Case Mail

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R v K.C., 2020 SKCA 126

Whitmore Barrington-Foote Kalmakoff, November 13, 2020 (CA20126)

Criminal Law - Appeal - Sentencing - Firearm Prohibition

The appellant was convicted of sexual assault after trial in the Court of Queen's Bench. The sentencing judge imposed a three-year jail sentence and ancillary orders that included a 10-year firearm prohibition. In his appeal of that portion of his sentence, the appellant argued that he should not be subject to the prohibition because he needed to hunt for his family, and the pandemic had made it imperative for him to provide food in this way.
HELD: The appeal was dismissed. If the appellant chose to pursue a conditional authorization order under s. 113(1) of the Criminal Code, the appropriate method would be by application to the Court of Queen's Bench. The appellant had not applied for the exemption order under s. 113(1) before the trial judge nor had he led any evidence or made any submissions relevant to that issue at trial. The court's role on appeal was to review the

sentence imposed by the trial judge for error. As the appellant had not raised the issue before the trial judge, it had no basis upon which to conclude that judge erred by not granting him an exemption.

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Caldwell Whitmore Leurer, November 18, 2020 (CA20128)

Municipal Law - Tax Assessment - Assessment Appeals Committee - Remittal Decision - Appeal

The appellant, Neptune Capital, appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board wherein it had been directed by the Court of Appeal to recalculate an assessed value for a property owned by the appellant. The appellant had been successful in its 2019 appeal, which allowed its tax assessment appeal under The Cities Act against the committee's decision. The court had remitted to the committee the recalculation of the final 2015 assessed value for a property owned by the appellant (see: 2019 SKCA 136). In this appeal of the committee's remittal decision, the appellant argued that the committee had exceeded its jurisdiction and erred in law by not following the court's direction in the remittal decision.
HELD: The appeal was allowed. The court found that the committee had erred in law and jurisdiction when it misapprehended the scope of its mandate under the remittal decision. It erroneously recalculated the final 2015 assessed value of the property. The matter was remitted to the Saskatchewan Assessment Management Agency (SAMA) pursuant to s. 226(1)(c) of The Cities Act to carry out the recalculation ordered under the remittal decision by using the correct 4-Good IQR embedded in the assessed value admitted by SAMA.

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Criminal Law - Procedure - Application for Mandamus

The appellants appealed the unreported decision of a Queen's Bench chambers judge (QBG 3288/18 and QBG 3447/18, JCR) that dismissed their application for dissolution of a family corporation and granted the respondents' application for a finding of oppression and request for relief. The appellants and the respondents were siblings, all of whom were named directors of Wells Ranching when their parents set it up in 2009. Their parents had also incorporated Wells Resources in 1983, and all of the siblings were shareholders in it, but only the appellants were directors. In their application, the respondents outlined some events they alleged were examples of the appellants' oppressive conduct. They never had signing authority for the Wells Ranching bank accounts, had limited access to them or the financial documents, and frequently had to request such information from the appellants. One of the appellants had prepared the financial statements since the incorporation. However, at a directors' meeting in 2018, it was unanimously agreed that Meyer Norris Penny would become the corporation's accountants. Despite this agreement, the same appellant prepared the 2018 financial statements and tax returns. In 2016, the appellants sold much of the farm equipment of Wells Ranching, and the respondents alleged that they were not advised of the transaction until after it occurred. The respondents asserted that they had never attended any of the shareholder meetings for Wells Resources despite records indicating that they did. When the appellants applied under s. 207 of The Business Corporations Act to dissolve Wells Ranching in 2018, the respondents brought their application for its dissolution and a declaration of opposition. They later amended their request before the judge and took the position that it was premature to order dissolution. The applications were heard together and consolidated by the chambers judge. She found that the respondent had established a prima facie case of oppression and ordered certain relief. She declined to order the dissolution of Wells Ranching because the evidence before her had not provided sufficient information as to the corporation's financial position, which was necessary for a fair and equitable dissolution. The issues were whether the chambers judge erred in deciding: 1) that an oppression remedy was appropriate, and 2) that an order for dissolution was premature. The appellants submitted that both parties had requested it, and the breakdown in their relationship rendered the continued governance of the corporations impractical. HELD: The appeal was dismissed. The court determined that the standard of review regarding the oppression remedy was deference. Regarding the matter of ordering dissolution, the standard of review was stricter than that applicable to discretionary orders. It found concerning each issue that the chambers judge had not erred in: 1) her decision regarding a finding of oppression. She set out the test for oppression under s. 234 of the Act and, based upon the evidence, concluded that the respondents had a reasonable expectation that the appellants would meet their obligations under the Act as directors of the two corporations. The court found that this expectation was breached when the appellants failed to adequately disclose relevant financial information, and 2) in her decision to decline to order the dissolution of Wells Ranching because it was premature in the absence of a liquidation plan respecting either of the corporations.

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Terracap Investments (Frontier) Inc. v North Battleford (City), 2020 SKCA 130

Richards, November 17, 2020 (CA20130)

Municipal Law - Tax Assessment - Assessment Appeals Committee - Leave to Appeal
Statutes - Interpretation - Cities Act, Section 165(3.1)

The applicants, the owners of commercial properties in the City of North Battleford, applied for leave to overturn a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (see: 2019 SKMB 112). The value of the properties was assessed in 2017, using the cost approach. The next year, the Saskatchewan Assessment Management Agency (SAMA) became the assessor and also employed the cost approach. The applicants appealed the 2018 assessment to the Board of Revision (BOR), and it concluded that the properties should be assessed using the income approach. The City appealed to the committee. The appeal was allowed, and SAMA's valuations reinstated. The committee found that the only thing that differed between the two years' assessments was that SAMA replaced the previous assessor. It relied upon s. 165(3.1) of The Cities Act and held that the BOR had made two mistakes, particularly in its finding that a change in the assessment service provider was not a change in the "facts,conditions and circumstances affecting the property" as contemplated by the Act. It also concluded that the BOR failed to adequately consider that it was open to the assessor to use the cost approach, and it was not a mistake in this case for the assessor to employ it. HELD: Leave to appeal was granted. The basis for the proposed appeal was limited to questions of law or a question concerning the jurisdiction of the BOR pursuant to s. 33.1 of The Municipal Board Act and subject to a modified version of the Rothmans test. The court reviewed the prospective grounds of appeal advanced by the applicants. It determined that leave to appeal should be granted on the issue of whether the committee erred in its interpretation of s. 165(3.1) of The Cities Act.

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Administrative Law - Judicial Review - Saskatchewan Human Rights Code - Discrimination

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Terracap Investments (Frontier) Inc. v North Battleford (City)

The applicant applied for judicial review of a decision of the Director of Resolutions acting on delegated authority of the Chief Commissioner of the Saskatchewan Human Rights Commission that dismissed the complaint filed by the applicant under The Saskatchewan Human Rights Code, 2018. The applicant filed his complaint after contacting the respondent, a provider of cleaning services, who failed to return his phone calls or text messages after he informed her of his name. He alleged that he had been the subject of discrimination on the basis of gender. The commissioner's initial response indicated that the complaint could not be accepted. The applicant was advised that the alleged facts must support a reasonable inference that the alleged adverse treatment was related to a prohibited ground of discrimination under the Code that required some substantive evidence to draw a link between how the appellant was treated and his sex. The appellant was invited to provide additional information to substantiate the claim. The applicant responded by contesting whether there was insufficient evidence of discrimination, arguing that it could only be proven by inference drawn from circumstantial evidence. However, the commissioner determined that because the additional material was insufficient evidence to support the appellant's allegations of discrimination, the matter would not proceed. HELD: The applicant's complaint was remitted back to the commissioner for reconsideration. The court determined that the standard of review governing its assessment of the commissioner's decision was reasonableness as set out in Vavilov. It found that the decision was not reasonable. Although it might be justifiable, it was not justified because the ground on which the complaint was dismissed was not identified in the commissioner's letters. In them, the commissioner had failed to refer to s. 29 of the Code or explain the difference between the wording therein of "substantive evidence" and his own use of the phrase "sufficient evidence" or set out the grounds under s. 30 of the Code on which the decision to dismiss the complaint was based.

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J.A.Z. v K.D.H., 2020 SKQB 288

Keene, November 5, 2020 (QB20266)

Family Law - Child Custody - Person of Sufficient Interest
Statutes - Interpretation - Children's Law Act, Section 4, Section 6

The proposed respondent, C.A.W., brought an application pursuant to s. 6(1) of The Children's Law Act, 1997, to be named a person of sufficient interest regarding the three children of her deceased common-law spouse, J.A.Z. The parties commenced their relationship in 2016, and the children resided with them. J.A.Z. and his

previous spouse, K.D.H., had separated in 2014, and K.D.H. had moved to Swift Current. She and J.A.Z. shared custody of the children until 2016, when she developed substance abuse problems and, as a result, agreed that J.A.Z. should have primary care of the children. An interim consent order was granted in January 2017. C.A.W. deposed that K.D.H. did not see her children for about two years. By 2018, however, the latter and J.A.Z. agreed that she would have parenting time with the children every other weekend. When the pandemic hit in March 2020, and the children's school closed, J.A.Z. and K.D.H. decided that a temporary week on/week off shared parenting schedule could start, but as soon as the children's school opened in September 2020, this arrangement had to end because K.D.H. did not reside in the same town as her children. J.A.Z. died in a traffic accident in September 2020. In this application, C.A.W. deposed that she looked after the children full-time for the previous four years as their step-parent. She was responsible for all aspects of their parenting and care. K.D.H. attested in her affidavit that the children recognized her as their mother. She argued that as the surviving parent, she was entitled to the legal custodianship of the children under s. 4(1) of the Act. The issues were: 1) whether C.A.W. was a person of sufficient interest; and 2) if so, what arrangement would be in the children's best interests in terms of custody and access?
HELD: The court ordered that C.A.W. was a person of sufficient interest regarding the children, and she would be added as a party to the proceedings and entitled to seek relief respecting them. It issued an interim order granting custody to C.A.W. and K.D.H. The children would reside with C.A.W., and K.D.H. would have parenting time every other weekend and holidays. It found concerning each issue that: 1) C.A.W. was a person of sufficient interest because the circumstances in this case met the criteria set out in D.L.C. v G.E.S. She had been intimately involved in their lives for four years and, until 2018, was their primary caregiver. Although she did not replace K.D.H., she was regarded as J.A.Z.'s spouse and the children's stepmother. As K.D.H.'s involvement with the children increased after 2018, the role of C.A.W. did not decrease; and 2) it could not make a final determination of what was in the best interests of the children based on the evidence before it, and the matter was referred to trial where s. 4 of the Act would become relevant. Until that time, the children's primary residence would continue with C.A.W. because it reflected the status quo, as the shared parenting arrangement during the pandemic was temporary.

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Schoff v Schoff, 2020 SKQB 290

MacMillan-Brown, November 5, 2020(QB20268)

Family Law - Divorce - Spousal Support

The petitioner, S.D.S., and respondent, S.E.S., separated after a lengthy marriage. At the time of the trial S.D.S. was 42 years of age and S.E.S. 49. The petitioner was primarily a childcare provider for their two female children, both independent adults at the time of the separation. S.D.S. had no post-secondary education, earning minimum wage when she worked. S.E.S. was a journeyman electrician who worked in the oil and gas industry. He and others formed a corporation, Power Tech Industries Ltd. (Power Tech), and two other smaller spin-off corporations, 700 SK and 165 SK. S.E.S. was very successful in his businesses. In 2014, Power Tech earned $28,000,000.00 gross income, with retained earnings of $ 5,000,000.00. S.D.S. and S.E.S. lived a luxurious debt-free life, which included a custom-built home priced at $1,400,000.00, a property in Arizona purchased with cash, expensive vehicles for themselves and their daughters bought with cash, frequent and expensive holidays, and amassed savings. The oil boom collapsed in 2018. For that year, Power Tech's gross income was close to $9,316,000.00, with retained earnings of $990,000.00. Power Tech's work force was reduced to 30 people from 75. S.E.S. and his partner were injecting funds into the corporation from their savings and through shareholders loans. Nonetheless, S.D.S. and S.E.S. did not curtail their expensive lifestyle, further depleting their financial resources, and the retained earnings of Power Tech. S.E.S.'s income from Power Tech was reduced from $3,500,000.00 in 2014 to $136,000.00 in 2018. S.D.S. and S.E.S. separated on September 19, 2016. S.D.S. petitioned for divorce and ancillary relief on February 8, 2017. S.E.S. voluntarily made spousal support payments to S.D.S. prior to any orders being in place. S.D.S. left the matrimonial home and first lived in a residence purchased for her by S.E.S., then purchased a second residence, purchased with a large line of credit and cash from her savings. In December, 2016, S.D.S. and S.E.S. had divided their bank accounts, each receiving in excess of $1,000,000.00. A property settlement was reached in August, 2018, which basically maintained the status quo between the spouses as far as property was concerned. The settlement required S.E.S. to make an equalization payment of $1,850,000.00. S.E.S. continued to make the voluntary spousal payments. At the time of the trial, the only contested issue was the quantum of spousal support, since S.E.S. conceded that S.D.S. was entitled to it. The court was first required to determine the income of both parties to be used in that determination, and then set the quantum of support to be paid by S.E.S. to S.D.S., and for what period of time. The Divorce Act, 1985 requires that income be determined in accordance with ss. 16 to 19 of the Federal Child Support Guidelines (Guidelines). According to the legislation, the starting point for that determination is the income from all sources shown under the heading "Total Income" in the spouse's T-1 income tax return for the most recent year. The Guidelines allow for consideration of three years of T-1 income tax returns to determine a pattern of income when fairness requires it, and specifically allows for the imputation of income where warranted. The income of a spouse who is a shareholder, director or officer of a corporation may be imputed to him or her from the pre-tax income of that corporation where not to do so would unfairly distort the amount of income available to the spouse to pay spousal support. As to the determination of the amount of support to be paid by the spouse, the court is to apply the Spousal Support Advisory Guidelines (SSGA), which provide the court with a range of payable

spousal support dependent on the income set by the analysis under the Guidelines. The court is to set the payable amount within that range.
HELD: After a consideration of the expert evidence presented by S.D.S. and S.E.S., the pertinent case law, the Guidelines, and the balance of the available evidence, the court ruled that S.D.S.'s income was to be set at $ 12,000.00. No income from Power Tech was included as S.E.S. was not earning any due to Power Tech's desperate finances. S.D.S. was living on and reducing Power Tech's retained earnings, which were not considered income. S.D.S.'s total income was calculated based on income from sources other than income from Power Tech, such as business income, but including incidental benefits received from Power Tech, and pre-tax undistributed income from 700 SK. The court rejected the notion that S.E.S. deliberately squandered income and assets, opining that it had been unwise for both spouses to live beyond their means. As to the determination of S.D.S.'s income, the court ruled that her income was to be set at $30,000.00, made up of investment income of $8000.00 and imputed income from employment. Though the court agreed with S.E.S. that S.D.S.'s investment income may have been lower than might have been expected, absent any hard evidence of what a reasonable return on investment might have been, the court was not prepared to find that lost income from that source should be imputed to her. As to employment income, the court ruled that though S.D.S. was of the view that she was of an age at which obtaining work would be unlikely, and her view that minimum wage work was below her station in life, she would nonetheless impute employment income to her based on annual minimum wage income of $22,000.00. The court set the monthly spousal support payments payable by S.E.S. to S.D.S. at the low end of the range, which is between $5457.00 and $7276.00 or $5500.00 for an indefinite period due to the long marriage. An adjustment was required to take into account S.E.S.'s overpayment during the period of the voluntary payments, such overpayment to be calculated by the parties.

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E.D. v J.D., 2020 SKQB 292

Brown, November 5, 2020 (QB20269)

Family Law - Custody and Access - Interim - Application to Vary

The respondent father applied for an interim order for shared parenting. The parties had separated in 2017 and executed an interspousal separation agreement, both of them having legal counsel. The agreement provided that the petitioner would have the primary residence of the two children of the marriage, and the respondent would have access every second weekend. In April 2020, the petitioner issued a petition and brought an

application that resulted in a consent order regarding summer access so that the respondent enjoyed shared parenting only for that period, but no changes to the parenting arrangement were made. The respondent then brought this application for an interim order. The petitioner opposed it on the basis of the decisions in Guenther and Gebert in that it had not been shown there was a risk to the children or a compelling reason to change the current status quo.
HELD: The application was dismissed. The court directed the matter to proceed to pretrial and trial if a settlement could not be reached. It found that there was no risk to the children nor compelling reason to move to shared parenting on an interim basis. Neither did the circumstances warrant even a "tweak" to the current arrangement, permitted under the principles of Guenther and Gebert, that would require immediate implementation. Since the status quo had been agreed to over three years earlier, it would be preferable to move to pretrial on an expedited basis.

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R v Saeed, 2020 SKQB 291

Gabrielson, November 5, 2020 (QB20274)

Criminal Law - Assault - Sexual Assault - Conviction - Appeal

The appellant appealed his conviction after trial in Provincial Court of a charge of sexual assault contrary to s. 271 of the Criminal Code. In his notice of appeal, he gave notice that he would seek leave to tender fresh evidence. Leave was granted and in that application, defence counsel filed the appellant's affidavit and exhibits of medical records confirming that he had two abdominal surgeries a month before the offence was committed. The appellant deposed that the trial judge convicted him in part because she found neither him nor his parents to be credible witnesses. In the case of the latter, she found them not to be credible because one testified that the appellant was awaiting hernia surgery at the time of the offence and the other testified that he had had appendix surgery the month prior to the incident. The defence argued that the fresh evidence would confirm that the appellant had numerous medical attendances before and after the date of the offence and the trial judge had been confused by the evidence of his parents and that she made credibility findings against him and them based upon this confusion.
HELD: The application to admit fresh evidence was denied and the appeal dismissed. The court found that the fresh evidence did not meet the second requirement set out in the Palmer test. Regardless of whether the defence ought to have been aware that credibility would be in issue at trial, it was not satisfied that the

evidence would bear upon a decisive or potentially decisive issue in the trial. The question of the surgeries would not have affected the outcome of the trial which depended upon the credibility of the appellant and the complainant. With respect to the summary conviction appeal, it was satisfied that the conviction was one which a trier of fact, properly instructed and acting judicially, could reasonably have made and the result was not unreasonable. Here, the trial judge gave detailed reasons as to why she determined that the evidence of the appellant and his parents was not credible.

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R v Boychuk, 2020 SKQB 302

Scherman, November 5, 2020 (QB20280)

Criminal Law - Sentencing - Sexual Interference
Criminal Law - Sentencing - Sexual Touching
Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - Joint Submission

Prior to the trial of numerous historical sexual offences, the Crown and defence counsel agreed that in exchange for guilty pleas to some of the offences, the Crown would ask the court to impose a global sentence of one year, and defence counsel could seek the sentence he thought fit. Counsel both agreed that the plea arrangement was not a joint submission on sentencing as that term is defined by case law and so did not require the court to accept it subject to a finding that the agreement was a miscarriage of justice. The offences were committed against four female children referred to as victim children 1, 2, 3, and 4. As to child 1, the offences were committed between April 1, 1972 and October 31, 1979, when she was between 8 to 17 years; the offences against child 2 were committed between January 1, 1993, and July 21, 1994, when she was between 13 and 15 years of age; the offences against child 3 were committed between April 1, 1997 and July 31, 1997, when she was 1 or 15; and the offences against child 4 were committed between January 7, 2007 and August 8, 2012, when she was 7 or 8 years old, about once a month until she was older. The offending behaviour consisted of rubbing the victims' bodies, touching and rubbing with the hands on the breasts and vagina, over the clothing, under the clothing on occasion, kissing, and fondling all over. With child 3, the offender attempted to finger her vagina on one occasion. Together the offending behaviour occurred numerous times over an extended period. The offending occurred when the children were either living at the offender's home or spending considerable time there. Locations were the children's bedrooms, the living room, on the

offender's lap, and on occasion accompanied by expressions such as "I have to tell you a story," "You're my favourite," "You're the only one," and "This will relax you." At the relevant times, the maximum penalties were five years' imprisonment for child 1; 10 years for child 2; 10 years for child 3; and 14 years for child 4, with a minimum of one year. The court agreed that under s. 11(i) of the Charter of Rights, the offender was entitled to a lesser punishment within the maximum sentence available at the time of the offending behaviour, but was to be sentenced within that maximum in accordance with present jurisprudence, which recognized the devastating harm such criminal behaviour had on the child and society at large. The court was also mindful that a conditional sentence of imprisonment was available to the offender even for those offences which predated that sentencing option.

HELD: Upon application of the sentencing principles codified in ss. 718, 718.1, and 718.2 of the Criminal Code and in particular the principle of proportionality - that the sentence must reflect the moral culpability of the offender and the gravity of the crime - that the offences were committed on children, and necessitated an emphasis on deterrence and denunciation; in consideration of the aggravating and mitigating factors; in considering that sexual offences against children are major offences and generally call for penitentiary terms; in considering the gravity of the offence and the moral culpability of the offender; in considering that any sentence of multiple, distinct counts must be served consecutively prior to an application of the principle of totality; and in considering the undertaking of the Crown not to seek more than one year of imprisonment concurrent, the court held, first, that a conditional sentence order would not be appropriate as it would not satisfy the requirements of deterrence and denunciation; and secondly, that though a sentence of four years in the penitentiary was justified, given that the guilty pleas were entered subject to the Crown's undertaking to defence counsel not to seek more than a one-year term of imprisonment, and the overriding sentencing concern in this case was to uphold the essential need for plea and sentencing bargaining to maintain the effective functioning of the justice system, the court imposed a sentence of one year in a provincial correctional centre, followed by a term of probation of three years.

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R v J.C.J., 2020 SKQB 294

Zerr, November 6, 2020 (QB20275)

Statutes - Interpretation - Youth Criminal Justice Act, Section 28, Section 29, Section 31
Criminal Law - Procedure - Application for Mandamus

The Crown applied to the Court of Queen's Bench for an order of mandamus to compel the Youth Justice Court (YJC) to hold a revocation hearing pursuant to ss. 524(3) and (4) of the Criminal Code. The application was made after a Provincial Court judge, acting in her capacity as a YJC judge, decided that she did not have jurisdiction to revoke the release of a young person under the Youth Criminal Justice Act (YCJA). The youth had been charged with committing robbery contrary to s. 344(1) of the Criminal Code. The Crown consented to his release upon an undertaking on September 5, 2019. On September 12, the youth pled guilty to assault with a weapon and theft of property and both charges were adjourned for sentencing. On October 20, 2019, the youth and others committed robbery and assault causing bodily harm, and he was back before the YJC, in custody, related to those charges. The Crown opposed the youth's release and sought cancellation of his previous release under s. 524(8) of the Code. A show cause hearing was held, and the YJC judge concluded that she did not have jurisdiction because revocation of bail for young persons is not specifically addressed in the YCJA. She relied upon the decision of R v C.M.S. to support her determination that she did not have jurisdiction to revoke bail. The YJC judge considered the circumstances of the September offences and that the youth had been released. She then his release plan, his lack of criminal record and the cogency of the Crown's case respecting the October charges and released him on an undertaking with several conditions. The issues were: 1) whether s. 524(8) (now s. 524(3) and (4)) of the Criminal Code applied, with or without modification, to proceedings under the YCJA at the time of the youth's show cause hearing; and 2) whether the YJC judge's conclusion that she did not have jurisdiction to revoke the youth's previous release constituted a failure to exercise jurisdiction.

HELD: The application was granted and an order of mandamus issued, compelling the YJC to hold a revocation hearing pursuant to ss. 524(3) and (4) of the Criminal Code. The court found with respect to each issue that: 1) the revocation process set out in s. 524(8) of the Code applied to proceedings under the YCJA. In interpreting the 2012 amendments to s. 29 of the YCJA, it determined that Parliament intended to expand the circumstances under which pre-trial detention of youth could occur. The amended version of s. 29(2) removed the presumption that youth detention was not permitted upon the secondary ground and imposed upon the Crown the onus of satisfying a YJC judge that detention is necessary. This interpretation of the YCJA is consistent with the existence of a revocation procedure available under s. 31; and 2) the YJC judge's conclusion that s. 524(8) did not apply led her to decline to exercise her jurisdiction to conduct a revocation hearing. It was a failure to exercise jurisdiction, and thus mandamus was available.

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R v Cantre, 2020 SKQB 309

Hildebrandt, November 6, 2020 (QB20284)

Criminal Law - Criminal Negligence Causing Bodily Harm
Constitutional Law - Charter of Rights, Section 7, Section 11(d)

The accused was charged that he: with criminal negligence, shot a loaded firearm at the victim, causing him bodily harm contrary to s. 221 of the Criminal Code; had used a firearm in a careless manner, contrary to s. 86(1) of the Code; and possessed a firearm without being a holder of a licence contrary to s. 91(1) of the Code. The accused brought Charter applications at the trial and sought a stay of proceedings. He alleged that his rights pursuant to ss. 7 and 11(d) of the Charter had been prejudiced by the police's loss of evidence. The items of evidence in question were an audio recording made by the victim while he was in the hospital in which three minutes of the recording were inaudible and photographs that were taken by an RCMP officer of the scene after the alleged offences occurred that had been lost. The charges were laid as a result of a hunting accident. The victim had set up a blind in a field in the late afternoon and then shot a deer. He was walking back to his van, which was parked nearby in the field. As he walked he saw a truck parked facing southward on the adjacent range road. He stopped and started waving his arms and yelling "don't shoot". He moved towards his van and then was struck by a bullet and fell to the ground. He observed the truck backing up and the accused get out and come towards him, but he then left the scene. The victim was able to crawl to his van and call his spouse. She and the RCMP arrived and the victim was taken to the hospital by ambulance. He underwent surgery to repair the damage the bullet had done to his hip. Some officers investigated the scene at that time and one took pictures that were lost. He testified that he could not recall where he located the victim's firearm without the photographs. The next day, the RCMP's forensic identification services officers returned to the scene and took photographs of the path on which the victim had been walking when he was shot, showing his foot tracks and where he dragged himself. The accused testified that as he was driving by the field at 5:30 pm, he saw a moose. He grabbed his rifle from the back seat and shot out the driver's side window. He denied that he saw the victim. Defence counsel admitted that the accused had been hunting in the vicinity at the relevant time and that it was a reasonable inference to draw that it was his shot that hit the victim. The defence argued that the accused's right to a fair trial was prejudiced because of the loss of evidence by the police. HELD: The Charter applications and application for a stay were dismissed. The accused was found guilty of the first two counts and the third count was stayed by the Crown. The second count was judicially stayed in accordance with Kienapple. The court found with respect to the Charter applications that the accused's ss. 7 and 11(d) Charter rights were not breached. He had not established actual prejudice to his right to make full answer and defence. The missing portion of the audio-recording by the victim had not impaired the defence's ability to explore any inconsistences in the victim's testimony. Any reference the victim may have made to the incident being an accident and not intentional was not relevant to the charge under s. 221 of the Code. The defence had not raised any concerns about the missing photographs during the six years between the charges

and the trial and, regardless, the defence concern as to where the victim's rifle was originally found was not material to the case. The court found the victim to be a credible and reliable witness, accepted his evidence and rejected the testimony of the accused. Respecting the first count, the court found that the Crown had proven both the actus reus of the offence, in that the accused had failed to take reasonable measures to be certain of his target and ensure that it was safe to shoot, and the mens rea, in that the accused's conduct had shown wanton and reckless disregard for the lives or safety of other persons.

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E.P., Re, 2020 SKQB 295

Megaw, November 10, 2020 (QB20271)

Family Law - Custody and Access
Family Law - Child Custody - Person of Sufficient Interest

The petitioner, L.P., was the mother of two children, N.P. and E.P., and had been their sole parent until October 2019. N.P.'s father was unknown, and E.P.'s father, the respondent, lived in Alberta and had not been involved in parenting E.P. until very recently. The children were apprehended by the Ministry of Social Services pursuant to The Child and Family Services Act in October 2019 and taken to the petitioner's mother's (grandmother) home for placement because she had a good relationship with them and was deemed appropriate. The Ministry determined that the children were in need of protection because L.P. was using drugs. The respondent learned of the apprehension and contacted the Ministry in December 2019 to inform them that he wished to care for E.P. As the petitioner continued to take drugs, the Ministry obtained successive temporary wardship orders whereby the children would be placed in its care. The petitioner would be subject to specific conditions to deal with her addictions and to work with the Ministry with the recognition that the goal would be the reunification of the petitioner with her children. The last order was made in July 2020 and was made by consent of counsel for the Ministry and the petitioner. The children were to remain with their grandmother. The respondent was not involved in the order. During the summer of 2020, E.P. went to visit the respondent and his family in Alberta several times and remained there after August. The Ministry obtained a positive protection assessment from the Alberta authorities regarding the respondent. As a result, it changed its recommendation to provide that E.P. should be placed in the respondent's custody. It applied to the court to vary the July order to permit the child's placement with the respondent, but the application had not yet proceeded. The petitioner and her lawyer swore in their affidavits that they were not advised that the Ministry

intended to place E.P. permanently with the respondent. The petitioner brought an application in the family law division under The Children's Law Act for the return and custody of E.P. and to determine the constitutionality of the provisions relied upon by the Ministry. She also applied to find the Ministry in contempt of the July 2020 court order and sought to have the terms of the order enforced. The grandmother applied to be named a person of sufficient interest in the action. The respondent applied for an order granting him interim custody and primary residence of E.P. and consolidating this action and the protection proceedings. Following the commencement of the application, the Ministry intended to have E.P. returned to Saskatchewan and placed in the grandmother's care for the duration of that order, but due to COVID-19, the child had had to remain in Alberta for the time being. It had been discovered that, unbeknownst to the counsel involved in this matter, an unreported judgment had granted sole custody of E.P. to the petitioner in July 2017, and that judgment had never been varied. The issues were whether: 1) the grandmother should be given standing as a person of sufficient interest; 2) this action and the protection proceedings should be consolidated; and 3) the Ministry should be held in contempt. The constitutional challenge would proceed to trial.
HELD: The court found with respect to each issue that: 1) the grandmother was a person of sufficient interest under s. 6 of The Children's Law Act, 1997. It granted an order adding her as a respondent in the family law division proceedings. She had been considered an appropriate parental resource by the Ministry and by the petitioner and had cared for the children as a result of the latter's struggle with addiction; 2) the respondent's application for consolidation was dismissed, as was his application for interim custody. E.P. should be returned to his grandmother. The court directed the matter to pre-trial because the affidavit evidence presented was insufficient. The respondent should have applied to vary the July 2017 judgment, but he was permitted to pursue it in this application. It was not appropriate to vary because the respondent had been absent as a parent in E.P.'s life until recently, and it would be disruptive of the status quo to move him. The petitioner was a member of the Peter Ballantyne First Nation, and that factor would have to be considered; 3) it was not an appropriate case to make a contempt finding. The actions taken by the Ministry were wrong and violated the terms of the July 2020 order, but it had taken steps to have E.P. returned to Saskatchewan and to place him with his grandmother.

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Farm Credit Canada v 101181565 Saskatchewan Ltd., 2020 SKQB 296

Layh, November 10, 2020 (QB20276)

Professions and Occupations - Barristers and Solicitors - Trust Conditions
Mortgages - Discharge - Application for Accounting

The applicants sought an accounting of the amounts owing under their mortgage debts to the respondent, Farm Credit Corporation (FCC). FCC granted three loans in 2015 to the applicant, a farming corporation, secured by mortgages over farmland. The other applicants guaranteed the loans. The loans went into default, and eventually, FCC, having complied with The Saskatchewan Farm Security Act, obtained an order appointing a receiver over the mortgaged lands. The mortgagor sold most of the mortgaged lands, and in April 2019, FCC's lawyer forwarded mortgage discharge documents to the mortgagor's lawyer, subject to trust conditions. The letter provided that if the mortgagor's lawyer could not accept the terms, the discharges should be returned. The mortgagor's lawyer paid the amounts requested by FCC's lawyer and submitted the discharges to the Land Titles Office. In August 2020, 14 months after accepting the trust conditions, the mortgagors and the guarantors brought this application for an accounting of the amounts owing under the mortgage debts. FCC responded by providing a reconciliation of the amounts owing from 2015 to 2019 but otherwise argued that the application should be dismissed because the applicants could no longer pursue the question of the amounts owing. The issue was whether a mortgagor could go behind valid, clear and accepted trust conditions and obtain an order for accounting.
HELD: The application was dismissed. The matter of payment of the mortgage had been concluded when the trust conditions were accepted. The court found with respect to the issue that: 1) by accepting the trust conditions, the applicants' lawyer had created a trust where the accepting lawyer became a trustee, obliged to act for the benefit of the sending lawyer. Having accepted the trust condition by using the mortgage discharges, the applicants' lawyer was personally bound by them. If the applicants were unhappy about the payment of the amount requested, it was a matter between them and their lawyer.

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Faer v Krug, 2020 SKQB 298

Klatt, November 10, 2020 (QB20273)

Trusts and Trustees - Resulting Trust

The plaintiffs, E.F and J.F., brought an action against the defendants, K.D. and T.K., alleging that they held a portion of land in trust for them. The plaintiffs lived in a resort community, and the plaintiff, J.F.'s son, K.D.,

owned a lot there too and planned to build a home on it. When K.D. and T.K. began a relationship, the parties decided to buy a larger lot (the property) in 2011 so that the defendants could build their home on part of it (2.1 acres) and the plaintiffs could build a welding shop on the remaining 4 acres. They envisaged subdividing the property in the future. Because the defendants needed a mortgage to build their house and the plaintiffs did not want to be parties to the mortgage agreement, it was understood that the defendants would be titleholders of the property, but the plaintiffs would retain an interest in it. The defendants purchased the property on that basis but did not reduce their agreement to writing. However, evidence of correspondence by email and texts between J.F. and T.K. was submitted that indicated how the parties would finance the purchase and their intentions. In the correspondence, concern was expressed as to how the plaintiffs' interest would be protected without resolving the question. T.K. inquired in one exchange how long the plaintiffs would be willing to let the title to the property remain in her name and K.D.'s because they needed time to pay down the mortgage and subdivide the property and refinance. The plaintiffs testified that they understood that their ownership quantum would be based on their contribution of $130,498, giving them a two-thirds share. The defendants contributed to the purchase by obtaining a mortgage of $69,325. In 2013, the relationship between the parties became strained, and in 2016, the defendants advised the plaintiffs that they were terminating their right of access to the property. Each of the parties testified at trial, and in the case of the plaintiffs, they denied telling the defendants that they did not have to pay back the money or that it was a gift. The defendants each stated that J.F. had told T.K. that she was not expecting to be repaid. T.K. asserted that the funds were a gift and that she had used poor wording in her correspondence. The issues were whether: 1) there was a valid contract between the parties; 2) an express trust was created in which the defendants would hold 65 percent of the property for the benefit of the plaintiffs; and 3) a purchase money resulting trust arose in favour of the plaintiffs?

HELD: The plaintiffs were awarded judgment for damages of $130,498 with pre-judgment interest commencing in 2016 as at the date on which the defendants began denying the plaintiffs access to the property. The court assessed the parties' credibility, accepted the plaintiffs' evidence, and rejected the defendants' evidence that the money advanced by the plaintiffs was a gift. It accepted that the parties all intended to have an interest in the property. It found with respect to each issue that: 1) there was no valid contract between the parties. There was no certainty regarding terms except that the plaintiffs would have an interest in the property commensurate with the amount they advanced; 2) no express trust was created. No language in the emails suggested an intention to create a trust; and 3) there was a purchase money resulting trust in favour of the plaintiffs. They had established that they did not have a donative intent at the time they transferred the funds. The appropriate remedy given the breakdown in the parties' relationship would be to award damages in the amount the plaintiffs contributed to the purchase.

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Capital One Corporation v Heebner,, 2020 SKQB 299

Klatt, November 16, 2020 (QB20277)

Civil Procedure - Queen's Bench Rules, Rule 1-6, Rule 10-12

The plaintiff applied pursuant to Queen's Bench rule 10-12 for an order renewing a judgment rendered in May 2010 for the amount of the debt that remained outstanding. The judgment expired in May 2020. The judgment amount in 2010 was $4,061 and it had grown to $5,164 as the defendant had made only one payment of $400 in 2015. The plaintiff advised in an affidavit sworn by one of its employees that the plaintiff had ceased enforcement measures in relation to outstanding debts as a result of the COVID-19 pandemic. Once it realized that the pandemic was ongoing, it resumed its collection measures and became aware that the judgment had lapsed. The application to renew was not served on the defendant, nor was it filed before the expiration of the 10-year limitation period set out in s. 7.1 of The Limitations Act. The plaintiff argued that Queen's Bench rule 1-6 empowered the court to cure this irregularity.
HELD: The application was granted. The court ordered that the judgment should be extended for a further 10 years. It found that it would be unjust to hold the plaintiff to strict compliance with Queen's Bench rule 10-12 in the circumstances of the pandemic and to extinguish the debt because of a delay of five or six months. The defendant had been served with the plaintiff's notice of motion and had not responded to it. Allowing the application did not appear to cause prejudice to him.

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Osika v Hall, 2020 SKQB 300

Robertson, November 16, 2020 (QB20278)

Civil Procedure - Summary Judgment
Family Law - Division of Family Property
Family Law - Access and Custody
Family Law - Child Support

The petitioner brought an application for summary judgment with respect to division of family property, child support for and primary custody of the two children of the relationship. Though served with adequate notice to participate in the proceedings in the past and served with notice of the application for summary judgment, the respondent did not attend or indicate an intention to attend court in response to the proceedings. The respondent was previously noted for default of defence. The petitioner sought summary judgment in his absence. The court referred to Queen's Bench Rules 1-3(1), 7-5(1) and (2) and 15-2(1) to (3), and Practice Directive #9, finding that summary judgment was available when no issue required a trial, the evidence contained in the materials filed could be properly weighed, credibility evaluated and reasonable inferences made, subject as always to the interests of justice being satisfied by such a procedure. Rule 15-2(1) to (3) made the general Rules applicable to family law proceedings, which permitted a level of informality. The court applied Hryniak v Mauldin, 2014 SCC 7, which fully endorsed summary judgments to resolve disputes without complex and expensive proceedings and thereby improve access to justice.
HELD: The court made a summary judgment, finding that there were no genuine issues to be resolved by a trial, and the affidavit evidence was uncontroverted, allowing the court to have confidence in its decision. The status quo as to custody and access by which the petitioner was the primary caregiver, and the respondent exercised access, was endorsed subject to the principle of maximum contact with the children. The court ordered that the only significant family property was the family home, which was transferred to the petitioner, who had waived all rights to the respondent's pensions and made no claim for spousal support. A claim for dissipation may have been available to the petitioner. The court was able to calculate child support as the parties' incomes were on file, making the support reviewable annually. The court was alive to the possible prejudice inherent in acting in the absence of the respondent, but in this case, it was satisfied that the respondent chose not to participate.

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Fairstone Financial Inc. v Hein, 2020 SKQB 301

Robertson, November 16, 2020 (QB20279)

Foreclosure - Procedure

The plaintiff mortgagee brought an application for an order to vary the upset price set by the court in an order nisi for sale of a residential property by a real estate agent. The mortgagee sought to recover a mortgage loan in the amount of $ 165,000.00. The respondents had not participated in this action and were not present. The

upset price initially set in the order nisi was $165,000.00. The plaintiff had successfully applied to reduce the upset price on two occasions prior to this one. The order nisi for sale was varied each time, reducing the upset price to $85,000.00, then to $60,000.00. The plaintiff now sought an order varying the upset price by reducing it to $40,000.00. The time between the initial order nisi and the present application was 22 months. The property had been listed for sale for 21 months. The reasons given by the mortgagee in each prior application for a reduction in the upset price was the poor condition of the property and the depressed real estate market in the area. An order for variation of the upset price is a discretionary one. A mortgagee does not have a right to a variation of the initial order. The governing legislative authority is s. 5 of The Limitations of Civil Rights Act and the case law interpreting the Act: in particular, CIBC Mortgages Inc. v Taylor, 2018 SKQB 118. Section 5 mandates a balancing act between the rights of the mortgagee and the mortgagor. In a situation like this one, where the mortgagee seeks to collect the deficiency between the mortgage amount and the proceeds of sale, only the mortgagee can benefit from an order reducing the upset price since any shortfall on the sale may be realized by collecting the difference from the mortgagor.
HELD: The application was dismissed. An order to vary by reducing an upset price is discretionary. The court was not inclined to exercise its discretion to grant the order. Such an order would be detrimental to the respondent mortgagor and would not strike the required balancing of interests between the parties. To make such an order would be unfair to the mortgagor since it would increase the deficiency for which he would be held liable when to do so would be unjustified. The mortgagee had it within its power under the terms of the order nisi to offer to purchase the property itself but did not. The applicant must suffer the consequences of setting its initial upset price as it did, allowing 21 months to pass without a sale during a declining market, and not protecting the property's value after the respondent had vacated it. The court was not satisfied on the evidence presented, being that of realtors and not land appraisers, of the property's current value and that the property's value could have declined as much as it did. This application was the fifth sought to vary the initial order. The applicant continued to have the right for an order of foreclosure of the property, though that would not allow it to collect any deficiency.

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R v Crowley, 2020 SKPC 43

Jackson, November 5, 2020 (PC20043)

Criminal Law - Procedure - Preliminary Hearing - Adjournment - COVID-19

The accused sought an adjournment of his preliminary hearing on charges of fraud and theft over $5,000. The defence submitted a medical note from the accused's physician advising that the accused suffered from panic attacks and anxiety, preventing him from traveling due to the COVID-19 pandemic.
HELD: The application was dismissed. The court determined that since the accused had requested to be absent, the preliminary hearing, which had already been delayed twice over 15 months, could proceed in accordance with s. 537(1)(j.1) of the Criminal Code. The accused could attend the hearing either through Webex or by phone. If neither were available, then the hearing could proceed in the accused's absence under s. 537(1.02) of the Code.

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R v Switenky, 2020 SKPC 46

Baniak, November 5, 2020 (PC20042)

Constitutional Law - Charter of Rights, Section 8, Section 9 - Arbitrary Detention - Unlawful Search and Seizure - Mandatory Alcohol Screening (MAS)
Constitutional Law - Charter of Rights, Section 10 - Right to Counsel - Requirements

The accused was reported as a possible impaired driver by a citizen. Saskatoon Police Air Support spotted him at a 7-11 store and obtained the vehicle's license plate number. Police arrived at the scene, at which time the accused was observed leaving the store and approaching the vehicle. The police officer detained him. The officer made a MAS demand, as he had no grounds to suspect the accused was impaired. The accused failed the screening test. At that time, he was arrested and provided with rights to counsel, which he declined. He was escorted to the police station. Once there, he indicated he now wanted to exercise his right to consult with counsel. He asked to telephone a specific lawyer, which call the police completed for him, but that lawyer was not present in his office, and so the accused left a message for him on his voice messaging system. After a wait for the lawyer to return his call, the accused was asked if he wanted to speak to legal aid duty counsel. He said he did want to, a call was made, and he spoke to duty counsel, indicating to police that he was satisfied with the call. The accused was charged with impaired operation of a conveyance contrary to s. 320.14(a) of the Criminal Code, and operating a conveyance with a blood alcohol concentration equal to or exceeding 80 mg of alcohol in 100 ml of blood within two hours of ceasing to operate the conveyance, contrary to s. 320.14(b) of the Criminal Code. The accused challenged the constitutionality of s. 320.27(2) of the Criminal Code, the provision allowing for the MAS. He also sought to exclude the certificate of qualified technician for a breach

of his right under s. 10(b) of the Charter to retain and instruct counsel without delay and to be informed of that right. A voir dire was held on the Charter challenge. At that time, the Crown called an expert witness who testified that Canada has the highest rate of impaired driving in the world, that subjective suspicion of the presence of alcohol in the body by a peace officer is unreliable. According to the expert, in other countries where a MAS is used, rates of detection of impaired drivers are much higher as technological detection is much more accurate than subjective indicators.
HELD: The court dismissed both the s. 10(b) and the ss. 8 and 9 challenges under the Charter of Rights, ruling that the evidence did not prove the accused had been "funnelled" to legal aid duty counsel. The court found the accused chose not to continue to seek private counsel and voluntarily agreed to consult with duty counsel, which he did. The absence of access to telephone books or the internet was of no consequence as he did not say he wished to attempt to locate another lawyer. As to the demand to provide a sample of breath under MAS, the court also held that the detention and search and seizure based on that demand were not arbitrary or unlawful. The court found that the aim of the legislation was backed by considerable research as to its effectiveness; that it resulted in minimal intrusion to the person detained; that vehicle stops made without reasonable suspicion of an offence are authorized under provincial legislation; and, in this case, the detention and search and seizure were also buoyed by a complaint of impaired driving by a member of the public. The court referred to its earlier decision in R v Morrison, 2020 SKPC 28, where the reasoning with respect to MAS was more fully developed.

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R v Schultz, 2020 SKPC 51

Baniak, November 25, 2020 (PC20045)

Criminal Law - Impaired Driving - Standard of Proof

The accused was charged with impaired operation of a conveyance contrary to s. 320.14(1)(a) of the Criminal Code. The accused was operating his truck on a highway in excess of the speed limit. However, the truck's exact speed was not known by the arresting officer, who followed it for two minutes and a distance of two kilometres with his emergency lights engaged. The officer observed the accused's truck touching the right shoulder of the highway and drifting slightly towards the centre line a few times. Upon the arresting officer engaging his siren, the driver reduced his speed rapidly prior to stopping, and when asked by the officer why he did not stop, the accused said, "I thought you were going to go around me." The accused provided a breath

sample in an approved screening device, which he failed. The arresting officer noted the accused mumbled some words, that his gait was slow when he walked from his truck to the police vehicle, and that he placed his hand on top of the police vehicle. While conversing with the accused during the drive to the police detachment, the accused admitted to consuming six or seven light beer since 6 pm. The time of the admission was at approximately 11 pm. The accused said on a scale of impairment from one to ten, he believed he was a three and believed he was safe to drive. On cross-examination, the arresting officer agreed with defence counsel that the accused had no difficulty following instructions and was polite and cooperative.
HELD: The charge was dismissed. The only issue was whether the Crown had met its onus of proving beyond a reasonable doubt that the accused's ability to operate the motor vehicle was impaired to any degree by alcohol. The court referenced R v Stellato (1993), 78 CCC (3rd) 380 (Ont CA), affirmed by the Supreme Court ([1994]] 2 SCR 478) and followed by R v McKenzie, 2020 SKQB 206. Based on these authorities, the court ruled that it must first determine whether the accused was impaired by alcohol in his functioning generally, and if so, whether he was impaired by alcohol in his ability to operate a motor vehicle. With respect to the first branch of the test, the court found that there was little evidence of any functional impairment on the part of the accused. The accused's behaviour was consistent with his belief that the officer intended to pass him. The court referred to the swerving and the slowing of the vehicle, as well as the accused's statement that he thought the officer wanted to pass him, as consistent with the actions of a person whose perception and actions were those of a person unaffected by the consumption of alcohol. The court also found that the accused's interactions with the arresting officer were indeterminate of any functional disability. The court went on to find that, as the accused did not exhibit clear indicia of impairment in his operation of the motor vehicle, the evidence of alcohol in the blood, speeding, the manner of pulling the vehicle over, and operation of the motor vehicle generally, did not satisfy the required standard of proof beyond a reasonable doubt that the accused's ability to operate the motor vehicle was impaired to any degree by the consumption of alcohol.

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Regehr v Keep, 2020 SKPC 50

Demong, November 26, 2020 (PC20044)

Small Claims - Torts - Negligent Misrepresentation

The plaintiff, Lorie Regehr (L.R.), brought an action against the Respondents, Edna Keep (E.K.) and 3D Real Estate Investment Ltd. (3D), for breach of contract and negligent misrepresentation. E.K. was the directing

mind of 3D. L.R. limited her claim to $30,000.00 to give the court jurisdiction to hear her action. L.R. was an unsophisticated investor and had little income or property to invest in any high-risk investments. She had obtained advice from E.K. for several years. E.K. knew or should have known that the potential losses and potential returns from any risky or complex investments would need to be fully explained to L.R. and the express terms reduced to clear and concise written contracts. E.K. proposed a rent-to-own investment to L.R. of a residential property (the Doiron property). E.K. explained that if L.R. purchased the Doiron property, E.K. would arrange for a tenant to be screened by a management firm and the tenant to rent the house for three years, after which time the tenant would be required to buy the property for its fair market value. E.K. said that all L.R. would need to do was to buy the Doiron property, and all details and requirements, including finding a reliable renter, managing the property, and any legal details would be taken care of by 3D or a property management firm hired by 3D. E.K. explained that over three years, she could expect the property to increase in value by 5%, 4% and 3%. E.K. had little knowledge of the real estate market in the area, but that was not made clear to L.R. E.K. told L.R. that she could expect a return on her investment in the property in two ways: from the rent, which was set high enough to cover financing costs and provide some monthly income, and from the sale of the house at a value 12 percent higher than the purchase price. E.K. represented that the investment was "an armchair investment" for L.R., meaning she would not need to be involved with it on an ongoing basis once she bought the Doiron property, and all would be taken care of. E.K. represented that there would be little risk to L.R. that the tenant would not buy the Doiron property at the conclusion of the three-year rental period, since he was to deposit $35,000.00 with 3D's lawyers, to be forfeited in the event that he did not complete the purchase. E.K. said this was a strong incentive for him to complete the purchase. Documents were prepared and executed by L.R. She did not understand them and E.K. did not explain them to her. They contained misleading calculations about potential returns. L.R. was not able to raise the purchase price other than by mortgaging her home for its total value and taking a line of credit, first in the amount of $95,000.00, and then for $100,000.00, as the purchase price had unexpectedly been changed to $385,000.00 from $380,000.00, thus further raising L.R.'s financing costs. L.R. did not know why the purchase price was raised. E.K. did not tell her why. The money to be applied to the purchase was all borrowed and secured by L.R.'s primary residence, which state of affairs was known to E.K. E.K. based her calculations of potential returns on the investment based on the $95,000.00 line of credit when she knew the actual amount was $100,000.00. One of the documents signed by L.R. was an assignment of contract to the management company, which stipulated a management fee of $10,000.00 up front and a second $10,000.00 fee upon completion of the sale, to be paid by L.R. A document called a purchase option contract set the purchase price of the Doiron property at the end of the three-year period at $438,000.00. The documents were executed, and the Doiron property was purchased. Nothing was said or referenced concerning 3D's fee. The management company located tenants. E.K. at a meeting with L.K. said the tenants had been through financial difficulties recently, but now had a solid gross income of $100,000.00. Contrary to the terms of the investment contract,

E.K. and 3D did not set aside the $35,000.00 deposit, but used it to pay the management fee of $10,000.00 to the management company, $19,300.00 to 3D for commission fees, and the balance to legal fees. L.R. did not understand that these payments had drained the $35,000.00 forfeiture amount. Near the end of the three-year term of the investment, L.R. was approached by E.K., who told her the tenants were having difficulty obtaining financing to purchase the Doiron property, and needed a one-year extension of the lease, to which L.R. agreed. L.R. executed a new offer to purchase, which called for a deposit of $45,000.00 and a purchase price of $447,000.00. There was no basis put forward by E.K. for increasing the purchase price. Two months prior to the end of the lease extension, the tenants abandoned the Doiron property without completing the sale. The $45,000.00 down payment had not been paid. L.R. visited the property at the end of the lease. Much damage had been done to it, which required repairs before the property was fit to be leased. The property manager had never checked on the property during the length of the lease. L.R.'s husband completed the repairs. After the repairs, a realtor valued the Doiron property at $270,000.00. The realtor indicated that E.K.'s value projections did not reflect the market in that area or in that city during the four-year term of the lease. HELD: The court found that L.R. had proven breach of contract and negligent misrepresentation. In particular, the court found that E.K. had not informed L.R. that the set-aside payment of $35,000 was not in fact set aside but was used to pay 3D's commission, legal fees and the first portion of the property manager's fees. The court also found that the investment was characterized as an armchair investment but was clearly not so treated by E.K. The screening of the tenant was not performed. (He was, in fact, unemployed and selling goods online, and did not have a $ 100,000.00 income.) The Doiron property was not being managed at all, as would have been expected. Regular inspections would have prevented the extensive damage to it. E.K., as a financial advisor promoting an investment contract, was bound by a code of ethics of loyalty, integrity, objectivity, competence, fairness and diligence to L.R. In particular, she was under a duty to ensure a full appreciation by L.R. of the extent of the risk, given its magnitude, which she did not do. What is more, E.K. did not have the expertise or competence required to properly advise L.R., though she attempted to project that she had. E.K. had created an expectation, founded on misrepresentations relied on by L.R., that L.R. could have realized a return on investment much higher than was likely. The damages payable to L.R. were to be determined according to the amount of the actual loss suffered by L.R., and not in accordance with her expectation interest. The amount of the actual loss is the net of her actual losses, i.e., loss of rent, cost of repairs, and loss of value to the Doiron property caused by the tenants' damage, less sums recouped due to her and her husband's efforts, being rent and a paydown of the mortgage, or $39,000.00, reduced to the jurisdictional limit under the Act to $30,000.00.

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