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The appellant was convicted of possession of methamphetamine, hydromorphone, cocaine, fentanyl, and gamma-hydroxybutyric acid (GHB) for the purpose of trafficking, trafficking in methamphetamine and cocaine, possession of proceeds of crime, and various firearm offences. The appellant was sentenced to ten years in prison, less two years' remand time. Two officers observed the appellant and a suspected drug dealer, J.P., park their vehicles nose to nose at a car wash where they had been watching J.P. J.P. got into the appellant's car, and both men began looking down at their laps. Cst. G. decided to arrest the men 30 seconds after J.P. entered the appellant's vehicle. The occupants were counting cash. Cst. B. arrested the appellant at 2:57 pm. A search of the appellant resulted in finding a folding knife and $2,310 in cash. A small amount of cocaine and methamphetamine were in plain sight on the vehicle floor. Additional drugs, being more cocaine and methamphetamine, fentanyl, hydromorphone, and GHB were located elsewhere in the vehicle. Firearms and weapons were also found in the vehicle. When given his rights to counsel, the appellant

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indicated that he wanted to speak to a lawyer. The appellant was not given the opportunity to call a lawyer but was instead transported to the detachment to wait while the officers obtained a warrant to search his home. The warrant was executed at 7:25 pm. More drugs, drug paraphernalia, and firearms were located in the home. The officers said they did not let the appellant communicate with anyone for seven hours because they did not want him to let anyone know that his house would be searched so that evidence was not destroyed and for officer safety. After 9:30 pm, the appellant was read his Charter rights again, and he indicated that he would call a lawyer in the morning. The trial judge found that s. 495(1)(a) of the Criminal Code was met such that the warrantless arrest was lawful. The trial judge also found the brief exchange where the appellant confirmed his address on his licence before being provided with his rights to counsel was not a Charter breach. The trial judge found a breach of the appellant's s. 10(b) Charter rights, but he did not undertake a s. 24(2) analysis. Instead, he indicated that both counsel had conceded that there was no remedy available "per se" because the police did not take a statement at the detachment. The appellant argued that the trial judge erred by failing to find a breach of his ss. 8 and 9 Charter rights and failing to exclude the evidence found on his person, in his car, and in his home. The issues were: 1) whether the trial judge erred in finding the police arrested the appellant lawfully pursuant to s. 495(1)(a) of the Criminal Code; 2) whether the trial judge erred by failing to find that asking the address question breached the appellant's s. 10(b) rights; and 3) whether the trial judge erred by failing to exclude the evidence obtained by the police searches of the appellant's person, vehicle and home pursuant to s. 24(2) of the Charter.

HELD: The conviction appeal was allowed in part. The court only found a breach of the appellant's s. 10(b) Charter rights. The evidence at the appellant's home should have been excluded pursuant to s. 24(2) of the Charter. The issues were determined as follows: 1) the issue turned on whether the trial judge erred in finding the officers had reasonable grounds to arrest pursuant to s. 495(1)(a). The trial judge adopted the correct test for the existence of "reasonable grounds to believe." After analyzing the facts all together, rather than piecemeal, the appeal court did not find a palpable and overriding error in the statement that the "vignette" of facts was sufficiently unusual to be described as incongruous. It was open to the trial judge to conclude that J.P. was known by the police to be involved in the drug trade. The appeal court did not find a breach of the appellant's ss. 8 or 9 Charter rights; 2) the appellant argued that the police asked him to verify his address to complete the Information to Obtain (ITO) for the search warrant, which was a breach of his s. 10(b) Charter rights. The transcript confirmed that the question was asked for administrative purposes. The appeal court agreed and found no Charter breach, and 3) the trial judge concluded that the evidence should not be excluded because he thought it was necessary for there to be a causal connection between the breach and

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the evidence. The appeal court found the trial judge erred in thinking that a causal connection was the only sufficient connection. The connection may be causal, temporal, contextual, or any combination of the three. The appeal court concluded that evidence was obtained in a manner that breached the appellant's Charter rights and, therefore, a s. 24(2) analysis should have been conducted. The appeal court found that all of the evidence seized as a result of the searches of the appellant's person, vehicle, and residence was obtained in a manner that infringed the appellant's s. 10(b) Charter rights. The appeal court found a sufficient temporal and contextual connection between the breach and the evidence acquired during the initial searches. The acquisition of that evidence was part of the same chain of events. The conduct of the police did not meet the good faith standard. The seven-hour delay in implementing the appellant's right to counsel was profoundly serious even though he was not questioned until after his rights were fully implemented. The appeal court found that the first Grant factor weighed strongly in favour of excluding the evidence obtained at the residence, but less so concerning the evidence obtained in the initial searches. The second factor was less serious than the first factor but resulted in a severe impact on the appellant's Charter rights due to the length of the delay and weighed in favour of exclusion. Concerning the third factor, the appeal court indicated that the evidence was reliable and critical to the Crown's case. That factor favoured admission of the evidence. The appeal court concluded that society's interest in a trial on the merits was insufficient to tip the balance in favour of including the evidence obtained at the residence. The appeal court concluded the opposite with respect to the evidence obtained from the initial searches. The admission of that evidence would not bring the administration of justice into disrepute. One of the 14 counts the appellant was convicted of was set aside while six others were varied to the extent that they related to items seized from the residence. The parties were ordered to provide written sentencing submissions within four weeks based on the conviction appeal decision.

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R v Napope, 2020 SKCA 71

Ottenbreit Barrington-Foote Tholl, June 11, 2020 (CA20071)

Criminal Law – Appeal – Conviction
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Criminal Law – Appeal – Jury Charge
Criminal Law – Manslaughter
Criminal Law – Robbery – Armed Robbery – Sentencing – Appeal

The appellant was charged with robbery and manslaughter after four men forcibly entered the victim's apartment to rob him of drugs and

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money. The victim was stabbed to death. The issue at trial was identity. The jury found the appellant guilty of robbery and therefore, must have concluded that he was one of the people who forcibly entered the apartment. The jury acquitted the appellant of manslaughter. The appellant was sentenced to seven years, or four years in prison after pre-sentence custody was deducted. The appellant appealed, arguing that the verdict of guilty of robbery was inconsistent with the verdict of acquittal for manslaughter. He also appealed his sentence. Two kinds of evidence linked the appellant to the apartment: DNA evidence and one of the two eyewitnesses at the apartment identifying the appellant. The appellant said that he had nothing to do with the robbery. He said that he had been assaulted and robbed earlier by two men. One was wearing a clown mask later located in the victim's apartment. The appellant said that he had landed a blow on one of the people and was knocked unconscious and bleeding.

HELD: The conviction appeal was allowed. The Crown agreed that the trial judge made errors in his jury address. He gave the jury two decision trees, one for manslaughter and one for the robbery charge. They contained several significant errors of law. The trial judge gave erroneous instructions on the proper meaning of the term "principal offender" that could have led to the jury's belief that the appellant could not be a principal offender in relation to the offence of manslaughter if he did not inflict the fatal injury. The jury could have been confused as to the real issue they had to decide. There were also errors related to the mens rea required to prove manslaughter. The trial judge's instructions may have led the jury to believe that the Crown had to prove subjective foresight or the objective foreseeability of the risk of death when that is not required. The appellant argued that the verdict was unreasonable because the robbery conviction was inconsistent with the manslaughter acquittal. The court's test was whether the verdict was one that a properly instructed jury, acting judicially, could have reasonably rendered. The court did not agree with the Crown that when an appellate court finds an error in a verdict of acquittal, it always has the discretion to affirm the conviction if there was evidence to support it. The court did not agree with the Crown that because the offences have different elements, the conviction on one and an acquittal on the other cannot constitute inconsistent verdicts. The appellant argued that the evidence for the two offences was interwoven and effectively inseparable. The court agreed. The issue was identity. A properly instructed jury could not reasonably find the appellant guilty of robbery, the predicate offence in relation to the charge of unlawful act manslaughter, and not guilty of manslaughter. The verdicts were inconsistent, and the conviction was unreasonable. The court allowed the appeal and directed a verdict of acquittal on the robbery charge. The court's comments regarding the law related only to inconsistent verdicts in the context of legally incorrect jury instructions.

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R v Pastuch, 2020 SKCA 72

Ottenbreit, June 9, 2020 (CA20072)

Criminal Law – Fraud
Criminal Law – Judicial Interim Release – Application for Release Pending Appeal
Criminal Law – Sentencing – Appeal

The applicant applied for release pursuant to s. 679(3) of the Criminal Code pending the hearing of her appeal. She was convicted of three Criminal Code offences after trial: defrauding corporation and private investors in a value exceeding $5,000, contrary to ss. 380(1)(a); stealing money, corporate or other private investors' property, in a value exceeding $5,000, contrary to s. 334; and money laundering with respect to proceeds alleged to have been obtained by fraud, contrary to s. 462.31(1)(a). A stay was directed on the theft and laundering offences. Individuals and closely held corporations invested in excess of $5.5 million over 33 months. She told them that the capital was required by a company developing an anti-spam product. The applicant asked for personal loans with receivables on government contracts to ensure repayment. Progress reports were sent. The trial judge found that none of the investors received any income-based return on their investments, and all but ten investors lost the entire principal of their investments. The evidence of culpable dishonesty was "overwhelming." The trial judge made numerous findings regarding the applicant, including that she intentionally misrepresented a variety of circumstances to the investors to encourage them to provide funds or maintain investments. None of the investments would have been made without her deceit. The applicant was sentenced to seven years and three months imprisonment minus three months pre-sentence credit. A restitution order of over $5.5 million was also made. A fine in lieu of forfeiture of the same amount was made, minus any amounts paid in satisfaction of the restitution order, payable within 12 years following her release from prison. A further five years' imprisonment would be imposed if there were default in payment of the fine, that term of imprisonment to run consecutive to the other term. The applicant appealed on 30 separate grounds of appeal. A previous application for release in August 2019 was dismissed as premature because the trial transcripts were not available. The Crown opposed release based on the third criterion of s. 679(3), public confidence in the administration of justice. The applicant argued that because there was such a delay in getting the trial transcript, she could be released on day parole before the appeal was heard. She said that she might have served her institutional incarceration before she could thoroughly review the transcript. The applicant said that she was also immunocompromised, so she was at heightened susceptibility to contracting COVID-19.
HELD: The application was granted. The court found that the applicant

met the first and second criteria in s. 679(3). The protection of the public branch of the third criterion was also met. The court had to determine the Crown's argument respecting confidence in the administration of justice. Enforceability and reviewability had to be weighed. The court identified the sub-criteria to consider as follows: 1) the gravity of the offence; 2) the circumstances surrounding its commission; 3) the potential for a lengthy term of imprisonment, and 4) the strength of the appeal. The onus was on the applicant to establish that she should be released. The court did not agree with the Crown that the applicant's release would undermine public confidence in the administration of justice. The offence was not violent, but it was serious. The public interest criterion was not the sole determinative component. There were no public protection concerns. The grounds of appeal were found to exceed the not frivolous standard. The court also considered the COVID-19 virus as part of the public confidence branch. The applicant would have less risk to her health if she were to reside with her mother pending the appeal. The court was not persuaded that the enforceability interest outweighed the reviewability interest. The court ordered that the matter be put on the first chambers day in July for appeal management to ensure that the appeal would progress as quickly as possible. The applicant was released with conditions including filing her appeal factum by October 31, 2020, and reporting during her release.

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R v Belcourt, 2020 SKCA 73

Caldwell Schwann Barrington-Foote, June 19, 2020 (CA20073)

Criminal Law – Appeal – Fresh Evidence
Criminal Law – Assault – Sexual Assault – Conviction – Appeal – Ineffective Counsel

The appellant appealed his conviction for sexual assault after serving his three-year sentence. He had originally appealed at the time of his conviction in 2015 but his then-counsel on appeal had filed a notice of abandonment. The accused maintained that he had never instructed his former counsel to do so and applied to reinstate his appeal. The abandonment was set aside and the appeal reinstated. He did not file an amended notice of appeal but his argument was based upon an allegation of ineffective trial counsel and he applied to adduce fresh evidence in the form of a forensic laboratory report. The issues on appeal were: 1) whether the fresh evidence should be admitted. The appellant submitted that his trial counsel did not tell him about the report at the time of the trial which mitigated the requirement for due diligence under the Palmer test to admit fresh evidence and the modified Palmer test applied. He argued that if the report had been

entered into evidence at trial, there would have been a different outcome; and 2) alternatively, whether the trial counsel's failure to adduce the forensic laboratory report and to pursue a line of question arising from it constituted ineffective assistance of counsel that resulted in a miscarriage of justice. The appellant argued that the report and ensuing questions would have undermined the credibility of the complainant and exculpated him.
HELD: The appeal was dismissed. The court found with respect to the issues that: 1) the fresh evidence application was denied. The appellant failed to satisfy the Palmer test if the purpose of the admission was to place additional material before an appellate court relevant to a factual or legal determination made at trial or to an issue of trial fairness. The relaxation of the due diligence criterion in criminal matters did not assist the appellant. Without grounding his application on an allegation of incompetent trial counsel as he did in his alternative argument, the appellant had to show that the report was of sufficient strength on its own that it might reasonably have affected the verdict. The report did not meet that standard; and 2) there was no miscarriage of justice. The appellant had failed to satisfy it that there was a reasonable probability the result at trial would have been different had his trial counsel introduced and used the report.

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SSAB Alabama Inc. v Canadian National Railway Company, 2020 SKCA 74

Richards Caldwell Barrington-Foote, June 19, 2020 (CA20074)

Statutes – Interpretation – Court Jurisdiction and Proceedings Transfer Act, Section 9, Section 10 – Appeal

The plaintiff respondent, Canadian National Railway (CN), commenced an action in Saskatchewan alleging the defendants, an American steel manufacturer and others based in Alabama, had improperly loaded a rail car with steel at the defendant's Alabama plant that resulted in a derailment in Saskatchewan, causing CN to suffer damages. The defendant then applied to the court of Queen's Bench for an order dismissing CN's action on the ground that the court lacked territorial competence because there was no real and substantial connection between Saskatchewan and the facts on which the proceedings were based. The chambers judge dismissed the application and found that the court had jurisdiction to hear the action, deciding that Alabama had not been shown to be a more appropriate forum (see: 2018 SKQB 272). The defendants appealed the decision on numerous grounds, amongst which were that the chambers judge erred: 1) in interpreting s. 9(g) of The Court Jurisdiction and Proceedings Transfer Act regarding whether the court had jurisdiction, i.e., whether there was a real and substantial

connection between Saskatchewan and the facts on which CN's action was based, because the action was brought for a tort committed in Saskatchewan, by relying on Moran and failed to consider and apply the Supreme Court's jurisprudence that developed since Moran; and 2) in his assessment of the most appropriate forum under s. 10 of the Act. HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge: 1) had not erred in relying on Moran. He dealt with the post-Moran authorities directly and correctly in the course of coming to his decision about whether the alleged tort had been committed in Saskatchewan. The fact that the precipitating event, the steel falling from the flat car that caused the derailment and ensuing damage, occurred in Saskatchewan meant that there was a real and substantial connection between those facts on which the action was based and the province. He had not erred in finding that the larger circumstances of the case did not rebut the s. 9(g) presumption of a real and substantial connection between Saskatchewan and the facts. As a result of this finding, the court did not have to decide the issue of whether the judge erred in finding presumptive territorial competence under s. 9(e)(i) of the Act regarding contractual obligations. If a real and substantial connection existed between the forum and the subject matter of the litigation in respect of one factual and legal situation, a court must take jurisdiction over all aspects of the case. If the goals of fairness and efficiency are to be advanced, a plaintiff should not be obliged to litigate one cause of action in one jurisdiction and a second cause of action in another. In the circumstances of this case, the fact that the Court of Queen's Bench has territorial jurisdiction in relation to the tort cause of action means that it has such jurisdiction to try the whole of CN's claim against the defendants; and 2) had not erred in declining jurisdiction in favour of the courts of Alabama under s. 10 of the Act. He made no reversible error in his assessment that the availability of witnesses was not something that tipped the forum non conveniens analysis one way or the other. He considered the law to be applied to the proceeding, the location of relevant records, procedural rights in Saskatchewan and Alabama, and judgment enforcement issues.

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R v Pawlivsky, 2020 SKCA 75

Whitmore Leurer Tholl, June 25, 2020 (CA20075)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)

The appellant appealed from the decision of a Queen's Bench judge sitting as a summary conviction appeal court judge (appeal judge) that

dismissed his appeal from the decision of a Provincial Court judge after trial to convict him of driving while he was over the limit contrary to s. 253(1)(b) of the Criminal Code (now s. 320.14(1)(b)) (see: 2019 SKQB 134). The appellant had been stopped by a police officer who, after smelling alcohol on his breath, made an ASD demand. Because the officer observed that the appellant was chewing gum, he believed that he should wait 10 minutes before administering the test. The trial judge rejected the appellant's argument that because of this delay, the officer had not met the requirements under s. 254(2)(b) of the Code and had therefore breached his ss. 8 and 9 Charter rights. She found that the officer had acted reasonably and had therefore complied with s. 254(2), and there was no issue of violating s. 8 or s. 9 of the Charter. As the officer had acted within the requirements of s. 254(2), the rights to counsel were suspended during that period and there was no violation of s. 10(b). On that basis, the trial judge did not consider whether the evidence from the breath sample should be excluded under s. 24(2) of the Charter. The appeal judge found that the trial judge erred because she failed to examine whether the officer's reasons for delay were objectively reasonable and held that they weren't, and thus found a breach of ss. 8 and 9 of the Charter. He also found that the trial judge had performed an incomplete analysis of whether the appellant's rights to counsel had been violated. She erred by failing to inquire whether the officer could realistically have implemented the right to counsel within 10 minutes. The appeal judge then conducted a Grant analysis on the ss. 8 and 9 breaches and, in the context of the facts as found by the trial judge, held that the breath sample evidence should not be excluded. As far as the s. 10(b) breach was concerned, the appeal judge concluded that the appellant had not proven on a balance of probabilities that the officer could realistically have informed the appellant of his right to counsel, nor could the appellant have realistically implemented that right within the delay period, and so there had been no breach and no miscarriage of justice arising from the trial judge's failure to conduct the Grant analysis. The issues on the appeal were: 1) whether the appeal judge could under undertake an analysis under s. 24(2) as a matter of law or whether he should have ordered a new trial; 2) had the appeal judge erred by failing to consider the cumulative effect of the two errors he found in the trial decision; and 3) if the appeal judge erred, was a new trial required?
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) an appeal court may undertake its own s. 24(2) analysis if there is an adequate factual record. Typically, those facts would exist if the parties proceeded from the premise that the s. 24(2) issue would be argued and decided at the trial level voir dire without the introduction of evidence in addition to that bearing on the question of whether a Charter breach had occurred, assuming the trial judge had made the necessary findings of fact to allow the appeal court to undertake the s. 24(2) analysis. In this case, the trial judge's fact-finding material to the s. 24(2) issue was not challenged before the appeal judge, nor was it

incomplete, and therefore there was no legal error in the appeal judge's undertaking the analysis for the first time; 2) the appeal court judge erred in failing to consider the cumulative effect of all three breaches in the context of the s. 24(2) analysis. After finding that the delay fell outside the scope of statutory authority and thereby resulted in ss. 8 and 9 Charter breaches, he failed to recognize that a s. 10(b) breach had also occurred as a result. If the delay was longer than permitted pursuant to s. 254(2), the s. 1 justification for the s. 10(b) violation disappeared. He should not have restricted his s. 24(2) analysis to only ss. 8 and 9 and whether these breaches should lead to the exclusion of the evidence; and 3) a new trial was not ordered. The court could undertake its own s. 24(2) analysis. Despite the appeal judge's incomplete analysis, the addition of the consideration of a breach of the appellant's s. 10(b) rights was the result of an understandable mistake on the part of the officer, and thus the appeal judge's conclusion was correct that the evidence of breath sample tests should not be excluded.

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R v J.S.G., 2020 SKQB 164

Danyliuk, June 4, 2020 (QB20153)

Constitutional Law – Charter of Rights, Section 7, Section 12, Section 24(1)
Criminal Law – Procedure in Jury Trials – Direct Indictment – Abuse of Process

The three accused, J.S.G., S.D.B. and A.K., brought applications alleging an abuse of process on the part of the federal Crown and sought a judicial stay as a remedy for that abuse of process. Originally all three accused were jointly charged by the federal Crown under a federal indictment on numerous counts of violating ss. 5(1) and 5(2) of the Controlled Drugs and Substances Act. A provincial indictment was also laid including 14 counts under the Criminal Code, some of which related to deaths caused by trafficking cocaine and cocaine that contained fentanyl. A.K. elected to be tried by a Queen's Bench judge and jury so that the other two, who had elected to be tried in Provincial Court were, by operation of law, caught by his higher election. Subsequently, the federal Crown withdrew the charges against A.K. in March 2019 and Messrs. G. and B. then sought a Provincial Court trial. The federal Crown agreed that their drug-related charges could proceed in the trial in well. The trial commenced in April 2019 and mid-way through it, the federal Crown stayed those charges and preferred a federal indictment against all three of the accused which halted the trial. Messrs. G. and B. argued that there was no Crown power to prefer a direct indictment once an actual trial had commenced and thus it was preferred without lawful authority, and was a nullity. The submitted

that ss. 567 and 577 of the Code do not confer authority on the Crown to directly indict in such circumstances. This was an abuse of process that violated their s. 7 Charter rights and they sought a stay of proceedings under s. 24(1). The position of A.K. differed in that he was not mid-trial when the direct indictment was preferred. He argued that the Crown withdrew the charges against him in March 2019 because of a lack of evidence. He submitted that when the new charges were laid, the evidence on which the Crown relied was virtually the same as when the charges were withdrawn, and it was thus an abuse of process to allow the trial to proceed against him. The issues were: 1) the general law applicable regarding abuse of process; 2) the general law applicable to direct indictments; 3) whether the Crown could directly indict during the course of a trial and whether there is statutory authority to do so; 4) whether the direct indictment violated ss. 7, 11(b) and 11(d) of the Charter; and 5) if any of the Crown's actions amounted to an abuse of process, what was the remedy?

HELD: The applications of J.S.G. and S.D.B. were granted in part and that of A.K. was dismissed. The direct indictment was filed without lawful statutory authority and was a nullity as against Messrs. G. and B., and was quashed as against them. The filing was declared an abuse of process both at common law and under s. 7 of the Charter. The direct indictment against Mr. K should proceed as he had not been in the middle of his trial. The court found with respect to each issue that: 1) the common law doctrine of abuse of process had not been completely extinguished by the Charter. It was satisfied that both types of abuse of process were involved in this application: prejudice to the accused and a deleterious effect on the administration of justice; 2) the power to indict directly is provided in s. 577 of the Code. The decision to prefer a direct indictment is an exercise in prosecutorial discretion and is reviewable on the basis of abuse of process. Some prosecutorial discretion and decisions made pursuant to it relate to tactics and conduct before the court. That aspect is controllable by the court within its inherent jurisdiction and reviews by it are not limited to the doctrine of abuse of process. 3) The Crown cannot directly indict during the course of a trial and in this case, it was improper and a nullity from the start. The modern power to indict directly is derived from the Criminal Code which contains limitations on that power, including the inability to file a direct indictment once an accused's trial in Provincial Court has commenced and is still in progress, as it would be fundamentally unfair and subject to scrutiny under the doctrine of abuse of process. However, in A.K.'s situation, the decision to directly indict him fell within the exercise of prosecutorial discretion. The Crown had acquired new evidence since the charges were dropped. There was no evidence that the Crown had acted improperly and A.K. had not established any abuse of process; 4) the direct indictment violated Messrs. G. and B.'s s. 7 Charter rights because they were entitled to procedural fairness and it damaged the integrity of the justice system; and 5) the appropriate remedy here was to remit the matter to Provincial Court which would

halt the improperly constituted proceedings in the Court of Queen's Bench and put the parties back in the position they were in prior to the abuse of process.

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Nelson v Teva Canada Limited, 2020 SKQB 159

Elson, June 3, 2020 (QB20154)

Civil Procedure – Application to Strike Statement of Claim – Abuse of Process
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Civil Procedure – Jurisdiction – Territorial Competence
Civil Procedure – Queen's Bench Rules, Rule 7-9
Civil Procedure – Class Action – Jurisdiction of the Court – Immunity of Proposed Party
Statutes – Interpretation – Enforcement of Canadian Judgments Act

The application concerned two proposed national class actions. The first was issued in Ontario in May 2005 (S. action) and this action issued in February 2014 (N. action). They both alleged the same risks or side effects associated with the use of a drug intended to treat symptoms of Parkinson's disease. The S. action named the drug's originators as the defendants while the N. action named the drug's generic producers and distributors as the defendants. The S. action was certified in 2012 and was settled in 2015 by providing compensation for some, but not all, of the certified class members. Many of the members of the proposed class in the N. action were not among the class members entitled to receive compensation in the S. action. A provision in the settlement barred the plaintiffs in the N. action from pursuing it on behalf of the proposed national class if the release provisions in the S. action were enforceable. The defendants in the N. action applied to strike or dismiss the N. action on the grounds that it was a collateral attack of the settlement approval order in the S. action and, as such, constituted an abuse of process. The certified class in the S. action also applied to class members who received the drug prescriptions from any producer and distributor of the drug, including entities not named as defendants in the S. action. Notice of the certification was provided to the class under the terms of a "notice publication plan" (notice plan). Only qualifying class members would receive compensation. Only one of the two named plaintiffs in the N. action would be a member of the qualifying class of the S. action even though both plaintiffs would be members of the class in the S. action. The defendant in the S. action registered the approval order in Saskatchewan pursuant to The Enforcement of Canadian Judgments Act, 2002 (ECJA). The issues were: 1) whether the common law principles of conflicts law obliged the court to enforce the

settlement approval order in the S. action; 2) whether the plaintiffs, as members of the class in the S. action, were properly given notice; and 3) whether the ECJA obliged the court to enforce the approval order in the S. action.

HELD: The issues were determined as follows: 1) the class actions legislation in Ontario is "opt out" legislation, meaning that a class member may opt out of the action within a specified time. If the member does not opt out, they are deemed to be included within it. Both actions were actions in personam, meaning that the subject matter of each action pertained to personal rights of the litigants. Most of the case law on jurisdiction dealt with jurisdiction over defendants rather than plaintiffs. The court reviewed Canadian cases regarding jurisdiction of non-resident parties. The court found there was considerable academic debate regarding the jurisdiction over non-resident plaintiffs in multi-jurisdictional class action proceedings. The effect of s. 5 of the ECJA is that the registered judgment may be enforced in Saskatchewan as if it were an order or judgment of this court. The limit to the effect is set out in s. 7, which permits a party to the proceeding to apply for directions on the enforcement of the registered judgment. The law regarding the limits of a superior court's jurisdiction remains somewhat unsettled. The court concluded that the non-resident members of the S. class properly fell within the jurisdiction of the Ontario court. The defendants in both actions carried on business in Ontario, so the Ontario court exercised direct jurisdiction over the non-resident class members. Applying the other side of the argument, the court found little doubt that the non-resident plaintiffs in the S. class would have a real and substantial connection to Ontario by virtue of the defendant in the S. action, the drug's originator, carrying on business in Ontario. That was the second presumptive connecting factor identified by the Supreme Court of Canada in the Van Breda case. The court also found that it was bound by the decisions in Frey No. 1 and Thorpe that found that a real and substantial connection could be recognized through the similarity of the subject matter of the claims between resident and non-resident plaintiffs. The court concluded that the principles of conflicts of law, subject to the requirements of procedural fairness, obliged the court to enforce the settlement approval order in the S. action; 2) the court found that the notice plan set out in the certification order was reasonably comprehensive, and the S. class members, including the two plaintiffs in the N. action, had ample notice of the proceedings and the certification order. There was no breach of procedural fairness. The court was to give "full faith and credit" to court decisions from other provinces; and 3) the plaintiffs in the N. action did not seek directions relating to the enforcement of the settlement approval order pursuant to s. 7 of the ECJA as they were entitled to do. The court was satisfied that even if an application for directions had been made, there was no basis for the court to stay or limit the enforcement of the settlement approval order as registered. The plaintiffs in the N. action were acting

in contravention of the terms of the release and bar provisions set out in the settlement approval order in the S. action. The settlement order was enforceable in Saskatchewan under the provisions of the ECJA and the conflicts of law principles. The N. action was a collateral attack against the settlement order. Thus, the court struck the N. action as an abuse of process pursuant to Rule 7-9(2)(e) of The Queen's Bench Rules. The defendants were entitled to costs under Column 3.

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Chernick v Chernick, 2020 SKQB 168

Robertson, June 10, 2020 (QB20155)

Civil Procedure – Queen's Bench General Application Practice Directive #9
Civil Procedure – Queen's Bench Rules, Rules 7-2 to 7-8
Civil Procedure – Summary Judgment

Counsel for the defendants wrote a letter to the Local Registrar attaching a draft consent order. The draft consent order set out a timeline for exchange of materials after which the Local Registrar would be directed to schedule the hearing of a summary judgment application. The letter indicated that it was submitted pursuant to Practice Directive #9. The decision dealt with the requirements and expectations of the court regarding the practice directive.
HELD: The application was granted in part. The Queen's Bench Rules prescribe Form 6-4 be used for without notice applications. Rule 13-20(2) requires the use of the forms. Cover letters may be useful to help summarize or explain the application, but they cannot replace the use of the prescribed forms. The court found that the draft consent order was in the proper form, but there was concern with part of the order. The draft order indicated that there would be a hearing date set without further review by the court. There is a two-step process for summary judgment applications created in Practice Directive #9. First, an application is brought in chambers for management of the summary judgment application. Second, the summary judgment application is heard. In the first step, the chambers judge will not order the summary judgment be scheduled for hearing unless it is ready to be heard. All materials should be filed prior to the hearing being scheduled. The court concluded that the application be returned to chambers for review of the file to determine whether the application met the test of "appropriate" and "readiness to proceed." The court applied the curative power authorized by Rule 1-6(4) to cure the irregularity. The draft order could issue with paragraphs 5 and 6 being removed and replaced with a term that either party could apply after August 28, 2020 in the usual manner to return the application to chambers for submissions on readiness to proceed to hearing.

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Smith v Hawryliw, 2020 SKQB 169

Crooks, June 10, 2020 (QB20156)

Civil Procedure – Queen's Bench Rules, Rule 7-5
Real Estate – Sale of House – Caveat Emptor
Real Property – Sale of House – Failure to Disclose Defect – Patent or Latent Defect
Contract – Home Inspection – Limitation Clause

The plaintiff brought an action against the defendant, F.H., for negligence, misrepresentation, and breach of contract in connection with her purchase of the defendant's house. She also sued the defendants, Complete Home and A.B., for negligence and breach of contract, alleging they failed to bring certain defects to her attention after they had provided a home inspection. Each of the defendants applied for summary judgment to dismiss the plaintiff's action pursuant to Queen's Bench rule 7-5. The plaintiff had purchased the house from F.H. in 2013. The parties finalized the contract subject to a home inspection and the provision of a Property Condition Disclosure Statement (PCDS) by F.H., but he declined to provide the PCDS because he had not lived in the property. He had acquired it in 2007 as a rental investment property, and at that time, he had thoroughly investigated and was satisfied with its condition and legal status. During his ownership, he completed repairs and renovations. He indicated that there had been some minor leaks that damaged the drywall in the basement ceiling in 2013. Complete Homes undertook the inspection at the plaintiff's request. Its employee, A.B., who conducted the inspection, emailed the inspection agreement to the plaintiff for her to review the day before the inspection, requesting that, unless she had questions, she sign it and bring it with her when they met after he completed the inspection the next day. The plaintiff replied affirmatively to the instructions but did not bring a signed copy with her when they met. She did sign it after A.B. reviewed the numerous deficiencies he had noted in his inspection. The inspection agreement contained an exclusion clause that limited liability to the fee for the service of $367.50. After the plaintiff took possession in 2013, she discovered moisture and mold in the insulation behind the drywall in the basement bedroom. She continued to remove drywall in the basement and found that the joists in the ceiling were burnt and charred. The drywall had date stamps of 2013 and 2014 on it. After obtaining an engineering report, the plaintiff sought quotes to repair the problems identified, and they ranged between $80,000 and $180,000. In her statement of claim, the plaintiff alleged that F.H. stated that the property was solid and sound, recently renovated and a great investment, and that these representations induced her to buy it

without a PCDS. Further, F.H. had concealed the fire damage since the date stamps on the drywall showed that the repairs had been made during the time he owned the property, and the concealment rendered F.H. liable. After the litigation started, the Saskatoon Fire Department confirmed that there had been a fire at the property in 2005, but that fact had not been disclosed to F.H. when he bought the property. In his defence, he denied making representations regarding it and had explicitly refused to provide a PCDS as part of the contract. He also relied upon a provision in the contract of sale that protected him against claims in both contract and negligent misrepresentation. He was not aware of any issues concerning moisture in the basement or any work done to remedy it or conceal the fire as it and the repairs were done before he purchased the house. Consequently, he argued that there was no genuine issue requiring a trial and pointed to the doctrine of caveat emptor and the parol evidence rule. Respecting her claim against Complete Home and A.B., the plaintiff argued that they had an obligation to inform her of the nature and effect of the exclusion clause and the liability limit. She submitted that to limit home inspectors' liability to the service fee would be unconscionable and contrary to public policy. In their defence, C.H. and A.B. submitted that the plaintiff had had a day to review the inspection agreement and raise any concerns regarding its terms. The issues regarding Complete Homes and A.B.'s applications were: 1) whether summary judgment was appropriate; 2) whether their liability was limited to the amount of the fee charged for the home inspection, which included the question of whether the exclusion clause applied, and if so, was it vitiated by unconscionable circumstances or a public policy consideration that permitted the court to refuse to enforce it? The issues regarding F.H.'s application were: 3) whether summary judgment was appropriate; and 4) whether there was a genuine issue requiring a trial that included considering whether his representations caused the plaintiff to purchase the property and whether he had concealed any defect.
HELD: The application of Complete Home and A.B. for summary judgment was granted. The application of F.H. for summary judgment was granted in part. The court found with respect to each issue that: 1) summary judgment was appropriate, as the facts were mostly uncontroverted; 2) liability was limited to the service fee for the inspection. The exclusion clause was applicable and enforceable. The plaintiff had not established that it was unconscionable, as she had had ample opportunity to review the inspection agreement before the home inspection was completed. She acquiesced to the expectation that she would review it in her email and conceded that she would have understood the exclusion clause if she had taken time to read the agreement. It found that there was no public policy factor that negated the public interest in supporting freedom and certainty of contract. The court granted summary judgment. The liability of the defendants was limited to the fee paid for home inspection; 4) there were inconsistencies in the evidence that could be resolved by summary

judgment except for the concealment of fire damage, which could not be reconciled. The plaintiff had not relied on F.H.'s representations because she chose to purchase the property without the PCDS. The property's deficiencies had been disclosed to her by the inspection report, and she still chose to proceed. Whether the fire damage was concealed and thus an exception to caveat emptor was a genuine issue requiring a trial.

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6517633 Canada Ltd. v Clews Storage Management Keho Ltd., 2020 SKQB 172

Robertson, June 11, 2020 (QB20157)

Civil Procedure – Vexatious Litigant
Civil Procedure – Queen's Bench Rules, Rule 6-3(1)(3), Rule 10-3(1)
Civil Procedure – Application Without Notice

The proposed plaintiffs were previously declared vexatious litigants. The proposed parties had been involved in two previous actions. The proposed plaintiffs filed a without notice application seeking leave to commence a legal action against the proposed defendant. The proposed plaintiffs' evidence alleged that the proposed defendant breached the 2017 Minutes of Settlement by failing to issue monthly invoices.
HELD: The application was dismissed on the basis that it was not appropriate for determination on a without notice basis. The Queen's Bench Rules require that all applications be made with notice unless otherwise specifically provided. For an application to be made without notice there must be authority from the Rules, legislation, or under the court's inherent jurisdiction. Even in cases where legislation expressly authorizes without notice applications, they remain subject to the general requirements for without notice applications. Pursuant to Rule 6-18(1), a judge does not have to determine an application made on a without notice basis. Anyone bringing a without notice application must proceed with utmost good faith and present all material facts. If the respondent is represented by a lawyer, he or she should be notified of the without notice application. Not providing such notice does not automatically invalidate an order, but it is a factor to be considered in an application to set aside the order. A court can set aside an order made without notice pursuant to Rule 10-3(5) and the court's inherent jurisdiction. The without notice application was found to be deficient in two respects: 1) there was no evidence to show that counsel for the proposed defendant was advised of the application. The opposing lawyer was identified but there was no evidence that he was notified. Hearing from counsel from the proposed defendant would have been of assistance to the court on deciding whether or not to grant leave; and 2) the application did not satisfy the criteria for a without notice

application. Rule 6-3(3) allows without notice applications when the court is satisfied that a delay caused by proceeding in the ordinary way would result in serious mischief. This application did not meet that requirement. There were no exceptional circumstances to justify departing from the Rules. The proposed plaintiffs could apply with notice to determine whether leave should be granted to allow them to commence the proposed action. The chambers judge remained seized with the matter. The proposed plaintiffs' counsel and proposed defendant's counsel would be provided with a copy of the fiat.

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Andrist, Re (Bankrupt), 2020 SKQB 173

Thompson, June 12, 2020 (QB20158)

Bankruptcy – Absolute Discharge
Bankruptcy – Conditional Discharge – Factors

A creditor opposed the automatic discharge from bankruptcy of the bankrupt for four reasons. The bankrupt filed an assignment in bankruptcy in June 2016. He said that the bankruptcy was attributed to "highly leveraged farm expansion and multiple crop failures due to weather and disease." The trustee recommended an order of absolute discharge for the bankrupt, stating that his financial circumstances left no room for him to have made a viable proposal to his creditors. The trustee also stated that the bankrupt was compliant with the duties imposed on him under the Bankruptcy and Insolvency Act (BIA) and that he did not commit a bankruptcy-related offence. The trustee's report indicated that the bankrupt could not be justly held responsible for any of the facts under s. 173 of the BIA, which include each of the grounds of wrongdoing asserted by the creditor. The creditor sought a conditional discharge in the range of $50,000. The creditor said that the bankrupt filled out a credit application (financial update form) a year prior to bankruptcy wherein he indicated that he had assets of $1.2 million and liabilities of $185,000. At the time of bankruptcy, the bankrupt indicated that he had assets of $722,706 and liabilities of $852,770 (unsecured) and $511,564 (secured). The issues were: 1) whether the bankrupt was an honest but unfortunate bankrupt: a) was he guilty of fraud by knowingly failing to fully and fairly disclose particulars of his financial circumstances in obtaining credit from the creditor; b) did the bankrupt bring on and contribute to his bankruptcy by culpable neglect of his business affairs; c) did the bankrupt fail to account satisfactorily for loss and deficiency of assets to meet his liabilities; and d) had the fact that the bankrupt's assets were not of a value equal to 50 cents on the dollar of his unsecured liabilities arisen from circumstances for which the bankrupt could justly be held responsible; and 2) what disposition supported the integrity of the

bankruptcy system under the unique circumstances of this bankruptcy? HELD: The issues were dealt with as follows: 1) a creditor who opposes an application for discharge bears the onus of establishing to the satisfaction of the court hat the bankrupt's misconduct affected his financial position in a way that ought to be deterred because it threatens the integrity of the bankruptcy system: a) in Ontario, a bankruptcy court will not find fraud without a criminal conviction or civil judgment against the bankrupt. The issue is not as clear in Saskatchewan. Re Horowitz set out four elements to ascertain fraud in bankruptcy: the existence of a representation; the representation was false; the bankrupt knew the representation was false and intended the creditor to act on it to give credit; and the creditor relied on the false representation. The first element was established. The court found that the evidence did not demonstrate that the representation was false or that the bankrupt made the representation knowing it to be false. The third element was not established. The creditor's reliance on the figures in the financial update form was also questionable. The court found that someone other than the bankrupt wrote the total equity amount on the form for the creditor. The bankrupt indicated that he quit filling out the form partway through because he was not sure of all of the figures. He said he left the total equity blank. The bankrupt said that he made the customer service agent aware that more reliable information would be required from his wife if greater accuracy were required. The bankrupt did not intend that the creditor rely on the information, nor did the evidence establish that the creditor relied on the figures. Fraud was not established; b) a preponderance of probability that the bankrupt neglected his or her business affairs is required. The creditor pointed to two problems pointing to the bankrupt's culpability. First, the bankrupt completed and signed the financial update form without proper information. Second, the bankrupt did not provide the creditor with a sufficiently detailed account of how his net value declined sharply. The bankrupt attributed his sharp loss of net worth due to crop production failures. The creditor did not contest the crop failure. The court concluded that it was not culpable negligence to rely on your spouse to perform the bookkeeping for a family farming operation; c) the degree of detail required to meet the obligation to account is tied to the passage of time since the loss occurred. The duty to account is based on the idea that a bankrupt should be held accountable for a general reduction in net worth. There was no evidence that assets were being sheltered. The court concluded that the bankrupt's net worth declined because his farming operation failed. The bankrupt was not at fault for the decline in his worth; and d) the court found that the trustee's conclusions were not rebutted; and 2) there is no authority to order a condition of payment, except in cases of windfall when there is no misconduct demonstrated to exist on the part of the bankrupt. The bankrupt was discharged absolutely from bankruptcy.

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Kraus v S3 Manufacturing Inc., 2020 SKQB 175

Megaw, June 16, 2020 (QB20159)

Employment Law – Dismissal Without Cause – Holiday Pay

The parties applied to have the issue of holiday pay and costs be determined after judgment had been rendered (see: 2019 SKQB 336). The plaintiff was awarded nine months' pay in lieu of notice. He now sought to receive holiday pay which would have accumulated on the pay in lieu of notice. The defendant argued that this would result in double recovery. The plaintiff also claimed that because he had made a formal offer to settle before the trial that was not accepted by the defendant, he should receive double costs.
HELD: The plaintiff's claim for holiday pay was dismissed. The court followed the Court of Appeal decision in Herbison. It determined that because the plaintiff was successful in obtaining an award for pay in lieu of notice but not for the entirety of his claims, that it would award costs based on Column 2 of the Tariff of Costs. The plaintiff's claim for double costs was declined.

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Gartner v Mavi, 2020 SKQB 176

Robertson, June 16, 2020 (QB20160)

Family Law – Spousal Support – Interim

The petitioner applied for interim spousal support. She and the respondent were married in 2017 and separated in 2019. She alleged that they had begun cohabiting in 2013, while the respondent was a student, and she had supported him by paying the rent and all living expenses. They eventually purchased a house together in 2017 in which the respondent continued to live. When the parties separated, the petitioner moved into her mother's basement. The respondent's income tax return showed income of $170,000 for 2019. The petitioner had lost her position due to the pandemic, but her income for 2018 was $30,000.
HELD: The petitioner was awarded interim spousal support in the amount of $1,200 per month from May 2020, based upon the parties' respective incomes and consistent with the Guidelines. The award was without prejudice to any claim for retroactive support. The court found that the petitioner was entitled to support on both a compensatory and non-compensatory basis and, on the evidence, the parties had begun cohabiting in 2013.

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R v Dias, 2020 SKPC 18

Kovatch, April 15, 2020 (PC20018)

Criminal Law – Judicial Interim Release – Application to Amend
Criminal Law – Mischief

The two accused, J.D. and S.D., were both charged with mischief to property in a value not exceeding $5,000, contrary to s. 430(4) of the Criminal Code. They applied to amend their release conditions. The accused both argued that they had a constitutional right to engage in lawful picketing, so their release conditions should be less restrictive to allow them to exercise their constitutional right. They also argued that the conditions prevented them from fulfilling duties related to their employment with the union. In January 2020, the police received a complaint that a union was blocking the entrance to a business during a lockout. The union refused to move the vehicles and other obstacles blocking the entrance. J.D. stood in the way of the police when they approached to remove the obstacles. He was arrested and taken into custody and charged. The undertaking required that J.D. not attend within 500 metres of the gates to the business. S.D. delivered some speeches at the picket lines, once in January 2020 and once in February 2020. In the speeches, S.D. averred that the union had done nothing wrong, and pledged that they would continue to fight. The Crown referred to ss. 21 and 22 of the Criminal Code, the party and counselling provisions.
HELD: Concerning J.D., the court concluded that some release conditions restricting the accused from being at the gates were appropriate. The office locations of the union were within 500 metres of the gates to the employer. Therefore, the release condition prevented J.D. from peacefully picketing and fulfilling his employment duties with the union. The court revoked J.D.'s undertaking. He was released on a new release order that required him not to attend within 50 metres of the gates. He was not to attend or be stopped at the gates but could drive past them to attend to the union's properties. With respect to S.D., the court concluded that s. 21 requires a common intention to commit an offence. Section 22 refers to a person counselling another person when "that other person is afterwards a party to that offence…" The court questioned the strength of the Crown's case because the Crown did not present any evidence that any individual had acted upon the advice of S.D. or committed any substantive offence based on advice given by S.D. The defence also relied on S.D. having a constitutional right to engage in lawful picketing. The court took judicial notice that speeches are commonplace and a form of expression at demonstrations and picket lines, so it was questionable whether S.D. could be convicted of a crime for giving a speech at the picket line. The court made note of s. 515(1), which provides a justice shall make a release order without conditions unless the Crown shows cause "in respect of that offence,

why the detention of the accused in custody is justified or why an order under any other provision of this section shall be made." The court revoked S.D.'s undertaking, and he was released on a release order, only requiring that he appear before the court as and when required to do so.

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R v Oakes, 2020 SKPC 23

Kovatch, June 22, 2020 (PC20019)

Criminal Law – Assault – Sexual Assault
Criminal Law – Disclosure – Production of Record – Sexual Assault Kit

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code and sexual touching of a person under 16 contrary to s. 151 of the Code. The RCMP obtained the records of the sexual assault kit prepared by a hospital nurse immediately upon completion. The defence applied for disclosure of the records of the kit and forensic analysis of any samples seized in accordance with Stinchcombe. The Crown resisted, arguing that the defence had to make an application under s. 278.3 of the Code as the sexual assault kit and forensic analysis of any samples were "pieces of personal information created with a reasonable expectation of privacy" and that sections 278.1 to s. 279.95 were applicable. The Crown explained that due to a change in policy, the sexual assault kits were no longer routinely disclosed to the defence. In this case, the document for which the defence sought disclosure was entitled "Child and Family Medical Services Report" which the Crown characterized as a medical report.
HELD: The court ordered the Crown to disclose the sexual assault kit and forensic samples to the defence. They were not medical records within the meaning of s. 278.1 of the Code. The change in the Crown's practice was not proper. Where, as here, the sexual assault kit may have been mixed together with other medical records, the Crown should redact the information that should not be provided to the defence. The court stated that it would be advisable for medical personnel to prepare two sets of records: one dealing with only the sexual assault kit, and a separate record dealing with clinical observations and treatment of the complainant.

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R v McKay, 2020 SKPC 24

Daunt, June 22, 2020 (PC20020)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine – Sentencing
Criminal Law – Sentencing – Aboriginal Offender

The accused pled guilty to a charge of possession for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. She was originally charged with this and other offences jointly with another accused, Quan, but the information was later severed. Quan was sentenced to five years for this and related offences as he played the principal role in trafficking and had an extensive criminal record involving drug trafficking. The charges were laid after the police surveilled the accused's apartment in a drug trafficking investigation. At the time, the accused was living at the premises with Quan in a romantic relationship. The police observed the accused holding two meetings of short duration outside the building, consistent with trafficking. A search of the premises revealed approximately 10 ounces of cocaine, $200 in cash and some scales. The police also searched Quan's house and found 1.8 grams of cocaine, a bill counter and cash totaling $25,800. The accused's guilty plea to the charge was premised on her liability as a party to Quan's offence. She stated that although she had no personal control over the drugs seized, she was aware of them and provided her apartment to Quan for their storage, knowing he intended to sell them. However, she did not sell it herself and denied receiving money from Quan's customers. She acknowledged handing off one gram or less on two occasions. The accused was 22 when she met the other accused, who was ten years older, and fell in love with him. He supplied her with cocaine as she had started using cocaine at the age of 19. She had grown up in Cumberland House as a member of the Cumberland House Cree Nation. Her mother and members of her family attended residential schools. As a result of her father leaving the family when she was 16, the accused struggled with feelings of abandonment. She did not complete grade 12 but moved to Prince Albert to attend Saskatchewan Polytechnic at the age of 18. She tried cocaine in an effort to "fit in," but otherwise was a productive member of the community, working and volunteering regularly. After meeting Quan, she allowed him to use her apartment and assisted him in distributing drugs because she wanted him to love her. Her cocaine problem became a daily problem and she lost her job. Her relationship with Quan ended after four months. Other than this offence, the accused did not have a criminal record. Several people provided letters on behalf of the accused, describing her excellent character and opining that Quan manipulated her. After release on a recognizance with conditions, the accused had lived in Cumberland House and abstained from drugs and alcohol. She had taken courses, upgraded her employment skills, obtained work to support herself and volunteered extensively in the community. Referees wrote that the accused was an asset to the community and had a lot of potential. The Pre-Sentence Report revealed that the accused took responsibility for the offence and was assessed at very low risk to reoffend. Cumberland House offers

counselling and treatment for substance abuse and the accused would be able to find help with self-management. Because of the pandemic, electronic monitoring was unavailable, but Community Corrections could supervise a house arrest program for the accused by means of telephone checks. COVID-19 made an intermittent sentence inadvisable and incarceration would increase the risk to the accused of contracting the virus.
HELD: The accused was sentenced to a fine of $2,000, a surcharge of $600 and 18 months on probation subject to multiple terms. The imposition of a firearms prohibition was mandatory, but the accused was exempted under s. 113 of the Code to enable her to obtain a registration for the purposes of sustenance hunting or employment, as she posed no threat to the community. The accused was exploited by Quan and consistent with drug trafficking practice, he kept the large quantities of cocaine at her residence where his name was not on the lease. She was not a partner in Quan's drug enterprise and her responsibility for the offence was diminished. The accused's background made her vulnerable to commit this crime and the Gladue factors made a comprehensible link between it and her offending that reduced her moral blameworthiness.

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R v T.S.H., 2020 SKPC 25

McAuley, June 11, 2020 (PC20021)

Constitutional Law – Charter of Rights, Section 11(b)

The accused, a young offender, was charged with two counts of sexual assault contrary to s. 271 of the Criminal Code, two counts of sexual touching of a person under the age of 16 contrary to s. 151 of the Code and one count of assault contrary to s. 266 of the Code. The offences were alleged to have been committed during the spring of 2017, but the Youth Information was not sworn until August 2018, 15 months later. After numerous adjournments, the trial was scheduled for June 2020. The accused brought an application for a stay of proceedings in February 2020, alleging that his right to be tried within a reasonable time had been breached contrary to s. 11(b) of the Charter. The presumptive ceiling was 18 months and the total delay from August 2018 to trial was 22 months. The Crown submitted that the defence was responsible for two delays: 1) six months as a result of an agent for defence counsel waiving delay on his behalf; 2) three months as a result of defence counsel waiving delay and a joint request for an adjournment; and 3) there were exceptional circumstances in this case because the evidence consisted of DVD videos and the testimony of four to five young witnesses on sensitive matters. This complexity was also a reason for the pre-charge delay. In addition, the death of the

mother of one of the young witnesses was a discrete event that justified delay of six months from December 2019 to June 2020. The defence argued that the trial could have proceeded by making support available to the witness. The defence submitted that in addition to any other delay factors: 4) the accused's status as a youth should be considered within the overall analysis. A psychological report of the accused commissioned by the defence indicated that he had significantly delayed cognitive development and the anxiety caused by the delay would impact him more than it would the average person his age, including the pre-charge delay, as the accused was aware of the potential charges when the police began their investigation.
HELD: The application was granted and the charges were stayed under s. 24(1) of the Charter. The court found that the net delay was 19 months and the pre-charge delay was a consideration in determining that the delay was unreasonable. Another factor was the delay in the accused's trial caused by the onset of the COVID-19 pandemic. With respect to the Crown's position, the court held that the delays were not attributable to the defence because: 1) during the first period, there were no clear and unequivocal waivers or deliberate delay tactics undertaken by the defence. It accepted that the defence counsel had not agreed to the waiver. The accused had not entered a guilty plea in February 2019. It was unrealistic for the defence to have been in a position to conduct the trial the next month because of the number of witnesses the Crown planned to call and, more importantly, the defence counsel was not available on the proposed trial date in March and there were no other available trial dates until September 2019; 2) the second period of delay had not been waived. It accepted the defence counsel's assertion that he did not waive the delay because he was prepared to proceed to trial in September 2019. The Crown requested an adjournment because one of the witnesses did not have transportation; 3) it was correct that the trial did not proceed as a result of the death, but the total delay of six months should be reduced to three months to be deducted from the net delay of 22 months; and 4) considering the pre-charge delay in the overall circumstances, it was significant enough in addition to the net delay of 19 months because the accused's youth and cognitive development made the overall delay unreasonable.

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Heffernan v Prince Albert Board of Police Commissioners, 2020 SKPC 22

Stang, May 22, 2020 (PC20017)

Employment Law – Collective Agreement – Interpretation – Indemnification Clause
Small Claims – Costs

The plaintiff was a former Special Constable with the Bylaw Unit of the

respondent Police Service (PS). In June 2016, a public complaint was made against the plaintiff, eventually resulting in three formal discipline charges pursuant to The Police Act, 1990 (Police Act). The plaintiff was represented by counsel at the formal hearing before a hearing officer. He was charged $10,411.73 for the services. The hearing officer found the plaintiff guilty of the third discipline charge. The plaintiff argued that he was entitled to indemnification for the legal costs in relation to the two charges for which he was found not guilty. He said that those charges were the more serious charges and that he was found guilty of the less serious charge. The PS argued that the plaintiff was not entitled to indemnification because clause 12.10(a)(ii)(d) of the collective agreement only provided for indemnification for defending charges when "the member is found not guilty, or where the matter is dropped, stayed, or dismissed." Because all three charges were brought about due to the same circumstances and there was a guilty finding on the third charge, the PS said that situation did not fall within the indemnification clause. The PS also said that the conduct resulting in the charge was willful or wanton disregard or dereliction of duty, which did not lead to indemnification. Further, the PS argued that the plaintiff's claim was premature because all avenues of appeal had not yet been exhausted, as they said was required in clause 12.10(a)(vi). The last argument of the PS was that the plaintiff was not entitled to the indemnification because the plaintiff had not yet incurred the legal expenses since he had not paid anything to the lawyer.

HELD: The court was guided by the modern principle of interpretation to interpret the collective agreement. There was no relevant jurisprudence. The court considered the general purpose of indemnification clauses. Clause 12.10(a)(i) set out that employees would be indemnified for defending themselves against alleged wrongful acts. The court had to determine whether there needed to be a finding of not guilty on all of the charges for them to be included in the definition of "alleged wrongful act" so that there would be indemnification. The indemnification provision was within the employee benefits section of the collective agreement. There can be limitations to any benefit. If there is ambiguity, it should be resolved in favour of the general intention to provide the employee with a benefit. The court determined that the indemnity provisions ought to be interpreted and applied separately to each charge under The Police Act that resulted from each separate wrongful act committed, or alleged to have been committed, by the plaintiff or other employee. The court found that more than one charge could result from a single act because of the use of the plural "charges". The third discipline charge pertained to a different alleged wrongful act than the first two discipline charges. The facts of the third charge were completely different from those of the first two. The court found that the plaintiff was entitled to the benefit of indemnification for reasonable costs, including legal costs, for defending himself against the first two discipline charges. The PS's argument that all appeals must be concluded relating to the third

charge had to fail: the indemnification provision can be relied upon for the first two charges separately and there was no appeal from the decision relating to those charges. The PS was not successful in arguing that the plaintiff was not entitled to any indemnification because the conduct underlying the third discipline charge constituted wanton or willful dereliction of duty. The evidence at trial was insufficient to establish that the plaintiff's conduct constituted willful or wanton disregard or dereliction of duty. The court found that $10,411.73 was a reasonable amount for three reasons. The plaintiff's claim for interest was dismissed. The court awarded the plaintiff the $100 he spent to file his claim. Further, the court awarded final costs to the plaintiff in the amount of $500, which was slightly less than 5% of the primary amount awarded.

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