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.

Vol. 24, No. 16 August 15, 2022

Subject Index

***R v Bear*, 2022 SKCA 69**

Schwann Tholl Kalmakoff, 2022-06-07 (CA22069)

Criminal Law - Application to Adduce Fresh Evidence - Appeal
Criminal Law - Sentencing - Errors in Principle - Appeal
Criminal Law - Sexual Assault - Unreasonable Verdict - Appeal
Ineffective Representation - Miscarriage of Justice - Appeal
Statutes - Interpretation - *Canada Evidence Act*, Section 14

The appellant, K.B., appealed to the Court of Appeal (court) his conviction for sexually assaulting K.K. The Crown appealed his sentence of 18 months in custody. K.B. also sought to adduce fresh evidence on appeal in the form of a sworn affidavit, his own, for the purpose of showing he received ineffective representation from his trial counsel, which he alleged resulted in a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code* (Code). His grounds of appeal were that the trial judge "misapprehended the evidence given by K.K. and,

Criminal Law - Application to Adduce Fresh Evidence - Appeal

Criminal Law - Assault Causing Bodily Harm - Self-Defence

Criminal Law - Causing Unnecessary Suffering to Animals - Appeal

Criminal Law - Child Pornography - *Sharpe* Exception

Criminal Law - Credibility Assessment - Appeal

Criminal Law - Motor Vehicle Offences - Driving over .08 - Defence under s. 320.14(5) of *Criminal Code*

Criminal Law - Motor Vehicle Offences - Driving over .08 - Elements of Offence

Criminal Law - Resist Arrest - Conviction - Appeal

Criminal Law - Sentencing - Conditions of Probation Order - Appeal

Criminal Law - Sentencing - Dangerous Offender Application

Criminal Law - Sentencing - Errors in Principle - Appeal

Criminal Law - *Sex Offender Information Registration Act* (SOIRA) Order

by relying on that evidence to find him guilty, rendered an unreasonable verdict" as that concept is understood in s.686(1)(a)(i) of the Code; that the trial judge should not have heard K.K.'s evidence as she was not properly sworn or affirmed as required by s. 14 of the *Canada Evidence Act*; and that the conviction should be set aside because his representation by counsel at trial was so ineffective as to amount to a miscarriage of justice. The Crown appealed the sentence imposed as being an unfit one arrived at as a result of errors in principle. The court recognized that central to the unreasonable verdict argument was an inconsistency in the evidence given by K.K. at the preliminary hearing and at trial: K.K. testified at the preliminary hearing she woke to find K.B. having oral sex with her, but at trial testified he had his fingers in her vagina. The court referenced the trial judge's ruling on this inconsistency, noting the trial judge was nonetheless satisfied beyond a reasonable doubt that K.B. "touch[ed] her vagina in some fashion" for a sexual purpose without her consent. As to K.B.'s argument that his representation at trial was so ineffective as to amount to a miscarriage of justice, the court first determined the fresh evidence application by looking at the trial record in relation to the allegations set out in K.B.'s affidavit, and trial counsel's affidavit, and then examined the allegations of poor representation not dependent on the proposed fresh evidence as against the trial record. As to the sentence appeal brought by the Crown, the court carefully considered the trial judge's reasons against the trial record and the sentencing provisions of the Code to determine whether the sentence was "demonstratively unfit or that it was affected by an error in principle."

HELD: The court denied K.B.'s fresh evidence application and dismissed all grounds of appeal. It allowed the Crown appeal from sentence, substituting a sentence of 30 months in custody. As concerned K.B.'s claim that the verdict was unreasonable, the court first canvassed the case law governing the parameters of the concept of unreasonableness, including the recent case *R v Brunelle*, 2022 SCC 5, appreciating that a "trial judge's assessment of the credibility of witnesses may be rejected only where it cannot be supported on any reasonable view of the evidence". The court ruled that the trial judge's reasons demonstrated he was alive to the "inconsistencies and frailties" of K.K.'s evidence pertinent to the sexual touching, addressed them directly, and resolved them in reasoning that a touching for a sexual purpose was made out beyond a reasonable doubt on K.K.'s evidence. It went on to find that it was open to the trial judge to so conclude, and K.B.'s view that the trial judge should have given K.K.'s testimony no weight was not subject to appellate review, as it was a question of fact only. Concerning the arguments in support of K.B.'s fresh evidence application, the court considered these under the headings of "failing to interview a potential witness," "failing to meet [K.B.] and prepare for trial," "failing to discuss potential testimony," making admissions not agreed to by K.B., "providing flawed advice about whether [K.B.] should testify," and "suggesting that he appeal on the basis of ineffective representation." In each case, the court found that the proposed evidence was either inadmissible because "it

Criminal Law - Sexual Assault - Unreasonable Verdict - Appeal

Criminal Law - Summary Conviction - Leave to Appeal to Court of Appeal

Family Law - Custody and Access - Best Interests of the Child

Family Law - Parenting Time and Access

Ineffective Representation - Miscarriage of Justice - Appeal

Natural Resources - Mines and Minerals - Oil and Gas - Lease

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

Real Property - Foreclosure - Costs

Real Property - Joint Tenancies - Partition - Appeal

Rules - Interpretation - Queen's Bench Rule 12-4

Service of Documents - Substitutional Service

Statutes - Interpretation - *Canada Evidence Act*, Section 14

could [not] have affected the result," or that it could not have assisted in establishing the fact in issue, being trial counsel's ineffective representation. The court commented that much of the proposed evidence was mere speculation, not credible in light of trial counsel's affidavit which was supported by detailed notes, and her itemized bill, or was simply an attempt to question reasonable judgement calls of counsel "with the benefit of hindsight." Having declined K.B.'s fresh evidence application, the court then turned to those allegations of ineffective representation which were not dependent on the proposed fresh evidence. These were grouped under the headings of "the DNA evidence application," "the introduction of K.K.'s prior inconsistent statements into evidence," and "[t]rial counsel's closing argument." Following its review of these assertions, the court concluded that each failed to show that K.B. was "prejudiced" by these allegedly incompetent acts, in that he failed to demonstrate that trial counsel's alleged acts or omissions "caused an adjudicative unfairness" or "if counsel had performed competently, there [was] a reasonable possibility the verdict would have been different." As an example, K.B. attempted to show trial counsel's cross-examination of K.K. on inconsistencies in her testimony as compared to her preliminary inquiry was incompetent because it was interrupted by the trial judge, who directed her on the accepted way to do it. The court said that the trial judge's intervention did not prevent trial counsel from highlighting the inconsistencies, so no prejudice arose. As to s.14 of the *Canada Evidence Act*, the court reviewed the trial court record pertinent to that argument briefly because K.B. conceded it could not succeed. With respect to the Crown's sentence appeal, the court found that the trial judge erred in principle in a number of ways, and these errors affected the sentence; that he erred by failing to appreciate that the offence committed by K.B. was a "major sexual assault" as understood by judicial authority, with a starting point sentence of three years' incarceration; by finding as mitigating that K.B. had no prior criminal record when the benchmark sentence of three years presupposes an accused with no prior criminal record; by finding as mitigating the length of time K.B. was bound by release terms without performing an adequate analysis of the onerousness of its terms or the reasons for the delay; and by failing to fully engage in an analysis pursuant to s. 718.2(e) of the Code, as required by *R v Gladue*, [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13; and *R v Chanalquay*, 2015 SKCA 141, of K.B.'s background as an Indigenous person and its effect on his moral culpability. As a result of these errors, the court overturned the sentence and engaged in its own analysis of a fit sentence, commenting in words to the effect that s. 718.2(e) of the Code should be seen as subordinate to the fundamental principle of proportionality as set out in s.718.1 of the Code, which states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender", with the goal of treating the offender as an individual, and fashioning a sentence appropriate "for this offence, committed by this offender, harming this victim, in this community" (*Chanalquay*).

 Back to top

Cases by Name

B.T. v C.O.

Bank of Montreal v Thompson

Homequity Bank v Lindemann

Martin v Martin

Merasty, Re (Bankrupt)

R v Bear

R v Fisher

R v Herring

R v L.P.

R v Nalco Champion

R v Potoreyko (resist arrest)

R v Potoreyko

R v T.G.L.

Schnell v Stene

***R v Potoreyko*, 2022 SKCA 70**

Richards Schwann Leurer, 2022-06-10 (CA22070)

Criminal Law - Resist Arrest - Conviction - Appeal
Criminal Law - Sentencing - Conditions of Probation Order - Appeal
Criminal Law - Credibility Assessment - Appeal

A.P. appealed to the Court of Appeal (court) his conviction for resisting arrest rendered by a judge of the Court of Queen's Bench (trial judge) and also sought leave to appeal the condition in his conditional discharge that he apologize in writing to the arresting officer, M.D. The court recognized that A.P. objected to the trial judge's findings of fact following a trial in which only M.D. and A.P. testified and appreciated further that the trial judge was required to assess this testimony to make the necessary findings of fact, apply these to the elements of the offence and any available defences to determine if he was convinced beyond a reasonable doubt that A.P. was guilty. It was also aware that A.P. did not forcefully challenge the testimony of M.D. that at the time of the arrest, he was attempting to execute a warrant on A.P.; A.P. knew about the warrant from courtesy calls from M.D.; A.P. failed to stop his vehicle when M.D. signalled him to do so, and drove into his yard and walked towards his house, which prompted M.D. to demand A.P. stop; A.P. did not stop and M.D. grabbed his arm to arrest him, and was pushed away by A.P., which led to the use of force by M.D. to effect the arrest. The court was cognizant that A.P.'s objection to the trial judge's verdict was primarily one of the weight the trial judge gave to his evidence with respect to his defence of reasonable excuse, that he was an older man with heart problems who was going into the house to get his medication, it was cold, he was tired, and he was afraid to go to jail, believing M.D. was biased against him, and further, was of the view that the warrant, being issued for his failing to provide fingerprints, was not important.

HELD: The court denied the appeal against conviction, gave A.P. leave to appeal his sentence, which it allowed, with the result that the apology clause was removed from the conditional discharge. As to the court's reasons for arriving at these results, it stated first that the trial judge's findings of fact did not permit appellate intervention unless the court record revealed that the trial judge made a "palpable and overriding error" in his assessment of the credibility of the witness testimony, and no such error was demonstrated by A.P., whom, the court stated, was simply attempting to launch "an attack on the credibility findings made by the trial judge" to which the court was required to show deference, given the trial judge's "intangible advantage…of watching and hearing witnesses." Secondly, the court considered whether the trial judge's verdict might be "unreasonable and… not… supported by the evidence", concluding that A.P. had failed to show that the trial judge's assessment of the credibility of the evidence of M.D. in arriving at his factual findings could not "be supported by any reasonable view of the evidence" as required by case law interpreting s.686(1)(a)(i) of the *Criminal Code* (Code). As to the sentence appeal, the court reviewed s. 732.1(3)(h) of the Code in light of *R v Shoker*, 2006

SCC 44, which considered the scope of the "residual power" of a judge to fashion "other reasonable conditions…for protecting society," ruling that in this case, though it was to apply a deferential standard of review, it was nonetheless required to intervene because the trial judge made an error in principle by imposing an apology requirement when nothing on the record showed that society needed to be protected from A.P. or how an apology clause might assist in achieving such a goal.

 Back to top

***R v Potoreyko*, 2022 SKCA 71**

Richards Schwann Leurer, 2022-06-10 (CA22071)

Criminal Law - Causing Unnecessary Suffering to Animals - Appeal
Criminal Law - Summary Conviction - Leave to Appeal to Court of Appeal

A.P. was convicted by a judge of the Provincial Court (trial judge) of wilfully causing unnecessary pain, suffering or injury to cattle and fined $2,000.00 along with prohibitions preventing him from being in possession of cattle. (*R v Potoreyko*,19 June 2019, Melfort, Sask Prov Ct) (Trial Decision). He appealed both his conviction and sentence to the Court of Queen's Bench under the summary conviction appeal provisions of the *Criminal Code* (Code) (see: 2021 SKQB 212). After his appeal was denied, he sought leave to appeal to the Court of Appeal (court) pursuant to s. 839 of the Code. By s.839(1), an appeal may be taken only "on any ground that involves a question of law alone" and is either "significant to the administration of justice generally" or "compellingly meritorious in the particulars of the case in question:" *R v Bray*, 2017 SKCA 17. The court appreciated that as A.P. was unrepresented at trial and that he alleged he did not receive a fair trial, it was to focus its analysis on the sufficiency of the trial judge's treatment of A.P. as a self-represented accused and whether she fell so short of her duty to assist A.P. and ensure he received a fair trial that a miscarriage of justice pursuant to s.686(1)(a)(iii) of the Code occurred. The court referred to A.P.'s examples of the trial judge's failures to provide helpful assistance, including that she: withdrew her decision to allow him to call "bovine witnesses;" accepted the evidence of Crown witnesses who denied suggestions he made to them; and was intimidating and seemed biased against him. As to the application for leave to appeal his sentence, he argued that the fine and other punishments were excessive in the circumstances.
HELD: The court declined the application for leave to appeal both as to conviction and sentence. With respect to leave to appeal the conviction, the court concluded that the trial judge conducted the trial fairly and within her discretion to manage it, which included ensuring that only relevant and admissible evidence was entered, and though she might have been "sharp" with A.P. on occasion, she was entitled to control the conduct of the trial. The court found upon a review of the trial transcript that the trial judge did not agree that A.P. should be allowed to call "bovine witnesses" and did not withdraw a previous ruling that she would allow it. Also, contrary to A.P.'s position that she should not have accepted the evidence of certain witnesses, the court expressed that a witness not agreeing with a suggestion made by A.P. did not nullify his evidence. As to the merit of the proposed appeal, the court stated that no questions were raised that "are fundamental to the criminal justice system." As to leave to appeal the sentence, the court referred to *R v Grover*, 2020 SKCA 40, which continued a long line of authority upholding the principle that "the appropriateness or fitness of a sentence is not a question of law and that an appellate court has no authority to entertain an application for leave to appeal a sentence on that basis," though it recognized an exception to this rule "where there is an error of law, that is "so bound up

with the sentence that it should be held to be inherent in it."

 Back to top

***R v Fisher*, 2022 SKCA 78**

Schwann Barrington-Foote Tholl, 2022-07-08 (CA22078)

Constitutional Law - *Charter of Rights*, Section 2(b)
Criminal Law - Child Pornography - *Sharpe* Exception

G.F. was convicted of possessing, accessing, and making child pornography and breaching an order of prohibition that related to such conduct. G.F. sought to set aside his convictions on the basis that his convictions under ss.163.1(2), 163.1(4), and 163.1(4.1) violated his ss. 2(b) and 7 *Charter* rights. Before the court, he sought an exception for his conduct in the same manner the Supreme Court granted exceptions in *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 (*Sharpe*). G.F. further argued that the facts did not support his conviction for breaching the order of prohibition. G.F. was residing in a federal community correctional centre that implemented the monitoring of outgoing calls. Correctional staff discovered that G.F. had placed an inordinate number of telephone calls to the same telephone number over a period of 46 days. G.F. had been calling a chat line service. G.F. admitted under questioning by his parole officer and correctional staff how he used the service and voluntarily supplied his password to the chat line. Correctional staff listened to voice recordings that had been left and sent on G.F.'s user account. They discovered explicit conversations in some of the messages about sexual activity with children. Correctional officers alerted the police, who investigated and charged G.F. When G.F. went to trial at the Court of Queen's Bench, he asserted that his conduct in recording and listening to messages fell within the existing personal use exceptions found in *Sharpe*. The trial judge rejected this argument. G.F. also filed for an order, pursuant to s. 52 of the *Constitution Act, 1982*, and s. 24(1) of the *Charter*, seeking to extend the personal use exceptions found in *Sharpe*. His application was denied by the trial judge. The recording and sharing of explicit audio messages were not found to be permissible under the *Sharpe* exceptions nor a new category of permissible freedom of expression. After rejecting G.F.'s *Charter* application, the trial judge convicted G.F. of the offences alleged. The trial judge did not find the chat line service to be a digital service, which G.F. was prohibited from accessing, but nonetheless convicted him as the chat service was deemed to be a messaging service captured by the broad prohibition order he was subject to. G.F. raised the following two grounds of appeal that were at issue before the court: 1) did the trial judge err in finding that an exception does not exist for G.F.'s conduct under ss. 163.1(2), 163.1(4) and 163.1(4.1) of the *Criminal Code*, because of her analysis of ss. 1, 2(b), and 7 of the *Charter*? (b) Did the trial judge err in convicting G.F. for breaching the order of prohibition because the facts did not support her finding that a breach of a term of the order occurred?
HELD: G.F.'s appeal was allowed in part: G.F.'s convictions for possessing, accessing, and making child pornography were upheld but his conviction for breaching an order of prohibition was set aside. Before commencing its analysis on the issues, the court stated the personal use exceptions found in *Sharpe*, namely that it is not unlawful to possess self-created expressive material kept exclusively for private use nor is it unlawful to have private recordings of lawful sexual activity that are kept exclusively for personal use. The court's analysis of the issues then commenced with a recitation of the provisions of the *Criminal Code* related to child pornography. G.F. argued that if he had a real-time conversation with individuals about the topics that were found in the audio

messages, it would be lawful conduct under the existing legislative scheme. He further argued an exception should be made for audio recordings between consenting adults that extend the personal use exceptions found in *Sharpe*. While the Crown conceded that G.F.'s freedom of expression was infringed, the trial judge found that the infringement was justified under s. 1 of the *Charter*. The court agreed with the trial judge's decision, after it also considered the test found in *R. v. Oakes*, 1986 CanLII 46 (SCC), to determine whether G.F.'s impugned *Charter* right was justified under s. 1. To justify an infringement of expression the test considered is (a) Is the law's objective pressing and substantial? (b) Are the means chosen in the legislation proportionate in terms of being rationally connected to the objective, minimally impairing of the right and proportionate in terms of the law's effects? For the first portion of the test, the court found that it was beyond argument that the regulation of child pornography is an objectively pressing and substantial societal interest. In answering the second portion of the test, the court considered cases after *Sharpe* that had weighed whether to extend the exceptions found by the Supreme Court. The court held that the *Sharpe* exceptions have been stringently applied throughout the country. The court further held the prohibition of audio recordings related to explicit sexual activity with children to be proportionate means of preventing harm to children. The court emphasized again that the *Sharpe* exceptions are intended for individual, private use, which was not the intention of G.F. in his exchange of audio messages. The court did not view the exchange of audio recordings to be akin to a real-time conversation between individuals as G.F. argued. While G.F.'s arguments were rejected related to creating an additional *Sharpe* exception, his appeal that the trial judge had overreached in convicting him of being in breach of an order of prohibition was accepted. The prohibition G.F. was subject to was not to access the internet or a digital network for the purposes of participating in activities related to child pornography. It was uncontroverted evidence at trial that the chat system G.F. accessed was not a digital network. The trial judge was found to have erred, and the court set aside G.F.'s conviction. As G.F. was serving his sentence for the contravention of the prohibition order concurrently with the convictions for child pornography, the court found that there was no basis to adjust his sentence based on his success on appeal.

Back to top

***Martin v Martin*, 2022 SKCA 79**

Schwann Tholl Kalmakoff, 2022-07-19 (CA22079)

Real Property - Joint Tenancies - Partition - Appeal
Civil Procedure - Assessment of Witness Credibility - Appeal

The appellant, R.C.M., was the defendant in a civil action brought by his parents, K.M. and M.M., for partition of a rural residential property (house) which had been transferred from R.C.M. to himself, K.M., and M.M. as joint tenants with rights of survivorship. K.M. died soon after the commencement of the action, which was continued by M.M. in her capacity as executrix of K.M.'s estate and in her personal capacity. After a trial before a judge of the Court of Queen's Bench (trial judge), it was ordered that R.C.M. be given the option to buy the house, with the net proceeds of the sale to be disbursed in three equal shares to R.C.M., the estate of K.M., and M.M., failing which, the acreage was to be sold by way of a court supervised sale under s. 4 of *The Partition Act, 1868* and divided in the same way (see: 2020 SKQB 272). At trial, R.C.M. opposed the equal division of the net proceeds of sale, advancing in argument that his contribution to improving the house and paying the mortgage vastly exceeded the contributions of

money and labour made by M.M. and K.M., such that the sale proceeds should be paid unequally in his favour. Discontented with the result at trial, R.C.M. appealed to the Court of Appeal (court) on grounds which the court "distilled" to two: did the trial judge err in accepting M.M.'s evidence about her and K.M.'s contributions to the value of the acreage and in rejecting R.C.M.'s evidence on this issue; and did she err in "not dividing the sale proceeds unequally in Richard's favour." The court set out what it saw were the core findings of fact made by the trial judge following her credibility assessment of the evidence presented at trial, including: at the time of the transfer by R.C.M. of the acreage into joint names, the mortgage lender was threatening foreclosure of the mortgage; K.M. and M.M. assumed the mortgage; R.C.M. intended that all legal and beneficial interest in the house be transferred jointly with right of survivorship; K.M. and M.M. made financial contributions to the construction of the house and the mortgage payments; the evidence did not permit quantification of these contributions; R.C.M. also made financial contributions to pay down the mortgage and to renovate the house which could not be quantified from the evidence either; K.M.'s contribution of labour to the renovations was not quantifiable; some of the labour provided by K.M. to the house renovations were gratuitous, and some were intended to benefit himself as registered owner but these were, again, not quantifiable from the evidence.

HELD: The court dismissed R.C.M.'s appeal. Dealing first with his argument that the trial judge erred by not rejecting M.M.'s evidence and not accepting his own, the court reiterated that the standard of review with respect to findings of credibility, the weight to assign to evidence, and the inferences to be drawn from the evidence are questions of fact which cannot be disturbed by an appeal court unless the appellant demonstrates that the trier of fact made a palpable and overriding error in his treatment of the evidence. The court agreed with *R v Brunelle*, 2022 SCC 5, that "an error is palpable if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is overriding if it has affected the result," and went on to find that the trial record and the trial judge's reasons did not reveal such an error. It commented that to challenge the trial judge's factual findings, it was not sufficient for R.C.M. to simply point to M.M.'s problems in explaining entries in ledgers purporting to record financial contributions made by K.M. and M.M. to the mortgage and renovations in order to convince the court the trial judge made an error in law in accepting some of her evidence, and not accepting his evidence in this area, which he claimed was detailed and comprehensive. The court pointed out that the trial judge was very aware of the reliability problems associated with the ledger evidence and gave it no weight but asserted that it was nonetheless open to the trial judge to accept M.M.'s evidence about her own and K.M.'s contributions, both financial and by the provision of labour, to increasing the value of the house. The court also disagreed with K.M. that rejection of M.M.'s ledger evidence automatically meant the trial judge erred by rejecting his evidence concerning the respective value contributions to the house, observing that it was not unreasonable for the trial judge to find on the evidence as a whole that R.C.M. had greatly overstated the money he put into the house when he testified that on a proven salary of $60,000.00 he made all the mortgage payments while also making other financial contributions, which together totalled $450,000.00. Of particular significance on the appeal, the court said, was that R.C.M. was off the mark in his challenge to the trial judge's credibility findings because by aiming his argument at perceived weaknesses in the evidence in relation to quantum of contributions, he failed to appreciate that the trial judge had found as a fact that he could not on the evidence arrive at a dollar value of the contributions, whether of money, labour or of the house itself. As such, the court ruled, R.C.M. not only failed to prove the trial judge made a palpable error; he also failed to show he made an overriding error, one that affected the result. Secondly, as to the partition order itself, the court recognized that the trial judge referred to and applied *Stubbings v Stubbings*, 2018 SKQB 8, and stated that R.C.M. had not satisfied it that the trial judge was wrong to do so or that he erred in his application of the case to the facts before him. The court suggested that R.C.M. was misguided on the law with respect to the trial judge's discretion to order a sale of the house pursuant to *The Partition Act, 1868* in that it mattered not who contributed how much to the house. What mattered was the type of property interest held by the parties in the house. The court said the trial judge was correct in finding on the evidence that R.C.M. had intended to transfer all property and equity in the house to himself and his parents as joint tenants with right of survivorship, and

no impediments prevented the trial judge from ordering an equal sharing in the proceeds of the house sale, as he did.

Back to top

***R v Nalco Champion*, 2022 SKQB 145**

Hildebrandt, 2022-06-14 (QB22347)

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

Following the death of M.B., an employee of Nalco Canada ULC (Nalco), from exposure to contamination levels of hydrogen sulphide (H2S) while taking samples of gas at an oil field facility, a task he was trained to perform, the Crown brought charges against Nalco which included an allegation under s. 302 of *The Occupational Health and Safety Regulations, 1996*, that it had failed in its legal duty "to take all practicable steps to prevent [M.B.] from being exposed to H2S beyond the contamination limit". The prosecution proceeded to trial before a judge of the Provincial Court (trial judge). Nalco was acquitted (see: 2018 SKPC 61). The Crown appealed the verdict to the Court of Queen's Bench acting in its capacity as a summary conviction appeal court pursuant to s. 4(4) of *The Summary Offences Procedure Act, 1990*. This provision incorporates, with necessary modifications, Part XXVII of the *Criminal Code*, including s. 813(b)(i), which houses the Crown's right of appeal from acquittal. The Crown's grounds of appeal were recast by the summary conviction appeal court judge (appeal judge) into two: (1) whether the trial judge erred in law by failing to consider the totality of the evidence pertaining to the foreseeability of the risk of the type of harm which caused M.P.'s unfortunate death; and (2) whether the trial judge "err[ed] in law by misinterpreting s. 3-80 of *The Saskatchewan Employment Act* and by failing to properly apply that section to his factual findings". She first directed herself as to the applicable standard of review, and after canvassing the case law, including *R v Helm*, 2011 SKQB 32, concluded that the trial judge's factual findings were to be reviewed on a deferential standard, and could not be interfered with unless these findings revealed a palpable and overriding error. She then determined that a wrong application of the facts by the trial judge to the determination of whether a legal standard had been met, in this case "reasonable foreseeability," was an error of law to be reviewed on a standard of correctness. She next recounted and summarized the trial judge's findings of fact, with particular emphasis on the factual foundation for his ruling that "the facts were insufficient, at law, to constitute" reasonable foreseeability of the type of event which resulted in the death of M.B (see: *R v Shepherd*, 2009 SCC 35). She found these facts included: M.B. was not wearing a self-contained breathing apparatus (SCBA); sampling without SCBAs is generally deemed safe in the industry; "the type of danger that arose was a rapid, uncontrolled release of high pressure H2S;" the release overwhelmed M.B.; M.B. was an experienced "sampler" who would have taken one to five minutes to take the sample but for the unprecedented event; at the time of the release of gas, his foot was "caught;" a respirator would have prevented him from being overwhelmed; "a possible breach of the contamination limit was highly unlikely;" Nalco was aware of the risk associated with harmful levels of H2S, training its samplers as to what to do in the event of expected releases of H2S and providing safety equipment for them including SCBAs; the sampling facilities, including this one, were equipped with monitoring equipment which engaged when levels of gas exceeded safety limits; it is exceedingly rare that H2S reached levels above what was considered harmful, and also rare that a sampler would be in the sampling space long enough to be harmed by it. HELD: The appeal judge dismissed both reframed grounds of appeal. She disagreed with the Crown that the trial judge failed to consider the totality of the evidence. She was aware the Crown had elicited evidence on cross-examination of an expert who

testified for Nalco and who conceded that a SCBA would have given M.B. a “fighting chance” to extricate himself, and she was also aware that the Crown adduced evidence to the effect that following M.B.’s death, Nalco required samplers to wear SCBAs at all times. Nonetheless, she was satisfied that the trial judge was aware of this evidence, and his factual findings relating to the unprecedented nature of the rapid and uncontrolled release of high-pressure gas justified his ruling that the incident was not reasonably foreseeable, as that concept was understood at law, and flowing from that, she concluded that the trial judge was also correct in deciding that Nalco had taken all reasonable practical means to comply with its duty under s. 3-80 of the SEA because it was not evident what more it could have done, given the rarity of the occurrence which caused M.B.’s unfortunate death. Lastly, the appeal judge addressed an issue which arose during the trial: whether reasonable foreseeability was an element of the offence which the Crown was required to prove beyond a reasonable doubt, or an aspect of the defence of due diligence that Nalco was required to prove on a balance of probabilities. In the end, she concluded that, though it was somewhat unclear from the trial judge’s reasons where the concept of reasonable foreseeability belonged in his analysis, she concluded that either the Crown had failed to prove reasonable foreseeability as an element of the offence or Nalco had proven on a balance of probability that as the catastrophic event was not reasonably foreseeable, and it had taken all practicable means to allay reasonably foreseeable dangers, the fluidity of his reasoning was of no import to his decision.

Back to top

***Schnell v Stene*, 2022 SKQB 146**

Bardai, 2022-06-17 (QB22345)

Civil Procedure - Summary Judgment
Natural Resources - Mines and Minerals - Oil and Gas - Lease

D.S. and his company D & K Schnell Holdings Ltd. (D.S.) sought summary judgment against C.S., the defendant, who serves as the executor of the estate of I.H. C.S. also sought summary judgment. C.S. is the daughter of I.H. and represents the beneficiaries of the estate of I.H., who was married to C.H. In 1973, D.S. entered a contract with C.H. to acquire 320 acres of land. Six oil wells operate on the lands acquired. Under the terms of the agreement between D.S. and C.H., they agreed that the surface lease rental payments for the existing oilfield sites would continue to be paid to C.H. C.H. died in 1984, at which time the oilfield lease payments continued to be paid to I.H., who was the assignee in the surface leases. I.H. passed away in 2002. Her estate claimed interest in the surface lease payments. D.S. argued that an implied term of the contract was that C.H. would not receive rental payments for a long period of time. D.S. further argued for damages under unjust enrichment or, in the alternative, damages for nuisance, trespass, and inconvenience, given that the wells have continued to be operational since 1973. It was established before the court that the leases had originally been entered into in May 1956 by C.H.’s father and subsequently renewed. The evidence indicated that the leases had been appropriately assigned to C.H. by his father before the land was sold in 1973. D.S. had commenced his claim in 2000. The parties each filed three affidavits and multiple briefs of law. D.S. also filed an expert report from an individual involved in oil and gas who confirmed that horizontal drilling introduced in approximately 1993 has extended the life of oilwells. D.S.’s evidence is that when he entered a contract with C.H., his understanding and belief was that the lifespan of an oil well was 20 to 25 years. He did not believe the agreement he signed with C.H. could be interpreted to have reserved the surface

leases to the heirs of C.H. in perpetuity. The court considered two fundamental questions from the pleadings filed: (1) did the agreement between C.H. and D.S. create or reserve an interest in the land in favour of C.H.? (2) If the agreement created or reserved an interest in the land, did the contract include an implied term or should the court otherwise imply a term that the benefit of such payments came to an end when C.H. passed away or some other date?
HELD: The court found in favour of the estate. D.S. and C.H. had contracted that C.H. would maintain an interest in the surface leases for as long as the leases continued. Neither the development of new technology, nor any other factors, constitute an implied term that would limit the leases being in the interest of the estate. The court first considered whether the case was appropriate for summary judgment. The court considered jurisprudence that had referenced the test for summary judgment from *Hryniak v Mauldin*, 2014 SCC 7, that a case is appropriate for summary judgment if there is no genuine issue for trial. The court found that the case could be decided based on contract interpretation and there was no genuine issue for trial. The court referenced the recent case of *Day v Muir*, 2022 NSSC 20, which summarized the general principles governing contract interpretation. In essence, the court held that the court is to consider the intent and facts surrounding the making of a contract at the time the contract is made. In considering the context of the agreement between D.S. and C.H., it was obvious to the court that C.H. intended to have the benefit of surface leases for as long as the leases were valid (i.e., the oil wells were operational). If D.S. intended to limit C.H.'s interests to a life interest, he could have contracted as such; he did not. The parties did not enter any reservations about surface leases, which they could have in 1973, such as to limit subsequent lease renewals. The agreement particularly provided the "reservation and reversion of that part of the said Land leased under the said leases, shall remain in the vendor (C.H.)". The court was not convinced there was any implied term that could be read into the contract that would support D.S.'s arguments. As there is a juristic reason for the leases to be in place and paying the estate, there was no finding of unjust enrichment and the agreement between C.H. and D.S. provided consent defeating any claims of nuisance and trespass. D.S.'s claim was dismissed. As monies had been deposited into court by the current oil company leasing the wells, the estate was entitled to those funds, and the parties were granted leave to contact the court if the issue of costs could not be resolved.

Back to top

***Homequity Bank v Lindemann*, 2022 SKQB 149**

Robertson, 2022-06-22 (QB22344)

Real Property - Foreclosure - Costs

The plaintiff, Homequity Bank (bank), sought solicitor-client costs against the defendant, B.R.L., who had defaulted on a mortgage. B.R.L. subsequently rectified the default after issuance of the statement of claim. The parties agreed that the bank was entitled to costs but they disagreed on the amount payable. The bank sought full-indemnity of solicitor-client costs, which it calculated at $11,756.88 comprised of $10,377.50 in legal fees, $237.00 in disbursements and $1,142.38 in GST and PST. B.R.L. argued that costs should not exceed the cap generally imposed by the court on foreclosure actions. B.R.L. entered a mortgage described as a Canadian Home Income Plan in January 2014. While the mortgage would not normally become payable until the borrower died or left or sold the property, other conditions could trigger default. Such a condition was triggered in March 2021, when B.R.L. failed to pay property taxes. Subsequently, he also failed to pay home insurance. The bank commenced foreclosure

proceedings. After taking preliminary steps to effectively give notice and obtain appropriate service, the bank filed a statement of claim in January 2022. B.R.L. filed a statement of defence in February 2022. The bank's application to strike the statement of defence was mutually adjourned, ultimately to May 2022, when the court was advised that the mortgage default had been rectified and the only issue in dispute was costs. The issue for the court to determine was the appropriate costs payable by B.R.L. to the bank.

HELD: The court found in favour of the defendant, B.R.L., and awarded costs of $3,000.00 for legal fees and disbursements of $237.00 plus taxes on those amounts. The court further ordered the cost award to be payable in equal monthly instalments over five months, due on the first day of each month or the next business day, commencing July 1, 2022. The court found that the bank did not point to any specific provision in the mortgage in support of its application for full indemnity. In any event, as a general principle, the court held that while mortgage agreements typically contain provisions requiring the borrower to pay all costs incurred with the enforcement of a mortgage agreement, the court usually declines to award any pre-leave costs and awards a lesser amount of post-leave costs. B.R.L. had exercised his right under s. 61 of *The Queen's Bench Act* (Act) to rectify default and stop the mortgage action. The Act subsequently provides at s. 61(a) the right of a mortgagee to costs when a mortgage has been redeemed. The court cited numerous cases the confirmed the principle that although a mortgagor may have agreed to pay full solicitor-client costs, the court retains jurisdiction to decide the reasonableness of those costs. Further, the court noted that in its supervisory jurisdiction to control solicitor-client costs awarded on foreclosure proceedings, there is a standard amount for legal fees for normal actions. At present, the court found that jurisprudence points to the standard award of legal fees in foreclosure proceedings to be $5,000.00. The court determined that it may depart from the standard award of legal fees where circumstances require, such as in the situation that a mortgage has been redeemed. The court rejected the bank's arguments that the foreclosure was not a standard action. Given that B.R.L. redeemed the mortgage prior to the application for an order *nisi*, a proportionate reduction was granted which reduced the legal fees from the standard amount of $5,000.00 to $3,000.00.

Back to top

***B.T. v C.O.*, 2022 SKQB 151**

Brown, 2022-06-23 (QB22346)

Family Law - Parenting Time and Access
Family Law - Custody and Access - Best Interests of the Child

B.T. and A.K., the petitioners, applied to the court primarily for an order seeking parenting time of B.T.'s 8-year-old grandson, O. C.O., the respondent, is O's biological father, who opposed the application and sought for O to reside with him and his new family. B.T.'s daughter, A.P., had a relationship with C.O. that ended in mid-2016 when C.O. moved to Ontario from Saskatchewan. A.P. passed away in February 2021. Prior to her death, commencing in September 2019, O began to reside with his grandfather and his new partner (A.K.). Since 2016, C.O. had not seen O. B.T. enrolled O in soccer, baseball, and swimming lessons. B.T. described to the court that O has some behavioural issues, ADHD and issues related to grief caused by the loss of his mother. B.T. and C.O. did not get along and made various allegations against each other before the court. The issue before the court was what

interim parenting order would be in the best interests of O.
HELD: The petitioners were granted an interim parenting order for O, with C.O. to have graduated parenting time. In addition, the court seized itself with the matter pending pre-trial of the matter that may occur with the direct consultation of the parties and the local registrar. The court made various other orders to advance the matter in the interim. The court's analysis of interim parenting affecting O. was centered on its analysis of the applicable provisions from *The Children's Law Act, 2020*, SS 2020, c 2 (Act), primarily section 10, which requires the court only take into consideration in making a parenting order the best interests of the child. The court reiterated the findings of *S.A.L. v. K.H.*, 2011 SKQB 397, that the factors enumerated for the consideration of a child's best interests are not limited to those listed in the Act. The court considered at length the evolving jurisprudence that considers biological connection of a child to a parent. The court's analysis of cases highlighted that the consideration of parentage as the primary issue to be considered in the best interests of a child has diminished and parentage is now to be considered among many other factors which consider a child's best interest from the vantage point of the child. The court cited the recent case of *T.B.S. v. S.J.B.*, 2020 SKCA 93, 45 RFL (8th) 148, which summarized this principle in the following way: "Based on the above survey of jurisprudence from Saskatchewan and across Canada, examined within the context of a child-centred assessment of a child's best interests, I conclude there is no presumption in favour of a biological parent versus a person of sufficient interest when determining the appropriate parenting arrangements for a child. It is a factor that is subsumed within the best interests framework and must be considered in conjunction with all of the other factors." The court then considered the enumerated factors itemized in section 10 against the evidence received and determined that O. must remain in his grandfather's care. In considering "the nature and strength of the child's relationship with the parties", the court found that O. had been doing better in the petitioners' care since he started living with them. Considering the "plans for the child's care and ability to meet their needs", the court accepted that O. appears to be thriving with the petitioners and that limited evidence was available from C.O. on his residence in Ontario. In considering "the child's needs, ages and stages of development", the court emphasized that C.O.'s interest in parenting O. is recent and caution is necessary moving forward. The court placed no emphasis on "the child's views and preferences", "the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage", and on any history of "family violence". In considering the willingness of the parties "to support the development and maintenance of the child's relationship with the other," the court was critical of both parties given their allegations against each other but felt that they would endeavour to follow the order being imposed. In considering "the history of care of child", the court found that O. was experiencing stability living with B.T. and A.K. With the best interests of O. favouring his care remaining with his grandfather, the court ordered a parenting order in favour of the petitioners. The court further ordered graduated parenting time to C.O. to commence under supervision and escalating to overnights, possibly in Ontario. The court ordered that C.O. could give notice as of November 21, 2022, to further consider O. spending time in Ontario. The petitioners were granted leave to amend their petition for child support from C.O., who was ordered to provide a completed financial statement and his tax information for the past three years. Costs were reserved, and the parties were permitted to proceed to pre-trial, but they were not to be assigned a pre-trial date before December 1, 2022 in order to provide sufficient time to gauge the growth of O.'s relationship with C.O.

Back to top

***Bank of Montreal v Thompson*, 2022 SKQB 152**

Hildebrandt, 2022-06-27 (QB22348)

Service of Documents - Substitutional Service
Rules - Interpretation - Queen's Bench Rule 12-4

The applicant, Bank of Montreal (BMO), applied to a judge of the Court of Queen's Bench (chambers judge) for a final order of foreclosure claiming it had validly served the respondent mortgagor (E.T.) with a copy of the order *nisi* or, in the alternative, for an order validating substitutional service of the document. BMO alleged to having served the order *nisi* on E.T. by text message. It was the position of BMO that rule 12-4 of The Queen's Bench Rules expressly provided for such a method of service or alternatively, that rule 12-10 permitted such a method of substitutional service to be validated. On an examination of the court file, the chambers judge noted that the telephone number appearing on previous acknowledgments of service (AS) returned by E.T. contained a telephone number, but it was absent from the most recent AS, motivating BMO to attempt service by text message. The chambers judge referred to an affidavit of a process server on the court file in which he swore he attended at the subject property and called and texted the subject telephone number. He also swore he left four messages at that number. He stated further he did not contact E.T. on that occasion. The chambers judge pointed out that the process server further did not indicate in the affidavit whom the voicemail message belonged to, whether the telephone number was for a cell phone or land line, or whether the telephone could receive documents or photos. She remarked further that the affidavit of purported service of the order *nisi* by text message did not aver positively that it was received by E.T. or whether a response was obtained from him.
HELD: The chambers judge determined that rule 12-4 did not expressly permit service of documents by text message, that the term "electronic transmission" did not include text messaging but was meant as a reference to email. She reasoned that rule 12-4 could not support such an interpretation as the rule specifically listed "address, fax number or e-mail address" as acceptable methods of service but did not include telephone numbers. She reasoned further that the listed modes of service assured the documents were received, which she stated fulfilled the fundamental goal of service which was to give notice to respondents or other interested parties of a pending court proceeding or of an order made against their interests. She went on to say that she had no confidence E.T. received the order *nisi* by text message. and as such could not endorse substitutional service by this method. In the result, she dismissed the application for a final order for foreclosure without prejudice to BMO bringing a new application for substitutional service of the order *nisi* once an effective method of service was found.

Back to top

***Merasty, Re (Bankrupt)*, 2022 SKQB 153**

Thompson, 2022-06-29 (QB22349)

Bankruptcy and Insolvency - Discharge
Bankruptcy and Insolvency - Lifting of Stay

The trustee in bankruptcy (trustee) opposed the automatic discharge of the bankrupt (J.S.R.) and applied to the registrar in bankruptcy (registrar) for an adjournment pending J.S.R.'s completion of his bankruptcy obligations. The trustee also applied to lift the stay of the bankruptcy to "reinstate the creditor's rights against the bankrupt." The trustee's grounds for opposing the absolute

discharge and for an order for a conditional discharge had to do with J.S.R.'s failings in submitting financial information to the trustee, which he was required to do to complete his bankruptcy. The trustee was also seeking the costs of bringing the application payable during the adjournment of the conditional discharge application. The registrar was aware from the record that J.S.R. had agreed at the time of the assignment in bankruptcy to pay the trustee's fees. The registrar was satisfied the filings on the record were sufficient for her to decide the issues.
HELD: The registrar first dealt with the application to lift the stay, deciding that s. 192 of the *Bankruptcy and Insolvency Act* (BIA) did not cloak her with the authority to lift a stay unless the parties consented, and as J.S.R. had chosen not to participate in the proceedings, a lift application would need to be initiated by notice of application, which the trustee had not done. As to the matter of the trustee's additional costs, the registrar referred to s.156.1 of the BIA, which set out that agreements between the trustee and the bankrupt to pay fees and disbursements "may be enforced after the bankrupt's discharge," implying that she had the discretionary authority to recognize and enforce costs in the form of additional fees and disbursements, but chose not to do so during the adjournment because the estate was small and a costs award would likely completely "diminish the creditor's dividends". She decided she would deal with the trustee's claim for costs until conclusion of the bankruptcy when all issues could be finally resolved.

Back to top

***R v L.P.*, 2022 SKPC 27**

Scott, 2022-06-17 (PC22026)

Criminal Law - Sentencing - Dangerous Offender Application

The offender, L.P., was found guilty of assault causing bodily harm on his intimate partner after a trial before a judge of the Provincial Court (trial judge) (see: 2018 SKPC 54). Prior to sentencing, the Crown gave notice that it intended to apply to have L.P. declared a dangerous offender under Part XXIV of the *Criminal Code* (Code). A hearing for that purpose was held and the trial judge rendered her decision. She first itemized the evidence adduced at the hearing, including that of institutional witnesses and records from the correctional centres and penitentiaries in which L.P. had been an inmate; the reports and expert opinion testimony of Dr. Shabehram Lohrasbe, the psychiatrist appointed by the court to assess L.P. for purposes of the application; the forensic psychiatric reports and expert opinion testimony of Dr. Terry Nicholaichuk, who provided evidence for the defence; court binders related to L.P.'s criminal history, a pre-sentence report; a Gladue report (See: *R v Gladue*, [1991] 1 SCR 688); the evidence of Dr. Michelle Stewart (M.S.) of the Integrated Justice Program (IJP), who prepared the Gladue report; statistical information from Correctional Service Canada about dangerous offenders and long-term offenders; and testimony from A.S., L.P.'s mother, and L.P. himself. She next reviewed this evidence finding that: L.P. was a 42-year-old Indigenous person whose background included residential school survivors in his immediate family, a dysfunctional home life, alcohol abuse by his mother, and foster home placements; he witnessed spousal abuse; suffered physical abuse at the hands of his parents, and sexual and physical abuse of himself and his siblings by his step-father; he was sexually abused by a teacher over a lengthy period of time; his formal education as a child ended in grade 10; a number of close family members died tragically while he was a child, including three cousins in a house fire; as a child he participated in Indigenous culture; he was diagnosed with schizotypal personality disorder, alcohol dependence and schizophrenia; he likely suffered from FASD and other cognitive deficits; his criminal history began in 1998, and included 50

convictions, 11 violent offences, including four sexual assaults and numerous offences for breaching court orders, including by reoffending while in the community on conditions of release, with 13 of them being for failing to comply with conditions of recognizances made pursuant to s. 810.2 of the *Criminal Code*; the sexual assault convictions were for touching sleeping victims for a sexual purpose, though on one occasion he broke into the victim's home to do so; he committed assaults of various kinds while intoxicated by alcohol, including striking a victim with a bottle of alcohol; the predicate offence was a prolonged serious assault on an intimate partner while consuming alcohol which caused her injuries, and L.P. was committed while he was bound by a s.810.2 recognizance; he had a history of institutional offences while incarcerated; he was known to make sexually suggestive comments and gestures towards female staff; his access to programing and his participation in it was mostly unsatisfactory due to his "cognitive, behavioural and mental health deficits;" if he took his medications, stayed off alcohol, and attended counselling, his behaviour and thinking were "dramatically improved;" while under intense supervision in the community, when he was taking his medication, not consuming alcohol, and attending counselling, he showed a desire to live a normal life and shed his criminal lifestyle; A.S., his mother, was now sober, and wanted to help L.P.; the Gladue report and the witness M.S. described an "integrated program" developed by the IJP, of which she was the director, which was designed to assist people like L.P. surmount the "multiple forms of trauma including developmental, historic, intergenerational, cultural and systemic" which he "carrie[d]" with him; the expert witnesses both agreed that as of their most recent interviews with L.P., he was genuinely aware of his many limitations and problems and expressed what they believed was a genuine desire to reduce his "high risk for future acts of violence", which they opined did not include sexual assaults, because these were the result of poor self-control and were not a pathology; they both agreed that with the proper level and length of intensive supervision with treatment interventions including antipsychotic medications and relapse prevention programs, and with his cooperation and motivation to "participate in multiple treatment interventions" there was reason to be optimistic of reducing his risk of reoffending to a manageable level; further, they were in accord that at the age of 42, his risk of violence was on the decline; and they agreed that the shortest possible jail term and the longest possible intensive supervision in the community would be required to reduce his risk to the public to a manageable level.

HELD: The trial judge ruled the Crown had not proven beyond a reasonable doubt that J.P. met the criteria for designation as a dangerous offender as set out in ss. 752 and 753 of the Code but that she was satisfied he met the criteria for designation as a long-term offender under s. 753.1 of the Code. Following this finding, she then focused her attention on the imposition of a fit sentence for J.P. under s. 718 of the Code. In doing so, as required, she kept the overarching principle and goal of Part XXIV in mind, that being the safety and protection of the public. Following her analysis, which included an in-depth review and application of the pertinent and binding case law with respect to each step of her analysis, she sentenced J.P. to five years in custody followed by a 10-year long-term supervision order for the predicate offence of assault, and three years' consecutive time for the s. 810.2 breach of recognizance. She then credited J.P. with remand time of five and a half years for a total remaining sentence of 30 months' incarceration to be served in a federal institution. Lastly, she made orders concerning various ancillary matters. She recognized that her step-by-step analysis began with determining whether the predicate offence was a serious personal violence offence under s. 752(a) of the Code, which she found it was. She then considered on the evidence before her whether the predicate offence established that J.P. "constitute[d] a threat to the life, safety, or physical or mental well-being of other persons" and whether the predicate offence established, along with the offences in his criminal history, a pattern of failure by J.P.to restrain his behaviour and a likelihood of "causing death or injury to other persons, or inflicting severe psychological damage on other persons" in the future as she was required to do pursuant to s.753(1)(a)(i) of the Code. She was aware that at the stage of determining if J.P. was a dangerous offender, she was to decide, in accordance with the pronouncements in *R v Boutilier*, 2017 SCC 64, whether the Crown had proven beyond a reasonable doubt that his pattern of violent behaviour, which she found the Crown had proven under s. 753(1)(a)(i), was highly likely to be a "real and present danger to life or limb," that the pattern of conduct [was] substantially

or pathologically intractable" and that such a determination required a "prospective assessment of risk and the viability of future treatment." She then applied her factual findings to this legal requirement, in particular, that of the expert witnesses, the witnesses from IJP, and the community parole officers, which she said led her to conclude that the Crown had not shown that J.P. was an "intractable" offender, that his risk to the safety and security of the community could not be reduced to manageable levels through the methods testified to, and his honest resolve to commit to them. Nonetheless, she was not prepared to say that J.P. did not present a substantial risk to reoffend, that the predicate offence required a sentence of at least two years, and as a result, J.P. met the criteria of a long-term offender under s. 753.1(1). Having ruled on J.P.'s designation under Part XXIV, she then turned to the imposition of penalty on J.P., and the application of the general principles and goals of sentencing in s. 718, which in the context of a Part XXIV proceeding were to be governed by the primary goal of safety and protection of the public. She examined principles of proportionality, that the sentence should reflect "the gravity of the offence and the degree of responsibility of the offender," which led her to consider J.P.'s Gladue factors. She surveyed the case law to determine where this particular offender and this offence fitted within similar sentences previously imposed; she weighed the mitigating and aggravating factors; and she reviewed other principles, all this with a view of establishing J.P.'s moral culpability in relation to the offences, in the context of the primary principle of protection of the public, and accordingly arrived at the penalty she imposed.

Back to top

***R v T.G.L.*, 2022 SKPC 30**

Hinds, 2022-07-15 (PC22027)

Criminal Law - Sex Offender Information Registration Act (SOIRA) Order

T.G.L. applied for termination of a 20-year order made under the *Sex Offender Information Registration Act*, SC 2004, c10 (SOIRA) pursuant to section 490.015(1)(b) of the *Criminal Code*. The Crown opposed T.G.L.'s application. In 2011, T.G.L. had entered a guilty plea to a charge that he did make available representations of a person under the age of 18 years engaged in explicit sexual activity, contravening section 163.1(3) of the *Criminal Code*. In 2009, police identified that T.G.L. was sharing child pornography through a file sharing program. T.G.L. pled guilty and was sentenced in January 2012. As a condition of sentencing, an order was imposed on T.G.L. requiring his registration as a sex offender. T.G.L.'s circumstances before the court were markedly different than when he was sentenced: he had moved to a small community outside of Saskatchewan and commenced the operation of a restaurant that employed 12 people; he had married seven years ago and had an infant daughter, and his adult son from a previous relationship resided with him. T.G.L. testified about difficulties he was experiencing with his registration as a sex offender. In the small community where he began residing with his family and operating his restaurant, social media posts alluding to his status had been posted that affected his business; the police sent two marked vehicles to conduct a residence check in 2021, and recently, a woman accosted T.G.L. while he was with his daughter and stated he should leave the community because of his prior conviction related to child pornography. T.G.L. advised the court that he had privacy concerns related to his annual registration directed by the SOIRA order as it required him to attend to an RCMP detachment and publicly state to the receptionist who was behind a thin glass barrier that he was completing his annual registration as a sex offender. The sole issue for the court to consider was whether to terminate the SOIRA order T.G.L. is subject to.

HELD: The court terminated the SOIRA order and directed copies of the decision be provided to the commissioner of the Royal Mounted Police, the Attorney General of the Province of Saskatchewan and the Attorney General in the province where T.G.L. resides, pursuant to section 490.016(3) of the *Criminal Code*. Before commencing an analysis on the merits of T.G.L.'s application, the court reviewed the law relating to SOIRA orders. The court used jurisprudence, including the decision of *R v Debidin*, 2008 ONCA 868, to set out an updated framework to understand orders issued pursuant to SOIRA. The court looked at the governing principles of SOIRA; registration requirements under SOIRA, and duration of SOIRA orders. The governing principles of SOIRA are to aid police in the prevention and investigation of crimes of a sexual nature. Offenders are required by s. 5 of SOIRA to report information such as their place of residence, employment, and vehicle registration information. SOIRA imposes a duration of 20 years for orders issued but permits the ability of an offender to seek termination of an order he is subject to pursuant to section 490.016(1) of the *Criminal Code*. The key concept in s. 490.016(1) is "grossly disproportionate"; an offender must prove on application, on a balance of probabilities, that the order continuing would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature. An offender's privacy and liberty interests are considered on application. While considering whether an offender should be subject to a SOIRA order upon conviction, the court cited prior decisions and identified the standard imposed by "grossly disproportionate" to be very high. The court applied the law to T.G.L.'s circumstances and found it was appropriate to immediately terminate the SOIRA order as the impact of the order was grossly disproportionate to the public interest in continuing it. The court found T.G.L. to be leading a pro-social lifestyle. It further concluded that in addition to causing T.G.L. anxiety and stress, the fear of discovery of conviction has been realized in the small community where T.G.L. resides and operates his business because of the SOIRA order. The court was concerned by the public aspect of T.G.L. attending to the RCMP attachment and having to publicly state his reason for being there to the receptionist behind the glass barrier, while members of the public could hear. The court was also troubled by the residence check completed in 2021 that had two marked RCMP vehicles attend to the proximity of T.G.L.'s home, which had the effect of compromising T.G.L.'s privacy. In addition to terminating the SOIRA order, the court ordered the disclosure of its decision to the commissioner of the RCMP and to the Attorney General of Saskatchewan and the Attorney General where T.G.L. resides as is required pursuant to section 490.016(3) of the *Criminal Code*.

 Back to top

***R v Herring*, 2022 SKPC 31**

Brass, 2022-07-19 (PC22028)

Criminal Law - Assault Causing Bodily Harm - Self-Defence
Criminal Law - Motor Vehicle Offences - Driving over .08 - Elements of Offence
Criminal Law - Motor Vehicle Offences - Driving over .08 - Defence under s. 320.14(5) of *Criminal Code*

The accused, D.H., was tried before a judge of the Provincial Court (trial judge) on charges of committing an assault on C.B., causing bodily harm to him, and of having a blood alcohol concentration that was equal to or exceeded eighty milligrams of alcohol in one hundred milliliters of blood within two hours of ceasing to operate a conveyance. The trial judge assessed the credibility and reliability of the witness testimony and made the following notable factual findings: C.B. believed D.H.'s driving put his

family and the public at risk as he was driving in an erratic manner on a street heavy with pedestrian and vehicular traffic due to a fair; D.H. nearly sideswiped C.B.'s vehicle and nearly hit pedestrians, who then yelled and kicked his truck; D.H.'s driving was "deliberately slow, swerving side to side and randomly pressing on his brakes;" C.B. followed D.H. in his vehicle on his usual route home while honking his horn to get him to stop; D.H. pulled over, testifying that he believed C.B. was being a Good Samaritan; he testified further that C.B. immediately approached him with clenched fists, in an angry manner, then turned sideways in a way which led him to believe C.B. was going to strike him; D.H. said he punched C.B. with a fist to the face in self-defence; C.B. stated he was telling D.H. about his reckless driving and had turned to point back at the fairgrounds when he was punched, falling to the ground and fracturing his ankle; D.H. got in his truck and drove away without waiting for officers from the Weyburn Police Service (WPS) to arrive; C.B. was struck by D.H. at approximately 4:30 pm; at 5:30 pm, an officer at the WPS station was approached by D.H. and he was arrested for the assault and brought into the station; in the station he smelled of alcohol and appeared intoxicated; he had red eyes, slightly slurred speech, a flushed face and he admitted to consuming alcohol; the arresting officer had been told by an EMT that he saw D.H. drive away in his truck after punching C.B.; he was arrested for impaired driving and a breath demand was made of him; he provided two breath samples, the first at 6:15 pm with a reading of 160 mg and the second at 6:35 pm with a reading of 150 mg; the second test was taken five minutes outside the two-hour limit; the Crown proceeded on the second lower reading; D.H. had volunteered to an officer at the station that he knew he was "pissing off" the driver, C.B., and also volunteered that "someone has to teach these little spoon-fed fuckers a lesson and give him the spanking his mother should have given him;" D.H. told one officer he had drunk two beers at home after the incident but at trial testified it was eight beers; he also claimed he had not consumed any alcohol until he arrived at home; D.H. called no evidence that his blood alcohol level (BAC) was below .08 at the time of the incident or that his drinking pattern was consistent with his BAC readings at the time he was tested; and he testified he did not believe he would be required to provide breath samples when he drank the beer at home.

HELD: The trial judge rendered a verdict of guilty to both charges. He rejected D.H.'s testimony as it concerned s. 34(1) of the *Criminal Code* (Code). He recognized that he was required to first apply the test set out in *R v Gunning*, 2005 SCC 27: was there an "air of reality" to the defence of self defence? In doing so, he was aware that this test imposed an evidential burden, and not a persuasive one, on D.H. to show that the evidence as a whole, if believed, could raise a reasonable doubt that the Crown had failed to disprove D.H. had acted in self defence. The trial judge ruled that the air of reality test had been met by D.H. on his evidence that he saw an angry man with clenched fists coming toward him and make a movement which he believed was a wind-up for a punch, and so punched him in self defence. However, the trial judge went on to assess the evidence and found he did not believe the accused that he punched C.B. with great force in the face seconds after exiting his truck, though he thought C.B. was a Good Samaritan and did so without taking the reasonable step of asking him his reasons for wanting him to stop. The trial judge also pointed to D.H.'s statements that he was going to teach the sissy a lesson as contradicting his assertions he was only acting in self defence and was not intent on applying force to C.B. when he exited his truck. As to the .08 charge, the trial judge was satisfied from the evidence, including the certificate evidence filed during the trial, that the first breath sample was taken within the required two-hour period and the second lower reading proved D.H. was over the legal limit when he operated his truck. He found as well that D.H. had failed to make out the defence of post-driving consumption. Again, he disbelieved his evidence that he had had time to drink eight beers in 45 minutes while at home, or that he could reasonably believe that in the circumstances he would not be required to provide samples: it would be highly likely he would be promptly arrested for the assault and at that time, grounds for making a breath demand would be established. Lastly, with respect to this defence, D.H. had not provided any evidence creating an air of reality suggestive of the likelihood his BAC could be below .08 at the time he operated the truck, and at the same time his consumption pattern might result in a BAC consistent with his BAC at the time of testing. D.H. had not provided toxicology evidence that would permit the court to evaluate "the consumption, absorption, and elimination of alcohol from [D.H.'s] body." In coming to

these rulings, the trial judge stated that “from the *Preston* case, we see the approach taken in *Deshpande* is the accepted approach in the Saskatchewan Provincial Court” in assessing a defence under s. 320.14(1)(b) of the Code (see: *R v Deshpande*, 2021 ONCJ 699 and *R v Preston*, 2021 SKPC 43).

Back to top