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Choice vs Coercive Control: The Alberta Court of Appeal Decision in *R v Naslund*

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Case Commented On: *R v Naslund*, 2022 ABCA 6 (CanLII)

In January 2022, a majority of the Alberta Court of Appeal overturned a joint sentencing submission in the appeal of Helen Naslund, a woman who killed her husband after she sustained decades of his abuse. The sentencing decision of Justice Sterling Sanderman accepted the joint submission by the Crown and defence of 18 years imprisonment for the offence of manslaughter. This sentence was notorious for having imposed one of the longest known sentences for a survivor of intimate partner violence (IPV) who resorts to homicide. The sentencing decision was unreported, but quickly gained media attention and led to a petition to overturn the sentence imposed on Ms. Naslund. Writing for a majority of the Court of Appeal, Justice Sheila Greckol (Justice Kevin Feehan concurring, Justice Thomas Wakeling dissenting) reduced Ms. Naslund's sentence to 9 years imprisonment.

The Court of Appeal's decision has not been appealed by the Crown, and it is important in refuting some of the myths and stereotypes that prevail in the legal treatment of IPV by courts and other legal actors (see also this post). Although the *Naslund* decision is also an important one in confirming the test for reviewing joint sentence submissions, this post will focus on how the judgment deals with IPV in the process and substance of sentencing abused women who kill their partners.

Sentencing Hearing and Decision

As noted, the sentencing decision of Justice Sanderman was unreported. This is remarkable in a case that sentenced a victim of IPV to 18 years imprisonment for killing her husband. Researchers and members of the public who had concerns about an apparently harsh sentence had to rely on media reports to try to understand the outcome (see in particular the excellent reporting of Johnny Wakefield from the Edmonton Journal and Christina Frangou in Chatelaine). This lack of written reasons for this decision raises concerns from an access to justice and rule of law perspective. Even in a case involving a joint sentencing submission, it is important for members of the public to understand the basis upon which the Crown, defence, and sentencing judge thought it appropriate to deprive someone of their liberty for up to 18 years. This is especially so in light of the test for reviewing joint submissions: whether the sentence would "cause the reasonable observer to lose confidence in the justice system and be contrary to the public interest" (at para 6).

The Court of Appeal decision is helpful in setting out the background to the case and the reasons of Justice Sanderman. According to the Agreed Statement of Facts admitted at the sentencing

hearing, Helen Naslund was in a 27-year marriage to Miles Naslund that "involved many incidences of physical and emotional abuse, including controlling behaviour directed at Ms. Naslund" (at para 13). She "genuinely feared for her safety" due to comments her husband would make while intoxicated and handling firearms (at para 14). Because of "the history of abuse, concern for her children, depression and learned helplessness", Ms. Naslund "felt she could not leave" the family farm in rural Alberta (at para 14). On September 5, 2011, Mr. Naslund became angry due to some farm equipment problems, "threw a number of wrenches at Ms. Naslund during an angry tirade" (at para 16), told Ms. Naslund she would "pay dearly" for damaging the equipment, and "violently cleared the fully set dinner table onto the floor, indicating the meal was not fit for a dog" (at para 17). While Mr. Naslund slept that night, Ms. Naslund shot him twice in the back of the head with a revolver. The next morning, she and her son Neil disposed of Mr. Naslund's vehicle and body, hid the weapon, and cleaned the bedroom. On September 6, Ms. Naslund reported her husband missing to the police, and told a story suggesting he had died by suicide, which he had threatened before. This and follow-up from Ms. Naslund led to the RCMP expending "considerable time and resources investigating" Mr. Naslund's disappearance (at para 23). In the summer of 2017, the RCMP learned that one of the other Naslund sons had told multiple people about the killing of his father. They investigated the family farm and surroundings and recovered the body, vehicle, and weapon. Helen and Neil Naslund turned themselves in, and Ms. Naslund provided a statement admitting she had killed her husband.

Ms. Naslund and Neil Naslund were both charged with first-degree murder and indecently offering an indignity to human remains. In a plea agreement, Ms. Naslund agreed to plead guilty to manslaughter in exchange for a sentence of 18 years imprisonment and the Crown agreed to withdraw the indignity to human remains charge. Neil Naslund agreed to plead guilty to the human remains charge in exchange for a sentence of 3 years imprisonment, with the murder charge against him dropped (at para 2).

During sentencing submissions, defence counsel recounted the extent of Mr. Naslund's violent and controlling behaviour and submitted that Ms. Naslund's actions were "out of character" and a "last resort" (at paras 33-35), while nevertheless agreeing to an 18-year prison term. The Crown submitted that an 18-year sentence was fit and proper for what it called a "near-murder" (at para 36), but did not provide any case law to support this period of incarceration for a woman in Ms. Naslund's circumstances. It cited several aggravating factors, alleging that Ms. Naslund was in a position of trust to her husband and that he was "particularly vulnerable" (at para 38). The defence did not disagree with this characterization of aggravating factors and did not provide the sentencing judge with case law.

Justice Sanderman's decision characterized Ms. Naslund as someone who had made a mistake and was "generally overwhelmed by … personal difficulties" (at para 40); someone who had "reacted poorly when 'other options' were open to her" (at para 41). He viewed his role as assessing the joint submission to "make sure that justice is still done" and that "somebody isn't being taken advantage of" (at para 43). In accepting the joint submission, Justice Sanderman relied on the knowledge of counsel as to what was a fair sentence, noting they were "experienced lawyers" who had "lived with" the case for a period of time and handled similar cases before (at para 43). He called Ms. Naslund's offence "a callous, cowardly act on a vulnerable victim in his own home, so

his domicile, by a partner" and found that her conduct deserved a "stern" and "denunciatory" sentence of 18 years for manslaughter (at paras 44-5).

A review of the transcript of the sentencing hearing leads to some additional observations. The Crown and defence repeatedly characterized their submission as a "true joint submission" that had been reached after a lengthy period of negotiations (at 2, 3, 4 &13). The defence also disclosed its view that the application of the "battered women's syndrome" (BWS) defence – which will be discussed below – was a central issue in those discussions (at 4). Also worth noting is the defence's description of Ms. Naslund's relationship with her husband, which is reproduced in the Court of Appeal's decision at para 33:

> She describes her relationship with Miles, indicating that, when I was in public, he was always right there. If I talked to a friend, he had to be there to include his input. I couldn't go anywhere without him. I had to get rid of the horses. I couldn't go to events. It was do as I say or else, that's the way it's going to be. It was always the third degree in terms of questioning, and if I went to town, he would ask where exactly did you go, who exactly did you speak with.

In spite of this description and the Agreed Statement of Facts detailing Mr. Naslund's physical and emotional abuse of Ms. Naslund, the defence referred to "difficulties within the home", noting that "[a]lcohol was a significant issue, as was violence, as well as gun play" (transcript at 6). This passive language obscured the reality that it was Mr. Naslund who was responsible for the violence.

Justice Sanderman's reasons do not mention Mr. Naslund's violence at all, referencing only Ms. Naslund's and Neil Naslund's "personal difficulties", "problems in their lives", and the "tragic situation" they faced (at 6). He characterized Mr. Naslund as a victim of domestic violence, not Ms. Naslund.

Court of Appeal Decision

The Test for Reviewing Joint Sentencing Submissions

Ms. Naslund was represented by new counsel at the appeal hearing, who argued that the 18-year term of imprisonment brought the administration of justice into disrepute and was contrary to the public interest in light of the sentencing principles of proportionality and parity and concerns about coercive plea bargaining. The Crown sought to maintain the sentence, arguing that joint submissions for sentence must meet a very high standard to be overturned (at paras 46-48).

The first section of the majority's decision addresses the importance of joint sentencing submissions to the criminal justice system and the related importance of ensuring that there is a high threshold for rejecting such submissions (at paras 49-55, relying on *R v Anthony-Cook*, 2016 SCC 43 (CanLII)). With these considerations in mind, Justice Greckol adopted the "public interest" test articulated in *Anthony-Cook*: a sentencing judge "should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest" (*Naslund* at para 57, quoting *Anthony-Cook* at para 29).

This test is an onerous one and may even allow for "demonstrably unfit" joint sentence submissions to be accepted where they have other public interest benefits (at para 66). Furthermore, this test applies whether the sentencing judge is considering acceptance or rejection of a joint submission and requires counsel to "ensure they 'amply justify their position'" (at para 64, quoting *Anthony-Cook* at para 54). Conventional sentencing principles, such as the fitness of the proposed sentence, are "relevant, though not determinative" (*Naslund* at para 67).

On appeal, the question remains whether a joint sentence submission should be set aside "because it brings the administration of justice into disrepute" (at para 81). This question will arise most commonly where the argument is that the sentencing judge erroneously rejected a joint submission, but also applies where an accused alleges that the judge erroneously accepted a joint submission, as in Ms. Naslund's case (at paras 84-85).

In his lengthy dissent, Justice Wakeling maintained that where a judge is considering acceptance of a joint submission, but not rejection, the question is whether the proposed sentence is fair and just, a lower standard than the "public interest" test. For Justice Wakeling, the latter test only applies where the sentencing judge is of a mind to reject the joint submission (at paras 267-272).

As noted, the correct test for joint submissions is not my focus in this post, but I do question how a sentencing judge can consider accepting a joint submission without also considering its rejection. The very nature of "consideration" is that thinking about acceptance is not possible without thinking about its alternative, rejection.

Application of the Test(s)

Majority Decision

For the majority, Justice Greckol held that Justice Sanderman applied the wrong test in reviewing the joint submission: he focused on the experience of counsel and their assessment of fairness in light of this and like cases to conclude that "no one [was] being taken advantage of" (at para 87). Instead, he should have independently determined whether the proposed sentence met the public interest test, including consideration of whether it was unduly harsh according to conventional sentencing principles. Justice Greckol found that the public interest in the joint submission could not be assessed absent case law relevant to the circumstances of Ms. Naslund that allowed the sentencing judge to "properly determine whether the sentence was proportionate" (at para 91). In a case such as this, where the proposed sentence was "markedly harsher than those imposed in similar cases" (at para 92), counsel had an obligation to explain their rationale – particularly the Crown, whose role "transcends that of advocate and as the representative of the state … has an obligation to ensure that justice is done" (at para 93).

Justice Greckol undertook her own review of cases dealing with women who kill their abusive partners. She noted (at para 97) that in the leading case of *R v Lavallee*, [1990] 1 SCR 852, 1990 CanLII 95, Supreme Court Justice Bertha Wilson permitted the accused to introduce expert evidence that she suffered from "battered woman syndrome" (BWS) to support an argument of self-defence to murder. *Lavallee* recognized that women may face "the prospect of being condemned by popular mythology about domestic violence" (at 872-3), including the myth that

"[e]ither she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it" (at 873).

Although *Lavallee* was not a case involving sentencing, Justice Greckol found that it supported the argument that abused women are entitled to raise their history of domestic violence as a relevant factor in evaluating their actions at the sentencing stage (*Naslund* at para 98). Sentencing courts across Canada have taken this approach, including other appellate courts (see paras 109-114). Based on her review, Justice Greckol concluded that it is "beyond time for this Court to explicitly recognize that cases of battered women killing abusive partners involve unique circumstances that must be considered by the sentencing judge" (at para 115).

Justice Greckol then found that the Agreed Statement of Facts provided sufficient grounds for considering Ms. Naslund's actions in the context of BWS. The Crown had agreed that Ms. Naslund could not leave her relationship because of "learned helplessness", which is a classic hallmark of BWS (at para 104). Although expert evidence may be helpful in sentencing decisions where BWS is raised, it was not necessary in this case (at para 106).

The relevance of BWS to sentencing is that it indicates "a diminished moral blameworthiness" (at para 108). Put differently, sentencing courts must consider "the existential risks women face as a result of domestic violence… violence in the home, usually perpetrated by a man against a woman over years, can result in her death" (at para 118). Consequently, the range of sentences for women convicted of manslaughter for killing their abusive partners is relatively low, from suspended sentences at one end of the spectrum to eight years imprisonment at the other (although a sentence of at least 4 years imprisonment is now mandated for manslaughter with a firearm). Justice Greckol noted that counsel in this case were not able to find any manslaughter sentences involving BWS greater than 10 years imprisonment, let alone 18 years (at para 120).

She then turned to whether the 18-year sentence imposed on Ms. Naslund was contrary to the public interest. Although there was some benefit to the joint submission, including certainty for both parties, Justice Greckol accepted that Ms. Naslund was in a "distinctly vulnerable position" in her plea negotiations with the Crown (at paras 124-126). She recognized that abused women may be irresistibly driven to plead guilty because of myriad factors, including "the desire to protect children; the worry of publicly discussing family domestic violence in court; and the risk a jury will not understand a battered woman's actions as defensive in the already complex area of self-defence law" (at para 127) as well as seeing themselves "worthy only of harsh punishment" (at para 128). Justice Greckol also found that the risk to Ms. Naslund of being found guilty of murder had the matter gone to trial "should not be overstated" (at para 130). Therefore, the joint submission for an 18-year sentence did not appear to be in the public interest.

In terms of fitness, Justice Greckol found that the sentence did not adequately account for BWS and Ms. Naslund's reduced moral blameworthiness. She took issue with Justice Sanderman's suggestion that Ms. Naslund "had "other options" open to her" in spite of *Lavallee* having debunked this stereotype of battered women 30 years ago (at paras 140-141). The sentencing judge's view that it was Mr. Naslund who was the victim of domestic violence was also "ironic and jarring" (at para 143). While the *Criminal Code*, RSC 1985, c C-46, does stipulate that violence

against an intimate partner is an aggravating factor, this consideration is diminished in cases involving the sentencing of battered women who have lived under constant threat (at paras 142-144). A review of similar cases also supported the conclusion that the 18-year sentence was demonstrably unfit for an abused woman, even if the Crown's argument was accepted that this was a "near-murder." Of particular relevance was *R v Doonanco* (31 August 2020), Edmonton 140579798Q1 (ABQB, unreported), a "roughly comparable" case factually which involved a joint submission of 8 years imprisonment that was accepted by the sentencing judge (at para 172).

In conclusion on the overarching public interest test, Justice Greckol found that Ms. Naslund's 18-year sentence was "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances … to believe that the proper functioning of the justice system had broken down" (at para 173, quoting *Anthony-Cook* at para 34). The majority substituted a sentence of 9 years imprisonment, finding that 6 to 8 years was appropriate for the manslaughter offence with an increase for the aggravating nature of Ms. Naslund's post-offence conduct.

The Dissent

Like Justice Sanderman, Justice Wakeling focused on the "bargain" reached after "lengthy negotiations" by "experienced counsel" (at paras 211-212). He indicated that from Ms. Naslund's perspective, the joint submission was advantageous because she avoided the risk of a first-degree murder conviction and a sentence of life imprisonment, and only gave up the chance of a sentence of less than 18 years. In his view, Ms. Naslund made a "choice of her own free will" to accept the Crown's offer (at para 304) and she "did not give up much" (at para 214; see also para 316); the Crown "gave up more than Ms. Naslund did" by forgoing a conviction for murder (at para 215). Justice Wakeling cited the *Doonanco* case as a cautionary tale of a woman who claimed BWS and was convicted of second-degree murder at trial (at paras 319-320). However, he minimized the fact that this conviction was overturned by the Supreme Court of Canada and Ms. Doonanco was eventually sentenced to eight years for manslaughter pursuant to a joint submission (see footnote 161).

Justice Wakeling was also concerned that there was no expert evidence that Ms. Naslund's actions were the result of BWS (at paras 185 and 329). He again noted the experience of Ms. Naslund's original lawyer and the fact that he had rejected the possibility of raising both self-defence and the relevance of BWS to sentencing, assuming "he must have had a good reason for adopting this position" (at para 328). He also indicated that Ms. Naslund had confirmed in oral argument at her appeal that she did not challenge the quality of this legal advice (at para 328).

Justice Wakeling would have dismissed Ms. Naslund's sentence appeal.

Commentary

The majority's decision in *Naslund* is a very important recognition of the significance of IPV at the stage of sentencing an abused woman who has killed her partner. Justices Greckol and Feehan properly took a contextual approach to the appeal by looking at statistics on the social reality of

IPV and femicide and the need to look at the case through a gendered lens that avoids myths and stereotypes about IPV.

Lavallee, cited in *Naslund*, was the first decision where the Supreme Court of Canada recognized myths and stereotypes about IPV. However, some caution is required in relying on the notion of battered women's syndrome from *Lavallee*. In *R v Malott*, 1998 CanLII 845 (SCC), [1998] 1 SCR 123, another case in which a woman killed her abusive partner, Justices Claire L'Heureux-Dubé and Beverley McLachlin noted in their concurring reasons that:

> Concerns have been expressed that the treatment of expert evidence on battered women syndrome, which is itself admissible in order to combat the myths and stereotypes which society has about battered women, has led to a new stereotype of the "battered woman". … It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman. (at paras 39-40)

Although this quote raises concerns about the application of BWS to self-defence, it is equally applicable in the context of sentencing. While the majority in *Naslund* cited *Malott* (at para 108), it did not note *Malott*'s cautions about stereotypes related to BWS and "learned helplessness" – perhaps because Ms. Naslund herself appeared to fit the stereotype of a battered woman.

A more modern notion is that of coercive controlling violence. Coercive control is not yet a criminal offence in Canada, but there was a private member's bill proposing criminalization that led to a parliamentary study of this issue in 2021. According to that study, coercive control can be understood as "a course of intimidating, degrading and regulatory practices used by abusers to instill fear and threat into the everyday lives of their victims" and that deprives victims of their liberty and autonomy (at 7). Coercive control often includes social isolation, which may restrict a victim's access to legal protections and other supports (at 8). Ms. Naslund's circumstances also appear to fit well with the concept of coercive control (see the passage quoted above from para 33 of the Court of Appeal's decision). Indeed, her factum to the Court of Appeal used this language (see e.g., para 22). The Court of Appeal did not use the lens of coercive control to analyze Ms. Naslund's relationship with her husband, but the majority did apply the lens of coercion in the context of her plea bargain with the Crown. This is an important recognition of the structural and institutional contexts in which the harms of coercive control can manifest.

The dissent and sentencing judge's reasons, with their reliance on Ms. Naslund's "options", "choice", and "free will", did not recognize the applicability of these concepts at all, regardless of what we call them. As recognized in *Lavallee* and *Malott*, there are many reasons that survivors of IPV cannot leave their partners: lack of employment options, social and financial supports, children to care for and protect from abuse, pressures to maintain the family unit, and fear of retaliation (*Lavallee* at 887 and *Malott* at para 42). That some of these factors applied to Ms. Naslund was apparent in the Agreed Statement of Facts. And while I critiqued the lack of written

reasons on the part of Justice Sanderman, the opposite problem arises from Justice Wakeling's written reasons for decision. His judgment is exceedingly long and full of asides and analogies, some of which – including those related to golfing (at para 278) and the choice of medical professionals who are either "not stupid" or "smart" (at paras 269-270) – are unhelpful and frankly, disrespectful to Ms. Naslund. His comment noted above that "[s]he did not give up much" (at para 214) is highly problematic in the context of a victim of IPV originally sentenced to 18 years imprisonment. To say that the Crown "gave up more" is also to downplay the Crown's obligation to ensure that justice is done, which was emphasized by the majority.

Beyond *Naslund*, we must remain cautious that the concepts of BWS, learned helplessness, and coercive control are appropriately applied and not used as stereotypes that exclude some women from the mitigating effects that should flow from their experience of IPV. As noted in *Malott* and in the literature, this may be a particular concern for women who are racialized and Indigenous (see Linda Ammons, "Mules, Madonnas, Babies, Bathwater, Racial Imagery, and Stereotypes: The African American Women ad the Battered Women's Syndrome" in Katherine Wing, ed, *Critical Race Feminism: A Reader* (2d ed) (NYU Press, 2003) 261; Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) at 48). As I discussed in my last post, myths and stereotypes about IPV can also arise in the family law context and should be acknowledged and avoided there as well.

I have written previously with Deanne Sowter on the importance of judicial education and ethical guidelines on IPV (see here). *Naslund* also emphasizes the need for education and ethical guidance for lawyers on coercive control and myths and stereotypes about IPV. In 2012, the Law Commission of Ontario recommended mandatory education on IPV for law students and published curriculum models in this area. In 2018, New Brunswick's Domestic Violence

Death Review Committee recommended that the Law Society of New Brunswick implement mandatory courses for articling students and lawyers on IPV (see here at 8-9). More recently, the Department of Justice Canada has developed a series of online courses in family law that includes modules on IPV that are accredited by several law societies. The Law Society of Alberta is currently reviewing its approach to continuing professional development (CPD) for lawyers, but it has publicized training on IPV for consideration as a CPD learning activity. Judicial and lawyer education will not solve all the challenges posed by IPV and its consideration in legal proceedings, but they are nevertheless crucial steps.

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