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

Volume 22, No. 17 **September 1, 2020**

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T.B.S. v S.J.B., 2020 SKCA 93

Ottenbreit Barrington-Foote Tholl, August 5, 2020 (CA20093)

Family Law – Custody and Access – Variation – Appeal
Family Law – Child Custody – Person of Sufficient Interest

The appellant grandmother appealed the decision of a Queen's Bench judge that awarded sole custody of her two grandchildren, now aged eight and five years of age, respectively, to their mother, the respondent, S.J.B. (see: 2019 SKQB 174). After S.J.B. and the father of the children had separated, the court had granted a consent order granting sole custody and primary residence of the children to the father in 2016. The appellant had cared for the children almost since their birth due to the parents' problems with substance abuse. They continued to reside in fact with the appellant, and she was their primary parent after the consent order was granted. S.J.B. moved to a different city, began a stable relationship with a new partner, obtained employment and stopped using illicit drugs. In 2018, she learned that the children's father had been incarcerated for serious criminal offences and, as a result, applied to vary the consent judgment to have sole custody and primary residency of the children. The appellant then successfully applied to be named as a person of sufficient interest pursuant to s. 6 of The Children's Law Act (CLA) and for an order that the children continue to reside primarily with her. The judge directed that the matter proceed to trial. Among her grounds of appeal, the appellant argued that the trial judge erred: 1) in assessing the factors specified in s. 8 of the CLA by treating them as minimum requirements that S.J.B. merely had to meet to be equivalent to the appellant when considering the best interests of the children; 2) by failing to consider S.J.B.'s

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shortcomings and conduct; 3) by placing insufficient weight on the status quo and the appellant's status as the primary caregiver and psychological parent; and 4) by placing undue emphasis on S.J.B.'s status as the biological parent.
HELD: The appeal was dismissed. The standard of review was narrow and deferential in child custody cases. The court found that the trial judge had not erred concerning any of the grounds raised by the appellant, and specifically that he had: 1) not considered the factors set out in s. 8 of the CLA as the minimum requirements that S.J.B. had to meet to rank equally with the appellant. He had conducted a best interests test, not a fitness test; 2) specifically referred to S.J.B.'s conduct, including her prevarication at trial, in his judgment, and had stated he was satisfied that it was an isolated incident that did not detract from her overall parental capabilities; 3) properly considered the primary parent and status quo factors and gave them the emphasis they required. He acknowledged and maintained the importance of the children's relationship with the appellant by providing her with regular and frequent access; and 4) correctly determined S.J.B. was not entitled to a presumption or preferential position by virtue of being the children's biological mother. As this was the first time the Court of Appeal had considered this issue, it held there was no presumption in favour of a biological parent versus a person of sufficient interest when determining the appropriate parenting arrangements for a child. It is a factor that is subsumed within the best interests framework and must be considered in conjunction with all the other factors.

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Naber v John Deere Financial Inc., 2020 SKCA 94

Ryan-Froslie Leurer Barrington-Foote, August 6, 2020 (CA20094)

Statutes – Interpretation – Saskatchewan Farm Security Act, Section 53

The appellants appealed from the decision of a Queen's Bench chambers judge that refused their application for temporary relief from forfeiture pursuant to s. 53 of The Saskatchewan Farm Security Act (SFSA). The judge found they had failed to establish that their inability to pay had arisen from temporary circumstances. They had entered into four agreements for the purchase of farm equipment financed through the respondent, John Deere Financial. The appellants fell into arrears under the contracts and brought this application. The issues were whether the chambers judge: 1) correctly identified the test to be applied under s. 53(1) of the SFSA; and 2) erred in law in applying that test.
HELD: The appeal was granted and the decision of the Queen's Bench judge was set aside. The matter was remitted to the Court of Queen's Bench for reconsideration with additional evidence to be

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Statutes – Interpretation – Registered Plan (Retirement Income) Exemption Act, Section

filed by the appellants and the respondent providing an update as to any matters that might touch on the issues, including the value of the equipment, the amount outstanding and the appellants' proposal for payment. The court found with respect to each issue that the chambers judge: 1) failed to identify the test. Instead of focusing on "what is just in the circumstances," she examined whether the appellants had demonstrated the existence of a temporary hardship rather than assessing all relevant factors; and 2) erred in law by overlooking relevant factors in arriving at her determination. She regarded the appellants' past performance of the contract as creating a concern on the part of the respondent that it would be not be paid in full. The appellants were seeking forbearance until grain could be sold pursuant to delivery contracts and the respondent was well secured. The judge overlooked many key factors in exercising her discretion that evidenced an error in principle, such as that the contracts were all purchase agreements, the appellants had paid 75 per cent of the purchase price, and the value of the equipment exceeded the amount owing against it. Considering the purpose of the SFSA, it was just that the relief request be granted.

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Re Harmon International Industries Inc., 2020 SKCA 95

Jackson, August 6, 2020 (CA20095)

Statutes – Interpretation – Bankruptcy and Insolvency Act, Section 193(c)
Civil Procedure – Court of Appeal Rules, Rule 59

The applicant, Harmon Industries, applied for leave to appeal the sales process order made by a Queen's Bench judge granted to the respondent receiver appointed under the Bankruptcy and Insolvency Act (BIA). The order authorized the receiver to enter into two listing agreements with a commercial real estate company to effect a sale of the applicant's assets and set a listing price. The order was issued on June 5, 2020 but the notice of appeal was not filed with the Court of Appeal until July 9, beyond the 10-day time limit for appealing orders made under the Bankruptcy and Insolvency General Rules. The applicant took the position that it had an appeal as of right under s. 193(c) of the BIA which obviated the issue of when it filed its application for leave to appeal. However, leave to appeal should be granted regardless under s. 193(e) of the BIA because the appeal was sufficiently meritorious and important to justify such order. In addition to its application for leave to appeal, the applicant applied to adduce fresh evidence of an appraisal attesting to the value of its assets as being greater than the listing price in the order and to extend the time within which to appeal under s. 31 of the Bankruptcy and Insolvency General Rules.

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HELD: The application was dismissed. The court declined to grant leave to appeal or to admit fresh evidence. It found with respect to the application to adduce fresh evidence that a single judge of the Court of Appeal does not have authority to grant it as per Court of Appeal Rule 59. It was not to be taken as saying that there were no circumstances under which a chambers judge hearing an application under s. 193 of the BIA or s. 31 of the General Rules could not receive such materials under Rule 48(1)(b). However, in this case, the proper place to assess the new evidence was the Court of Queen's Bench. Regarding whether the applicant had an appeal as of right under s. 193(c), it found that the proposed appeal did not exceed in value $10,000 as those words are used in that section. The Queen's Bench order was procedural only and dealt with the manner of sale. It did not have an impact on the proprietary or monetary interests of the applicant, nor did it crystallize any loss at this time. Thus, leave to appeal was required. In this case, the proposed ground of appeal that the appraisal should not have been admitted because of its having been filed by the secured creditor's lawyer was destined to fail because no objection had been made to its admission before the chambers judge. The other ground of appeal, that the judge erred in his weighing of the evidence to set a list price, was also destined to fail. The decisions of supervising judges in bankruptcy proceedings are discretionary and are afforded a high degree of deference. Although it was unnecessary to decide whether the time for leave to appeal should be extended, the court found that the test is whether the justice of the case requires an order should be made. Since the appeal was not arguable, it would not benefit anyone to grant the application for extension of time.

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Prince Albert Right to Life Association v Prince Albert (City), 2020 SKCA 87

Ottenbreit Schwann Kalmakoff, August 10, 2020 (CA20096)

Administrative Law – Judicial Review – Standard of Review – Reasonableness – Appeal
Civil Procedure – Mootness
Civil Procedure – Costs
Civil Procedure – Queen's Bench Rules, Rule 11-1

The appellants appealed the decision of the Queen's Bench Court that dismissed an application for judicial review of the City's decision on the basis that it was moot. The City cross-appealed on various issues, including costs. Prior to 2017, the City allowed the appellants to fly their flag on its flagpole to increase public awareness about its cause. In January 2016, the City adopted the Flag Protocol Policy (Policy). In 2016 and 2017, the City received correspondence from the community opposing the flying of the

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appellants' flag. In May 2017, the mayor of the City advised the appellants that the City would not allow the flag to be flown because it was not "national" or "nationally recognized." In October 2017, the appellants filed an originating application seeking judicial review of the City's decision to deny its application to fly its flag on the flagpole. The City amended its Policy and ended the practice of allowing the public to use the flagpole. The chambers judge determined that the application was moot but nonetheless considered whether she should exercise her discretion to hear the case. In the end, the chambers judge dismissed the application as being moot due to the repeal of the Policy. The chambers judge awarded costs of $6,000 to the appellants because the City did not follow its own Policy or proceed in a procedurally fair manner. HELD: The appeal and cross-appeal were dismissed. The City appealed on various issues, including the reasons of the chambers judge. The appeal court stated that the City could not seek to uphold a favourable decision and ask the court to rewrite the favourable decision with reasons more to its liking. The only issue raised by the City that the appeal court considered was the appeal from the costs award at chambers. The appeal court determined that the assumptions made by the chambers judge did not significantly impact her exercise of discretion with respect to costs. The chambers judge's findings were grounded on facts, not presumptions. The appeal court found this to be an exceptional case and agreed with the chambers judge. She did not err in the exercise of her discretion to award costs. The appeal court considered whether the chambers judge erred in dismissing the application of the appellants because it was moot. The appellants argued that the application was not moot because there was a sufficiently live controversy between the parties, even with the elimination of the flagpole by the City. They also argued that the chambers judge should have exercised her discretion in favour of determining the matter even if it was moot. The appeal court endorsed the two-step test set out in Borowski to consider whether to hear a case when mootness was alleged. The appeal court considered: a) whether the matter was moot (the first step of the Borowski test). The appellants argued that the chambers judge could have granted a separate and discrete remedy, namely, a declaration that the decision of the City was an unreasonable violation of its Charter rights. The appeal court determined that the chambers judge concluded rightly that there remained no live controversy between the parties and that the application was therefore moot; b) did the chambers judge err in the exercising her discretion to determine the matter in any event (the second step of the Borowski test)? The situation would not arise again because there was no longer a flagpole or a Policy. The factor of conserving judicial resources mitigated against hearing the matter. Nor would the case settle a recurring point of law. The appeal court found that the chambers judge was correct in noting that pronouncing a declaration in the absence of a concrete dispute risked intruding into the legislative function of the City. The chambers judge did not err

in principle, disregard a material fact, or fail to act judicially. The appeal court did not award costs on the appeal or cross-appeal.

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R v Gmerek, 2020 SKCA 97

Caldwell Schwann Tholl, August 12, 2020 (CA20097)

Criminal Law – Appeal – Conviction
Criminal Law – Fraud
Criminal Law – Admissibility of Statement – Voluntariness of Statement
Appeal – Evidence – Grounds – Misapprehension of Evidence

The appellant appealed his conviction of defrauding his former employer of approximately one million dollars. The grounds of appeal were: 1) the judge erred by admitting a statement the appellant made because it was not a voluntary statement; and 2) the judge misapprehended or misapplied the criminal burden and standard of proof beyond a reasonable doubt. The appellant worked at a livestock brokerage business that bought and sold cattle in Canada and the United States. He was the general manager commencing August 8, 2008 and he was fired in December 2012 after the employer learned the appellant had taken money over and above his salary. The investigation revealed that the appellant had actually converted over $1 million. The appellant acknowledged receiving the money. He acknowledged that he forged signatures on cheques and acted to hide the payments in the financial records of the employer. The appellant argued, however, that the employer agreed to supplement his salary through these "off-record" payments. According to the appellant, the payments were authorized by the employer. The employer testified that was not the case. The trial judge accepted the employer's evidence over that of the appellant.
HELD: The appellant's conviction appeal was dismissed. The grounds of appeal were dealt with as follows: 1) the statement was made by the appellant when the employer, family members, and an RCMP officer attended at the appellant's office. They placed cheques before the appellant and asked for his comments. The employer agreed that he was yelling and gave the appellant 30 seconds to explain. The appellant responded with "What can I say." The appellant argued that statement should not have been admitted into evidence because it was not a voluntary statement. The appellant took the position on the voir dire that the employer was not a person in authority. He did not call any evidence on the voir dire. At the voir dire, he had opposed the admission of the statement based on it being inadmissible hearsay. The trial judge admitted the statement under the traditional exception to the hearsay rule for statements against interest. Even if the trial judge had erred, the appeal court

found that it could not have affected the admissibility of the statement at law because the voluntariness of the statement was not called into question by the evidence adduced in the voir dire. The appeal court also noted that the statement did not play into the trial judge's findings for conviction in any case. The only issue at trial was whether the employer authorized the payments and defrauding of auditors and others. 2) The trial judge rejected the appellant's testimony, indicating that his evidence and his theory were nonsensical in the circumstances or had no correlation to the evidence of how the payments had been made. Other off-record payments to other employees were found to be not at all similar to the appellant's arrangement. The trial judge concluded that there was "no air of reality" to the suggestion that the employer was aware of the fraudulent transactions. The trial judge did not err in terms of the burden and standard of proof or in her approach to the evidence.

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Harpold v Saskatchewan (Corrections and Policing), 2020 SKCA 89

Schwann Barrington-Foote Tholl, August 12, 2020 (CA20098)

Civil Procedure – Appeal – Fresh Evidence
Civil Procedure – Pleadings – Application to Strike – Frivolous, Vexatious and Abuse of Process
Civil Procedure – Pleadings – Application to Strike – No Reasonable Cause of Action
Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 7-9, Rule 13-8
Torts – Misfeasance in Public Office

The appellant appealed the decision striking his statement of claim because it failed to disclose a reasonable cause of action and was frivolous and an abuse of process. The appellant commenced a statement of claim against the respondent, the Ministry of Corrections and Policing. He was being supervised by the respondent after entering into an undertaking and then a recognizance pursuant to s. 810.1 of the Criminal Code. The claim related to how two of the appellant's probation officers discharged their supervisory function under The Correctional Services Act, 2012. It specifically dealt with some of the discretionary aspects of his conditions. He cited the refusal to modify his residency condition and to allow him to accept employment as a heavy equipment operator. The appellant claimed that he had to forgo lucrative employment in Alberta and Saskatchewan. He claimed damages of $300,000. The chambers judge characterized the appellant's claim as either a claim in some sort of contract or a "back door attempt to launch a collateral attack on the terms of the

recognizance." She determined that neither came close to disclosing a reasonable cause of action. When considering whether the claim was frivolous or an abuse of process, the chambers judge noted that the appellant did not allege that the probation officers acted in bad faith and s. 111 of The Correctional Services Act, 2012 provides immunity for actions done in good faith. The appellant applied to adduce fresh evidence on appeal, namely a publication called "High Risk Offenders: A Handbook for Criminal Justice Professionals" (Handbook) published by the Government of Canada. He said that he did not know about the Handbook until after the application to strike had been determined.

HELD: The appeal was allowed. The appellant's application to introduce fresh evidence was found to fail the Palmer test for two reasons. First, the Handbook was dated 2001 and thus had been available prior to the chambers application. Second, the appeal court did not see its relevance. The standard of review was correctness. The appellant did not specify any cause of action by name other than referencing an alleged contract. The appeal court adopted the reasoning in Thirsk regarding strict adherence to technical rules of pleadings where litigants are self-represented. The appeal court interpreted the appellant's appeal to argue that the chambers judge erred in over-emphasizing his failure to specify a cause of action by name. The appeal court did not find an error in the chambers judge's conclusion that there could not be a claim in contract. The appeal court considered whether the appellant's claim was one of misfeasance in public office. The tort was not identified by name in the appellant's claim. The appellant did assert a violation of his rights under ss. 2, 11, and 15 of the Charter. The chambers judge did not address those assertions. The appeal court found that the tort of misfeasance in public office was supported by the appellant's pleadings. The chambers judge was required to consider whether, assuming the facts as stated in the statement of claim were true, was it plain and obvious that the appellant's claim disclosed no reasonable cause of action. The chambers judge erred in failing to assess the appellant's claim as one of misfeasance in public office. The appeal court next considered whether the claim was frivolous and an abuse of process. Evidence beyond the pleadings could be considered. The appeal court did not find an error with the chambers judge's analysis of the appellant's contract claim; however, the decision could not be sustained because the chambers judge failed to take into account the tort of misfeasance in public office. The appellant should be given an opportunity to amend his pleadings to respond to the defence of good faith immunity protection in s. 111. The chambers decision was set aside and there was no order for costs.

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T N C Mall Property Holdings Inc. v Moose Jaw (City), 2020 SKCA 99

Richards Jackson Kalmakoff, August 12, 2020 (CA20099)

Municipal Law – Appeal – Property Taxes – Assessment – Non-regulated Property – Equity
Statutes – Cities Act, Section 165(5)

The appellant owned a shopping mall (mall) in the respondent City. In 2017, the assessed value of the mall nearly doubled. The Saskatchewan Assessment Management Agency (SAMA) found that there was only one Saskatchewan enclosed mall sale, in a different city, from January 1, 2011 to December 31, 2014. One sale did not allow the generation of a capitalization rate, so SAMA applied the capitalization rate of 6.61 percent, which was the rate developed for general commercial property in the City. The Board of Revision (board) concluded it was not appropriate for SAMA to apply the general commercial property capitalization rate to the mall. After requesting, but not receiving, a new calculation from the City, the board ordered that the 2017 assessment for the mall was to be the same as in 2016. On appeal to the Assessment Appeals Committee (committee), it determined that the board erred by ordering an assessment valued from a previous assessment cycle. The committee determined this to be contrary to achieving equity. The committee said that the general commercial property capitalization rate was properly determined, and equity was obtained by applying it to the mall. The issues were: 1) whether the committee employed the correct standard of review; 2) whether the committee correctly interpreted and applied the "market valuation standard" set out under s. 163(f.1) of The Cities Act; 3) whether the committee correctly interpreted and applied s. 165(5) of the Act when it was determined equity was achieved in the assessment of the non-regulated property; and 4) whether the committee correctly interpreted the "mass appraisal process" (s. 163(f.3) of the Act) and the statutory powers of a board of revision when it concluded that a board of revision cannot order an assessor to use a property value established in an earlier assessment cycle.
HELD: The appeal was allowed. The issues were determined as follows: 1) the committee said it would review the board's decision on the basis of reasonableness. The appellant argued that the committee erred by not actually applying that standard. The committee's decision was taken as saying that it was not possible to determine a capitalization rate based on enclosed mall sales because there had been only one sale, and that SAMA made no reversible error in applying the general commercial property capitalization rate even though the properties used to calculate the rate were not directly comparable to the mall. The committee did not err. 2) The appellant was not successful in its argument that the committee defaulted to statistical testing and ignored the question of comparability or confused statistical testing results with comparability. Neither was the appeal court persuaded by the

appellant's argument that the committee erroneously deferred to SAMA's discretion when it upheld the application of the general commercial property capitalization rate to the mall. SAMA never suggested that the properties used to calculate the general commercial property capitalization rate were closely comparable to the mall. The appellant also argued that the committee erred in law by implicitly finding that the level of comparability required between and among properties by the market valuation standard depends on how much sales information is available. The court of appeal noted that properties are never completely comparable in relation to all variables. The committee did not imply that the meaning of the term "similar properties", as found in the Act, somehow changes with the amount of sales data available to an assessor. The committee did not misapprehend the meaning of the comparability concept; 3) the committee erred in law by applying the wrong test for equity. The achievement of equity under s. 165(5) for non-regulated properties is a matter of result. The market valuation standard must be applied to achieve equity in assessing non-regulated properties such as the mall; and 4) a board is not given express authority to remit assessments to the assessor, whereas the committee is, as per s. 226(1)(c) of the Act. The board must either confirm the assessment or change it. SAMA responded to the board's request for a capitalization rate calculated on the basis of three malls by saying the board did not have the authority to make such a request. SAMA cannot stand in the way of a board's attempt to correct an assessment error by denying the board access to the information necessary to make the correction in issue. An error in that regard, however, did not necessarily mean that the committee erred in overturning the board's decision. According to the committee, the calculation requested by the board was not possible. The appeal court found that the committee did not err in concluding that the time-adjustment requested by the board was not statistically possible. The appellant was given costs of its application for leave to appeal; however, the appeal court found it appropriate for each party to bear its own costs with respect to the appeal proper because the appellant was not successful in most points raised.

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Patel v Saskatchewan Health Authority, 2020 SKCA 100

Caldwell, August 16, 2020 (CA20100)

Civil Procedure – Appeal – Costs
Civil Procedure – Leave to Appeal – Costs – Court of Appeal
Statutes – Court of Appeal Act, Section 5, Subsection 7(3), Section 20
Statutes – Queen's Bench Act, Section 38(b)

The applicants obtained leave to appeal against the costs order made in the chambers decision. The threshold question for the appeal court was whether the single appeal judge sitting in chambers had the jurisdiction to grant the relief and alternative relief sought by the applicants.
HELD: The appeal judge concluded that a single judge in chambers did not have jurisdiction to grant the relief and alternative relief sought by the applicants. The right to appeal is limited by s. 7(3) of The Court of Appeal Act, 2000 and s. 38(b) of The Queen's Bench Act in circumstances where litigants seek to appeal against an order of costs alone. Where the appeal is only with respect to the costs order, there is no appeal unless leave to appeal has been granted by the Court of Queen's Bench judge who made the cost order. The chambers judge had not granted the required leave to appeal as the applicants had not sought it. The applicants said that they did not apply for leave to appeal from that chambers judge because the judge had recused himself in the chambers decision. The applicants argued that the chambers judge lost jurisdiction to grant leave under s. 38 of The Queen's Bench Act, 1998 so the appeal court judge should assume the jurisdiction. The applicants did not point to any authority or legislation that would allow the appeal court to stand in the shoes of a Court of Queen's Bench judge for the purposes of granting leave to appeal from a costs order alone. The appeal court also found that neither s. 5 nor s. 20 of The Court of Appeal Act provided the authority the applicants sought. The appeal court was unable to conclude that a single judge had the jurisdiction necessary to grant the relief sought. After the jurisdiction issue was raised in the oral hearing, the applicants sought an extension of time to file a notice of appeal against the costs order as final order, i.e., one that does not require leave. The application for extension of time to appeal was granted. Costs of the application were left to the panel of the court that hears the appeal.

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Onion Lake Cree Nation v Stick, 2020 SKCA 101

Ottenbreit Caldwell Leurer, August 17, 2020 (CA20101)

Civil Procedure – Appeal
Civil Procedure – Appeal – Fresh Evidence
Civil Procedure – Contempt Application – Service
Civil Procedure – Queen's Bench Rules, Rule 12-9
Civil Procedure – Service – Service on Legal Counsel
Civil Procedure – Statutes – Interpretation – First Nations Financial Transparency Act, Sections 7 and 8

The appellant appealed the order wherein it was found in contempt of a previous court order. The appellant had not provided evidence or submissions on the contempt application because the

respondents had not served the appellant's lawyer with the contempt application. When the First Nations Financial Transparency Act (FNFTA) was passed in 2013, the appellant refused to comply with its terms. The respondents were made up of a member of the appellant First Nation and an advocacy group described as promoting "the responsible and efficient use of tax money." The respondents were unhappy that the appellant was refusing to comply with the FNFTA, so they issued an originating notice (enforcement application). The enforcement application sought an order pursuant to s. 10 requiring the applicant to provide copies of her financial records for 2015 and 2016 within 21 days., etc. The respondent then made an application to stay the enforcement application. The chambers judge granted the enforcement application and dismissed the stay application in a judgment in June 2017. The compliance order required the appellant to comply with the duties imposed by ss. 7 and 8 of the FNFTA within 30 days. In April 2018, within 15 days of the appellant's compliance order appeal being dismissed, the appellant posted the 2015 and 2016 audited financial documents on the internet. Documents relating to 2017 and 2018 had not been released. In February 2019, the respondents served a councillor of the appellant with the contempt application. The respondents acknowledged that it was an oversight for the appellant's legal counsel not to be served. In July 2019, the chambers judge found that the compliance order established an ongoing obligation to comply with ss. 7 and 8 of the Act. In August 2019, the appellant filed a notice of appeal and made an application to adduce as fresh evidence an affidavit sworn by the appellant's associate director of operations. The affidavit showed that the appellant was represented by legal counsel at all times. The councillor who was served with the contempt application did not bring the matter to the attention of the appellants' legal counsel. The issues were: 1) whether the chambers judge erred by hearing the contempt application without seeking proof of service on counsel for the appellant; and 2) whether the chambers judge erred in finding that the compliance order created an ongoing obligation to comply with the FNFTA.

HELD: The application to adduce fresh evidence was granted and the appeal was allowed. The appellant did not breach the previous court order and was not in contempt. The issues were determined as follows: 1) the parties agreed that service on the councillor met the requirement that the contempt application be served directly on the appellant. The issue was whether the respondents were also required to serve the appellant's legal counsel. Rule 12-9(1) of The Queen's Bench Rules requires that the lawyer of a party be served when they are represented. Rule 12-9(2) indicates that Rule 12-9(1) does not apply when there is an application for committal of a person for contempt of court. Both parties proceeded on the basis that the application fell within the exception in Rule 12-9(2). The court also proceeded on that basis without considering whether the application did fall within the exception. The appeal court was not persuaded that the failure to serve may have constituted a breach of

professional obligations by the respondents' lawyer allowed for an interpretation of the Rules so as to require service on the party and the party's counsel. The appeal court ultimately decided the issue based on Rule 12-9(1) that expressly provides for personal service in substitution of service through counsel. The chambers judge did not err when she proceeded to hear the contempt application in the absence of proof of service on the counsel for the appellant; and 2) two sub-issues were raised: a) by what standard is the chambers judge's interpretation of the compliance order to be reviewed; and b) did the chambers judge err in her interpretation of the compliance order? The appeal court determined that the proper interpretation of a court order is, like a statute, a question of law. The court can review the interpretation given to the compliance order by the chambers judge and substitute its own interpretation if it disagrees with that of the chambers judge. The chambers judge concluded that the compliance order "established an ongoing obligation on the part of the [appellant] to comply with ss. 7 and 8 of the Act." To interpret a court order, the circumstances in which it was made, including the pleadings, must be considered. The enforcement application described specific relief that the respondents wanted, namely, information for the years 2014 and 2015. The appeal court did not agree that statements such as "requiring the [appellant] to comply with is disclosure obligations" within the application should be interpreted as containing a request for ongoing disclosure. There was nothing in the proceedings or pleadings that went beyond the relief requested by the respondents. A party must be given notice and an opportunity to respond before a court grants relief beyond that requested in the application. The appeal court preferred to interpret the order in a way that was consistent with basic rules of procedural fairness and the Rules, which was not to provide for ongoing disclosure requirements. The respondents' argument that limiting the interpretation to 2014 and 2015 would engender relitigation of issues already determined was not successful. The chambers judge was found to have erred by interpreting the compliance order as directing the appellant to provide any financial records other than for 2014 and 2015. The finding that the appellant was in contempt for not providing any financial records other than for 2014 and 2015 was set aside. The court then considered the appellant's application to introduce an affidavit as fresh evidence on appeal. The first part of the Palmer test, the due diligence requirement, was found to be met, even though the councillor did nothing when he was served with the contempt application. The appeal court concluded that the appellant would have presented evidence if its legal counsel had been aware of the matter. The application to admit fresh evidence would have been granted if it had been required. The order of costs against the appellant in the Court of Queen's Bench was set aside and the appellant was awarded costs of the appeal.

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The Real Canadian Superstores v United Food and Commercial Workers Union Local 1400, 2020 SKCA 102

Caldwell Schwann Leurer, August 19, 2020 (CA20102)

Arbitration – Award – Judicial Review – Appeal
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Labour Law – Collective Agreement – Interpretation
Labour Law – Collective Agreement – Jurisdiction

The respondent union brought a grievance against the appellant employer under a collective bargaining agreement between the parties (collective agreement). The sole arbitrator found in favour of the union. The employer's application for judicial review of the arbitration award was dismissed by a Court of Queen's Bench judge in chambers. The employer appealed the chambers decision. The employer had reorganized the way its employees worked in the self-checkout, or "u-scan," areas of its grocery stores. When the self-checkout machines were first installed, there was a cashier podium that was equipped with an anti-fatigue mat. In 2016, the employer changed the system for self-checkouts by providing the cashiers with handheld iPads and removed the podiums and anti-fatigue mats. The parties disagreed as to whether the removal of the anti-fatigue mats breached the collective agreement. The arbitrator found that the installation of mats in the self-checkout areas was reasonable. He found that the "refusal to have anti-fatigue mats in the u-scan area was a breach of the [collective agreement]." The employer's application for judicial review of the arbitration award was not successful. The issues were whether the chambers judge erred by failing to find that the arbitrator: 1) expanded the matter beyond the dispute between the parties; 2) was unreasonable in how he addressed the employer's management rights; 3) improperly dealt with the employer's expert evidence; 4) ignored evidence regarding safety concerns with anti-fatigue mats; and 5) ignored the employer's regulatory obligations.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the employer argued that the grievance was whether the mats were required at u-scan podium areas and since the podiums were removed there was nothing left to grieve. It was not clear to the court whether the employer made the jurisdictional argument before the arbitrator. The record suggested that the parties agreed that the arbitrator had jurisdiction to decide the issue. The jurisdictional argument was made to the chambers judge, but the chambers judge did not explain why he concluded that the arbitrator's assumption of jurisdiction was reasonable. The appeal court noted that the approach to appellate review of the chambers decision allowed it to step into the shoes of the lower court to review the arbitrator's decision. The standard of review regarding the arbitrator's jurisdiction was reasonableness. The appeal court

determined that the arbitrator's decision was coherent and followed a logical path in explaining how he determined to embark upon answering the question he did. The arbitrator briefly addressed whether he should turn his mind to whether he should adjudicate the dispute even though the u-scan podiums had been removed. The arbitrator accepted the union's argument that the grievance should be interpreted to include the area where the self-checkout machines were located; 2) the employer argued that the arbitrator substituted his decision for a discretionary decision of the employer as per management rights under the collective agreement. The employer further argued that the chambers judge compounded the arbitrator's error by substituting his own reasons for why the management rights clause did not prevail over the anti-fatigue mat clause. The parties agreed that the standard of review of this issue was reasonableness. Because the arbitrator's decision did not contain any overt discussion of management rights the employer argued that the award was not reasonable. The arbitrator focused on the meaning and factual applicability of the anti-fatigue mat clause, which was coherent and followed a logical path. It was reasonable. The employer substantially recast the argument from what had been advanced before the arbitrator. The chambers judge did not err; 3) the employer called an occupational therapist as a witness and he was qualified to give expert opinion "as to whether anti-fatigue mats would be useful in the situations described at the u-scan stations." The union tendered evidence of employees who said the anti-fatigue mats provided some relief to them. The employer argued that the arbitrator ignored the expert evidence. The chambers judge correctly identified and applied the reasonableness standard to the issue. The arbitrator found that the expert's options were based on assumptions that were at odds with the evidence led in the arbitration, such as length of time an employee was standing at any one time. The appeal court did not find anything to suggest that the arbitrator ignored or misconceived the expert's evidence. The evidence of the other employees was also not found to be opinion evidence as suggest by the employer: it was fact evidence; 4) the employer argued that it provided evidence of a slip and fall incident created by an anti-fatigue mat in a u-scan area. The arbitrator held that there was no evidence of any actual trip and fall incident. There was no consensus as to what evidence was before the arbitrator. The appeal court found that it was impossible to say that the arbitrator's decision was unreasonable because there was nothing on the record nor was there an affidavit to supplement the record; and 5) the employer argued that the arbitration award was unreasonable because it ignored s. 79(1) of The Occupational Health and Safety Regulations, 1996 and the employer's duty pursuant to Part III of the Act regarding occupational health and safety. The appeal court agreed with the chambers judge, who said "as neither party argued this area of law in the arbitration, it is not applicable to raise those arguments in the appeal." The union was awarded costs of the appeal.

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R v Lola, 2020 SKCA 103

Ottenbreit Ryan-Froslie Leurer, August 19, 2020 (CA20103)

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

The appellant appealed his conviction of possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA). In January 2017, police installed a tracking device on what was thought to be the appellant's vehicle pursuant to judicial authorization. The vehicle was not registered to the appellant. The police learned that the appellant might be going to Calgary to purchase cocaine. On the vehicle's return from Calgary, the police stopped it in Saskatchewan. The appellant was the sole occupant. The vehicle was searched, and 208.3 grams of cocaine was located in the vehicle. Documents were also located where the registered owner indicated "signing over" the vehicle to the appellant. All of the evidence from the voir dire was applied to the trial by consent. The appellant did not call any evidence. The appellant argued that the Crown's evidence was not sufficient to prove he possessed the cocaine. He pointed to the police not having continuous surveillance of the vehicle, especially in Calgary, where someone could have hidden the cocaine in the vehicle. He also said that the previous owner could have hid the cocaine in the vehicle. The trial judge concluded that the quantity and value of the drugs made it inconceivable that the drugs would be casually entrusted to someone who did not know the drugs were in the vehicle. The issues were: 1) whether the trial judge erred by failing to consider the absence of evidence in drawing the inferences he did; and 2) whether the verdict of the trial judge was unreasonable based on the inferences he drew regarding knowledge and possession.
HELD: The appeal was dismissed. The issues were determined as follows: 1) the appellant argued that the statement made by the trial judge that there was "no other evidence of any one being involved with the [vehicle] or its contents" was indicative that he failed to consider the absence of evidence when assessing inferences that may be drawn. The appeal court found that the appellant's argument could not succeed for a number of reasons: a) the statement was taken out of context; b) the trial judge's statement was not indicative of failing to consider an evidentiary gap, as described in Villaroman; and c) the gaps in evidence that the appellant referred to were gaps in the manner that the appellant chose to present his defence; and 2) the trial judge did not err. He property instructed himself that he was to consider the evidence as

well as the absence of evidence. The trial judge was aware that there was circumstantial evidence linking the registered owner to the vehicle. He also evaluated the inference that someone other than the appellant placed the drugs in the vehicle. There are many cases dismissing the argument that a person unaware of the existence of drugs was entrusted with them. The appeal court found that the trial judge's reliance on those cases was appropriate. The appeal court agreed with the trial judge that, in the circumstances of the case, it was not a plausible theory or reasonable possibility that the registered owner entrusted the appellant with the drugs unbeknownst to him. The appellant challenged each item of circumstantial evidence and the inference arising therefrom that he knew of and possessed the drugs. The appeal court concluded that none of the challenges were successful. Further, there was no merit in the appellant's argument that the trial judge's drawing of inferences based on logic and experience and the probability of outcomes was an error.

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Arslan v Sekerbank T.A.S., 2020 SKCA 104

Caldwell Schwann Tholl, August 19, 2020 (CA20104)

Civil Procedure – Appeal
Civil Procedure – Preservation Order – Application to Set Aside
Statutes – Interpretation – Enforcement of Money Judgments Act, Section 5 and 8

The parties consented to a preservation order under The Enforcement of Money Judgments Act (EMJA) that prohibited the appellants from disposing, transferring, or otherwise transacting with respect to certain shares in a corporation. The appellants had applied to have the order set aside on five separate occasions. Their application was denied on each occasion. The appellants appealed the last denial. The respondent operated a bank in the Republic of Turkey. The appellant, H.A., founded or co-founded two Saskatchewan corporations. H.A. was also the chair of the board of directors of an Ontario corporation (ON Corp.). The other appellant, M.A.K., was the chief executive officer of ON Corp. The respondent commenced debt enforcement proceeding against H.A. in Turkey. H.A. then executed a trust indenture, as settlor of the trust, and transferred a large number of ON Corp. common shares into a trust. M.A.K. was the sole trustee of that trust. The beneficiaries of the trust were H.A.'s children, his brother's children, and M.A.K.'s children. The respondent commenced two actions in the Saskatchewan Court of Queen's Bench against the appellants. The second action claimed that the transfer of shares to the trust was a conveyance within the meaning of The Fraudulent Preferences Act. The statement of claim also sought a preservation order under the

EMJA. The consent preservation order (preservation order) was granted in January 2014. The preservation order prohibited the appellants from disposing of, transferring, or undertaking any transaction with respect to 850,000 shares of ON Corp. that were transferred by H.A. to M.A.K., as trustee of the trust. The preservation order was to remain in place until the Turkish Court rendered a final decision. The Turkish proceedings were being actively pursued and defended. The evidence on the current status of the Turkish proceedings was conflicting. The two grounds of appeal were: 1) the judge erred by failing to follow the standard set regarding the amount of time the respondent had within which to comply with its section 5(5)(c) EMJA obligations in the case; and 2) the judge erred in applying the Rules in a manner that negated the unambiguous expression of the legislature in s. 5(5)(c) of the EMJA that a party benefitting from a preservation order has a statutory obligation to prosecute its action without delay.
HELD: The appeal was dismissed. The interpretation of the EMJA and Rules is subject to review on a standard of correctness. The key issues raised by the appeal involved the extent of the respondent's obligation under s. 5(5)(c) of the EMJA to prosecute the Saskatchewan action without delay and the exercise of the chambers judge's discretion under s. 8 of the EMJA. Terminating a preservation order under s. 8 is a discretionary decision where failing to advance litigation without delay is but one factor in the whole of the circumstances. The issues were decided as follows: 1) the appellants argued that the chambers judge in the second and third decisions regarding their second and third applications to set aside the preservation order set out a standard for determining what "prosecution without delay" would consist of going forward. They said that the chambers judge of the appealed decision ignored the standard. Specifically, the appellants argued that the judge in the third decision pointed out that there would be sufficient time to conduct questioning before the September 2018 conclusion of the Turkish proceedings. They argued on the fifth application that the questioning had not even been scheduled yet. The appeal court disagreed with the appellants' argument that the direction in the third decision was a direction from the court regarding what constitutes proceeding without delay. The second and third decisions did not set out timelines. The chambers judge in the fifth decision was well aware of the comments in previous decisions. It was obvious that the chambers judge was not imposing a September 2018 deadline because the decision was not even released until May 2019; and 2) the appellants argued that the chambers judge erred by applying case management rules in a manner that was contrary to the statutory obligations imposed on the respondents under s. 5(5)(c) of the EMJA. The appeal court agreed that the onus was on the respondent to prosecute its action without delay. The appellants argued that the chambers judge changed that onus. The Queen's Bench Rules concerning case management do not conflict with s. 5(5)(c) of the EMJA. The appeal court determined that the chambers judge did not apply the Rules in a manner that was inconsistent

with the obligation imposed on the respondent under s. 5(5)(c) of the EMJA. The chambers judge found that the appellants had not satisfied their onus under s. 8(3) of the EMJA, so took the practical step of determining what should happen next. The order made as a result was within the chambers judge's discretion. The appeal court further disagreed with the appellants that the chambers judge failed to analyze the relevant factors because of his focus on the case management rules. The chambers judge did not need to rely on pre-EMJA caselaw or other caselaw related to injunctions as an interpretive aid. The appeal was dismissed, and the appellants were ordered to pay costs for the appeal and the application for leave to appeal.

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ABC v XYZ, 2020 SKQB 190

Danyliuk, July 21, 2020 (QB20183)

Torts – Sexual Assault – Damages

The plaintiff sued the defendant for damages arising from a sexual assault. The defendant failed to defend the action and was noted for default. The plaintiff applied to have his damage claim assessed. At the hearing of the application, the defendant appeared and denied that any assault had occurred, but was advised by the judge that his only recourse was to apply to have the default judgment set aside. The hearing was adjourned from March to June 2020 due to the pandemic, but the defendant took no steps to set aside the default judgment. The plaintiff, a man in his mid-sixties, had held a Christmas party for his employees. The defendant attended the party as the guest of one of the plaintiff's employees. At the conclusion of the party, the defendant grasped the plaintiff's penis and testicles in his hand for a moment and then removed his hand. Several of the plaintiff's staff witnessed the sexual assault. He deposed that he had suffered shock, humiliation and depression as a result and could no longer give his business his full attention, nor could he be comfortable with his staff.
HELD: The plaintiff was awarded $30,000 in general damages, $15,000 in punitive damages and costs calculated under Column I. As the defendant filed no defence and the court rejected the nature of his submissions in chambers, it found that he had effectively conceded liability and it would proceed to assess damages. The court assessed the quantum of non-pecuniary general damages based on numerous factors, including that the plaintiff was not in a vulnerable position because of his position or age; there was a single assault and it was not overtly violent; and the psychological impact of the wrongful conduct on the plaintiff. In examining the range of other awards in sexual assault cases, it determined on a "horizontal comparison" basis that $30,000 was appropriate. Punitive damages

of $15,000 were warranted to punish the defendant for his sexual misconduct and for his statements made at the hearing.

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R v Fisher, 2020 SKQB 197

McCreary, July 30, 2020 (QB20184)

Criminal Law – Child Pornography – Personal Use Exceptions
Constitutional Law – Charter of Rights, Section 1, Section 2(b)

The accused was charged with accessing, possessing and making audio recordings which constituted child pornography contrary to the Criminal Code. The materials in question were recorded messages. While residing in a correctional facility pursuant to a long-term supervision order, the accused accessed a telephone chat-line known as "Interactive Male." The system allows users to leave a greeting to connect with other users, each of whom has a unique identification number, and accounts are password-protected. When it was discovered by Corrections Canada that the accused had an account, they accessed the recorded messages and they were later obtained by the police through a judicial authorization. The messages in question were recorded by the accused and messages he accessed from three other users and contained graphic descriptions of sexual activity between adults and children. In this application, the accused argued that the recorded messages were not criminal because they fell within the personal use exceptions articulated in Sharpe. Alternatively, he asserted that ss. 163.1(2), 163.1(2), 163.1(4), and 163.1(4.1) of the Criminal Code infringed his rights pursuant to ss. 2(b) and 7 of the Charter by criminalizing the making, possession and accessing of the recorded messages, which the accused said were private conversations between two parties. The infringement was not saved by s. 1 of the Charter and he sought an order pursuant to s. 52 of the Constitution Act and s. 24(1) of the Charter extending the personal use exception outlined in Sharpe to audio recordings created by and shared between two individuals. The issues were: 1) whether the recorded messages fell within one of the two personal use exceptions set out in Sharpe; and 2) if not, was the accused's right to free expression unreasonably violated by Canada's laws banning access, creation and possession of child pornography?
HELD: The application was dismissed. The court found with respect to each issue that: 1) the recorded messages did not fall within the first exception because they were not held by the accused alone, nor were they held exclusively for his personal use. He recorded his messages on Interactive Male in order for them to be accessed by another individual. They did not fall within the second exception either because they were intended to be shared and they depicted unlawful sexual activity. The accused's argument that the messages

were not unlawful because they were imaginary was rejected because the court construed the word "person" in the definition of child pornography in s. 163.1 of the Code to include works of the imagination as well as depictions of actual people. Any sexual activity between an adult and a child, who cannot consent, is unlawful; and 2) the Supreme Court had determined in Sharpe that laws prohibiting the possession of child pornography infringe on an accused's rights pursuant to s. 2(b) of the Charter, but the infringement is saved by s. 1 other than in the circumstances of the personal use exceptions. The risks posed by child pornography are not diminished by the nature or medium of its production. A reasoned apprehension of harm to children exists when the child pornography is shared. The recorded messages were recorded, saved and left by one individual for the purpose of another individual's access and review of them. The act of sharing was identified by the Supreme Court as promoting the cognitive distortion that sex with children is acceptable and increases the risk of harm to children.

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R v Rutt, 2020 SKQB 200

Hildebrandt, August 7, 2020 (QB20186)

Criminal Law – Murder – Attempted Murder – Sentencing

The accused was convicted of attempted murder contrary to s. 239(a) of the Criminal Code, having a firearm in her possession while being prohibited from doing so under s. 109(1), contrary to s. 117.01(3) of the Code, wilfully obstructing a police officer engaged in executing his duty investigating a firearms offence by providing a false name, contrary to s. 129(a) of the Code, and knowingly uttering a threat to the victim of the attempted murder, her husband, contrary to s. 284.1(1)(a) of the Code. A Pre-Sentence Report was ordered, and a privately-funded Gladue Report was prepared to assist the court in determining an appropriate sentence. On the day the offences were committed, the accused approached her husband carrying a .22 calibre rifle and said, "I am going to kill you," pointed the gun at his head and pulled the trigger. The gun did not fire. When RCMP officers came to the remote lake where the incident occurred, the accused gave them a false name. At the time, the accused was still subject to a 10-year order prohibiting her from possession of a firearm. She was also on judicial interim release after being charged with assault in an unrelated offence. According to the Gladue Report, the accused had witnessed domestic violence and alcohol abuse in her home. After being apprehended and placed in foster care, she was physically, emotionally and sexually abused. She and her parents had all attended residential school. All her brothers had died from substance abuse, and one of her children

died in a vehicle accident at 22. The accused and her husband were actively engaged in helping to raise the daughter's children. However, she described her husband as abusive and alleged he had supplied her with alcohol. These statements were questioned because the accused had a history of false allegations against him and other individuals. The accused had not expressed remorse for her actions and did not take responsibility for them. Since the offence, the accused had been living in the community under bail and was attending church, pursuing addictions counselling and taking life skills courses. Letters of support from the community and her husband had been filed with the court, indicating that she was addressing her issues. The Crown recommended a sentence of eight years for attempted murder and one year consecutive for possession of a firearm with six months' imprisonment for uttering and four months for obstruction to be served concurrent to the first two sentences. The defence submitted that the accused should receive a five-year sentence for attempted murder and one year for the firearms offence, 90 days for obstruction and one year for uttering to run concurrently. Both the Crown and defence noted that there were significant Gladue factors.
HELD: The accused was sentenced to eight years' imprisonment for attempted murder to be served consecutively to one year for possession of a firearm while prohibited. The accused received four months' imprisonment for obstruction and nine months' imprisonment for uttering, both to be served concurrently to the other sentences. She was given credit for time on remand, which reduced her sentence to seven years. The court regarded the sentence it imposed for attempted murder at the low end of the range. Because the accused was on judicial interim release at the time of the offence, it was appropriate to impose a consecutive sentence pursuant to s. 718.3(4)(b) of the Code. It noted that the Gladue factors and the accused's personal history were significant but did not find other mitigating factors. The aggravating factors consisted of the accused's spousal relationship with the victim under s. 718.2(a)(iii) of the Code and that she was on judicial interim release at the time of the offence, as well as the lack of provocation involved in the attempted murder and that the accused had not expressed remorse.

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Amanda Holdings Inc. v Gmerek, 2020 SKQB 203

Tochor, August 17, 2020 (QB20188)

Statutes – Interpretation – Registered Plan (Retirement Income) Exemption Act, Section 3
Statutes – Interpretation – Saskatchewan Insurance Act, Section 158

Statutes – Interpretation – Enforcement of Money Judgments Act, Section 97, Section 120

The applicants, operating as a joint venture under the name Prairie Livestock (PL), applied for an order directing the sheriff to seize accounts held by the respondent G.G. with the respondent insurance companies. PL had obtained a default judgment of $1,257,000 against G.G. for conversion, breach of fiduciary obligation and fraud. G.G. had been the general manager of PL and had misappropriated the funds during his employment between 2008 and 2012. PL had had problems collecting the judgment debt and brought this application respecting: 1) two registered plans as defined in s. 2 of The Registered Plan (Retirement Income) Exemption Act (RPEA) held by G.G. in an account with Great-West Life Assurance. Under s. 3(1) of the RPEA, registered plans are exempt from any enforcement process; and 2) a life insurance policy held by G.G. with London Life Insurance, a contract within the meaning of s. 2(m) of The Saskatchewan Insurance Act (SIA) (repealed and replaced by the Insurance Act, effective January 1. 2020). Pursuant to s 158(2) of the SIA, a contract of insurance is also exempt from execution or seizure if the designated beneficiary is a family member. PL argued that neither of these accounts were exempt from seizure under s. 97(2) of The Enforcement of Money Judgments Act (EMJA), as they were "identifiable or traceable property acquired by the judgment debtor as a result of conversion, breach of fiduciary obligation or fraud." G.G. was not entitled to the exemptions set out in s. 3(1) of the RPEA because he acquired the property as a result of fraud. The evidence established that the contributions to the Great-West account were made while G.G. was being paid as an employee of PL during the period when he was stealing from it. G.G. submitted that since the contributions to the Great-West account were deducted from his employment income, they were not obtained by fraud and he made no other contributions to it other than through payroll deductions.
HELD: The application was dismissed. The court found that the Great-West and London Life accounts were exempt from execution or seizure. It found with respect to each plan that: 1) the contributions made to the Great-West account from the payroll deductions made by PL were not traceable property as required by s. 97(2)(d) of the EMJA. Regarding the conflict between that section and s. 3(1) of the RPEA, it was clear that under s. 120(2) of the EMJA, the Legislature intended to hold registered plans exempt from seizure. Further, the principle of generalia specialibus non derogant gives precedence to the specific provisions of the RPEA over the general provisions of the EMJA. However, the exemption from enforcement proceedings did not extend to payments out of a registered plan under ss. 4 and 5 of the RPEA. Consequently, PL was entitled to pursue enforcement against any payment out of G.G.'s registered plans; and 2) the same reasons applied to the London Life Insurance policy. The specific terms of s. 158(2) of the SIA take precedence over s. 97(2) of the EMJA regarding this

account. As well, insurance monies payable to the beneficiaries of the policy were also exempt from seizure under s. 158(1) of the SIA.

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R v Morrison, 2020 SKPC 28

Baniak, July 3, 2020 (PC20028)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08
Constitutional Law – Charter of Rights, Section 1, Section 8, Section 9, Section 10(b)

The accused was charged with operating a conveyance while impaired by alcohol contrary to s. 320.14(1)(a) of the Criminal Code and with having blood alcohol concentration exceeding the legal limit within two hours of ceasing to operate a conveyance contrary to s. 320.12(1)(b) of the Code. The alleged offence occurred in January 2019, and the trial commenced the following September. The defence brought its first Charter application then, alleging violations of the accused's ss. 8 and 9 Charter rights on the basis that s. 320.27(2) of the Code, which came into force in December 2018 and created mandatory approved screening demands, was unconstitutional and requested a declaration to that effect, or a judicial stay pursuant to s. 24(1) of the Charter. A blended voir dire and trial proceeded. A continuation date of November 2019 was set, and at that time, all of the evidence was completed. The matter was reserved until January 2, 2020 for the conclusion of arguments. However, the trial judge fell ill, and the resumption of the trial was postponed until he recovered, but the pandemic then extended the postponement until June 2020. The defence brought a second Charter application in April 2020, alleging that the accused's right to be tried within a reasonable time under s. 11(b) of the Charter had been breached and sought a judicial stay pursuant to s. 24(1). Two rural municipality police officers on patrol stopped the accused's vehicle at midnight for a licence and registration check under s. 209.1(2) of The Traffic Safety Act (TSA), but they had not observed anything unusual about the accused's driving. As the practice of that police service was to perform a mandatory approved screening device demand and take a sample from any driver stopped between 6 pm and 6 am, one officer made the demand by reading it from his police card. The officer retrieved the ASD from the police vehicle, and the accused gave the sample within 5 minutes. It showed a fail result. The officer arrested the accused for impaired operation of a vehicle. He was read the police warning and given his right to counsel, but the accused declined to contact counsel. The accused and the officers waited until RCMP officers arrived to look after the vehicle and then left for the detachment 22 minutes after the stop. At the detachment, the accused again answered that he did not want to

contact a lawyer. The first breath sample was administered at 12:27. The second sample was delayed until 1:38 because the accused burped, and the observation period had to be restarted.
HELD: Each of the Charter applications was dismissed. The court found that: 1) the accused's s. 11(b) Charter rights had not been breached. From the time of charge to the start of the trial was under 12 months. The delay from January 2020 to June 2020 still fell below the presumptive ceiling. Therefore, the defence had failed to show that the case took markedly longer than it reasonably should have; 2) the accused's s. 9 Charter right had not been violated. Although the officers had no reason to suspect that the accused had been drinking when they stopped him, they had the authority under s. 209.1(2) of the TSA to effect the stop and then detain him to make the demand without even reasonable suspicion as set out in s. 320.27(2) of the Code; 3) the accused's s. 8 Charter rights were infringed by s. 320.27(2). Following the analysis provided in Mann, it found that the provision authorized the search and that the officers conducted it in accordance with the provision's requirements; 4) s. 320.27(2) is unreasonable because an accused is asked to incriminate him- or herself without apparent grounds. However, after applying the Oakes test, the court determined that s. 320.27(2) was saved by s. 1 of the Charter; 5) judges of the Provincial Court have the power to consider the constitutional validity of provisions where the issue arises in the cases before them. Finally, the court dealt with the accused's argument that the requirements of s. 320.27(2) were not properly met in this case. It found that the possession of the ASD was satisfied by the officers having it in their vehicle. The officer read the demand from his card, although the section does not require specific language, and the accused understood the demand. The sample was provided within minutes, satisfying the requirement that it be taken immediately. The officers were not obliged to advise the accused of his s. 10(b) Charter right before making the demand. The accused's breath samples were taken "as soon as practicable" in accordance with s. 320.28(1) regarding both the period of time from arrest to the taking of the first sample, because it was reasonable for the officers to wait until the accused's vehicle was secured, and the period from the arrival at the detachment to the conclusion of the breath tests. The delay between the tests had been satisfactorily explained.

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