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Protection Against Family Violence Act Amended

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Legislation commented on:
Bill 2, *Protection Against Family Violence Amendment Act, 2011*, S.A. 2011 c.4

Bill 2, the *Protection Against Family Violence Amendment Act, 2011*, makes several important changes to the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 (*PAFVA*). The Bill, which was supported by all parties in the Alberta Legislature, received Royal Assent on March 18, 2011 and is currently awaiting proclamation. This post will review the major changes the Bill makes to the Act, having regard to the objectives of the framers of the *PAFVA*, judicial interpretations of the *PAFVA*, an independent evaluation of the *PAFVA*, and the legislative debates on the amendments.

First enacted in 1999, the *PAFVA* enables family members to apply for emergency protection orders (EPOs) in cases of family violence. Applications for EPOs may be made in person or by telephone to justices of the peace or provincial court judges, without notice to the respondent (*PAFVA* s. 2(1), *Protection Against Family Violence Regulation*, Alta. Reg. 80/1999, s. 4(2)). EPOs take effect upon service on the respondent (*PAFVA* s.5), and normally restrain contact between the respondent and claimant, as well as providing for exclusive possession of the family home and prohibitions against the respondent attending at a place of work, school, or other place (*PAFVA* s. 2(3)). If an EPO is granted, it 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* s. 2(6)). Applications for protection orders can also be made directly to the Court of Queen's Bench ("QBPOs", *PAFVA* s.4). The last important amendments to the *PAFVA* were made in 2006, and incorporated many of the recommendations made in an evaluation of the *PAFVA* conducted by University of Calgary researchers (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"*).

Bill 2's first significant change to the *PAFVA* is to clarify the scope of no-contact orders. At present, EPOs may contain "a provision restraining the respondent from communicating with or contacting the claimant and other specified persons" (*PAFVA* s.2(3)(b)), and QBPOs may contain "a provision restraining the respondent from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to family violence" (*PAFVA* s.4(2)(b)). A new subsection will be added to both sections 2 and 4 to provide that such orders are "to be interpreted as prohibiting contact by any means, including through a third party, unless the order expressly provides otherwise."

The Bill's second significant change to the *PAFVA* deals with the evidence that is to be considered at the Queen's Bench review hearing (colloquially known as the "comeback"

hearing). Currently, s. 3 of the *PAFVA* provides the following with respect to evidence at comeback hearings:

> 3(1) If a judge of the Provincial Court or a designated justice of the peace grants an emergency protection order, the judge or justice of the peace must, immediately after granting the order, forward to the Court of Queen's Bench a copy of the order and all supporting documentation, including any notes.
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> (2) A hearing referred to in section 2(6) must be based on affidavit evidence and any other sworn evidence.
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> (3) The evidence that was before the judge of the Provincial Court or designated justice of the peace may also be considered as evidence at the hearing. …

This section, particularly s.3(2), suggested that new evidence was required at the comeback hearing and that consideration of the evidence that formed the basis for the EPO was discretionary. This interpretation was confirmed in *J.S. v. D.J.K.*, 2009 ABQB 426 by Justice Donald Lee (see my post on that case here). The *PAFVA Evaluation Report* recommended that s.3 be amended to allow for a "paper review" of EPOs by the Court of Queen's Bench, unless the Court was not satisfied that the evidence supported the original order (recommendation 7, p. 93). This is essentially the change that Bill 2 makes to s.3. Subsection (2) will be repealed, and subsection 3 will now provide that:

> (3) At a hearing referred to in section 2(6), the justice of the Court of Queen's Bench
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> (a) must consider all the evidence that was before the judge of the Provincial Court or justice of the peace who made the order under section 2, and
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> (b) may allow additional evidence to be presented.

These first two amendments were referred to as "housekeeping" matters during the second reading of Bill 2 (Alberta Hansard, March 1, 2011, p. 134). In my view that is not an appropriate characterization of these changes – they are much more substantive than that. The clarification of the scope of no contact orders makes it clear that respondents who are the subject of such conditions cannot use indirect means to maintain power and control over victims of family violence, nor harass victims using third parties. Although in practice many EPOs and QBPOs stipulate that indirect contact through third parties is prohibited, this amendment will create a presumption to that effect that will need to be expressly overridden. The amendments still permit judges to craft EPOs and QBPOs to meet the circumstances of the parties, including arrangements related to access to any children.

Similarly, although it appears that not all Court of Queen's Bench justices took the same approach to evidentiary requirements for comeback hearings as Justice Lee did in *J.S. v. D.J.K.* (as he acknowledged at para. 22), s.3(2) of the *PAFVA* still had the potential to create an unnecessary burden on victims of family violence. The amendments to *PAFVA* s.3 may improve utilization rates of the legislation by making the review procedure less onerous for victims, while at the same time ensuring that respondents have an opportunity to present their own evidence. This amendment also brings the *PAFVA* more into line with the review procedures in similar legislation in other provinces, such as Saskatchewan (see *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s.5).

The third amendment to the *PAFVA* in Bill 2 is the introduction of an offence provision for breaches of orders made under the Act. Currently there are no specific provisions under the *PAFVA* dealing with breaches, but respondents may be charged under s.127 of the *Criminal Code* (which creates an offence for disobeying a lawful court order without excuse) or they may be cited in contempt of court for breaching protection orders. Bill 2 will add a new offence provision, s.13.1, which provides as follows:

> 13.1(1) A person who
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> > (a) contravenes or fails to comply with a provision of a protection order, other than a provision referred to in section 4(2)(d), or
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> > (b) obstructs or interferes with any person who is exercising a right or power or carrying out a duty or function under a provision of a protection order,
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> and who has actual notice of the provision under section 5, is guilty of an offence.
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> (2) A person who is guilty of an offence under subsection (1)(a) or (b) is liable
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> > (a) for a first offence, to a fine of not more than $5000 or to imprisonment for a term of not more than 90 days, or both,
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> > (b) for a 2nd offence, to imprisonment for a term of not less than 14 days and not more than 18 months, and
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> > (c) for a 3rd or subsequent offence, to imprisonment for a term of not less than 30 days and not more than 24 months.

This amendment was the focus of most of the commentary during the legislative debates on Bill 2. Calgary-Nose Hill MLA Dr. Neil Brown Q.C., who sponsored Bill 2, noted that the penalties were developed in consultation with Alberta Justice and after a review of similar legislation across Canada (Alberta Hansard, March 1, 2011, p. 134). Bridget Pastoor, Liberal MLA for Lethbridge-East, indicated that the new offence provision was welcomed by the Alberta Council of Women's Shelters and its Director, Jan Reimer (Alberta Hansard, March 15, 2011, p. 381). Pastoor further stated that Ms. Reimer "hopes the bill will encourage police to lay criminal charges when people do breach protection orders" (*ibid*., see also the comments of the MLA for Edmonton-Gold Bar, Hugh MacDonald, Alberta Hansard, March 17, 2011, p.438).

It is important to note that it will no longer be possible for criminal charges to be laid in light of s.13.1 of the *PAFVA*, as s.127 of the *Criminal Code* only applies where there is no other punishment expressly provided by law. The choice between s.127 of the *Criminal Code* and a discrete offence provision in the *PAFVA* was considered by the Alberta Law Reform Institute (ALRI) in its report preceding the *PAFVA*, *Protection Against Domestic Abuse* (Report No. 74) (Edmonton: ALRI, 1997). ALRI recommended that breaches of the *PAFVA* be prosecuted under s.127 of the *Criminal Code*, based on consultations with justice system personnel in Saskatchewan on their experience with similar legislation (recommendation 47, pp. 89-90). Use of s.127 for breaches has the advantage of making police arrest powers clear, since s.127 is an indictable offence with associated powers of arrest under s. 495 of the *Criminal Code*.

However, s.127 was not being used often or consistently by the police to deal with breaches of EPOs (see the *PAFVA Evaluation Report* at 74-5). Further, it was difficult to monitor such charges statistically, as data for s.127 charges is not broken down based on the kinds of orders which were breached (Alberta Hansard, March 16, 2011, pp. 413, 415). There was also considerable variance in the penalties that were provided under s.127 as compared to the civil contempt option (Alberta Hansard, March 1, 2011, p. 133). Therefore, although the decision to use s.127 of the *Criminal Code* for breaches may have been deliberately made at the time the *PAFVA* was enacted, it appears that subsequent practice justifies the inclusion of a separate offence provision in the *PAFVA*.

One question that remains is what powers police have to arrest respondents for breaching s.13.1 of the *PAFVA*. No specific arrest powers have been added to the *PAFVA*. Although EPOs and QBPOs themselves often stipulate powers of arrest for breaches (see *PAFVA Evaluation Report* at 8), this may not always be the case. The *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, indicates in s.3 that the *Criminal Code* provisions on summary conviction matters apply to all provincial offences covered by the Act, which would include s.13.1 of the *PAFVA*. Under s.495(1)(b) of the *Criminal Code*, peace officers may only make arrests without a warrant for summary conviction offences where they find the person in question committing the offence. In contrast, arrests without a warrant can be made for indictable offences that have been committed or the officer has reasonable grounds to believe have been committed, without the need to find the person in the act of committing the offence (s.495(1)(a)). Police powers to arrest for breaches of *PAFVA* orders therefore seem to have narrowed with the addition of s.13.1.

This issue was raised in the *PAFVA Evaluation Report*, which recommended that the *PAFVA* should be amended to specify that police have the authority to arrest respondents without warrant where there are reasonable and probable grounds to believe they had breached a protection order (recommendation 16, p. 95). Although this is a broader power of arrest than that which applies generally to summary conviction offences, it is arguably justified because of the nature of family violence, which often is ongoing and may increase in severity over time. This is recognized by several other provinces, in which family violence legislation contains specific powers of arrest for breaches (see e.g. Nova Scotia's *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s.19).

The legislative debates on Bill 2 make no mention of the issue of arrest powers, although MLA Brown, in response to a question about whether s.13.1 of the *PAFVA* could be enforced inter-provincially, stated that "[p]rotection orders are entered into the Canadian police information centre's computerized information system, and that does provide all Canadian law enforcement agencies with information on crimes and offenders" (Alberta Hansard, March 17, 2011, p. 439).

While all parties supported Bill 2, the Liberals, New Democrats and Wildrose Alliance parties all used the legislative debates to call for further action on family violence. Edmonton-Centre MLA Laurie Blakeman (Liberals) called for better funding for women's shelters, noting that more women are turned away than there are spaces for in Alberta shelters (Alberta Hansard, March 16, 2011, p. 411). New Democrat Leader Brian Mason also called for more funding for shelters, as well as financial support for women and children who are victims of family violence (Alberta Hansard, March 16, 2011, p. 413-414). Wildrose MLA Rob Anderson (Airdrie-Chestermere) called for tougher penalties for breaches of protection orders, including a mandatory minimum period of incarceration for first offences (Alberta Hansard, March 16, 2011, p. 409), and Wildrose MLA Paul Hinman (Calgary-Glenmore) noted the understaffing of the justice system to handle family violence matters (Alberta Hansard, March 16, 2011, p. 413). MLA Brown

responded that "[i]n addition to the strengthening of the legislation that's happening in this bill, there are a number of other measures that are ongoing, including addressing the need for more emergency shelter spaces for women, the fact that we have specific domestic violence courts and police teams, safe visitation sites that are now available in the province, victim support outreach projects, and the family violence information line…" (Alberta Hansard, March 16, 2011, p. 415).

It is to be hoped that the government's response will also include training of justice system personnel and public legal education on the amendments and their implications for the *PAFVA*. Training and education were raised as major issues in the *PAFVA Evaluation Report* (see recommendations 17-19, pp. 95-96), and the amendments call for a renewed commitment to such measures by the government if we are to take seriously its claim that one of its "top priorities is to prevent and address family violence …" (Alberta Hansard, March 1, 2011, p. 133).