act*, CCSM c D93 [MB *DVSA*]; *Code of Civil Procedure*, CQLR c C-25.01, arts 509, 510 [QB *CCP*]

The key remedy under these statutes is the emergency protection or intervention order (EPO). EPOs are generally available where family violence has occurred, the claimant reasonably believes the family violence will continue, and where circumstances of seriousness or urgency require the immediate protection of the claimant and other family members who reside with her.¹⁸ EPOs are typically available without notice and around the clock from justices of the peace or magistrates when applications are made by designated persons such as police, child protection workers, or lawyers—otherwise claimants must apply in court.¹⁹

(providing for protection orders in situations of violence more broadly); *Intimate Partner Violence Intervention Act*, SNB 2017, c 5 [NB *IPVIA*]; *Domestic Violence Intervention Act*, SNS 2001, c 29 [NS *DVIA*]; *Victims of Family Violence Act*, RSPEI 1988, c V-3.2 [PEI *VFVA*]; *Family Violence Protection Act*, SNL 2005, c F-3.1 [NL *FVPA*]; *Family Violence Prevention Act*, RSY 2002, c 84 [YK *FVPA*]; *Protection Against Family Violence Act*, SNWT 2003, c 24 [NWT *PAFVA*]; *Family Abuse Intervention Act*, SNu 2006, c 18 [NU *FAIA*]. Ontario's *Domestic Violence Protection Act*, SO 2000, c 33 was never proclaimed in force; the *Family Law Act*, RSO 1990, c F.3, s 46 and *Children's Law Reform Act*, RSO 1990, c C.12 provide for restraining orders.

¹⁸ See e.g. *PAFVA*, *supra* note 4, s 2(1). Non-emergency orders are also available in several jurisdictions (see e.g. *PAFVA*, *ibid*, s 4 (providing for “King’s Bench Protection Orders” [KBPOs]).

¹⁹ *PAFVA*, *ibid*, ss 2 & 6; *Protection Against Family Violence Regulation*, Alta Reg 80/1999, s 3(a), ss 3-4 [*PAFVR*]; under the BC *FLA*, applications can be made by persons on behalf of at-risk family members, but they must be made to court, see BC *FLA*, *supra* note 17, s 183(1)(a).

There are several features of protection order legislation that vary significantly across jurisdictions. Taking *PAFVA* as a focal point, it has relatively narrow definitions of who is eligible for protection orders and in what circumstances. In Alberta, protection orders are available to claimants in intimate relationships only if they are or were married, cohabited, or parented children together,²⁰ while in some other provinces and territories, orders are available to persons in intimate relationships even if they did not reside together.²¹ *PAFVA* also has a comparatively narrow definition of family violence that focuses on family members' reasonable fear of injury or property damage and excludes psychological, emotional, and financial abuse and coercive control, which are included in some other jurisdictions.²² *PAFVA*'s definition of family violence does not include children's direct or indirect exposure to violence, although the effect of

²⁰ *PAFVA*, *supra* note 4, s 1(1)(d) (referencing “adult interdependent partners”, which are defined in the *Adult Interdependent Relationships Act*, SA 2002, c A-4.5). See also *Lenz v Sculptoreanu*, 2016 ABCA 111 [*Lenz*]. Alberta excluded same-sex relationships from the *PAFVA* from 1999 to 2003. For discussion see Koshan & Wiegers, *supra* note 5 at 164.

²¹ See MB *DVSA*, *supra* note 17, s 2(1)(d); NB *IPVIA*, *supra* note 17, s 1; YK *FVPA*, *supra* note 17, s 1; NU *FAIA*, *supra* note 17, ss 2(3) & (4).

²² *PAFVA*, *supra* note 4, s 1(1)(e) (but see s 2(2)(b.1), which does include stalking and requires consideration of whether the respondent has used “controlling behaviour” towards the claimant or other family members). For provinces with broader definitions, see BC *FLA*, *supra* note 17, s 1; MB *DVSA*, *supra* note 17, ss 2(1.1); NB *IPVIA*, *supra* note 17, s 2; PEI *VFVA*, *supra* note 17, s 2(2)(e); NL *FVPA*, *supra* note 17, ss 3(1)(f), (f.1), (f.2); YK *FVPA*, *supra* note 17, s 1; NWT *PAFVA*, *supra* note 17, s 1(2)(e); NU *FAIA*, *supra* note 17, ss 3(1)(e) & (g).

exposure to family violence on the claimant's children is a factor that must be considered in deciding whether to grant a protection order to protect the claimant and other family members who reside with her.²³

Procedurally, claimants can apply for EPOs on behalf of themselves and other family members, and several categories of designated persons can apply on their behalf, including peace officers and child protection workers, who can apply by telecommunication. During the COVID-19 pandemic, telecommunication applications were extended to claimants in Alberta, an amendment that has remained in effect.²⁴ EPOs in Alberta must be automatically reviewed by the Court of King's Bench within nine working days after the order was granted,²⁵ whereas in some other jurisdictions, reviews are only triggered if one of the parties applies.²⁶ Manitoba also provides for an evidentiary burden on respondents at the review stage, an approach that is favourable for claimants.²⁷

²³ *PAFVA*, *supra* note 4, s 2(2)(c.2).

²⁴ *PAFVR*, *supra* note 19, ss 3-4. For a discussion of this and other pandemic-related initiatives, see Koshan, Mosher & Wiegers, *supra* note 15.

²⁵ *PAFVA*, *supra* note 4, ss 2(6) & 3.

²⁶ See BC *FVA*, *supra* note 17, s 187; MB *DVSA*, *supra* note 17, s 11(1); NL *FVPA*, *supra* note 17, ss 10 & 12. Busby et al postulated that procedural differences might explain the higher usage of legislation in Manitoba compared to Alberta and Saskatchewan, noting also the longer duration of orders in Manitoba and the wider scope of the legislation in that province, see Busby et al, *supra* note 5 at 208.

²⁷ MB *DVSA*, *supra* note 17, s 12(2). This section was read down following a *Charter* challenge in *Baril v Obelnicki*, 2007 MBCA 40, to create an evidentiary burden only. See also Department of Justice

In terms of conditions that can be made in EPOs, Alberta is consistent with other jurisdictions in providing for no-contact and communication orders (which can include the claimant and “other specified persons”), non-attendance at various locations such as workplaces and schools, and exclusive possession orders for the family home.²⁸ Most other jurisdictions also allow EPOs to include conditions for the temporary possession of personal property such as vehicles. In Alberta, this condition is only made explicit in the case of non-emergency King’s Bench Protection Orders (KBPOs).²⁹ Some provinces also provide for EPO conditions ordering the respondent to make rent or mortgage payments for the family residence, but this too is missing from *PAFVA*.³⁰

Several jurisdictions explicitly allow conditions related to temporary care and custody of children in their EPOs: New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and Nunavut. All of these jurisdictions require courts to consider the best interests of children in making protection orders, often incorporating best interests considerations from family legislation.³¹ In

Canada, *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (Ottawa: 2003) at 50 (noting that the reverse onus “significantly reduces the court’s workload”).

²⁸ See *PAFVA*, *supra* note 4, s 2(3).

²⁹ See *ibid*, s 4(2)(e).

³⁰ See PEI *VFVA*, s 4(3)(j.1), *supra* note 17; NL *FVPA*, s 6(1), *supra* note 17.

³¹ See NB *IPVIA*, ss 4(3)(e), 4(5)(h), *supra* note 17; NS *DVIA*, ss 6(2)(d), 8(1)(k), *supra* note 17; NL *FVPA*, ss 5(2)(d), 6(n), *supra* note 17; PEI

jurisdictions like Alberta that do not expressly authorize this type of condition, children may be included in EPOs as “other family members”, and the best interests of children is a mandatory consideration for EPOs.³² However, as Part III will discuss, courts have struggled with whether to impose conditions that may affect parenting disputes.³³ Conditions requiring respondents to provide material support to claimants and children are also lacking in protection order legislation in Alberta and most other Canadian jurisdictions, necessitating separate applications for spousal and child support.³⁴ A final condition relevant to parenting is the ability to order the respondent to undertake domestic violence counselling or

VFVA, ss 4(2)(d), 4(3)(f), *supra* note 17; NU *FAIA*, ss 7(2)(h), 35(d), *supra* note 17. Most of these jurisdictions also provide that EPO conditions related to temporary care of children may prevail over previous parenting orders made under the *Divorce Act* and some other provincial legislation. See e.g. NB *IPVIA*, s 12(1), *supra* note 17; NS *DVIA* s 8(4), *supra* note 17; NL *FVPA*, s 13(1), *supra* note 17, NU *FAIA*, s 9, *supra* note 17.

³² See *PAFVA*, *supra* note 4, ss 2(1)(b), 2(2)(d) (also referencing the best interests of the claimant).

³³ See e.g. *PAFVA*, *supra* note 4, s 2(3)(g) allowing courts to make any other conditions they consider necessary “to provide for the immediate protection of the claimant”, which excludes specific reference to children.

³⁴ Under *PAFVA*, *supra* note 4, s 4(1)(d), a court may order the respondent to “reimburse the claimant for monetary losses” suffered “as a direct result of the family violence” as part of a KBPO, but this does not equate to a support order. See also SK *VIVA*, s 7(1)(f), *supra* note 17; MB *DVSA*, s 14(1)(j), *supra* note 17; YK *FVPA*, s 7(f), *supra* note 17; NWT *PAFVA*, s 7(2)(g), *supra* note 17.

programs. In Alberta, this condition is only explicitly available under a KBPO.³⁵

In all provinces and territories, family law restraining orders continue to be available and may overlap with, or be used as alternatives to civil protection orders. In Alberta, legislative restraining orders are linked to applications related to child and spousal support or family property and apply to possession of the family home rather than directly restraining respondents' contact with claimants and children.³⁶ It is also important to note that unlike some other provinces,³⁷ Alberta's *Family Law Act* is not yet aligned with the new *Divorce Act* amendments.³⁸ While it does include family violence as a consideration relevant to the best interests of children, the *Family Law Act's* definition still focuses on physical harm and threats and like *PAFVA* does not include emotional or financial abuse or coercive control.³⁹ There are also some key

³⁵ See *PAFVA*, *supra* note 4, s 4(2)(k). See also *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 16(4)(g) which now requires consideration in parenting disputes of “any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child”.

³⁶ *Family Law Act*, *supra* note 16, s 68(1)(c); *Family Property Act*, *supra* note 16, s 19(1)(c). Common law restraining orders are also available in Alberta. See also *Lenz*, *supra* note 20 at paras 25–30.

³⁷ See BC *FLA*, *supra* note 17; *The Children's Law Act, 2020*, SS 2020, c 2; *Children's Law Reform Act*, RSO 1990, c C-12; *Family Law Act*, SNB 2020, c 23; *Children's Law Act*, RSPEI 1988, c C-6.1.

³⁸ *Divorce Act*, *supra* note 35.

³⁹ *Family Law Act*, *supra* note 16, ss 18(2)(b)(vi), 18(3).

differences between *PAFVA* and the *Family Law Act*.⁴⁰ As noted earlier, *PAFVA* includes exposure of children to family violence as a factor relevant to granting EPOs, while the *Family Law Act* requires consideration of the impact of family violence on children's safety and general well-being.⁴¹ The *Family Law Act* excludes the use of force to protect oneself or one's children from the definition of "family violence", an important recognition of protective or resistant violence that is missing from *PAFVA*.⁴²

The *Divorce Act* and provincial/territorial family legislation now require that courts consider the presence of civil protection orders and proceedings in order to avoid conflicts and coordinate proceedings.⁴³ With the exception of British Columbia, there are no repositories of civil

⁴⁰ Both Acts define family violence to exclude reasonable corrective force by a person towards a child under their care, which is unique in Canada and out of step with modern understandings of the best interests of children. See *Family Law Act*, *ibid*, s 18(3)(a); *PAFVA*, *supra* note 4, s 1(1)(e). For critiques of this exemption see Koshan & Wieggers, *supra* note 5 at 164; Lana Wells et al, *How Public Policy and Legislation Can Support the Prevention of Domestic Violence in Alberta* (Calgary: University of Calgary, 2012) at 10–11.

⁴¹ *Family Law Act*, *supra* note 16, s 18(3)(b)(vi); *PAFVA*, *supra* note 4, s 2(2)(c.2). The *Divorce Act* defines family violence to include children's direct or indirect exposure to family violence (*supra* note 35, s 2(1)).

⁴² For a discussion of the challenges with inconsistent definitions of domestic violence, see Jennifer Koshan, "Mapping Domestic Violence Law and Policy in Alberta: Intersections and Access to Justice" (2020) 58:3 *Alta L Rev* 521; Koshan, Mosher & Wieggers, *supra* note 5.

⁴³ See *Divorce Act*, *supra* note 35, s 7.8. See e.g. Alberta's *Family Law Act*, *supra* note 16, s 18(2)(x). Both provisions also require consideration of criminal orders and proceedings.

protection orders, which may mean that courts lack full information about these orders where the parties and their lawyers are unable to provide it.⁴⁴ Commentators have critiqued the lack of information-sharing between courts, and its potential to impede access to justice and to impair the safety of women and children.⁴⁵

There are also intersections between civil protection orders and child protection legislation. Child protection authorities might encourage or even require survivors whose children are at risk to apply for protection orders.⁴⁶ Although child protection workers are entitled to seek EPOs on behalf of survivors and children in some jurisdictions, including Alberta, such applications are rare, raising access to justice concerns for survivors who are required to apply on their own or risk child protection

⁴⁴ See British Columbia, “Protection Order Registry”, online: <www2.gov.bc.ca/gov/content/safety/crime-prevention/protection-order-registry>. See also Neilson, *Responding*, *supra* note 7, s 9.4.

⁴⁵ See e.g. Donna Martinson & Margaret Jackson, “Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts” (January 2016), online (pdf): *FREDA Centre*, <www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>; Linda C Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection) A Family Law, Domestic Violence Perspective*, 2nd ed (Department of Justice Canada: 2013).

⁴⁶ See Emily M Poor, “Disentangling the Civil-Carceral State: An Abolitionist Framework for the Non-Criminal Response to Intimate Partner Violence” 47 *NYU Rev L & Soc Change* [forthcoming 2023], online: SSRN, <ssrn.com/abstract=4186152> at 9 (referencing a “family policing system”).

consequences.⁴⁷ This can be a particular issue for survivors who are Indigenous, racialized, and/or poor, given the disproportionate level of child protection scrutiny for these groups.⁴⁸ Restraining orders are also available under child protection legislation in most Canadian jurisdictions, including Alberta, and could overlap with civil protection orders in some instances.⁴⁹ Prince Edward Island appears to be the only jurisdiction whose protection order legislation explicitly requires notice to be given to child protection authorities when a protection order includes a child.⁵⁰ In other provinces and territories, police and other designated persons applying for EPOs would be subject to the general duty in child protection legislation to report children in need of protection.⁵¹

Emergency protection orders are enforced in Alberta via arrest and offence provisions that were added to *PAFVA* in 2011.⁵² This amendment followed an evaluation that identified problems with the alternative approach to enforcement that previously applied in

⁴⁷ *PAFVR*, *supra* note 19, s 3(b). See also Tutty et al, *supra* note 4 at 57-58; and see Part III.

⁴⁸ See Wanda Wiegiers, “The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence” (2023) 35:1 Can J Fam L 183 (in this issue).

⁴⁹ See e.g. *Child, Youth and Family Enhancement Act*, RSA 2000, C-12, s 30 [*CYFEA*]. See also Wiegiers, *supra* note 48 at 218 (noting the rarity of “protective intervention orders” under Saskatchewan’s child protection legislation).

⁵⁰ *PEI VFVA*, *supra* note 17, s 8(6).

⁵¹ See e.g. *CYFEA*, *supra* note 49, s 4. Lawyers are exempt from this duty where solicitor client privilege applies.

⁵² *PAFVA*, *supra* note 4, ss 13.1, 13.2.

Alberta, and continues to apply in other jurisdictions that do not have offence provisions in their protection order legislation (under which breaches are dealt with via s 127 of the *Criminal Code*).⁵³ Problems include a lack of clarity in the case law about the application of s 127, which applies “unless a punishment or other mode of proceeding is expressly provided by law”, as well as reticence on the part of police and courts to criminalize what they perceive as more trivial breaches.⁵⁴ Survivors of family violence may also be reluctant to see their partners criminalized for breaches for a host of reasons, including financial precarity and fear and distrust of police and other authorities, a particular concern for members of marginalized groups.⁵⁵ At the same time, breaches of protection orders in jurisdictions with provincial offence provisions may not be taken seriously by police either.⁵⁶ Another issue is that

⁵³ See Tutty et al, *supra* note 4 at 39–40; *Criminal Code*, RSC 1985, c C-46, s 127. Jurisdictions that rely on s 127 are BC, SK, MB, and NU (see *supra* note 17).

⁵⁴ Tutty et al, *supra* note 4 at 74–5. But see *R v Nielsen*, 2015 ABCA 143 [*Nielsen*] (finding s 127 applies to breaches of restraining orders). See also Zara Suleman, Haley Hrymak & Kim Hawkins, “Are We Ready to Change? A Lawyer’s Guide to Keeping Women and Children Safe in BC’s Family Law System” (2021) at 30–31, online (pdf): *Rise Women’s Legal Center* <womenslegalcentre.ca/wp-content/uploads/2021/07/Are-We-Ready-to-Change-Rise-Womens-Legal-May2021.pdf> (also finding judges are reluctant to hear *ex parte* protection order applications under the BC *FVA*); Martinson & Jackson, *supra* note 45 at 48; Erika Day, “Reflections on Bill 11: The Domestic Violence and Stalking Amendment Act” (2017) 40:2 *Manitoba LJ* 56 at 61, 82 (citing a Manitoba case where a woman called police 22 times to enforce a protection order before she was killed).

⁵⁵ Koshan & Wieggers, *supra* note 5, 169–170, 173.

⁵⁶ See e.g. R A Malatest & Associates Ltd, *Evaluation of the Protection Against Family Violence Act (PAFVA): Final Report* (Northwest

most provinces and territories do not provide for the enforcement of protection orders obtained in another jurisdiction.⁵⁷

All Canadian jurisdictions also have police pro-charging policies for domestic violence offences. This may affect the likelihood of police applying for, or providing information about, EPOs as opposed to laying charges with no-contact with the complainant as a condition of the accused's release.⁵⁸ Civil protection orders were intended to supplement criminal charges, and most protection order legislation provides that existence of criminal charges should not preclude the granting of an EPO.⁵⁹ This is an important recognition that criminal matters may be resolved without the complainant's knowledge, leaving a

Territories, 2011) at 45, online (pdf): *Government of Northwest Territories* <library.assembly.gov.nt.ca/2011/J/a293265.pdf> (identifying enforcement as an issue).

- ⁵⁷ For exceptions see e.g. BC *FLA*, *supra* note 17, s 191 (providing the *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29, applies to protection orders from other Canadian jurisdictions); *The Enforcement of Canadian Judgments Act*, CCSM c E116, Part 3. In Alberta, the *Children First Act*, SA 2013, C-12.5, s 19(5) would have amended *PAFVA* to permit regulations for the recognition and enforcement of protection orders from other jurisdictions, but that section never came into effect.
- ⁵⁸ See Canada, Department of Justice, *supra* note 27 at 100–101; *The Domestic Violence Handbook for Police Services and Crown Prosecutors in Alberta* (2014), online (pdf): *Government of Alberta* <open.alberta.ca/publications/9780778541523>. See also Koshan & Wiegiers, *supra* note 5 at 170. No-contact conditions can also be made in probation orders and peace bonds. See *Criminal Code*, *supra* note 53, ss 501(3) (undertakings on release), 515(4) (judicial interim release orders), 732.1(3) (probation orders), 810 (peace bonds).
- ⁵⁹ See e.g. *PAFVA*, *supra* note 4, s 2(2.1)(e).

gap in protection if the criminal no-contact order is revoked. However, police may not see the need for both, nor see EPOs as an alternative if the violence in question is not covered by the *Criminal Code* or survivors wish to avoid criminal consequences for their (ex)partners.⁶⁰ Police may also consider criminal proceedings to be a more favourable way to deal with concerns about weapons, although EPOs can limit access to weapons and there is currently a federal bill under consideration that would restrict persons subject to protection orders from holding a firearms licence.⁶¹

There is burgeoning literature advocating an anti-carceral approach to gender-based violence that might support greater reliance on civil protection orders as a remedy that can potentially offer protection and autonomy to survivors.⁶² Yet some proponents of an anti-carceral

⁶⁰ See Koshan & Wiegers, *supra* note 5 at 170–171. The *Criminal Code*, *supra* note 53, does not currently contain any specific domestic violence offences, nor does it criminalize coercive control. See Standing Committee on Justice and Human Rights, “The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships” (2021), online (pdf): <www.ourcommons.ca/DocumentViewer/en/43-2/JUST/report-9/>.

⁶¹ See Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms)*, 1st Sess, 44th Parl, 2021-2022, ss 16 and 36 (adding ss 6.1 and 70.2 to the *Firearms Act*, SC 1995, c 39; see also the exceptions in proposed s 70.3). See also *PAFVA*, *supra* note 4, s 2(3)(f); *Schaerer v Schaeerer*, 2021 ABCA 104 at para 23 [*Schaerer*] (finding that the justice reviewing the EPO had no authority to order the respondent to destroy his firearms, which were “matrimonial property”).

⁶² There are also feminist scholars and activists who maintain the importance of some criminal response to gender-based violence. For a review of this debate, see Clare McGlynn, “Challenging anti-carceral

approach argue that protection orders are enmeshed with the criminal justice system—for example, because of the reliance on police to obtain and enforce protection orders.⁶³ The involvement of police may deter Indigenous, racialized, migrant, and other survivors experiencing intersecting inequalities from applying for protection orders or calling police in the event of breaches, based on their fear of consequences such as deportation and child protection scrutiny.⁶⁴ Importantly, however, some commentators also caution against a re-privatization of remedies for gender-based violence that places the onus on individual survivors to protect themselves.⁶⁵ One practical response by some Canadian jurisdictions has been to allow

feminism: Criminalisation, justice and continuum thinking” (2022) 93 Women’s Studies Intl Forum 102614.

- ⁶³ See e.g. Poor, *supra* note 46. In the Canadian context, see Koshan & Wieggers, *supra* note 5 at 170–172. See also Standing Committee on Justice and Human Rights, *supra* note 60 (considering similar concerns in the context of the proposal to criminalize coercive control in Canada).
- ⁶⁴ Koshan & Wieggers, *supra* note 5, 170–172. See also Poor, *supra* note 46 at 5, 11 (arguing as well that credibility assumptions about racialized and poor women may affect their ability to obtain protection orders). See also Deborah Epstein & Lisa Goodman, “Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences” (2019) 167 U Penn L Rev 399 at 432–8.
- ⁶⁵ See e.g. Lise Gotell, “Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence” in Anastasia Powell et al, eds, *Rape Justice* (London: Palgrave Macmillan, 2015) 53 at 54; McGlynn, *supra* note 62. See also Grant, *supra* note 12 at 561–568 (critiquing the “responsibilization” of survivors of gendered violence in the context of criminal harassment).

a broader range of designated persons to apply for EPOs, such as shelter workers.⁶⁶

In Alberta, *PAFVA* was last evaluated in 2005.⁶⁷ The report found that the legislation was not being used as might be expected—especially in Calgary and rural areas and in the case of migrant and Indigenous women, women with disabilities, and survivors in same-sex relationships.⁶⁸ The case law review and interviews conducted for this article suggest EPOs are being sought more often now in Alberta but that there are still concerns about the usage of protection order legislation, including usage by members of marginalized groups.⁶⁹ For Indigenous women, one

⁶⁶ See e.g. *General Regulation*, NB Reg 2018-34, s 3(2); *Family Abuse Intervention Regulations*, NU R-006-2008, s 1(3).

⁶⁷ Most other jurisdictions have not evaluated their civil legislation in the last 20 years. For exceptions see Malatest & Associates Ltd, *supra* note 56; Genesis Group, *Family Abuse Intervention Act Implementation Evaluation* (Nunavut: Department of Justice, Community Justice, 2010). For a discussion of these evaluations and the importance of ongoing monitoring, see Department of Justice Canada, *supra* note 27 at 50-54.

⁶⁸ Tutty et al, *supra* note 4 at 43, 84-85, 89. See also Busby et al, *supra* note 5 at 199; Department of Justice Canada, *supra* note 27 at 52 (noting usage rates across Canada in the early 2000s); Wanda Wieggers and Fiona Douglas, *Civil Domestic Violence Legislation in Saskatchewan: An Assessment of the First Decade* (Regina: Canadian Plains Research Centre, 2007) at 24.

⁶⁹ See Part III. See also Chris Durrant, “None of That Paper Stuff Works”: A Critique of the Legal System’s Efforts to End Domestic Assault in Nunavut” (2014) 19 Appeal 43 at 56. Statistics on the usage of EPOs are not readily available in most jurisdictions. For an exception see Department of Justice, Government of Nunavut, *Family Abuse Intervention Act (FAIA) Annual Report 2019-2020*, at Appendix, (accessed 26 February 2023), online: *Government of Nunavut*

issue is the inapplicability of provincial legislation to family property on reserves.⁷⁰ Federal legislation—the *Family Homes on Reserves and Matrimonial Interests and Rights Act*—has EPO provisions that apply on First Nation reserves, but only a few provinces have designated judges to hear such applications.⁷¹

As noted above, the majority of the previous studies have not focused on the intersection of civil legislation and family law, although some have critiqued courts' reluctance to include children in protection orders.⁷² Failure to include conditions requiring the respondent to participate in domestic violence counselling and

<docslib.org/doc/954350/family-abuse-intervention-act-faia-annual-report-2019-2020>.

⁷⁰ See *Derrickson v Derrickson*, [1986] 1 SCR 285, 26 DLR (4th) 175; *Paul v Paul*, [1986] 1 SCR 306, 26 DLR (4th) 196. See also Busby et al, *supra* note 5 at 217-219.

⁷¹ *Family Homes on Reserves and Matrimonial Interests and Rights Act*, SC 2013, c 20, s 16 [*FHRMIRA*]. New Brunswick, Prince Edward Island, and Nova Scotia are the only provinces that have designated provincial court judges to hear EPO applications under s 16 of *FHRMIRA*, see Indigenous Services Canada, "First Nations with Matrimonial Real Property Laws under the Family Homes on Reserves and Matrimonial Interests or Rights Act," (last modified 02 March 2022), online: *Matrimonial Real Property on Reserve* < www.sac-isc.gc.ca/eng/1408981855429/1581783888815>. Through s 20, *FHRMIRA* also provides for exclusive occupation orders in relation to family homes on reserves upon application to superior courts. For further discussion, see Elysa Darling, *Assessing Matrimonial Real Property Law on First Nation Reserves: Domestic Violence, Access to Justice, and Indigenous Women* (LLM thesis, Faculty of Law, University of Calgary, 2019) [unpublished], online: <hdl.handle.net/1880/111047>.

⁷² Neilson, *Responding*, *supra* note 7, ss 9.2.2.12, 9.2.2.17.

intervention programs has also been identified as a concern that can impact the respondent's parenting ability.⁷³ Linda Neilson argues that in the protection order context, the liberty interests of respondents continue to be emphasized more than women's and children's safety and freedom from violence.⁷⁴ At the same time, survivors may find themselves in the position of responding to an EPO application and defending their liberty if their (ex)partner uses the protection order system strategically or to further their abuse.⁷⁵ Survivors may also be accused of abusing the legal system by alleging domestic violence and applying for EPOs to gain an upper hand in family disputes or they may face pressure to agree to mutual protection orders. Mutual protection orders have become common recently in Alberta despite being negligible in the early years of civil legislation.⁷⁶

Many commentators have critiqued the different and often conflicting norms imposed on survivors of violence who are mothers, highlighting that these norms

⁷³ *Ibid*, ss 9.2.2.13; Tutty et al, *supra* note 4 at 94.

⁷⁴ Neilson, *Responding*, *supra* note 7, ss 9.2.2.17 and 9.2.2.1.

⁷⁵ For a discussion of litigation and systems abuse see e.g. *ibid*, s 9.2.2.3. See also Pathé et al, *supra* note 12 for a discussion in the context of stalking specifically. PAFVA, *supra* note 4, s 13, does prohibit "frivolous or vexatious" complaints to address these concerns, however this section has been referenced infrequently in the case law. For critiques of this provision's potential impact on survivors, see Tutty et al, *supra* note 4 at 39; Busby et al, *supra* note 5 at 199.

⁷⁶ See Koshan & Wieggers, *supra* note 5 at 169. Similar concerns have been raised in other jurisdictions. See e.g. Rosemary Hunter, "Narratives of Domestic Violence" (2006) 28 *Sydney L Rev* 733 at 768-9; Epstein & Goodman, *supra* note 64 at 425-32.

have often dictated that mothers must protect themselves and their children from violence or exposure to violence—through the civil protection order, child protection, and criminal law systems—while simultaneously facilitating and even maximizing contact between their children and abusive (ex)partners through the family law system.⁷⁷ These critiques suggest that while the objectives of civil protection order legislation may align well with criminal law objectives and procedures, civil legislation may be in tension with the aims of family law in some instances. These concerns are borne out by the case law and interviews discussed in the next Part.

III. CIVIL PROTECTION ORDERS, FAMILY LAW, AND OTHER AREAS IN PRACTICE

A. METHODOLOGY

The methodology for this Part includes a case law review encompassing a search of all Supreme Court of Canada and Alberta Court of Appeal decisions mentioning civil protection orders, and a search of Alberta family law parenting decisions that involve domestic violence and intersecting legal systems, including civil protection

⁷⁷ See e.g. Marianne Hester, “The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children’s Safety in Contexts of Domestic Violence” (2011) 41 *Brit J Soc Work* 837; Peter Jaffe, Claire Crooks and Nick Bala, “Domestic Violence and Child Custody Disputes” in Ursel et al, *supra* note 5, 254 at 255 (noting the “two solitudes” of parenting disputes and safety from domestic violence); Koshan, Mosher & Wieggers, *supra* note 15 at 798 (noting these trends in case law early in the COVID-19 pandemic).

orders.⁷⁸ The selection of family law decisions as the vehicle for exploring intersecting legal systems was based on the assumption that family decisions would be more likely to discuss these intersections than, for example, criminal decisions. However, it is important to recognize that the majority of family disputes never get to court,⁷⁹ and of those that do, the majority of these judicial decisions are not reported.⁸⁰

Accordingly, I supplemented the case law review with sixteen individual and group semi-structured interviews conducted with a total of 36 Alberta-based participants—17 lawyers and 19 domestic violence service providers—between February and April 2022.⁸¹ The

⁷⁸ Can LII was used for both searches. Appellate case law was updated to 31 October 2022. Lower court decisions cover the period 2011 to 30 June 2022. The case law is used illustratively rather than quantitatively in this Part.

⁷⁹ See Michaela Keet & Jeff Edgar, “Mediator Discretion in Cases Involving Intimate Partner Violence,” (2023) 35:1 Can J Fam L 131 (in this issue).

⁸⁰ Unreported decisions are also common in the context of protection orders and their review. See Jennifer Koshan, “Family Violence Cases in Alberta: A Snapshot” (2009) 46 Alta L Rev 847 at 855-856.

⁸¹ These interviews were approved by the ethics board of the author’s university. Purposive sampling was used to identify participants. The service providers interviewed worked primarily with domestic violence organizations serving survivors and perpetrators, including clients who identify as Indigenous, racialized, migrant, poor, and LGBTQIA2S+, in matters concerning criminal and family law, emergency protection orders, and child protection. Service provider interviews were also conducted with police and employees of court-based programs. Lawyer interviews included those representing survivors, perpetrators, and the Crown in criminal and/or family law, emergency protection orders, and child protection matters. Most

interviews focused generally on domestic violence and access to justice in intersecting legal systems, and were transcribed and coded for common themes related to protection orders using NVivo software.⁸² Judges did not take up my invitation to participate in the interviews, so I also observed a few EPO review hearings conducted by judges in the Alberta Court of King's Bench.⁸³ Overall, this methodology is intended to provide a qualitative case study of the interpretation and application of protection order legislation in Alberta and its intersections with other laws and legal systems, rather than providing a full evaluation of *PAFVA*.⁸⁴

interviewees were based in Calgary or Edmonton, Alberta. To preserve anonymity, interviews are referenced by assigned numbers. For further discussion of the methodology used for this project, see the Introduction to this issue, *supra* note 2.

- ⁸² Themes used in the NVivo coding software included “protection orders”, “mutual orders”, “litigation abuse”, “financial abuse”, “false allegations”, “parental alienation”, and “myths and stereotypes.”
- ⁸³ These observations occurred in the fall of 2022, both in person and online. I made notes of these hearings and reviewed them for themes. I also shared an earlier draft of this paper with several judges to ensure accuracy and received comments that have been incorporated.
- ⁸⁴ For example, Tutty et al, *supra* note 4, reviewed almost 1000 court files to undertake a quantitative assessment of the usage of *PAFVA* over several years, and conducted qualitative interviews with 180 key informants, including 30 officers from the RCMP and city police forces. My study cannot provide a similar evaluation of, for example, different police practices and institutional cultures across Alberta, nor as between Alberta and other jurisdictions.

B. GENERAL PRINCIPLES AND PRACTICES

Although the Supreme Court of Canada has not yet issued a judgment focusing on protection order legislation, the Court has provided some general principles related to peace bonds that may offer guidance in protection order cases. Most recently, in *R v Penunsi*, Justice Karakatsanis recognized that peace bonds are “an important tool used to protect women leaving abusive relationships.”⁸⁵ She characterized peace bonds as instruments of “preventive justice” based on “reasonable fear,” also noting the importance of “safeguarding the liberty of the defendant, who is not accused of any criminal offence.”⁸⁶ Overall, peace bond proceedings “must be guided by the policy objectives of timely and effective justice, and minimal impairment of liberty.”⁸⁷

Jurisprudence from the Alberta Court of Appeal provides similar guiding principles for the interpretation and application of protection order legislation. Most recently, the Court stated in *Schaerer v Schaeerer* that a protection order decision

...always requires a careful balancing of the need to protect vulnerable domestic partners, while at the same time not unreasonably

⁸⁵ 2019 SCC 39, at para 37. See also *Criminal Code*, *supra* note 53, s 810.

⁸⁶ *Ibid*, at paras 60 and 61.

⁸⁷ *Ibid*, at para 61.

interfering with the liberty of the other spouse.⁸⁸

In *Lenz v Sculptoreanu*, the Court concluded that *PAFVA*'s "serious abridgement" of liberty had informed the legislature's rationale for restricting its application to the familial context, and interpreted *PAFVA* to be inapplicable to intimate partners who had not cohabited.⁸⁹ An earlier decision of the Court, *LL v DG*, noted that protection orders "may include terms that are quite drastic and intrusive on the respondent" and suggested that was the legislature's rationale for requiring automatic review of EPOs by superior courts.⁹⁰ However, as noted above, wider definitions of family members and family violence have been adopted by other jurisdictions, and review procedures that are only triggered upon application have been upheld as a justifiable violation of liberty.⁹¹

In Alberta, the Court of Appeal recently clarified in *DCM v TM* that the standard for EPO reviews is the same as the test for granting an EPO in the first instance: "whether (1) family violence has occurred; (2) there is reason to believe that the respondent will continue or resume carrying out family violence; and (3) by reason of seriousness or urgency, an order should be granted."⁹²

⁸⁸ *Schaerer*, *supra* note 61 at para 19.

⁸⁹ *Lenz*, *supra* note 20 at paras 30, 24.

⁹⁰ *LL v DG*, 2009 ABCA 387 at para 7.

⁹¹ See *Baril v Obelnicki*, *supra* note 27. See also *JSM v FYM*, 2022 NBQB 11 at para 41 (in which the court applied *Baril*, *ibid*, to the reverse onus provision in New Brunswick's *IPVIA*, *supra* note 17).

⁹² *DCM v TM*, 2021 ABCA 127 at para 15.

Citing this test, in *LE v JE* a review judge interpreted EPOs as being restricted to situations where “even an urgent application to the Courts is insufficient in a family matter.”⁹³ According to interviewees, the courts’ strict interpretation of the test for granting and confirming EPOs typically focuses on recent and ongoing incidents of physical violence and does not account for patterns of coercive control, non-physical forms of abuse, or children’s exposure to violence.⁹⁴ The judgement in *DCM* also appears to have led to more EPOs being revoked at an earlier stage, raising safety concerns for some women and children.⁹⁵

The Court of Appeal has also accepted review courts’ practice of replacing EPOs with mutual restraining orders if the parties consent, and sometimes even if they do not.⁹⁶ This practice appears to be based largely on

⁹³ *LE v JE*, 2022 ABQB 76 at para 18 (citing *DCM v TM*, *ibid*). This case involved alleged family violence against a child.

⁹⁴ See interviews 7, 10, 11, 12 (some of these interviews noted that court clerks may advise against EPO applications if they are not filed within 72 hours). Interview 9 did suggest that some courts are willing to look beyond physical violence.

⁹⁵ See also interview 10 (noting that previously, review hearings were often adjourned for weeks, allowing time for safety planning).

⁹⁶ See e.g. *Kurszewski v Giroux*, 2019 ABCA 414 (the Court of Appeal upheld the review court’s decision to grant mutual protection orders in a case involving a “tumultuous relationship” (para 2)); *DCM v TM*, 2020 ABCA 441 (the Court granted a mutual no-contact order pending the father’s appeal of an EPO confirmation. The Court of Appeal ultimately revoked the orders, finding that the review judge did not consider whether family violence had occurred (see *DCM v TM*, *supra* note 92 at para 17)). For a case granting mutual common law restraining orders where the *PAFVA* definition of “family violence” was not established, see e.g. *ATC v NS*, 2014 ABQB 132 where the

efficiency in light of the volume of EPO reviews.⁹⁷ Review hearings are held in chambers, which take place in larger centres daily and, since the COVID-19 pandemic began, can be accessed in person or, for initial review hearings, virtually.⁹⁸ Hearings can involve a dozen cases on the docket for review, and if the facts or outcome are disputed, the matter is typically set for a *viva voce* hearing in special chambers.⁹⁹ Legal Aid has an Emergency Protection Order Program in Calgary and Edmonton that provides duty counsel for claimants for provincial court EPO applications and at initial review hearings, and there is no income

court based their reasoning on the potential risk of reputational harm present. For a case rejecting the argument that mutual restraining orders were necessary to prevent a mother from “making false allegations of assault” against a father, see *El-Hayouni v Charef*, 2015 ABQB 416 at para 37.

- ⁹⁷ See e.g. *Schaerer*, *supra* note 61 at paras 14, 18 (the reviewing justice noted that the court was pressed for time and subsequently granted mutual restraining orders even though the respondent had withdrawn his consent. The order was revoked by the Court of Appeal).
- ⁹⁸ *Viva voce* review hearings are held in person unless the court grants leave to appear virtually. At the time of my court observations, such hearings were being scheduled approximately four months later, which may entail other appearances in court before that stage.
- ⁹⁹ In my court observations, several cases were resolved with consent mutual restraining or no-contact orders. Courts may also replace EPOs with one-way restraining orders; however, a finding of contempt for a restraining order breach—which is more common than charges under s 127 of the *Criminal Code*, *supra* note 53—is less serious than conviction for a *PAFVA* offence (see interview 2). One case was observed where, in response to the judge’s query about a mutual order, respondent’s counsel indicated a one-way no-contact order for his client would be more appropriate because there was no need to restrict the mother’s communications.

guideline and no cost at this stage.¹⁰⁰ However, for contested, *viva voce* review hearings, claimants must meet Legal Aid guidelines and repayment requirements. While other community legal clinics may provide some support where Legal Aid is unavailable, many claimants are unrepresented by counsel, especially at *viva voce* hearings and in areas outside the cities of Calgary and Edmonton.¹⁰¹

Interviewees indicated that non-consent mutual orders are often granted after *viva voce* hearings, which may also influence the parties to consent to such an order.¹⁰² Mutual orders have been granted in cases where there appears to be no evidence of family violence or other harmful conduct on the part of the original EPO claimant (typically the mother), contrasted with evidence of alleged conduct on the part of the respondent that includes—for example—serious criminal charges,¹⁰³ threats to report his wife to immigration authorities,¹⁰⁴ or participation in

¹⁰⁰ See Legal Aid Alberta, “Family Violence Matters” (accessed 31 October 2022), online: *Family Violence Matters* <www.legalaid.ab.ca/services/family-violence-matters/>. Respondents who meet eligibility guidelines are eligible for Legal Aid roster counsel.

¹⁰¹ See interviews 2, 7, 9, 11.

¹⁰² See interviews 2, 10, 13.

¹⁰³ *AMD v KG*, 2020 ABQB 325 at para 20 (referencing a mutual order made in a different proceeding as well as a restraining order obtained by the father against the mother, the basis of which is unclear). See also *Warren v Francois*, 2022 ABPC 79 [*Warren*] (a mother’s relocation application was refused; the children were ordered to reside with the father even though he was subject to house arrest for a “very serious assault” against the mother; the court noted a delay in the mother seeking criminal charges and an EPO (at para 47)).

¹⁰⁴ *FDM v EGM*, 2021 ABQB 420 at para 48 (referencing an EPO obtained by the mother that was replaced with a consent mutual no-

fathers' rights advocacy that included displaying his children's pictures on the internet.¹⁰⁵ These cases suggest that courts do not always assess the actual risks of family violence to claimants and their children, nor consider the consequences of placing non-violent parties under mutual orders.¹⁰⁶ Interviewees also expressed concerns that their clients felt pressured to agree to mutual orders for reasons of expediency and because they lack financial resources for legal representation at *viva voce* review hearings. While mutual orders can provide some certainty in cases where

contact order, and a later EPO application by the mother that the father alleged was tactical. The court declined to make this finding (at para 51), but found the father "likely" did report the mother to immigration authorities (at para 43) and "exercised control in the relationship due to his superior financial position and the power imbalance between the parties" (at para 52). Nevertheless, this did not result in a finding of family violence for the purposes of the parenting order (at para 53)). See also Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Fam L 297 (in this issue).

¹⁰⁵ *KWT v LMB*, 2019 ABQB 21 (finding that the mother—who had taken to wearing a GPS monitoring device—had exaggerated her fear of the respondent and granting a mutual no-contact order under s 4 of *PAFVA*).

¹⁰⁶ See e.g. *VGM v MNW*, 2022 ABQB 291 at para 21 [*VGM*] (referencing a mutual order made in an earlier proceeding which provided that if either party breached the order, "they would lose their access rights to [the child] until further order"). See also *Schaerer*, *supra* note 61 at para 21 (noting that breaches can lead to arrests and findings of contempt). For a case from Ontario where the judge granted mutual restraining orders in circumstances where he disclosed that he had "made a fuss" to encourage the parties—who were immigrants—to agree to mutual orders to "stop wasting [tax] money", see *Abdulaali v Salih*, 2017 ONSC 1609 at para 33. For a critical commentary on this case, see Alice Woolley, "Judgmental Judges" (March 22, 2017), online: *Slaw* <www.slaw.ca/2017/03/22/judgmental-judges/>.

confirmation of the EPO is in doubt, and can allow the parties to focus on parenting issues, interviewees see them as inadvisable in cases where there is a pattern of ongoing abuse, criminal charges pending, or a chance the parties may reconcile.¹⁰⁷ The practice of encouraging and granting mutual orders may also perpetuate the assumption that domestic violence is a mutual problem or that the case is merely a “high conflict” one, allowing the perpetrator to avoid responsibility for his violence, which may in turn impact parenting disputes.¹⁰⁸

C. INTERSECTIONS BETWEEN PROTECTION ORDERS AND FAMILY LAW

The timing of EPO applications may affect how claimants are perceived by courts and the remedies available to them and their children. In some cases, courts have questioned the motives of claimants seeking EPOs in advance of, or contemporaneous with family law proceedings. In *Lenz*, the Court of Appeal cited with approval a decision where the reviewing justice speculated that “protection orders are now being used for collateral purposes” and as a “backdoor, *ex parte* way of obtaining custody of children, or exclusive possession of matrimonial premises ... or ... chattels.”¹⁰⁹ In *LE v JE*, the reviewing judge similarly

¹⁰⁷ See interviews 2, 4, 6, 10, 11, 13.

¹⁰⁸ See interviews 6, 7, 10, 13.

¹⁰⁹ *Supra* note 20 at para 28, citing *Siwiec v Hlewka*, 2005 ABQB 684 at paras 17–18. See also *Schaerer*, *supra* note 61 at para 19 (“care must be taken that the hyper-vigilance of one spouse is not the basis for unreasonably restraining the liberty of the other spouse”, suggesting the claimant’s motives for seeking an EPO were questionable); *FA v*

quipped that “[u]nfortunately, there is a small but measurable subset of cases in which EPO stands for ‘Extrajudicial Parenting Order.’”¹¹⁰ While it cannot be assumed that every EPO application is meritorious,¹¹¹ statements such as these may reinforce the opposite assumption that women falsely allege domestic violence to gain an advantage in family litigation.¹¹² Interviewees confirmed that courts can be suspicious of EPO applications that intersect with parenting matters, often as a result of arguments by respondents and their lawyers—the “number one playbook response” referenced at the beginning of this article.¹¹³ Feeding into this is the concern that courts may fail to recognize how trauma affects survivors’ credibility in respect of their claims of abuse.¹¹⁴

SK, 2018 ABPC 276 at para 46 (finding the mother used EPOs to thwart the father’s parenting time); *MM v BM*, 2017 ABQB 532 at para 16 (noting that if an EPO was sought “to pre-empt or short-circuit an exclusive possession application”, that would have “significantly undermined” the application).

¹¹⁰ *Supra* note 93 at para 19. For other cases where claimants’ motives for seeking an EPO are questioned, see e.g., *VGM*, *supra* note 106 at paras 44, 57; *Salehi v Babrak*, 2017 ABQB 317 at para 11 (involving a mother’s concerns the father would remove the oldest child to Afghanistan).

¹¹¹ See interviews 4, 5, 14.

¹¹² See Jennifer Koshan, “Challenging Myths and Stereotypes in Domestic Violence Cases” (2023) 35:1 Can J Fam L 33 (in this issue). See also interviews 9, 10, 11.

¹¹³ The ethics of lawyers in cases involving domestic violence is beyond the scope of this paper, but see e.g. Deanne Sowter, “The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers’ Ethics” (2021) 44:2 Dal LJ 603.

¹¹⁴ See interviews 1, 2, 6, 7, 9, 10, 13 (noting survivors may appear “hysterical” while perpetrators may present as very rational and

In other cases, courts have properly rejected respondents' claims of false allegations by claimants, including one case where the father's accusations evidenced racist beliefs against the mother.¹¹⁵ Some interviewees noted that perpetrators may themselves apply for EPOs for tactical advantage, as part of their abuse, or by provoking their partners.¹¹⁶ This can have negative repercussions for survivors in parenting applications.

Even before the recent *Divorce Act* amendments, the Alberta Court of Appeal stated that evidence of an EPO should lead judges in family proceedings to give "meaningful consideration to the allegations of family violence" before making a parenting order, with failure to do so amounting to an error of law.¹¹⁷ However, because EPOs are unilateral, *ex parte* orders, they are not seen as probative of family violence in and of themselves, nor can they establish a "status quo" for parenting matters.¹¹⁸ One might expect this to change when an EPO is confirmed on review, but there is little case law to this effect, and EPOs are often mentioned only in passing in family law

articulate). See also Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31:1 Can J Fam L 57.

¹¹⁵ See e.g. *ERR v PJS*, 2021 ABQB 65 at paras 11, 36 (involving a Filipina mother and white father).

¹¹⁶ See interviews 2, 11.

¹¹⁷ *HG v RG*, 2017 ABCA 89 at para 12 (a case governed by the *Family Law Act*, *supra* note 16). This approach would not follow for mutual orders, another concern with that practice. See e.g. interviews 10, 13.

¹¹⁸ *HG v RG*, *ibid* at para 14. This was also raised as a concern in interview 9.

decisions.¹¹⁹ In *VLM v AJM*, Justice Brian O’Ferrall noted that the case management judge, who had varied a parenting order from limited supervised contact with the father to a shared parenting regime, had failed to consider evidence of family violence against the mother—in this case an EPO which had been varied on review but remained in effect for almost two years.¹²⁰ He was also critical, in light of the ongoing EPO, of a letter from children’s services stating that domestic violence by the father had not been substantiated.¹²¹ However, he was writing in dissent, and the majority of the Court of Appeal focused on “parental alienation” by the mother with no discussion of family violence by the father.¹²² Interviewees

-
- ¹¹⁹ Some decisions also refer to EPOs without specifying which party obtained the order. See e.g. *PAC v WDC*, 2012 ABCA 31 (also finding alienation by the mother); *PJA v SCC*, 2015 ABQB 800. It is important that courts use clear language to avoid the suggestion that domestic violence is a mutual problem.
- ¹²⁰ 2021 ABCA 267 at paras 21, 67. Under *PAFVA*, *supra* note 4, s 7, protection orders cannot be made or extended for more than one year, so it may be that there were a series of orders in this case. O’Ferrall JA would have allowed the mother’s appeal and left the children in her primary care.
- ¹²¹ See *VLM v AJM*, *ibid* at para 57. See also *MAS v CGL*, 2022 ABQB 281 (considering both sets of reasons in *VLM* and finding it is “not necessary to individually, pedantically and exhaustively analyse each factor” related to family violence in every case (at para 37)).
- ¹²² See *VLM v AJM*, *ibid* at paras 7–11 (per Slatter and Strekaf, JJA). The majority did, however, find the case management judge’s order to be practically unreasonable and returned it for reconsideration in light of the findings of parental alienation and the inability of the parents to cooperate (at para 11). O’Ferrall JA noted that there was no expert evidence of parental alienation (at para 71); however, in a previous decision, the Court held that expert evidence is not required to make this finding (see *VMB v KRB*, 2014 ABCA 334 at para 16).

noted that women's claims of domestic violence are often countered with allegations or findings of alienation, including in cases where they relocated with children to flee their partners. Lawyers may therefore advise clients not to raise violence in family matters.¹²³

There are also cases, however, where the absence of an EPO has been noted by courts in family matters, typically to call into question the veracity of later domestic violence claims.¹²⁴ In some instances, this approach might root out false allegations of domestic violence made to influence family proceedings, including cases where

¹²³ See interviews 5, 7, 10, 11, 13 (also noting that parental alienation allegations seemed particularly high during the COVID-19 lockdown). For national studies on this issue see e.g.: Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018), online (pdf): *FREDA*, <www.fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf>; Elizabeth Sheehy & Susan B. Boyd, "Penalizing women's fear: intimate partner violence and parental alienation in Canadian child custody cases" (2020) 42 J Soc Welfare & Fam L 80; Suzanne Zaccour, "Does Domestic Violence Disappear from Parental Alienation Cases?" (2020) 33 Can J Fam L 301. For a case finding "extreme alienation" by a father, see *LAU v IBU*, 2016 ABQB 74 (also finding he reported the mother to children's services and obtained an EPO against her without basis).

¹²⁴ See e.g. *DGB v ADB*, 2017 ABCA 293 at paras 6, 16 (noting the chambers judge had questioned why the father removed the child from the family home and prevented contact with the mother without an EPO application); *Leroux v Leroux*, 2019 ABPC 238 [*Leroux*] (discounting a mother's claim of family violence because she had applied for a protection order in BC but not in Alberta); *Sekyi v Sekyi*, 2021 ABQB 915 at para 43 (discounting a mother's claim of family violence in a relocation case because she had not applied for an EPO or complained to police or children's services about the father). Interviewees also raised this concern, see interview 4.

perpetrators engage in litigation or systems abuse.¹²⁵ However, in others it risks ignoring the many reasons survivors—particularly those from marginalized groups—may have for not applying for, or seeking confirmation of, EPOs, including a lack of knowledge of the parameters of this option, fear of retaliation, distrust of the authorities, advice of their lawyers, and access to justice barriers.¹²⁶ Given that seeking an EPO can also be seen as gaming the system, this reveals a Catch-22 for EPO claimants involved in family law proceedings.¹²⁷

This leads to the question of how decision-makers interpret their authority to include conditions respecting contact with children in EPOs. In *LL v DG*, the Alberta Court of Appeal found that a review judge did not have jurisdiction to grant the respondent access to his child during an EPO review because access was the subject of

¹²⁵ See e.g. *NL v SF*, 2021 ABPC 273 (finding the father used court orders “as weapons to manipulate” the mother (para 70), including claims of obtaining an EPO that were actually untrue (para 6)); see also *Best v Cuthbert*, 2019 ABPC 279 at para 25 (the mother obtained an EPO based on the father’s threats regarding her continuation of court proceedings). Interviewees also noted litigation and systems abuse as an issue, including for newcomer and financially vulnerable women, see interviews 1, 4, 5, 7, 11, 15. For cases where men were found to be vexatious litigants in circumstances involving litigation abuse, see e.g. *SC v JD*, 2013 ABPC 220 (the father used the court process to abuse the mother); *Lofstrom v Radke*, 2017 ABCA 362 (denying a man’s claim that his wife’s allegations of domestic violence were false and instead finding him to be vexatious).

¹²⁶ See interviews 1, 3, 7, 10, 12, 13, 15, 16. See also Part III.E.

¹²⁷ Another concern is that multiple EPO applications may be seen as judge-shopping, even if the claimant is relying on new incidents and evidence of violence after an unsuccessful initial application, see interview 11.

other proceedings and the father had not notified the mother he would be seeking access during the review.¹²⁸ Regardless, the Court did note that in situations where there was a status quo with respect to parenting, EPO proceedings must consider whether those arrangements can continue with an EPO in place.¹²⁹ This decision was relied on in *Hartman v Fulton*, where the review judge removed children from an EPO on the basis that parenting issues had been subsequently raised in other proceedings.¹³⁰ The court did not restrict its comments to that context, however, suggesting that “parenting matters should not ordinarily be dealt with” via EPOs because this would effectively allow claimants “to obtain *ex parte* “no contact” orders whose intended effect could be to frustrate or to prevent the other parent from visiting or seeking custody of their children.”¹³¹

Interviewees noted claimants’ difficulty in bringing a parenting application at the same time as, or shortly after an urgent EPO application, as duty counsel does not represent them on parenting matters and they are often dealing with pressing and costly issues such as housing.¹³²

¹²⁸ *Supra* note 90 at para 11.

¹²⁹ See *ibid.* EPOs often provide that contact pursuant to a parenting order does not constitute a breach of the EPO. See e.g., *Krisco v Terin*, 2018 ABQB 533 at para 17 [*Krisco*].

¹³⁰ 2011 ABQB 619 at para 17.

¹³¹ *Ibid* at para 20. See also the cases discussed at *supra* notes 109 to 110 and accompanying text.

¹³² See interviews 2, 4, 11, 15. For a case where a mother obtained both an EPO and an *ex parte* interim parenting order that prevented the father’s contact with the child, see *St. Pierre v Welch*, 2019 ABQB 731 (also involving criminal charges).

If a respondent can initiate a parenting application immediately after being subject to an EPO, this may give him an advantage at the time of the review hearing in revoking conditions involving the children.¹³³ In my court observations, I also saw EPOs confirmed or mutual no-contact orders granted with conditions relevant to parenting made subject to subsequent parenting orders, including those made by the Provincial Court.

In cases where other proceedings are already underway, courts tend to place the burden on the parties to avoid conflicts between EPOs, parenting orders, and criminal no-contact orders respecting the respondent's contact with children. In *Krisco v Terin*, the court stated that "the party who obtained the EPO should apply as soon as possible for a parenting variation order if they believe a variation is warranted", noting that EPOs should not be used to avoid a determination of the child's best interests for parenting purposes, nor as a substitute for a parenting variation order "for any longer than practically necessary."¹³⁴ Alternatively, variation can be seen as the respondent's responsibility if the conflict arises in respect of a criminal order. In *CGS v CBS*, the court found that having ordered unsupervised access to the father in a family proceeding, it was up to the father's counsel to seek to vary his release conditions on criminal charges to the extent they only permitted supervised access (a mutual no-contact order that replaced an EPO also stipulated

¹³³ See interview 10. But see *Nirwal v Mahal*, 2018 ABQB 413 (rejecting a father's *ex parte* application in family chambers for an order varying an EPO before the review hearing).

¹³⁴ *Supra* note 129 at paras 19, 13.

supervised access).¹³⁵ My interviews and court observations confirmed that courts often do not have information about the details of other orders in front of them, and must rely on the parties and their counsel (if they are represented) to provide this information—but there can be confusion and lack of information amongst parties and counsel about other orders as well.¹³⁶

While the approach in these decisions leaves some room for EPOs that provide immediate protection to children regardless of existing proceedings or orders, courts in Alberta have also tended to require evidence of direct violence towards children for them to be included in no-contact conditions, which is evidenced by judicial decisions¹³⁷ and interviews.¹³⁸ This displays a narrow interpretation by courts of their jurisdiction to grant orders in relation to children under *PAFVA*, given that the best interests of children and children’s exposure to violence are explicitly mandated considerations for EPOs. Unlike the *Divorce Act*, however, children’s exposure to violence is a

¹³⁵ 2019 ABQB 644 at paras 7, 37. The court found the criminal order took precedence over any family orders.

¹³⁶ See interviews 1, 2, 6, 7, 9, 12. In my court observations, it was evident that reviewing judges had read the transcripts from the EPO hearing before the review, but these transcripts may not contain details about any other orders.

¹³⁷ See e.g. *Kurszewski*, *supra* note 96 (declining to include children in an EPO, noting the trial judge “was not convinced that any violence had been directed against them” (at para 3)); *PT v LM*, 2018 ABQB 396 at para 16 (a child had been removed from an EPO because the mother’s fear of harm to her was found to be “exaggerated”, even though the father “had damaged property [and] was aggressive”).

¹³⁸ See interview 10.

factor under *PAFVA* rather than part of its definition of family violence, which may play a role in judicial approaches in this context.¹³⁹

In jurisdictions with legislation that explicitly allows for protection orders with parenting conditions, courts appear to have interpreted their powers mindful of the preventive and emergency nature of these orders.¹⁴⁰ For example, in *JSM v FYM*, the New Brunswick Court of Queen's Bench considered a father's application to either terminate a three-month EPO that provided the mother with temporary custody and care of their young child, or to vary the order to allow contact.¹⁴¹ In denying the application, the Court found that "restraints and conditions are still necessary to provide a safety zone" to the mother and child while the parties sought a more permanent parenting order under family legislation, and that protection orders are "not the proper forum to conduct a full assessment of what the best interests of a child are and to devise a detailed parenting arrangement with various possible conditions or terms."¹⁴² In other cases, courts have ordered variations of

¹³⁹ *PAFVA*, *supra* note 4, s 2(2)(c.2) and (d); *Divorce Act*, *supra* note 35, s 2(1).

¹⁴⁰ I searched CanLII noting up the five statutes that include this power, see *supra* note 31. There were few reported decisions involving parenting conditions, and because I did not conduct interviews or court observations in these jurisdictions, the reported case law cannot be seen as necessarily representative of the practice in these jurisdictions.

¹⁴¹ *Supra* note 91.

¹⁴² *Ibid* at paras 44, 45 (involving evidence of the father's verbal and emotional abuse and controlling behaviour towards both the mother and child). See also *EAW v MJM*, 2012 NSSC 216 at para 27 (finding

initial EPOs to allow contact between respondents and children, while still finding that more permanent resolution of parenting disputes should be left to family courts.¹⁴³

More generally, courts in Alberta continue to refer to the “maximum contact” principle in recent parenting decisions even though that specific wording was removed from the *Divorce Act*.¹⁴⁴ Earlier decisions applying Alberta’s *Family Law Act* read in a maximum contact principle for consistency with the *Divorce Act*, which should no longer be applied to disputes involving that legislation either.¹⁴⁵ As noted above, continued focus in family law matters on maximum contact and shared parenting rather than the best interests of children—the latter of which must include consideration of any family

EPO temporary parenting conditions are only appropriate where “necessary to ensure the immediate protection of a victim or child”).

¹⁴³ See e.g. *KG v VG*, 2020 PESC 18 at para 30 (varying an EPO to allow the father supervised access to the children based on the recommendation of a child protection worker, also noting the serious history of the father’s violence against the mother (at para 20)). See also *MP v NJ*, 2020 CanLII 29335 at para 62 (NL PC) (noting an EPO “should not become a substitute for resort to the family court for issues involving custody and access of children”); *WW v JW*, 2021 CanLII 94051 (NL PC) at para 22 (making a similar comment but refusing a father’s application to revoke or vary an EPO condition including the children).

¹⁴⁴ See e.g. *DC v NC*, 2021 ABQB 1015 at para 171; *Ball v Malone*, 2022 ABQB 321 at para 13; *Warren v Francois*, *supra* note 103 at paras 33–36. See also the Introduction to this volume for a discussion of this amendment, *supra* note 2.

¹⁴⁵ See e.g. *Kostin v Eaket*, 2012 ABQB 756 at para 85; *Omar v Ali*, 2013 ABQB 703 at para 10. See also *ST v KT*, 2021 ABPC 167 (interpreting the *Family Law Act* definition of family violence, post-*Divorce Act* amendments, to include emotional abuse, noting that maximum contact had formerly been read into the *FLA* on the same basis).

violence—does not sit well with the preventive objectives of protection order legislation.

D. INTERSECTIONS BETWEEN PROTECTION ORDERS AND OTHER AREAS OF LAW

Interviewees suggested that some police forces in Alberta are not using their powers to apply for EPOs on behalf of survivors of violence except in the most serious cases, and are instead directing survivors to apply via EPO programs or themselves.¹⁴⁶ In addition, the layering of criminal and civil no-contact orders is not being used routinely by police, and this can create safety concerns if a no-contact order disappears when criminal matters are resolved.¹⁴⁷ At the same time, review courts will not revoke an EPO simply because a criminal no-contact order exists, which shows a proper appreciation for the fact that criminal matters may conclude without notice to the complainant.¹⁴⁸ This may present issues for EPO claimants who seek to reconcile with their partners. Interviewees expressed concerns that Indigenous women and newcomers often struggle with navigating the complexity of intersecting legal systems in this context.¹⁴⁹

¹⁴⁶ See interviews 2, 9, 11, 12, 13. For an example, see *LL v DG*, *supra* note 90 at para 3. Other interviewees suggested the police may not apply for EPOs in cases where they disbelieve the complainant, fail to recognize trauma, or see them as manipulating the legal system (interviews 6, 14, 16). Police also serve EPOs on respondents and enter EPOs in police tracking systems.

¹⁴⁷ See interviews 2, 4, 6, 9, 12 (with one interviewee raising this as an issue when matters are diverted from Calgary's Indigenous Court, which hears criminal matters only).

¹⁴⁸ See interview 2; see also PAFVA, *supra* note 4, s 2(2.1)(e).

¹⁴⁹ See interview 2. Some survivors may be pressured by extended family into reconciling (interview 6). For a case where family violence against a mother involved the extended family, see *CSM v MKN*, 2018 ABQB

There are few reported Alberta decisions raising the intersections between protection order legislation and criminal law, and in particular, little case law interpreting and applying *PAFVA*'s arrest and offence provisions.¹⁵⁰ Courts will sometimes include police enforcement clauses in EPOs, which suggests some doubt regarding whether they see the *PAFVA* provisions as sufficient for enforcement purposes.¹⁵¹ Interviews also raised the concern that breaches of EPOs are not being routinely enforced, and that it is regular patrol officers who are responsible for responding to breaches rather than police officers who specialize in domestic violence.¹⁵² In addition, interviewees confirmed that Indigenous and racialized survivors may be reluctant to call police due to systemic colonialism, racism, and fear of legal consequences.¹⁵³ Service and enforcement of EPOs may also present issues on some First Nations reserves because of police reluctance to intervene.¹⁵⁴

594 at para 68 (finding “this case has nothing to do with culture; it has everything to do with abuse.”)

¹⁵⁰ For an exception see *CGS v CBS*, *supra* note 135. In *Nielsen*, *supra* note 54 at para 11, the Court of Appeal explicitly declined to comment on the interaction of the *PAFVA* offence provisions and s 127 of the *Criminal Code*.

¹⁵¹ See e.g. *DCM v TM*, *supra* note 92 at para 4; *Schaerer*, *supra* note 61 at para 15 (noting the absence of such a clause).

¹⁵² See interviews 2, 11, 16.

¹⁵³ EPO program counsel are not involved in hearings on breaches, which may mean the perspective of claimants is not represented. It may also affect the information available to judges conducting the hearings.

¹⁵⁴ See interviews 2, 6, 9, 12.

One other issue raised in my interviews is that in cases where respondents face both EPOs and criminal charges, they may use EPO review hearings to test the evidence of complainants and to obtain a record for later cross-examination on perceived inconsistencies during the criminal proceedings.¹⁵⁵ This concern reflects another example of how EPO proceedings can be used strategically by perpetrators. It supports the practice of confirming EPOs until the matter can be heard more fully, with appropriate constraints on the examination of witnesses that are alert to such tactics and not influenced by misconceptions about domestic violence or survivors.

As for intersections with child protection law, interviewees noted that even though children's services workers are involved in many families where EPOs are sought, they rarely use their powers to apply for EPOs to protect children. Instead, they direct survivors to apply themselves or via EPO programs, and then either step back once a parenting proceeding is initiated or step in again if the parties reconcile.¹⁵⁶ This approach is a particular issue for Indigenous women, with interviewees also noting the

¹⁵⁵ See interview 10 (noting defence counsel might put the complainant "through so much" that she seeks to have the charges withdrawn).

¹⁵⁶ See interviews 2, 4, 7, 10, 11, 13. For a decision where children's services did apply for an EPO against a father, although in relation to a claim of child abuse, see *MEL(P) v B JL*, 2013 ABQB 227 (terminating the father's contact with the child and denying his claims of alienation by the mother. The mother was also found in contempt for denying access (see also 2013 ABQB 236)). Courts often rely heavily on reports from children's services in family matters (interviews 7 and 10). See also Wieggers, *supra* note 48 (in this issue).

rarity of Indigenous litigants in EPO and family matters.¹⁵⁷ Overall, lawyers and service providers expressed frustration with the role of children's services in EPOs, although there were also positive accounts of interviewees working with children's services to obtain appropriate outcomes for their clients and their children.¹⁵⁸

E. PROTECTION ORDERS AND ACCESS TO JUSTICE

Access to justice concerns have been raised throughout this part, but it bears repeating that the EPO application and review process can be confusing and overwhelming for claimants, especially those who are Indigenous, racialized, English-language learners, criminalized, and/or lack financial and other resources, such as child care or the ability to travel to court.¹⁵⁹ One interviewee noted that due to the cost of legal assistance, "people are dealing with having to choose between fighting to keep their protection order and getting child support"; others stated their clients have no hope or faith in the legal system.¹⁶⁰ In some situations, clerks of the court may provide assistance, but interviewees indicated that not all clerks appear to have

¹⁵⁷ See interviews 9 and 12. According to one Indigenous interviewee, taking a family member to court opens up "our deepest wounds, and so to do that to your partner is very painful, and they know that right?"

¹⁵⁸ See interviews 5, 12.

¹⁵⁹ See interviews 2, 5, 6, 9, 10, 12, 13, 15, 16. Parties requiring interpretation are responsible for providing their own interpreters, and from my court observations, it appears that family members are permitted to provide this service. Interpreters are not sworn in.

¹⁶⁰ See interview 4; similar concerns were raised in interviews 12, 15.

training in domestic violence or engaging with survivors, nor do they have adequate time to do so.¹⁶¹ Survivors often lack awareness and information about protective remedies, including online resources.¹⁶² Perpetrators may also face barriers in accessing resources such as counselling and housing.¹⁶³

Interviewees also expressed concerns about the scope of *PAVFA* and its inability to provide remedies in cases of emotional and financial abuse and coercive control, which were noted to be particularly serious issues during the COVID-19 pandemic.¹⁶⁴ They recommended that the legislation should be amended to include these forms of abuse as well as explicitly authorizing related conditions, such as allowing the claimant temporary

¹⁶¹ See interviews 7, 13, 16. A shortage of clerks may also result in delays in filing and serving EPOs, which was a particular concern during the COVID-19 disruption in in-person services, see interviews 4, 9, 11.

¹⁶² See interviews 2, 3, 7. Helpful online resources were said to include: Centre for Public Legal Education Alberta, “Legal Topics” (last updated 2021), online: *CPLEA* <www.cplea.ca/publications-and-resources/?wpv-resourcecategory=abuse-and-family-violence&wpv_aux_current_post_id=14&wpv_aux_parent_post_id=14&wpv_view_count=379>; and Calgary Domestic Violence Collective, “Review Hearing of Emergency Protection Order (EPO)” (June 2020), online (pdf): *CDVC* <cdvc.ca/wp-content/uploads/2020/09/EmergencyProtectionOrderReviewMapSeptember2020.pdf>.

¹⁶³ See interviews 13, 15.

¹⁶⁴ See interviews 1, 3, 4, 7, 13, 15 (raising e.g. tax and business-related abuse, threats to file for bankruptcy, deliberate underemployment to avoid support obligations, failing to provide children with necessities and withholding consent to vaccinations, tricking survivors who do not read English into signing papers, abusing access to technology (e.g. alarm systems), poisoning survivors’ co-workers to the point of job loss).

possession of personal property, requiring the respondent to make rent or mortgage payments for the family home, and providing support and other necessities to the claimant and children.¹⁶⁵ Although other legislation will ultimately govern property and support disputes, it provides limited consideration of these forms of abuse and limited emergency remedies. Protection order legislation could also fill a gap here.¹⁶⁶

More positively, the Alberta Court of Appeal held in *Lenz* that *PAFVA* should not be interpreted to allow cost orders against claimants based simply on lack of success at a review hearing. The Court found it would be inappropriate “to create any impediment which would cause vulnerable victims to avoid seeking an EPO when they are at immediate risk of family violence, merely for fear that they may later have to pay adverse costs.”¹⁶⁷ Some exceptions to this general principle have been applied in subsequent cases—for example, in a case where the claimant failed to appear at the review hearing—although interviewees indicated that claimants may struggle to

¹⁶⁵ For examples of legislation that explicitly include such conditions, see e.g. *supra* note 30. As noted above, *PAFVA* does contain a general “any other conditions” clause for EPOs (*supra* note 4, s 2(3)(g)), but case law does not offer examples of it being used for these types of remedies.

¹⁶⁶ See the *Family Law Act*, *supra* note 16 and *Family Property Act*, *supra* note 16.

¹⁶⁷ *Supra* note 20 at para 45. See also *Kurszewski v Giroux*, 2019 ABQB 942 (costs were not granted even though the review court had “some suspicion” the claimant “engaged the EPO process for an ulterior purpose” (at para 2)); *Krisco*, *supra* note 129 (costs were not granted even though the court noted the claimant should have applied for a parenting order sooner to resolve a conflict in orders).

attend review hearings because of access to justice barriers.¹⁶⁸ Claimants may also be afraid to attend reviews where both parties will be in court at the same time, particularly if the respondent is self-represented.¹⁶⁹ This concern may be alleviated somewhat by the fact that review hearings have, since the COVID-19 pandemic, allowed for the option of virtual appearances, at least at the initial stage.¹⁷⁰

Interviewees observed that numbers of EPO applications in Alberta have appeared to remain steady during the pandemic after some decrease in March and April of 2020, but matters tended to be more serious and to involve children more often during the most significant lockdowns.¹⁷¹ Information sharing and communications between support services were also more difficult during this period as people were not physically present in court, and claimants likewise faced greater barriers gathering corroborative evidence.¹⁷²

¹⁶⁸ See e.g. *Jama v Jama*, 2016 ABQB 379 (involving sisters rather than intimate partners); interview 12.

¹⁶⁹ See interviews 1, 2, 6, 12 (suggesting the need for trauma-informed hearings). For a recent report on safety in BC courts, see Haley Hrymak, “Creating Safety in BC Courts: Key Challenges and Recommendations” (October 2022), online (pdf): *Rise Women’s Legal Centre* <womenslegalcentre.ca/wp-content/uploads/2022/10/RISE-courthouse-safety-Oct-13-2022.pdf>.

¹⁷⁰ See interview 13.

¹⁷¹ See interview 2.

¹⁷² See interview 6; see also Koshan, Mosher & Wiegers, *supra* note 15 at 792 (discussing *MP v NJ*, *supra* note 143).

A final issue is that *PAFVA* does not provide for recognition of EPOs obtained in another province or territory. There is case law confirming that in the absence of legislative provisions, inter-jurisdictional protection orders cannot be enforced.¹⁷³ This is a strong argument for amending *PAFVA* and other protection order legislation to include this recognition.

IV. CONCLUSION

Protection order legislation was enacted to enhance safety and access to justice for survivors of domestic violence. However, in jurisdictions like Alberta, this legislation may have become a victim of its own success, with the volume of applications construed as evidence of strategic litigation rather than levels of violence.¹⁷⁴ The intersections of protection order legislation with family law in particular indicate that the systems are not working together as they should, namely by providing immediate protection for survivors and children until family disputes can be resolved in the longer term. Use of mutual no-contact orders, reluctance to include children, and the reticence of police and child protection workers to apply for and enforce breaches of EPOs may also support (mis)assumptions that family violence is falsely claimed, exaggerated, or mutual.

There are amendments which can be made to *PAFVA* and legislation with similar gaps to address these concerns. Protection order legislation should authorize domestic violence service providers to apply for EPOs, and

¹⁷³ See *DH v TH*, 2018 ABQB 147. See also *Leroux*, *supra* note 124.

¹⁷⁴ For statistics on rates of domestic violence, see the Introduction to this volume, *supra* note 2.

legislative definitions of family violence should include emotional and financial abuse, coercive control, and children's direct or indirect exposure to violence. Legislation should explicitly allow EPO conditions aimed at preventing these diverse forms of abuse and to include orders for interim parenting. Express inclusion of the ability to make conditions related to parenting is not only important for claimants and children, but also for respondents so that consideration can be given to all the relevant circumstances. There are several jurisdictions that could serve as models in this regard, providing courts with broader scope for making protection orders that are more consistent with modern understandings of family violence, yet also consistent with reasonable limits on liberty.

Automatic review hearings should also be replaced with a model like Manitoba's, where a review is only prompted when the claimant or respondent applies and occurs in the Family Division if there are concurrent or anticipated family law proceedings.¹⁷⁵ This would require appropriate provision of legal services for claimants, and would also be facilitated by a Unified Family Court to provide expertise and avoid problems with information-sharing between courts.¹⁷⁶ This model for reviews could potentially respond to arguments about the purported

¹⁷⁵ See Court of the Queen's Bench of Manitoba, "Manitoba's Family Division Case Flow and Scheduling Model, Practice Direction Re: Comprehensive Amendments to Court of Queen's Bench Rules (Family)" (1 February 2019), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1152/december_19_revised_and_corrected_practice_direction.pdf>.

¹⁷⁶ Plans for a Unified Family Court in Alberta were suspended in February 2020.

strategic advantages of applying for an EPO and might assist in protecting survivors and children pending the outcome of family matters. It might also reduce the use of mutual orders, but that practice should be legislatively discouraged. BC's *Family Law Act* explicitly provides that before courts grant mutual orders, they must consider "the history of, and potential for, family violence, ... the extent of any injuries or harm suffered, and ... the respective vulnerability of the applicants."¹⁷⁷ This is a recommended approach for other protection order legislation as well.

Governments should also monitor and evaluate their protection order legislation regularly and provide statistics on its usage and enforcement, including demographic information about claimants and respondents to the extent possible, so that specific access to justice barriers can be assessed and redressed.

Ongoing training on trauma, intersecting inequalities, and myths and stereotypes about survivors and domestic violence is also required for all legal actors working with protection order legislation, including police, child protection workers, lawyers, court staff, justices of the peace, and judges.¹⁷⁸ In order to fulfill their roles in responding to violence, these actors—particularly courts—must assess claims of family violence on the basis of the evidence with alertness to the social context of violence and its manifestations and consequences for women and children.

¹⁷⁷ BC *FLA*, *supra* note 17, s 184(2).

¹⁷⁸ See interviews 5, 9.

As noted earlier, protection orders are only one means of attempting to prevent domestic violence. Other supports and services, including housing, childcare, employment supports, health services, and education, are also critically necessary. But the legal remedies that do exist must be appropriately responsive to domestic violence and accessible to all survivors, and must work in appropriate ways with other laws and legal systems. This article has endeavoured to show that protection order legislation can be amended and applied in ways that fulfill these goals.