Court of Queen's Bench of Alberta

Citation: Boychuk v Boychuk, 2017 ABQB 428

Date: 20170707
Docket: 4803 178400
Registry: Edmonton

Between:

Carolyn Leanne Boychuk

Plaintiff

- and -

Darren Sandy Boychuk

Defendant

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] On December 21, 2016, in reliance on events the last of which had occurred on December 3, 2016, Ms. Boychuk obtained a without notice restraining order against her husband, preventing him from attending at the matrimonial residence and restricting his parenting.

[2] In this morning chambers application, Mr. Boychuk asks the court to vacate the *ex parte* restraining order because Ms. Boychuk did not, on the basis of all of the evidence, have a reasonable fear of her husband and because it was obvious that the order was obtained only for tactical reasons.

[3] The without notice, or *ex parte*, restraining order is vacated.

[4] Because of the lapse of time arising as a result of my failure to address the proper basis for the issuance of a restraining order pursuant to the provisions of s. 8 of *the Judicature Act* in a timely way, the actual controversy between the parties has essentially become moot.

Nonetheless, the court chooses to exercise its discretion to deal with the issue because: there is an adequate adversarial context – the parties having raised opposing views of the law in Alberta; limited judicial resources should be expended on dealing with an issue which is of almost daily occurrence in the courts; and, the court's decision does not interfere with any legislative policy.

[5] Without notice applications are exceptional. Therefore, lawyers and self-represented litigants who bring such applications bear a heavy and unique burden in litigation: they must make full and frank disclosure of all material facts "including facts that may not be helpful to that party's position." That obligation was not met in these proceedings.

[6] With respect for those who are of a different view, in Alberta, a domestic restraining order issued pursuant to the court's equitable jurisdiction described in s. 8 of the *Judicature Act*, is not limited to safeguarding an applicant's reasonable fear for their safety: a court has the much broader authority to protect an individual from vexatious conduct. That vexatious conduct needn't rise to the level of threatening conduct. Inopportune telephone communications may suffice: ***Motherwell.***

[7] In the circumstances here, it is not clear that Ms. Boychuk's motive for bringing the application on December 20, 2016 was purely tactical; it can therefore not be set aside on that basis.

[8] In any event, even as of the time of the confirmation hearing – much less at the time of the without notice application - Ms. Boychuk did not demonstrate a reasonably held and legitimate fear for her own safety, or for that of her children. However, because this court is a court of superior jurisdiction, this court's discretion to issue a restraining order does not depend on meeting a statutory standard, in particular, finding an objective fear for the applicant's safety: it is sufficient if the applicant establishes repeated communication which is unwelcome. In the circumstances here, the applicant has not met the lower standard. In the result, the without notice restraining order issued December 21, 2016 is vacated.

Cases and authority cited:

[9] **By Ms. Boychuk**: ***A.T.C. v. N.S***. 2014 ABQB 132.

[10] **By Mr. Boychuk**: ***Siwiec v. Hlewka*** 2005 ABQB 684.

[11] **By the court**:: ***Borowski v Canada (Attorney General)*** [1989] 1 S.C.R. 342; ***Celanese Canada Inc. v Murray Demotion Corp.*** 2006 SCC 36; ***A.M. v J.M.*** 2016 ONCA 644; ***R.P. v R.V.*** 2012 ABQB 353; ***Lymer v Jonsson*** 2016 ABCA 76; ***Ewanchuk v Canada (Attorney General)*** 2017 ABQB 237; ***Calpine Canada Energy Ltd. (Re)*** 2007 ABCA 266; ***Tran v. Armstrong*** 2015 ABQB 343***; R. v Kordrostami*** [2000] O.J. No. 613; ***Motherwell v Motherwell*** [1976] A.J. No. 555; ***Hunter v Canary Wharf*** 1997 A.C. 655 (H.L.); ***MacDonnell v Halifax Herald Ltd***. 2009 NSSC 187; ***McCague v Meighan*** [1832] O.J. No. 40; ***Miller v Smith*** [1905] O.J. No. 668; ***R.S. v M.S.M.*** 2016 ONCJ 297; L. Klar, *Tort Law*, 6th ed., 2008, Thomson Carswell; G.H.L. Fridman, *The Law of Torts in Canada*, 3d ed., 2010, Carswell.

1. Background

a) Factual

[12] The parties are the married parents of two children, one of whom is 13 and the other 7.

[13] On December 19, 2016, the day on which she initiated divorce and matrimonial property proceedings, Ms. Boychuk filed an application for a restraining order without notice in a family law situation. In her application, she swore that: the married parties had separated on November 21, 2016, although they continued to live in the same residence until Mr. Boychuk moved out prior to the application; there had never been any domestic proceedings in any court; the granting of the order would not require Mr. Boychuk to leave his residence; there were two children of the marriage in relation to whom she proposed alternate week-end, supervised, from 6:00 p.m. on Saturday to 7:00 p.m. on Sunday; she had a lawyer and that her husband did not; and, she was "afraid that the respondent will physically harm me if I do not follow his demands". She stated that the respondent had been emotionally, psychologically and physically abusive to her throughout the relationship. In particular, she stated that::

- on October 30, 2016, the respondent had threatened to give her a black eye;

- on October 31, 2016 he took the handcuffs and gun from a mutual friend who was a police officer, emptied the bullets from the gun, made shooting gestures with the gun, and later put the handcuffs on the parties' daughters;

- on December 3, 2016, "the respondent followed me in his car to a mutual acquaintance's residence;The respondent proceeded to trespass on the property . . . and confronted me, while recording the altercation with his phone . . . he pushed me. I have not felt safe on my property around the respondent since that time";

- as of December 6, 2016, the respondent deprived her of access to the parties' joint bank account;

- Mr. Boychuk had told her that, prior to their relationship, he had been in jail on a number of occasions.

[14] What is not mentioned in the December 19 affidavit includes the following:

- whatever comment Mr. Boychuk made to her on October 30, it was at a time when Ms. Boychuk had black eyes as a result of a facial treatment;

- the October 31, 2016 events took place at a Hallowe'en party, attended by both parents, and by other neighbours including an RCMP officer who was a friend of both parties and who had divested himself of his gun and handcuffs and allowed them to be used as toys during the party;.

- the December 3, 2016 event occurred in the bedroom of the same RCMP officer to whose garage Mr. Boychuk had access because he stored a vehicle there and considered the RCMP officer to be his "best" friend, (which designation is confirmed by the police officer in his own handwriting in his apology for the December 3 events) and that the altercation occurred as a result of Mr. Boychuk's attempts to video his wife and his friend. The entry by Mr. Boychuk into the residential part of the building from the garage occurred when Mr. Boychuk noticed his wife's shoes at the entrance to the residential area of the building;

- on each of December 4, 5 and 6th, 2016, Ms. Boychuk wrote to her husband saying, amongst other things, "I do want to work things out";

- Mr. Boychuk had voluntarily left the matrimonial home on December 6, 2016;

- on December 12, 2016, Ms. Boychuk withdrew $70,000.00 from the parties' joint line of credit.

[15] Ms. Boychuk made her application for a restraining order on December 20, 2016. The court's regular sittings had terminated on December 16, 2016. Only emergency matters were to be brought during the week commencing December 19. Ms. Boychuk's lawyer informed the court that Mr. Boychuk had voluntarily moved out of the matrimonial home some time before but that he had been returning, from time to time, to remove personal property. In answer to a question from the chambers judge about police involvement up to that date, Ms. Boychuk's lawyer responded: "she is afraid to go to the police about this": 9:37:15 on the FTR recording for that date. At the hearing, the judge questioned Ms. Boychuk's lawyer about the failure to address Christmas access and that Ms. Boychuk had not provided any information about the family's Christmas traditions while they were together as a family group. The chambers judge said that she was not prepared to deal on a without notice basis with property disputes between the parties.

[16] A without notice restraining order, prepared by Ms. Boychuk presumably in response to the chambers judge's concerns regarding Christmas access, was issued by this court on December 21, 2016. In addition to the supervised one overnight on alternate weekends – which the chambers judge characterized as "sparse", but indicated that it would be for a short period of time only - the order also gave Mr. Boychuk parenting time commencing on Saturday, December 24 at 5:00 p.m. to Christmas morning at 11:00 a.m. The order does not indicate that the judge was satisfied that Ms. Boychuk had a reasonable fear for her safety. The order does state, in relation to Rule 6.4, that the court was satisfied that notice of the application did not have to be given to Mr. Boychuk because serving notice of the application on him might cause undue prejudice to Ms. Boychuk.

[17] The order was filed on December 22, 2016. It was served on Mr. Boychuk on December 23, 2016 which is when Mr. Boychuk presumably first learned about Christmas with his children and his subsequent restricted parenting.

[18] The "on notice" hearing was held on January 10, 2017. Ms. Boychuk asked the court to extend the December 21, 2016 order for 6 months. I heard the application. Unfortunately, perhaps because an arrangement had been made as of that date for Ms. Boychuk to have exclusive possession of the matrimonial home and for Mr. Boychuk to have increased parenting, and because a parenting hearing was to be held later that week, I lost sight of my duty to comment on the general principles relating to the granting of without notice restraining orders; I thank both counsel for reminding me, on June 16, 2017, of that obligation. Although the court does, of course, have a mechanism in place to remind judges of outstanding reserves, the January 10 obligation was not included in that mechanism.

b) Legislative

[19] Section 8 of Alberta's *Judicature Act* reads:

> *General jurisdiction*
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> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all

> matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

2. Mootness

[20] In her appearance on January 10, 2017, Ms. Boychuk asked the court for a six month restraining order. Effectively, six months has now elapsed since she made that request. Because, during that six month period, the court's without notice order of December 21 continued to operate, Ms. Boychuk's original request has now become moot as she has effectively received what she requested.

[21] In establishing the two-step analysis which a court must undertake in a situation of mootness, in ***Borowski*** the Supreme Court of Canada held:

> The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[22] In deciding that I should address the outstanding issue of principle as to the correct basis for the issuance of a Q.B. restraining order, I have taken the following into account:

- there has been a full adversarial context: both parties were represented by counsel who relied on existing, but opposing, decisions of this court. In addition, counsel for the parties asked me, after the contest between the parties had essentially become moot, to issue a decision on the contested principle;

- limited judicial resources should be spent on resolving the issue in dispute. As it happens, serendipitously, I am a supernumerary judge and therefore have time available for judicial work outside regularly scheduled assignments. Also, although the issue of the no-go zone between the parties has become moot, the domestic contest is ongoing. It is not impossible, during the course of those proceedings, that the granting of a without notice restraining order against the husband would be raised in some way to his potential detriment; therefore, it is fair to resolve the issue at this, late, juncture. Finally, and most importantly perhaps, applications for restraining orders are, if not daily occurrences, at least very common applications. What is relatively rare today is that both sides are represented by counsel. As the lawyers were able to advance opposing positions on the basis for issuing restraining orders, it is in the interests of other litigants that this court attempt to clarify that issue;

- this is not a situation where the court's decision could in any way interfere with the legislative power. This is certainly not a situation where the court might have to criticize existing

legislation, or even a gap in legislative action. Rather, this is a case where a court is called on to assess the limits of its inherent power.

[23] In the result, there is no impediment to the court's choosing to weigh in on an issue which is moot, and there are advantages to the court's doing so.

3. Responsibility in bringing a without notice application; satisfying Rule 6.4; bringing an application on an emergency basis

a) Full and frank disclosure

[24] This application provides a good occasion on which to remind lawyers that they bear a heavy responsibility when they bring a without notice application. Although the comments cited below were made in the context of an Anton Piller application – i.e. a commercial search warrant situation – the duty of an applicant proceeding without notice to the party opposite is a general one which applies in all *ex parte* situations, not just Anton Piller applications. In addition, there surely cannot be any doubt that a restraining order which has the effect of restricting an individual's freedom, property rights and, most importantly, parenting, is a situation that is at least as serious as an application dealing with money. In ***Celanese Canada Inc***., the Supreme Court of Canada commented on the general principle of *ex parte* applications as follows:

> 36 Both the strength and the weakness of an Anton Piller order is that it is made ex parte and interlocutory: there is thus no cross-examination on the supporting affidavits. The motions judge necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms. We are advised that such orders are not available in the United States (Transcript, at p. 70).
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> 37 A troubling example in Canada is the Adobe Systems case, where a computer software company was tipped off that a small advertising firm in Halifax was using unlicensed versions of some of its software. The affiant swore that, in his opinion, the firm was likely to destroy its unlicensed copies of the software if it became aware of the pending litigation against it. The target firm was well established and its principals had an excellent reputation in the community. On subsequent cross-examination it was revealed that the source of the informant's opinion that the defendant was likely to destroy unlicensed copies was his "observation of human nature" and not any observation of that particular defendant. Upon a review of the order, Richard A.C.J. (now C.J. of the Federal Court of Appeal) found that the plaintiffs had not made sufficient inquiries of the facts before obtaining the order. Citing Adobe Systems, the Federal Court recently reiterated that "[i]n all proceedings taken ex parte, particularly in Anton Piller situations, there is a heavy obligation upon the moving party to make full and frank disclosure of all relevant facts to the Court" (Netbored Inc., at para. 41).

[25] I personally could not find many applications of the general principle in domestic disputes. It is clear that there is at least one major difference between commercial and domestic without notice applications: in the former, the applicant must provide an undertaking in damages, which presumably encourages full and frank disclosure, whereas, for obvious policy reasons, there is no penalty, other than possibly in costs, for failing to make full and frank disclosure in domestic matters.

[26] Fortunately, the Ontario Court of Appeal has considered, and applied, the general principles relating to *ex parte*, i.e. without notice, applications in the context of domestic litigation. Given the realities of such litigation today, it was very useful for that court to emphasize that the obligation of full and frank disclosure which has always applied to lawyers applies to self-represented litigants as well. In ***A.M.*** that court held:

> *Ex Parte Orders*
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> 26 Rule 14(12)(c) of the Family Law Rules, O. Reg. 114/99, allows a motion to be brought without notice if "there is an immediate danger to the health or safety of a child or of the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences." If an ex parte order is made, under rule 14(14) that order must contain a requirement that the matter come back to court, if possible before the same judge, within 14 days or on a date chosen by the court. And under rule 14(15), an order made without notice must be served immediately on all parties affected, together with all documents used on the motion, unless the court orders otherwise.
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> 27 These rules are consistent with the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, for other civil matters. An ex parte order is intended to be used only in exigent situations where the delay required to serve the motion would probably have serious consequences, or where the giving of notice by the service itself would probably have serious consequences. A judge hearing an ex parte motion who is not satisfied of the probability of those consequences will decide that the motion cannot proceed ex parte and order that notice be given.
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> 28 Where a motion is brought without notice, the person bringing the motion must make full and fair disclosure of all material facts (rule 39(6) of the Rules of Civil Procedure), including facts that may not be helpful to that party's position. An ex parte order that is obtained without full and fair disclosure, even if the lack of full disclosure was unintended, is subject to being set aside. See for example, Rinaldi v. Rinaldi, 2013 ONSC 7368.
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> 29 Notice and the opportunity to be heard are basic tenets of our justice system. Ex parte orders are therefore made only in very limited circumstances. The requirement for full and frank disclosure is essential to allow a court to fairly make a temporary order that will affect the rights of another person in an emergency situation where the court has not heard both sides of the story.
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> 30 That requirement is well-known to lawyers. It applies equally to self-represented parties.
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> *b) Urgency*

[27] Rule 6.4 of Alberta's Rules of Practice outlines the situations in which notice of an application to the party opposite is not required. The chambers judge sitting on December 20 was satisfied that 6.4(b) had been satisfied.

[28] It is, however, worth noting that, under Alberta practice, the last day of regular court sitting was December 16. Emergency duty judges were available during the week of December 19. Ms. Boychuk therefore had to meet a double standard when bringing her application on December 20; she also had to prove that her situation required emergency treatment.

4. Scope of a restraining order in an Alberta domestic situation

[29] Mr. Boychuk states that the evidence on the confirmation proceeding does not establish, objectively, that Ms. Boychuk fears for her safety or that of the children and that the evidence establishes that Ms. Boychuk obtained the order for mere tactical reasons. He relies on comments made by Slatter J., as he then was, in ***Siwiec***:

> 18 Unfortunately, over time it appears that the extraordinary nature of the remedy provided for in the Act has been forgotten. In some instances protection orders are handed out as if they were routine business. Of particular concern is that protection orders are now being used for collateral purposes. Protection orders were designed to protect claimants from family violence. They were never intended as a backdoor, ex parte way of obtaining custody of children, or exclusive possession of matrimonial premises, or possession of matrimonial chattels. That may well be an incidental effect of many protection orders, but that should not be their primary purpose.

[30] I observe, parenthetically, that Slatter J. did not purport to strike down protection orders which had a collateral effect. His analysis is what ethics might refer to as the rule of the double effect in which the good effect is the real objective and outweighs the bad effect even though a bad effect may be produced. Where a person in a domestic situation needs protection, that protection should be given even though the protection may have the incidental effect of depriving the other person of their residence and of their parenting. However, if an applicant's main purpose in applying for an *ex parte* order is to short-circuit the assessments that would normally apply in parenting and property distribution applications, that applicant is prevaricating.

[31] The view that restraining orders could only be issued in the Court of Queen's Bench in reliance on s. 8 of the *Judicature Act* if the court were satisfied that the applicant has established a reasonable fear of the respondent was expressed in ***R.P.***, where the judge said:

> 24 In my opinion, within the context of a no-contact restraining order these factors lead to a more specific standard: has the applicant established that the respondent poses a legitimate risk of harm to the applicant, a person under the applicant's care or the applicant's property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour?

[32] After reviewing legislation in this province and elsewhere which gave lower courts the statutory right to issue injunctions in the shape of restraining orders, the judge in ***R.P.*** concluded:

> 33 In summary, subject to the wide discretion of the Court to grant equitable remedies based on all the circumstances, the general rule this Court should follow before granting a restraining order under the common law is whether the applicant has sufficiently demonstrated a reasonably held and legitimate fear for his or her safety, the safety of any other person under his or her care or the safety of his or her property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour. If so, the Court should grant the injunctive relief barring any other circumstances that might militate against doing so, such as facts that implicate one or more other equitable considerations, such as clean hands, excessive hardship, misrepresentation, laches, etc.

[33] It is important to underline that, even the judge who took this restrictive view of the jurisdiction of a superior court, prefaced her remarks by noting that, as a matter of law, a superior court has wide jurisdiction to grant equitable remedies.

[34] With respect, I disagree with the approach in ***R.P***. that one should look to legislation to determine the jurisdiction of a superior court. Many examples could be given of situations in which a court of inherent jurisdiction has greater jurisdiction than an inferior court: see, for example, ***Lymer***. I pause to say that it is not necessary to justify the wording superior/inferior to lawyers and judges; because self-represented litigants might, however, conclude that the use of that wording implies some negative connotation in relation to another level of court, I will make a few comments on that topic. No slight is intended or taken by the use of that language. The structure of the court system is undertaken with a view to best satisfying different objectives: as it happens, "inferior" courts deal with most court applications. Because of that heavy burden, they are relieved, as much as possible, of disputes which are likely to be time consuming. Hence, as illustrated in ***Lymer***, their ability to deal with contempt which occurs in the court but their unsuitably to deal with contempt which occurs outside the court and in relation to which evidence must be led thereby causing delay.

[35] Naturally, where legislation specifically removes the inherent power of a superior court, the legislation must be followed: ***Ewanchuk***. However, where there are gaps in legislation, a superior court can fill the gap: ***Calpine Canada Energy***.

[36] Ms. Boychuk maintains that, subjectively, she is afraid of her husband. She relies on the position expressed by Lee J. in ***A.T.C.*** on the broad potential scope of this superior court's jurisdiction to issue injunctive-type relief such as a restraining order:

> 18 Accordingly, while I accept that the law is generally that restraining orders and EPO's are only granted in cases of fear for personal physical safety or fear of property damage, this Court's jurisdiction today must be more encompassing than its common law historical development, and as well it must go beyond its present statutory limits. As such, in circumstances such as the present one, it is only necessary for the Court to determine that the parties genuinely do not get along and are a threat to each other, not necessarily in terms of their personal safety or property damage, but also in terms of the damage that can be done to their reputations and lives. Both these parties depose that they are very worried and legitimately so about the damage the other can do their professional, personal, and family reputations. This harm is not physical harm involving one's personal safety, or damage to property, but still is serious emotional harm carried out through the internet, or caused by stalking and other harassing behaviour.

[37] With respect, I am of the view that it is inappropriate to restrict the jurisdiction of a superior court to do justice between citizens in order to equal the jurisdiction given to a lower court by statute. As I previously indicated in ***Tran,*** I share Lee J.'s perspective. Indeed, I go further than Lee J. EPOs are creatures of statute. When deciding whether an EPO should be confirmed or whether a Queen's Bench Protection Order should be granted, a superior court must stay within the ambit of the legislation and, in Alberta, that legislation is based on the existence of violence. However, a superior court has inherent jurisdiction and is not limited to any statutory standard; it is entitled, and indeed expected, to administer equity, i.e. to do what is fair as between litigants. The rights of citizens include not only the right to live in safety but also the right to be free from vexatious or harassing conduct. A citizen who has been plagued by

harassing behaviour but told that the court cannot do anything to protect them from that behaviour would be further vexed upon learning that courts protect themselves from vexatious litigants by making orders restricting access of those litigants to judicial process; vexatious litigant orders do not depend on evidence that courts fear for the safety of the judges.

[38] Do citizens have the right to be free from vexatious conduct by another?

[39] I have concluded that there is such a right. The *Criminal Code* criminalizes certain types of harassment. In ***Kordostrami***, the Ontario Court of Appeal defined harassment in that context as follows:

> *Harassment*
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> 10 Mr. Greenspan submits that the finding that the complainant was "harassed" cannot be sustained. In his reasons for judgment, the trial judge adopted a dictionary meaning of harassed as repeated communication with the complainant that is unwelcome. In Sillip, supra, Lamontagne, supra and Kosikar, supra, harassed is defined as "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered". Mr. Greenspan submits that these words must be read cumulatively, so that a conviction could not be sustained unless it has been proven beyond a reasonable doubt that the complainant experienced the mental state expressed by these words as a whole. It is submitted that the failure of the trial judge to advert to this stricter standard is fatal to the conviction. It is also submitted that making a few hang-up calls falls short of conduct of sufficient gravity to warrant a conviction for criminal harassment. It was pointed out that calls of this kind are covered by another, less serious offence of harassing telephone calls, under s. 372(3).
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> 11 I do not view the list of words used in Lamontagne, supra and Kosikar, supra as cumulative. Nor do they replace the word "harassed" in the Criminal Code. In their origin in R. v. Sillip, supra, at p. 393 they were stated to be individually synonyms for "harassed"; see also R. v. Ryback (1996), 105 C.C.C. (3d) 240 (B.C.C.A) at p. 248 where this point is made. Thus, it would be harassment to be "plagued" in one context and "bedeviled" in another.
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> 12 While I agree that the trial judge appears to adopt a less strict meaning of harassed, it is my view that his factual findings fully support the conclusion that the complainant was harassed within the meaning of s. 264(1). The hang-up calls cannot be seen in isolation from other relevant facts. In order to appreciate the impact of the calls and the gravity of the wrong committed by the perpetrator of the calls, the entire factual context must be considered. In Kosikar, supra, the court took into account the entire history of the relationship between the parties in finding that a single incident was found to be a sufficient basis to establish harassment; see also R. v. Riossi (1997), 6 C.R. (5th) 123 (Ont. Gen. Div.).
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> 13 In the present case, the factual context includes the earlier conversation at the restaurant and the first call made by the appellant. The trial judge found that the complainant had called the appellant a "pervert" and that she explicitly told him that if he called her back he would be in a lot of trouble. She was sufficiently alarmed by the appellant's conduct at the restaurant to speak to the manager. After receiving the

> appellant's first call, she called the police. The trial judge found that the calls made by the appellant caused the complainant to fear for her safety.
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> 14 In my view, on these findings, the complainant was harassed within the meaning of s. 264(1). To the extent the synonyms adopted from Sillip, supra, serve to elucidate the meaning of harassment, I have no difficulty in concluding on the findings of the trial judge that the complainant was "tormented", "troubled", "plagued" or "bedeviled" as a result of the appellant's conduct. Where a 39 year old man persists in making several hang-up calls to a young girl after having invited her to engage in a threesome and having been told that she regards him as a "pervert" on account of his unwanted overtures, the young girl has been harassed.

[40] It is excessively rare for there to be criminal redress for conduct which cannot also be dealt with civilly. In my respectful view, a person who repeatedly communicates with another after having been told that the communications are unwelcome is harassing the other person. That unwelcome communication should, and can, be stopped.

[41] Criminalizing it is not the only way to deal with socially reprehensible conduct; it is not always the best way to do so. Professor Klar underlines the respective roles of the criminal and civil justice systems in a civilized society:

> Tort and criminal law, aside from having a common historical origin, frequently arise simultaneously our of serious human conflict.. In short, tort and criminal law, in addition to a common historical origin, also express similar contemporary concerns . . . (such as) deterrence of antisocial conduct.

[42] Professor Klar quotes with approval from G. Edward White:

> It seems to me first, that there is something to be said for using tort law as a device for censure and punishment . . . While such admonitions may not deter other potential violators, there is something to be said for a society declaring, through its legal system, that it finds certain non-criminal conduct reprehensible.

[43] Later, when discussing the tor of private nuisance, Professor Klar comments:

> The private action is fluid and flexible and reflects changing conceptions of what type of society Canada is.

[44] Professor Fridman addresses the emerging tort of invasion of privacy and notes that, although Alberta is not one of the jurisdictions which has established statutory rights of privacy, interestingly, it is one where there is a judicial recognition of the right to be free from the kind of harassment which does not rise to the level of creating a fear for one's safety.

[45] Indeed, as I indicated in an earlier decision – ***Tran*** - I take comfort in the words of our Court of Appeal in ***Motherwell*** which are alluded to by Professor Fridman:

> 24 It is clear to me that the protracted and persistent harassment of the Brother and the Father in their homes, and in the case of the Brother as well in his office, by abuse of the telephone system is within the principle of private nuisance as it has been recognized in the authorities I have referred to. The question is whether the calls amounted to undue interference with the comfortable and convenient enjoyment by the plaintiffs of their respective premises. I can conceive that persistent and unwanted phone calls could become an harassment even if the subject matter is essentially agreeable. The deliberate

and persistent ringing of the telephone cannot but affect the senses in time, and operate on the nervous system as the evidence discloses. No special damage is required to support an injunction: it is the loss of the amenities of the premises in substantial degree that is involved.

25 I think that the interests of our developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a new category, rather than seeking by rationalization to enlarge the third category recognized by Clerk and Lindsell. We are dealing with a new factor. Heretofore the matters of complaint have reached the plaintiff's premises by natural means; sound through the air waves, pollution in many forms carried by air currents, vibrations through the earth, and the like. Here, the matters complained of arise within the premises through the use by the appellant of communication agencies in the nature of public utilities available to everyone, which the plaintiffs have caused to serve their premises. They are non-selective in the sense that so long as they are employed by the plaintiffs they have no control over the incoming communications. Nevertheless there are differences between the two agencies of telephone and mail and it does not necessarily follow from their similarities that both should be accepted into a new category.

26 The telephone system is so much the part of the daily life of society that many look on it as a necessity. Its use is certainly taken as a right at least in a social sense. It virtually makes neighbours not only of the persons close at hand, but those in distant places, other cities, other countries. It is a system provided for rational and reasonable communication between people, and its abuse by invasion of privacy is a matter of general interest within the meaning given the phrase by Lord Atkin in Fender v. St. John-Mildmay. It is essential to the operation of such a system that a call from someone be signalled to the intended receiver by sound such as the ringing of a bell. The receiver cannot know who is calling him until he answers. Calls must be answered if the system is to work. There are not many who would assert that protection against invasion of privacy by telephone would be a judicial idiosyncrasy. Further than that, the people of this province through the Legislature have expressed a public interest in the proper use of the system in enacting section 31 of The Alberta [*69] Government Telephones Act.

27 In Clerk & Lindsell para 1396 this is said:

> "A nuisance of this kind, to be actionable, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man."

This statement is amply supported by authority and I take it to be applicable to invasion of privacy. The proof here of real interference is well nigh overwhelming. All of these considerations lead me to accept the statement of Townley, J., in Stoakes et al v. Brydges, [1958] The Queensland Law Reporter 9 at 10:

> "It is quite a lawful use of his premises to use the instrument installed thereon for the purpose for which it was quite obviously intended. But there are numerous cases in the books which clearly show that although a person may be using his premises for the conduct of some operation perfectly lawful in itself, he must not so conduct that operation as to interfere materially with the health or comfort of other persons in the

> ordinary enjoyment of their premises. I do not think that this restriction is to be confined merely to interference with the health and comfort of neighbouring occupiers or owners strictly so called. I think any person who comes within the ambit of the operation and whose health or comfort in the ordinary enjoyment of his premises is interfered with to the requisite degree may take action to restrain that interference. The category of nuisances, particularly by such potentially noxious things as noise, is not closed and, it seems to me, will never be closed whilst human ingenuity is still attempting to devise fresh means of communicating or disseminating sound. Suppose a public address or Tannoy system is used under such conditions as to interfere materially with the sleep or rest of persons living in the vicinity I apprehend that it is not only the occupiers [*70] of those premises which immediately adjoin the source of the noise who may take action but also those whose premises though not immediately adjoining that source, nevertheless are situated within the radius of its effect."

I am of opinion that the Brother and the Father have established a claim in nuisance by invasion of privacy through abuse of the system of telephone communications.

[46] It is true, of course that our Court of Appeal's decision was criticized in the House of Lords in ***Canary Wharf***, but that was in the context of there being, in England, a statutory right to be protected from harassment:

> But I must go further. If a plaintiff, such as the daughter of the householder in Khorasandjian v. Bush, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal, viz. Malone v. Laskey, by which the court was bound. In any event, a tort of harassment has now received statutory recognition: see the Protection from Harassment Act 1997. We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from Khorasandjian v. Bush by the plaintiffs in the present appeals

[47] Although the ***Motherwell*** decision is particularly helpful because it deals specifically with abusive telephone communications, it is in line with current authority which expands the common law approach to nuisance. In ***MacDonnell***, for example, the court said:

> 14 Ms. MacDonnell relies on Somwar v. MacDonald's Restaurants of Canada Ltd., [2006] O.J. No. 64, and its extensive review of authorities. Somwar concluded that a common law tort of invasion of privacy may be emerging in Canadian law. It is "not unheard of". The court refused to strike a statement of claim based on the posited tort.

> 15 In Haskett v. Trans Union of Canada Inc., [2001] O.J. No. 4949, the court adopted a passage from Dean Klar's text suggesting privacy is protected only under the traditional torts and legislation. But, Justice Cumming said there is "some recognition of invasion of privacy as an embryonic tort where there is harassing behaviour or an intentional invasion of privacy". That seems to me a sound conclusion to be drawn from most of the cases reviewed in Somwar.

[48] In the absence of a legislated right to privacy, a superior court is entitled to look at the equities of a situation and grant appropriate relief. Indeed, in the absence of a statutory provision establishing such a possibility, the only way in which a court can ensure that vexatious communications are stopped permanently is to issue an injunction, i.e. a civil restraining order; that remedy is, in many ways, even more effective than recourse to the criminal justice system.

[49] Apart entirely from contemporary takes on privacy rights, from the earliest days of reported Canadian case law, courts have allowed recourse to the civil justice system in order to deal with harassment: ***McCague***; ***Miller***. Those decision and decisions of that type do not depend on fear for one's safety.

[50] While case law exhibits understandable concerns about monetizing breaches of privacy under tort principles, surely there is no similar need for caution when considering only injunctive relief, without any award of damages.

[51] I agree with the chambers judge who granted the without notice restraining order that it will be a very rare situation in which fear for the safety of property will, alone, justify the granting of an order which, for example, limits parenting.

[52] In summary, with respect for those who are of a different view, I conclude that:

- in general, it is neither necessary nor wise to diminish the power of a superior court to do justice by restricting it to the same powers enjoyed by a statutory court;

- in particular, in relation to restraining orders in a domestic situation, it is not necessary for applicants to establish an objective fear for their safety. On the contrary, imposing such a pre-requisite, courts only encourage citizens to lie, or at least grossly exaggerate, the reasons they feel entitled to a no-contact order;

- a superior court in Alberta is entitled to grant a no contact restraining order when it is satisfied that the respondent has repeatedly communicated with the applicant, knowing that such communication was unwelcome, or recklessly without ascertaining the wishes of the person with whom communication is made;

- because a restraining order arises from a different set of circumstances than an Emergency Protection Order or a Queen's Bench Protection Order, such an order does not ordinarily stigmatize the respondent.

5. Application of the principles here

[53] Ms. Boychuk brought her application in a week where only emergency applications were to be advanced. There is nothing in the application made on December 20 which would characterize Ms. Boychuk's situation as an emergency.

[54] The court accepts that, if it were able to conclude that the main purpose for bringing the application was tactical, in the sense used by Slatter J., it could set the order aside. However, it is

not clear that Ms. Boychuk's application was brought for a tactical purpose: by the time she brought her application, Mr. Boychuk had voluntarily left the matrimonial home. In relation to parenting, Ms. Boychuk appears to have had the misguided notion that claiming to have been the primary parent was a sufficient basis on which to craft an ongoing parenting regime. The chambers judge who heard the application on December 20 insisted that the father have parenting time over Christmas and characterized Ms. Boychuk's proposed ongoing parenting regime as "sparse". Ms. Boychuk would then have been aware that she was unlikely to meet her children's best interests by minimizing the role their father had in their future lives. The timing of Ms. Boychuk's application is certainly troubling. One assumes from their names that the parties would culturally, if not religiously, consider Christmas to be a time of celebration: to serve an *ex parte* order that will have an effect on parenting on December 23 appears designed to disorient the party opposite. In summary, nothing in the way the application was made or its timing is, by itself, a sufficient basis on which to set the without notice order aside.

[55] Obviously, by January 10, 2017, as a result of the filing of additional affidavits, particularly by Mr. Boychuk, the court had much more information than it did before the chambers judge on December 20, 2016. "Truth is the daughter of time" is not only a felicitous phrase; it is a reality in litigation. That is why a litigant who circumvents normal processes bears unique responsibilities relative to the truth of the situation. We understand that people involved in domestic disputes try to avoid the extremely lengthy delays which prevent the holding of timely special chambers hearings; that is not, however, an excuse for failing to observe the duty of full and frank disclosure.

[56] This court is now able to say that – on the basis of all of the evidence before the court - there is no reasonable, or objective, basis for a finding that Ms. Boychuk feared for her own safety or the safety of her children on either December 20, 2016 or on January 10, 2017. Her actions immediately after the December 3, 2016 incident – including the messages she sent to her husband - and Mr. Boychuk's own actions – including voluntarily leaving the matrimonial home - demonstrate that Ms. Boychuk did not have any fear of her husband and that, after his misguided invasion of his wife's privacy who was at liberty to have sexual relations with anyone she chose, Mr. Boychuk did not act aggressively towards his wife. On the contrary, in the circumstances, Ms. Boychuk was disingenuous in telling the chambers judge that she was so afraid of her husband that she was even too afraid to go to the police for help; she may have been embarrassed, she may have been trying to protect the police officer with whom she had an intimate relationship, but she was not afraid of her husband. Ms. Boychuk manifestly did not meet the test established in ***R.P***.

[57] Because of the failure to fully inform the chambers judge of all relevant facts, and because of the failure to meet the ***R.P.*** test, the without notice restraining order is set aside.

[58] This court observes that, in any event, Ms. Boychuk does not even meet the lower - in my view correct - test for a restraining order, i.e. proving that the claimant has suffered vexatious conduct: her complaints about Mr. Boychuk's occasional returns to the matrimonial home after December 6 are not concerns about her safety, but about her property interest in the property he may have removed.

6. Costs

[59] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 10th day of January, 2017.
Dated at the City of Edmonton, Alberta this 7th day of July, 2017.

J.B. Veit
J.C.Q.B.A.

Appearances:

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