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.

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Subject Index

***R v D.B.*, 2022 SKCA 76**

Caldwell Tholl Kalmakoff, 2022-06-29 (CA22076)

Criminal Law - Appeal - Conviction - Sexual Assault
Criminal Law - Assault - Sexual Assault - Evidence - Credibility - Appeal
Criminal Law - Evidence - Judicial Notice
Criminal Law - Appeal - Unreasonable Verdict
Appeal - Criminal Law - Sufficiency of Reasons

The appellant, D.B., appealed to the Court of Appeal (court) his conviction for sexually assaulting the complainant, C.N., following his trial before a judge in Youth Justice Court (trial judge) on numerous grounds, which for the most part, pertained to the trial judge's treatment of the evidence adduced at trial with respect to the reliability of D.B.'s testimony due to his having imbibed a psychedelic drug known as "Molly." D.B. also advanced the argument that the trial judge had erred in ruling that the Crown had

Appeal - Criminal Law - Driving Over .08

Appeal - Criminal Law - Sufficiency of Reasons

Barristers and Solicitors - Professional Negligence - Duty of Care

Civil Procedure - Access to Court Records

Civil Procedure - Appeal - Self-represented Litigant

Civil Procedure - Self-Represented Litigants - Duty of Court

Constitutional Law - *Charter of Rights*, Section 8 - nreasonable Search and Sei ure

Constitutional Law - *Charter of Rights*, Section 10(b) - Right to Counsel

Constitutional Law - *Charter of Rights*, Section 11(a) - Right to be Informed of Offence

Constitutional Law - *Charter of Rights*, Section 24(2) - *Grant* Analysis

Constitutional Law - *Charter of Rights*, Section 7 - Life, Liberty and Security of Person

Constitutional Law - *Charter of Rights*, Section - Arbitrary Detention - Overholding

Constitutional Law - Open Court Principle

proven to the required criminal standard the sexual nature of the assault, an essential element of the *actus reus* of the offence. Following a review of the trial judge's evidentiary findings, the court restated D.B.'s grounds of appeal as follows: whether the trial judge erred in assessing D.B.'s testimony; whether the verdict was unreasonable; whether the trial judge failed to provide adequate reasons; and whether the trial judge "appl[ied] the correct legal standard to her findings of fact when determining whether the elements of sexual assault had been proven".

HELD: The court dismissed the appeal. As to the matter of the trial judge's assessment of D.B.'s evidence, the court found no error on the part of the trial judge in rejecting D.B.'s evidence that his memory and perception of his actions were not distorted by having ingested Molly because it had not yet "kicked in". The court noted that the trial judge made findings of fact from C.N.'s evidence which she said were supported by the evidence of her brother, C.H., to the effect that D.B. was acting out of character by becoming "really hyper all of a sudden and started being touchy;" that he climbed on top of C.N., sitting on her belly with his knees on her arms, not letting her get up for half an hour, even though she was squirming and pleading with him while C.H. tried to push him off of her; that he told C.N. they were going to have sex; and that he touched her belly while trying to put his hand in her pants. The court noted also that the trial judge appreciated that C.H.'s testimony differed from C.N.'s in that he testified he heard D.B. ask C.N. if she "wanted to make a baby" and he did not testify to seeing any touching as described by C.H. Further, the court noted that the trial judge found that C.H. had memory gaps about how D.B. was keeping her down, or how she eventually freed herself. The court considered the trial judge's assessment of D.B.'s testimony, which consisted of a straight denial of C.N.'s evidence. In particular, she rejected his denial that the ingestion of the drug had made his testimony unreliable. The court observed, however, that she nonetheless put great weight on his description of the effects of the drug, as he had used it before, including that it "increas[ed]… his confidence in approaching women" and could affect his perception. D.B. argued that by accepting this evidence, the trial judge had improperly admitted it as expert opinion evidence; that she had improperly taken "judicial notice of the effects of Molly on perception and memory;" had drawn "an inference about Molly's effects that was not available on the evidence" or had misapprehended the evidence. With the benefit of the case law on point, the court ruled that the trial judge had not erred in any of these ways because D.B.'s testimony was not expert opinion evidence, being only his description of the effect of Molly on him on other occasions; that the trial judge had not taken judicial notice of the effects of this drug on memory or perception, and if she had she would have erred because such a fact in issue was not so certain nor so well-known that it would fall into the category of a fact that is "notorious or generally accepted to the point of being beyond reasonable debate;" and that she did not err in making an inference that D.B. was under the influence of Molly at the time of the incident to an extent which affected his memory and perception. The court commented that the trial judge did not err by using common sense and human experience to make this inference because it was not speculative, but was "grounded in, or flow[ed] from, the [ample] evidence from the testimony of C.N., C.H., and D.B. himself, given his confusion about how many times he had come and gone from the house; and that simply because no direct evidence had been presented about the effect of Molly on memory and perception, the

Contract - *Saskatchewan Farm Security Act*

Contracts - Agreement for Sale - Vendor Financing

Contracts - Sale of oods - Recovery of Farm uipment by Seller

Criminal Law - Appeal - Assault

Criminal Law - Appeal - Conviction - Sexual Assault

Criminal Law - Appeal - nreasonable Verdict

Criminal Law - Assault - Sexual Assault - vidence - Credibility - Appeal

Criminal Law - Dangerous Offender Designation

Criminal Law - Drug Offences

Criminal Law - vidence - Judicial Notice

Criminal Law - Prison and Prisoners - Regulation of Prisons - Prisoner Rights

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence

vidence - xpert vidence - Standard of Care

Family Law - Appeal - Division of Family Property

inferences she drew from the balance of the evidence did not demonstrate "a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence" on her part. As to the remaining grounds of appeal, the court rejected the notion that the trial judge's verdict was unreasonable or that the inconsistencies in the testimony of C.N. were so grave that her assessment of C.N.'s credibility and reliability could not "be supported on any reasonable view of the evidence," stating that the trial judge's reasons demonstrated that she was alive to the frailties in C.N.'s evidence but that she found C.H.'s evidence was trustworthy, credible, and corroborative of the essential portions of C.N.'s testimony; and that the trial judge stated and applied the law correctly with respect to her determination that the Crown had proven the essential element of the sexual nature of the touching when she used an objective test: whether a reasonable observer, considering all the relevant factors explicit or implicit in the trial judge's reasons, would have concluded that the touching was sexual or carnal in nature, and interfered with the bodily integrity of C.N.

Back to top

***Affinity Holdings Ltd. v Shaunavon (Town)*, 2022 SKCA 83**

Jackson Ottenbreit Caldwell, 2022-07-28 (CA22083)

Administrative Law - Municipal Tax Assessments - Jurisdiction
Administrative Law - Right of Appeal - Standard of Review
Municipal Law - Appeal - Property Taxes - Assessments
Municipal Law - Property Tax Assessments - Market Valuation Standard
Taxation - Property Taxes - *Cities Act*, *Municipal Board Act*, *Municipalities Act*, *Northern Municipalities Act, 2010*

Three groups of taxpayers (the appellants) appealed Assessment Appeals Committee decisions to affirm property assessments of non-regulated properties under *The Municipalities Act*, SS 2005, c M-36.1. The Court of Appeal issued one decision for the three appeals. Each of the properties was valued using the cost approach to valuation by applying a market adjustment factor derived from sales data from a sales array made up of 53 commercial properties sold throughout Saskatchewan. The appellants argued the assessments were not fair because the market adjustment factor did not reflect typical market conditions for similar properties and, therefore, the assessments did not meet the market valuation standard. Each argued two warehouse properties were not similar to the appellant's property. Each assessment was reviewed by the respective municipal appeals board under the statutory internal appeal process. One board changed the assessment and two boards confirmed the assessments. The board decisions were subsequently reviewed by the committee under the statutory internal appeals process. The committee restored or upheld the original assessment decisions. The next level of

Family Law - Child Custody and Access - Interim - Mobility Application

Family Law - Custody and Access - Interim - Mobility

Family Law - Parenting - Variation of Interim Order

Limitations - Application of *Limitations Act*

Municipal Law - Appeal - Property Taxes - Assessments

Municipal Law - Property Tax Assessments - Market Valuation Standard

Practice - Application for Summary Judgment - Disposition Without Trial

Queen's Bench Rules, Rule 7-2, Rule 7-3, Rule 7-5

Regulations - Interpretation - *Correctional Services Regulations, 2013*, Section 7

Statutes - Interpretation - *Correctional Services Act, 2012*, Section 16, Section 26

Statutes - Interpretation - *Criminal Code*, Sections 718, 718.1, 718.2, 753 and 753(4.1)

Taxation - Property Taxes - *Cities Act, Municipal Board Act*, *Municipalities Act*, *Northern Municipalities Act, 2010*

statutory appeal was to the Court of Appeal. The Court of Appeal considered whether: (1) the committee erred in the selection or application of the standard of review of a board of revision decision; and (2) the committee incorrectly interpreted and applied the market valuation standard, the Act and precedent in determining whether the assessment achieved equity.

HELD: The court dismissed the appeals. The court thoroughly described property assessment, the assessment appeal process and the meaning of the applicable standards of review. (1) Although the committee did not precisely identify the applicable standard of appellate review, the committee correctly applied the proper standard of appellate review to each type of question. The Court of Appeal identified, explained and described the standards of review applicable at each level of statutory appeal. A reasonableness review applies to questions of mixed law and fact, and a correctness standard of review applies to questions of law, assessment practice and jurisdiction at each level of the assessment appeal regime. The Legislature established an internal assessment appeal regime under *The Municipalities Act*, *The Cities Act*, *The Northern Municipalities Act, 2010*, and *The Municipal Board Act*. The boards of revision and committee are internal appellate tribunals which apply internal standards of review set out in the statutory regime, and not the judicial standards of review applied by courts. The assessor makes the assessment and outlines the facts, assessment law and principles on which the assessment was based. The board of revision has the power to correct specifically identified errors if the assessment was based on a material error and if equity was not achieved. The board of revision hearing is an appellant's first opportunity to present evidence and argument. In this respect, the board of revision hearing is not similar to a judicial review or court appeal. The board of revision is a tribunal of first instance that starts from a presumption the assessor's assessment is correct. The board reviews the evidence and assesses whether facts are proven on a balance of probabilities. In a board of revision hearing, the appellant has the onus to establish on a balance of probabilities that a material error occurred. The committee fulfills a traditional appellate role and reviews board decisions for error. Consistency is important in assessment decisions, and thus, the committee may resolve issues of stare decisis and resolve interpretation differences among boards of revision. The committee reviews questions of fact on a standard of reasonableness. The Act provided a right of appeal to the Court of Appeal only with leave and only on questions of law or jurisdiction, which attract a correctness standard. (2) The committee correctly interpreted and applied the market valuation standard and the statutory terms 'similar properties', 'allowing for statistical testing', and 'quality assurance standards established by order of the agency'. The court explained the income, cost and comparable sales methods of appraisal and the use of data and statistical testing in property assessment. Because it was permissible under the legislation, principles, guides and handbooks to use a different approach to property assessment did not lead to the conclusion that the assessor was unreasonable in the approach employed. Determining whether properties are similar for the purposes of the market valuation standard and the achievement of equity in non-regulated property assessment is a process involving professional judgment in the proper application of assessment law and practice to the facts, circumstances and conditions affecting the properties as of a base date. The market valuation standard is achieved when the assessed value of a property is an estimate of the market value, as of the first day

Torts - Negligence - Duty of Care - Negligence - Professional Negligence

Case Name

Affinity Holdings Ltd. v Shaunavon (Town)

Charles v Director of Saskatoon Provincial Correctional Centre

Fraser v Ksenych

J.M.P. v C.J.N.

Leffler v Aaron Behiel Legal Professional Corporation

MFI Ag Services Ltd. v Kramer Ltd.

N.M. v B.M.

R v D.B.

R v Maytawayashing

R v Peterson

R v Smockum

R v Watetch

R.W.J. v Canada (Attorney General)

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in the property valuation cycle; uses one of income, cost or sales-comparison methods of appraisal and employs accurate data that allows statistical confirmation of the reliability of the estimate of market value; reflects typical market conditions for similar properties; and has a median assessed value to adjusted sale price ratio between 0.95 and 1.050. The appellants argued that certain properties in the sales array deviated significantly from the median adjusted sale price ratio and, therefore, the assessments were unreliable estimates of the fair market value of the properties in the assessment array. Although the assessor could have taken a different approach, the assessor had discretion to choose among several possible approaches. An assessor cannot whimsically depart from prior assessment practice, but assessors can take different paths in the assessment of a property so long as the assessor justifies any material departure or inconsistency with its prior assessment of the property. Every remedy for a material error ordered by a board or committee must achieve equity with similar properties. Although the committee took a legally incorrect approach to the review of the board of revision decision, the committee's bottom line conclusion that the board was not entitled to interfere with the assessment on the basis that the sales array could have been further stratified was correct in relation to each of the three appeals. The court ordered costs in favour of each of the respondent municipalities in their respective appeal.

 Back to top

***R v Watetch*, 2022 SKCA 91**

Richards Barrington-Foote Kalmakoff, 2022-08-10 (CA22091)

Constitutional Law - *Charter of Rights*, Section 7 - Life, Liberty and Security of Person
Constitutional Law - *Charter of Rights*, Section 11(a) - Right to be Informed of Offence
Criminal Law - Appeal - Assault

At his trial before a judge of the Provincial Court (trial judge) for aggravated assault and assault simpliciter alleged to have occurred at the Saskatchewan Penitentiary (Sask Pen), the accused, K.W., brought an application pursuant to ss.7 and 11(a) of the Charter, arguing that Crown's actions had resulted in abuse of process. The Crown had delayed the swearing of an information, which delay caused him to enter a plea bargain on what he believed was his only outstanding charge, a pending second-degree murder allegation. He also complained that the 23-day period between the swearing of the information and being informed of the charges was unreasonable and caused him prejudice because he was not able to consult counsel before his first court date. The trial judge allowed the Charter motion and as a remedy excluded crucial evidence from the trial, which led to K.W.'s acquittal and prompted the Crown to appeal to the Court of Appeal. No factual findings were at issue on appeal. These were summarized by the court and included: on January 3, 2019, in order to determine if the

accused could be identified as one of the perpetrators of the assaults, the investigating officer, S., requested that the security intelligence officer at the Sask Pen provide him with an officer recognition report (ORR); prior to receiving the ORR, S. was put in charge of a high priority, complex investigation which forced him to put aside all other matters; he did not obtain the ORR until June 27, 2019, at which time he reviewed it and was satisfied he had sufficient evidence to swear an information charging K.W. with the assaults; he did so on July 22, 2019; as K.W. was an inmate at Sask Pen, he was not arrested but was brought to court pursuant to a production order on August 14, 2019, where he learned of the charges for the first time; on June 11, 2019, K.W. resolved a separate charge of second-degree murder by entering a guilty plea to manslaughter, for which he received a sentence of 10 years' incarceration; though K.W. did not call his previous counsel or other witnesses on the Charter motion, he claimed his counsel had determined he would not be charged with the assaults, and he stated he would not have entered into a plea bargain on the murder charge had he known he would be charged with the assaults since to do so would be detrimental to his ability to counter the dangerous offender application the Crown would bring if it obtained convictions for the assault charges.
HELD: The court allowed the Crown's appeal and ordered a new trial. It first dealt with K.W.'s s. 7 ground of appeal, setting out the "doctrinal background" relevant to a claim of abuse of process in the context of s. 7, as contained in such cases as *R v O'Connor*, [1995] 4 SCR 41, and *R v Babos*, 2014 SCC 16 (*Babos*), recognizing that the type of abuse of process being advanced by K.W. fell within the "residual category," requiring K.W. to show that the state conduct in this case was "so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency" and thereby harms "the integrity of the justice system" (see: *Babos*). In reviewing the facts pertaining to the s. 7 argument, the court first pointed out that delay in laying charges, without more, will not amount to an abuse of process under s. 7 since the courts will not act as a watchdog over police investigative matters unless these have prejudiced an accused's right to a fair trial, which the court stated was not in issue here. As to K.W.'s claim that he was prejudiced by being led to believe no charges would be laid, the court first pointed out that this belief "sits on somewhat shaky factual ground," which the trial judge chose to disregard. Nonetheless, the court went on to consider the matter in the light of *R v Demers* (1989), 49 CCC (3d) 52 (Que CA), a case where the Crown proceeded with charges after agreeing to drop them in exchange for Mr. Demers' assistance with another investigation. In contrast, the court expressed, K.W.'s case could not be seen as rising to a level of an abuse of process: no plea agreement was reneged on, no one was misled, and S. did not act in bad faith. As to the 23-day delay in informing K.W. of the charges, the court commented that the trial judge failed in her analysis by wrongly suggesting that S. was required to follow the arrest warrant procedures of the *Criminal Code* even though K.W. was already in jail in the Sask Pen and erred in finding that producing him was "an example of the systemic violation of s. 11(a)." In the final analysis, the court held that the trial judge erred by misapplying *R v Delaronde*, [1996] QJ No 535 (QL) (Que CA) and finding an unreasonable delay in informing K.W. of the charges, or that he suffered any prejudice by being informed of the charges on his first court appearance.

Back to top

***Fraser v Ksenych*, 2022 SKCA 93**

Richards Jackson Tholl, 2022-08-11 (CA22093)

Civil Procedure - Appeal - Self-represented Litigant
Civil Procedure - Self-Represented Litigants - Duty of Court
Family Law - Appeal - Division of Family Property

The main issue of this appeal was whether the trial judge had properly exercised his duty to assist the appellant, M.F., a self-represented litigant, in conducting his case, which was held to determine parenting, support, and division of family property issues. The trial proceeded before a judge of the Court of Queen's Bench (trial judge). M.F. appealed all of the trial judge's rulings to the Court of Appeal (court) on a number of grounds, but the court saw fit to consider in detail those grounds centered on the question of the adequacy of the trial judge's assistance to M.F. during the trial. M.F. had limited his argument to these alone. HELD: The court dismissed the appeal except to the extent of correcting minor calculation errors in the division of family property. The court first oriented itself as to the case law it was to apply in determining whether the trial judge properly exercised his discretion in the extent and manner of his assistance to M.F. while maintaining fairness to J.K., the opposing party. The court recognized that the discretion of the trial judge in assisting an unrepresented litigant during a civil trial as opposed to a criminal trial was subject to a less rigorous test, that being "a trial judge must provide some assistance and accommodation to ensure that a self-represented litigant has a fair opportunity to present a case to the best of his or her ability" as stated in *Sydor v Kehough*, 2019 MBCA 119, and that self-represented litigants in civil matters have a duty and responsibility to prepare their case in accordance with the rules of evidence, the applicable law and civil procedure. With these governing principles in mind, the court reviewed the trial judge's exercise of his discretion in the manner and extent of his assistance to M.F. on the standard of review required for discretionary decisions, that being deference. The court then dealt in detail with M.F.'s specific concerns with the trial judge's assistance to him, under the following headings: J.K.'s disclosure obligations; restrictions on or lack of assistance in presenting evidence; filing of documents by J.K. without M.F.'s consent; structuring of the final arguments and improper use of exhibits. In general, the court's reasoning was that M.F. had not shown what he would have done differently had the trial judge not acted as he alleged; what he requested be done was irrelevant to the issues at trial; he raised no objections to, and agreed with, suggestions and directions of the trial judge on specific issues during the trial; he objected to the admission of his own documents; the trial record showed the trial judge provided M.F. with helpful direction and assistance when it was needed which he now claimed had not been helpful; he had consented to the admission of evidence he argued on appeal should not have been entered; and he took objection on appeal to proceeding in a manner he himself had suggested. In conclusion, the court found the trial judge had committed no error in the exercise of his discretion in how and to what extent he assisted M.F., observing that the trial record demonstrated M.F. was fully capable of navigating the complexities of the trial, and did not require much help from the trial judge, though he did receive what was necessary. As well, the court pointed out, the trial judge provided him with a guide to conducting a trial and explained the trial process to him. All in all, the court could not find that the trial judge had failed in his duty of fairness to M.F.

 Back to top

***R v Smockum*, 2022 SKQB 127**

Currie, 2022-05-13 (QB22321)

Criminal Law - Dangerous Offender Designation
Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence
Statutes - Interpretation - *Criminal Code*, Sections 718, 718.1, 718.2, 753 and 753(4.1)

The offender had been convicted of attempted murder. The Crown sought a dangerous offender designation and indefinite sentence of incarceration. The offender opposed the dangerous offender designation and proposed a substantial prison term followed by a seven-year supervision order. The offender was 41 and had a history of childhood physical and sexual abuse. When the offender was in grade three, he beat another child, resulting in the other child having a broken rib and punctured lung. His criminal record included 11 assaults, many of which involved violence causing serious injuries and continuing until restrained by third parties. The judge considered: (1) should the offender be designated as a dangerous offender; (2) was an indefinite sentence appropriate?
HELD: (1) The court declared the offender to be a dangerous offender. Under s. 753 of the *Criminal Code*, the Crown had the onus to establish the offender was convicted of a serious personal injury offence; the offence was part of a broader pattern of violence; there was a high likelihood of harmful recidivism; and the violent conduct was intractable. All four conditions were satisfied. The offender's violence was unrestrained by a concern for the consequences to the victim, and constituted a threat to the life, safety or physical or mental well-being of other persons. One expert witness opined it was not likely that violent recidivism would be reduced to an acceptable level through intensive programming for violence, spousal violence and alcohol abuse. The other expert witness opined it was premature to conclude the risk of violent recidivism was not likely to be reduced to an acceptable level. Previous programming had not resulted in lasting changes. The offender did not view himself as primarily responsible for his behaviour. The expert witnesses disagreed on the question of whether a threat of a dangerous offender designation in itself caused a reduction in recidivism rates. The offender had a relatively stable employment history while in the community and had the support of family. He appeared to have a new recognition of the role of his childhood abuse and stated he was committed to change. However, the offender had said he was committed to change before and had breached conditions many times. The court was not convinced that the possibility the offender would change was more than a hope. The court accepted the expert evidence that risk of all criminal activity decreases with age but noted that it might be 20 years before this factor reduced the risk. The overall purpose of a dangerous offender designation is to protect the public. Despite the expected eventual effect of aging, the offender's violent conduct was, for the time being, intractable. (2) The offender was sentenced to indefinite incarceration. The sentencing principles in ss. 718, 718.1, 718.2 and 753(4.1) of the *Criminal Code* applied. The least intrusive sentence that achieved public protection was required. The court was not satisfied that a conventional sentence including probation would adequately protect the public because the offender was highly likely to remain a violent offender until at least 60 years of age, 19 years into the future. A conventional sentence would put him back into the community before the risk was reduced.

Back to top

***N.M. v B.M.*, 2022 SKQB 138**

Gerecke, 2022-05-30 (QB22338)

Family Law - Child Custody and Access - Interim - Mobility Application

The court record showed that the applicant, N.M., and the respondent, B.M., were married in December 2013 and separated in October 2021. Two children were born to them, R.M.M. in 2014 and R.B.M. in 2015 (children). N.M. applied to a judge of the Court of Queen's Bench (chambers judge) in May 2022 for an interim order permitting her to relocate the children from Warman, Saskatchewan to Sylvan Lake, Alberta. The chambers judge was satisfied he could extract the relevant facts from the record of the court proceedings and the affidavits, which he acknowledged were in many ways conflicting, and contained irrelevancies, to arrive at a decision. N.M. and B.M. met in 2008, when N.M. was a resident of Sylvan Lake and B.M. of Medicine Hat, where they lived together until the fall of 2013 when they moved to Saskatoon; in 2016, the family moved to a home in Warman, which continued to be the home of the children at the date of the application; no formal parenting agreement or interim order was in place at the time of the application; the children were parented according to an informal shared parenting arrangement; during the marriage and since the separation, N.M. performed the majority of the routine parenting and was at home running a daycare; B.M., who worked long hours outside the home, was primarily responsible for the children's activities, such as hockey, ringette, soccer, and more informal activities, including visits with the children's friends; otherwise, he was a "constant presence in the children's lives;" he assisted with the day-to-day care when needed; N.M. became addicted to alcohol in 2021 and went into a rehab program; she had maintained her sobriety for six months prior to the application; her alcohol addiction and recovery were disruptive for the family; B.M. used marijuana daily, but said he would not use it when parenting the children in the future; N.M. took steps to detach herself from Warman in advance of her application to relocate to Sylvan Lake, in ways such as not looking for alternate accommodation after her parents sold their house where she was living, and moved to Sylvan Lake, accepting work in Sylvan Lake at iRecover, not looking for work in Warman since August 2021, not "build[ing] a future for the children in Warman" after completing rehab, and talking to the children about the move; her reasons for moving were that she claimed her employment there was ideal for her and the children because of regular work hours and access to sobriety resources, the presence of her parents and a sister with cousins living in Sylvan Lake, and that the children were young and adaptable; Sylvan Lake and Warman are 600 km apart; and the children were living a settled life in Warman, the only community they knew, were doing well in school, had friends and family there, were involved in sports and activities, and were living in their own home, close to their mother and father.

HELD: The chambers judge dismissed N.B.'s application to relocate the children and ordered that they not be relocated beyond 30 km of Warman. Following the application of his factual findings to the factors enumerated in ss. 16 and 16.92 of the *Divorce Act*, as well as case law fleshing out these provisions, he ruled that the proposed relocation would not be in the best interests of the children. In doing so, he concentrated his focus on the following factors: the needs of the children; "the nature and strength of each child's relationship with each parent, their siblings and grandparents and others who play important roles in the children's lives;" "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;" reasons for the proposed relocation; impact of the relocation on the children; and the reasonableness of N.B.'s proposal to accommodate N.M. in exercising his parenting of the children. First, he concluded that the status quo was shared parenting in the children's established home in Warman, and that N.M. had the onus of presenting "compelling circumstances to warrant a relocation order," which she had failed to do. He expressed that his review of the factors convinced him that these were either of even weight or weighted against the relocation. In particular, he pointed to N.B.'s reasons for the relocation, noting that these were primarily aimed

at her own interests, not those of the children, which she rationalized by an over-emphasis of the factor of "happy parent-happy child". Further, he could not endorse the move due to the distance between Warman and Sylvan Lake, which he believed would be hard on the children and detrimental to N.M.'s relationship with them for no appreciable benefit to them.

 Back to top

***Leffler v Aaron Behiel Legal Professional Corporation*, 2022 SKQB 158**

Crooks, 2022-06-30 (QB22355)

Practice - Application for Summary Judgment - Disposition Without Trial
Queen's Bench Rules, Rule 7-2, Rule 7-3, Rule 7-5
Barristers and Solicitors - Professional Negligence - Duty of Care
Torts - Negligence - Duty of Care - Negligence - Professional Negligence
Contracts - Agreement for Sale - Vendor Financing
Evidence - Expert Evidence - Standard of Care

The plaintiffs and the defendant both applied for summary dismissal. The plaintiffs engaged the defendant lawyer to draft a contract to formalize the sale of the plaintiff's landscaping and excavating business. The plaintiffs had negotiated the sale directly with the purchasers, although the defendant lawyer and other professionals provided advice. The sale included $300,000 in vendor financing and referred to personal guarantees by the shareholders of the purchaser corporation. Personal guarantees were not signed. Issues arose with the repayment of the vendor-financed portion of the sale. The defendant lawyer started litigation on behalf of the plaintiffs to realize repayment. The defendant lawyer discontinued the litigation without recovering payment. The plaintiffs then sought to recover the unrealized payments from the defendant lawyer, alleging he did not meet the standard of a reasonably competent lawyer. The judge considered: (1) was summary judgment appropriate; (2) what standard of care did the defendant owe the plaintiffs; (3) was the expert evidence admissible; (4) did the defendant meet the standard of a reasonably competent lawyer; (5) was there a genuine issue requiring a trial; and (6) what damages did the plaintiffs suffer?
HELD: (1) Summary judgment was appropriate. The issues between the parties related to the application of the law to undisputed facts. Summary judgment achieved a fair and just adjudication, allowed the judge to make the necessary findings of fact and to apply the law, and was proportionate, more expeditious and less expensive. (2) The defendant was held to the standard of a reasonably competent lawyer. The standard of a reasonably competent lawyer required the lawyer advise clients of the risks of vendor financing and risks of transferring title without securing the payment of the purchase price. The primary problem with the transaction was that the lawyer did not conduct due diligence to confirm the shareholders of the purchaser corporation. (3) The plaintiffs filed reports of two experts regarding legal counsel's role representing a client providing vendor financing. The defendant objected to the expert evidence because it did not consider the context of the retainer nor the purchaser's control of assets before the sale agreement was finalized. The expert evidence was uncontradicted. Expert evidence is generally required to determine standard of care in a lawyer negligence claim. The judge accepted the expert opinion on the basic principles in assisting a client in a commercial sale of a business with vendor financing; security considerations in vendor-financed transactions; the distinction between promissory notes, personal guarantees and security agreements; and the expert's opinion on the particular sale

agreement. The defendant lawyer was aware of the need to hold the shareholders liable for the debt. The defendant overlooked the due diligence required to confirm who the shareholders were. The defendant lawyer argued he was not specifically retained to conduct due diligence searches and the deal was made before he was retained to prepare the documentation. The judge rejected these arguments. There was no written retainer. The lawyer did not negotiate the deal but did provide ineffectual advice regarding the deal. The defendant lawyer advised the plaintiffs that two individuals would be liable under the agreement despite the individuals not being party to the agreement and the lack of promissory notes or guarantees from those two individuals. The defendant lawyer advised, based on a faulty assumption, that the two individuals were shareholders of the purchaser corporation and did not investigate whether the corporation had any assets. The plaintiffs relied on the advice and commenced an action against two individuals when there was no connection between those two individuals and the debt. The defendant lawyer did not meet the standard of care expected of a reasonably competent solicitor. (5) There was no genuine issue for trial. The plaintiffs' application for summary judgment was granted. (6) If the defendant had advised the plaintiffs that they were essentially gambling $300,000, the plaintiffs would not have proceeded with the transaction. Had steps been taken to provide an improved level of security, the plaintiffs would have received the full purchase price. This was not a mere loss of a chance of recovery. The defendant was ordered to pay the plaintiffs the remaining purchase price plus interest according to the formula in the agreement.

Back to top

***R.W.J. v Canada (Attorney General)*, 2022 SKQB 159**

Popescul, 2022-06-30 (QB22363)

Civil Procedure - Access to Court Records
Constitutional Law - Open Court Principle

A member of the media made a request for access to court records to review Court File No. QBG 1782 of 1998, Judicial Centre of Saskatoon. The subject matter of the file was an action by one R.W.J., who alleged he was physically and sexually assaulted while a day student from 1961 to 1965 and a resident of St. Anthony's Residential School from 1967 to 1969. No steps had been taken in the action since 2003, when R.W.J. underwent examinations for discovery. The court file included transcripts of this questioning, and "memorandums regarding pre-trial management meetings."
HELD: The judge of the Court of Queen's Bench to whom the matter was referred first reviewed the case law with respect to the open court principle. He agreed that this principle was of "crucial importance in a democratic society" and so unrestricted access by the public to the courts, including the right to review court documents, is presumed. (See: *CBC v Canada (Attorney General)*, 2011 SCC 2) He went on to refer to *Sherman Estate v Donovan*, 2021 SCC 25, which clarified that the open court principle was constitutionally protected by s. 2(b) of the Charter, but was subject to a "discretionary limit test" in three parts: whether the principle "poses a serious risk to an important public interest," whether reasonable alternative measures "will not prevent this risk" and whether the benefits of a limitation to the principle outweigh the negative effect of these constraints. Next, he reviewed the judicially endorsed principle that the "court retains supervisory discretion over its own court records" irrespective of the rule of functus officio, thereby ensuring public access to them. In this case, the judge reasoned that unfettered access to the court record posed a risk to

the privacy rights of R.W.J.to not have material of a sensitive and highly personal nature exposed to the view of the public long after he had ceased to be preoccupied with it. He did go on to find that he could prevent this risk to R.W.J.'s privacy rights by not granting access to the discovery and pre-trial management materials, and ordering that no details of the court record be published before applying first to the court, with notice to R.W.J. and the defendants.

Back to top

***Charles v Director of Saskatoon Provincial Correctional Centre*, 2022 SKQB 166**

Klatt, 2022-07-14 (QB22361)

Administrative Law - Judicial Review - *Habeas Corpus*
Administrative Law - Natural Justice - Procedural Fairness
Administrative Law - Judicial Review - Duty of Fairness - Full Disclosure
Criminal Law - Prison and Prisoners - Regulation of Prisons - Prisoner Rights
Regulations - Interpretation - *Correctional Services Regulations, 2013*, Section 7
Statutes - Interpretation - *Correctional Services Act, 2012*, Section 16, Section 26

The applicant applied for *habeas corpus* when the Saskatoon Provincial Correctional Centre (SPCC) upgraded his security assessment and moved him from a low security unit to a secure unit on two separate occasions. The applicant claimed his right to procedural fairness was violated because he did not receive the reports that had been relied upon in preparing the security assessment and because the decision-maker, SPCC, was not impartial. The applicant was incarcerated in September 2020. He was initially rated at low security level. In January 2021, the applicant was moved to a secure unit. He was returned to a low security unit a few weeks later. In February, he was again moved to a secure unit. For each security upgrade, the applicant was provided a summary of the incidents relied upon in moving him to high security assessment: refusing to wear a mask when instructed to do so; disobeying orders; causing fear in another inmate; interfering and arguing with staff. The applicant requested detailed disclosure including reports, video surveillance, detailed log reports, and lists of staff witnesses. The detailed disclosure was not provided. The court considered: (1) was the issue of the first move to a secure unit moot because the applicant had been returned to the low security unit before the hearing; (2) did SPCC breach its duty of procedural fairness by failing to disclose the reports that it considered in preparation of the assessments; (3) did SPCC breach its duty of procedural fairness by failing to appoint an impartial decision-maker; and (4) were the security assessment decisions unreasonable?
HELD: The application was dismissed. (1) The court heard the application in relation to both security upgrades. The challenge to the first decision was arguably moot because the applicant had been returned to low security a few weeks later. Circumstances change quickly in prison. The applicant argued the same issues in relation to both security upgrade decisions and the prison relied on previous incidents to support its decisions. Hearing the arguably moot issue put matters in context. (2) Security assessments attract lesser procedural protections than prison discipline decisions. The *Stinchcombe* duty to disclose does not apply in the administrative context. Security assessment reviews occur at least every 21 days for the purpose of maintaining order, managing risk, and restricting inmates as little as appropriate. The applicable regulations required that, after the decision was made, the SPCC give the applicant reasons for the decision and the opportunity to respond. The SPCC decisions provided sufficient

information for the applicant to present arguments why his security level should be changed. (3) A correctional officer completed a security assessment recommendation. The Assistant Deputy Director of Programming for the applicant's unit met with the correctional officer and then prepared a decision for the signature of the Deputy Director of Programming. The Deputy Director of Programming had no in-depth knowledge of the applicant's behaviour. His partiality was not coloured. An informed person, viewing the matter realistically and practically and having thought the matter through, would not find a reasonable apprehension of bias. (4) The decisions were reasonable. The purpose and relevant factors were listed in the applicable policy. An inmate must be placed in the least restrictive environment that will assure the security, safety and the good order of the correctional centre and prevent undue risk to the inmate, other inmates, staff or the public. Medium or high security assessments are warranted where an inmate is an escape risk, uncooperative, or refuses to participate responsibly in routines. The applicant was defiant to health procedures. The decisions were transparent and intelligible.

 Back to top

***R v Maytawayashing*, 2022 SKQB 170 (not yet available on CanLII)**

Clackson, 2022-07-18 (QB22362)

Criminal Law - Drug Offences
Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure
Constitutional Law - *Charter of Rights*, Section 24(2) - *Grant* Analysis

The accused, T.M., brought a pre-trial application pursuant to s. 8 of the *Charter* to the judge of the Court of Queen's Bench (trial judge) trying her case for a ruling that her right to be secure against unreasonable search and seizure was infringed and that as a result cocaine and methamphetamine found in a package she had shipped by Purolator courier that had been seized by police should be excluded from the evidence at trial pursuant to s. 24(2) of the *Charter*. The trial judge reviewed the evidence presented on the Charter voir dire, consisting of testimony from one witness called by the Crown, Sgt. Kelly Tryon (Sgt. K.T.), to make his factual findings: T.E., the manager of a Purolator Courier outlet in Saskatoon, on the authority of a standard shipping agreement, inspected a cardboard box which he believed contained illicit drugs; he did so based on his "considerable experience" dealing with suspicious packages; he satisfied himself on a preliminary examination that in the cardboard box (package) were two teddy bears containing drugs in the form of bricks of cocaine and methamphetamine; T.E. called Sgt. K.T., who attended at Purolator, and without fully opening the teddy bears examined them sufficiently to form grounds to believe cocaine was in one of the teddy bears; he seized both teddy bears and brought them to the police station, where they were fully opened and proved to contain bricks of cocaine and methamphetamine; T.E. did not testify and no admissible evidence about the terms of the standard shipping agreement was called on the voir dire; at no point had Sgt. K.T. sought to obtain a warrant to seize and open the package, believing that s. 489 of the *Criminal Code* (Code) and his common law power to prevent the commission of a crime pursuant to an Act of Parliament provided him with lawful authority to seize and search the package.
HELD: The trial judge ruled that both the search at the Purolator outlet (first search) and at the police station (second search) were conducted in breach of T.M.'s right to be secure against unreasonable search and seizure. He went on to decide, however, following a s. 24(2) analysis in accordance with *R v Grant*, 2009 SCC 32, that T.M. had failed to prove on a balance of probabilities that

including the evidence of the drugs derived from the searches would bring the administration of justice into disrepute. He first determined that T.M.'s privacy right, which s. 8 was intended to protect, was infringed by Sgt. K.T.'s actions, but as the infringements involved an interference with an "informational" right of privacy as opposed to a personal right of privacy, such as the taking of bodily substances, her privacy interests in the package were "diminished" to a degree. He disagreed with the Crown that s. 489 of the Code or the common law power to prevent crime legitimized a warrantless and therefore a *prima facie* unreasonable search and seizure, absent evidence of exigent circumstances, which did not exist in this case. He also rejected the Crown's argument that because T.E. was not a state agent, T.M.'s *Charter* rights were not engaged by his passing on the package to Sgt. K.T., and that as a result Sgt. K.T. received it free from any obligation to comply with s. 8. He pointed out first that he had no evidence before him as to the terms of the shipping agreement, i.e., whether these allowed Purolator to open the package, and in any event *R v Cole*, 2012 SCC 53 was clear authority for the proposition that a contract allowing a non-state agent to access private information from an individual which is then put into the hands of police did not "afford… the police lawful authority to conduct [a] warrantless search and seizure." Having found the Crown had failed to show the warrantless search and seizure were not unreasonable, the trial judge then turned to the s. 24(2) *Grant* analysis, which he acknowledged required him to consider whether admission of the drug evidence at trial would bring the administration of justice into disrepute based on three criteria: "the seriousness of the *Charter*-infringing conduct," "the impact of the breach on the accused's *Charter* protected interest," and "society's interest in adjudication of the case on its merits," reasoning that he was not required to "dissociate… [himself] from the fruits of the unlawful conduct" because, first, Sgt. K.T.'s actions were motivated by a sincere desire to prevent crime but an erroneous belief as to his warrantless search powers; second, the search and seizure was a diminished one because it involved informational privacy and not a violation of T.M.'s bodily integrity; and lastly, the drug evidence was reliable, and its exclusion would "gut the case." Lastly, the trial judge said because strong reasonable grounds existed for the issuance of a search warrant, discovery of the evidence was inevitable, which also weighed in favour of its inclusion.

 Back to top

***J.M.P. v C.J.N.*, 2022 SKQB 170**

Brown, 2022-07-21 (QB22366)

Family Law - Parenting - Variation of Interim Order
Family Law - Custody and Access - Interim - Mobility

In July 2022, J.M.P., the father of two children, aged eight and four years, applied under s. 8(4) of *The Children's Law Act 2020* (CLA 2020) to a judge of the Court of Queen's Bench (chambers judge) to vary an interim order made in June 2020 giving him primary residence of the children and generous access to their mother, C.J.N. The interim order also required the children "remain in Regina unless the parties agreed otherwise or there was a further court order." J.N.P. wished to amend the term that the children remain in Regina by permitting them to relocate with him. The chambers judge was required to determine from the affidavit evidence filed at court and the court record, first, whether there had been a "material change in circumstances" since the making of the interim order and second, whether the relocation was in the best interests of the children, having regard to the enumerated factors set out in ss.10 and 15 of the CLA 2020. In arriving at his decision, he found as fact that: at the time the interim order was

made, J.M.P. was working in Regina; following the interim order, he was laid off; to meet the necessaries of life for the children, he secured employment at a location within two hours' travel time from Regina, the place where he had grown up and where family and friends continued to live; at the time the interim order was made, CJ.N. adduced evidence to the effect that her alcohol and drug consumption was "no longer an issue," that she had quit drinking in February 2020, and "had an addictions counsellor;" it came to light and was part of the evidence that C.J.N. had not quit drinking, and had not taken addictions counselling; in fact, C.J.N. was drinking heavily, and her mental health was deteriorating; C.J.N.'s behaviour included making death threats to J.M.P., which resulted in no-contact orders with him, making unfounded allegations of child abuse against J.M.P., having firearms removed by police from her home, accidentally injuring herself in front of the children when drinking, not maintaining suitable housing for them, being prevented by school authorities from picking up the children and having the children apprehended by the Ministry of Social Services while in her care, resulting in a two-month committal order; generally, the children lived a chaotic existence when with C.J.N.; and in April 2022, J.N.P. moved the children without notice to C.J.N. under s. 13 of the CLA 2020.
HELD: The chambers judge concluded that the evidence satisfied him there was a material change in circumstances since the interim order was made, and that it was in the best interests of the children that they be allowed to relocate with their father. In coming to this decision, he first looked at the onus provisions pertinent to a relocation application and being satisfied that s. 16(4) gave him the discretion concerning who should bear the burden of proof, he placed it on C.J.N. because she had proven to be less than truthful in the evidence she had presented on the application resulting in the interim order. Next, he reviewed what he considered the relevant factors bearing on his decision, taking guidance from binding authority on point, including *Barendregt v Grebliunas*, 2022 SCC 22, which reaffirmed the applicability of *Gordon v Goertz*, [1996] 2 SCR 27. Of central importance to him, he determined, was the demonstrated inability of C.J.N. to provide for the "physical, psychological and emotional safety, security and well-being" of the children, which he contrasted with J.M.P.'s demonstrated ability to care for them as he had been doing as the primary parent since the separation. He went further, stating that the move would be beneficial to the children by having them live close to their father, who would be assisted with their care by family and friends. The chambers judge did not condone the unilateral earlier relocation of the children by J.M.P., and dealt with it by awarding costs in favour of C.J.N.

 Back to top

***R v Peterson*, 2022 SKQB 171**

Robertson, 2022-07-25 (QB22367)

Appeal - Criminal Law - Driving Over .08
Constitutional Law - *Charter of Rights*, Section 10(b) - Right to Counsel
Constitutional Law - *Charter of Rights*, Section 9 - Arbitrary Detention - Overholding

The accused, T.P.P., appealed his conviction following his trial before a Provincial Court judge to a judge of the Court of Queen's Bench (appeal judge) on the grounds that the trial judge erred in law by dismissing his application under the *Charter* for a ruling that his right to counsel under s. 10(b) and his right not to be arbitrarily detained under s. 9 were infringed: 2021 SKPC 47. The appeal judge first stated that no facts were in issue. He found that T.P.P. was lawfully detained for driving while over .08 and brought to the RCMP detachment where police made a proper demand that he provide a sample of his breath and informed him of his right

to consult counsel of his choice without delay. T.P.P. asked for his cell phone so he might call his father to obtain the office number of the "family lawyer." The investigating officer (officer) provided him with his cell phone. He was able to reach his father and obtained the family lawyer's number. The officer dialed the number, and when she received no answer left a voicemail concerning the nature of her call and requesting that the lawyer call back. The call was placed at 11:33 pm and no reply having been received, the officer made a second call to the family lawyer at 11:52 pm and left a voicemail as before. As before, no reply was received from the family lawyer. The officer advised T.P.P. on more than one occasion that he could call any counsel of his choice and he could also call legal aid. She showed him lists of lawyers and contact information for them from the yellow pages. To each piece of advice, he indicated he would not speak to any lawyer other than his family lawyer and took no steps to contact another lawyer. This stalemate lasted until approximately 00:19 a.m. when T.P.P. provided his first breath sample. His readings were 220 and 210 mg/100 ml. Given the high readings, the investigator was concerned with T.P.P.'s safety if he were released while intoxicated. He was far from home, and there was no responsible person to release him to, so she decided to detain him in cells until he was sober. He was released at 9:07 am.

HELD: The appeal judge dismissed the appeal. He first dealt with the trial judge's treatment of T.P.P.'s s. 10(b) ground of appeal, recognizing that this fact scenario had been dealt with in many cases under the rubric of "reasonable diligence." He referred to many judicial authorities holding that the implementational duty of the police to a detained person was to facilitate that person in exercising his right to contact counsel if that person was reasonably diligent in his efforts to do so. He appreciated that the case law was also consistent in ruling that if a detainee takes the unreasonable position of insisting on only speaking to an unavailable lawyer, and not considering any alternative choices, that detainee was not acting with reasonable diligence, and the police had fulfilled their duty to facilitate access to counsel. As to the s. 9 "overholding argument," the appeal judge reviewed the trial judge's reasons for denying the application, and agreed that *R v Scott*, 2010 SKPC 81 was on point. He agreed that ss. 497 and 498 of the *Criminal Code* justified the continued detention of an intoxicated driver until sober if the detaining officer believed, on reasonable grounds, it was necessary in the public interest. Like the trial judge, the appeal judge was satisfied the officer thought the issue through and made her decision on reasonable grounds.

Back to top

***MFI Ag Services Ltd. v Kramer Ltd.*, 2022 SKQB 178**

Robertson, 2022-07-28 (QB22378)

Contracts - Sale of Goods - Recovery of Farm Equipment by Seller
Contract - *Saskatchewan Farm Security Act*
Limitations - Application of *Limitations Act*

This matter concerned two applications to a judge of the Court of Queen's Bench (chambers judge) made pursuant to s. 50 of *The Saskatchewan Farm Security Act* (SFSA) by a farmer, J.M, in his own right and as agent for two farming corporations wholly controlled by him, namely MFI and 101 Sask, filed at court on January 24, 2022, and March 8, 2022. The applications were brought in response to a prescribed notice of intention to take possession of farm equipment served on J.M. by Kramer Ltd. (Kramer). The chambers judge reviewed the evidence and made the following material findings of fact: the farm equipment in question consisted of

two combines and headers (farm equipment) which were initially leased to MFI and 101 Sask by Kramer in August 2016 and September 2016; in September 2017, J.M. and Kramer agreed to the sale of the farm equipment; J.M. claimed no purchase price was agreed to and Kramer maintained that the agreed upon purchase price was $502,000.00 less the amounts paid under the lease; Kramer made repeated requests of J.M. for payment of the purchase price from November 16, 2017 to July 26, 2021; J.M. made promises to pay in five emails dating between November 16, 2017 and July 26, 2021; J.M. made no payment towards the purchase of the farm equipment after 2017 and used the equipment to harvest his crop in each of these years; the farm equipment depreciated considerably in value while in the possession of J.M., who offered to buy it for half of what Kramer believed it was worth, failing which he said he would return it to Kramer, but only after the 2021 harvest season; Kramer was not interested in negotiating a sale price at this juncture and wanted the farm equipment delivered immediately because harvest was near, and it was an opportune time to sell it.

HELD: The chambers judge rejected the suggestion of the applicants that the application engaged *The Limitations Act* (LA) because, he said, by s. 13, the LA only applies to statements of claim and originating notices and does not apply to "proceedings in the nature of applications." The LA could not be interpreted to mean that limitation periods could extinguish an owner's undisputed title to his own property, and J.M. had acknowledged the debt as late as July 2021, within the two-year limitation period. He then ordered that J.M. deliver the farm equipment to Kramer within seven days or it would be subject to seizure. In making this decision, he first determined the parameters of his discretionary power, noting that s. 53 of the SFSA empowers the court to "make any orders it considers just" and that this broad discretion was to be delimited in accordance with the purposes of the SFSA. He enlisted the support of judicial authority for this purpose, including *Chmil v National Leasing Group*, 2006 SKCA 140, which referred with approval to *Bartko v Odnokon Holdings Ltd.*, 2012 SKQB 262, and the enumerated factors or "equitable considerations" listed in that case. He then went on to apply the facts of this case to the relevant equitable considerations, which he found to be in favour of Kramer. He found that J.M.'s suggested plan to deal with the farm equipment and his debt to Kramer was no plan at all as it did not provide any assurances that the farm equipment would be returned after harvest. He also expressed that it was manifestly unfair to Kramer that J.M. should have had free use of the farm equipment for four years, and now proposed to again harvest with it free for another year before returning it further depreciated and at a disadvantageous time for its sale.

Back to top