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. 14 **July 15, 2019**

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6517633 Canada Ltd. v Norton (Rural Municipality No. 69), 2019 SKCA 45

Richards Caldwell Barrington-Foote, May 24, 2019 (CA19044)

Civil Procedure – Court of Appeal Rules, Rule 46(2), Rule 46.1(1)

The appellant was given notice by the Registrar of the Court of Appeal, pursuant to Court of Appeal rule 46(2), to show cause why its appeal should not be dismissed as abandoned. The appellant's notice of appeal had been filed in July 2017. Despite receiving requests made by the respondent's counsel to be served with the appellant's factum and appeal book, no actions were taken. In October 2018 this notice was given to the appellant.
HELD: The appeal was dismissed as abandoned. The court held that it was appropriate in a show cause hearing for it to apply the same standard used in applications made under Court of Appeal rule 46.1(1)(c) that permits the court to quash an appeal where there is no possibility that any ground might succeed. In this case, it found that the only two remaining grounds were without merit and that finding determined the question of whether the appeal should be allowed to proceed. In addition, the court reviewed the factors to be considered under rule 46(2) as set out in Maurice Law and found that the appeal could not proceed because the respondent had expressed concern about the lack of progress, there was no explanation for the delay and no steps had been taken since September 2017.

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Clemens v McGruther, 2019 SKCA 46

Ottenbreit Schwann Tholl, May 31, 2019 (CA19045)

Civil Procedure – Queen's Bench Rules, Rule 10-4
Civil Procedure – Judgments and Orders

After a trial concerning family property and its valuation, the judge made findings of fact regarding the value of an acreage and a pension exemption, but due to illness was unable to deal with the remainder of the family property. In his decision, he referred to his attached handwritten notes, identified by him as "schedules". The notes detailed assets, valuations and potential division to guide the parties in the hope that they could agree on the rest. The parties took different views as to what findings of fact had been made by the judge in light of his decision and the schedules and an application was made under Queen's Bench rule 10-4 to settle the terms of the formal judgment. The respondent argued before the chambers judge that the formal judgment should reflect the values assigned to the numerous items of property listed in each schedule as they represented findings of fact. The chambers judge found that the contents of the decision and the schedules were suggestions made by the trial judge to help resolve the disputes. The trial judge had not identified the evidence he relied upon to prepare the schedules or how he resolved the conflicting positions taken by the parties where the values were disputed. The appellant appealed from the trial judge's failure to adjudicate the bulk of the family property issues and from the value he assigned to the acreage. The respondent cross-appealed from the decision of the chambers judge. He agreed that the matter should be returned to the Court of Queen's Bench for purposes of property division, but maintained the trial judge had already identified and valued the family property in the schedules and there was no need to revisit those issues.
HELD: The appellant's appeal was allowed and a new trial ordered regarding the identification and valuation of family property, including the acreage, and for its division. The respondent's cross-appeal was dismissed. The court found that the trial judge erred in law when he failed to divide the family property, the family home or its value. The judge also erred in the manner in which he valued the acreage based upon the evidence. The court found that the respondent had failed to demonstrate an error on the part of chambers judge. In the circumstances, he correctly concluded he was unable to examine the evidence to confirm that the schedules represented findings of fact respecting property valuation. The respondent cited no authority for the proposition that a judge settling the terms of the formal judgment arising from a decision pronounced by another judge, must revisit and re-examine the evidence in order to do so.

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Ahmed v R, 2019 SKCA 47

Jackson Barrington-Foote Tholl, May 31, 2019 (CA19046)

Criminal Code – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Conviction – Appeal

The appellant was convicted of possession of cocaine for the purpose of trafficking pursuant to s. 5(2) of the Controlled Drugs and Substances Act, possession of methamphetamine pursuant to s. 4(1) of the Act and possession of proceeds of crime under $5,000 pursuant to s. 345(1) and s. 335(b) of the Criminal Code. The Provincial Court judge sentenced him to 32 months in jail, less remand credit of 336 days and to one year of probation. The appellant appealed his conviction, arguing that he should only have been convicted of simple possession of methamphetamine. He argued that the trial judge erred in her finding that she did not believe his testimony that he had known nothing about the drugs found in the vehicle he had been driving when he was stopped because he had borrowed the vehicle from a friend and that the drugs found on his person were for his own use. The judge accepted the evidence of a police officer testifying as an expert witness that the quantity, nature and packaging of the cocaine, cash found on the appellant's person and the entries on his cell phone indicated that he was trafficking. The appellant also argued the custodial sentence of 32 months (less remand credit) was too long. He submitted that he should have been given credit for time served on remand from January 2, 2017 to July 19, 2017. The trial judge held that he was not entitled to credit for that period as a prior 20-month sentence for trafficking had not expired when the appellant was arrested for these offences. The prior sentence did not expire until July 19. The appellant argued that the prior sentence was complete when he was released on December 29, 2016, based on time served and the remission he earned while in custody serving that sentence. After the hearing of the appeal and prior to the issuance of the court's judgment, the Crown advised the court that it agreed that if the appellant served his prior sentence and had not forfeited remission as a result of a breach of prison rules, he was deemed to have served the entire prior sentence as at the date he was released.
HELD: The conviction appeal was dismissed and the sentence appeal was allowed in part. The court found that the trial judge had explained why she did not believe the appellant and her conclusion as to his credibility was entitled to deference. Regarding the sentence appeal, the court concluded that under s. 99 of The Correctional Services Act, 2012 and s. 6 of the Prisons and Reformatories Act, the appellant should have received credit for the 198 days he spent in custody from January to July 2017 at a rate of 1.5 days for each day served, resulting in an additional credit of 297 days. In addition, the court set aside the appellant's sentence to five days in custody in lieu of a victim impact surcharge because the surcharge was held to be unconstitutional after his sentence was imposed.

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Saskatoon (City) v West Coast Reduction Ltd., 2019 SKCA 48

Richards Caldwell Leurer, June 5, 2019 (CA19047)

Municipal Law – Assessment Appeal
Statutes – Interpretation – The Cities Act, Section 172(5)

The City appealed a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board regarding the assessment of a non-regulated property, a warehouse (warehouse). The appeal was pursuant to s. 33.1 of The Municipal Board Act. The owner of the warehouse was the respondent, W.C. The City argued that the committee erred by failing to find that the Board of Revision (board) erred in law by taking into consideration the evidence of B.M. contrary to the prohibition in s. 172(5) of The Cities Act. Warehouses are non-regulated property and are therefore assessed according to the market valuation standard. Section 171 places a statutory duty on property owners to provide information regarding market value information of their property. In 2013, 2014, 2015, and 2016 the City assessor valued warehouses using direct capitalization of market net operating income. The City assessor used a sales verification form (SVF) to obtain sales information about 104 sales between 2008 and 2010 for the 2013 assessment. The properties were separated into groups. The Group 4 properties were at issue. The sale of a warehouse, FP Warehouse, was one of nine warehouse properties used in Group 4. Property owners argued that the FP Warehouse sale information should not be used in calculating the assessments because it included more than an estate in fee simple, so was too high. 16 Group 4 warehouse assessments were appealed regarding the 2014 assessments. B.M. testified that the FP sale included more than the fee simple title. He testified that: it included goodwill for a business; it was not a typical storage warehouse; it had temperature control; and the person providing the FP SVF was never an employee. The Board concluded that the FP sale was not reliable and excluded it from the Group 4 sales used to calculate the capitalization rate. The capitalization rate was changed from 8.04 percent to 8.22 percent. The other Group 4 warehouse assessments were also appealed and comprised the present appeal. By agreement, the evidence and testimony from the previous 2014 assessment appeal regarding the 16 properties carried forward to the other 2014 assessment appeal. In 2015, the Group 4 warehouses appealed their assessments and the board decided not to include the FP sale to the Group 4 sales resulting in the capitalization rate being reduced from 8.04 percent to 8.22 percent. The 2016 assessments were also appealed. The board again removed the FP sale from the Group 4 sales array and did not further stratify Group 4 warehouses. The committee released its decision on the 2014 and 2015 assessment appeals under one decision, the 2014-2015

committee decision. The committee found that the board did not make a mistake when it removed the FP sale. The committee found similarly in the 2016 committee decision on the appeal of the 2016 board decision. The issues on appeal were: 1) did the committee err in failing to consider the application of s. 172(5) of The Cities Act to the evidence before the board; and 2) did the committee err by placing greater weight on the evidence of D.M. about the FP sale over the information set out in the FP SVF?
HELD: The appeal was dismissed. The issues were dealt with as follows: 1) the City argued that the board failed to consider s. 172(5) when it accepted the evidence of D.M. in the 2014 board decision. The appeal court said that to engage the prohibition in s. 172(5), the witness must have a direct tie to the assessment appeal before the board. The witness must be the person or agent of the person whose assessment is the subject of the appeal. D.M. was not that type of person: he was not the owner of the property in question. Section 172(5) prohibits the property owner (or its agent) from calling evidence substantially at variance with an SVF provided respecting the property in an assessment appeal. The appeal court concluded that the board did not err by taking into consideration D.M.'s evidence; and 2) an assessor is entitled to presume that the information given in an SVF is correct; however, the presumption is rebuttable. In its 2013 decision, the board questioned the FP SVF. The City did not address the issues with the FP SVF even when the Board invited it to do so. The FP sale was excluded from the sales array largely because D.M.'s testimony established that the sale price was not reflective of the fair market value of the estate in fee simple. The question was one of fact, not law.

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Peet v Law Society of Saskatchewan, 2019 SKCA 49

Ottenbreit Whitmore Leurer, June 4, 2019 (CA19048)

Professions and Occupations – Lawyers – Discipline – Appeal
Professions and Occupations – Lawyers – Discipline – Progressive Discipline
Professions and Occupations – Lawyers – Discipline – Sanctions

The appellant appealed the committee decision imposing a six-month suspension from the practice of law, a fine of $40,000, and assessed costs of $1,865. The committee decision was a result of the appellant pleading guilty to a charge of conduct unbecoming a lawyer. The appellant had a lengthy disciplinary history. The charge that the appellant pled guilty to was the result of him not filing reporting forms with the Law Society for the year ending December 31, 2015. When the forms were not submitted by August 29, 2016, and after ample correspondence and numerous time extensions, the auditor reported the matter to complaints counsel. The appellant did

respond to the requests satisfactorily on September 29, 2016. The Conduct Investigation Committee concluded that a lengthy suspension and significant fine were required due to the appellant's lengthy disciplinary history and his consistent downplaying of the seriousness of his conduct. The appellant indicated that he had prioritized a major piece of litigation ahead of the "routine correspondence" of the Law Society. He argued that a suspension would be unnecessarily harsh because there was nothing wrong with his trust accounts, his response to the Law Society was just delayed. The committee agreed with the Conduct Investigation Committee. The appellant argued that that committee imposed an unreasonably high penalty because: 1) it failed to consider mitigating factors; 2) it failed to adhere to the principle of progressive discipline; and 3) it improperly considered an earlier penalty for a similar offence he had committed. The appellant also argued that less deference should be given to the committee's decision because there were non-Benchers on the committee.
HELD: The appeal was dismissed. The appellant's arguments were discussed as follows: 1) the appellant argued that his guilty plea and the agreed statement of facts should have been considered mitigating factors. The appeal court agreed that the mitigating factors needed to be considered but found that only a view of the committee decision that was too narrow would find they were not considered. The committee did not agree that the guilty plea and agreed statement of facts were as mitigating as the appellant argued due to the appellant's history of non-compliance. The court also noted that mitigating factors do not carry as much weight in professional disciplinary sentencing as they do in criminal sentencing; 2) the appellant argued that it was inappropriate to consider his 2017 sentencing because the penalty was imposed after the conduct of the current offence took place and before a penalty was imposed for the current offence. The appellant said that he had no opportunity to learn from the 2017 mistake. He argued that the 2013 sentencing, which was much less severe than that in 2017, should have been used to consider a progressive penalty. The 2017 conduct was relevant to express the committee's pessimism that anything less than a significant sanction would cause the appellant to change. The 2017 matter would not have been his first opportunity to learn from his mistakes: he had ample opportunity given his numerous previous charges. The court determined that the committee could consider the 2017 sanction; it did not err in the application of the principle of progressive discipline; and 3) the committee rejected the appellant's argument that the offence was minor. The court found that a significant penalty was warranted given the appellant's continued disregard for the Law Society's authority. The penalty was not unreasonable. The appellant argued that the committee should be more closely reviewed because it was composed of persons who were not Benchers or practicing lawyers, so they had less expertise in the area of the legal profession. The court found that the complaint had nothing that required a

practicing lawyer to determine. The court did not find that the Ryan case supported the appellant, as he argued it did.

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101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority), 2019 SKCA 50

Jackson Whitmore Ryan-Froslie, June 6, 2019 (CA19049)

Civil Procedure – Appeal – Rehearing

The appellants applied for a rehearing of an appeal that upheld the decision of a panel appointed pursuant to s. 17 of The Securities Act. The appellants were found to contravene the Act by the panel. The appellants argued that the court failed to consider the Financial Consumer Affairs Authority's (FCAA) legal duty to preserve electronic records. According to the appellants, there was an abuse of process that led to a miscarriage of justice because the records were not preserved. They also argued that the court overlooked evidence like documents that were returned to the appellants' accountant and records in the FCAA's possession that they did not produce even though they were ordered to be disclosed. The conduct of the FCAA, which amounted to a "fraud upon the court", was also overlooked, according to the appellants. The appellants further argued that the personal appellant's s. 15 Charter rights were breached because the court overlooked her mental disability that affected her capacity to present the appellants' case before the panel. The appellants indicated that they would apply to adduce fresh evidence, an affidavit of a lawyer indicating the existence of a binder that contained information not fully disclosed by FCAA and new medical evidence of the personal appellant.
HELD: The application for a rehearing was denied. The court determined that the appellants did not establish any special or unusual circumstances to justify a rehearing. The grounds relied upon by the appellants were not special or unusual circumstances required to meet the test in Storey. Some of the arguments raised were new and the court concluded that they would not have affected the outcome of the appeal. Further, the personal appellant's mental disability was not raised before the panel or on appeal even though there were frequent requests for medical information. There was no order as to costs.

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R v Needham, 2019 SKPC 24

Bazin, June 7, 2019 (PC19026)

Criminal Law – Defences – Charter, Section 11(b)
Criminal Law – Defences – Delay – Jordan
Criminal Law – Driving over .08 – Impaired Driving
Criminal Law – Evidence – Expert
Criminal Law – Procedure – Adjournment – Expert Evidence – Criminal Code, Section 657.3

The accused argued that his s. 11(b) Charter right to be tried within a reasonable time was breached. The information was sworn on May 15, 2018 and the trial was set for January 21, 2019. The trial did not proceed in January 2019 but was adjourned to June 7, 2018, 12.9 months post-charge. On June 14, 2018, the Crown gave verbal notice of its intention to call an expert because of the timing of the readings. The Crown served the expert notice on December 28, 2018, which was 23 days before the trial. The Crown admitted to a number of errors that had occurred, resulting in the written notice being sent out late. The accused did not bring that matter back before the court when the notice had not been received even though the court had provided instructions that he could do so without a formal application. The accused's counsel argued that the notice was served when he was away on holidays, which would have been known to the Crown. The Charter notice was filed by the accused on January 7, 2019, which was not 30 days prior to trial as directed by the court. The Crown did not ask for an adjournment based on the late filing. On January 16, 2019, the accused made an application to adjourn the trial due to late notice of the expert. The court was bound to grant the adjournment pursuant to s. 657.3(4)(a) of the Criminal Code. The accused advised that he would be bringing a Jordan delay application. The new trial date was set for June 7, 2019. Earlier dates that were available to the court and the Crown were not available to the accused.
HELD: The defence's application was dismissed. Notice that an expert will be called does not have to be in writing, as outlined in s. 657.3(3)(a) of the Criminal Code, but the Crown's verbal notice given in court was insufficient. The accused therefore had an automatic right to an adjournment. The court commented on defence counsel's holidays by noting that the Criminal Code does not state that the time frames set out are based on lawyers' personal schedules. The accused could have had the matter of the missing written notice of the expert brought before the court by December 21, 2019 but did not do so. The accused agreed that the time to trial was under the presumptive ceiling established in Jordan, so he had the onus of showing that the delay was unreasonable. The accused did not do anything about the missing information regarding the expert. He also did not file his Charter application in the time frame directed by the court and to which he agreed. The court concluded that the accused did not make a sustained effort to expedite the proceedings. The court then considered whether the case took markedly longer than it reasonably should have. The accused argued that since the accused was without his licence for 12.9 months due to the impaired charge, the delay was unreasonable.

The court did not find that the Crown was responsible for all of the delay as a result of the trial being adjourned. Approximately one month of the 4.5 months' adjournment was the accused's responsibility. The total time to trial was then 11.9 months. The court nonetheless considered whether the 12.9 months was markedly longer than it should have been and commented that: a) the case was not overly complex and both defence and Crown counsel had significant experience in drinking and driving cases; b) the court found the local consideration of an expert having to travel to the court was minimized because the parties agreed that the expert could appear by video. The time to trial added by the Crown calling an expert was thus found to be in the six-month range. The court also had numerous options available to set trial dates in a timely manner; and c) the Crown offered to switch prosecutors to open up more dates when it was learned that the February 15, 2019 date was not available. The Crown also did not object to the accused's late Charter notice. The court concluded that the time to trial of 12.9 months was not markedly longer than it should have been. This was not found to be a clear case of unreasonable delay. The trial was well within the time to trial for this type of matter and well below the Jordan 18-month mark. There was no Charter breach.

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R v Whitefish, 2019 SKPC 34

Schiefner, June 13, 2019 (PC19027)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Sentencing – Joint Submission
Criminal Law – Sentencing – Remand Time
Criminal Law – Sentencing – Sentencing Principles

The accused pled guilty to 19 Criminal Code charges on seven different informations: three counts of possession of stolen property over $5,000, contrary to s. 354(1); three counts of possession of stolen property under $5,000, contrary to s. 354(1); joyriding, contrary to s. 335; two counts of stealing property under $5,000, contrary to s. 334(b); two counts of possessing a weapon for a dangerous purpose, contrary to s. 88; breaking and entering, contrary to s. 348(1)(b); breaking and entering a dwelling house and stealing firearms, contrary to s. 98; using a firearm during a fight following commission of offence, contrary to s. 85(2)(c); operating a motor vehicle in a dangerous manner, contrary to s. 249(1)(a); evading police, contrary to s. 249.1; assaulting anther inmate, contrary to s. 266; and two counts of breach of recognizance (possession of a knife and curfew breach), contrary to s. 145(3). The Crown and accused recommended a global sentence of 15 months custody followed by probation. The accused would have been released at sentencing if the court agreed with the joint submission. The Crown justified the

recommended sentence based on the potential evidentiary weaknesses in some of the charges; the accused's limited and dated record; and the accused's assertion of her reduced moral culpability. The offences were committed over a 43-day period. The accused said she was on a drug-fueled, rural crime spree. She accepted responsibility for several of the charges on the basis of her involvement as a party to the offences. The accused was a 29-year-old Aboriginal woman. She had a troubled childhood with exposure to poverty, addictions, and abuse. The accused was addicted to crystal meth. The accused had a grade 12 education, some employment experience and three young children. She had a dated youth criminal record. Her only convictions as an adult were for driving while disqualified in 2007 and breach of probation. She received fines for both of those charges.

HELD: The joint sentencing submission was rejected because the court determined that it would have brought the administration of justice into disrepute. The sentence failed to adequately address the principles of proportionality, denunciation, and deterrence. The court found significance in the requirements imposed by s. 85(3)(a) and 85(4) of the Criminal Code. Section 85(3) mandates a minimum punishment of one year in custody and pursuant to s. 85(4) the sentence must be served consecutively to any other punishment arising out of the same event or series of events. A global sentence of 15 months would mean the s. 85(2)(c) charge would require the 12-month minimum, the break and enter a dwelling house could be no more than three months, and then all of the other 17 charges could be no more than three months, all to be served concurrently to each other. The court had to determine a fit and just sentence once the joint submission was rejected. The court found that an aggravating factor was that the accused's offences involved crimes against rural residents, who are vulnerable due to their location. Additional aggravating factors were: entering a dwelling house; stealing guns; using a firearm in fleeing from the commission of the offences; the number of victims involved; the lengthy period over which the offences were committed; that the acts were not impulsive; and that most of the offences occurred while the accused was out on bail. The mitigating factors were: the accused's guilty pleas; the Gladue factors; the unique systemic or background factors that may have played a role in the accused's coming before the courts; and the types of sanctions that may be appropriate given the accused's Aboriginal heritage. The court found that the offences required a lengthy period of incarceration and the length of the sentence was the court's primary consideration in a Gladue analysis. The court also considered the principles of proportionality, totality, and consecutive versus concurrent sentences. The circumstance of each offence was considered. The court sentenced the accused to a global sentence of 32 months, less remand credit together with ancillary orders. The court considered the accused's record but gave it limited weight.

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R v Ryan, 2019 SKPC 35

Morgan, June 10, 2019 (PC19028)

Criminal Law – Mischief

The accused was charged with committing mischief. He had had an x-ray taken at a medical imaging business and became upset when told there would be a charge for making a copy. The manager met with him and provided him with a free copy. The manager testified that the accused was mildly aggressive and argumentative. The accused returned again a month later and asked to see the manager. He testified that that the report was wrong, he was going to sue the radiologist and that he needed more imaging done. The manager explained that he would have to obtain a requisition from a doctor whereupon the accused became agitated, reached across his desk and picked up a piece of paper and wrote the word "murder" on it. The manger told him to leave and that he was calling the police. The accused complied and the doors to the clinic were locked for 10 minutes until the police arrived. The accused said that he too called the police and advised them that he wanted them to investigate the business' alleged murder of him because they refused to take further images of him which would contribute to his untimely death.
HELD: The accused was found not guilty. The court found that he had not committed the actus reus of the offence. The locking of the doors did not constitute an interference with property attributable to the accused. The court considered the accused's action in taking the paper and writing "murder" on it was de minimis and it was not prepared to convict him on that. The mens rea was not proven either. The accused had left the business as soon as he was asked to do so.

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R v Ryan, 2019 SKPC 36

Morgan, June 10, 2019 (PC19029)

Criminal Law – Weapons – Possession Dangerous to Public

The accused was charged with possession of a knife for a purpose dangerous to the public peace contrary to s. 88 of the Criminal Code. The two Crown witnesses testified that while they were attaching a poster to a bulletin board, the accused approached them on rollerblades while unsteadily holding a large kitchen knife. The accused told them that they could not put up their posters and said that he had been arrested for doing the same thing. He said the police had confiscated his Exacto knife so he had replaced it with the

one he now carried and he used it to stab the witness' posters. The witnesses said that they were not concerned for their personal safety, but found the accused's behaviour erratic. They thought that he was enjoying the situation and did not put the knife away after they repeatedly requested that he do so. In his testimony, the accused said that he did not use the knife as a knife because it wasn't sharp as he had sanded the blade. He used it as a tool to remove posters. He explained that he wanted to get into a confrontation to get attention and make a point with the City because of his ongoing dispute with it over its poster policy.
HELD: The accused was found guilty. The court found that the accused was in possession of a knife and the knife was a weapon and that the purpose of his possession was dangerous to the public peace. It was satisfied from the evidence that the accused's purpose in carrying the knife was to get involved in some kind of confrontation to make a statement about the City's postering policy.

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R v Arcand, 2019 SKQB 131

Kalmakoff (ex officio), May 24, 2019 (QB19136)

Criminal Law – Firearms Offences – Discharge with Intent

The accused was found guilty of five charges but by application of the Kienapple principle, three charges were conditionally stayed and he was sentenced only for discharging a firearm with intent to prevent arrest or detention contrary to s. 244 of the Criminal Code and carrying a weapon for a purpose dangerous to the public peace contrary to s. 88 of the Code. The accused was reported to the police to be using a metal pipe to try to break into a car in a parking lot in downtown Saskatoon in mid-afternoon on a weekday. (It was later learned that it was the accused's vehicle and he had locked himself out.) A police officer approached the accused and tried unsuccessfully to engage him in conversation. Realizing that the pipe was actually an improvised firearm, a "zip gun", the officer called for backup and drew his gun. Other officers arrived, the accused walked into the street and a standoff ensued. The officers repeatedly commanded the accused to drop his gun but he did not respond. The accused discharged his gun in the direction of an officer and the blast barely missed him. The accused then ran away, still carrying his gun which he reloaded and tried again to discharge. When the police stopped him, he would not surrender. The officers shot him multiple times and he was seriously injured. The Crown argued that an appropriate sentence would be nine to ten years in prison and the defence submitted that it should be between six and seven years. The Pre-Sentence Report (PSR) described the accused as a 36-year-old man of Aboriginal ancestry who was originally from the Alexander First Nation in Alberta. His

grandparents and parents had attended residential schools. His home life as a child was turbulent and unstable. His parents abused alcohol and drugs. They were physically abusive of each other and their children. The accused was sexually abused by his older cousin. He spent much of his youth in group homes and began using alcohol when he was nine and drugs in his early teens. He used and sold cocaine and crystal methamphetamine and developed a serious dependency. He was under the influence of crystal meth at the time of the present offence. The accused's formal education ended in grade six, but he was trying to complete his GED. His employment history was sporadic due to his struggles with substance abuse that also led him to criminal activity and periods of incarceration. His criminal record showed 21 youth convictions and 16 adult convictions, primarily related to property offences but included assault-related offences. His life had been spent in poverty and transience.

HELD: The accused was sentenced to eight years' imprisonment on the first count with two years' credit for remand time at the rate of 1 to 1.5 days. On the second count, the accused received a sentence of four years, to be served concurrently. The court found in its assessment of proportionality that both offences were at the high end of the scale in terms of their nature and comparative seriousness, the commission and gravity of the offence,s and that the accused's degree of responsibility rested at the high end of the scale since he had carried an inherently dangerous and unpredictable firearm into the downtown area. He had the opportunity to bring the situation to a peaceful end but he refused to and instead fired at a police officer. The aggravating factors were numerous and included that the accused threatened the police and bystanders by discharging a firearm. Very few mitigating factors existed but the accused had accepted responsibility for his action and expressed sincere remorse. In considering the Gladue factors, the court concluded that the accused's experience as an Aboriginal person played a significant role in his criminal history and in the commission of the offences for which he was being sentenced. Regardless of his personal circumstances as an Aboriginal person, the court found that no sentence short of a significant term of imprisonment in a federal penitentiary would be appropriate because of the seriousness of the offences and the accused's degree of responsibility.

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Antoniadou v Sasktchewan Government Insurance, 2019 SKQB 138

Currie, May 30, 2019 (QB19133)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 39

The applicant insured applied for the appointment of an umpire in an arbitration under s. 39 of The Automobile Accident Insurance Act. The application related to payment for seven separate instances of repair to the applicant's vehicle. The repairs were made by Kmtaxitech Agency, owned by K.M. K.M. knew that Kmtaxitech was not an accredited repairer. The respondent, Saskatchewan Government Insurance (SGI), paid for labour at rates between $92/hour for accredited repairers and $46/hour for non-accredited repairers. In this case, all of the applicant's interest in the matter had been handled by K.M. and he had her power of attorney in this regard. Under that authority, K.M. pursued this application and had named himself as her appraiser for the purpose of an arbitration. SGI's response to the application was that there was no genuine dispute between the insured and it but rather, that the true applicant was K.M. who was dissatisfied with the rate paid to non-accredited repairers. K.M. had been involved in three other similar applications.
HELD: The application was dismissed. The court found that, as there was no issue between the insured and SGI, it was not properly the subject of arbitration under s. 39.

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Arcand v Wright, 2019 SKQB 139

Scherman, May 30, 2019 (QB19134)

Guardianship – Dependant Adult – Personal and Property Guardian – Temporary Appointment
Power of Attorney – Capacity

The applicant, Y.A., applied to be appointed as temporary personal guardian and temporary property guardian (PPG) of F.T. under s. 19(1) and s. 44(1) of The Adult Guardianship and Co-decision-making Act (AGCA). In a second application, she and her two siblings applied for an order revoking of a power of attorney (POA) purportedly granted by F.T. in March 2019 to his two daughters, the respondents. F.T. had children from a different relationship and the respondents were some of his biological offspring. They resided in Ontario and were not involved in F.T.'s life on a regular basis. F.T. and his wife had been married for 37 years and they had lived in North Battleford for the last 19 years. The applicants had been parented by F.T., had been significantly involved with him and his wife since they were married and supported them as they aged. When F.T.'s wife developed Lewy body dementia, she was moved into temporary hospital care in Saskatoon. F.T. wanted to be able to live in the same home with her when she was transferred from the hospital. However, he then suffered a massive stroke in February 2019. When the respondents were notified, they traveled to Saskatoon and then made arrangements for F.T. to be moved first to

a hospital in Battleford without informing the applicants. They retained a lawyer and obtained a form of enduring power of attorney (POA), appointing them as F.T.'s personal and property attorney, signed by him with a mark. The lawyer competed the legal advice and witness certificate required by The Powers of Attorneys Act, 2002. They then closed F.T.'s bank accounts and transferred funds. The applicants learned that the respondents planned to sell F.T.'s home. On April 1, 2019, Y.A. filed this application requesting her temporary appointment and the respondents responded by filing a statement of objection. In May 2019, the respondents had F.T. discharged from the hospital and transported to Thunder Bay, Ontario where they placed him in a long-term care facility. The applicants submitted that F.T. did not have the legal capacity to execute the POA. Sfter his stroke, he was unable to communicate and no formal medical assessment had been made of his mental functioning. The respondents filed no sworn evidence regarding the circumstances of the making of the POA. The applicant Y.A. explained her reasons for making her application were the physical and emotional harm that Tucker would suffer by being separated from his wife and concerns about the respondents' handling of his property pursuant to an invalid POA.
HELD: The application by Y.A. was granted. The court appointed her temporary PPG for F.T. under ss. 19(1) and 44(1) of the AGCA. Under s. 52, the appointment prevailed over the POA. It ordered the respondents to account to it and the PPG regarding F.T.'s funds and property. Y.A. could arrange for F.T.'s return to Saskatchewan if she so decided. Subject to its approval of their appointment, the court advised that Y.A. should arrange for two health professionals to examine F.T. The court declined to grant the second application because the temporary appointment was an interim determination only and it was open to the respondents to oppose it from becoming permanent and to oppose the application to have the POA set aside. It found that it was necessary to make the appointment to protect F.T. from serious physical or mental harm and/or protect his estate from damage or loss. The respondents appeared to have known that F.T. lacked capacity to provide them with a valid POA and it had been obtained in suspicious circumstances. As well, once the question of capacity was raised, they bore the burden of proof to establish legal capacity and they had not provided any sworn evidence to support their position that F.T. had capacity. Furthermore, they had improperly removed him from the province while the matter of his guardianship was before the court and after they had attorned to its jurisdiction when they filed their objection.

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R v Dirksen, 2019 SKQB 140

McMurtry, May 24, 2019 (QB19135)

Criminal Law – Sexual Offences – Sexual Interference – Person under 16 – Sentencing
Criminal Law – Mandatory Minimum Sentence – Constitutional Challenge
Constitutional Law – Charter of Rights, Section 12

The accused was convicted of two counts of committing sexual assault contrary to s. 271 of the Criminal Code, two counts of sexual touching contrary to s. 151 of the Code and one count of exposing himself contrary to s. 173(2) of the Code. The two victims were 14 and the accused was 25 at the time of the offences. The Crown stayed the first two counts by operation of the Kienapple principle. Before sentencing, the defence filed an application for a mistrial on the basis that fresh evidence had emerged since the conviction that put it in doubt. The accused argued that the victim impact statements (VIS) contained evidence he could have used to challenge the complainants' credibility. The accused also asserted that his undiagnosed and unmedicated attention deficit hyperacitivy disorder (ADHD) had an impact on his ability to reason, think and process information while testifying. The defence also brought a Charter application, arguing that the minimum sentences under ss. 151, 271 and 173(2) are excessive and would be disproportionate to the appropriate sentence in this case and should be struck down under s. 12 of the Charter as cruel and unusual punishment.
HELD: The application for a mistrial was denied. The Charter application was dismissed as well. The court sentenced the accused to 12 months for the s. 151 offence and six months consecutive for the s. 173(2) offence on the first victim and 12 months concurrent for the s. 151 offence on the second victim. Upon release, the accused would be on probation for two years subject to numerous conditions. Regarding the application for a mistrial, the court found that there was no fresh evidence because the accused's original counsel used the same information at trial to argue that the complainants' testimony could not be trusted. They were cross-examined in accordance with this theory and did not say anything inconsistent with the information later provided in the VIS. The court did not find the new evidence of the accused's ADHD caused it to look at his testimony differently. It had found the accused guilty, not because he could not express himself, but because it did not believe his evidence. After determining the minimum sentences imposed by the Code would not result in a grossly disproportionate sentence in the case of the accused, the court found it unnecessary to decide the constitutionality of the mandatory minimums.

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Mooney v Kempert, 2019 SKQB 141

Goebel, May 30, 2019 (QB19137)

Civil Procedure – Contempt
Civil Procedure – Family Law Proceedings – Notice to Disclose

The parties had separated in 2018. The petitioner mother served her petition for relief on the respondent in August 2018 and he was noted for default in November 2018, although at some point he had retained counsel. He also failed to respond to notices for disclosure of his finances and a parenting certificate as required by The Queen's Bench Act, 1998, served on him in September 2018. The petitioner applied in November for an order requiring the respondent to reply to her requests but nothing was filed and neither he nor his counsel appeared. The court made an order for service of a reply and awarded costs of $1,500 against the respondent. He failed to comply and the petitioner applied again for another order, but neither the respondent nor his counsel appeared, nor had they filed anything, when the matter came before the court in February 2019. The respondent was given 20 days to serve a reply regarding disclosure and the judge further ordered that his counsel provide an explanation for his non-attendance at the previous appearances. At the hearing in March 2019, the respondent's lawyer apologized and requested an adjournment to give his client time to comply. The matter was adjourned until May but disclosure was not provided and a further adjournment was sought. The petitioner's counsel requested a contempt hearing. The court adjourned the matter to provide that the respondent be personally served with its fiat to give him notice of the jeopardy he faced and ordered that he pay costs for the last three court appearances fixed at $1,500 with $500 payable by counsel personally. The respondent failed to appear at the next hearing. His counsel advised that after being unemployed for many months, the respondent had obtained a position out of town and expected to be able to pay child support and the costs award in the near future. The petitioner argued that the respondent should be found in contempt and be incarcerated for 30 days.
HELD: The respondent was found in contempt of court for his failure to comply with the November and February orders. In order not to jeopardize the respondent's employment by sentencing him to serve time in jail, the court granted an adjournment to June to allow him to attend in court to provide the requested disclosure and make support payments. At that time the court would address whether the respondent had complied with the disclosure order and the appropriate sanction for his contempt.

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R v Paul, 2019 SKQB 142

Smith, June 7, 2019 (QB19138)

Criminal Law – Manslaughter – Sentencing
Criminal Law – Aboriginal Offender – Sentencing

The accused was convicted of charges of manslaughter and unlawful confinement (see: 2019 SKQB 40). At the time of the offences, the accused was just under the age of 18 but consented to be sentenced as an adult after the Crown filed its notice under s. 67 of the Criminal Code. She had agreed because she would have access to treatment programs offered in federal prisons. The accused and a number of other members of a gang had taken the victim to a remote location with the intention of beating him to punish him for theft. Although the accused had not orchestrated the attack, she left the truck and began participating in it. The accused stabbed the victim six times in the leg. The group left the victim alone and bleeding and he died. The participants had been using methamphetamine and alcohol. One of the co-accused who had driven the truck but not participated in the beating received a seven-year sentence. The Crown argued that an 11-year custodial sentence was appropriate due to the gravity of the offences and the accused's direct involvement in the death of the victim. The defence maintained that the accused's moral blameworthiness was substantially reduced by the Gladue factors and her moral culpability was at the lower end of the sentencing range and thus an appropriate sentence would be five years' imprisonment. The accused's father, a member of the Muskoday First Nation, had abandoned his family. He had been one of the children taken from his family during the Sixties Scoop. The accused was raised by her non-Aboriginal mother and had no connection with her Aboriginal heritage until the age of 11 when she met her father. She left home at the age of 16 and joined the Indian Posse and acquired a lengthy youth criminal record. The Pre-Sentencing Report (PSR) stated that the accused expressed remorse for her actions, but also took pride in her membership in the gang. While on remand she had been involved in 28 incidents, some of them related to her role as a gang member. She was assessed at the highest level of risk to reoffend and at high risk of violent reoffending and the risks could only be reduced through counselling if it were effective. The accused's attitude to mental health programming was negative but she indicated willingness to participate in treatment for addictions and anger management.
HELD: The accused was sentenced to nine years' imprisonment for manslaughter and two years' imprisonment for unlawful confinement, to be served concurrently. The court took into account that the gravity of the offence was high and the accused's moral blameworthiness was only diminished by her age and the Gladue factors. The sentence received by her co-accused should not determine what might be an appropriate sentence for her.

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Prince Albert Right to Life Association v Prince Albert (City), 2019 SKQB 143

Goebel, June 6, 2019 (QB19139)

Administrative Law – Judicial Review – Municipal Application of Policy
Charter of Rights, Section 2(b)
Municipal Law – Judicial Review – Costs
Municipal Law – Judicial Review – Procedural Fairness
Municipal Law – Judicial Review – Policy

The applicants were a non-profit charitable organization (non-profit) operating in the respondent City and the non-profit's past president and event organizer. For 20 years, the non-profit applied for and received permission to use the City's "Courtesy Flagpole" during a week in May. In 2017, the City received two complaints about the non-profit's flag. The complaints were referred to the mayor's office. The applicants indicated that they learned from a media report on May 5, 2017 that the mayor would not allow the requested flag to be flown the following week. The media release stated that the requested flag was "not consistent with any nationally or provincially approved flag, which is unique to this group". The applicants never received a response from the City regarding their application to use the flagpole in 2017. The applicants sought judicial review of the City's denial of their application to fly their requested flag on the requested dates on the basis that: a) the decision was arbitrary, unreasonable, and contrary to the principles of natural justice and procedural fairness; and b) a declaration that the decision violated their right to freedom of expression guaranteed by s. 2(b) of the Charter. In May 2018, the City passed a motion repealing the policy allowing access to the Courtesy Flagpole. The issue was whether the application was moot because there was no longer a Courtesy Flagpole Policy.
HELD: The first step to consider in determining whether an application is moot is to determine whether there is a live controversy remaining between the parties. The applicants argued that the primary remedy sought, a declaration that the decision was an unreasonable violation of the non-profit's rights, was still a remedy available to the court. To decide on the first step the court considered: a) was there a denial of procedural fairness? The City held a duty of procedural fairness to the applicants. The City had to follow its own policy and to ensure general fairness in so doing. The policy was not followed and there was a denial of procedural fairness, but the decision could not just be quashed and returned to the City for determination because the policy had been repealed; b) was the decision reasonable, and if not, what was the appropriate remedy? The court should not speculate as to the reasons that might have been given or the findings of fact that may have been made had the prescribed decision-maker put his or her mind to the application and the underlying policy. Where the decision is found to be unreasonable, the remedy is to direct the matter back to the

deciding body, which could not be done because the policy had been repealed; and c) did the decision violate s. 2(b) of the Charter and if so, what was the appropriate remedy? Charter claims must be decided based on an adequate factual record. There was not an adequate factual record. The appropriate relief would be again to refer the matter back to the City for a proper and fair determination. The court concluded that there was no live controversy between the parties and the application was moot. There was no practical reason to redirect the issue back to the City. The second step was whether the court should exercise its discretion to the hear the case even though the application was moot. The court was not satisfied that it should exercise its discretion to fully determine the issues raised by this matter on the merits. The application was dismissed as being moot. The application was found to be sincerely brought as a result of the City's mishandling of the non-profit's application to use the Courtesy Flagpole. The applicants were awarded costs of $6,000 payable within 30 days.

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Royal Bank of Canada v Yuzak, 2019 SKQB 145

Danyliuk, June 7, 2019 (QB19140)

Civil Procedure – Evidence – Opinion Evidence
Foreclosure – Evidence
Foreclosure – Remedies
Foreclosure – Stay of Proceedings
Statutes – Interpretation – Land Contracts (Actions) Act, Section 4(1)

The defendant, Y., mortgaged her property in favour of the plaintiff bank securing a bank account and line of credit. Subsequent to the mortgage registration, the defendant, K., registered an interest, which was followed by a tax lien and then three judgments, two by the plaintiff. The plaintiff sought leave to commence an action for realization on the mortgage in August 2018. Y. was in default of the loans secured by the mortgage in the amount of $208,000. The plaintiff's position was that there was no equity in the property, especially when debts other than the mortgage were considered. The plaintiff used a realtor's valuation opinion as the value of the property. The drive-by opinion valued the property at between $160,000 and $200,000. Leave to commence was granted on October 15, 2018. Y. was noted for default on December 6, 2018. The plaintiff filed an application for order nisi for sale by real estate listing in March 2019. The matter was adjourned to May 27, 2019. Y. indicated in her affidavit that she had made arrangements to pay the tax debt monthly so as to stall any tax enforcement proceedings. She also wanted to pay the plaintiff back with monthly payments. Y.'s affidavit also exhibited a formal appraisal valuing the property at

$350,000. The plaintiff indicated that it had demanded payment of the credit line and was not prepared to accept payments over time. Y. asked for the action to be stayed or at least adjourned for a lengthy period. The issues were: 1) what evidence of the property's value should be relied upon; 2) did the court have jurisdiction to stay the application and/or action; and 3) what was the appropriate disposition of the application?
HELD: The issues were determined as follows: 1) the full appraisal was preferable but not perfect. The appraisal was based on the assumption that certain work in progress was completed. The plaintiff's opinion of value was found to be deficient in several aspects. The author only drove by the property and there was no evidence that he had any qualifications beyond being a realtor. The plaintiff relied on the opinion even though it states it is only reliable on the date written, which was one year earlier. The court cautioned that a litigant should not be filing opinion evidence unless it can assure the court of the basic requirements for experts. The plaintiff did not satisfy the court that the realtor was properly qualified. The court disregarded the opinion of the realtor because it was inadmissible. The current fair market value of the property was found to be $350,000; 2) Y. requested that the action be stayed pursuant to s. 4(1) of The Land Contracts (Actions) Act. The ordinary meaning of the section suggests that the court could stay the action. The court determined that it had the jurisdiction to stay the application and/or action; and 3) Y. owed the plaintiff a substantial amount of money. She did, however, make significant payments on her debt to the plaintiff. The court found that Y. was sincere in her desire to address the debt. The plaintiff argued that since it demanded full payment of the credit line, it was now due and owing and could not be reinstated. The court found that the express terms of the mortgage supported the plaintiff's position. There were no reinstatement provisions; to grant Y. her exact remedy would be to rewrite the contract between the parties. The Land Contracts (Actions) Act is generally not used to create new rights or obligations. Reinstatement would have been available if the mortgage were not payable on demand. If it were available, the court said that it was discretionary, and the court would not exercise the discretion in this case. Y. did not defend the action and therefore was taken as admitting the contents of the statement of claim. The court adjourned the matter to October 2019 to allow Y. to seek alternative financing or sell the property to realize her equity.

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Leo v Global Transportation Hub Authority, 2019 SKQB 150

Kalmakoff (ex officio), June 13, 2019 (QB19143)

Privacy – Access to Information – Appeal
Privacy – Access to Information – Exemptions

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act

The applicant, a journalist, appealed the decision of the respondent relating to disclosure and non-disclosure of documents pursuant to the provisions of The Freedom of Information and Protection of Privacy Act (FOIP). The applicant requested access to certain records held by the respondent. The Information and Privacy Commissioner (IPC) reviewed the matter and made recommendations to the respondent. The respondent then disclosed some records to the applicant but refused to disclose others. Some of the records that were disclosed were in redacted form. The applicant argued that the respondent did not properly follow the IPC's recommendations and applied exemptions that it was not legally entitled to apply. The respondent and third party argued that the appeal should be dismissed. The third party argued that the exemptions should apply because otherwise it would suffer damage from disclosure of the information. Step one of the appeal was an in-camera review of the records in question as well as receiving further evidence and representations in camera from the respondent and third party. Step two, the present matter, was the determination of the applicability of the exemptions in light of the evidence presented on the appeal. The respondent and/or third party claimed the following exemptions: 1) s. 15 – the investigative/law enforcement exemption; 2) s. 17 – the government advice or consultation exemption; 3) s. 18 – the economic interest exemption; 4) s. 22 – the legal advice/privilege exemption; 5) ss. 24 and 29 FOIP and s. 27 Health Information Protection Act – the protected personal information exemption; and 6) s. 19 – the third-party interest exemption.

HELD: The appeal was dismissed. Section 58 of FOIP makes is clear that this appeal is a hearing de novo. The onus of proving that access to the records should not be granted was on the respondent. The argued exemptions were analyzed as follows: 1) the s. 15 exemption permits refusal of disclosure of information relating to lawful investigation or law enforcement matters in general. The head's decision is discretionary because of the use of the word "may". The court determined that the exercise of such discretion could not be reviewed. The word "matter" means the context is broad and "lawful investigation" and "law enforcement matter" must have different meanings. The exemptions were determined to apply to more than just specific ongoing investigations or proceedings. The court concluded that the three documents that the respondent applied the s. 15 exemption to were related to an investigation being conducted by the RCMP and were thus within the scope of the exemption; 2) the applicant argued that the court should follow the three-part test to the s. 17 exemption set out in the IPC Guide. The court determined that the test set out in the Guide was generally consistent with the leading authorities. The test in the Guide does not require that the information actually be communicated, only that it was prepared by someone as part of

their employment responsibilities, and with a prescribed purpose in mind. The court concluded that the respondent was authorized to apply the s. 17 exemption in all the instances that it did. The records all involved or were related to advice, recommendations, proposals, or analysis or development of policy options related to the business activities of the respondent. Access to the redacted portions of the records would disclose the type of information listed in s. 17(1)(a) and (b); 3) the s. 18 exemption required that the respondent show that release of the information would prejudice the economic interests of the Government of Saskatchewan or a government institution, such as the respondent itself. The court concluded that the respondent properly applied the s. 18 exemption. There was more than a mere possibility that release of the information would prejudice the economic interests of the Government of Saskatchewan or the respondent; 4) the scope of solicitor-client privilege is broad. The court found that the respondent properly applied the legal advice/privilege exemption pursuant to s. 22; 5) the redactions under the personal information exemption in both Acts were found to be properly made; 6) the protected third party information includes trade secrets, information supplied in confidence by a third party to a government institution, and additional information pursuant to the "safety net" provision in s. 19(1)(c) preventing disclosure of information that could reasonably be expected to harm the business interests of the third party in the ways described in that section. The harm must be more than a mere possibility. The court did not have to make the determination based on the third-party exemption because all of the applicable records were already found to have been properly exempted by the respondent. The respondent was wholly successful on the contested portion of the appeal and was thus entitled to costs on Column 1 of the Tariff.

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