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

Volume 21, No. 11 **June 1, 2019**

Subject Index

Knight Archer Insurance Ltd. v Dressler, 2019 SKCA 34

Caldwell Whitmore Leurer, April 12, 2019 (CA19033)

Injunction – Interim – Restrictive Covenant – Appeal

The appellant insurance company appealed the decision of a Queen's Bench chambers judge to dismiss its application for an interlocutory injunction. It had sought to restrain its former employees from soliciting business on behalf of their new employer, another insurance company (see: 2019 SKQB 30 and 2019 SKCA 24). The judge found that the appellant had failed to show a strong prima facie case and had not established that there was a high likelihood that the restrictive covenant in the employment contracts between the appellant and its former employees would be upheld. The clauses were ambiguous as to the prohibited activity and prima facie unenforceable. The issues on appeal were: 1) what standard of review was applicable; 2) whether the chambers judge had erred in concluding that the appellant had failed to establish a strong prima facie case that the non-solicitation provisions of its contracts were unenforceable; and 3) whether the judge had erred in concluding that the appellant had not demonstrated that it would suffer irreparable harm if the injunction were not granted.
HELD: The application was dismissed. The court found with respect to each issue that: 1) the applicable standard of review was that of deference to the chambers judge's exercise of his discretion in refusing to grant an interlocutory injunction absent a clear mistake on the law or the evidence; 2) the chambers judge had not erred in reaching his conclusion on the basis of the evidence before him. It remained open to the appellant to

Cases by Name

Disclaimer

All submissions to Saskatchewan courts must conform to the *Citation Guide for the Courts of Saskatchewan*. Please note that the citations contained in our databases may differ in style from those endorsed by the *Citation Guide for the*

convince a judge at trial that its restrictive covenants were enforceable; and 3) it was unnecessary to determine this question in light of the court's decision regarding the previous issue. However, the court did not endorse the chamber judge's reasons regarding the issue of irreparable harm.

© The Law Society of Saskatchewan Libraries Back to top

Tofin v Galbraith, 2019 SKCA 35

Jackson Caldwell Leurer, April 12, 2019 (CA19034)

Civil Procedure – Appeal – Fresh Evidence
Civil Procedure – Costs – Party-Party Costs – Enhanced Party-Party Costs
Civil Procedure – Costs – Solicitor-Client Costs
Civil Procedure – Queen's Bench Rules, Rule 11-1
Family Law – Division of Family Property – Interim Distribution of Family Property
Wills and Estates – Division of Family Property

The deceased and the respondent were married for 22 years. The deceased had six children from a previous marriage. In 2004, the deceased made a will denying the existence of a valid marriage and leaving his entire estate to his children. He died in 2013. The respondent filed a family law petition claiming spousal support and an equal division of family property under the Divorce Act and The Family Property Act and requesting relief under The Dependants' Relief Act, 1996. The deceased's son (the son) was the executor of the estate. He applied for probate. The appellants were the deceased's estate, the son as executor, and the son personally as owner of the condominium unit at issue (the condominium). The deceased and the respondent started living in the condominium in 1996. The condominium was owned by the son. In her petition, the respondent asserted that the condominium was purchased with money from the sale of the matrimonial home and put into the son's name, a fact she was unaware of until after the deceased's death. The respondent continued to reside in the condominium. The parties executed minutes of settlement in the family law file in 2015. The minutes required the parties to execute an occupancy agreement with respect to the condominium and the parties were to discontinue the action. The occupancy agreement declared that The Residential Tenancies Act, 2006 did not apply. The minutes recognized that the matter of distribution of the personal property still had to be decided, notwithstanding the discontinuance. The son and estate were represented by counsel until the minutes and occupancy agreement. Since then the son represented himself and the estate. He initiated several unsuccessful applications. In 2017, the son brought an application in the family law file requesting

Courts of Saskatchewan.

access to enter and remove items from the condominium, granting reasonable access to him to monitor the condominium, and an order requiring the respondent to comply with a previous order confirming that no estate property was in the restricted areas of the condominium and to describe the contents in two suitcases. The respondent replied and requested $5,000. An interim distribution of matrimonial property was not made, and the other requested relief was denied. With respect to costs, the chambers judge noted that the application was without merit and was an abuse of process. The chambers judge concluded that the son's actions were meant to harass the respondent more than to gain lawful relief. He ordered that the son personally pay the respondent $5,000 in costs. The appellants appealed and also sought to introduce fresh evidence consisting of email exchanges between the son and counsel for the respondent relating to what was family property that the respondent could keep. The issues were: 1) whether the chambers judge erred by holding that he could not entertain an application for an interim distribution of family property on the basis of the material before him; 2) whether he erred by awarding the respondent $5,000 in costs and requiring the son to pay the costs personally, and if so, whether enhanced costs should be awarded; and 4) whether to award solicitor-client costs of the appeal.

HELD: The court first determined the application to adduce fresh evidence. The first email exchange was already part of the court record. The admission of the second email was not allowed because the court found that it was not credible as to the essential fact. The issues were dealt with as follows: 1) the chambers judge did not err as a matter of law in refusing to make an interim distribution of family property; 2) the appeal court found that the chambers judge erred by awarding $5,000 in solicitor-client costs for three reasons: a) solicitor-client costs were not claimed; b) there were ambiguous clauses in the minutes that could have led a self-represented litigant to conclude that no further application could be considered in the family law file; and 3) the fourth chambers judge appeared to have condoned the respondent's previous conduct. Pursuant to Rule 11-1 of the Queen's Bench Rules, a judge has a discretionary authority to fix all or part of the costs without reference to the Tariff. The factors pointing to an enhanced award of costs were: the applications were complexly devoid of merit; the applications lengthened the proceedings and delayed a final resolution of the matter; the respondent incurred legal fees to defend each application; and the respondent had the costs of preparing a seven-page affidavit. The court fixed the party-party costs at $4,000. The court agreed with the chambers judge that it was appropriate for the son to personally pay the costs within two weeks; and 3) solicitor-client costs were not warranted because the appeal was not completely dismissed. Because of the mixed success on the appeal, costs were fixed at $3,000 payable by the son within four weeks.

© The Law Society of Saskatchewan Libraries Back to top

R v Todd, 2019 SKCA 36

Richards Ottenbreit Schwann, April 18, 2019 (CA19035)

Criminal Law – Appeal – Acquittal
Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Defences – Charter of Rights, Section 7, Section, 8, Section 9, Section 10(b), Section 24(2)

The respondent was charged with possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA). An officer was running radar on the highway and detected that the respondent's vehicle was travelling at 143 km/hr in a 110 km/hr zone at 11:22 pm. According to the officer, there were many indicators of drug activity, such as a newly lit cigarette, air fresheners, and a rental vehicle with a radar detector. After running the respondent's licence and registration through police databases, the officer returned to the respondent's vehicle and told him that he was free to go. He stepped a few paces from the vehicle and then turned back to the respondent and asked him if he could ask him a few more questions. The officer concluded that the answers did not add up. The officer believed that he had grounds to detain the respondent and at 11:28 he told the respondent that he was being detained for a drug investigation. At the police vehicle, the respondent asked the officer if he could go if he let the officer look in his duffel bag. The respondent's increased nervousness, panicked reaction and desire to bargain were viewed by the officer as advancing from reasonable suspicion to reasonable and probable grounds for arrest. The respondent was arrested at 11:31 pm and given his rights to counsel. A search of the rental vehicle revealed cocaine, hash oil, and bundles of cash totaling $22,000. The respondent applied to have the seized evidence excluded at trial, arguing his ss. 7, 8, 9 and 10 Charter rights had been violated. A voir dire was held, and the trial judge found that the respondent's ss. 7, 8, and 9 rights had been breached and concluded that his arrest was unlawful. The seized evidence was excluded, and the respondent was acquitted. The trial judge found lawful authority for the officer to detain the respondent for speeding. He also found that it was close to the line, but that the officer also had a reasonable suspicion to detain the respondent for purpose of a drug investigation. The trial judge concluded that the respondent's offer to search the bag was not enough to establish reasonable grounds for arrest. Counsel for the respondent on appeal, who was not counsel at trial, argued that the respondent had been detained at an earlier point in time, and therefore, his s. 10(b)

Charter right was also violated. The argument resulted in issues for the court to consider: 1) did the trial judge err in his Charter analysis; 2) at what point after he was told that he was free to go was the respondent detained; 3) was the respondent given his right to counsel without delay; and 4) should the evidence be excluded pursuant to s. 24(2) of the Charter?
HELD: The appeal was allowed, and a new trial was ordered. The issues raised by the respondent were dealt with as follows: 1) the appeal court concluded that the trial judge did not apply the legal test properly. The trial judge focused on the utterance made by the respondent in the police vehicle and the duration of the exchange. The appeal court said that the trial judge should also have considered precisely what the respondent said and how he said it. The trial judge failed to consider the circumstances in their entirety; 2) the respondent argued that he was psychologically detained when he agreed to answer the officer's questions even though the officer said that he was free to go. The evidence was found to support the conclusion that the respondent was detained when he was told that he was being detained for a drug investigation, and not prior to the point; 3) the respondent argued that what he said in the police car was inadmissible because he may not have blurted it out if he had already been given his rights to counsel. The respondent argued that he should have been given his rights to counsel immediately after being informed that he was being detained for a drug investigation. The appeal court proceeded to make the determination based on the evidence called on the voir dire. The phrase "without delay" in s. 10(b) of the Charter was found to mean "immediately". The respondent's s. 10(b) rights were engaged at 11:28 pm when he was informed he was detained for a drug investigation. Therefore, he was entitled to be informed of his right to counsel at that moment. The respondent's right to be informed of his right to retain and instruct counsel was breached; 4) the appeal court proceeded with a fresh s. 24(2) analysis because a s. 10(b) breach was found rather than a s. 8 breach as found by the trial judge. The evidence of the drugs, money and the utterance made by the respondent were the evidence to be considered for exclusion. The appeal court considered the Grant factors as follows: a) the breach was at the lower end of the seriousness spectrum and thus did not weigh significantly in favour of exclusion of evidence; b) the respondent's utterance was spontaneous, which may lead to it having a less serious impact. The appeal court did not agree with the respondent's argument that if he had been given his rights, he would not have made the utterance, and the drugs would not have been discovered. The impact of the breach was found to have been lessened and favoured inclusion of the evidence; and c) there could be some concern that the respondent's utterance was unreliable as to a finding of knowledge or intention to transport drugs. The drugs and money were highly reliable. The appeal court concluded that the administration of justice would not be tarnished by the admission of the evidence.

© The Law Society of Saskatchewan Libraries Back to top

R v Kernaz, 2019 SKCA 37

Caldwell Schwann Barrington-Foote, April 25, 2019 (CA19036)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Cocaine – Methamphetamine
Criminal Law – Controlled Drugs and Substances Act – Definition of Trafficking – Give

The Crown appealed the respondent's acquittal of a charge of possessing methamphetamine and cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA). The respondent was found guilty of the lesser and included charge of simple possession. The respondent was arrested after parking a borrowed vehicle. A search of the accused revealed 3.92 g of methamphetamine in his pocket. A pipe and a container of 26.3 g of cocaine were found in the console of the vehicle. Other paraphernalia, drugs, and cash were found in other areas of the vehicle. An expert testified that, in his opinion, the respondent possessed the drugs for the purpose of trafficking and the cash was the proceeds of crime. The accused testified and denied ownership of everything except the methamphetamine in his pocket, and the cocaine and pipe found in the centre console. He said that he intended to share the drugs. The trial judge found that the respondent intended to do drugs with a friend when he parked the vehicle. She did not infer that the other drugs and paraphernalia found in the vehicle were subject to the respondent's use and control. The trial judge did not directly deal with whether sharing the drugs was trafficking. The Crown argued that the trial judge erred because the definition of "traffic" in the CDSA includes "give".
HELD: The appeal was allowed. The Crown was correct in that "give" in the definition of "traffic" includes sharing a drug with another person. The Crown was not required to prove that there was a settled plan with a third party to consume the drugs. It was clear that the trial judge accepted the respondent's evidence that he had possession of some of the drugs. The trial judge's statement that the respondent drove to the house to share the drugs was unambiguous and showed the trial judge believed the respondent intended to share them. The trial judge erred in law by concluding that sharing drugs was not trafficking. The conviction for simple possession was set aside and the verdict of guilty for the s. 5(2) trafficking charge was entered.

© The Law Society of Saskatchewan Libraries Back to top

E.Z. Automotive Ltd. v Regina (City), 2019 SKCA 38

Jackson, April 30, 2019 (CA19037)

Administrative Law – Municipal Planning Appeals Committee – Leave to Appeal
Municipal Law – Appeal – Order to Comply

The applicant applied for leave to appeal a decision of the Planning Appeals Committee of the Saskatchewan Municipal Board (the committee) pursuant to s. 33. 1 of The Municipal Board Act. In January 2018, the respondent city issued an order to comply that required the applicant to stop operating the salvage yard he was operating on the property by May 2018 because the form of development was in contravention of a zoning bylaw. The applicant's appeal to the development board was dismissed in June 2018, but the development board added a caveat that a number of junked vehicles could remain on the property so the applicant could use them for parts for the repair service. The applicant and the city appealed that decision to the committee. Neither party wanted the city to determine the number of junked vehicles that could remain on the property. The committee did not accept the development board's interpretation of the bylaw that required the city to allow salvage vehicles to remain on the property. The original order was reinstated, giving the applicant three months to comply. The appeal court found that the applicant's appeal could be grouped into two sets of questions. The first set of questions was: whether the committee erred by applying the wrong standard of review to its consideration of the development board's decision; and whether the committee incorrectly applied the correct standard of review by finding that the development board's interpretation of the bylaw allowing some junked vehicles was in error. The second group of questions included: whether the committee failed to provide sufficient reasons in its decision; whether the committee failed to consider relevant factors mandated by s. 221(a) of The Planning and Development Act, 2007; and whether the committee failed to consider a relevant bylaw within its jurisdiction.
HELD: Leave to appeal was granted. The appeal court determined that leave to appeal should be granted with respect to the first set of questions because it could not be said that an appeal in relation to them was "destined to fail". There was at least some argument that the development board answered a question that was not placed before it. The question was whether the storage of any junked vehicles at all was part of the auto repair business. If an error was made, it would materially affect the result, which would make it of sufficient importance. The appeal court then dealt with the second set of questions. The development board held that the official community plan did not provide a specific definition as to what compatibility within a neighbourhood means. The applicant was found to concede that it could not stack vehicles to wait for a time when salvage prices were high. The

applicant suggested that it could keep junked vehicles with usable parts for the purposes of future repair claims. The applicant relied in part on the official community plan. The committee did not provide written reasons explaining why it dismissed the applicant's cross-appeal. Therefore, the appeal court granted leave with respect to the following two additional questions: whether the committee erred in law by failing to provide sufficient reasons with respect to the applicant's appeal before it; and whether the committee erred in law by failing to give effect to s. 221(a) of The Planning and Development Act, 2007. The appeal court did not grant leave with respect to whether the committee failed to consider a relevant bylaw within its jurisdiction. The applicant also raised a question as to whether the committee based its decision on costs on an irrelevant factor. The appeal court found that the question lacked merit. The applicant requested costs regardless of the outcome because of the city's aggressive treatment. The applicant also requested leave on procedural grounds but did not provide any authority that would permit leave to be granted.

© The Law Society of Saskatchewan Libraries Back to top

R v Napope, 2019 SKPC 23

McAuley, April 5, 2019 (PC19020)

Criminal Law – Breach of Recognizance – Sentencing
Criminal Law – Aboriginal Offender – Sentencing

The accused pleaded guilty to one breach of a recognizance issued under s. 810.2, contrary to s. 811 of the Criminal Code. He had been released in November 2017 on an 18-month recognizance, expiring in April 2019, and under it was required to register and report in person to an officer with the Prince Albert Police Services every second Tuesday and to report to his probation officer. The accused missed a reporting date in February 2019 but did report the next day, advising that he had had to see his physician. Although instructed to report again in two weeks, the accused failed to do so. The police officer advised the probation officer. When the accused called her, she cautioned him on his continued issues of non-compliance with reporting, attending appointments and attending required programs. She told the accused to report to the police by 4:00 pm that day and he agreed that he would but did not. The probation officer then submitted a breach. The Crown requested a sentence of 15 months with enhanced credit for the accused's time on remand. The defence sought a two-month jail sentence minus the accused's remand at enhanced credit. It explained that the accused was feeling ill on the date in question because he was HIV positive and had other health problems. He was also taking methadone due to previous

addiction issues. He was residing with his mother and stayed at home most of the time due to his health problems. The accused had not attempted to remove himself from supervision and turned himself in two days after his breach. The Gladue factors were significant as he had attended residential school between the ages of six to 12 and became involved in the criminal justice system as a young offender. He had spent the majority of his life in prison between 1993 and 2009. His crimes included robbery with violence when he was a youth, manslaughter with a firearm in 1997 and robbery in 2009. Since the last offence, for which he served a seven-year sentence, most of his offences had involved suspensions following his statutory release. He had previously breached the s. 810.2 recognizance in 2018 and received a 12-month jail sentence.
HELD: The accused was sentenced to time served of 44 days' actual jail time, but was given credit for 66 days at enhanced credit. The court found that the accused's past and criminal history and the breach did not give it any reason to fear that the public was at risk for some type of violent crime. The accused's failure to report was not one of non-compliance or an attempt to remove himself from supervision. He had not committed any other substantive offences, nor had he resumed using drugs. The court held that there was a duty imposed upon a sentencing judge by s. 718.2(e) of the Code to apply Gladue to consider the unique circumstances of an Aboriginal offender in such as case as this. To do otherwise would result in a sentence that was neither fit nor consistent with the principle of proportionality. The accused should be released back into the community to allow him to make progress in his rehabilitation.

© The Law Society of Saskatchewan Libraries Back to top

Mosten Investment LP v Manufacturers Life Insurance Co., 2019 SKQB 76

Scherman, March 15, 2019 (QB19089)

Contract Law – Interpretation
Insurance – Contract – Interpretation
Statutes – Interpretation – Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019

The applicant, an investment company, brought an originating application requesting the court to make declarations in respect of a contract between it and the respondent insurance company (Manulife). One of the declarations sought was to have the contract interpreted as having distinct life insurance and investment entitlements and that the applicant would be entitled to pay premiums in any amount of its choice into the investment options provided in the contract. Such options included 10 year

guaranteed investment certificate type investments paying interest at four per cent per annum. (Two other proceedings brought by related entities, Ituna Investment and Atwater Investment, against other life insurance companies were heard at the same time). The applicant's position was based on the fact that the word "premium" was not defined in the contracts and they contained a provision that stated: "You may make additional premium payments at any time while this policy is in force". The policy in this case had been originally issued in 1997 by Aetna Insurance to an individual insured. Aetna was acquired by Manulife in 2004. In 2010, the applicant purchased the policy by way of an assignment and then added another individual insured life to it. Manulife accepted the change in ownership. In 2016, Manulife declined to accept a proposed payment of $1 million by the applicant to the investment account. Following this denial, the applicant brought its application. Manulife opposed the application on the basis that the contract in question, a Universal Life Insurance policy, was to provide life insurance and investments that are exempt from tax accrual within the exemption limits provided for such policies in the Income Tax Act. Such policies were never intended to permit insured parties to access investment opportunities as distinct investment rights unconnected to the core life insurance purpose of the contracts. Manulife and the insurance companies involved in the other proceedings argued that the recent coming into force of The Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2019 under s. 467 of The Saskatchewan Insurance Act made the various applications by the insureds for declaratory relief moot, and they should be dismissed. Related to the substance of the first declaration and preliminary to the hearing on the merits, both parties applied to strike major portions of each other's original, reply and rebuttal affidavit evidence as inadmissible because it was not relevant to a material issue in the case, because it was opinion evidence or evidence as to the subjective intention or understanding of a contract, and on other bases. The applicant also sought a declaration that the policy never had or had lost its tax-exempt status with the consequence that it could pay unlimited premiums for investment within the investment account of the policy.

HELD: The applications for the two declarations were dismissed. With respect to the first application, the court found: that as the contract was standard form and for life insurance, it would be interpreted in accordance with the principles set out by the Supreme Court in Ledcor and Sabean. As a result of the finding that it was a standard form contract, the court granted the preliminary application to strike portions of the affidavit evidence because their contents were beyond the permissible factual matrix used to interpret such contracts. It ascertained the purpose of the contract by finding as relevant: its language; the legislation applicable to life insurance companies; the nature of the relationship created between the original insurer who purchased

the life insurance policy; and that the life insurance industry was the market in question. The purpose of the contract was to provide life insurance and investment opportunities within the accrual tax exempt opportunities permitted by the Income Tax Act, not investment opportunities unrelated to the fundamental life insurance purpose of the contract. In this context, the word "premiums" would be understood by the ordinary insured as monies to be paid to the insurer that would not include unlimited investment opportunities and that the purpose of the investment account was to hold excess premiums to maintain the tax-exempt status of the policy. To harmonize with the policies' use of the word "premiums", the court interpreted the provision that permitted additional payment of premiums as having the purpose of allowing insureds to make prepayments of premiums that would be due in the future. In the alternative, assuming the word "premium" in the contract was ambiguous, the court reviewed it in accordance with the general rules of contract construction and reached the same conclusion. In response to Manulife's argument that the recent passage of the regulations made this application moot, the court determined that they were not applicable to this type of policy. Furthermore, after reviewing the regulations, the court found that they did not have retrospective reach. Regarding the second application, the court exercised its discretion under s. 11 of The Queen's Bench Act, 1998 and decided that it would decline jurisdiction to interpret and apply provisions of The Income Tax Act and the Income Tax Regulations. It deferred to the jurisdiction of the Tax Court and to its expertise.

© The Law Society of Saskatchewan Libraries Back to top

Ryhorski v Commercial Industrial Manufactuing Ltd., 2019 SKQB 85

Hildebrandt, March 22, 2019 (QB19091)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5
Employment Law – Wrongful Dismissal

The plaintiff applied for an order directing that a date be set for a pre-trial conference in his action against the defendant for wrongful dismissal. In response, it applied for summary judgment dismissing the plaintiff's claim. It argued that the contract of employment between the parties had been frustrated or that the plaintiff had abandoned his position with it. The plaintiff worked as a welder for the defendant from 2003 to 2014 when he had to take an absence due to a medical condition. The defendant's office manager assisted the plaintiff in completing the forms necessary to making his application for short-term disability coverage at that time. The insurer both denied him long-term disability benefits and discontinued his short-term

benefits as at April 2014, stating that the medical information that it had received did not support the policy definition of total disability. The defendant then issued a Record of Employment (ROE) to the plaintiff in June 2014 recording "illness or injury" as the reason for its issuance. There was no communication between the parties for some months following, and in January 2015, the defendant issued a second ROE as the plaintiff had not returned to work. It stated that the reasons for its issuance was: [the plaintiff] "quit/health reasons" and explained that the insurer had not found a valid reason for him not returning to work. Once he received this ROE, the plaintiff contacted the defendant's president and recorded the conversation. In the transcript, he objected to the indication that he had quit. The president explained that the defendant was responding to the insurer's position but that the plaintiff could return to work with it if he was able. The plaintiff did not respond to emails sent by the president to him in July and December 2015, asking him to retrieve personal items he had left at the defendant's premises. In March 2016, the plaintiff obtained employment as a welder elsewhere although he had never been cleared by his physicians to return to work. In April 2016, the plaintiff commenced this action, alleging wrongful dismissal.
HELD: The defendant's application for summary judgment was granted. The court dismissed the plaintiff's application and his claim. It found that this was an appropriate case for summary determination under Queen's Bench rules 7-2 and 7-5 because it had sufficient facts based upon the evidentiary materials filed by the parties on which to conclude that there was no genuine issue requiring trial. The court decided that the plaintiff had abandoned his position and the defendant was entitled to summary judgment. In the alternative, the contract of employment was frustrated because the evidence showed that there was no reasonable likelihood that the plaintiff would be able to return to work within a reasonable time.

© The Law Society of Saskatchewan Libraries Back to top

R v Anga, 2019 SKQB 97

Zerr, April 5, 2019 (QB19108)

Criminal Law – Disclosure – First Party Records

The accused was charged in April 2017 with possession of marijuana for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The accused filed an application to exclude the evidence under s. 24(2) of the Charter, alleging that his s. 8 Charter right had been breached because the RCMP failed to draft a report to a justice, failed to file a report to a justice, failed to obtain detention orders, failed to return his cell

phone, and failed to return his medical cannabis. In order to make his case that the RCMP had not complied with s. 489.1 and/or s. 490 of the Criminal Code, the accused filed a notice of application to seek records in the possession of the RCMP detachment involved in laying the charge against him. He requested records generated in relation to three categories of files: those which had exhibits held at the detachment and those relating to either simple possession or possession for the purpose of trafficking for both 2016 and 2017. He further sought detailed information about each file including the date of the seizure, whether property was brought to a justice or reported to a justice under s. 489.1(1)(b) of the Criminal Code, whether an order for detention was made under s. 490 of the Code, and the identity of the officer who seized the exhibit. Counsel for the RCMP and defence counsel agreed to a draft consent order and the detachment prepared a spreadsheet for the defence indicating that there were 55 files. Of them, eight had showed that a report to justice had been made, five had involved search warrants and in only one of them had a detention order been made. A year later, the accused filed a second notice of application that sought additional records in the possession of the detachment. The request was for very detailed answers relating variously to the eight files and to all of the 55 files. The RCMP and the Public Prosecutions Service of Canada (PPSC) opposed the application, arguing that the records sought were third party records in relation to which the accused had failed to establish "likely relevance". The defence submitted that the records were relevant to the prosecution against the accused and therefore characterized as first-party disclosure. The issue to which they were relevant was the accused's application for exclusion of evidence because the records would likely be relevant to the s. 24(2) analysis as to whether there was a violation of s. 489.1 of the Code because of an officer's failure to file report to a justice and to demonstrate whether the violation was isolated or systemic. HELD: The application was dismissed with the exception that the RCMP was ordered to disclose the identity of officers who seized exhibits. With respect to the various categories of files and information requested, the court found that they were not likely relevant to the proceedings against the accused.

© The Law Society of Saskatchewan Libraries Back to top

R v Maurice, 2019 SKQB 112

MacMillan-Brown, April 25, 2019 (QB19106)

Criminal Law – Weapons – Possession Dangerous to Public – Acquittal – Appeal

The Crown appealed the acquittal of the accused on a charge of carrying a weapon for a purpose dangerous to the public peace

contrary to s. 88 of the Criminal Code. The Crown argued that the trial judge erred in law by misinterpreting the section. After being attacked by four individuals while visiting a friend's house, the accused called the RCMP to attend at the residence. The attackers had fled the scene. The officers found the accused, who was intoxicated, to have sustained injuries which required medical attention. While being taken to a clinic, the accused repeatedly advised the officers that he wanted them to find the assailants and charge them. After treatment, the officers took the accused to his aunt's house. The officer testified that the accused repeated that he wanted something done and if the police weren't going to do something, he would take matters into his own hands. The officers told him to stay at home and let them deal with it. They began patrolling around the area looking for the individuals who allegedly attacked the accused. At approximately 3:00 am, they noticed the accused walking up the street. The accused was carrying an unsheathed sword and had an unsheathed dagger in his pocket. He gave up possession of both and was charged. The accused testified at trial that his purpose in carrying the weapons was to defend himself because he was scared that the same people would attack him. The trial judge found the accused to be credible and acquitted him on the basis that he was left with a reasonable doubt as to his purpose for carrying the weapons.
HELD: The appeal was allowed. The acquittal was set aside and a conviction substituted. The court found that the trial judge erred in his interpretation of s. 88 of the Code. He failed to apply the second requirement set out in the Supreme Court's decision in R v Kerr that a court must examine and decide not only the accused's subjective purpose in possessing the weapon, but whether, in all the circumstances, that purpose was objectively dangerous to the public peace.

© The Law Society of Saskatchewan Libraries Back to top

Saskatchewan (Director under The Seizure of Criminal Property Act, 2009) v Olivares, 2019 SKQB 113

Mitchell, May 2, 2019 (QB19109)

Criminal Law – Drug Offences – Forfeiture

The Director under The Seizure of Criminal Property Act, 2009 applied under ss. 3, 7 and 10.7 of the Act for an order directing that $2,715 in cash seized from the defendant be forfeited to the Crown. A police officer saw the defendant enter a drugstore. The officer knew that there was an outstanding warrant against him and had received information from a confidential source that the defendant had been trafficking in fentanyl for approximately one year. He arrested the defendant and found a wallet containing $2,665, a $50 bill in his hand, a knife in his pants pocket and blue

balloon discarded by him containing four fentanyl pills. After the arrest, the accused's cell phone rang a number of times and one caller said that the wanted "two". The officer deposed that based on his experience and because the defendant had had fentanyl in his possession, it was his opinion that the caller was requesting two fentanyl pills. Other affidavits were filed in support of the Director's application indicating that the affiants believed that the defendant was a drug dealer. The defendant filed a statutory declaration that the funds in his possession at the time of arrest represented cash that he had received from the sale of a truck and included $714 he had obtained when he cashed his social assistance cheque.
HELD: The court granted the application for forfeiture of the sum of $2,001. The remainder, $714, should be returned to the defendant as it was not the proceeds of unlawful activity.

© The Law Society of Saskatchewan Libraries Back to top

Stephens v Stephens, 2019 SKQB 114

Brown, April 29, 2019 (QB19107)

Family Law – Spousal Support
Family Law – Child Support – Adult Child

The petitioner and the respondent were married in 1990 and separated in June 2016 when the respondent left the family home. The parties had two sons who were 20 and 19 years of age respectively and attending university at the time of separation. They had since graduated. The respondent wife brought an application in July 2017 for interim spousal support and child support and was awarded the former in the amount of $1,500 per month. The judge concluded that s. 3(2)(b) of the Federal Child Support Guidelines governed interim child support and determined that, based upon the petitioner's income of $92,000, he should pay $1,000 per month. At trial, the respondent claimed retroactive child support for the sons as adults attending university from June 2016 and for ongoing and retroactive and ongoing spousal support. The respondent had worked full-time before the children were born and after their birth, she obtained employment at various positions involving office management and accounting. Although she was paid for full-time employment, the respondent was able to work three to four days per week because she was efficient, so that she could shoulder most of the parenting duties. The respondent continued to work in this fashion after the children were self-sufficient and after the separation. Her annual income had ranged from $20,000 to $41,000 in her current job. The petitioner, an engineer with CPR, had an annual income of $100,000 and would earn $130,000 in 2018. During the marriage, the parties paid off their mortgage, did

not acquire debt and accumulated $65,000 in an RESP for their sons' education. The respondent took care of the family's finances and how the sons' education was funded. Each son studied to be an engineer. The oldest son was awarded a scholarship of $13,000 and the youngest son received one for $27,000. The parties agreed these funds would be invested for the sons except for portions that could only be used to pay tuition directly. They also agreed that they would pay for tuition, books, rent and gas for the first two years of university and then each son would become responsible for his own gas and cell phone. Each son was given a credit card to be used for his school-related expenses and they were reimbursed from the parties' joint bank account. During the summers, each son was employed and each earned in total $41,700 and $19,800 between 2016 and 2017. By the summer of 2016, the RESP fund had been spent when the oldest son had completed three-quarters of schooling and the youngest son was halfway through. The respondent's claim for retroactive child support was for expenses she and each son had paid from August 2016 to April 2018. In the case of one son, she paid $33,000 and he contributed $17,700 (an average of $2,400 per month) and for the other she paid $27,000 and he had paid $17,700 (an average of $2,600 per month). The petitioner argued that the respondent had not provided receipts of the actual costs or expenditures and furthermore, each son had sufficient resources to support himself and thus they were not dependent under s. 3(2)(a) or s. 3(2)(b) of the Guidelines.

HELD: The respondent's application for retroactive child support was dismissed and her application for retroactive and ongoing spousal support was granted. The court found with respect to the respondent's claim for retroactive child support that she had not met the evidentiary requirements to verify the expenditures she claimed for each son's time at university for the period in question. Regardless, the sons had had adequate resources to complete university if reasonable decisions had been made by them and by the respondent who controlled the flow of money to them. Regarding the respondent's claim for spousal support, the court found that she was not entitled to it on a compensatory basis because she had not forsaken a particular career path for the marriage. Although the petitioner's earning power was likely increased due to the respondent taking on the primary responsibility of parenting, the impact on her employment did not reach the level whereby compensatory spousal support entitlement was created. The respondent was entitled to spousal support on a non-compensatory basis because of the disparity between her income and the petitioner's. However, the court imputed income to the respondent because she should be working full-time and was capable of earning $10,000 more per annum. Based upon that imputed income and the petitioner earning $110,000 the court awarded her $2,000 per month in support for five years, to end in 2024. The respondent was also entitled to retroactive spousal support as at the time of separation.

The court examined her income and the respondent's in 2016 and found $1,100 per month and for 2017, $2,400 per month, based on the petitioner's increased income, to be appropriate. Thus, the total spousal support arrears were $61,800 but as the petitioner had paid $21,000 in spousal support and $31,500 in child support, his arrears were reduced to $9,300. The respondent was awarded costs of $4,500.

© The Law Society of Saskatchewan Libraries Back to top

Witwicki v Teslak, 2019 SKQB 116

Layh, May 2, 2019 (QB19110)

Wills and Estates – Executors – Fees

The executrix of the estate of J.S. applied for an order to receive $41,800, representing five per cent of the value of the estate, as an appropriate executrix's fee. Her application was opposed by two of the major beneficiaries. They proposed that reasonable compensation would be one percent of the value. The statement of property submitted with the application for probate showed the value of the estate to be $836,940 and $819,600 of that was attributed to the value of real property, consisting mainly of farmland. The applicant noted that the administration of the estate was complicated by having to sell the farmland and defending the estate against the claim made by an individual as having been the common law spouse of the deceased. The applicant had kept track of the duties that she had performed and how long she spent on them and it totaled 320 hours and included seeing the estate solicitor 33 times. She had already been paid for out-of-pocket travel expenses for traveling a total of 7,700 miles respecting which she charged $0.86 per km for a total compensation of $6,700.
HELD: The court granted the application for fees in the amount of $16,000 as a reasonable allowance for administration of an estate as required by s. 52(1) of The Trustee Act, 2009. The court calculated that amount based on the applicant's evidence that she spent 320 hours administering the estate and allotting a reasonably generous hourly fee of $50. It applied the factors set out in MacDonald for determining a reasonable allowance and in considering the factor of time spent found that the applicant's record was inaccurate and undermined the credibility of her affidavit evidence. It was concerned with the legitimacy of her travel expenses because of exorbitant distances for which she had overpaid herself. With regard to the factor of the success she achieved in the administration of the estate, the court did not accept the applicant's request for five percent of the estate value as an equal split between administering it and handling the claim of the putative common law spouse. The court granted the

respondents' request that the costs of the application be paid from the estate on a solicitor-client basis.

© The Law Society of Saskatchewan Libraries Back to top