February 26, 2016

Costs Not Appropriate in Protection Against Family Violence Act Litigation

By: Jennifer Koshan

Case Commented On: *Denis v Palmer*, 2016 ABQB 54 (CanLII)

This is a short comment on a short decision by the Court of Queen's Bench on whether costs are appropriate in reviews of emergency protection orders (EPOs) under the *Protection Against Family Violence Act*, RSA 2000, c P-27 (*PAFVA*). The case is rather notorious, as the party seeking costs was Jonathan Denis, former Justice Minister and Solicitor General for Alberta, against whom an EPO was made right before the provincial election last spring. Breanna Palmer, Denis's former wife, obtained an *ex parte* EPO from the Provincial Court against Denis and his mother Marguerite on April 25, 2015. Following the review hearing that must be held for all EPOs (see *PAFVA* s 3), Justice C.M. Jones gave an oral decision on May 4, 2015 in which he rejected the Denises' request for an order setting aside Palmer's application before the Provincial Court for an EPO *nunc pro tunc* (i.e. retroactively); granted their request to abridge the time for service, and revoked the EPO. He left it to the parties to reach an agreement regarding costs, but when they were unable to do so, the Denises brought the costs issue back before Justice Jones.

The Denises argued that costs should be awarded to them – and on a solicitor-client basis – because Justice Jones had revoked the EPO during the review hearing, signalling success for them. They also argued that Palmer's actions "were scandalous and vexatious" and were "calculated to injure Denis at a critical point and unjustly profit against him" (at para 10). More specifically, they pointed to the fact that Denis was required to resign from his cabinet position and that he "may have lost his election bid as a result of [Palmer's] false accusations." They characterized Palmer's conduct as punitive in nature and argued that it had caused "irreparable harm to [Denis'] career" (para 10). In terms of policy, they argued that "Failing to award costs will send a message that EPO applications that are not meritorious may be brought without consequence. A message needs to be sent to the general public that false allegations of family violence and collateral usage of EPOs will not be tolerated as they may diminish society's view of the serious impact of family violence when it has in fact occurred." (at para 12). Palmer argued that the parties should each bear their own costs.

There are no specific provisions in the *PAFVA* dealing with costs, but Justice Jones noted that costs are within the discretion of the court, with that discretion to be exercised judicially and with reference to a number of factors. Generally, Rule 10.29 of the *Alberta Rules of Court*, Alta Reg 124/2010, provides that a successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party. The factors that a court may consider in exercising its discretion include the result of the action and the degree of success of each party; conduct of a party that was unnecessary; and whether a party has engaged in misconduct (Rule 10.33(1) and (2)). The court may also consider the importance of the issues at stake (Rule 10.33(1)(c)), and Justice Jones found that this factor required consideration of the objectives of the *PAFVA* "and the importance society attaches to protecting its vulnerable members from

family violence" (at para 15).

Based on these considerations, Justice Jones decided that the parties should each bear their own costs. He noted that the Denises' success was mixed – they were successful in having the time for the hearing of their matter abridged and in having the EPO revoked, but they were unsuccessful in their bid to have the EPO set aside retroactively. He also noted that he had not determined that the EPO was originally issued in error. His review of the EPO was made in light of a "more fulsome factual matrix", which led him to conclude that Palmer was not "in danger of family violence or in need of protection" at the time he rendered his decision. But that decision had "did not equate to a finding that the Provincial Court Judge erred in granting the EPO at the first instance." (at para 17).

Justice Jones also considered the Denises' argument that costs should be assessed against Palmer because she violated section 13 of the *PAFVA*, which provides that "No person shall, with malicious intent, make a frivolous or vexatious complaint under this Act." He noted that although he had revoked the EPO, he made no finding "that Palmer acted frivolously or without merit or that she intended to cause harm to Denis or Ms. Denis." (para 19) Rather, the case proceeded accorded to the procedures set out in the *PAFVA*, which permit an EPO to be obtained *ex parte*, after which it is reviewed in the Court of Queen' Bench in a hearing that allows parties to present additional evidence to assist the Court in determining whether the EPO should be revoked or continued. Justice Jones also noted that although the *PAFVA* prohibits frivolous or vexatious complaints, there is no penalty in the Act or regulations for doing so. Accordingly, "it does not seem reasonable for this Court to use its discretion to make a cost award to effect that result. That would require this Court to search for malicious intent by assessing an applicant's professed subjective belief in the threat of family violence at the time of the EPO application before the Provincial Court. In my view, this would be an unjustifiable exercise in speculation." (at para 20). Justice Jones reiterated that there was no evidence of wrongful, vexatious, or malicious conduct by Palmer, and noted while Denis "may have felt injured and aggrieved by Palmer's actions" and "may have felt that, because of his position, he had more to lose than another individual", those were not appropriate considerations. (at para 22).

Although Justice Jones did not put the matter in these terms, there is also an element of access to justice in his ruling. The Denises may have believed that "a precedent [was] required to establish that an EPO cannot be obtained frivolously, without merit and with intent to cause harm by wrongfully and publicly accusing an individual of such acts where no family violence has indeed occurred" (at para 10). However, the flip side of that argument is that parties who face the possibility of an adverse costs award on review will avoid seeking EPOs even when they are at risk of family violence. In an evaluation report on the *PAFVA*, I and other colleagues recommended that section 13 should be repealed for the same reason – that it may deter victims of family violence from accessing EPOs (see Leslie Tutty, Jennifer Koshan, Deborah Jesso, & Kendra Nixon, *Alberta's Protection Against Family Violence Act: A summative evaluation* (Calgary: RESOLVE Alberta, 2005) at 94-95).

I therefore believe that Justice Jones made the right decision in this case, considering the broader objectives of the *PAFVA* in preventing family violence and making relief accessible on an emergency basis.