The Law Society of Saskatchewan Library's online newsletter
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R v Kamara, 2020 SKCA 76

Richards Leurer Kalmakoff, June 26, 2020 (CA20076)

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

The self-represented appellant appealed from the decision of a Provincial Court judge to convict him of several drug offences, possession of the proceeds of crime and weapons offences, and from his sentence of 78 months in jail. After the police conducted a drug investigation and surveilled the appellant at two different apartments, they seized funds in the amount of $11,500 in cash when he attended a bank to make a deposit. A few days later, the police arrested him at his apartment, where they found marijuana and, after searching his person, found a set of keys to another apartment. It was set up as a stash house. In a safe, the police found bags of crack and powder cocaine, a semi-automatic handgun, two loaded magazines and some ammunition. The appellant was charged with possession of cocaine for the purpose of trafficking, possession of marijuana, two counts of possession of the proceeds of crime with values under and over $5,000 respectively and eight weapons offences including possession of a restricted firearm with readily accessible ammunition contrary to s. 95(1) of the Criminal Code. At trial, counsel for the appellant and the Crown presented a lengthy admission of facts. As a result of the appellant's admissions, the Crown called only one witness, a police officer who had made the arrest and searched the apartments. It also submitted an expert report that offered an officer's opinion that the second apartment was set up as a stash house, and the cocaine seized had been for the purpose of trafficking. The appellant testified that he had been only

a street-level trafficker and said that he had not been in control of the second apartment and that the cash that he had been depositing was to another person's account to pay for a car. The trial judge rejected the appellant's testimony and accepted that of the arresting officer, finding that the appellant was in control of the apartment used as a stash house. The only reasonable inference was that he had been in possession of both the safe and its contents. He went on to accept the appellant's guilty pleas respecting possession for the purpose of trafficking and possession of marijuana and the two counts of possession of proceeds of crime. He found the appellant guilty of all eight weapons offences. The judge imposed a sentence of 42 months for possession for the purpose of trafficking and 36 months consecutive for the possession of a firearm and ammunition without a licence. All the sentences for the remainder of the offences were to run concurrently. The appellant raised several arguments relating to errors made by the trial judge. He also argued that the sentence imposed upon him was too harsh.
HELD: The appeal from conviction was dismissed. The appeal from sentence was allowed in part by setting aside the $2,500 victim surcharge imposed under s. 737 of the Code because the Supreme Court had found the section be to unconstitutional in Boudreault. The court found that the trial judge had not erred concerning any of the grounds. It did note that the trial judge should have addressed the appellant directly with respect to his guilty pleas and made the necessary inquiries under s. 606(1.1) of the Code, but his failure to do so did not mean that the pleas were invalid pursuant to s. 606(1.2). Further, the appellant had not established that his pleas were not voluntary, not informed or not unequivocal. The appellant's sentence was not demonstrably unfit.

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R v Cowan, 2020 SKCA 77

Jackson Ottenbreit Kalmakoff, June 26, 2020 (CA20077)

Criminal Law – Robbery – Armed Robbery while Masked – Acquittal – Appeal
Statutes – Interpretation – Criminal Code, Section 21, Section 22

The Crown appealed from the respondent's acquittal on charges of armed robbery contrary to s. 351(2) of the Criminal Code and having his face masked with intent to commit robbery contrary to s. 351(2) of the Code (see: 2018 SKQB 75). The respondent had given a warned statement after his arrest denying that he had any direct involvement in the robbery but admitted that while he was with a group of men at a house on the day it occurred, they had expressed a need for money. He identified those men by name and admitted that he advised them how to commit a robbery with precise instructions. Later that day, the robbery committed by two masked

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men matched those instructions. The respondent identified two robbers shown on a security video as two of the men who had been present in the house: Matthew Tone and an individual known only as "littleman." The Crown called two witnesses. The first testified the respondent had asked her to provide him with an alibi, but she had not been with him that evening. The second witness testified that the respondent told her that he had committed the robbery. At trial, the Crown had advanced two alternative theories of the case: the first was that the respondent was the masked robber in the crime and, as such, was guilty as a principal offender; and alternatively, the respondent was guilty as a party to the offence under ss. 21(1)(c) or 22(1) of the Code because, by providing instruction to the men that he named in his warned statement to commit robbery, the respondent had aided or counselled them to commit the offence. The trial judge found that the Crown had failed to prove the respondent's guilt on the basis of either theory and entered an acquittal. He rejected the evidence of the second witness because he found her to be an unsavoury witness. Since the rest of the evidence against the respondent was circumstantial, the judge decided the Crown had not established his guilt as the principal. Regarding the Crown's party theory, the judge found that the respondent's guilt had not been proven. There was insufficient evidence implicating or proving beyond a reasonable doubt that Tone or littleman were the persons involved in committing the robbery. Accordingly, it was not established that the respondent had aided, abetted or counselled the persons who did commit the crime within the meaning of ss. 21 and 22 of the Code. On appeal, the Crown argued concerning each of its theories that: 1) the trial judge misapplied the Vetrovec principles to the evidence of the second witness by failing to properly consider the nature of the evidence capable of supporting her testimony; and 2) the trial judge erred by holding that it was required to prove beyond a reasonable doubt that Tone and littleman were the two persons who participated as principals in the robbery to establish the respondent's guilt as a party to the offence under ss. 21(1)(c) or 22(1) of the Code. The respondent's liability to conviction as a party on the basis of abetting or counselling was not limited to aiding or counselling one or more of the principal offenders in the robbery. He was equally culpable as a party if he abetted or counselled another person who participated in the robbery as a non-principal party. The trial judge committed a legal error in the application of the Code sections, and that error had a material bearing on the acquittal because it led him to fail to consider relevant and probative evidence that supported a finding of guilt.
HELD: The majority of the court allowed the appeal. In dissent, Jackson J.A. dismissed the appeal. The majority found with respect to each of the Crown's arguments that: 1) even if the trial judge's reasons revealed an error, the standard set out in Graveline was not met as it could not be said that the materiality of the error had been demonstrated with a reasonable degree of certainty; and 2) the trial judge had made a legal error by instructing himself that as a prerequisite to establishing the respondent's culpability on either the

basis of abetting the commission of the robbery under s. 21(1)(c) or the basis of counselling the commission under s. 22(1), the Crown was required to prove that Tone and littleman were the principal offenders. There was no need for it to prove that the person or persons counselled by the respondent participated in the offence as a principal offender to establish the respondent's guilt on the robbery charge based on s. 22(1) of the Code. The court was satisfied that the Crown had met the standard required to warrant intervention, i.e., showing that the error had a material bearing on the acquittal. The appropriate remedy here was to order a new trial on whether the respondent was guilty of robbery as a party on the basis of abetting or counselling because this was not a clear case where the court could enter a conviction. In her dissenting judgment, Jackson J.A. found that the trial judge had not erred by limiting himself to considering Tone and littleman only, apart from the respondent, as being principals only to the offence. The judge responded to the evidence and the Crown's submissions, which narrowed the case to a consideration of who had committed the crime, and the judge named the most obvious. Even if he had committed an error, it was not of sufficient materiality to overturn the acquittal and order a new trial.

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Walmart Canada Corp. v Prince Albert (City), 2020 SKCA 78

Jackson, June 30, 2020 (CA20078)

Municipal Law – Appeal – Property Taxes – Assessment – Leave to Appeal

The applicant applied for leave to appeal a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board pursuant to s. 33.1 of The Municipal Board Act. The applicant applied on behalf of itself, three tenants and one other owner (all referred to as owners) of non-regulated properties (subject properties) in the city. The subject properties were described as big box retail stores. The cost approach to value as modified by a market adjustment factor (MAF) of 1.43 was used to determine their assessed values. The land values were determined using the land sales comparison approach (underlying sales). The board found that there was no similarity between the underlying sales and subject properties in terms of size of the improvements or land. The board concluded that the subject properties were of a higher value than the underlying sales so could not conclude that even the largest underlying sale was comparable. The board found no evidence to support the 1.43 MAF and set aside the assessment and applied a neutral MAF of 1.0 to the subject properties. The city appealed to the committee. The committee found that the neutral MAF imposed by the board did not meet the market value standard

(MVS) defined in s. 163(f.1) of The Cities Act (Act) for numerous reasons. The grounds of appeal were: 1) the committee erred in the interpretation of ss. 163(f.1) and 165(5) of the Act when it found that the MVS required a MAF to be applied to all properties valued under the cost approach; 2) the committee erred in the interpretation of ss. 163(f.1) and 165(5) of the Act when it found that the MVS and equity were met by applying a MAF to properties that were not comparable to the properties in the MAF group if they were "the only evidence of market conditions"; 3) the committee erred in the interpretation of ss. 163(f.1) and 165(5) of the Act when it found that a different standard of comparability may be applied when valuing properties using the cost approach; and 4) the committee erred in law or jurisdiction by overturning the board's finding of fact that the subject properties were not comparable to the properties in the MAF group without finding that the said finding of fact was unreasonable.
HELD: The appeal was allowed in part. Leave was granted with respect to grounds 1, 2, and 4. The principal reason was that there was an aspect of the committee decision that required interpretation. The committee had to decide whether the board committed a reversible error by applying a MAF of 1.0. There was a question as to how the committee interpreted the board's finding that there was no market evidence from which to derive a MAF. The appeal court found that there was an interpretive issue as to whether the committee set aside the finding without applying the appropriate standard of review. It found that the resolution was beyond the authority of a chambers judge exercising discretion pursuant to s. 33.1. The appeal court declined to redraft grounds 1 and 2 as requested by the city. As drafted, grounds 1, 2, and 4 raised questions of law that were of sufficient merit and importance. Ground 3 was destined to fail because the committee made no such error. Costs were reserved to the discretion of the division of the court hearing the appeal.

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Walmart Canada Corp. v Estevan (City), 2020 SKCA 79

Jackson, June 30, 2020 (CA20079)

Municipal Law – Appeal – Property Taxes – Assessment – Leave to Appeal

The applicant applied for leave to appeal a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board pursuant to s. 33.1 of The Municipal Board Act. The applicant applied on its behalf and on behalf of another property owner (Owners). The properties (subject properties) were described as big box retail stores. The subject properties were non-regulated properties for the purposes of tax assessment. The

Saskatchewan Assessment Management Agency (SAMA) assessed the subject properties using the income approach to value. The owners argued that the cost approach should have been used and that the market adjustment factor (MAF) used in the cost approach should be no greater than 1.0 because past sales used to develop the MAF were not comparable to the subject properties. SAMA calculated an MAF of 1.01 if the cost approach was to be used. The board allowed the owners' appeal and determined that a cost approach should be used. The cities appealed the board's decision to the committee. The committee dismissed the appeal in relation to changing the cost approach of valuation but allowed the appeal concerning the board's application of an MAF of 1.0. It was not clear what the committee did regarding SAMA's argument that the board did not give proper weight to the evidence provided by SAMA. The grounds of appeal were: 1) the committee erred in its interpretation of ss. 163(f.1) and 165(5) of The Cities Act (Act) when it found that the market valuation standard (MVS) requires a MAF to be applied when valuing unique properties under the cost approach; 2) the committee erred in the interpretation of ss. 163(f.1) and 165(5) of the Act when it found that the MVS and equity were met by applying a MAF to properties that were not comparable to the properties in the MAF group if they were "the only ones available"; and 3) the committee erred in the interpretation of ss. 163(f.1) and 165(5) of the Act when it found that a different standard of comparability may be applied when valuing properties using the cost approach.
HELD: The appeal was allowed in part. Leave to appeal was not granted for the third ground of appeal. Concerning the first and second grounds, the matter was similar to the decision in Walmart Prince Albert because the committee ruled in both decisions that the MAF of 1.00 was contrary to the principles of mass appraisal and did not meet MVS. The matter was different because there was no interpretative issue regarding what the committee ruled about the board's finding of comparability. Leave would be refused for that reason; however, the appeal court decided to grant leave on the first two grounds because the applicant's argument would form part of the argument in Walmart Prince Albert, with possible consequences in that appeal, so the applicant should have the same opportunity to make its argument. Costs were reserved to the discretion of the court hearing the appeal.

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South Hill Mall Property Holdings Inc. v Prince Albert (City), 2020 SKCA 80

Jackson, June 30, 2020 (CA20080)

Municipal Law – Appeal – Property Taxes – Assessment – Leave to Appeal

The applicant applied for leave to appeal a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board pursuant to s. 33.1 of The Municipal Board Act. The applicant mall represented eight property owners. There were two appeals made to the committee, and the committee decision dealt with both. The first appeal contested the market adjustment factor (MAF) on the basis that the underlying sales (underlying sales) used to develop the MAF were not comparable to their properties (subject properties). The second appeal called into question the application of a 1.43 MAF to the mall, specifically in comparison to another mall in the city where an MAF of .64 was applied. The subject properties were all non-regulated. The committee decision dismissed both appeals. The applicant sought an MAF of .90 for all the subject properties on generic grounds and, failing that, sought an MAF of .90 or lower in its own right based on the grounds of appeal specific to the applicant. The grounds of appeal relating to all of the properties were: 1) the committee failed to conclude that the sales used in the assessment model to develop an MAF of 1.43 did not achieve basic factual comparability to the subject properties consistent with paragraphs 163(f.1)(i) and (iii) of The Cities Act (Act) and with this court's decision in Harvard Property Management Inc. 2017; 2) the committee erred when it interpreted the terms "similar" and "comparable" inconsistently with paragraph 163(f.1)(iii) and ss. 165(5) of the Act, interpretive jurisprudence thereunder, and the fundamental legal principle of statutory interpretation; and 3) the committee overstated the extent of assessor discretion in relation to similarity and comparability for the purposes of ss. 163(f.1) of the Act. The applicant argued that the grounds were all intertwined. The grounds of appeal of the applicant alone were: 1) the committee erred at law when it failed to overturn the board's reasons by taking notice of downtown district "incentives" and of which neighbourhood is more desirable when those reasons were not founded on evidence and were inconsistent with the evidence before the board; 2) the committee erred when it overlooked material and relevant evidence brought by the applicant concerning equity as defined under ss. 165(5) of the Act and 3) the committee erred at law when it failed to overturn the board's reasons, which refused to consider properties stratified separately as being similar for the purposes of equity as defined under ss. 165(5) of the Act.

HELD: The application was dismissed. The appeal court first considered the grounds of appeal in relation to all the properties. In this matter, the committee sustained the board's decision, which had sustained the assessor's decision. The appeal court distinguished this matter from Walmart Prince Albert. The appeal court found that equity was achieved because comparability was found as a fact. In Walmart Prince Albert equity was not achieved because comparability with different subject properties was not found as a fact. The Harvard case referred to by the applicant was distinguished from the present matter by the appeal court. The applicant was found not to have pointed to how the committee

misinterpreted the terms "similar" and "comparable" as indicated in the second ground. The appeal court found that the second ground was destined to fail. The applicant did not point to any error beyond the assertion of a failure to comply with the statements of law taken from the jurisprudence. Application for leave to appeal on the third ground was also dismissed. Next, the appeal court considered the applicant's argument that leave to appeal should be allowed for it alone. The applicant argued that an MAF different from 1.43 should be applied to its property. The argument was based on a comparison to another mall in the city that received an MAF of .64. The applicant provided proof that its base annual rental income was lower than the other mall's. The applicant also argued that malls, compared to other smaller commercial properties, consist of different prospective purchasers, which supports claiming a different grouping, such as one with the two malls alone. The applicant shared the same comparability with the Underlying Properties as the balance of the subject properties. The applicant argued that its first and second grounds should be considered together. The city argued that the rental income and vacancy of one mall compared to the other was irrelevant because they are not factors under the cost approach to value. Therefore, according to the city, the committee could not have erred by not holding that the board had "overlooked material and relevant evidence" filed by the applicant. The appeal court found that the applicant's claim was reduced to whether the committee erred by not giving effect to the principle of equity, ground three of their application. The committee determined that the board did not err by finding that the underlying sales and subject properties were comparable within each of the neighbourhoods. Therefore, the committee had effectively determined that equity had been achieved between similar properties. The board accepted that there were two distinct neighbourhoods with different market influences to justify the assessor's decision. The committee did not disturb the finding. The appeal court determined that the applicant's argument was destined to fail. The application for leave to appeal was dismissed.

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Abrametz v Law Society of Saskatchewan, 2020 SKCA 81

Ottenbreit Leurer Barrington-Foote, July 3, 2020 (CA20081)

Administrative Law – Appeal – Application to Stay – Abuse of Process
Administrative Law – Appeal – Standard of Review – Correctness
Administrative Law – Appeal – Standard of Review – Palpable and Overriding Error
Appeal – Professions and Occupations – Lawyers – Discipline – Law Society

The hearing committee of the respondent found the appellant guilty of four counts of conduct unbecoming a lawyer (conduct decision) in January 2018. The appellant was found to have breached the Law Society of Saskatchewan Rules (Rules) and the version of the Code of Professional Conduct (Code) that was then in effect. The appellant was disbarred with no right to apply for readmission as a lawyer prior to January 1, 2021 (penalty decision). The appellant appealed his conviction and the penalty decision pursuant to s. 56(1) of The Legal Profession Act, 1990 (LPA). The appellant was a member of the professional association (LSS) for 46 years and this was his first disciplinary event. The LSS was still investigating allegations of tax evasion by the appellant that were first identified in 2013. The LSS first started to look into the appellant's financial records in 2012 when irregularities were identified relating to a lawyer with whom the appellant shared a trust account. The appellant self-reported that he failed to promptly deposit $36,578.45 in fees from eight files into his office account as required by s. 10 of the LPA. The LSS auditor therefore attended at the appellant's office to review his records in December 2012. He asked for and received additional documents. In January 2013, the Conduct Investigation Committee (CIC) determined that it knew enough to prepare a Notice of Intention to Interim Suspend the appellant. In March 2013, the appellant signed an undertaking to retain an approved member of the LSS (supervisor) to oversee and monitor his practice and trust account activities. The auditor returned to the appellant's office in August 2013 to review further records. The auditor completed his final trust report in October 2014. The trust report resulted in a second Notice of Intention to Interim Suspend by the CIC in November 2014. The appellant took the position that tax matters between him and the Canada Revenue Agency were not relevant, and he objected to the LSS request that he produce personal and corporate income tax returns. That matter was bifurcated from the discipline proceedings. The CIC prepared a report recommending seven charges be brought against the appellant for conduct unbecoming a lawyer. The formal complaint was signed in October 2015. All of the charges were related to the first Notice of Intention to Interim Suspend from February 2013. The hearing was conducted in May 2017, and continued in August and September. The conduct decision was rendered in January 2018 where the Hearing Committee found the appellant guilty of four charges. In July 2018, the appellant advised that he would apply to dismiss the prosecution for delay (stay application). The stay application was dismissed. The appellant was disbarred and prohibited from applying for re-admission prior to January 1, 2021. Further, the CIC also sought to recover $102,629.18 in costs. Costs of $58,645.24 against the appellant were imposed. The issues were: 1) whether the Hearing committee erred by convicting the appellant of failing to maintain proper books and records; 2) whether the hearing committee erred by convicting the appellant of entering into or continuing a debtor-creditor relationship with clients; and 3) whether the hearing committee erred in dismissing the stay

application.
HELD: The appeal was allowed in part. The issues were determined as follows: 1) the appeal court found that Rule 962(f) included cancelled cheques and could include documents recording the payments into and out of a trust account, such as a statement of adjustments. That ground of appeal was dismissed; 2) the facts found by the hearing committee supported the conclusion that the advances by the appellant were loans that resulted in debtor-creditor relationships, and that the transactions resulting in those loans were business transactions. The conclusion was reasonable and correct. The hearing committee did not err; 3) there were four principles identified in Blencoe: a) the period of delay must be so inordinate as to be clearly unacceptable; b) the party claiming abuse of process must show that the inordinate delay directly caused them a significant prejudice that was related to the delay itself; c) the analysis requires a weighing of competing interests; and d) a stay is not the only remedy available in administrative law proceedings. The appeal court agreed with the hearing committee that the clock began ticking December 4, 2012, which was the time the LSS was obliged to take further action. The appeal court determined that the clock should stop on May 17, 2017, the date the hearing commenced. The period of delay was 53 months. The appeal court reviewed all time periods in the 53 months and concluded that 32.5 months were found to be undue delay with only 2.5 months attributable to the appellant and 18 months being inherent to the process. The hearing committee did not reach the same conclusion due to palpable and overriding errors and its failure to correctly apply the law to the facts. The appeal court concluded that the delay so grossly exceeded the inherent requirements of the case as to be "clearly unacceptable" within the meaning of Blencoe. Whether the appellant suffered significant prejudice as a result of the inordinate delay was the next consideration. The appeal court concluded that the appellant demonstrated that the there was unreasonable delay that resulted in very significant personal prejudice such that the public's sense of decency and fairness would be affected. The appeal court then weighed the competing interests. The appeal court found that the delay would bring the LSS disciplinary process into disrepute. There was an abuse of process. The appeal court concluded that the hearing committee erred by failing to find that the damage to the public interest in the fairness of the LSS regulatory system if the proceedings continued would exceed the harm to the public interest in the enforcement of the LPA, Rules, and Code if the proceedings were halted. A stay was the appropriate remedy and it should have been granted. The appeal was allowed. The penalty and costs award was set aside, but the findings of professional misconduct stood. The appellant was awarded costs.

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Thomas v Quinlan, 2020 SKCA 82

Ottenbreit Schwann Kalmakoff, July 8, 2020 (CA20082)

Civil Procedure – Appeal – Application to Strike
Civil Procedure – Court of Appeal Rules, Rule 46.1
Criminal Law – Evidence – Sentencing Submissions

The respondents applied to strike the appellant's appeal pursuant to Court of Appeal rule 46.1 on the ground that it was an abuse of process, alleging that the appellant was trying to relitigate his criminal conviction. The appellant appealed the decision of a Queen's Bench chambers judge that granted the respondents' application under Queen's Bench rule 7-1 to determine a point of law. The respondents had successfully argued that s. 104(2) of the Automobile Accident Insurance Act (AAIA) applied to their case, permitting their respective actions for bodily injury against the appellant. He had caused the vehicle accident in which they were injured and had been convicted of impaired driving contrary to s. 253(1)(a) of the Criminal Code. The vehicle accident in question occurred at 12:45 pm on April 6, 2014. The appellant admitted that he was the driver of the other vehicle, and he had left the scene of the accident. Before that accident, the appellant had been reported twice for erratic driving. He was eventually stopped by the police at 4 pm at a different place and charged with four offences, including impaired driving. In Provincial Court, the appellant pled guilty to the charges. Another Provincial Court judge sentenced him in October 2015. A certificate of recording was prepared pursuant to s. 30 of The Evidence Act concerning the evidence heard by the sentencing judge. The respondents commenced their civil actions against the appellant in November 2015, claiming general damages for pain and suffering. In his statement of defence, the appellant admitted that he was the driver but denied that he was convicted of impaired operation of a vehicle in relation to the collision and that the respondents had no right of action for non-economic loss under ss. 40.1 and 104 of the AAIA. The respondents then made their rule 7-1 application. A transcript of the criminal proceedings of October 2015 was attached as an exhibit to an affidavit filed on their behalf. In his affidavit, the appellant maintained that he was only charged with impaired driving in relation to his actions before his arrest at 4 pm. He was not informed that his arrest related to anything that had transpired earlier in the day. He submitted the police occurrence report in support of his position. The chambers judge noted that the only direct evidence tying the appellant's conviction to the collision was that it involved the same vehicle as that the appellant had been driving at the time of his arrest, and that with his guilty plea, he may have admitted to being impaired at the time of the collision. Based on the transcript, the judge found that the appellant had entered a guilty plea before the sentencing judge. The proceedings were a blended form of guilty plea and sentencing submissions. The Crown had presented information about the events before the appellant's arrest to have the court accept that it was he who had

been driving at those times while impaired. The chambers judge found that the sentencing judge had accepted that the appellant had been driving while impaired at the time of the collision and that he had not objected to the Crown's statement of facts. Although the charges had not stipulated the time of day or location where the offence was said to have occurred, it should have been obvious to the appellant from the Crown's submissions that the scope of the charge was broader than just the events at the time of arrest. The appellant should have objected to the Crown's sentencing submissions. Based on these findings of fact, the judge concluded that an action under s. 104 of the AAIA was available to the respondents. The grounds of appeal were whether the chambers judge: 1) erred in his interpretation of s. 104 and whether it could apply in these circumstances; and 2) erred in relying on the sentencing submissions recorded in the transcript to assess and determine the issue.
HELD: The application to strike the appeal was dismissed, and the appeal was allowed. The court found with respect to each issue that: 1) the chambers judge had not erred in his interpretation of the provision; and 2) as the appellant had not taken issue with the admissibility nor the use that could be made of the content of the sentencing transcript at the hearing below, it was a new issue on appeal. However, it decided that the appeal could be resolved on other grounds. The judge erred by characterizing the October 2015 proceeding as blended. The appellant had already pled guilty at a previous court appearance, a transcript of which had not been put into evidence by either party. Consequently, the mischaracterization of the sentencing hearing led the judge to err in principle by concluding what the appellant had said or not said amounted to an admission of facts, as alleged by the Crown. The judge also erred in relying on the sentencing submissions. There was no legal basis for him to treat what was said or not said at the sentencing hearing as an admission by the appellant. The transcript did not disclose the essential facts of the offence, and it was not open to the judge to accept as fact that the appellant was driving while impaired at the time of the collision for the purpose of conviction. In addition to mischaracterizing the evidence, the judge placed too much weight on the transcript and disregarded the contents of the police report, which was highly probative.

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R v McDormand, 2020 SKCA 83

Jackson, July 9, 2020 (CA20083)

Criminal Law – Conviction – Appeal – Application for Court-Appointed Counsel

The appellant applied pursuant to s. 684 of the Criminal Code for an order assigning counsel to act for him in his pending appeal from conviction and 12-year sentence for manslaughter. He appealed his conviction on the primary basis of ineffective assistance of trial counsel. He alleged that his lawyer had not contacted him prior to trial and he did not have the opportunity to review the Crown's disclosure package with his lawyer. The appellant's formal education ended in grade seven. He admitted that he had a lengthy criminal record but it resulted from his drug addiction and he had always pled guilty to offences connected with his drug habit. In this case, he had not pled guilty because he was not guilty.
HELD: The application was allowed. The court found that it was in the interests of justice. The claim of ineffective counsel was based on what happened outside the trial courtroom and would involve the applicant waiving solicitor-client privilege and possibly require cross-examination of his former counsel. With these factors, it would aid the court and the applicant to have counsel on appeal. The seriousness of the offence and the significant sentence increased the court's concern that the appeal be presented properly.

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R v Levac, 2020 SKQB 171

Mitchell, June 5, 2020 (QB20164)

Criminal Law – Assault – Sexual Assault – Victim Under 16

The accused was charged with two counts of sexual assault of a person under 16, contrary to s. 271 of the Criminal Code and two counts of sexual touching of a person under 16, contrary to s. 151 of the Code. At the time of the alleged offences, the complainant was 14, and the accused was 31. The complainant testified via closed-circuit television from a safe room with a police officer and court service dog present (see: 2019 SKQB 322). She testified that she met the accused when she was working out in a gym. The accused obtained her cell phone number from her, and after the parties agreed that he would act as her trainer, they exchanged hundreds of text messages. The accused initially informed the complainant that he had been convicted of sexually assaulting three women and had been imprisoned for ten years. He would have to tell his probation officer that he would be training her. The officer did call the complainant and confirmed those facts, but the accused had not told the officer that the complainant was 14. Shortly after their first meeting, the accused asked the complainant to provide him with sexually explicit photographs of herself and sent her photographs of himself. The accused invited the complainant to visit him at his residence, where he lived with his mother. They had sex, and the complainant identified photographs of the bedroom. She also mentioned that the accused took a new package of condoms from a

secret drawer and broke two of them. The second assault took place after the two had met at the gym. The complainant testified that she did not want to go with the accused to his house or have sex with him, but she was frightened of him. She broke contact with him following the assault and went to the hospital where a sexual assault kit was done, and the samples were sent to the National Forensics Laboratory (laboratory). The Crown called two witnesses who had seen the accused with the complainant at the gym. They contacted the Regina police after they learned of its public service announcement respecting the accused to advise them that they had seen the two together. Another witness testified that he had seen a Facebook post advising that the accused was a sex offender and recognized the accused as the person who lived next door to him. He said that he watched the complainant enter the residence on one occasion and, a few days later, saw her leave it quickly. Police officers testified that when they searched the accused's room and found the opened box of condoms in a secret drawer. The package was missing two. They seized his bedding, which was forwarded to the RCMP for forensic testing. An expert witness in forensic DNA analysis employed by the laboratory testified that the samples obtained from the sexual assault kit and the bedding, although not perfect matches, indicated that it was likely that blood from the latter source belonged to the complainant. The accused was the only witness called for the defence. He testified that he provided training to the accused and denied that they had a relationship or that she had come to his house at the time of the alleged first sexual assault. On the second occasion, he said that the complainant accompanied him to his residence in a taxi because she wanted to visit a nearby friend. When they arrived, she asked if she could use the washroom but had not seen his bedroom.
HELD: The accused was found guilty. The court applied the approach followed by the Court of Appeal in Groshok regarding the criteria in D.W. It found that the complainant was a credible witness, and it did not believe the accused's evidence. It relied primarily on the DNA forensic analysis and the credibility and reliability of the evidence given by the police and civilian witnesses.

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Wilson v Fraser, 2020 SKQB 166

MacMillan-Brown, June 8, 2020 (QB20161)

Family Law – Custody and Access – Primary Residence

The petitioner husband and the respondent each sought an order to have their home designated as their two children's primary residence. The parties had separated in 2018 when the respondent left the family home in Waldheim and moved to North Battleford. The petitioner had obtained an order granting him primary

residence of the children and prohibiting the respondent from taking the children with her. The court awarded the parties interim joint custody and specified the times when the respondent would have parenting time, arranged to suit her weekly schedule as a paramedic. She exercised her access to them by staying in Saskatoon overnight to enable her to take the children to school in Waldheim. The respondent alleged that she had been the primary caregiver to the children since birth. However, there was evidence that the petitioner had been more involved than the respondent alleged. Since she began working as a paramedic in North Battleford in 2015, which required her to be away from home for several days at a time, the respondent had been solely responsible for them. Their separation then extended this arrangement. The children were very close to their maternal grandparents, the respondent's siblings and their children. The children's grandmother provided childcare since the separation. The respondent was estranged from her family. Neither of the parties' employment would permit them to move to the other location, and the distance of 120 km between their two residences required substantial travel time. The petitioner's annual income was in 2018 was approximately $92,000, and the respondent's was $64,000.
HELD: The court granted the parties joint custody of their children with their primary residence being with the petitioner. The respondent was granted access, and the parties were encouraged to create a mutually agreeable schedule. The court found that the children's best interests would be to remain in Waldheim in the home that they had occupied since they were infants. It would be extremely disruptive to them to move houses, schools, leave their extra-curricular activities and limit their close relationship with their grandparents and cousins. Over time, the status quo had changed so that the petitioner became their primary parent. He had demonstrated his willingness to facilitate the respondent's parenting time with the children, whereas the court was not convinced that she would maximize contact between them and the petitioner. Based upon their respective incomes, the respondent was ordered to pay child support in the amount of $900 per month and s. 7 expenses were to be shared proportionately.

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Ryan v KDGO Holdings Ltd., 2020 SKQB 170

Danyliuk, June 10, 2020 (QB20163)

Civil Procedure – Queen's Bench Rules, Rule 3-19, Rule 7-9

The defendants applied for an order striking out the plaintiff's statement of claim on various grounds. The self-represented litigant had commenced his action against the defendants related to their landlord-tenant relationship. The plaintiff's dispute with them had

already been dealt with under the provisions of The Residential Tenancies Act (RTA) by the Saskatchewan Residential Tenancies Office (SKORT) (see: 2019 SKORT 974). His appeal from the decision had been dismissed (see: 2020 SKQB 29). Therefore, the defendants argued that under Queen's Bench rule 3-14, the matter should be struck because the RTA governed the matter, and the court had no jurisdiction. The defendants also argued that the statement of claim should be struck as disclosing no reasonable cause of action, frivolous and vexatious, and otherwise an abuse of process pursuant to Queen's Bench rules 7-9(2)(a), 7-9(2)(b) and 7-9(2)(e) respectively. The plaintiff did not appear at the hearing.
HELD: The application was granted. The court struck the statement of claim in its entirety. It found that it did not have jurisdiction as the pleadings were within the jurisdiction of the SKORT and amounted to a collateral attack on a valid and subsisting order. The plaintiff's claim disclosed no reasonable cause of action and was scandalous and vexatious as well as an abuse of process. The causes of action were impossible to discern. Costs were awarded to the defendants in the amount of $1,500.

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G.L. v K.H., 2020 SKQB 167

Turcotte, June 11, 2020 (QB20162)

Family Law – Child Support

The claimant applied, pursuant to The Inter-jurisdictional Support Orders Act, for child support, including special expenses and retroactive child support. This was an original application under Part II of the Act as there was no previous court order regarding support. The parties cohabited from 2009 until 2010. After their separation, the respondent mother gave birth to their daughter, now aged 10. The respondent was responsible for the child's care and received child support from the claimant pursuant to an Alberta Provincial Court order. The respondent gave birth to twins in 2013 with her new partner while also caring for his three children from his previous relationship. As a result of post-partum depression following the twin's birth, the respondent agreed to a consent order in 2015 whereby the parties had joint custody of their daughter with her primary residence being with the claimant in Calgary and the respondent having reasonable access. There was no provision for child support. The claimant and his wife also had a two-year-old daughter. The respondent deposed that the parties agreed at the time of the order that because she was a student and was responsible for the high cost of travelling to Alberta to exercise access, she would not pay child support. Until this application, the claimant had not sought child support from her. The respondent agreed that she was obliged to pay child support, but resisted

paying retroactively and sought a reduction in ongoing support. She argued that under s. 10 of the Guidelines, the application would cause her undue hardship because of her obligation to support her second family and the unusually high access costs of visiting her daughter in Alberta. She claimed expenses of $1,200 per month for gas, hotel, meals and loss of income to take time off work. The respondent worked part-time to enable her to take online courses to obtain a university degree. She submitted that income should be imputed to the claimant under ss. 18 and 19 of the Guidelines because he had been receiving worker's compensation benefits and had pre-tax earnings from a company of which he and his spouse were sole shareholders. The issues were: 1) whether the respondent had shown undue hardship; 2) if so, what was her income and that of her spouse; 3) what was the income of the claimant and his spouse; 4) whether the respondent should pay retroactive child support and if so, in what amount; and 5) if undue hardship were determined, should the amount of child support be reduced? HELD: The claimant's application was granted, and child support, retroactive child support and special expenses were ordered payable to the claimant by the respondent. The court found concerning each issue that: 1) the respondent's access expenses constituted unusually high expenses within the meaning of s. 10 of the Guidelines, but they were reduced to $600 per month; 2) it established the respondent's income for 2019 and 2020 child support purposes as $59,000. Her spouse's income for that period was $61,500; 3) based upon the claimant's financial records, income should be imputed to him of $57,300 and $59,350 for 2019 and 2020 respectively as income commensurate with what he had been and was currently capable of earning as assessed by the Alberta Workers' Compensation Board. His spouse's annual income was established as $67,700; 4) retroactive support would be awarded only from September 2019 because the claimant had not requested support until that time and had not explained his delay in applying for it until then; and 5) the amount of child support payable by the respondent based upon her income would be $486 per month under s. 3 of the Guidelines. Having determined undue hardship, the court reduced that amount to $300 per month retroactive to September 2019. Further, the respondent was ordered to pay $190 per month retroactive to the same date as her share of the child's gymnastic expenses pursuant to s. 7 of the Guidelines.

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Affinity Credit Union 2013 v Algner, 2020 SKQB 174

Danyliuk, June 16, 2020 (QB20165)

Foreclosure – Procedure – Selling Officer
Mortgages – Foreclosure – Order Nisi – Selling Officer
Mortgages – Foreclosure – Order Nisi – Upset Price

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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Stone v Adsit, 2020 SKQB 177

Hildebrandt, June 17, 2020 (QB20166)

Barristers and Solicitors – Compensation – Taxation – Limitation Period

Barristers and Solicitors – Compensation – Taxation – Standing to Apply
Wills and Estates – Estate Administration – Indian Act

The deceased died intestate in November 2016 at the age of 83. His estate assets, held with Indigenous and Northern Affairs Canada (INAC), totaled $111,198.85. The administration of the deceased's estate was governed by the Indian Act (Act). The jurisdiction was transferred to the "judicial setting" pursuant to ss. 44(1) of the Act because there were conflicting claims arising from the administration of the estate. The respondent was the initial lawyer to act for the estate. In March 2019, the respondent had four individuals described as "the beneficiaries" sign a contingency agreement. One of the beneficiaries was the applicant. Letters of administration were granted to the administrator, another one of the beneficiaries listed in the contingency agreement, in July 2019. The application for grant of administration stated that there were four biological children and no others entitled to share in the estate. The statement was not accurate. The administrator and applicant retained a new lawyer after they determined there had been inordinate delays. The estate funds minus the respondent's fees were transferred to the new lawyer by the respondent. The amount was forwarded to the office of the Public Guardian and Trustee for Saskatchewan for disposition. The applicant sought an order referring the respondent's bill and demand for payment for assessment by a proper officer of the court and that, pending completion of such assessment, the respondent be restrained from taking any action on the account. The issues were: 1) whether the applicant had standing to bring the application; and 2) whether it was in the interests of justice, pursuant to ss. 67(1)(a)(iii) of The Legal Profession Act, 1990 (LPA), that an assessment of the fees proceed.
HELD: The issues were determined as follows: 1) it was undisputed that the applicant was a beneficiary. The administrator was placed for adoption and thus ceased to be a child of the deceased as per The Adoption Act, 1998. He was not a beneficiary of the estate. The administrator no longer wished to administer the estate and requested the Public Guardian and Trustee of Saskatchewan administer the estate. The Public Guardian and Trustee supported the application. The LPA allows the person charged with the bill to apply to the court for assessment. The administrator could have brought the application, or it could have been delayed and brought by the Public Guardian and Trustee. The matter was time-sensitive. The applicant's share of the estate was directly impacted by the respondent's account. The court therefore determined that the applicant could be considered as a "person charged with the bill." She also signed the contingency agreement; and 2) ss. 67(1)(a)(i) of the LPA provides 30 days from receipt of a bill to apply. The applicant indicated that there was no bill rendered. The respondent's affidavit included an exhibit that was an unsigned receipt of payment and an unsigned account dated August 30, 2019.

The respondent's affidavit was sworn on June 7, 2020 and provided to the applicant's lawyer on June 8, 2020. The court found it in the interests of justice to grant the application. The court was not persuaded by the respondent's arguments. The contingency agreement was found to be neither fair nor reasonable. The respondent knew during the first conversation that the administrator had been adopted, so she should have known there was no issue regarding his lack of entitlement to estate proceeds. The court found that the respondent approached the estate administration in anything but a cost-effective and prudent manner. The contingency agreement was found to be confusing. An assessment pursuant to s. 67(1) of the LPA was in the interests of justice. The application for grant of administration failed to include possible beneficiaries and it did not even address the conflicting claims that necessitated the transfer of estate administration to the Court of Queen's Bench.

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R v Singharath, 2020 SKQB 178

Elson, June 19, 2020 (QB20167)

Criminal Law – Murder – Second Degree Murder – Elements
Criminal Law – Evidence – Common Sense Inference

The victim died of a gunshot wound he received in or near his backyard. The accused was charged with second degree murder, contrary to s.235(1) of the Criminal Code, and with intentionally discharging a firearm while being reckless as to the life or safety of another person, contrary to s. 244. 2(1)(b) of the Criminal Code. An agreed statement of facts was filed with the court wherein it was agreed that the victim died of a gunshot wound and the accused fired the firearm that struck and killed the victim. The accused was in a stolen Nissan truck both before and after the victim was shot. There were three other occupants of the vehicle: John Doe, Jane Doe, and Fred Doe. All four of the occupants of the vehicle were crystal meth users. On the morning of July 22, John Doe called Fred Doe for a ride. The accused, Fred Doe, and Jane Doe were in the vehicle and agreed to meet John Doe at the Mac's store, which was beside the accused's residence. While he was waiting for a ride, John Doe, the victim, and the victim's brother-in-law got into an argument and John Doe was chased into a nearby park. When the vehicle with the accused and the others arrived, John Doe told them about the confrontation. The vehicle was driven to the back of the victim's residence via the back alley. The three men got out of the vehicle and were standing by the other vehicle parked just off the back alley. The victim went to the back fence. There was a gunshot and the three men from the vehicle returned to it and fled. John Doe and Jane Doe both testified that the shooting was an accident but did not

provide testimony to support that belief. The accused did not call any evidence at the trial. The Crown called 17 witnesses and the court called one witness, Fred Doe. Fred Doe was originally on the Crown's witness list. He was present at the scene of the shooting, but the Crown indicated that they no longer believed the witness would be truthful in giving testimony. The accused was concerned with the loss of ability to cross-examine Fred Doe and also with the fact that he would lose the right to make final submissions after the Crown just because he called that one witness. The court therefore called the witness in the interests of procedural fairness. The only meaningful dispute between the parties was pertaining to the third essential element for second degree murder, the accused's state of mind.
HELD: The three essential elements of second degree murder are: 1) that the accused caused the deceased's death; 2) that the accused caused the death by an unlawful act; and 3) that, at the time the accused caused the death by the unlawful act, the accused possessed the state of mind required for murder. The court was satisfied beyond a reasonable doubt that the accused's state of mind at the time of the shooting was not affected by the consumption of illicit drugs or alcohol. The court was also satisfied beyond a reasonable doubt that the accused had at least basic familiarity with the subject firearm. This inference was drawn from the fact that the accused kept it in his possession while loaded. It was also found that the firearm was functional and required roughly 5.5 pounds of pressure to fire. The accused was also found to have brought, and physically carried, the loaded firearm to a scene he expected would evolve into a serious confrontation. The accused was standing between 20 and 22 feet away from the victim when he shot him. There was no evidence to suggest the firing of the firearm was accidental. The court applied the common sense inference in this case to conclude that, beyond a reasonable doubt, when the accused pulled the trigger he knew the reasonable and probable consequences of his action would be either to cause the victim's death or to cause him grievous bodily harm that would likely cause his death, and was reckless whether death ensued or not. The accused was found to have committed second degree murder. A stay was entered with respect to the second charge.

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Atrium Mortgage Investment Corporation v Koh, 2020 SKQB 179

Robertson, June 19, 2020 (QB20168)

Civil Procedure – Queen's Bench Rules, Rules 6-13, 7-2, and 7-3
Civil Procedure – Summary Judgment – Affidavits – Application to Cross-Examine

Civil Procedure – Summary Judgment – Queen's Bench Practice Directive #9

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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Yorkton (City) v Mi-Sask Industries Ltd., 2020 SKQB 183

Layh, June 26, 2020 (QB20172)

Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5

The plaintiff, the city of Yorkton, commenced an action in 2012 against the defendants regarding the functioning of a sewer installation built between 2009 and 2010. In this application, the plaintiff sought a preservation order under s. 5 of The Enforcement of Money Judgments Act (EMJA) against the defendant, Mi-Sask Industries Ltd. (MSI), the installer of the sewer pipe. It initiated the action when it learned that MSI was winding up its business, having sold its equipment and negotiated a sale of its land and buildings. The children of the original owners of MSI had taken over the shareholder ownership through their respective holding companies. Each of these companies were owed repayment of shareholder loans. MSI stated that after payment of the shareholder loans and funding the expenses of defending the action, the money remaining, $1 million, was intended to be held to satisfy any judgment issued against it. MSI argued that no preservation order should be granted and alternatively, if it issued, then it be permitted to pay the shareholder loans as part of its ordinary course of business and to retain funds to cover the expenses of defending the action against it, as permitted by s. 5(5)(b)(ii) and (iii) of the EMJA. The plaintiff objected to MSI's position, stating that the purpose of the sale of its

assets was not to pay the shareholder loans or fund the expenses of defending the action, but to wind down the business. In the alternative, the plaintiff said that using the sale proceeds to pay ordinary creditors was not objectionable but that payment of the three shareholder loans was different in that they had no expectation of payment given the lack of formality attending the loans in the ordinary course of business under s. 5(5)(b)(ii). MSI pointed out that historically, it had repaid previous shareholder loans. MSI had advised the plaintiff that the costs of defending the action were covered in least in part by its insurance, but the plaintiff argued that as it had not provided any evidence regarding the specifics and extent of its coverage, there was no proof that the disposition of MSI's assets occurred for the purpose of acquiring income to pay its expenses in defending the action. The plaintiff acknowledged that it must establish a prima facie case that in the absence of preservation order, enforcement of a judgment against MSI would be wholly or partially ineffective.
HELD: The application was dismissed. The court found that the plaintiff had not discharged the onus of proving that its judgment enforcement measure would be thwarted in the absence of a preservation order. No evidence had been presented by either party regarding MSI's insurance coverage, which affected the court's ability to determine the merits of either party's claim.

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Bauck v Farm Credit Canada, 2020 SKQB 184

Megaw, June 29, 2020 (QB20173)

Creditors and Debtors – Lease – Farm Equipment

The applicant farmer served an application for hearing pursuant to s. 50 of the Saskatchewan Farm Security Act (SFSA) after the respondent, Farm Credit Corporation, served a Notice of Intention to Take Possession on the applicant regarding certain items of farm equipment. At the hearing, the applicant represented himself and acknowledged that his indebtedness with the respondent was in arrears. He said that he attempted to negotiate a refinancing package with the respondent but it would not respond, and that he was trying obtain refinancing through other financial institutions but did not provide any information as to where he was in the process. He advised the court that the equipment in question was necessary to him at the time of hearing to harvest the cattle feed crop and requested that he have it until the end of November 2020 before the respondent would be able to seize it.
HELD: The court denied the relief sought by the applicant because he had not presented a plan to deal with the indebtedness or sufficient evidence to allow it to exercise its discretion to provide an extended period of time. It ordered that the applicant should have

two weeks from the date of judgment to make appropriate arrangements to either satisfy the indebtedness with the respondent or to make arrangements for payment satisfactory to it. If such payment or arrangements were not made, the applicant was to permit the respondent to obtain possession of the secured equipment.

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R v Larlham, 2020 SKPC 27

Metivier, June 30, 2020 (PC20024)

Criminal Law – Defences – Entrapment
Criminal Law – Driving over .08
Criminal Law – Evidence – Witness – Credibility
Criminal Law – Stay of Proceedings

The accused applied for a stay of proceedings based on entrapment. The accused had been found guilty of impaired driving over .08 within two hours of ceasing to operate a conveyance, contrary to s. 320.12(1)(b) of the Criminal Code. The accused was ice fishing with her fiancé and father. She drove her truck to the lake with her fiancé and her father drove his own vehicle. All were drinking. The accused said entrapment occurred because a conservation officer who was checking for fishing licences told her father he should not drive, but stated to the accused and her fiancé that they "looked fine to drive." The accused was stopped while driving off the lake an hour later. The accused said that she relied on the statement made by the conservation officer because of the inherent authority of the officer. She said she was thus entrapped into operating a conveyance when her blood alcohol exceeded the legal limit. The conservation officer testified that he did not make the statement to the accused and her fiancé. He indicated that he told the accused, her fiancé and her father that consuming four or five drinks, as they indicated they had, would likely put them over .04. The conservation officer said that the father was slurring his words so he advised him that he should not be driving. The conservation officer also said that either the accused or her fiancé indicated that their stepmother would be available to give them a ride if need be.
HELD: The accused had the onus of proving entrapment on a balance of probabilities. The court had to consider the credibility of the witnesses. The conservation officer had no relationship with any of the defence witnesses. He was sober and on duty. All of the defence witnesses had been drinking. The conservation officer testified in a straightforward manner and acknowledged that he swore at the father when he thought he was lying to him. He also acknowledged where his assumptions might have been mistaken. For example, the father's slurring may have been from not wearing his bottom dentures. The defence witnesses were adamant that the

conservation officer told the accused and her fiancé that they "looked fine to drive." The court found that the conservation officer was generally a credible witness; however, it accepted the defence evidence concerning the impugned statement. The first branch of the entrapment test required that the accused establish that the authorities provided an opportunity to commit an offence and they did so without reasonable suspicion. The court found the case to turn on whether the conservation officer provided the accused with such an opportunity. The court concluded that the conservation officer did not present the accused with an opportunity to commit a criminal offence. The conservation officer had no way of knowing who might drive, when they might drive, or their levels of impairment. There was no reasonable link or proximity between the statement and the accused's criminal conduct. There was no entrapment. The accused's application for a stay of her charge was dismissed.

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R v M.A., 2020 SKPC 13

Kovatch, June 30, 2020 (PC20022)

Criminal Law – Young Offender – Sentencing – Adult – Appeal
Criminal Law – Assault – Sexual Assault – Young Offender – Sentencing

The accused pled guilty to committing a sexual assault and causing bodily harm to the complainant contrary to s. 272(1)(c) of the Criminal Code. The accused and the complainant were both 14 years of age at the time the offence was committed. The accused and four other young men participated in multiple sexual assaults on the complainant. One young man was the primary instigator, inviting the others to participate and denigrating them for any unwillingness to do so. A Pre-Sentence Report (PSR) stated that the accused had arrived from Syria with his family in 2016. The family was described as good and supportive. The accused had no prior criminal record, did not use drugs or alcohol and had been a good student. He accepted responsibility for the incident and expressed remorse. The PSR indicated that the accused was at level III to offend generally, a moderate risk, and in terms of sexual re-offending, he was at low risk. The psychologist and social worker who authored a risk assessment report suggested that the accused participate in specific treatment programs for adolescent sexual offences. The Crown submitted that the accused should receive a two-year custodial sentence plus probation. The defence asked the court to consider probation or a sentence of open custody for six months, followed by probation, based on s. 3 of the Youth Criminal Justice Act (YCJA). HELD: The court imposed a 10-month custodial sentence on the accused, followed by five months' community supervision subject to

conditions and a nine-month probationary period on conditions. The accused needed to receive a custodial sentence because of his role in a major sexual assault; however, the sentence must be less than the maximum two-year sentence available under the YCJA because that should be reserved for the ringleader of the offences. Because the accused's family was supportive and stable and the accused had complied with all of the terms imposed upon his judicial interim release, the court decided that his custody would be open. He was not a security risk or a danger to the public. During his probation, the accused was ordered to observe a curfew, attend school and participate in assessments and programming for sexual offending.

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R v Benjaminson, 2020 SKPC 26

Jackson, June 18, 2020 (PC20023)

Criminal Law – Evidence – Documentary Evidence – Criminal Code, Section 540(7)
Criminal Law – Preliminary Hearing
Criminal Law – Witness Attendance – Video-conference – COVID-19
Criminal Law – Witness Attendance – Video-conference – Criminal Code, Section 714.1

The accused was charged with impaired driving and over .08 causing death. Prior to the preliminary hearing, the Crown applied to have Constable E. (Cst. E.) testify by video conference pursuant to s. 714.1 of the Criminal Code and to tender certain documentary evidence at the preliminary hearing pursuant to s. 540(7) of the Criminal Code. The accused opposed the application. The Crown opposed the accused's request to cross-examine pursuant to s. 540(9) of the Criminal Code concerning the expert evidence of the toxicologist that the Crown wanted to tender by documents. If the request to cross-examination were allowed, the Crown further applied to have the toxicologist available by video.
HELD: Neither ss. 714.1 nor 540(7) require affidavit evidence in their support. There was also no case authority providing that affidavits were required on the applications. The court relied on counsel submissions to establish the factual background for the applications. Section 714.1 of the Criminal Code required the court to consider all of the circumstances, including an enumerated list, to decide whether Cst. E. should be allowed to testify by video conference. Cst. E. lived and worked in New Brunswick and it would cost $1,450 to bring him to testify at the preliminary hearing. Cst. E. would testify as to date, time, jurisdiction, identity, and interactions with the accused as well as his observations at the scene of the accident. Cst. E. also prepared and swore two informations to obtain for medical records and a production order that the accused might want

to cross-examine vigorously on, which, it was argued, could be inhibited by video conference. The Crown raised COVID-19 in support of its application. Aside from the risks of travel, Cst. E. would be required to self-isolate for 14 days upon his return to New Brunswick. The court was satisfied that Cst. E. should be permitted to testify by video. The Crown reduced the volume of documentary evidence it wished to tender pursuant to s. 540(7) down to 11 documents. The documents were not statements of key witnesses wherein credibility was paramount; they were in the nature of expert medical and professional reports as well as institutional business records. The Court was satisfied that the threshold required in s. 540(7) of the documents being "reliable and trustworthy" was met and that it was appropriate in the circumstances to admit them as evidence at the preliminary hearing. The court next considered the accused's application to cross-examine. The accused said that much of the toxicologist's evidence was based on her opinion, which was open to interpretation and challenge. Further, it was argued that the toxicologist's conclusions were a critical component of the Crown's case, so to deny the accused the opportunity to cross-examine would severely prejudice the accused's right to full answer and defence. The court found that the accused should be permitted to cross-examine the toxicologist. The toxicologist was located in Edmonton, five hours' travel by car. According to the Crown, the approximately $850 cost to have her attend and health safety reasons, namely COVID-19, mitigated in favour of her attendance by video. The court granted the Crown's application to have the toxicologist attend by video conference.

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