The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 23, No. 16 **August 15, 2021**

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Tyacke v Tyacke, 2021 SKCA 80

Caldwell Schwann Leurer, May 20, 2021 (CA21080)

Family Law - Division of Family Property - Appeal
Family Law - Divorce Act - Spousal Support - Appeal

Both parties appealed certain decisions of the trial judge following a trial with respect to division of family property and entitlement to spousal support (see: 2019 SKQB 271). Of the grounds advanced on appeal by J.D.T., his primary objections to the trial judgment were that the judge erred in principle in exercising her discretion: 1) not to include as family property the value of farmland which C.C.T owned jointly with her mother (the SE property); and 2) by ordering an in specie transfer of farmland to C.C.T. C.C.T.'s main contentions on appeal were that the trial judge erred: 1) in principle in exercising her discretion not to award her spousal support and 2) by deducting the sale value of the 2015 crop by 25% to compensate J.D.T.'s mother for her contribution to the farming operation. J.D.T. and C.C.T. separated in March, 2015 after 34 years of

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marriage. The two of them together built a thriving mixed-farm operation with help from J.D.T.'s mother, who provided a house on the home quarter for them to live in and allowed them to use her land and equipment without remuneration. During the marriage, many assets were accumulated, including 14 quarters of farmland and, prior to their sale, 200 head of cattle. Upon separation, C.C.T. left the farm and took administrative work with a local grain elevator. She petitioned for divorce, spousal support, and a division of family property in December, 2015 and applied for interim spousal support, which was granted. The total amount she had received in spousal support to the date of trial was $27,000.00.

HELD: The appeal court under the pen of Schwann, J.A. partially allowed J.D.T.'s appeal, deciding that C.C.T.'s joint interest in the land held with her mother was family property to be divided equally, but dismissed his appeal of the in specie transfer of the 4 quarters of farmland to C.C.T. As to C.C.T.'s grounds of appeal, the court allowed her appeal with respect to entitlement to spousal support to the extent that it returned the matter to the trial judge to be reconsidered because it was an error in principle that she exercised her discretion not to award it. The court further ordered that the 25% deduction of the value of the 2015 crop meant to compensate J.D.T.'s mother be included as family property to be distributed equally. Throughout its analysis, the appeal court was mindful that the myriad of discretionary decisions required to be made by the trial judge to achieve equity and fairness between the parties in dividing family property and in deciding whether to award spousal support. These findings were entitled to a standard of deference, and were not to be disturbed unless "the trial judge has abused his or her discretion by erring in principle, disregarding a material matter of fact, or failing to act judicially, or if the result is so plainly wrong as to amount to an injustice" (Ackerman v Ackerman, 2014 SKCA 137 at para 23). As to legislative authority, the court was required, with the assistance of the applicable case law, to review the trial judge's application of s 21(3)(e) of The Family Property Act (Act), and whether, due to a third-party contribution to a spouse, it would be unfair and inequitable to divide family property equally, as the Act presumed should be done. As to entitlement to spousal support, the appeal court recognized that the making of an award was governed by s 15.2 of the Divorce Act and its interpretive case law, and the trial judge's decision was to be scrutinized on that basis. The court ruled that where the trial judge's discretionary decisions with regard to the main grounds argued by the parties were to be overturned, they were to be for the reasons that: 1) the trial judge erred in excluding C.C.T's share of the SE property as family property because, in finding it would be unfair and inequitable to do so, she failed to give any weight to the fact that C.C.T. was gifted her share of the land long before the separation, and gave too much weight to the fact that C.C.T. and J.D.T. did not farm the SE property, failing to recognize it was too far away to be farmed by them; 2) in considering whether to award non-compensatory spousal support, she erred in principle by deciding against such an award without any factual determination as to J.D.T.'s income; and 3) in awarding an unequal distribution of family property to compensate for the contribution of J.D.T.'s mother to the farming operation, she lost sight of the governing principle that the Act was intended to balance the equities between

the spouses and not a third party, and in erroneously attempting to include J.D.T.'s mother in the litigation, failed to properly interpret the Act with respect to the inclusion of the 2015 crop as family property.

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R v Wilson, 2021 SKCA 87

Ottenbreit Schwann Tholl, June 9, 2021 (CA21087)

Criminal Law - First-Degree Murder - Appeal
Criminal Law - Admissibility of Evidence - Jury Instructions

The three appellants, J.D.W., D.C.T. and J.N.P., were convicted of first-degree murder following a joint jury trial. They brought the appeal on collective grounds that the trial judge erred: 1) by admitting gang-related evidence; 2) by failing to provide the jury with specific instructions as to its use; 3) by failing to provide Vetrovec warnings with respect to a number of Crown witnesses; 4) by not providing sufficient limiting instructions with respect to the evidence of post-offence conduct; and 5) by not putting the lesser included offence of attempted murder to the jury. J.D.W. appealed on grounds 1, 2, 3 and 5, D.C.T. on grounds 1, 2, 4 and 5, and J.N.P. on ground 2. The evidence presented to the jury was provided by numerous civilian witnesses with varying degrees of involvement with a street gang, N.S. Their evidence described the murder of S.D., who had been at a house party with a number of the witnesses, and who was robbed of his debit card at knife point, then unlawfully confined at the house until the arrival of J.N.P. and D.C.T., at which time he was beaten up by J.N.P., who took control of events, zip-tied him, and forced him into the trunk of a car after beating him unconscious. He was driven out to the country and killed. He was first struck in the head by J.N.P. with a sledgehammer, and then immediately stabbed with a knife by J.D.W. and struck by D.C.T. with a prybar. He was also struck by a number of the civilian witnesses. Just before the attack, J.N.P. told S.D. that he was going to die and to say his prayers, and he also said a prayer. S.D. died in the bushes where he lay following the attack. The appellants in two vehicles returned to the house where police were present. The appellants and other witnesses then drove to Saskatoon to a safe house. While in the vehicle, J.D.W. talked about killing one of the witnesses. The police caught up with one of the vehicles and a police chase ensued. The vehicle crashed and after a foot chase, police arrested J.N.P. Based on witness information, J.D.W. and D,C.T. were found and arrested at the safe house. S.R.'s debit card was located there. The Crown applied to the trial judge on a voir dire for the admission of gang-related evidence at the trial. As she was concerned that the gang evidence risked leading the jury to propensity reasoning, to the effect that the jury might conclude that by the very fact of

being gang members, the accused were more likely to have committed the murder. In order to allay her concern, the court ruled that gang evidence was to be admitted only for narrative purposes and to explain the motive for the murder. After the voir dire, the trial judge said she would provide limiting instructions to the jury about the use to be made of the gang evidence, but she did not do so at the trial. At the conclusion of the evidence, the trial judge held pre-charge meetings with counsel after providing them with a copy of her draft jury charge, at which time, over a number of days, counsel had the opportunity to suggest changes to it. No counsel asked that limiting instructions concerning the use of the gang evidence be included in the jury charge during these meetings nor did either object at trial when cross-examination by defence counsel of the Crown witnesses went well beyond the confines of the permitted limits set by the trial judge, instead delving into the rules of gang membership and its hierarchical power structure. In particular, J.N.P. relied heavily on this evidence in his defence to suggest that the Crown witnesses were lying to protect the gang members J.D.W. and D.C.T. by turning on J.N.P., who had been beaten out of the gang and was no longer entitled to its protection. The other appellants relied on the gang evidence to varying degrees for their own tactical purposes. HELD: The appeals were dismissed. The court upheld the trial judge's admissibility rulings and jury charge in all respects. In doing so, it reviewed and applied all essential case law germane to the various grounds advanced. The court was satisfied that the trial judge's jury charge fulfilled its functional purpose in providing the jury with the instructions it needed to grapple with the issues raised in the trial. In dismissing the objections of the appellants to the admission of the gang evidence, the court emphasized that in cross-examination of Crown witnesses, the appellants chose to go far outside the parameters of the limits placed by the trial judge on the gang evidence after the voir dire to advance their defences, and chose not to object to its admissibility for that reason. Though the court recognized that a failure to object to the admission of evidence or the absence of limiting instructions by counsel in the course of a jury trial cannot cure errors made during the trial, the absence of objections by counsel to the inclusion of limiting instructions to the jury concerning the gang evidence signaled to the trial judge that as a matter of law, her jury instructions should not interfere with the defences being advanced by counsel. To tell the jury to restrict their use of that evidence to narrative and motive would impinge on counsel's challenge to the veracity and credibility of the Crown witnesses. As to the ground of appeal relating to Vetrovec warnings, the court agreed with the trial judge's use of her discretion to limit the warnings to the jury only to the essential Crown witnesses with strong motives to avoid telling the truth, and so not "water down" the effect of the warnings by including all the witnesses requested by the defence. By establishing a reasonable foundation for her decision, the appeal court stated, the trial judge properly exercised her discretion in regards to the principles in Vetrovec. As concerns post-offence conduct, the failure of defence counsel to object to admission of such evidence at trial could reasonably have led the trial judge to conclude that defence counsel were satisfied that it should go in as evidence with the limiting instructions presented in the jury charge. This evidence consisted of the testimony of one of the civilian witnesses about the statements by D.C.T. made in the vehicle that he was worried about another witness not

keeping quiet and that he should kill him, the evidence of the police chase and his running away on foot. The appeal court was satisfied that the trial judge's jury instructions concerning post-offence conduct were correct and equipped the jury with the information required to assess that evidence. She told the jurors that they should not jump too quickly to a finding of guilt based on the after-the-fact evidence, but must first ask themselves, as they would with any indirect or circumstantial evidence, whether this evidence is consistent with the balance of the evidence presented and whether any other reasonable explanation existed for the behaviour of the appellants other than their "consciousness of guilt." With respect to the argument by J.D.W. and D.C.T. that on the evidence, a reasonable doubt was raised that S.D. was dead after the first blow with the sledgehammer wielded by J.N.P., the blows inflicted by them were not a contributing cause of the death of S.D., and as a result they could only be found guilty of attempted murder, the appeal court referred to the expert testimony of the forensic pathologist who concluded that he could not say which blow killed S.D. and that " he died as a result of receiving all of them." Also, by the law of parties, in a group attack, all are guilty of the offence, and the Crown need not prove which blow was the fatal one. As there was no reasonable route on the evidence to a conviction by the jury of attempted murder, the trial judge would have erred in law by putting it to the jury.

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A.B. v Rodgers, 2021 SKCA 96

Leurer Barrington-Foote Kalmakoff, July 7, 2021 (CA21096)

Civil Law - Torts - Malicious Prosecution - Appeal

The appellant, A.C., appealed the decision of a Queen's Bench judge following a summary judgment hearing dismissing his action for malicious prosecution brought against the senior Crown prosecutor, B.R., who prosecuted him for two counts of sexual assault; one count of sexual assault with a weapon; and two counts of uttering threats to cause death (see: QBG 448/16, JCS). The facts of this matter were not in issue at the summary judgment hearing. The charges were laid on August 17, 2014 by police on the allegations of the complainant against A.C. during a highly contested child custody dispute in which she sought an order to move with the children to Ireland. A week after her application for the mobility order was denied, she made her first complaint to the police alleging the activity which led to the charges. Though she failed to convince the police that charges should be proceeded with initially because the investigator thought the story was "fantastic," she persisted, and eventually convinced police to lay charges against A.C. following a second

interview with them. However, once police had watched video evidence of sexual activity between A.C. and the complainant which she claimed showed the offending behaviour, a third interview was conducted (the October 23 interview), which A.C. characterized during the summary judgment hearing as resulting in a statement which was "unethically procured and false" because the interviewer asked the complainant questions in such a way that they led to the desired answer, that the activity could not have been consensual. A.C. was tried in September, 2015. The evidence against A.C. consisted of testimony from the complainant and the extensive video depicting sexual activity between A.C. and the complainant. Essentially, she claimed that all the activity depicted was forced on her by A.C. after she had been drugged, and that he had threatened to hide her in an underground bunker, strangle her and have sex with her corpse. She claimed A.C said she would end up like C.D., whom she claimed A.C. had killed in Ireland. A.C. vehemently denied all substantive charges against him to B.R., the prosecutor. All charges were dismissed after trial, with the trial judge stating that the sexual assault charges were "not only improbableâ€¦ [they border] on the impossible." The family law proceedings also went to trial. At that trial, the complainant accused A.C. of sexually abusing their five-year-old daughter. The trial judge found these allegations were made "knowingly and with intent to manipulate the course of the litigation." A.C. was awarded sole custody of the children. During the summary judgment hearing, the chambers judge was convinced that the video evidence was proof the sexual activity was consensual. For instance, he said, though the claimant alleged that A.C. had applied makeup to her while she was unconscious so she would look like C.D., she is seen in the video applying her own makeup prior to the sexual activity. The complainant was interviewed by police three times before trial, and her account of the offending behaviour changed each time: from her being unconscious or sleeping during the activity, to pretending to be unconscious or sleeping, to consenting to the depicted activity but not to activity not depicted in the video evidence. The judge on the summary judgment application ruled that the action failed because A.C. had not proven the essential element of the tort of malicious prosecution, that B.R. "lacked a subjective belief in sufficient grounds to prosecute." A.C.'s grounds of appeal were that the hearing judge erred: 1) in principle by deciding to proceed to hear the matter as a summary judgment application and not allow the action to proceed to trial; and 2) by misapprehending or overlooking evidence which, if properly considered, would have led him to find the essential element that B.R did not have an honest, subjective belief that she had sufficient grounds to prosecute had been proven by A.B.

HELD: As to ground 1), the appeal court was satisfied that the hearing judge had laid the proper foundation for the exercise of his discretion under Rule 7-5(2)(b) to decide the matter without a full trial. He had put his mind to the question of whether he would be able to fully assess B.R.'s credibility on the essential issues without a full trial and was satisfied that her viva voce evidence and evidence elicited from her in cross-examination permitted him to do so. As to ground 2), the court first examined whether the hearing judge had applied the correct law, and noted that he adopted the elements of the tort as pronounced by the governing authorities: Nelles v Ontario, [1989] 2 SCR 170; Proulx v Quebec (Attorney General), 2001 SCC 66; Miazga v Kvello

Estate, 2009 SCC 51; Henry v British Columbia (Attorney General), 2015 SCC 24; and R v Cawthorne, 2016 SCC 32. He correctly decided that the only element requiring consideration to resolve the case was whether B.R. had an honest, subjective belief that she had sufficient grounds to prosecute A.C. The appeal court could not say that the hearing judge erred in principle in finding that A.C. had failed to prove this essential element because it found he did consider and weigh all the evidence, including that B.R. did have knowledge of the October 23 interview, was aware of the inconsistencies in the complainant's accounts, had viewed the videotape evidence, seeing the stark contrast between the videotape and the complaint's assertion that she did not consent, and had heard B.R. give evidence, and was therefore unassailable in ruling that A.C. had not proven, no matter how reckless or overzealous B.R. might have been, that she did not have an honest, subjective belief in the sufficiency of her grounds to prosecute A.C.

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Rimney v Gilchuk, 2021 SKQB 98

Robertson, April 6, 2021 (QB21089)

Civil Procedure - Queen's Bench Rules, Rule 12-2, Rule 12-4
Statutes - Interpretation - Land Contracts (Actions) Act, 2018, Section 11

The plaintiffs applied in March 2021 for order nisi for cancellation of an agreement to sell a property. Counsel for the defendants appeared at the hearing. The plaintiff applicants purportedly served the proposed defendants with notice of application for leave to commence by registered mail. The court granted leave to commence on October 27, 2020. No one appeared for the proposed defendants. A month later, the plaintiffs filed their statement of claim. On December 21, 2020, the statement of claim was purportedly served by ordinary mail. In January 2021, the claim was noted for default of defence. The notice of application for order nisi for cancellation of agreement for sale, forfeiture of money paid and immediate possession of land was purportedly served by registered mail on September 29, 2021. The issue was whether the process previous to the application for order nisi was properly served.
HELD: The court found that service on the defendants had apparently been irregular. However, as the defendants appeared by counsel at the hearing, it assumed jurisdiction. It expressed its potential concern to the plaintiff's counsel that if the defendant's counsel had not appeared at the hearing, how could it be assured they had received notice of application? It noted that the apparently irregular service might be relevant to further proceedings. Under s. 11 of The Land Contracts (Actions) Act, 2018, required documents "may be served in

any manner permitted by The Queen's Bench Rules." Pursuant to Queen's Bench rule 12-2, personal service is normally required with exceptions provided in rule 12-4. In this case, the affidavits of service by registered and ordinary mail were attached as exhibits of proof of the mailing, but not of receipt. As well, the court file did not contain any address for service filed by the defendants, nor was acknowledgment of service filed.

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D.W. v E.O., 2021 SKQB 157 (Not yet available on CanLII)

Richmond, May 27, 2021 (QB21152)

Family Law - Children's Law Act, 2020 - Decision-making Responsibility
Family Law - Child Support - Retroactive

The trial judge was required to order a parenting arrangement allowing for decision-making responsibility in the best interests of B.W., a five-year-old child born to E.O. and D.W. Her analysis was governed by the new Children's Law Act, 2020 (Act), which came into effect on March 1, 2021. The challenge for her was making a reasonable decision in the face of the immature behaviour of B.W.'s parents, E.O. and D.W., who could not desist from attacking each other or their new partners verbally and physically in front of B.W., behaviour which the trial judge found amounted to "family violence" as defined by the Act. Additionally, E.O. withheld parenting time from D.W. in breach of court orders and moved B.W. without the consent of D.W., which, when B.W. began to attend kindergarten, seriously complicated parenting arrangements. In retaliation, D.W. withheld child support. Subsection 10(1) of the Act sets out a non-exhaustive list of factors which the trial judge needed to consider in determining what parenting arrangement was in the best interests of B.W. She determined that the most relevant factors in this case were the unwillingness of the parents to "support the development and maintenance of the child's relationship with the other parent" and the "family violence" to which B.W. was subjected due to the actions of E.O. and D.W.
HELD: The trial judge's solution to her difficult task was to make a detailed order with a view to minimizing the unreasoned actions of the parents. The primary care of B.W. was to remain with E.O., though the trial judge stated she did not condone her unilateral actions, and the maximum parenting time available in the circumstances was awarded to D.W. Decision-making authority was ordered to be shared, but again with detailed provisions governing all types of decisions to be made on behalf of B.W. D.W. had fallen into arrears with respect in his child support, which the trial ordered that he pay by monthly payments. She also set ongoing support payments to be paid by D.W. in accordance with the Federal Child Support Guidelines.

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Nunweiler v Nunweiler, 2021 SKQB 166

Smith, June 1, 2021 (QB21165)

Family Law - Custody and Access - Joint Custody - Primary Residence

The parties sought an order for divorce and to determine which of them should be the primary custodial parent. They had married in 2016 and their son was born in 2017. They separated in 2019 and since that time had a shared parenting arrangement of week-on/week-off custody of the child. The respondent mother had moved to Beaumont, Alberta at the time of separation and the petitioner resided in Saskatoon, so they each drove to Lloydminster to exchange the child. This arrangement had been ordered by the court in 2019 on an interim basis after the petitioner applied to the court when the respondent resisted giving him parenting time. As the child would start school in September 2022, the parties had to address the issue of his primary residence, as shared parenting would no longer be an option. The petitioner owned his own home and while the child was with him, he attended Montessori school. The maternal grandmother and his paternal grandparents either lived in Saskatoon or would be moving there shortly and the child had a relationship with all of them. As the petitioner shared custody of his nine-year-old son from a previous marriage, his second son would have a sibling. The respondent rented a home in Beaumont and had close friendships with other women. Recently, her father had started to visit her and his grandson. She had a 13-year-old son from a previous relationship who lived with her. The evidence of the income of each of the parties adduced for the purposes of child support showed that the petitioner was a minority shareholder in a business from which he derived dividend income of $134,000 per annum but the dividends were funded in full by his father. The respondent's income was $16,630. HELD: The parties were granted a divorce and the court ordered that they would have joint custody of their son and shared parenting would continue until August 2022. At that time, his primary residence would be with the petitioner with the respondent having specified access. Although they would remain joint decision-makers for their child, the petitioner would have sole and final decision-making authority regarding education and health matters if agreement could not be reached between him and the respondent. Until September 2022, the petitioner would pay the net sum of $1,030 per month to the respondent in for child support. The amount was a set-off of their support obligations based on their respective incomes of $134,000 per annum (imputed) and $16,630. As of September 2022, the petitioner's child support obligations would cease and the respondent would pay $114 per month to the petitioner. He would be responsible for 90 percent of s. 7 expenses incurred for the child. The amount of child support payable under the order was subject to recalculation by the

Saskatchewan Child Support Recalculation Service if eligible. The court observed that it would not have hesitated to order a shared parenting regime had the respondent not maintained her opposition to living in Saskatoon or its environs. It reached its decision regarding custody after reviewing the factors set out in s. 16(3) of the Divorce Act to assess the best interests of the child. It found the each of the parties were equally good parents and could provide satisfactory homes. It determined that by reason of extended family and, in particular, the conclusion that the petitioner would be willing to ensure the child's regular parenting time with the respondent (which was not reciprocated by the respondent), that the petitioner's home in Saskatoon presented a better environment and better potential for him to develop as a student and eventually as an adult.

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R v Friesen, 2021 SKQB 168 (Not yet available on CanLII)

Robertson, June 3, 2021 (QB21171)

Criminal Law - Pre-trial Applications - Admissibility of Evidence - Criminal Code, Section 276
Constitutional Law - Charter of Rights, Section 7, Section 11(d)
Constitutional Challenge - Criminal Code, Section 278.92, Section 278.94

Prior to the calling of evidence at trial, the accused, P.M.F., brought two pre-trial applications before the trial judge. He sought to have admitted at trial evidence of one incident of sexual activity by the complainant with her former boyfriend (other sexual activity) which occurred after the alleged sexual assault and prior to a medical examination showing injuries to her vagina and vaginal area. Pursuant to section 276 of the Criminal Code and supporting provisions, P.M.F. was required to prove at this first stage of the application that this evidence, on "a facial consideration of relevance", was admissible because it described a specific instance of sexual activity which would not offend the prohibition barring the admission of any evidence engaging consideration of the "twin myths" (see: R v Barton, 2019 SCC 33). The twin myths are that because of the other sexual activity, the complainant was more likely to have consented to the alleged sexual assault or because of the other sexual activity, her evidence was less worthy of belief at trial. The defence was also required to show, as with all evidence, that its probative value exceeded its prejudicial effect. P.M.F. argued that the proposed evidence, on the low threshold of the first stage analysis, was unlikely to engage twin myths reasoning at trial and could be argued to be more probative than prejudicial. In particular, P.M.F. argued that the medical evidence of vaginal injury obtained after the other sexual activity would potentially provide an alternate explanation for the injuries, and therefore nullify the effect of important Crown evidence. As well,

P.M.F. argued that by not telling the police she might have been injured as a result of the other sexual activity, she "lied to the police," so her credibility was questionable. With respect to the Charter challenge, P.M.F. advanced that comity applied and so by the principles of that legal concept, his Charter challenge to ss 278.92(1), 278.92(2)(b), and 278.94(2) of the Criminal Code should be allowed.
HELD: The trial judge allowed both applications. As concerned the admissibility of the evidence of the other sexual activity, he ruled that at the first threshold stage of the application, the evidence was capable of admission but only for the purpose of showing a cause for the injuries to the complainant's vaginal area other than the alleged sexual assault. It was not to be admitted for the purpose of cross-examining the complainant on her credibility. The trial judge expressly found that P.M.F. had not shown that the complainant could have lied to the police about her vaginal injuries, so that to cross-examine her in this area would amount to a "fishing expedition" likely to lead to impermissible two myths reasoning. On the constitutional challenge in which P.M.F. sought to have admitted at trial a photograph of the complainant, the trial judge felt bound to follow the decision of a sister judge in R v Anderson, 2019 SKQB 304, and R v Anderson, 2020 SKQB 11, who had allowed the constitutional challenge to the impugned provisions, finding that the legislation infringed the accused's right to a fair trial and to make full answer and defence. The trial judge, by the principle of comity, followed Anderson, as did the trial judge prior to him in R v Zabihullah, 2021 SKQB 127.

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T.D.B. Holdings Ltd. v 101102382 Saskatchewan Ltd., 2021 SKQB 170

Elson, June 4, 2021 (QB21172)

Contract Law - Interlocutory Injunction

The applicant/plaintiff, T.D.B., brought an action for an alleged breach of contract by the respondent and defendant/plaintiff by counterclaim, 2382 Sask. The affidavit evidence filed on behalf of T.D.B. and on behalf of 2382 Sask that was not excluded for being argumentative, stating conclusions without supporting facts and otherwise being inadmissible sur-reply, set out the narrative and the position of the parties on the application. T.D.B. was a franchisee of three Wendy's Restaurants (Wendy's) in Saskatoon and wished to build a fourth Wendy's on a property owned by 2382 Sask in the Stonebridge district (the property), which was an undeveloped corner lot zoned for commercial use, with "excellent access, a high traffic count and exceptional exposure." T.D.B. thought the property was ideal for a Wendy's, and unique in the Stonebridge district. T.D.B. and 2382 Sask entered into a long term "build-to-suit" lease on May 3, 2018 (the lease). The property was to

be built by 2382 Sask "to current Wendy's Restaurant building standards." T.D.B. paid a deposit towards the lease of $34,182.00 and expected that the restaurant would be open to conduct business by February 1, 2019. By November, 2018, D.M., the principal of T.D.B., believed no meaningful work had been done on the building and arranged for a site meeting with the principal of 2382 Sask, Mr. Ng, in October, 2019. D.M. pointed out deficiencies in construction, to which Mr. Ng took offence and walked away from the meeting. Construction of the site stopped, and both parties hired lawyers. 2382 Sask sought to unilaterally cancel the lease. T.D.B. registered its tenancy in the property and brought an action for specific performance of the lease on October 23, 2020. At that time the construction consisted of a "shell" of a building. Construction had resumed in the Spring of 2020. T.D.B. learned that 2382 Sask was attempting to enter into a "build-to-suit" lease of the property with one of T.D.B.'s competitors and brought the application for an interlocutory injunction enjoining 2382 Sask from any further construction on the property pending conclusion of the action. HELD: The application was allowed with the condition that the injunction was to expire in one year unless extended upon review by a chambers judge. This condition was imposed due to the delay by the plaintiff in commencing the claim and to speed up the action, as neither side was proceeding expeditiously. In his analysis of the merits of T.D.B.'s claim for injunctive relief, the chambers judge was guided by the long-standing and binding case law applicable to the determination of the granting of injunctive relief, in particular, Manitoba (Attorney General) v Metropolitan Stores Ltd. ([1987] 1 SCR 110), RJR-MacDonald Inc. v Canada (Attorney General) ([1994] 1 SCR 311), and Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership (2011 SKCA 120). These authorities, though using slightly varied language, all set out a three-part test for determining whether an injunction should be granted: 1) is the strength of the plaintiff's case sufficient to justify an injunction; 2) will the plaintiff suffer irreparable harm if an injunction is not imposed; and 3) does the balance of convenience favour the plaintiff? Superimposed on the tripartite test are the principles of equity and fairness to the parties. The chambers judge found generally that: 1) though in some cases, the burden of proof on the plaintiff requires he or she prove a strong prima facie case that the action will be successful, in most cases in Saskatchewan, a plaintiff need only satisfy the chambers judge that he or she has a serious issue to be tried – i.e., the claim is not frivolous or vexatious; 2) that "irreparable harm" means a harm which cannot be remedied by payment of damages by the defendant to the plaintiff should the plaintiff be successful in the action, in a sense which includes the inability to quantify damages in monetary terms or to cure the harm with the payment of money; and 3) the balance of convenience simply means that there exists a meaningful risk that the plaintiff will suffer significant irreparable harm while the defendant will not suffer irreparable loss should the injunction be ordered. Collaterally, an injunction will not be granted if the plaintiff does not undertake to the court that it will pay any damages incurred by the defendant in the event it is not successful in the action. With respect to the case at hand, the chambers judge found that: 1) as the lease stipulated that 2382 Sask was under obligation to " construct and pay for the Building to current Wendy's Restaurants building standards" and the affidavit evidence was sufficient to satisfy him that 2382 Sask had not done so, a serious

issue to be tried existed; 2) there was also sufficient evidence to satisfy him that T.D.B. would be deprived of its property rights under the lease should construction be allowed to continue, creating a presumption of irreparable harm which 2382 Sask had failed to overcome; and 3) that the scales of justice weighed in favour of the granting of the injunction, since the evidence showed that T.D.B risked suffering harm which could never be put right if the injunction were not granted, but 2382 Sask would suffer no unrecoverable loss if it was. Lastly, the chambers judge considered the overall equities between the parties and as a result imposed the one-year reviewable limit to the injunction.

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R v Kaliati, 2021 SKQB 182

Klatt, June 18, 2021 (QB21178)

Criminal Law - Controlled Drugs and Substances Act - Possession for the Purposes of Trafficking - Cocaine - Sentencing
Criminal Law - Drug Offences - Unlawful Possession of Canadian Currency - Sentencing

Following Charter applications to exclude evidence obtained as a result of a search warrant and strip search, and after trial, A.E.K. was convicted of possession of cocaine for the purpose of trafficking and possession of Canadian currency over $5000.00 knowing it was obtained through the commission of an offence. He was unsuccessful in having the evidence of the search warrant excluded, which consisted of the seizure of 13.6 grams of crack cocaine and $14,170.00 in cash, but was successful in having the evidence of a strip search excluded. At his sentencing hearing, the undisputed facts included that: A.E.K., who was from Edmonton, set himself up in a hotel room in Estevan between March 13, 2017 and May 15, 2017 expressly to sell cocaine in this lucrative market, being successful in doing so; the hard drug trade in Estevan had increased substantially in a number of years prior to the sentencing hearing, fueled by the presence of young people working in the oil patch with money to spend on hard drugs like cocaine, a situation which attracted drug dealers; in 2018, the oil and gas market collapsed, leaving in its wake drug addicts with no money to feed their habit, and a commensurate increase in crime as a result; the effect on the city was significant, with increased work for police, the need for a drug treatment facility, increased hospital admissions for persons suffering the effects of drug abuse, and the infiltration of drugs into the schools. A pre-sentence report, which was not contested by A.E.K., was filed. It spoke of a young man with a normal background who was raised in a loving home, and whose basic needs were satisfied; a home free from the factors which often lead to dysfunction and crime.

After a dispute with his father in Grade 12 concerning the people with whom he was associating, he left home and soon became involved in the drug trade. He also accumulated a criminal record, the most significant of which were drug possession charges, and drinking and driving offences, the most recent of which in 2019, committed while he was awaiting trial for the predicate offences. The pre-sentence report showed he was trying to improve his life by learning the electrical trade, staying away from pro-criminal people, and benefiting from the influence of a supportive mother and partner. The Crown sought a sentence of four years' incarceration in a penitentiary and the defence a sentence of one year in jail.
HELD: The trial judge imposed a sentence of 36 months in the penitentiary less 6 months to remedy the unconstitutional strip search, for a net sentence of 30 months. Instructing herself with respect to the purposes and principles of sentencing enshrined in s 718 of the Criminal Code, and in particular the overarching principle of proportionality contained in s 718.1, as expounded in R v Ipeelee, 2012 SCC 13, the trial judge found that in the circumstances of these serious offences, and this highly culpable offender, proportionality required that she place the greatest emphasis on deterrence and denunciation. A.E.K. was not a victim of a dysfunctional background and was not selling drugs to satisfy a drug craving, but sold drugs as a business enterprise, choosing a lucrative market with the intention of making money, which he did. His drug peddling had a serious deleterious effect on the community, and created drug addicts. In short, he had added to the burden illegal drugs had imposed on the community. The trial judge was cognizant of mitigating factors applicable to A.E.K., which suggested he had "prospects for rehabilitation," but said such could not significantly affect the primary sentencing requirement of denunciation and deterrence, given the grave harm his offending had visited on the community, which her sentence was fashioned to help prevent in the future.

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R v Walker, 2021 SKPC 1

Lang, July 5, 2021 (PC21027)

Criminal Law - Assault - Assaulting a Peace Officer - Sentencing

The offender, T.M.W., pled guilty to assaulting a peace officer engaged in the execution of his duty. No facts from the Crown submissions were contested by him. The victim police officer (I.M.), along with other officers, attended T.M.W.'s residence following a complaint of a disturbance at a liquor store. The complaint concerned T.M.W. in a state of intoxication throwing rocks at vehicles and threatening customers. I.M. attempted to arrest T.M.W. at his home. He became belligerent immediately, yelling obscenities at I.M. from his front porch. As

I.M. approached him, he "blew nasal mucus into his own hand" and threw it at I.M., hitting him in the chest. He was then arrested, and continued to be belligerent on the way to and at the police station. He was placed in a jail cell until the morning due to his intoxication. On the day of sentencing, he told the court that he wanted to keep the police from arresting him, so he threw the mucus because he believed the police officer would think he had COVID and would not approach him. At the time of his release from his cell, he apologized to the police officer present (though not to I.M.) and also apologized to the court at his sentencing. T.M.W., who was 33 at the time of sentencing, suffered from a number of unfortunate background factors in his life, including alcoholism, bipolar disorder and schizophrenia, for which he was prescribed medication, but which he often neglected to take. He had a criminal record including uttering threats and assault. He claimed to have Gladue factors and lived with his mother. The Crown sought a jail sentence of four months to be served in jail; the defence, a jail sentence to be served in the community while bound by the terms of a conditional sentence order (CSO).

HELD: The sentencing judge sentenced T.M.W. to a jail term to be served in the community while bound by the terms of a CSO of 4 months. After reviewing the purpose and principles of sentencing codified in ss 718 to 718.2 of the Criminal Code and particularly, s 718.02, which mandates that for the offence of assaulting a peace officer he is to "give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence", the sentencing judge reminded himself that s 718.1 enshrines the overarching sentencing principle of proportionality, to which all other principles are subordinate. The provision states that "the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender:" R v Nasogaluak, 2010 SCC 6, [2010] 1 SCR 206. Bearing this fundamental principle in mind in the context of a sentence which was required to give primary consideration to deterrence and denunciation so as to promote the protection of police, after considering all aggravating and mitigating factors, including the Gladue factors, the gravity of the offence and the degree of responsibility of T.M.W., the principle of parity as reflected in the relevant case law, and other factors including the delay in sentencing T.M.W. due to COVID-19 shutting the court circuit, and his exemplary behaviour during that time, the trial judge saw fit to impose what he believed was a fair and proportionate sentence.

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R v BLS Asphalt Inc., 2021 SKPC 37

Brass, June 22, 2021 (PC21026)

Public Welfare Offences - Occupational Health and Safety - Death of a Worker - Sentencing

This sentencing decision followed the trial of BLS Asphalt at which it was found guilty of regulatory offences relating to the death of one of its employees, T.L., who died as a result of devastating injuries when he slipped onto a moving conveyor belt of a gravel crusher situated under a chute he was clearing of debris. At trial, BLS was found guilty of failing to provide its employees with any information, instruction, training and supervision necessary for their protection in cleaning out the chutes, and failing to provide an effective safeguard at this "choke point" (see: 2021 SKPC 25). The government amended The Saskatchewan Employment Act prior to the sentencing with a view to improving worker safety in Saskatchewan by the imposition of higher fines where warranted, which it expected would provide an impetus to employers for that to be done.
HELD: The sentence imposed was a fine of $125,000.00 and surcharges for a total penalty of $350,000.00. The trial judge recognized that the new sentencing regime reemphasized that the primary goal of sentencing in cases of occupational health and safety was to reduce workplace injury and death through penalties which acted as a deterrent to employers to continue unsafe practices. Upon an extensive review of relevant case law within the rubric of factors set out in by R v Westfair Foods Ltd., 2005 SKPC 26, the trial judge stressed the following relevant factors which would govern his decision as to the fine to impose: on the aggravating side, the offences were of a high level of gravity as they resulted in the preventable death of T.L.; BLS Asphalt was at the lower end of a mid-sized business but had a level of organizational sophistication; there was a connection between profit and the illegal action by not disengaging the conveyor belt to clean the chute; it failed to install a safeguard over the tail pulley while knowing it should be done; it failed to provide information, instruction, training or supervision on the clearing of the chute knowing such would have prevented T.L.'s death; it knew other workers also cleared the chute in the unsafe area where T.L. was killed; and BLS Asphalt had the means to pay a fine "proportionate to its size and degree of culpability." On the mitigating side, following the death of T.L., BLS Asphalt received Notices of Contraventions, and as a result shut down its site and put in place a Remedial Action Plan; it had high safety ratings from its industry association; had no other offences; and provided financial support to T.L.'s family, including a payment above the company's life insurance benefits. The trial judge believed this sentence was fair and proportionate and would deter BLS Asphalt specifically as well as other employers in the industry from allowing unsafe practices in their workplaces.

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