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What Counts as "Sexual Abuse" under the Protection Against Family Violence Act?

By Jennifer Koshan

Cases Considered:

L.L.S. v. W.M.C., 2009 ABQB 527

Justice Donald Lee has written another decision dealing with a definitional issue under the *Protection Against Family Violence Act*, R.S.A. 2000, c.P-27 (*PAFVA*). In *L.L.S. v. W.M.C.*, 2009 ABQB 527, Justice Lee had to consider whether to confirm an Emergency Protection Order (EPO) constraining a father's access to his children because the father was watching pornography and openly engaging in sexual behaviours in the presence of his children. Unfortunately, Justice Lee concluded that this behaviour did not amount to "sexual abuse" without endeavouring to define the term. Further, the case highlights concerns about the interplay between child welfare legislation, custody and access laws and the *PAFVA.*

According to the Court, the parties were married for just over 10 years and had three children - a 17 year old daughter, a 13 year old daughter (who had complained to her therapist about her father's behaviour) and an 11 year old son. An EPO was granted in Provincial Court on March 11, 2009. On May 14, 2009 Justice Lee ordered that a Practice Note 8 Investigation be conducted. An Investigative Report was prepared, including interviews with all three children and the father as well as a home visit. The 13 year old daughter complained of being exposed to pornography at her father's home, and exposed to his masturbation and open nudity. At the same time, the daughter stated that her father "did not know that she was watching him at the time", and she had not been invited to watch pornography or to touch herself or her father sexually. She also "indicated that she still wished to see the father, although she wanted him to change his behaviour" (at para. 9). The 11 year old son also said that he had seen his father watching pornography "a lot", "but he did not believe that his father was aware that he was there" (at para. 12). The 17 year old daughter had not visited her father in his home since she was 16, but "confirmed that the father would generally always watch pornography whenever she visited" (at para. 13). The father acknowledged possession of pornographic magazines in his home, which the son had found on one occasion. The son had also watched one of his father's "adult movies", after which the father "put a code on his television so that this cannot occur again" (at para. 14). After visiting the father's residence, the investigator observed the room where the father would

watch pornography and concluded “that it was clear that a child could come into the room and not be heard” (at para. 15).

Based on this evidence, Justice Lee concluded that “it is most likely that the children have been inappropriately exposed to pornography while visiting their father” (at para. 18). However, “none of the children has indicated that they have been touchedinappropriately or have been invited to watch or view the pornography by their father or with their father. If he was aware that the children were in the room, the father appears to have consistently turned off or removed the pornography” (para. 18).

Justice Lee also noted that the Edmonton Police Service and Children's Services had closed their files in the matter, as there were not “any allegations of sexual abuse to be dealt with” (at para. 20).

Turning to the *PAFVA*, Justice Lee noted that it applies to acts of “family violence”, defined as follows:

> (e) “family violence” includes
>
> > (i) any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms a family member,
> >
> > (ii) any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member,
> >
> > (iii) forced confinement,
> >
> > (iv) sexual abuse, and
> >
> > (v) stalking,…

Justice Lee then stated “sexual abuse is the only relevant prohibition from the Act that is relevant here, and thankfully we have no acts of sexual abuse. What we do have in this case is inappropriate behaviour in the presence of the children, which appears to have been effectively addressed” (at paras. 22-23).

In making this finding, Justice Lee made no effort to interpret the term “sexual abuse”. The term is not defined in the *PAFVA*, and there are no reported cases where the term has been interpreted previously. Nevertheless, there are a number of sources Justice Lee could have turned to in assisting him to interpret the meaning of this term. As famously stated by E. A. Driedger in *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court of Canada has adopted this approach in cases such as *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42.

What is the grammatical and ordinary meaning of the term sexual abuse? Dictionary definitions may be useful as a "starting point by indicating a range of meanings" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada Inc., 2008) at p. 33).
The *Concise Oxford English Dictionary* defines "abuse" as to "maltreat, assault (esp. sexually)". The term "maltreat" might suggest causing harm even without physical contact. Interestingly, however, the *New Oxford Dictionary of English* provides a narrower definition: to "treat (esp. a person or animal) with cruelty or violence".

How does reading the term "sexual abuse" in the context of the overall statute contribute to understanding its meaning? If the definition of "family violence" is considered, it includes actions that do not necessarily entail physical contact between the parties, i.e. acts and omissions that cause injury or property damage and that intimidate or harm a family member (section 1(1)(e)(i)), acts or threatened acts that intimidate a family member by creating a reasonable fear of property damage or injury (section 1(1)(e)(ii)), and stalking (section 1(1)(e)(v)). Both intentional and reckless acts are included.

The scheme of the *PAFVA* is to provide protection from family violence through a series of protection orders. Overall, the object of the Act appears to be the protection of family members from family violence, and the prevention and deterrence of family violence. This might suggest a broad reading of the term "sexual abuse" beyond actual physical violence.

What about the use of other statutes to assist in the interpretation of "sexual abuse" in the *PAFVA*? There is a presumption that a legislature will use words consistently both within and across legislation, particularly where the legislation deals with similar subject matter (Sullivan, *supra* at 411-12).

Alberta's *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 (*CYFEA*) is legislation dealing with a subject similar to the *PAFVA*, namely, child protection. Section 1(3)(c) of the *CYFEA* states that "a child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour including prostitution related activities". This definition suggests that actual physical contact between a parent and child is not required. Exposure of children to "sexual contact, activity or behaviour", seemingly even where unintentional, would also appear to be included.

It is also "standard practice" for judges to consider similar legislation in other provinces (Sullivan, *supra* at p. 419). A number of jurisdictions with legislation similar to the *PAFVA* are akin to Alberta in that family or domestic violence is defined to include "sexual abuse", but that term is not itself defined (see Saskatchewan's *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02; Manitoba's *Domestic Violence and Stalking Act*, C.C.S.M. c. D93; and the Northwest Territories' *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24). In a couple of other

provinces, "sexual assault, sexual exploitation or sexual molestation", are used instead of "sexual abuse" (see Nova Scotia's *Domestic Violence Intervention Act, S.N.S.* 2001, c. 29 and Newfoundland and Labrador's *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1). These terms suggest both physical contact (assault, molestation) and non-physical behaviours (exploitation). P.E.I.'s *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, covers "actions or threats of sexual abuse, physical abuse or emotional abuse of the victim" in s.2(2)(e). This provision could be seen as drawing a similarity between sexual and emotional abuse, suggesting that actual physical contact is not required for sexual abuse. Perhaps most helpfully, Nunavut's *Family Abuse Intervention Act*, S.Nu. 2006, c. 18, defines sexual abuse as follows:

> s.3(1)(c) sexual abuse, including sexual contact of any kind that is coerced by force or threat of force;
>
> (c.1) sexual abuse of any kind, including sexual exploitation, sexual interference and encouragement or invitation to sexual contact, of a person with a mental or physical disability or a child;

Sexual abuse can thus include both acts of physical contact as well as sexual exploitation and interference, which do not imply physical contact.

Further, there is case law interpreting family violence legislation that suggests sexual abuse should be interpreted more broadly than actual physical contact, which it is also legitimate to consider (Sullivan, *supra* at 424). In *Baril v. Obelnicki*, 2007 MBCA 40, obscene and sexually abusive comments made by telephone were seen to fall within the scope of Manitoba's *Domestic Violence and Stalking Act* (at para. 19). In a different context, the Supreme Court of Canada in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, spoke of the importance of a prohibition against possession of child pornography on the basis that the law would "benefit society by reducing the possibility of cognitive distortions, the use of pornography in grooming victims, and the abuse of children in the manufacture and continuing existence of this material" (at para. 103). The use of pornography in the eventual physical abuse of children was thus recognized.

On the other hand, where a word or term is ambiguous, there is also a presumption that the legislature does not intend to interfere with individual rights; however this presumption is rebuttable "by words that clearly indicate the legislature's intention to interfere" (Sullivan, *supra* at p. 476). It could be said that the term "sexual abuse" is ambiguous as to whether it requires actual physical contact (or the threat of such contact). Should the term be interpreted narrowly so as not to interfere with the liberty of respondents under the *PAFVA*, or do the words of the *PAFVA* indicate the legislature's intent to do just that – to interfere with a person's liberty where they intentionally or recklessly put other family members at risk of harm? If the latter is the case, this would also support a broad reading of the term "sexual abuse".

Based on these interpretive sources, it would seem that there is a strong argument that sexual abuse in the *PAFVA* should be defined to include both physical contact of a sexual nature, as well as other sexual activities that could be seen as abusive. Given the legislation's protective

purpose, exposure of children to pornography could be seen as falling within the scope of the Act, as could masturbating in view of children. At the very least, these arguments merited consideration by Justice Lee.

While I am critical of Justice Lee's decision for assuming a narrow meaning of "sexual abuse" rather than engaging in statutory interpretation, this is not to say that I disagree with his conclusion that "there is no need for an Emergency Protection Order preventing the father from seeing his children" (at para. 24). Justice Lee noted that the father had taken steps to deal with his behaviours (or at least to keep them hidden from the children). In addition, the matter of ongoing access "and the manner and conditions surrounding such visits, if any" are before Justice Hillier in another proceeding before the ABQB (at para. 25). It does appear, then, that the father's behaviour will be considered in terms of its impact on the children and his entitlement to have access with them in the future.

This, however, gives rise to another concern. In addition to the *PAFVA* and access proceedings, there were also investigations undertaken and the possibility of other proceedings relating to child protection under the *Child, Youth and Family Enhancement Act*, and under the *Criminal Code*, R.S.C. 1985, c. C-46. Early in his reasons, Justice Lee stated that "Children's Services … closed their file because there was an Emergency Protection Order in place as they saw no need for further intervention" (at para. 3). But what happens when an EPO is vacated or expires? This multiplicity of potential proceedings requires a great deal of collaboration between authorities, numerous court appearances, and costs to the parties (and perhaps the state) in terms of legal representation. It is obviously a good thing to have sexual abuse being taken seriously by the government, but I wonder whether there is a more streamlined way to deal with this social problem?