From Awareness to Action

BRIEF

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Navigating Protection Orders: Analyzing the Application Process and Precedent Cases in Manitoba

ALLIANCE OF CANADIAN RESEARCH CENTRES ON GENDER-BASED VIOLENCE

RESOLVE

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RESOLVE Manitoba is based at the University of Manitoba, Winnipeg, Manitoba, Canada, on original lands of Anishinaabeg, Cree, Oji-Cree, Dakota, and Dene peoples, and on the homeland of the Métis Nation.

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Department of Justice Canada
Ministère de la Justice Canada

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INTRODUCTION

A Protection Order is a legal tool intended to safeguard individuals from domestic violence, stalking, and other various types of harassment. It is a court order that forbids the respondent from contacting the applicant. In Manitoba, these orders may be issued without prior notice to the respondent if a designated Justice of the Peace determines that (1) the respondent is committing or has committed domestic violence against the subject or is stalking or has stalked the subject; (2) the subject believes that the respondent will continue or resume the domestic violence or stalking; (3) the situation is serious or urgent, and (4) that there is a reasonable likelihood the respondent will persist in or return to the impugned behaviour.[1]

The Domestic Violence and Stalking Act outlines the requirements for issuing a Protection Order. The on-duty Judicial Justice of the Peace may grant a Protection Order if they are satisfied that the respondent is actively committing or has a history of domestic violence or stalking, and if it is believed that the respondent is likely to continue or resume such behaviour. The applicant must show a necessity for protection based on a reasonable likelihood of ongoing or resumed violence or stalking, and the order should be issued without delay due to its seriousness and urgency.

PROCESS

PROTECTION ORDER SUBMISSION

Under section 4(2) of *The Domestic Violence and Stalking Act*, an application for a Protection Order may be submitted in person by the subject, or by a lawyer, peace officer, or a person designated by the minister with the subject's consent, or by telecommunication with the same parties and consent, in accordance with section 5. Importantly, the applicant is not required to wait until they are injured to apply for a Protection Order. The applicant is also not required to pay a fee to obtain a Protection Order.[2]

BALANCE OF PROBABILITIES

Under section 3(2) of the *Act*, all determinations made by a designated Justice of the Peace on an application for a Protection Order are to be made on a balance of probabilities. This standard, which requires a finding that the applicant's claims are more likely than not to be true, ensures a fair and accessible process for individuals seeking protection. The Justice of the Peace must determine that the applicant requires immediate or imminent

[1] *The Domestic Violence and Stalking Act,* Section 6.

[2] *Ibid* at Section 5.

protection and must be satisfied that there is a reasonable likelihood that the respondent will continue the stalking or resume the domestic violence in question.[3]

AVAILABLE INFORMATION REVIEW

The Justice of the Peace will need to consider any information available during the application hearing from court registries regarding any criminal proceedings, family law cases, and other legal matters involving the respondent. The respondent's past behaviour and the history of the relationship between the parties are pertinent and admissible in assessing whether the respondent's actions led to the applicant being harassed and whether the applicant's fear was justified.[4]

PROCEDURE AND PROVISION IMPLEMENTATION

The Justice of the Peace may implement procedures they deem suitable to help the applicant feel at ease and to facilitate their understanding of the application process. Additionally, evidence must be presented under oath.[5]

A Protection Order may contain various provisions that the designated Justice of the Peace considers necessary or appropriate in the circumstances. These provisions can include prohibitions against the respondent from following, communicating with, or contacting the subject, as well as from attending locations where the subject lives, works, or frequently visits.[6] If a Protection Order is granted, the police or Sheriff's Office serve the respondent with a copy of the order as soon as they are able.

PROTECTION ORDER ISSUE

It is important to highlight that Protection Orders issued without prior notice can have significant and potentially life-changing consequences for the respondent. Such orders may restrict the respondent from communicating with or contacting the applicant, as well as from being present at or near the applicant's residence, workplace, or place of worship. Additionally, if a child is involved, the order can greatly impact the respondent's ability to access and maintain contact with the child. However, the respondent has 20 days, or a longer period as permitted by a judge, from the receipt of their copy of the order to apply for its cancellation and present evidence.

CHALLENGES

Protection Orders do not always succeed in preventing domestic violence.[7] Several obstacles impede their effectiveness, including inadequate enforcement by police officers, procedural challenges in the application process, financial and accessibility barriers, and the limited ability of Protection Orders to actually prevent domestic violence.

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[3] *Lafreniere v. Bulloch*, [2015] M.J. No. 221.
[4] *R. v. Davis,* [1999] M.J. No. 477.
[5] *Supra* note 1 at Section 4.
[6] *Supra* note 1 at Section 7.
[7] Isabel Grant, "Intimate partner criminal harassment through a lens of responsibilization" (2015) 52:2 Osgoode Hall LJ 552 at 560 (noting that protection orders often fail to prevent criminal harassment)

INADEQUATE ENFORCEMENT OF PROTECTION ORDERS

A major barrier is the inadequate enforcement of Protection Orders by police officers. Studies show that law enforcement may justify their inaction when protective orders are violated by attributing blame to bureaucratic or technical obstacles in securing a conviction. This failure to enforce leaves many women at risk, even with Protection Orders in place.[8]

The provisions outlined in a Protection Order aim to guarantee the immediate safety and security of the individual involved. These provisions may limit the respondent's movements and communications, and in cases involving firearms, they can require the surrender of weapons to law enforcement. The enforcement of these orders is strong, as they are an order of the Court of King's Bench and are enforced accordingly.

Police officers are required to notify designated firearms officers when seizing weapons pursuant to a Protection Order.[9] Despite this legislative provision that mandates police officers to notify firearms officers upon weapon seizures, enforcement remains inconsistent. The requirement for Protection Orders to be filed in court to become enforceable does not ensure that police will respond to breaches of these orders. This lack of enforcement leaves many individuals vulnerable, even with legal protections in place.

LIMITED ACCESS TO PROCEDURES

Another challenge is the limited access to the procedure for applying for a Protection Order. In Manitoba, Section 4(2) of the *Act* authorizes the use of telecommunications, including telephone, internet, email, or fax, for submitting applications for Protection Orders and presenting evidence to the Justice of the Peace. Furthermore, pursuant to section 5(4) of the *Act*, a Protection Order granted following an application submitted via telecommunication holds the same legal weight as one based on an in-person application. Despite these advancements, challenges persist to obtain a Protection Order, particularly in northern and rural communities in Manitoba, where access to reliable internet and phone service remains limited. Additionally, barriers to in-person applications, such as limited access to transportation, make the process more difficult for all individuals. the process restricts the use of telephones and limits the individuals through whom an application can be submitted, requiring applicants to physically visit courthouses and police stations to seek Protection Orders. This can be especially difficult for those living in remote areas or those with limited mobility.[10] Provinces had allowance for telecommunication applications during the COVID-19 pandemic, which highlights the potential for broader reforms to enhance accessibility in the application process.

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[8] Psychological Abuse Claims in Family Law Courts in BC: Legal Applications and Gaps, (2021) 34:1 Can. J. Fam. L. 1 - 43 / (2021) 34:1 Rev. Can. D. Fam. 1 - 43.

[9] *The Domestic Violence and Stalking Act:* Domestic Violence and Stalking Regulation, Definitions.

[10] Underneath the Golden Boy: A review of recent Manitoba laws and how they came to be The Domestic Violence and Stalking Prevention, Protection and Compensation Act, (2001) 28 Man. L.J. 269 - 286.

FINANCIAL CONSTRAINTS

Financial constraints and a lack of resources significantly impede access to Protection Orders. The application process in and of itself is confusing and overwhelming for self-represented individuals, and additional challenges exist for marginalized groups, notably Indigenous and racialized individuals, as well as those with limited financial means. This barrier is worsened by funding cuts to Legal Aid and the high costs associated with the applicants retaining private legal counsel.

There also remains an inherent limited effectiveness of Protection Orders in preventing violence. While the *Family Law Act's* broad definition of family violence[11] is a positive development, the judicial emphasis on isolated incidents rather than the cumulative impact of ongoing violence undermines the effectiveness of these orders. This limited perspective does not adequately address the full extent of the threat posed by abusers.

OTHER

The judicial system can create obstacles as well. Individuals who have experienced abuse frequently struggle to access the courts due to significant cuts in funding for Legal Aid and the high costs associated with private lawyers. Additionally, a lack of understanding among general judges regarding family law and domestic violence can result in rulings that adversely affect these individuals.

CONCLUSION

The challenges associated with obtaining and enforcing Protection Orders in Manitoba are multifaceted. Although legislative measures exist to streamline the application and enforcement processes, practical obstacles remain. The limited effectiveness of Protection Orders in preventing violence underscores the need for a more comprehensive approach to addressing domestic violence. Legislative reforms and enhanced enforcement mechanisms are essential for ensuring the protection and safety of domestic violence survivors.

Despite the advancements made through the *Family Law Act*, Protection Orders exhibit an inherent limitation in their effectiveness at preventing violence. While the *Act's* broad definition of family violence represents a significant step forward, the judicial system's focus on isolated incidents rather than the cumulative effect of ongoing abuse significantly undermines the power of these orders. This narrow perspective fails to capture the full scope of the threats posed by abusers, leaving many survivors inadequately protected.

The judicial system itself presents substantial barriers for survivors seeking justice. Many survivors of abuse encounter significant challenges in accessing the courtroom, exacerbated by funding cuts to Legal Aid and the prohibitive costs associated with hiring private attorneys. This financial strain disproportionately affects those who are already vulnerable. Furthermore, a lack of comprehensive understanding among general division judges regarding the complexities of family law and domestic violence often leads to decisions that can

[11] "One Family, One Judge": Towards a New Model for Access to Justice for Families Facing Violence in BC, (2013) 18 Appeal 3 – 19.

further jeopardize the safety and well-being of survivors.

To ensure the effectiveness of Protection Orders and safety of victims, it is imperative to adopt a more holistic approach that considers the cumulative impact of abuse and addresses the systemic barriers within the judicial process. Legislative reforms, increased funding for legal resources, and comprehensive training for judicial officials on the nuances of domestic violence are essential steps toward creating a more equitable and supportive legal environment for domestic violence survivors.