

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** *T.L.T. v. R.T.*, 2003 NSSC 251

**Date:** 20031231  
**Docket:** S.H. 210141  
**Registry:** Halifax

**Between:**

T.L.T

Applicant

v.

R.T.

Respondent

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Restriction on publication:** Publication Ban on name and address of applicant

**Judge:** The Honourable Justice Gordon A. Tidman

**Heard:** December 2, 2003, in Halifax, Nova Scotia

**Counsel:** Maureen Ryan for the applicant  
Eric K. Slone for the respondent

**Tidman, J.:**

[1] This is a hearing of two applications pursuant to section 12(1) of the *Domestic Violence Intervention Act* (Chapter 29 Acts of 2001).

[2] An Emergency Protection Order (EPO), dated November 4, 2003, was granted by justice of the peace, Elizabeth Mullaly, upon the application of the wife, T.L.T., against the husband, R.T. The order grants the wife exclusive

possession of the matrimonial home, directs the police to remove the husband from the home, directs the husband to remain away from the matrimonial home and grants the wife temporary possession or control over keys and utility or household accounts. The order to remain in effect until December 1, 2003.

[3] The husband applies to revoke the order. The wife cross-applies to extend the order for a further period of time beyond December 1, 2003.

[4] The applications came before the court during regular chambers on November 26, 2003. At that time, there was insufficient time to conduct the hearing. Consequently, the matter was adjourned to December 2, 2003 for a hearing. In the interim, the husband agreed to give the wife exclusive possession of the matrimonial home until the outcome of a pending Family Division court application by the wife dealing with several domestic claims, including a claim for exclusive possession of the matrimonial home. Notwithstanding that agreement, the parties wish to proceed with these applications.

### **Application Before Justice of the Peace**

[5] The justice of the peace order of November 1, 2003, was granted following a telephone application by the wife. The order was confirmed by an order of Justice Kelly of this court, dated November 10, 2003.

[6] In accordance with the procedure set out under the *Act*, the wife gave *ex parte* testimony by telephone to the Justice of the Peace. The Justice of the Peace made a determination following the testimony. Justice Kelly confirmed the order after reviewing an audio tape of the hearing conducted by the Justice of the Peace.

[7] Among the circumstances related to the Justice of the Peace, the wife said that she and her husband had been living separate and apart since August, 2003. At the time of the application she said she was living with her mother after leaving the matrimonial residence in which her husband's parents also resided. The husband had previously left the matrimonial home following a domestic dispute.

[8] When asked by the justice of the peace to tell her of the violence committed by the husband, the wife initially stated that, "well, it is a lot more mental and a

controlling issue more than anything drastic”. When questioned further by the justice of the peace as to whether there was any violence at the time of the August separation, the wife initially responded, “a lot of vulgar, disgusting conversations, harassing control issues and more mental violence, more mental, not violence physical...he did push me...it wasn’t something I’d call drastic...he just pushed me away or pushed me aside or something like that”. The wife went on to tell the justice of the peace that the husband swore at her and called her names in the presence of their only child, a 4-year-old daughter.

[9] The justice of the peace later asked the wife if she was frightened of the husband. The wife responded that she was and that she wanted the husband to stay away from her. Upon further questioning by the Justice of the Peace, the wife said that two years earlier the husband attempted to smother her with a pillow a couple of times. “I’ve almost been near death with that...he literally beat me up one time...the fear like, it’s just a build up over 14 years. So I mean just the past year just because he hasn’t drastically hurt me it’s just a matter of a slap in the face”.

[10] The wife also suggested that the husband might try to take the child from her. She also said that she could probably live with her mother for only two more weeks or so and after that she needed a place for her daughter and herself to live. She said the husband was paying her only \$850.00 monthly.

[11] The wife indicated that her lawyer and the husband’s lawyer were negotiating the issues between them, but “because of the paperwork” she could not get before the Family Division for a timely resolution of the issues.

### **Evidence**

[12] The court was provided with affidavit evidence of the wife and the wife’s mother and aunt, in support of the wife. Counsel for the husband provided an affidavit of the husband. The wife and the husband were both cross-examined on the contents of their respective affidavits. Neither the wife’s mother nor her aunt were cross-examined on the contents of their respective affidavits.

[13] The affidavit evidence and cross-examination of the parties on that evidence presented a much different situation than that presented to the justice of the peace who granted the Emergency Protection Order.

[14] The husband denied any physical violence toward his wife since September, 2001, at which time he says he slapped her.

[15] The wife says that she obtained the Emergency Protection Order because she was afraid of her husband and needed a guarantee that he would not harm her.

[16] The wife says there were assaults upon her by her husband after September 2001, but there were no assaults since their separation on August 16, 2003.

[17] It is evident that the husband has in the past assaulted the wife. The extent of domestic violence inflicted on the wife is difficult to determine, but it is clear that there have been no assaults on the wife, nor have there been attempts by the husband to see the wife since their separation in August, 2003.

[18] During cross-examination, the wife admitted that on many occasions after the August, 2003 separation she attempted to contact the husband by cell phone and says she left messages for him, including messages telling him that she loved him. She admitted that on November 4, the day she made application for the Emergency Protection Order, she passed the husband's vehicle while driving on a Halifax street and immediately telephoned him and berated him for not returning her wave to him while passing. During cross-examination she also admitted that the husband had made no attempts to see her in the three months preceding her application and, in fact, avoided seeing her. She also admitted that on the husband's birthday - November [...] - after the issuance of the Emergency Protection Order she telephoned the husband and suggested that she, he and their daughter all get together for his birthday.

[19] She also admitted that at the time of the Emergency Protection Order hearing, her husband in addition to paying her \$850.00 monthly, was making a monthly payment of \$294.00 on the Jeep vehicle she was driving. She also says that at the same time she was receiving Employment Insurance of \$984.00 monthly and a Child Tax Credit benefit of \$115.00 monthly.

[20] When asked on cross-examination why, after their separation, she continued to attempt communication with the husband, she explained that she did so to determine what his mood was at that particular time so she would know what actions to expect from him.

**Domestic Violence Intervention Act**

[21] The following sections of the *Domestic Violence Intervention Act* are pertinent to this hearing:

**6(1)** Upon application to a designated justice of the peace, the justice of the peace may make an emergency protection order to ensure the immediate protection of a victim of domestic violence if the justice of the peace determines that

- (a) domestic violence has occurred; and
- (b) the order should be made forthwith.

**(2)** In determining whether to make an order pursuant to this Section, the justice of the peace shall consider, but is not limited to considering,

- (a) the nature of the domestic violence;
- (b) the history of domestic violence by the respondent towards the victim;
- (c) the existence of immediate danger to persons or property; and
- (d) the best interests of the victim and any child of, or in the care and custody of, the victim.

**(3)** In determining whether to make an order pursuant to this Section, the standard of proof is to be on a balance of probabilities.

...

**8(1)** An emergency protection order may do any or all of the following:

- (a) grant the victim or other family members exclusive occupation of the victim's residence for a defined period regardless of any legal rights of possession ownership;
- (b) direct a peace officer to remove the respondent from the victim's residence immediately or within a specified time;

- (c) direct a peace officer to accompany a specified person, within a specified time, to the victim's residence to supervise the removal of personal belongings;
  - (d) restrain the respondent from directly or indirectly communicating with the victim or any other specified person;
  - (e) require the respondent to stay away from any place identified specifically or generally in the order;
  - (f) grant temporary possession of or control over specified personal property, including an automobile, cheque book, bank card, health services card or supplementary medical insurance cards, identification documents, keys, utility or household accounts or other personal effects;
  - (g) restrain the respondent from taking, converting, damaging or otherwise dealing with property;
  - (h) restrain the respondent from committing any further acts of domestic violence against the victim;
  - (i) prohibit the publication of the name and address of the victim or any other information that may identify the victim;
  - (j) require a peace officer to seize
    - (i) any weapons, and
    - (ii) any documents that authorize the respondent to own, possess or control a weapon referred to in subclause (i);
  - (k) award temporary care and custody of a child of the victim to the victim or to other person;
  - (l) do any other thing that the designated justice of the peace considers necessary to ensure the immediate protection of the victim or any child.
- (2)** A designated justice of the peace may make an emergency protection order for a period not exceeding thirty days.

...

**11(1)** As soon as practicable after making an emergency protection order and in any event within two working days, the designated justice of the peace shall

forward a copy of the order and all supporting documentation, including a transcript or tape recording of the proceedings, to the court in the prescribed manner.

(2) Within such period of time, as the regulations prescribe, of the receipt of the emergency protection order and all supporting documentation by the court, a judge shall review the order and, where the judge is satisfied that there was sufficient evidence before the justice of the peace to support the making of the order, the judge shall

(a) confirm the order; or

(b) vary the order

and the order as confirmed or varied shall be deemed to be an order of the court.

(3) Where, on reviewing the emergency protection order, the judge is not satisfied that there was sufficient evidence before the justice of the peace to support the making of the order, the judge shall direct a hearing of the matter in whole or in part before a judge...

**12(1)** Notwithstanding subsection 11(2) and at any time after a respondent has been served with an emergency protection order, the court, on application by a victim or respondent named in the order, may

(a) make changes to, or terminate, any provision of the order;

(b) decrease or extend the period for which any provision in the order is to remain in force; or

(c) revoke the order.

(2) On an application pursuant to subsection (1), the evidence before a justice of the peace on previous applications pursuant to this *Act* shall be considered evidence.

(3) Unless otherwise ordered by the court, an emergency protection order continues in effect and is not stayed by a direction for a hearing pursuant to subsection 11(3) or an application pursuant to subsection (1).

(4) On an application pursuant to clause (1)(b) the judge may extend the emergency protection order for a period not to exceed thirty days from the expiration date of the original order.





## **Positions of Parties and Arguments**

[22] Mr. Slone's position on behalf of the husband is that an Emergency Protection Order should be granted only in a situation of real emergency involving the threat of physical violence and such is not the case here. In support of that position, Mr. Slone refers the court to several Saskatchewan cases where similar legislation has been in effect for some years. At this early stage of our legislation there is a dearth of Nova Scotia cases dealing with the *Act*.

[23] In *Bella v. Bella* (1995), S.J. 253, Mr. Justice Gerein of the Saskatchewan Court of Queen's Bench states at paragraphs 12 and 13:

Any violence, including domestic violence, is by its very nature serious. However, the degree of seriousness will vary and this is recognized in Section 3(1). By having reference to the seriousness of the violence, the Legislature acknowledged that not all incidences of domestic violence should trigger the extreme remedy provided by the *Act*. The violence must be of sufficient seriousness as to justify an emergency intervention. Alternatively, the situation must be of such urgency, which I read as meaning a real likelihood of violence occurring or being repeated, as to justify an emergency intervention.

Put otherwise, an order is not to be granted simply to alleviate unhappiness or discomfort or to improve a less than ideal situation, but only to provide protection in a situation of emergency.

[24] Section 3(1) of the Saskatchewan *Victims of Domestic Violence Act* (S.S., c. V- 6.02) is similar to Section 6(1) of the *Nova Scotia Act*. The Saskatchewan *Act* provides:

**3(1)** An emergency intervention order may be granted *ex parte* by a designated justice of the peace where that designated justice of the peace determines that:

- (a) domestic violence has occurred; and
- (b) by reason of seriousness or urgency, the order should be made without waiting for the next available sitting of a judge of the court in order to ensure the immediate protection of the victim.

[25] The position of Ms. Ryan, on behalf of the wife, is that the wife feared the husband who in the past had assaulted her. Thus she argues the order should not only be confirmed it should be extended. Ms. Ryan correctly points out that the

wording in the similar section of the *Nova Scotia Act* differs from that of Section 3(1) of the *Saskatchewan Act*. That is, the *Saskatchewan Act* specifically sets out that even though domestic violence has occurred an order should be granted only if there is reason to do so “because of the seriousness or urgency of the situation which may require the order to ensure the immediate protection of the victim”. As Ms. Ryan points out no similar wording is contained in Section 6(1)(b) of the *Nova Scotia Act*. That subsection provides that the justice of the peace having found that domestic violence has occurred must then determine only that “the order should be made forthwith”.

[26] Therefore, Ms. Ryan argues that having found that domestic violence has occurred there is no requirement that the justice of the peace find a serious or urgent situation before granting an order.

[27] It should be noted, however, that Section 6(1) of the *Nova Scotia Act* contains wording similar to that of Section 3(1)(b) of the *Saskatchewan Act* in that the *Nova Scotia Act* states that the justice of the peace may make an emergency protection order “to ensure the immediate protection of a victim of domestic violence”.

[28] Notwithstanding the difference in wording of the two *Acts*, Kennedy, C.J. in *J.M.J. v. C.L.J.* EPO#084 (2003), relied on *Bella v. Bella* (supra) in revoking an Emergency Protection Order after finding that the circumstances before him did not amount to an emergency situation contemplated by the *Nova Scotia Act*.

[29] It is clear from the wording of S. 6(1) of the *Nova Scotia Act* that a determination of the occurrence of domestic violence alone is not sufficient to warrant the making of an order. Section 6(1) provides that upon finding that domestic violence has occurred, the justice of the peace must go on to determine whether the order should be made forthwith.

[30] Unlike the *Saskatchewan* legislation, there is nothing further in Section 6(1)(b) of the *Nova Scotia Act* to guide either the justice of the peace or the reviewing court as to what additional circumstances should be considered in deciding whether the order “should be made forthwith”.

[31] In determining the meaning of the phrase “should be made forthwith”, the court must look at the whole of the *Act* and extract a meaning consistent within that context.

[32] Some guidance is given by the Legislature’s use of the limiting word “forthwith”. The use of forthwith connotes a sense of urgency or immediacy. The use of the word forthwith in that sense is consistent with the use in Section 6(1) of the phrase “to ensure the immediate protection of a victim”. The same phrase is included in the residual clause (1) of Section 8(1) of the *Act* whereby the justice of the peace may “do any other thing that the designated justice of the peace considers necessary to ensure the immediate protection of the victim or any child”.

[33] Perhaps most importantly in attempting to obtain some guidance from the provisions of the *Act* in determining whether an order should be made forthwith is the description of the order itself, ie. an “emergency protection order”. The term “emergency” is not defined in the *Act*. The Concise Oxford Dictionary, 7<sup>th</sup> Edition, defines emergency as “a sudden state of danger, etc.” and “condition needing immediate treatment”.

[34] I am in agreement with Kennedy, C.J. that the Saskatchewan legislation although not identical is very much the same as ours as he stated in *J.M.J. v. C.L.J.* (supra) adopting the reasoning set out in paragraphs 12 and 13 of *Bella* (supra).

[35] In my view, the Nova Scotia *Act*, like the Saskatchewan *Act*, is intended to provide a zone of safety for abused spouses in those cases where there is a realistic threat of immediate harm to the spouse or child. It is not the intent of the *Act* to provide a speedy alternative remedy to a spouse seeking exclusive possession of a matrimonial home.

[36] In this case the parties have been separated since August, a period of almost three months before the application for an Emergency Protection Order. There is no evidence that during that time the husband made any attempt to see the wife while she was residing with her mother at her mother’s summer home. Indeed, the wife was critical of the husband that he was so disinterested in her family that he did not even know where her mother’s summer home was located. There is no evidence that the husband made any threats to harm the wife during the separation.

Although the wife professed to both the justice of the peace who issued the order and to this court that she feared the husband, it was the wife who attempted to initiate contact with the husband after the August separation. Indeed, even after the Emergency Protection Order was granted, the wife contacted the husband and suggested that they, along with their child, “get together” to celebrate the husband’s birthday. Under those circumstances I cannot find a rational basis for the wife’s immediate fear of harm from the husband.

[37] Evidence adduced before the court indicates that the parties at the time the order was sought were, with counsel, actively negotiating the domestic issues outstanding between them including the wife’s application for exclusive possession of the matrimonial home for her and the child of the marriage. In fact, the husband had agreed to that request provided he could have unsupervised access with the child, a request denied by the wife even though her evidence was that she did not fear that the husband would harm the child. Although the wife complained that she could not get timely relief in her application to the Family Division because of “the paper work” it was, in fact, her failure to provide financial disclosure that prevented that application from proceeding.

[38] In the circumstances here I am satisfied there was no urgency or emergency situation as contemplated by the *Act* to justify the granting of an Emergency Protection Order.

[39] Therefore, I would grant the application to revoke the Emergency Protection Order and dismiss the application to extend the order.

J.