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Family Violence Cases in Alberta: A Snapshot

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Cases Considered:

M.E.B. v. C.W.M., 2008 ABQB 484;
N.L.B. v. K.G.C., 2008 ABQB 485;
R. v. M.S., 2008 ABQB 488;
K.F. v. A.F., 2008 ABQB 496.

In a one week period in August, four decisions concerning family violence were posted on the Alberta Courts website, all written by Justice Donald Lee of the Alberta Court of Queen's Bench. This is certainly the highest number of cases posted in this area in one week since ABlawg began systematically reviewing Alberta court decisions in the fall of 2007. Three of the four decisions (*M.E.B. v. C.W.M.*, 2008 ABQB 484; *N.L.B. v. K.G.C.*, 2008 ABQB 485; and *K.F. v. A.F.*, 2008 ABQB 496) arose under Alberta's *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 (*PAFVA*), and the fourth dealt with a criminal matter (*R. v. M.S.*, 2008 ABQB 488). This post will consider whether these cases, even though they are a very small sample, are representative of family violence matters coming before the Alberta courts. Statistics Canada undergoes a similar exercise each year when it gathers statistics on women's shelters in a one day period as a snapshot of overall trends (see for example http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/85-002-X/85-002-XIE2007004.pdf).

The *PAFVA*, which was first enacted in 1999, allows family members to apply for emergency protection orders (EPOs) in cases of family violence. Family relationships covered by the Act include those between current and former spouses, adult interdependent partners, others residing (or formerly residing) in intimate relationships, and generally, between those related to one another by blood, marriage, adoption, or adult interdependent relationships and children in the care and custody of any of the above persons (*PAFVA* s. 1(1)(d)). Family violence is defined to include acts, omissions, and threats to cause injury or property damage that intimidate or harm family members, as well as physical confinement, sexual abuse and stalking (*PAFVA* s. 1(1)(e)). EPOs typically restrain contact between the respondent and claimant, although other conditions can also be made, including orders for exclusive possession of the family home and prohibitions against attending at a place of work, school, or other place (*PAFVA* s. 2(3)). EPOs can be granted by provincial court judges and justices of the peace on an application without notice to the respondent, in person or by telephone (*PAFVA* ss. 2(1), *Protection Against Family Violence Regulation*, Alta. Reg. 80/1999, s. 4(2)). Where an EPO is granted, it must be served on the

respondent before it takes effect, and must be reviewed by a justice of the Court of Queen's Bench in a hearing held not later than 9 working days after the granting of the order (*PAFVA* ss. 5(1), 2(6)).

In an evaluation of the *PAFVA* completed in 2005, University of Calgary researchers analyzed data collected from court files with respect to the use of the *PAFVA* from 2002 to 2004 (see Leslie Tutty, Jennifer Koshan, Deborah Jesso, and Kendra Nixon, *Alberta's Protection Against Family Violence Act: A Summative Evaluation* (Calgary: RESOLVE Alberta, 2005) ("*PAFVA Evaluation Report*"), available here). Amongst the findings of this study were (at pp. 2 - 3, 43):

- Claimants under the *PAFVA* were predominantly female (92.1%), and respondents were primarily male (94.5%).
- The most frequent categories of relationship between claimant and respondent were spouses (31.9%), followed by common-law partners (19.6%), ex-common law partners (15.9%), and ex-spouses, either legally separated or divorced (12.1%).
- Of the intimate relationships with children associated with them, most applications (75.6%) requested that the order cover the children.
- The majority of files did not include information on the racial background of the claimant or respondent, but on files where this information was provided, both claimants and respondents were mostly Caucasian (53.4% and 57% respectively).
- There was only one case involving a same sex partner relationship that was explicitly acknowledged.
- In a majority of files (85.7%) the respondent had not been charged criminally for the same matter(s) at the time of the EPO application.
- Almost all of the cases (90%) included evidence of previous incidents of violence before the circumstances that were the subject of the EPO application.
- Of 976 applications for EPOs heard by Justices of the Peace or Provincial Court Judges in Alberta from 2002 to June of 2004, the majority (82.7%) were granted.
- In the 781 cases where information was available about the review in the Court of Queen's Bench, 70.4% of EPOs were confirmed or confirmed with some changes.
- The *PAFVA* is used most frequently in Edmonton, with 55.3% of applications occurring in that city, as compared with only 12.4% in Calgary.

These patterns play out to different degrees in *M.E.B. v. C.W.M.*, *N.L.B. v. K.G.C.*, and *K.F. v. A.F.* All three cases involve allegations of violence between intimate partners, and in two of the three cases (*N.L.B. v. K.G.C.* and *K.F. v. A.F.*), there were children of the relationship. All three relationships were heterosexual, and two of the three involved male respondents and female claimants, with the third, *K.F. v. A.F.*, involving a female respondent and male claimant. The racial background of the parties is not mentioned by Justice Lee in any of the *PAFVA* cases.

What is the significance of these demographic details? First, it is important to recognize the reality that while the *PAFVA* covers elder abuse, child abuse, and other categories of violence between family members, cases of violence between intimate partners are heard most frequently under the Act, with cases of male against female violence being most common. The Alberta

government was explicit in its consultations leading to the *PAFVA* that the Act should be gender neutral (see Alberta Justice, *Protection against Family Violence Act: Consultation Report* (Edmonton, AB: Alberta Justice, 1998)), but it is important that this does not mask the actual reality of family violence in this province.

Second, the absence of information about the racial and cultural background of the parties makes it very difficult to assess whether the *PAFVA* is being used by victims of violence who come from racialized communities. Unique considerations may make it more difficult for racialized victims of violence to seek protection under legislation like the *PAFVA*, including concerns about immigration status, fear of the authorities, and fear of ostracism within their own communities (see Dianne Martin and Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8 Canadian Journal of Women and the Law 3). This led the researchers conducting the *PAFVA* evaluation to recommend that the application forms used under the *PAFVA* be revised to include demographic information about the claimant and respondent, including their racial and cultural background (*PAFVA Evaluation Report* at 92).

As noted above, the *PAFVA Evaluation Report* also quantified the number of files where criminal charges were laid for the incident(s) that were the subject of the *PAFVA* application. This was thought to be an important factor in assessing the interaction between the civil approach to family violence and the criminal approach. The government's intent in passing the *PAFVA* was not to replace the criminal justice response to violence, but to supplement it with remedies that would be more accessible and broader in scope. Interestingly, however, the *PAFVA* is often used as an alternative to the criminal law in practice. The cases in this sample illustrate this trend - it is explicitly stated in two of the cases that no criminal charges had been laid in relation to the abuse that formed the basis of the *PAFVA* application (*M.E.B. v. C.W.M.* and *K.F. v. A.F.*), and in the third case there is no mention of criminal charges (*N.L.B. v. K.G.C.*). This is so even though in one case, *M.E.B. v. C.W.M.*, Justice Lee noted that the claimant sought medical attention for her injuries and was "pursuing assault charges against the Respondent with the police" (at para. 10), and in another case, *N.L.B. v. K.G.C.*, there had been sufficient evidence of family violence to confirm the EPO for a period of one year.

These cases raise the question of whether the police are following the mandatory charging policy that is intended to leave the decision to pursue domestic violence charges with the police, to be based upon whether they have reasonable and probable grounds to lay the charge rather than the victim's wishes. Similar policies have been in place across Canada since the early 1980s, although questions have been raised over the years about whether these policies are being followed, or conversely, are being followed with a vengeance, resulting in dual charging of victims who use force to defend themselves. While incidents covered by the *PAFVA* may not always qualify for a criminal response, given the lower burden of proof under the *PAFVA* and its broader definition of violence (as compared to the definition of assault under the *Criminal Code*), cases such as *M.E.B. v. C.W.M.* do raise concerns about the police approach to relatively serious cases of family violence.

It is also interesting to note that two of the three *PAFVA* cases came before the Court of Queen's Bench due to allegations that no-contact orders had been breached. There are no specific provisions under the *PAFVA* dealing with breaches of EPOs, but respondents may be charged under s.127 of the *Criminal Code*, which creates an offence for disobeying a lawful court order without excuse.

In *M.E.B. v. C.W.M.*, a somewhat unusual situation arose in that the respondent attended at the claimant's residence before he had been served with the EPO, which had been granted earlier that day and provided for a no-contact order and exclusive possession of the residence to the claimant. The claimant called the police, but when they attended and served the EPO on the respondent, he continued to speak to the claimant and, as Justice Lee put it, "to try to reconcile with her" (at para. 4). The police eventually arrested and charged the respondent under s.127. Justice Lee found that there had been a breach of the EPO, and confirmed that order for a period of one year.

In contrast, in *N.L.B. v. K.G.C.*, an EPO was granted on July 10 and confirmed by the Court of Queen's Bench on July 23 for one year. The respondent was later arrested at the claimant's residence, which he was prohibited from attending, although it does not appear he was charged under s.127 of the *Criminal Code*. At the breach hearing, Justice Lee accepted the respondent's evidence that he had gone to the claimant's (and his former) residence because family members told him that she had abandoned their three young children there for several days. The respondent argued that this situation gave rise to a necessity defence. There was also evidence that the claimant had contacted the respondent "demanding money and / or drugs" (at para. 9), and that she had both told him to "forget about" the no-contact order, and threatened to use it against him (at paras. 14, 17). In these circumstances, Justice Lee found that the respondent had not breached the EPO, but he also advised the respondent to seek to vacate or amend the EPO to avoid further allegations of breaches in the future.

The third case, *K.F. v. A.F.*, was a review hearing to decide whether to confirm the EPO that had earlier been granted by the Provincial Court. This case is of interest because it involved a female respondent and male claimant. By affidavit, the claimant alleged a long history of emotional and physical abuse by the respondent. In opposition, the respondent's affidavit alleged that any violence on her part was in defence of herself and the child of the relationship, and she characterized the claim against her as "vexatious and false" (at para. 7). While no mention was made of it, it should be noted that s.13 of the *PAFVA* provides that "no person shall, with malicious intent, make a frivolous or vexatious complaint under this Act." Both the claimant and respondent accused each other of having a mental illness. Children's Services, which was involved in the matter in light of a pending child welfare application against the respondent, provided a letter expressing its opinion that she was "aggressive, threatening, and emotionally unstable", and supporting the respondent's argument that he was in need of protection under the *PAFVA* (at paras. 14-15). Because the parties' affidavit evidence was conflicting, and there was no evidentiary basis put forward for the opinion of Children's Services, Justice Lee ordered that the matter proceed to a full hearing with *viva voce* evidence. He ordered that the existing EPO remain in place until the hearing.

Of note is the fact that all three *PAFVA* cases in this sample were decided in Edmonton by Justice Donald Lee. It is somewhat futile to speculate why this particular judge based in Edmonton rendered three decisions under the *PAFVA* in one week. Perhaps cases are being heard by a broader range of judges in a broader range of Alberta jurisdictions, and not being posted to the Alberta Courts website. If that is the case, it is to be hoped that judges will change this practice, as these cases are an important source of information about the operation of the *PAFVA.* Because applications under the *PAFVA* are often made before justices of the peace, and often by telecommunication, it is difficult to monitor the operation of the Act unless decisions like those of Justice Lee are posted.

The fact that all three *PAFVA* cases were from Edmonton might also suggest that the Act continues to be used more frequently in that city. Police play an important role in the usage of the *PAFVA* given that often they are the first in contact with alleged victims of family violence. However, the *PAFVA Evaluation Report,* which included interviews with police, shelter and child welfare workers, and judges, found that in some communities "the police prefer not to use the legislation" (at 59). This problem was found to be particularly acute in rural and remote communities, resulting in access to justice issues given that the option of the victim applying through provincial court is more limited there. This led the authors of the report to recommend that the category of persons who are authorized to apply for EPOs under the *PAFVA* be broadened to include shelter and victims services workers (at 90). Training on the potential benefits of the *PAFVA* for police, and public education about the *PAFVA* were also recommended (at 95-96).

What about the criminal case in this sample? *R. v. M.S.* displays many of the same attributes of a "typical" family violence matter as the three *PAFVA* cases. It involves a male accused and female alleged victim in an intimate relationship with a young child. Unlike the cases under the *PAFVA*, however, ethnic background is explicitly mentioned in *R. v. M.S.* Justice Lee notes that the couple is from Sierra Leone, and that "the [c]omplainant believes that the [a]ccused tends towards domestic violence because of his background of cultural beliefs" (at para. 10). The alleged assault was a serious one, involving a weapon, injuries, and the attendance of emergency medical services at the scene. The case came before the court as an application by the accused to waive the no-contact order made as a condition of his release on bail pending the trial of his criminal charge. The complainant gave evidence to support the accused's application, during which it came out that she was economically dependent on him, but felt that he would not re-offend, in part because he had taken an anger management class. The Crown opposed the application.

In my experience working as a Crown prosecutor, this type of situation occurred relatively frequently. The mandatory charging policy mentioned above, and its companion "no-drop" prosecution policy were motivated by these kinds of cases in an effort to take the pressure off the alleged victim to decide whether to proceed with criminal charges. However, if the couple remains together between the time of the charges and the trial, pressure may be brought to bear on the complainant not to testify at trial, or to claim memory loss. Jurisdictions such as Calgary and Edmonton now have specialized domestic violence courts, the mandate of which is to

provide support to all of the parties and resolve cases as expeditiously as possible to avoid situations like the one in *R. v. M.S.* Nevertheless, there will still be some delay between the time of charges and trial.

Justice Lee took many of these considerations into account in his decision in *R. v. M.S.*, where he denied the application to remove the no-contact condition from the bail order. He noted that the complainant was only 21 years old, was financially dependent on the accused and isolated from her family, and that her actions were largely motivated out of fear that he would take their baby away from her. He also expressed concern that the accused "could persuade or influence the [c]omplainant in such a way that [she] will never testify fully at the trial of this matter" (at para. 27). The accused was already permitted to have contact with the complainant in public and by telephone, and Justice Lee held that this would have to be sufficient until trial. The fact that the accused had completed an anger management course was not seen as persuasive, with Justice Lee finding that the course did not "materially reduce this risk and danger, particularly given the apparent additional cultural background issues here" (at para. 25).

It is helpful to see the issue of culture being explicitly acknowledged and discussed in a family violence case. However, it is unclear what evidence was before Justice Lee other than the complainant's testimony about their culture. One would hope that assumptions were not made about the propensity for violence of persons from a particular ethnic background. Also of concern is the finding that the anger management course would not have made a material difference to the accused's risk of re-offending. If this conclusion was based on evidence, it points to a need to ensure that courses such as this are responsive to the needs of persons from varying cultural backgrounds. Many domestic violence perpetrators are ordered to take anger management courses as conditions of their sentences, suggesting that the judiciary puts a fair amount of faith into such courses. *R. v. M.S.* might simply be seen as an acknowledgement that this should not always be so, although to the extent this is tied to the cultural background of the accused and complainant, it does raise concerns.

Overall, it is noteworthy that this sample of cases does reflect many of the trends in family violence matters. While the justice system has undergone significant reforms to provide more accessible procedures and remedies for family violence, these kinds of cases remain amongst the most difficult that lawyers and judges have to deal with. Regular monitoring of family violence cases is critical to obtaining a sense of how the civil and criminal justice approaches are working at a systemic level, and this can be facilitated if decisions such as Justice Lee's are made available to the public on the Alberta Courts website.