

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

M.W.

Applicant

-and-

B.J.

Respondent

Review Under s.5(2) of the *Protection Against Family Violence Act*, SNWT 2003

Heard at Yellowknife: October 13, 2022

Written Reasons filed: November 3, 2022

**REASONS FOR DECISION OF THE
HONOURABLE CHIEF JUSTICE S.H. SMALLWOOD**

Self-Represented Applicant

Self-Represented Respondent

Counsel for the Attorney General
Of Canada: Kirsty Hobbs

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RULING ON A REVIEW UNDER S. 5(2) OF THE PROTECTION AGAINST
FAMILY VIOLENCE ACT, SNWT 2003

[1] A Justice of the Peace granted an *ex parte* Emergency Protection Order (EPO) against the Respondent B.J. on September 17, 2022. The order was sought by the Applicant M.W. who had been in a relationship with the Respondent for several months before they broke up. The relationship ended when the Respondent became pregnant. In seeking the EPO, the Applicant alleged that the Respondent had physically abused him several times. At the time the Order was granted, the Respondent was 8 months pregnant.

[2] The EPO was reviewed by a Supreme Court Justice as required by section 5 of the *Protection Against Family Violence Act*, SNWT 2003, c. 24 (*Act*). Upon review, a hearing was directed on the issue of whether the Applicant was a person who could apply for an EPO pursuant to section 2(1) of the *Act*.

[3] The Attorney General of the Northwest Territories was invited, along with the Applicant and Respondent to make submissions on this specific point. Counsel for

the Attorney General attended the hearing as did the Applicant and Respondent. The Attorney General made submissions that the Applicant was not eligible to apply for an EPO as he was not the parent of a child with the Respondent. At the conclusion of the hearing, I agreed with the submissions of the Attorney General, revoked the EPO and indicated that further reasons would be provided.

[4] The Act is intended to permit persons who have been affected by family violence to apply for an emergency protection order or a protection order. Individuals are entitled to apply for protection under the *Act* only if they meet the requirements set out in section 2. A review of section 2 of the *Act* makes it clear that not all family or intimate relationships will qualify for protection under the *Act*.

[5] Section 2(1) of the *Act* states:

The following persons may apply for an emergency protection order or a protection order:

- (a) a spouse or former spouse of the respondent;
- (b) a person who resides with, or has resided with, the respondent in an intimate or family relationship;
- (c) a person who is, together with the respondent, a parent of a child;
- (d) a parent or grandparent of
 - (i) the respondent, or
 - (ii) a person referred to in paragraph (a), (b) or (c).

[6] Obtaining an EPO under the *Act* has been described as an extraordinary remedy that is only available in certain situations where there has been family violence and there is a seriousness or urgency to the situation so that the EPO should be issued without delay on an *ex parte* basis to protect the applicant. This was explained in *Siwiec v Hlewka*, 2005 ABQB 684 at para 17:

Protection orders constitute a restraint on the liberty of the respondent, and they should be regarded as an extraordinary remedy. They are intended to protect claimants from family violence, an objective that was considered so pressing that it was felt to justify granting restraints on the liberty of third parties on an *ex parte* basis.

[7] The *Act* is intended to provide protection to certain family members or individuals in certain intimate relationships but it is not intended to cover all family members or intimate relationships. As stated in *Lenz v Sculptoreanu*, 2016 ABCA 111 at para 30-31:

The *Protection Against Family Violence Act*'s extraordinary procedure was designed and intended to address one subset of abusive relationships – violence among prescribed family members – whereas common law restraining orders are available for

broader forms of abusive relationships. The *Act* is a specially designed instrument that seriously abridges the liberty of person, and its application should be restricted to its intended familial context.

In summary, the *Protection Against Family Violence Act* has the specific purpose of targeting violence amongst persons with familial relations, as defined under the statute. The EPO scheme is reserved for those that fall within the strict definition of “family members”.

[8] The Applicant and Respondent were in an intimate relationship but are not spouses or former spouses, do not reside together and have not in the past resided together during their relationship so the issue is one of whether they are the parent of a child within the meaning of s. 2(1)(c) of the *Act*. An EPO is only available to the applicant in this case if there is a determination that they are together “a parent of a child”, the Applicant and Respondent having acknowledged that they do not meet any other criteria under s. 2 of the *Act*. In this case, at the time of the appearance before the Justice of the Peace and the review hearing before this Court, the Respondent was pregnant and the child had not yet been born.

[9] Turning to a consideration of the meaning of child. Child is defined in section 1(1) of *Act* as meaning “a person under the age of 19 years.” A reasonable interpretation of the phrase, “a person under the age of 19 years”, requires a person to have been born as a person does not acquire an age until after birth. *Re Baby R*, 1998 CanLII 3132 (BCSC) at para 17.

[10] On that basis, one could consider a child to be a person who is born and under the age of 19 years. The definition of person has also been referred to in legislation and in caselaw.

[11] Person is not defined in the *Act*. There is a definition of person in the *Interpretation Act*, SNWT 2017, c.19 but it does not assist in this matter:

"person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person.

[12] Persons have been held to be either natural persons or legal persons. A natural person is a human being with the capacity for rights and duties. A legal person is anything to which the law gives a legal existence and personality with rights and duties such as contained with the definition of person in the *Interpretation Act*. *The Minister of National Revenue v Stanchfield*, 2009 FCC 99 at para 21.

[13] Within the criminal justice system, a child does not become a human being until it has been born alive as specified in the *Criminal Code*. The Supreme Court of Canada in *R v Sullivan*, [1991] 1 SCR 489, held that, in the context of criminal negligence provisions in the criminal law, the term person was synonymous with the term human being. Therefore, a child does not become a person until it has been born alive.

[14] Outside of the criminal context, there is some jurisprudence that has considered the law with respect to unborn children. In *Winnipeg Child and Family Services (Northwest Area) v D.F.G.*, [1997] 3 S.C.R. 925, the Supreme Court of Canada considered the rights of an unborn child, stating at para 11:

I turn to the general proposition that the law of Canada does not recognize the unborn child as a legal or juridical person. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. This is a general proposition, applicable to all aspects of the law, including the law of torts.

[15] There are differences in how the unborn child and the born child are treated in the law and the general proposition continues that the unborn child is not a legal or juridical person. This is not a biological or spiritual conclusion regarding the differences between an unborn child and a born child but a legal one long recognized by the common law. *DFG* at para 12.

[16] There is nothing in the *Act* to suggest that the legislature intended the definition of child to be expanded upon from this general proposition to include an unborn child. As such, I concluded that the *Act* did not permit the Applicant to apply for an EPO as he was not, together with the Respondent, the parent of a child.

[17] I advised the Applicant that once the child was born, he could renew his application for an EPO if he continued to feel the need for protection. I also note that there may be other provisions available to the Applicant for his protection such as a common law peace bond or a peace bond pursuant to s. 810 of the *Criminal Code*.

S.H. Smallwood
Chief Justice

To: Self-Represented Applicant
Self-Represented Respondent
Counsel for the Attorney General
Of Canada: Kirsty Hobbs

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