September 5, 2013

Domestic Violence Cases: A Summer Snapshot

Written by: Jennifer Koshan

Cases commented on: *R v Hooker*, 2013 ABQB 271; *R v Bandesha*, 2013 ABCA 255

There were a number of reported Alberta cases involving domestic violence this summer. The decisions collectively illustrate the broad range of issues that can arise in domestic violence cases – for example, constitutional, criminal and family law issues – some of which may now be heard by specialized domestic violence courts. They also show a range of sensitivities on the part of judges to the realities of domestic violence. In this post I will comment on two of the cases, both arising in the criminal context, and in a subsequent post I will comment on two cases arising in the family law context.

R v Hooker: The Role of Specialized Domestic Violence Courts

In the first case, *R v Hooker*, 2013 ABQB 271, Associate Chief Justice John Rooke of the Alberta Court of Queen's Bench heard an application for a detention review under section 525 of the *Criminal Code*, RSC 1985, c C-46, in which the accused argued that he was subject to unreasonable delay and discrimination while waiting for his trial in Provincial Court. The gist of his argument was that he would normally have been tried within two months in Provincial Court because he was in custody, but since he was charged with an assault against his partner, the trial would be heard in the specialized Domestic Violence Court, for which there was a wait of four months.

Justice Rooke rejected the argument that there was unreasonable delay. He indicated (at para 9) that in an earlier case, *R v Bowden*, 2013 ABQB 178, he had set a guideline of six to nine months for trials in Provincial Court for accused persons in custody. A trial within four months in Domestic Violence Court was not unreasonable under these guidelines.

As for the accused's argument of discrimination, Justice Rooke noted that there had been no *Charter* application made in the case. However, he indicated that the right to a trial without unreasonable delay is subject to reasonable limits under section 1 of the *Charter*, such as those which are "appropriate to protect public safety, order, health and morals, or the fundamental rights of others, all of which include alleged victims of domestic violence and the family values they represent" (at para 6, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 95). According to Justice Rooke, "there may be a difference in the treatment of different accused charged with different forms of assault, without the differences being the subject of any

legitimate complaint or relief under s. 525 or otherwise" (at para 6). He referred to materials provided by the Crown, attached as Appendix B to the decision, which establish that "Domestic Violence Court is a positive action program designed to "address the unique nature of violence which occurs within the family, as opposed to violence between strangers or casual acquaintances . . . " and provide answers to "some of the challenges with hearing family violence cases", including providing a more holistic approach to the subject, such as specialized counselling and treatment services for the benefit of both victims and offenders" (at para 4). This "positive action" of the Domestic Violence Court was found to justify "a longer than normal, but still reasonable, delay, had there been unreasonable delay in this case to any real extent" (at para 8).

The accused also argued that there had been a change in circumstances warranting a review of his detention, namely, that the complainant had recanted her complaint of domestic violence. Justice Rooke stated (at para 11) that this was an issue to be considered pursuant to an application under section 520 of the *Criminal Code* for a review of bail, which can be exercised every 30 days.

Justice Rooke's written decision is quite brief, but it does include a transcript of the application where the parties' arguments are fleshed out in more detail. From the transcript, it appears that the discrimination claim was based on the point that while the *Criminal Code* does not differentiate between domestic and other assaults, the creation of a domestic violence court does have this effect, which prejudices accused persons because of delay. The defence argued that the majority of persons accused of domestic violence are males, so the delay prejudices an identifiable group (Appendix A, p 7). The accused also contended that the Domestic Violence Court was established "for administrative convenience of the Crown" (Appendix A, p 11). This was disputed by the Crown, who noted that the Court was initiated by the government as part of a consultative process leading to a new policy on domestic violence (Appendix A, p 12). Appendix B contains further information provided by the Crown on the establishment of domestic violence courts in Alberta, as well as international and American research on domestic violence courts, all of which is quite useful.

While *Hooker* involved the Edmonton Domestic Violence Court, recent research on Calgary's Domestic Violence Court also deals with the issue of delay. My colleague Leslie Tutty and I have an article forthcoming in volume 50(4) of the *Alberta Law Review* in which we analyze the impact of Calgary's DV Court (see the full evaluation report here). Although we did not measure the impact that the Calgary DV Court has had on trial wait times, our research does show that the Court has had the effect of increasing the number of cases resolved before trial, which in itself reduces delay. Before the Court was implemented, 43% of cases concluded without trial, and after the Court was established, 68-70% of cases concluded without a trial (at 6). Interviews with justice and community stakeholders indicated that reducing delay was one of the objectives of the DV Court, and confirmed the importance of expediting domestic violence matters so as to decrease the number of victims recanting and to get perpetrators into counselling and treatment more quickly (at 51-52). However, some interviewees suggested that the Calgary DV Court has seen an increase over time in the volume of cases it is processing without a corresponding increase in resources, leading to some delays (at 61, 64-66).

It is important to reiterate that although an argument of discrimination was made, *Hooker* did not involve an application under section 15 of the *Charter*. It is difficult to see such an application being successful. In order to establish a violation of section 15(1), a claimant must show evidence of (1) differential treatment on a protected ground, and (2) discrimination, defined in terms of prejudice, stereotyping, and perhaps disadvantage more broadly (for a discussion of the evolving and rather uncertain test for discrimination see here). While there may be differential treatment (i.e. delay) for persons accused of assault whose charges are processed in domestic violence court, it is difficult to see this distinction as being based on a protected ground, as it flows from the nature of the criminal charge. Hooker's point that a majority of persons accused of domestic violence are males hints at an argument of adverse impact based on sex, but such claims are notoriously difficult to prove (see e.g. *Symes v Canada*, [1993] 4 SCR 695, in which a majority of the Supreme Court rejected an argument that the inability to fully deduct child care expenses under income tax rules amounted to sex discrimination because of an adverse impact on women). Even if trial delay could be seen as having a differential impact based on sex, it would likely not be seen as discriminatory. Delays are not based on any prejudicial or stereotypical thinking about persons accused of domestic violence related offences, and even if a broader definition of discrimination as disadvantage were applied, a two month delay (or four months to trial) would likely be seen as *de minimus*, particularly in light of the six to eight month guideline set out in *Bowden*. It is likely that a section 15 application would never get to the sort of section 1 considerations noted by Justice Rooke in this case.

Alternatively, the government might contend that domestic violence courts are ameliorative programs protected under section 15(2) of the *Charter*. In *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41, section 15(2) was given independent force, and will shield programs where "(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds" (at para 41). The first part of this test might be satisfied on the basis that domestic violence courts were established to deal with the complexities of such cases in ways that will be more beneficial, particularly for victims and their children. Justice Rooke may have been getting at this when he referred to the Domestic Violence Court as a "positive action program" (at para 4). However, the second part of the test may present the same problem as the argument that domestic violence courts result in discrimination – such courts are not directly linked to protected grounds of discrimination. The application of section 15(2) would also require an adverse effects type of argument, focusing on the preponderance of females as victims of domestic violence, or perhaps an argument that being a victim of domestic violence is an analogous ground deserving of protection (and if this was the case, then being accused of domestic violence might equally be an analogous ground).

Hooker is the first reported case I am aware of dealing with issues related to the operations of domestic violence courts in Alberta, and it is heartening to see a decision recognizing the important objectives of such courts. Justice Rooke's decision suggests that for the time being, arguments about the short delays before trial in domestic violence courts will not meet with success, either on the basis of unreasonable delay or discrimination, at least in part because of the "positive action" provided by these courts. If delays become longer, however, and exceed the guidelines stipulated by Justice Rooke in *Bowden*, the outcome may be different. This is a good

reason for the government to ensure that domestic violence courts in Alberta have sufficient resources to process cases in a timely fashion, which was after all one of the original rationales for establishing such courts.

R v Bandesha: Sentencing In Domestic Violence Cases

Like *Hooker*, *R v Bandesha*, 2013 ABCA 255, also deals with domestic violence in the criminal context. Unlike *Hooker*, however, it does not involve the most common form of domestic violence, intimate partner violence. Rather, *Bandesha* involves an assault committed against a woman by four family members to coerce her to marry someone against her will. The woman was pushed, kicked and beaten, and a large clump of her hair was pulled out. The assault took place in the victim's home, where the ringleader (her uncle) also resided, and where the accused (her cousin) was visiting. Following the assault the victim left the residence and stayed in a women's shelter for about three weeks.

The accused appears to have pleaded guilty to assault causing bodily harm, and was granted a conditional discharge by the sentencing judge, Justice Marsha Erb of the Court of Queen's Bench. It is important to note that this matter was not heard by a specialized domestic violence court, as such courts only operate at the provincial court level in Alberta.

The Crown appealed the sentence to the Alberta Court of Appeal. In a memorandum of judgment, Justice Jean Côté, writing for himself and Justices Patricia Rowbotham and Bruce McDonald, allowed the appeal and substituted a sentence of 84 days in jail. The Court noted the importance of the principle of proportionality, such that "every sentence must fit the crime and the offender" (at para 6). In this case, it was appropriate to consider a number of factors. The accused had been a permanent resident of Canada for ten years, but did not hold Canadian citizenship and risked deportation following conviction for this crime. The Court of Appeal noted that in *R v Pham*, 2013 SCC 15, the Supreme Court indicated that possible deportation can be taken into account in sentencing, but cannot "overrule proportionality" in terms of "the gravity of the offence or the degree of the offender's responsibility" (at para 6, citing *Pham* at para 14). According to *Pham*, a "small adjustment of sentence" may be appropriate where deportation is a possible consequence, but "the will of Parliament as to deportation must not be circumvented by inappropriate and artificial sentences" (at paras 6-7). In this case, the Court of Appeal found that based on all of the circumstances, jail would have been a proportionate sentence, so a discharge and avoidance of criminal conviction was not appropriate based on immigration consequences.

The factors that warranted a jail term were as follows. First, the Court of Appeal considered the circumstances of the accused and his role in the assault. Although the accused was not the ringleader, he "took full part in the physical attacks, and was a big strong man in the prime of life" (at para 12). Second, the Court considered the nature of the assault itself, stating that "In some cultures, women are not free to choose or reject a prospective spouse. That sort of coercion is abhorrent to Canadian society, and physical beatings to enforce such coercion are doubly abhorrent" (at para 13). Although the Court did not specify the culture of the victim and her family, it found that this was an appropriate case for denunciation, which could not be served by a discharge. Apart from cultural considerations, the Court denounced "violence of some length deliberately employed to obtain sustained dominance and power over someone else" (at para 17).

The assault was also made worse by the fact that there were four perpetrators – the accused, his father, and his sister and brother (at para 19). The third consideration was the sentences obtained by the other perpetrators. The accused relied on the fact that his brother and sister had both received conditional discharges, but the Court noted that the Crown had tried to appeal those sentences as well, yet was unable to serve the respondents in time (at para 23). The accused's father, the ringleader, was sentenced to 90 days in jail, and the Court stated that it felt unable to impose a higher sentence than that on the accused. After deducting six days of pre-trial custody, the Court imposed a sentence of 84 days imprisonment on the accused, and did not allow him to serve that time intermittently (at para 26).

Although *Bandesha* is a Memorandum of Judgment, and does not have the same precedential authority as a Reserved Judgment, it is significant in its recognition that cultural considerations such as arranged marriages cannot excuse or mitigate family violence, a principle that has been recognized in the international context. For example, the UN Commission on the Status of Women's 57th meeting in March 2013 focused on the issue of violence against women and girls, and one of the agreed conclusions in its final report "urges States to strongly condemn all forms of violence against women and girls and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination" (at para 14). At the same time, the report also acknowledges that family violence occurs across all cultures and societies (at paras 10, 12). The Court of Appeal's decision in *Bandesha* is significant for its recognition of the need to denounce the power and control that can characterize all family violence cases, not just those occurring in "other" cultures.