The Law Society of Saskatchewan Library's online newsletter
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Leurer Tholl Kalmakoff, November 24, 2020(CA20131)

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Each of the three appellants appealed his conviction for first-degree murder on different grounds after they were jointly tried by a Queen's Bench judge and jury. The appellant Theodore, a white man, was involved in the drug trade. His co-accused were Indigenous men, also involved with drugs and/or gangs. A Crown witness, J.R., testified that she had worked for the victim, Lee, in his drug trafficking business. She knew all of the appellants, and when she informed the appellant Gordon of Lee's business, he requested she arrange a business meeting between them about their respective drug-dealing operations. At the meeting, Lee was assaulted by the appellant Bellegarde, Theodore and another man, and Gordon instructed them to take Lee to another

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location but did not accompany them there. Bellegarde and Theodore interrogated Lee about where he kept his drugs and money, and at some point, Lee was shot twice in the head. At trial, the Crown's theory was that all of the appellants were guilty of first-degree murder because they all participated in in the plan to rob and kill Lee. Gordon had crafted and directed the plan while Theodore and Bellegarde had implemented it. Further, they could all be properly found guilty of first-degree murder on the basis that they murdered Lee while unlawfully confining him. Theodore's grounds of appeal were that the trial judge erred: 1) by not questioning prospective jurors about racial bias during the pre-screening stage of jury selection as permitted by the words "or any reasonable cause" in s. 632(c) of the Criminal Code. He argued that racial bias had an impact on his trial because racism is so pervasive in Saskatchewan that there was an "air of reality" that jurors would be biased against his co-accused because they were Indigenous, had committed a violent offence and were involved with drugs and gangs; 2) in violating his s. 11(d) Charter right by failing to ensure, in accordance with Barton, that racial bias did not affect the fairness of the trial; and 3) by ailing to provide adequate instruction to the jury regarding racial stereotypes. Other irregularities, such as the failure by Crown and defence counsel to apply to challenge jurors for cause on the basis of bias, caused a miscarriage of justice. Bellegarde's grounds of appeal were that the trial judge erred: 1) by allowing J.R.to testify remotely by video link pursuant to s. 486.2(2) of the Code; and 2) by providing inadequate final instructions to the jury regarding first degree murder under s. 231(5)(e) of the Code. Gordon's grounds of appeal were that the trial judge erred: 1) in reviewing the evidence as it related to him, because he had not participated in the unlawful confinement or the killing and was not aware what his co-accused planned to do to Lee; and 2) by failing to instruct the jury that they could find him guilty of manslaughter as an alternative.
HELD: The appeals were dismissed. The court found with respect to Theodore's grounds that: 1) the trial judge had not erred by not asking pre-screening questions regarding racial bias of prospective jurors because s. 632 of the Code does not give a judge authority to question jurors in open court about personal matters so as to identify potentially biased jurors. It is presumed that jurors will carry out their duty without bias and questioning of them regarding their personal biases is only permitted when this presumption is rebutted, which is not automatic where matters of race are involved; 2) he had not demonstrated there was a violation of his s. 11(d) Charter rights. The trial judge's opening and final instructions to the jurors were properly made. Theodore's and the other appellants' failure to raise the question of an apprehension of bias and challenging jurors for cause precluded a challenge to it on appeal. They had not requested that the judge provide specific instructions regarding racial bias. Further, Barton did not impose a requirement that in every case involving an Indigenous accused, the trial judge must provide a special instruction to jurors to set aside racial bias; and 3) the trial had not been rendered unfair by the alleged irregularities. The trial judge had not erred by not pre-screening under s. 632(c) as previously discussed. Failure by the Crown or defence counsels to challenge for cause was not an irregularity. Regarding Bellegarde's grounds, it found that the trial judge had not erred: 1) in allowing the witness to testify remotely. She properly exercised her discretion under s. 486.2(2) of the Code in

deciding that because the witness had been threatened and could be subjected to retribution by gang members, it would be appropriate for her to testify remotely; 2) in her explanation to the jury of the legal basis of constructive first degree murder under s. 231(5)(e). On the facts, it was not necessary for her to provide specific instruction regarding the need for the confinement and the killing to be distinct criminal acts. Respecting Gordon's grounds, the trial judge had not erred in: 1) reviewing the evidence, as her apprehension of it was balanced, fair and tailored to the facts of the case. She made it clear to the jury that Gordon could only be a party to culpable homicide if he had the requisite intent when he aided, abetted or counseled the shooting; and 2) in her instructions to the jury. She advised it unless it was satisfied beyond a reasonable doubt that Gordon personally had the requisite intent for murder, he could only be convicted the lesser offence of manslaughter.

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Bouvier v Bouvier, 2020 SKCA 133

Whitmore Tholl Kalmakoff, November 26, 2020 (CA20133)

Family Law - Family Property - Division - Default Judgment
Civil Procedure - Queen's Bench Rules, Rule 15-1, Rule 15-19, Rule 15-23, Rule 15-24

The appellant appealed a Queen's Bench judge's decision to grant default judgment to the respondent for divorce and division of family property. The parties separated in 2014, and the respondent issued her petition in 2012 in which she sought divorce, equal division of the family home and unequal division of the family property. The appellant was served, and his counsel filed a notice of intent to answer, but the appellant never served or filed an answer or a property statement as required by The Queen's Bench Rules. He did not respond to a notice to disclose, which the respondent had obtained an order to serve upon him personally because his counsel had withdrawn. The appellant did not appear at the hearing, and the judge gave him 10 days to comply with the notice to disclose, including his property statement, but he did not do so. The respondent obtained another order permitting various agencies to provide some information directly to her in the absence of any financial information from the appellant. In April 2013, the appellant filed a notice of change of solicitors. However, when he failed to respond to his new lawyer's communications, the latter gave written permission to the respondent's counsel to deal directly with the appellant. The petition was noted for default in March 2017, and the respondent applied for judgment without notice to the appellant. The judge reviewing the application determined that he should receive notice and directed that the matter be heard in chambers. The appellant was

Torts - Negligence - Public Authorities - Public Duty
Torts - Bad Faith
Torts - Defences - Immunity - Proceedings Against the Crown Act
Civil Procedure - Application to Strike Statement of Claim - Collateral Attack

Traffic Safety Act - Motor Vehicle Offences - Appeal
Criminal Procedure - Self-represented Litigant

Cases by Name

Access Container, Inc. v The Container Guy Ltd.

Armbruster v Barrett

Bouvier v Bouvier

Dungey v Dungey

Frondall v Frondall

G.P. v S.T.W.

Hertz v Kille

Jones v Jones

Kupsar v Regina Provincial Correctional Centre

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Mitchell v Joint Medical Professional Review Committee

Prime v Prime

personally served on June 14, 2017. When the matter was heard on June 26, the appellant did not attend. The chambers judge granted the divorce, ordered that titles to certain farmland be vested in the respondent's sole name and the titles to other farmland be vested in the appellant's name, and ordered that each party retain all other property in their possession free from any claim by the other. In support of her application, the respondent had filed an appraisal made in 2014 of the value of the farmland. She also filed a property table showing the debts that she was aware of and undertook responsibility for a mortgage and a writ registered against some of the farmland that she sought to have vested in her name. The respondent deposed in her affidavit that the basis of her claim for unequal distribution of family property was that the appellant had retained all the income from the farmland since the separation. Further, during the marriage, her father had gifted land to the parties and money to her alone that she held as an investment. She sought to have each party keep the investments in their own names, have the farmland divided in specie and allow the appellant to keep the vehicles and equipment. The grounds of appeal were: 1) the notice of the application for judgment was inadequate. The appellant argued that he received only 12 days' notice of the application for judgment when he should have been given, at minimum, 14 days' notice. As his lawyer of record had not formally withdrawn, it had been an error to grant judgment in the absence of service of the application upon his counsel; 2) whether the evidence of value was sufficient for the chambers judge to grant the judgment. Further, the judge had not taken into account encumbrances registered against the land; 3) whether the chambers judge erred in granting an unequal division of family property. The appellant submitted that the judge failed to examine and explain why an equal distribution would be unfair and inequitable. The respondent brought an application to admit fresh evidence in response to the first ground of appeal pertinent to service. She sought to introduce the letter from the appellant's counsel permitting her lawyer to deal directly with the appellant.
HELD: The appeal was dismissed. The court granted the respondent's application to adduce fresh evidence. It found with respect to each ground that: 1) no notice of the application for judgment was required to be provided to the appellant pursuant to Queen's Bench rule 15-1 and 15-23. The respondent's application was made under Queen's Bench rule 15-24, and it was not converted to an application under Queen's Bench rule 15-19 that would have required 14 days' notice. Regardless, the appellant had not appeared in chambers to argue that he needed more time, nor had he shown any prejudice to himself related to the amount of notice. There was no requirement that the appellant's former counsel be served with the application. As the respondent's fresh evidence was admitted, it was clear that the appellant's counsel had effectively withdrawn. He was self-represented and had been served personally: 2) the chambers judge had not erred in failing to select the value of the land at the time of application or adjudication nder s. 2(1) of The Family Property Act because he had the benefit of a professional appraisal that set out the value of the land, and in the absence of any evidence of change, he was entitled to use the appraisal. The judge was not obliged to determine that the encumbrances registered against the land should affect the division without further evidence. The respondent had disclosed the debts that she was aware of, and the appellant chose not to submit any evidence of additional

R v Babich

R v Binkley

R v Binsfield

R v Getz

R v Skorka

R v Theodore

R v Watetch

R v Young

Rankin v Rankin

Schening v Steel

Strohan v Saskatchewan (Occupational Health and Safety Division, Ministry of Labour Relations and Workplace Safety)

debts. 3) Finally, the judge had not erred because there was no way of ascertaining whether there truly was an unequal distribution of family property favouring the respondent. The appellant chose not to disclose any financial information of any kind when he had control of all the information regarding the farming operation. If he did possess evidence regarding the unfairness of the judgment, he should have applied to the Court of Queen's Bench pursuant to Queen's Bench rules 10-13 and 15-2.

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Frondall v Frondall, 2020 SKCA 135

Schwann Barrington-Foote Tholl, December 9, 2020(CA20135)

Family Law - Division of Family Property - Appeal
Family Law - Quantum of Spousal Support - Appeal
Evidence - Expert Opinion - Admissibility - Appeal

The appellant (petitioner) appealed the findings of the trial judge with respect to the valuation of his interest in certain corporations for purposes of the division of family property, the trial judge's determination of the appellant's income, and the imputed income of the respondent for the purpose of determining the quantum of spousal support. Central to the valuation of the family property was the evidence of an expert witness for the appellant concerning calculations to determine the value of the appellant's interest in the Doug Frondall Group of Companies (DFGC). The expert, Mr. Weber, was the appellant's friend and business associate of long standing, both when the appellant was a partner at the accounting firm Virtus Group (Virtus), and also at the time Mr. Weber prepared what he titled an "Advisory Report" and gave trial testimony, at which time the appellant was under contract to Virtus to provide consulting services. The process of having Mr. Weber qualified to give expert opinion evidence was muddled at trial in large part because the parties had agreed that Mr. Weber should be qualified to give expert opinion evidence so that the threshold inquiry required by White Burgess Langille Inman v Abbott and Haliburton Co., 2015 SCC 23 (White Burgess), was not performed. The Supreme Court in White Burgess stated that the inquiry into the impartiality, independence, and absence of bias of the proposed expert witness must be conducted at the admissibility stage and not the weighing stage of the evidence. The question of Mr. Weber's independence, impartiality, and absence of bias was not tested until he was cross-examined by counsel for the respondent, though he had been open about his relationship with the appellant, and that he had based his calculations on assumptions and material provided by the appellant. The trial judge was left in a quandary as to what to do with the evidence of Mr. Weber, given that the trial had been

conducted and his evidence admitted and weighed.
HELD: The appeal was allowed in part. With respect to the question of what to do with Mr. Weber's evidence, the appeal court rejected the appellant's argument that, the respondent having agreed his evidence was admissible, she could not now challenge that evidence, either for admissibility or weight. The appeal court ruled that the trier of fact was at all times the final arbiter of the admissibility and weight of evidence, and that role could never be usurped by agreement of the parties to the litigation. The appeal court could not find the trial judge had erred by resolving the issue of Mr. Weber's evidence by omitting from his consideration any evidence which was based primarily on assumptions or opinions provided by the appellant to Mr. Weber. The appeal court was cognizant of the unfairness which would have been visited on the respondent if the trial judge had declared a mistrial when it was the appellant who chose to engage an expert witness whose independence from him would be in question. The trial judge then went on to the valuation of the appellant's share value in the DFGC. The appellant advanced five fundamental errors were made by the trial judge in his determination of the value of the appellant's shares in DFGC. After considering Riley v Riley, 2011 SKCA 5, 336 Sask R 110, and the standard of appeal to be applied to a trial judge's myriad decisions in coming to a fair and equitable distribution of family property, the Court of Appeal allowed the appeal as to valuation of the appellant's shares in DFGC to the extent that the pre-tax value of certain properties under the umbrella of DFGC had been overstated by the trial judge to an extent which required intervention on appeal. These interests included properties referred to as the Las Palapas restaurant investment and the Machetoso Holdings Ltd. investment. The trial judge had valued each of these interests pre-tax at $30,432.00, making an error of fact by doubling the value of what was, in effect, one and the same entity. As well, one of the DFGC companies, Debrenlar Holdings Ltd. (Debrenlar), had a one-fifteenth share in a property referred to as the Plainsman Plaza Property (Plainsman). The trial judge was required to decide how the refundable dividend tax on hand (RDTOH) of
$75,000.00 should be allotted. The RDTOH is a corporate tax credit available to a corporation when it pays dividends to its shareholders. In determining the value of the one-fifteenth interest Debrenlar had in Plainsman, both experts used an accepted valuation methodology which assumed the liquidation of the partnership's assets and the payment of dividends to the partners. Both parties agreed that the RDTOH of
$75,000.00 was to be credited to Debrenlar upon payment of up to $196,000.00 in dividends to the partners. The trial judge added the full amount of the credit to the value of Debrenlar's interest in Plainsman as determined using the liquidation valuation method both parties agreed was appropriate; however, though Mr. Weber's report and viva voce evidence was clear and uncontroverted that though the RDTOH would be credited to Debrenlar, income tax would be paid in the same amount by the shareholders of Debrenlar upon payment of the dividends, the trial judge made an error of fact in including the RDTOH in the share value of Debrenlar. The appeal court therefore reduced Debrenlar's share value by $75,000, the amount of the RDTOH. As to a determination of the personal tax to be paid by the appellant to arrive at a net family property value, the trial judge was required to decide the likelihood that the appellant would need to liquidate his corporate

holdings to meet his obligations, which included the family property equalization payment. The trial judge ruled that, when considering all of the evidence, the appellant would not need to do so, and would not do so as it would result in a large, unnecessary tax bill. The trial judge did allow a discretionary discount of the appellant's net value as a contingency against any tax to be paid, as he had the discretion to do under s.21(3) of The Family Property Act. The appeal court found that the trial judge had properly exercised his discretion in doing so. Turning to the grounds of appeal with respect to the matter of spousal support, the appeal court first considered the appellant's contentions concerning the trial judge's conclusions as to the respondent's imputed income. The primary argument of the appellant was that the trial judge had erred in his view of the evidence or lack thereof as to the effect the respondent's health had on her ability to earn income. The appeal court was satisfied that the trial judge had before him sufficient evidence about the respondent's medical problems and how these affected her ability to earn income, and had weighed and evaluated that evidence in arriving at unreviewable findings of fact made in accordance with the legal principles in play. As to the amount of the appellant's income for spousal support purposes, the appeal court overturned the trial judge's decision to impute income to the appellant for "unused earning capacity." The trial judge had concluded that the appellant's work as a consultant for Virtus was not full-time, and he could earn income from Virtus by filling that time, even though there was no evidence that Virtus could or would require the appellant to provide the extra work. The appeal court ruled that this imputation of income had no evidentiary foundation and constituted a reviewable error. The appeal court was required to calculate the appellant's income anew, and applied the Federal Child Support Guidelines for that purpose, in particular, ss. 15 to 20, which guided the court to use the sources of income from the T-1 tax return to arrive at the paying spouse's income if appropriate to do so. Being of the view that would be a fair reflection of the appellant's income in this case, the appeal court was satisfied that using the sources of income in the T-1 return was appropriate.

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Mercier v Saskatchewan Government Insurance, 2020 SKCA 136

Richards Caldwell Kalmakoff, December 9, 2020 (CA20136)

Statutes - Interpretation - Personal Injury Benefit Regulations
Automobile Accident Insurance Act - Income Replacement Benefits - Appeal

The appellant appealed from the decision of the Automobile Injury Appeal Commission that dismissed his appeal from Saskatchewan Government Insurance's (SGI) Decision Letter. The letter terminated the appellant's

Income Replacement Benefits (IRB) in September 2015, on the basis that he was able to return to work full-time and perform his normal duties. The appellant was injured in a car accident in November 2013. Before the accident, he had been performing landscaping, carpentry and construction work as the owner-operator of a company. He filed an application for IRB in January 2014 pursuant to Part VIII of The Automobile Accident Insurance Act (AAIA) and SGI calculated his IRB by using the annual income of $20,000 he reported in his personal income tax returns, which was dividend income paid to him by his company. His IRB were calculated at 90 percent of his net earnings. The injuries he suffered in the accident required surgery in April 2015. The appellant began physiotherapy in May 2015, and within two weeks, a team of specialists created an expanded 16-week rehabilitation plan for him. In August, a number of reports prepared by his therapists indicated that the appellant was able to return to work full-time and resume the strenuous tasks required by his business, and that he was satisfied with treatment and recovery. After a Vocational Progress Report and a Vocational Closure Report were prepared in September 2015 confirming that the appellant had been cleared to return to work and that he had not raised any concerns, SGI issued the letter explaining how the appellant's IRB had been calculated and why it was being terminated. The appellant appealed to the commission. At the hearing, he testified that in August 2015 he was still unable to perform the essential functions of his work, and denied that he told any of his therapists that he was fully functional. He argued that SGI erred by reducing and terminating his IRB and that it had calculated his IRB incorrectly according to The Personal Injury Benefit Regulations as they existed at the time his claim was filed rather than at the time of the hearing. The Regulations were amended in 2017 and as they were benefit-conferring, he argued, they ought to have been applied "retrospectively." The commission dismissed his appeal. After reviewing the evidence provided by the appellant and SGI, including the above-noted reports, it found that it preferred the evidence of SGI. Absent any concerns expressed by the appellant to his therapists, it was reasonable for SGI to conclude that he was able to perform the essential duties of his employment. It determined that Regulations did not have "retrospective" application and that SGI had correctly determined the IRB amount. The appellant's grounds of appeal were that the commission erred in law: 1) in its assessment of the evidence. It rejected his evidence without any explanation and it had a duty to give reasons when making an adverse credibility finding. It also erred by concluding on the basis of speculative evidence that SGI had discharged its onus about whether he was able to meet the physical requirements of his job; and 2) determining that the 2017 amendments to the Regulations did not apply retrospectively.

HELD: The appeal was dismissed. The court found with respect to each ground that the commission had not erred in law: 1) in assessing the evidence and providing adequate reasons. Where there are conflicting versions of the events in the evidence before a trier of fact, the considered and reasoned acceptance of one version can be a sufficient basis for rejecting a contrary version, even if the contrary version contains no obvious flaws. The commission had not based its decision on speculative evidence, as there was clear evidence before it that the appellant was considered safe to return to work and that he had not raised any concerns about his

rehabilitation; and 2) in determining that the 2017 amendments did not apply retrospectively. The appellant had in fact sought retroactive application of the amendments and had not rebutted the presumption that legislation does not apply retroactively.

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Schening v Steel, 2020 SKCA 137

Caldwell Whitmore Kalmakoff, December 10, 2020 (CA20137)

Civil Procedure - Queen's Bench Rules, Rule 4-44(a)

The appellant appealed the decision of a Queen's Bench chambers judge that dismissed her application for an order striking the petition brought against her by the respondent under The Family Property Act (FPA) for want of prosecution. The respondent commenced family law proceedings against the appellant in 2007. She filed an answer and counter-petition stating that she had never been the respondent's spouse as defined in the FPA. At a hearing in 2008, a judge directed a viva voce hearing on the issue raised by the appellant and she subsequently submitted to examination for discovery in November 2008, but the respondent cancelled his examination without ever rescheduling it. Neither party took any further steps until January 2019, when the appellant applied to strike the petition under Queen's Bench rule 4-44(a) as well as for orders vacating a Certificate of Pending Litigation (CPL) registered against her property. The chambers judge dismissed it, finding that both parties had responsibilities to move the proceeding toward the via voce hearing, and alluded to the respondent's explanation for the delay being that he had had health problems and was not able to afford his lawyer.
HELD: The appeal was allowed. The respondent's petition was struck, the CPL vacated and costs awarded to the appellant for the appeal and the Queen's Bench application. The court noted that the discretionary standard applies in the appellate review of a decision in an application under Queen's Bench rule 4-44(a). It found that the chambers judge acted upon a wrong principle of law when assessing the appellant's application. He dismissed it without engaging in the three-step approach required by International Capital Corp. v Robinson Twigg & Ketilson, 2010 SKCA 48 (ICC), when deciding whether a claim should be struck for want of prosecution. It proceeded to apply the ICC steps and found that in this case, a ten-year delay was inordinate. Although the respondent had offered reasons for the delay, he failed to meet the onus of explaining how they affected his capacity to advance the litigation. Under the third step, it determined that the public interest would not be served by allowing the FPA action to continue.

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Dungey v Dungey, 2020 SKCA 138

Richards Schwann Tholl, December 17, 2020 (CA20138)

Family Law - Division of Family Property - Appeal
Family Law - Quantum of Spousal Support - Appeal

The appellant (respondent at trial) brought this appeal on grounds which included, first, that the trial judge erred in setting the valuation date of the family property at January 31, 2014, the date the petition issued, and not the date the trial commenced, November 5, 2018, five years later, during which time the value of the principal family asset, the shares in D.B. Dungey Holdings Inc. (the Corporation) increased from $1,950,069.00 dollars to a value of $4,679,000.00 dollars; second, that the trial judge erred in not discounting the tax liability to be incurred by the Corporation as a result of the respondent being required to access funds from the Corporation's earnings to pay the equalization payment and applying a 100% tax deduction to the value of the Corporation; and third, that the trial judge erred in not attributing all or some of the Corporation's income to the respondent for the purpose of calculating the quantum of spousal support. The appellant and respondent were in a traditional long-term marriage, with the appellant providing childcare and homemaking while the respondent worked as a franchisee of a series of Canadian Tire Stores throughout Canada, the most recent stores owned by him being located in Yorkton and Melville. The respondent was the sole director, officer and shareholder of the Corporation, whose value and assets were wholly derived from the income generated by the Canadian Tire stores it owned. The respondent devoted very long hours to his business and was a successful franchisee, was recognized as such by Canadian Tire, and was rewarded by having access to the purchase of ever larger stores. The appellant had no direct involvement with the stores, though the family was required to move numerous times as a result of the respondent's purchase of new stores. The franchise agreement between the Corporation and Canadian Tire required that the respondent maintain a minimum equity of 25% as a cushion against market fluctuations common to the retail market.
HELD: The appeal was dismissed. At the outset, the appeal court reiterated the standards of appeal to be applied in reviewing trial decisions with respect to a division of family property, relying on the authority of its decision in Riley v Riley, 2011 SKCA 5, 336 Sask R 110 (Riley), which emphasizes that the myriad of decisions made by a trial judge to arrive at a fair and equitable division of property attract a high degree of deference, being in large measure discretionary. The appeal court recognized, as stated in Riley, that it was to apply three standards of review depending on the type of question being considered: whether the trial judge

applied the law correctly; whether the trial judge made any palpable or overriding errors of fact; and whether the trial judge abused his discretion, all subject to the overarching principle that deference must be given to the trial judge's overall property division. As to the date to be used for valuing the family property, s.2 of The Family Property Act (the Act) gave the court a choice of only two options: one, the application date, and two, the adjudication date, "whichever the court thinks fit." In this case the trial judge gave primary emphasis to the five-year delay from the application date - the issuance of the petition - and the date of the adjudication, finding as a fact that the increase in value of the Corporation was solely due to the hard work and acumen of the respondent, with no involvement from the appellant. Based on this finding, the trial judge ruled that it would be unfair to give any benefit of the increased value to the appellant, and so set the valuation date as of the application date. The appeal court upheld this decision as being a proper exercise of the trial judge's discretion on a reasonable factual finding. The appellant argued that the trial judge erred in his decision to reduce the pre-tax value of the Corporation by 100% of the income tax payable upon withdrawal of the value as at the application date, and should have discounted the amount he found to be payable for taxes. The appeal court found no reviewable error, primarily on the basis that s .21(3)(j) of the Act as interpreted by James v Belosowsky, 2012 SKQB 316, permitted the trial court to take tax liability into account in dividing family property where not to do so would be unfair and inequitable. The Court of Appeal upheld the trial judge's decision to deduct 100% of the payable income tax and not a lesser percentage, agreeing that the tax payable was not contingent but was in fact certain, both as to the amount of tax to be paid, and the source from which the taxable funds were to be paid - the equity in the Corporation - contrasting this case to the recent decision of the Court in Frondall v Frondall, 2020 SKCA 135, where the amount of tax was uncertain, and not supported by the evidence. Lastly, the appeal court was asked to review the trial judge's decision not to attribute any of the Corporation's income to the respondent in determining the quantum of spousal support payable to the appellant. The court referred to Hickey v Hickey, 1999 CanLII 691 (SCC), [1999] 2 SCR 518, in which the Supreme Court set out the standard of review for appeal courts with respect to the making of spousal support awards, and in doing so fixed a high degree of deference to the decisions of trial judges, who are required to weigh multiple factors and exercise many discretionary decisions in coming to a final amount of spousal support. The court was not prepared to find that the trial judge erred concerning the relevance of the availability of post-petition corporate income above that amount required to maintain Canadian Tire's level of equity in deciding not to attribute any corporate income to the respondent's personal income. The Court of Appeal ruled that this misapprehension did not amount to a reviewable error, since the trial judge did include post-petition corporate income indirectly by averaging the respondent's personal income from the Corporation over four years, from 2013 to 2016. The petition had been issued in January 2014. The appeal court was mindful of the importance of the ultimate final decision, that a spousal support order be fair and equitable to both spouses.

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R v Babich, 2020 SKCA 139

Richards Whitmore Kalmakoff, December 21, 2020 (CA20139)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Refusal to Provide Breath Sample - Acquittal - Appeal
Constitutional Law - Charter of Rights, Section 8, Section 24(2)

The Crown sought leave to appeal a Queen's Bench judge's decision dismissing its appeal from a Provincial Court trial judge's decision to dismiss the Crown's appeal from the respondent's acquittal. The respondent had been charged with refusing to comply with an ASD demand and impaired driving. The defence brought a Charter application, alleging that a police officer violated the respondent's s. 8 Charter rights. The officer responded to a convenience shop clerk's report describing an intoxicated person who had been seen driving away from the shop with a small child as a passenger. The clerk provided the driver's licence plate number. The officer ascertained that the vehicle was registered to the respondent and went to her address. When the officer knocked on the door, the respondent answered and identified herself as the person driving the vehicle in issue. The officer detected the accused smelled of alcohol and observed that she spoke slowly and had glossy eyes. The officer advised that she was going to make an ASD demand. As the respondent needed to deal with the young child she was carrying, the officer followed her into the house while she gave the child to a nanny because the officer believed that she had to ensure that the accused did not consume anything that would affect the ASD test. Later, at the police vehicle on the street, the respondent would not comply with the demand. She was charged with refusal and with impaired driving. After a blended voir dire and trial, the judge held that the respondent's Charter rights were breached, following the Court of Appeal's decision in Rogers. She then conducted a Grant analysis and determined that the evidence should be excluded. The Crown appealed on the grounds that the trial judge erred by finding there had been a Charter breach and by excluding the evidence of the refusal to comply with the ASD demand pursuant to s. 24(2) of the Charter (see: 2016 SKPC 123). The appeal judge accepted that Rogers was the controlling authority and found the trial judge had not erred in finding a Charter breach. She had properly considered and applied the principles relating to s. 24(2) (see: 2017 SKQB 304). In the Crown's application, it proposed to argue on appeal, if granted, that Rogers should be reconsidered so that there would be no violation of the respondent's s. 8 Charter right and that the appeal judge erred in law by endorsing the trial judge's s. 24(2) analysis.
HELD: The appeal was allowed on the s. 24(2) question. The court set aside the acquittal on the refusal charge

and entered a conviction against the respondent. The matter of sentencing was remitted to the Provincial Court. The court found that the appeal was governed by s. 839 of the Criminal Code. Leave was to be granted on a question of law alone regarding the operation of s. 24(2), and it was unnecessary to reconsider Rogers. It would review the appeal decision on the correctness standard. The appeal judge had erred by endorsing the trial judge's reasons because the latter had misapprehended the applicable principles in her s. 24(2) analysis in finding under the first branch of the Grant tests that the fact that the officer followed the respondent into her house was serious. She did not consider the specific reason why the officer went into the house and that the officer's position was reasonable based on the law at that time. Under the second branch, the trial judge failed to consider the extent to which it had undermined the respondent's reasonable expectation of privacy. The impact of the breach had a substantially less significant effect on the respondent's Charter-protected interests than what was entailed in the trial judge's analysis as accepted by the appeal judge. In applying the third branch, the trial judge erred in suggesting that the police should have obtained judicial authorization to knock on the respondent's door as there is no such provision in the Criminal Code and failed to note the reliability of the evidence. The trial judge's final balancing of the Grant factors was corrupted by the previous errors of law or principle. The court concluded that the respondent had not met the burden of establishing that admitting the evidence would bring the administration of justice into disrepute.

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Armbruster v Barrett, 2020 SKCA 140

Ryan-Froslie Schwann Leurer, December 23, 2020 (CA20140)

Civil Procedure - Queen's Bench Rules, Rule 1-4
Civil Procedure - Judgments and Orders - Final - Appeal

The appellant appealed the decision of a Queen's Bench chambers judge to dismiss his application for an order directing the pension plan to divide his former spouse's pension using a different method of calculation. The parties divorced in 2013, leaving the issue of spousal support to be determined, which they did at a pre-trial conference before a Queen's Bench judge. A consent judgment was prepared by the appellant's counsel that tracked the minutes of settlement. It contained a direction that the parties could refer the matter back to the judge for further direction should there be any difficulty implementing the judgment. Following the judgment, the respondent's pension plan administrators, Desjardins Financial, determined the appellant's share of the pension and transferred that amount to him in 2014, which he accepted without objection or reservation. In

2015, the appellant retained different counsel who informed Desjardins that its calculation of the pension's actual value as at the dates set out in the judgment was incorrect. It replied that it stood by its earlier calculation, whereupon the appellant made his application for the order regarding the pension valuation and division. The chambers judge concluded that according to the wording of the judgment and because the pension division had taken place, the court was functus officio and dismissed the application. The appellant's grounds of appeal were that he was denied basic procedural fairness by determining his application on the doctrine of functus officio. As the issue had not been raised at the chambers hearing, he had no opportunity to be heard on whether the doctrine was applicable in the circumstances. If he had, he would have directed the judge's attention to the wording of the judgment that explicitly allowed the parties to return to the pre-trial judge, which would have accorded with the purpose of Queen's Bench rule 1-4(2).
HELD: The appeal was dismissed. The court found that the appellant was not denied procedural fairness. The court found that the respondent's brief had raised the doctrine of functus officio, albeit without naming it, but it should have been clear to the appellant that the former was arguing that the judgment was final and fully implemented. The wording of the consent judgment stated that if there were difficulties in implementing it, it could be returned to the pre-trial judge. As there had been no such difficulty, the chambers judge's conclusion was the only logical one. He simply attached the proper nomenclature to the respondent's position. It agreed with the respondent's argument that the judgment was final and fully implemented, and the appellant should have raised any of his concerns at the time of the pre-trial or by appealing the judgment.

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Jones v Jones, 2020 SKCA 141

Whitmore Tholl Kalmakoff, December 23, 2020 (CA20141)

Civil Procedure - Queen's Bench Rules, Rule 11-26, Rule 11-27, Rule 12-2

The appellant appealed from a Queen's Bench chambers judge's decision to find him in contempt of an order that required his attendance for cross-examination on his affidavit and to strike the affidavit and grant summary judgment to the respondent. The parties were involved in a dispute over jointly-owned farm equipment and commenced litigation. The respondent applied for summary judgment, and then the parties filed their affidavits. At the hearing of the application on January 9, 2020, the chambers judge ordered that each party submit to cross-examination on his affidavit on January 16, 2020. The appellant had participated in the hearing through a telephone conference call and consented to the date that was set. Immediately after the

hearing, the respondent's counsel arranged for the cross-examinations to take place at a reporting business and served notice of the date, time and place on the appellant by email. On January 14, the respondent's counsel emailed a draft copy of the unissued cross-examination order to the appellant for his review and consent as to its form pursuant to Queen's Bench rule 10-4, but the appellant did not respond. The court formally issued the order on January 28, 2020. The respondent and his lawyer attended the office on January 16, but the respondent did not appear nor contact them. The respondent then applied for an order holding the appellant in contempt and for an order striking out his affidavit as a penalty. The application was served on the appellant by email. In response, the appellant applied for an order appointing his wife as a litigation guardian and a stay of the cross-examination order. He submitted that he had missed the cross-examination because his stepdaughter had had a medical emergency, and his wife needed to stay with her. The chambers judge dismissed the appellant's application for a litigation guardian because there was no evidence that he lacked capacity. After noting that the appellant had been in attendance on January 9 and had heard the oral order pronounced, the judge found that he had had notice. It was of no significance that the order had not been issued until January 28. The judge did not accept the appellant's explanation for not attending cross-examination as providing a reasonable excuse as his wife was not required to be present at it. He then struck the appellant's affidavit and granted summary judgment to the respondent. The issues on appeal were: 1) whether the appellant was served properly with the contempt application; 2) whether a person can be held in contempt of an order that was not formally issued; 3) whether the chambers judge erred in finding that the appellant did not have a reasonable excuse; and 4) whether the chambers judge erred in striking the appellant's affidavit.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the appellant was properly served by email. Although Queen's Bench rule 11-26 regarding contempt and rule 12-2 both require personal service, he was deemed to have been personally served under rule 12-2(5) because he had appeared and argued the application in chambers. 2) The appellant had notice of the order on the date it was pronounced. An order comes into existence upon being pronounced, not upon issuance. 3) The appellant failed to comply with the order and would not be found in contempt under Queen's Bench rule 11-26 only if the judge determined that he had a reasonable excuse. The exercise of the judge's discretion in finding that the appellant's excuse was not reasonable was entitled to deference, and his decision was based on the evidence and could not be disturbed; and 4) the exercise of the judge's discretion under Queen's Bench rule 11-27(1)(c)(i) was entitled to deference. He had not erred in his choice of penalty. He was not required to grant the appellant an opportunity to purge his contempt before imposing a sanction.

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Kupsar v Regina Provincial Correctional Centre, 2020 SKCA 142

Ottenbreit Whitmore Barrington-Foote, December 31, 2020 (CA20142)

Administrative Law - Judicial Review - Procedural Fairness - Appeal
Statutes - Interpretation - Correctional Services Act, 2012
Statutes - Interpretation - Correctional Services Regulations, 2013, Section 60

The appellant appealed from a Queen's Bench judge's decision to dismiss his application for judicial review of the decision by the Director of the Regina Provincial Correctional Centre (RPCC) to deny his appeal made pursuant to s. 80 of The Correctional Services Act, 2012 from the decision of a discipline panel of the RPCC to convict him of a major disciplinary offence under The Correctional Services Regulations, 2013. He appealed the Queen's Bench decision on the ground that his conviction unjustifiably breached his right to be presumed innocent pursuant to s. 7 of the Charter, as it was based solely on the allegation contained in the Notice of Charge (NOC), which initiated the disciplinary process. He submitted that the disciplinary hearing was conducted in a manner that breached his right to procedural fairness. The appellant had been charged under s. 72 of the Act and the charge was specified in a NOC report signed by a corrections officer. The officer stated in the NOC that he had taken the appellant to the medical clinic, and after his appointment, he had described a nurse there in derogatory terms and had said he could not wait to see him on the street. The appellant retained counsel, and at the hearing, the appellant pled not guilty. The chair of the panel stated that it was going to proceed solely on the basis of the NOC and not bother to look at the institutional logs. The defence argued that the RPCC had not discharged its onus to prove the charge on a balance of probabilities. The charge details did not constitute admissible evidence and were merely an allegation. The chair said that the panel would accept the written statement as evidence, and if the defence did not have any further arguments, it would find the charge substantiated and sentenced the appellant to a three-day cell confinement. On appeal to the Director, the appellant's grounds were that the panel had improperly treated the NOC as evidence and found him guilty based solely on it, thereby interfering with the appellant's rights under s. 11(d) of the Charter. In dismissing the appeal, the Director confirmed the panel's decision, finding that the panel had complied with the Act and Regulations and that the appellant had been afforded procedural fairness after she reviewed the logs prepared by staff members at the time of the alleged incident. Only when the appellant applied for judicial review were the same logs disclosed to him. The chambers judge dealt with the application on the appellant's grounds that the Director had made two errors in failing to overturn the panel's decision as there was no evidence of guilt and that by accepting the NOC details as presumptive proof of his guilt, the panel had unjustifiably infringed his ss. 11(d) and 7 Charter rights. The judge adopted the reasonableness standard of review as to the panel's interpretation of its own legislation, assessment of the evidence and findings of fact. He found that the NOC had set out the evidence that could result in a finding against the appellant on a balance of probabilities. Section 65 of the Regulations allowed it to accept that evidence was rational and fell within the range of reasonable outcomes that attracted deference.

HELD: The appeal was allowed. The court found that the chambers judge erred in finding that the appellant's right to a fair hearing was not breached, and it quashed the discipline decision. The panel failed to conduct an inquiry that was fair and breached procedural fairness. The standard of review of the judge's decision was correctness. Therefore, it could step into the lower court's shoes, apply that standard to the panel's decision and determine whether its procedure was fair in the circumstances. It held that it could determine that question regardless of whether the appellant was raising procedural fairness as an issue for the first time on appeal, primarily because the Director had raised the issue in the appeal decision. It was not necessary to resolve the Charter issues. It reviewed sections 73 and 80 of the Act and sections 56, 59 to 68, and 75 of the Regulations. It found that the NOC had not complied with s. 56 of the Regulations and breached the duty of fairness. If the panel intended to present no evidence other than the unsworn summary contained in the NOC, the NOC should have stated that. Further, the legislation establishes an inquisitorial model. The panel failed to undertake any inquiry at all, accepting the charge details as prima facie proof of the charge when the appellant pled not guilty.

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Access Container, Inc. v The Container Guy Ltd., 2020 SKQB 314

Scherman, December 1, 2020 (QB20296)

Contract - Formation - Oral Agreement - Breach

The plaintiff, a supplier of shipping containers, sued the defendant for an alleged unpaid debt of $807,760 owed in respect of containers sold to it. The plaintiff had been selling containers to the defendant since 2011 under an oral contract. It claimed that that the terms of sale were payment of its invoices on delivery of the containers to the defendant. It said that, due to the defendant falling behind in its payments, the terms of sales and delivery remained as described but in April 2018, the parties reached an oral settlement agreement whereby the defendant would make an initial payment of $100,000 and the total outstanding balance would be paid in full before the end of the year. The defendant argued that the terms of the agreement evolved such that they began a consignment relationship in 2014. It said the original agreement ended when the new relationship came into existence and denied that a settlement agreement had been created in 2018. The plaintiff applied for summary judgment and the defendant agreed, and each submitted their evidence by affidavit and copies of email correspondence between them. The issues were 1) the law governing proof of oral agreements; 2) whether the defendant proved that a consignment agreement existed; 3) whether the plaintiff proved the

settlement agreement; if so, whether the defendant breached it; and if so, what judgment the plaintiff was entitled to.
HELD: Judgment was granted to the plaintiff in the amount of $807,700 USD and pre-judgment interest on that amount in accordance with The Pre-Judgment Interest Act from January 1, 2019 until the date of the judgment. The court found that this was an appropriate case for summary judgment under Queen's Bench rule 7-5 as there was no genuine issue requiring trial. It found with respect to each issue that: 1) a contract can be created by oral agreement of the parties and the essential terms of it can be inferred from their conduct. The defendant acknowledged that the original agreement existed and based upon the evidence and subsequent conduct of the parties that, commencing in 2011, the plaintiff delivered containers to the defendant as per its request on the understanding that it would pay the plaintiff its invoice price upon delivery; 2) the defendant failed to prove the consignment agreement existed based upon the evidence provided by the affidavits and their correspondence; 3) the plaintiff had proven the settlement agreement. It had compromised its rights under the original agreement so that the defendant's obligation to interest on invoices was limited to interest on the unpaid balance as at December 2018. The defendant made the $100,000 payment consistent with the settlement agreement.

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R v Getz, 2020 SKQB 316

Dawson, December 3, 2020 (QB20292)

Traffic Safety Act - Motor Vehicle Offences - Appeal
Criminal Procedure - Self-represented Litigant

The appellant was unrepresented before a justice of the peace for his trial on traffic offences of driving over the speed limit and driving while suspended. On appeal, he advanced grounds which the court dealt with as claims of miscarriage of justice, as allowed by s. 813(3) of the Criminal Code, incorporated into the traffic ticket trial by The Summary Offences Procedure Act. The first trial was with respect to the speeding offence. The trial was adjourned numerous times for various procedural and evidentiary reasons, including late disclosure of individual items. In issue as well was whether the justice properly assisted the appellant during the trial by directing him on cross-examining a peace officer on his notes; whether the justice improperly referred to a photograph of the radar result when that was not an exhibit; and whether she should have concluded the speeding trial, and conducted the second trial when the appellant failed to attend court on the

adjourned date.
HELD: After a fulsome review of the case law with respect to miscarriage of justice, including R v Moosomin (2008 SKCA 168), the appeal court found no miscarriage of justice. The numerous adjournments and delays were in large measure required to assist the appellant during the trial. For example, it was necessary to research whether the Crown was required to subpoena a witness for cross-examination on the certificate of disqualification, and not the appellant. As to assisting the appellant during the trial, the appeal court recognized that how much the trier of fact was to help was discretionary, and in this case, it was made clear to the appellant that the judge could only consider evidence properly tendered and could not then consider in argument any non-evidentiary matters. She also went as far as she could in hinting to the appellant that she knew through other evidence the point he wanted to make by cross-examining the officer on his notes. As to whether improper use was made of the non-tendered photograph, the appeal court pointed out that the trier of first instance made no reference to the photograph itself, only to the testimony of the officer that he had taken the photograph. Lastly, the appeal court found that upon being satisfied the appellant knew about the adjourned date, the trier of first instance acted within her discretion in proceeding in the absence of the appellant, as expressly allowed by s. 20(1) of The Summary Offences Procedure Act.

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Rankin v Rankin, 2020 SKQB 317

Turcotte, December 3, 2020 (QB20297)

Family Law - Division of Family Property

The petitioner wife commenced a proceeding in January 2010 for divorce, equal division of the family home and unequal division of the family property under The Family Property Act (FPA). The parties separated in May 2008 after 29 years of marriage, during which time they had operated a large farming corporation, Rankin Farms (RF). In September 2010, the parties sold all the farmland owned by RF except for the home quarter and three other quarter sections. The sale was structured as a share sale agreement for gross cash proceeds. Prior to the share sale agreement becoming effective, by an Assumption of Liabilities and Transfer of Assets Agreement, the parties equally assumed all the liabilities and debts of RF and it assigned to them equally all its current post-sale assets, despite the fact that they held unequal shareholder interests. To minimize income tax payable by the parties, no actual cash was paid by them to RF or by one party to the other. Although some of the assets of RF were subsequently transferred into the respective names of the parties (the home quarter and

two quarters were transferred into the name of the petitioner and two quarters were transferred to the respondent's name), there was never an equalization or final division between them of their family property or its value. Following these transactions, the petitioner remained in the family home and the parties continued to farm the remaining four quarters together as well as renting four other quarters, under custom-farming arrangements, sharing the income and expenses equally from 2010 until 2017, when the petitioner purported to unilaterally terminate that relationship and insisted on a 70-30 split. The respondent then filed his answer and counter-petition seeking equal division of the family home and unequal division of the family property. He had been asked by the petitioner in 2011 to hold off on finalizing matters respecting the divorce and he had complied. Since then, neither party had taken steps to deal with the division of family property. In addition to her claim for an unequal share regarding the farming operation, the petitioner argued that the farmland and assets should be retained by each party as theirs and the value of the same divided between them determined as at the date of application, because only the RF shares constituted divisible family property; RF's assets must be excluded because they were acquired after the date of application. Further, the value of the assets transferred to the parties under the agreement, as at the date those transfers were effected, should be included in the calculation of the division of the value of the parties' family property. She suggested the only way for the court to consider a date of adjudication value of those assets would otherwise be in consideration of an unequal division of the value of family property between the parties. The respondent argued that regardless of whose name the assets were transferred into from RF after the date of application, their clear intention as set out in the agreement was that each party was equally entitled to those assets. If the position of the petitioner were accepted, he would be denied a significant portion of the value of the parties' family property. Given that the market value of the farmland has almost tripled since 2010, he argued that the parties should equally benefit from such increase in value in the determination of the final distribution of their family property or its value. In this application, the parties did not seek a final resolution of their claims but to have the court to resolve certain discrete issues. Of those, this digest will deal only with the question of how to value RF and the assets retained and transferred from the corporation to the parties.

HELD: The court found with respect to the valuation that RF would be valued based on the sum of the net proceeds payable to the parties from the sale of their shares to the purchaser as at September 30, 2010, plus the fair market value as at September 6, 2019 of the assets transferred under the agreement to the parties by RF on September 30, 2010, less the amount of any debts or liabilities of RF assumed by the parties on that date and subject to an adjustment to equalize any income tax paid by each of them on the 2010 transactions. It decided that there were no extraordinary circumstances to support an unequal division of the family home, its value or any increase in its value since the date of application. As to the family property interest in RF, it found that the definitions of "family property" and "value" under the FPA permitted it to trace a spouse's interest in property that existed at the time of application and continued to exist as the date of adjudication, including where the nature of the spouse's equitable or legal interest as at the latter date had changed since the former date. Here,

the parties had a continuing family property interest in RF's assets assigned to them equally under the agreement and in the money they received under share sale agreement. The parties' interest in the four quarters of land, including the family home, buildings and equipment was directly traceable to the interest they held in the property of RF as its sole shareholders on the date of application. Regardless of the registration of title of the four quarters in their respective names, the value of those assets continued to be divisible as family property. They should share in any increase in the value of the property. The intentions of the parties regarding their interest in RF after the date of application under the agreements could also be considered through trust law. The respondent had discharged the burden of establishing that the parties' intention was to be equally entitled to the assets acquired by them under the agreement. Their subsequent conduct established their lack of donative intent respecting the transfers by them of the assets into their respective names.

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R v Binkley, 2020 SKQB 323

Bardai, December 7, 2020 (QB20299)

Criminal Law - Intoxilizer
Constitutional Law - Charter of Rights, Section 8, Section 9 - Arbitrary Detention - Unlawful Search and Seizure
Constitutional Law - Charter of Rights, Section 10(b)
Constitutional Law - Charter of Rights, Section 24(2)

The appellant appealed his conviction for operating a motor vehicle when his blood alcohol concentration exceeded eighty milligrams of alcohol in one hundred milliliters of blood on the basis that the trial judge made errors in her finding against the appellant's claim that his rights under ss. 8 and 9 of the Charter to be free from unreasonable search and seizure and arbitrary detention, and his right under s. 10(b) of the Charter to retain and instruct counsel without delay, had been infringed. The summary conviction appeal court judge (the appeal court judge) reiterated that the standard of appeal in the matter was correctness when an error of law was alleged, and, when an error of fact was alleged, one of palpable and overriding error. The matter concerned the reasonableness of a search of a motor vehicle under ss.152 and 153 The Traffic Safety Act (TSA), which required judicial authority in the form of a warrant to search a motor vehicle unless exigent circumstances could be shown by the Crown. Section 153 of the TSA defined "exigent circumstances" to mean that a warrant was not necessary if the delay in getting one would result in a danger to human life or safety or would result in

the loss, removal or destruction of evidence. HELD: The appeal court judge reviewed R v Robillard, a case involving a police chase of a motor vehicle on a winter seasonal road in a remote northern area of the province in which two cases of hard liquor were observed in the motor vehicle. On the facts found by the Provincial Court judge in Robillard, exigent circumstances existed permitting a warrantless detention of the occupants of the motor vehicle, and its search. The appeal court judge contrasted the facts in Robillard with those in the case before the trial judge, and found that, unlike in Robillard, the facts in the case before the trial judge revealed an ordinary vehicle stop of the type encountered regularly by the justice system, and where exigent circumstances seldom presented themselves. As such, the appeal court judge ruled that the trial judge erred in law in finding on the facts before her that exigent circumstances were present, and overturned her ruling that the detention and search and seizure without a warrant were reasonable and not arbitrary, and found the appellant's rights under ss. 8 and 9 of the Charter had been breached. As to the appeal of the trial judge's determination that the appellant's right to retain and instruct counsel without delay under s.10(b) Charter had not been infringed, the appeal court judge determined that nothing in the facts as found in the trial judge's ruling concerning the reasonable duration of the detention by the investigating officer considering all facets of the roadside investigation could be considered a palpable and overriding error, and as such the trial judge was not in error in finding that rights to counsel were engaged. Having found a breach of the appellant's rights under ss. 8 and 9 of the Charter, the appeal court judge was required to decide whether he should determine that any evidence obtained as a result of the Charter infringements should be ruled to be inadmissible pursuant to s.24(2) of the Charter as interpreted by the SCC in R v Grant, or whether he should send the matter back to the trial court to make that determination. As the trial record was sufficient for that purpose, the appeal court judge chose to himself engage in the three-part analysis required by Grant and ruled that the admission of the evidence obtained after the Charter breaches, namely the smell of alcohol on the appellant's breath and his admission of alcohol consumption, supported the demand to provide a sample of breath in the approved screening device. Admitting the evidence would not bring the administration of justice into disrepute, the tipping point in the balance being the relatively unobtrusive detention and search and seizure conducted in good faith by the officers for a pressing societal need.

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R v Binsfield, 2020 SKQB 322

Danyliuk, December 8, 2020 (QB20298)

Criminal Law - Motor Vehicle Offences - Dangerous Driving Causing Bodily Harm

The accused was charged with two counts of operating a vehicle in a manner dangerous to the public and causing bodily harm to the victims, her two passengers in the vehicle, contrary to s. 249(3) of the Criminal Code. On the night of the accident, the accused, who was 19 years of age, drove with her mother and her friend, C.M., to a nearby farm where they began drinking with the resident, S.B. They left the farm at 11 pm to go to the bar in the nearest town with the accused driving her vehicle with C.M. and S.B. driving his vehicle with the accused's mother. They stayed until 2 am and then left to return to S.B.'s farm to continue drinking. When the group left the bar, three vehicles drove in a convoy with the accused driving in the middle vehicle with C.M. and B.J. as passengers. The convoy proceeded down a gravel grid road. At some point, the accused's vehicle entered the ditch. She drove without trying to exit the ditch for more than a quarter-mile, when she collided with the side of an approach. The collision's violence caused the vehicle to launch into the air and come down nose-first on the other side of the approach. The accused was not injured, but C.M. suffered a lacerated liver and a broken nose, teeth and ribs, while B.J. had a severe laceration to his head. The next vehicle stopped and transported the three occupants of the accused's vehicle to the farm, and later they were hospitalized. All of the Crown's witnesses testified that the accused had been drinking in the bar and that road conditions were good. C.M. and B.J. said that the accused was travelling fast after driving into the ditch. The vehicle was bouncing on the rough ground. When the accused testified, in addition to maintaining that she had had nothing to drink, she said that it was foggy, the road was wet, and when she felt the vehicle shimmy, she slowed down her speed from 50 km/hour but ended up in the ditch. The accused said she stopped the vehicle to assess whether she could drive out of it but gave different estimates of how long she paused before resuming driving. She explained that she did not feel safe getting back onto the road because the banks were steep. In cross-examination, the accused admitted that she knew driving in the ditch was dangerous. When asked why she hadn't reported the accident, the accused was unable to explain her failure.
HELD: The accused was convicted of both offences. The court did not accept the testimony of the accused and preferred the testimony of the other witnesses. The evidence showed that she consumed alcohol and was showing signs of impairment before she drove. The weather conditions were good, and the road surface dry. Her passengers' evidence was that the accused had not stopped the vehicle after it entered the ditch, and she had been driving too fast. The slope of the ditch was relatively shallow and could easily have been navigated. The Crown had proven the actus reus that the accused operated the vehicle in a manner dangerous to the public when she continued to drive in the ditch on a dark night with alcohol in her system. It had proven the required mens rea that the accused's decision to do so in the circumstances was a marked departure from what a reasonable person would have done in that situation.

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Prime v Prime, 2020 SKQB 326

Megaw, December 8, 2020(QB20294)

Family Law - Child Support - Determination of Income - Imputing Income
Family Law - Custody and Access - Mobility Rights

The parties separated in 2017. There were three children of the marriage, aged 17, 12 and 7 at the time of the trial. After the separation, the children remained with the petitioner in the family home in Wynyard and the respondent moved into an apartment. In 2018, the petitioner applied on an interim basis for an order allowing her and the children to relocate to Stony Plain, Alberta where her parents and siblings lived. The respondent then successfully applied for an order prohibiting the move and later, in 2019, obtained an order for shared parenting on an interim basis. That parenting arrangement had continued without problem until the trial at which the petitioner sought a divorce, to be named the primary parent and to be allowed to relocate with the two youngest children to Stony Plain to have the benefit of her family's support. She asserted she had been the primary parent of the children during most of their lives because the respondent was occupied with work. The petitioner submitted that shared parenting was not appropriate because she and the respondent had had difficulty communicating with each other. The respondent contested these views and argued that the shared parenting regime should continue. The petitioner also sought current and retroactive child support. She had been employed as a teacher and had earned $89,600 in 2019. She had not obtained employment in Stony Plain. She submitted that the respondent's income should include pre-tax corporate income. The respondent was the CEO of two ambulance companies owned by his parents. His 2019 income from that position was $123,800. Within the previous year, he made a corporate purchase of another ambulance service that showed net income of $406,500 before taxes in 2019. He was the sole shareholder of the holding corporation that held all of the shares in the new business. He opposed the petitioner's application to have the corporate net income included in his income because the new company would have to buy new vehicles and other equipment.
HELD: The court granted a divorce and ordered that the parties have joint custody of the two youngest children in a shared parenting arrangement. It declined to permit them to relocate from Wynyard or to award retroactive child support. The court attributed an income of $200,000 from the respondent's corporation to him and ordered him to pay child support commencing in September 2020. The court found that a shared parenting regime was in the best interests of the children. Both parents were capable, loving parents and it was satisfied they were communicating well with each other and had shown their ability to work together since the shared parenting order was made. The petitioner had not demonstrated how relocation would better enable her to meet the children's needs. It would be contrary to their best interests to disrupt their lives and would make the shared parenting arrangement impossible to effect if they had to travel between Stony Plain and Wynyard. The respondent's corporation's net income would not necessarily be used to finance capital expenditures in the

future, and it was fair and reasonable to include a portion of it in the respondent's income. The parties were given leave to have the issue of the appropriateness of the table amount of support returned to the court for submissions and determination.

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Strohan v Saskatchewan (Occupational Health and Safety Division, Ministry of Labour Relations and Workplace Safety), 2020 SKQB 328

Smith, December 9, 2020 (QB20301)

Torts - Negligence - Public Authorities - Public Duty
Torts - Bad Faith
Torts - Defences - Immunity - Proceedings Against the Crown Act
Civil Procedure - Application to Strike Statement of Claim - Collateral Attack

The plaintiff, Strohan, the respondent in an application by the defendant, Occupational Health and Safety (OHS) to have her statement of claim dismissed, had been employed by the Government of Saskatchewan, Ministry of Justice (Justice). She brought a complaint to the Public Service Commission (PSC) alleging workplace harassment by her supervisor and was successful in obtaining a finding that the supervisor had harassed her at her workplace. Recommendations were suggested to Justice so she could return to work, which Justice failed to implement; instead, Justice advised her that she would be relocated to a new workplace. Strohan wished to be returned to her former workplace, so she brought a complaint to Justice and to her union, Saskatchewan Government and General Employees' Union (SGEU), which prompted Justice to relocate the supervisor and return Strohan to her former place of work, though not to the same job assignment. It continued to resist implementing the PSC's suggested recommendations for her return to work following the finding of workplace harassment. Strohan then left her workplace and turned for relief to the defendant, OHS, which conducted a formal investigation of discrimination against Strohan by Justice as mandated by its governing statute, The Saskatchewan Employees Act (SEA). The investigator concluded his investigation, making numerous findings, including that failing to reinstate her to her previous job assignment following the finding of harassment was an unlawful discriminatory practice under the SEA, and ordered her return to her full job assignments, with continuous monitoring by Justice to ensure a safe workplace free of harassment. Strohan then wished to return to work, but believed the work environment continued to be discriminatory. She asked OHS to intervene, but the investigating officer would not, and demurred on the basis that his duties ended once

he filed his report and served Notice of Contravention on Justice, which he had done. Strohan then resigned her position, had a change of heart, and tried to get her job back. Justice accepted her resignation and declined to reinstate her. In an attempt to overturn her resignation, she appealed to SGEU to intervene on her behalf, which it did. The matter went to arbitration resulting in a finding against her reinstatement to her former employment. She then brought an action against OHS claiming that OHS failed in its statutory duty to her under the SEA by being reckless, careless, and negligent during its dealings with her in relation to her complaint of discrimination by Justice and her attempted return to work in a discrimination-free environment. HELD: In allowing the application to dismiss the action, the chambers judge considered three arguments from a "cafeteria of grounds" advanced by OHS. These were: (1) that the action was a collateral attack on the decision of the investigating officer for OHS, (2) that, due to the immunity provision of the SEA, s. 9-10, the respondent, Strohan, could not prove that OHS had acted in bad faith, and (3) that the action was barred by The Proceedings Against the Crown Act (PCA). After a thorough and helpful review of the case law with respect to these three grounds, the chambers judge ruled that (1) the action was not a collateral attack on the decision of the OHS investigator. Strohan was not seeking to overturn the decision in another forum, but was seeking damages for breach of statutory duty as a result of that decision, allegedly made in bad faith, so that the policy behind the rule was not undermined, leaving the integrity of the justice system intact; (2) that Strohan could not maintain her action, since s. 9-10 of the SEA shielded OHS from the negligent actions of the investigator "for anything in good faith done, caused or permitted or authorized to be done." This meant she would be unable to show bad faith on the part of the investigator based on any of the five "rubrics of bad faith." In particular, she would not be able to show that OHS, through its investigator, intended to do harm to Strohan, was intellectually dishonest during its investigation, was wilfully blind to what it should be investigating, or acted in a manner inconsistent with relevant legislation; and (3) ruled that Strohan was barred from maintaining an action against OHS by s. 5(6) of the PCA, because the investigator was exercising a judicial function, and in such a case, his actions created an absolute immunity from suit for OHS.

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Liao v Saskatchewan (Economy), 2020 SKQB 329

Scherman, 2020-12-09 (QB20302)

Administrative Law - Judicial Review - Natural Justice/Procedural Fairness

The applicant applied for judicial review of decisions made by the program integrity manager of the Saskatchewan Immigrant Nominee Program (SINP) disallowing her applications and barring her from applying to the program for two years on the grounds of false information and misrepresentations made by her to SINP in the application process. SINP is a joint federal/provincial program designed to expedite permanent residency for immigrants who have skills and experience that would fill voids in the labour pool in Saskatchewan or would be a good fit for Saskatchewan's needs. In order to meet its mandate, SINP must rely on the honesty and forthrightness of applicants to ensure the objectives of the program are fulfilled and the program is not being abused. The Program Integrity Unit of SINP (PIU) was created to "conduct investigations appropriate to ensure the integrity of the Program," which included investigating the truthfulness and accuracy of applications made by foreign nationals for acceptance into the program. The PIU believed the applicant had misrepresented the kind of work she had done in China because the type of work she claimed to have done changed over time. Also, letters of recommendation appeared to be forged since the signatures were not in the proper place. The signatures were placed on the English translation of the documents although that was not done, according to the applicant's employer in China, who was surprised to hear from the investigator for the PIU that she was applying to SINP. The employer in China also said they had no positions like those described by the applicant, and what was more damning to the applicant, they had never signed any reference letters for her. The applicant also changed the names of the contact persons at the Chinese company during the application process. The PIU officer wrote to the applicant and her counsel by email, detailing his concerns that she was not being truthful in her applications, was believed to have misrepresented the information in support of her applications, and requesting that she provide evidence in support of the veracity of the application and supporting materials, failing which her application would be denied and she would be suspended from using the program for two years. After allowing for an exchange of correspondence and emails between the officer, the applicant and her counsel during the period within which the applicant was to provide the requested proof of her forthrightness during the application process, and upon his belief that no adequate response had been received by the applicant or counsel on her behalf, and that they would not be forthcoming, the officer advised the applicant that her applications were denied, and she was suspended from using the SINP for two years. In response, she brought an application to the court to review the officer's decision on the basis that her right to procedural fairness at the hands of SINP had been denied.
HELD: The application was dismissed. Relying on the authority of Feng v Saskatchewan (Economy), 2020 SKCA 6 , the court determined that the relation of the applicant and the SINP required a level of procedural fairness at the low end of the fairness spectrum because the decision-making process was entirely administrative, was governed by internal policies and protocols, which had been followed, and which did not make provision for appeal or review of any decisions, because the decisions made by the SINP were to be accorded deference and were not to be interfered with lightly. In this case, procedural fairness was satisfied by the PIU through its officer providing the applicant with a clear statement of its concerns as to the truthfulness

of the information and materials provided to the SINP and providing the applicant with an opportunity to answer these concerns. The court could not find that the SINP acted in an unreasonable or unfair manner towards the applicant, and thus it was free to make its decision.

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Hertz v Kille, 2020 SKQB 331

Bardai, December 11, 2020 (QB20303)

Contract - Interpretation

This matter came before the court as a summary judgment application in an ongoing action to resolve a dispute between the parties with respect to the interpretation of an agreement, referred to as the Settlement Agreement (Agreement). The trial judge endorsed the consent of parties to proceed to summary judgment as any triable issues in the action could be satisfactorily determined without the calling of evidence, as permitted by The Queen's Bench Rules. After setting out the rules of construction he was to use and canvassing the factual matrix relevant to his interpretation of the Agreement, the trial judge then outlined the contractual issues he needed to resolve, being whether an essential term agreed to was omitted or incorrectly drafted and should be rectified; whether a party failed to understand what they were signing; and whether there was a meeting of the minds by the parties as to the essential terms of the Agreement. In arriving at the essential facts, the trial judge was required to ignore the bitter history between the parties, whose relationship commenced as a romantic one, but deteriorated after twelve years to one dominated by emotion over reason. He found the essential facts to be these: the plaintiff, Greg, became the sole owner and operator of a family-owned business, Hertz Northern Bus Service Ltd. (Northern) during his relationship with the defendant, Albina. In 2006, Northern and Greg declared bankruptcy. At a time when Greg was still an undischarged bankrupt, a new business, Northern Bus Service (2006) Ltd. (Hertz 2006) was formed, with Albina as the sole officer, shareholder, and director, though Greg was involved in the business and was paid a salary. Greg claimed that Albina had agreed that she held 50% of the shares in Hertz 2006 in trust for him, and posited as proof a contract between him and Albina, the Unanimous Business Ownership Agreement, though Albina denied the validity of the contract for reasons of duress or forgery. The dispute resulted in the within action, with Greg seeking a declaration that he owned 50% of the shares in Hertz 2006. He also sought interim relief in the action for oppressive conduct by Albina, which required the chambers judge to determine whether Greg had sufficient interest in Hertz 2006 to allow her to order interim relief. Prior to the decision being rendered, Student Transport Canada (STC) made an offer

to purchase Hertz 2006 for $7,100,000.00, conditional on Greg and Albina releasing and indemnifying STC from any claim. STC had a legitimate concern that it would be dragged into their dispute. In order to satisfy this condition of the sale, Greg and Albina, through counsel, negotiated the Agreement, which allowed the sale to be completed, and 20% of the sale proceeds to be released to each of Greg and Albina, pending a further disbursement of sale proceeds to Greg should he be entitled to be paid a larger percentage following the decision in "the oppression application." Ultimately, the chambers judge found that she could not find that Greg had a sufficient interest in Hertz 2006 to ground his claim for interim relief, being of the view that it was more likely that Greg was merely an employee of Hertz 2006, given his status as an undischarged bankrupt. The trial judge considered the main issue to be decided was whether Greg honestly believed that "oppression application" was intended to mean the action within which the oppression application was taken.
HELD: The trial judge found against Greg and in favour of Albina, ruling that by a common sense reading of the Agreement and the background context in which it was made, and using the plain meaning of the words used, "oppression application" in the Agreement could only mean the oppression application taken prior to the offer of purchase being made by STC, which had been argued but not decided at that time, and could not mean the action itself. No rectification of the contract was required, as it contained the very terms which had been negotiated by the parties and their experienced counsel; Greg could not argue he did not know what he was signing, since again, his counsel had explained the purport and meaning of the Agreement; and lastly, there was a meeting of the minds by the parties as to the essential terms, including that any additional interest Greg might have in Hertz 2006 was to be determined by the oppression application and not at the conclusion of the action since any other interpretation would be incompatible with the context and the plain and ordinary meaning of the language used in the Agreement.

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Mitchell v Joint Medical Professional Review Committee, 2020 SKQB 334

Tochor, December 15, 2020 (QB20305)

Statutes - Interpretation - Saskatchewan Medical Care Insurance Act, Section 49.21

The applicant, a physician, appealed the decision of the Joint Medical Review Committee made pursuant to s. 49.21 of The Saskatchewan Medical Care Insurance Act. In that decision, the committee reviewed the applicant's pattern of billings in accordance with its authority under the Act. It concluded that her billing for a specific period should be reduced by the sum of $280,315. The committee reassessed ten categories of the

applicant's billings. The issues on appeal were whether the committee: 1) erred in reassessing her billings that it determined had not complied with the payment schedule; 2) erred in reassessing her billings that it determined were not medically necessary; and 3) erred by applying a review of selected records to her entire practice.
HELD: The appeal was dismissed except that one category of billings was remitted back to the committee. The court noted that it had jurisdiction to hear the appeal, and the grounds of such an appeal were permitted as established by earlier cases. The standard of review was that of reasonableness. It found that the committee had not erred with respect to the first two issues. It had appropriately grounded its reasons in a consideration of whether the documentation met the requirements of the payment schedule. However, it had erred in reassessing billings in one category because it was unclear whether it relied upon concerns outside its ambit or based its reasoning on reliance upon the payment schedule. Regarding the third issue, it found that the committee's extrapolation from a select sample of billings was consistent with many cases where the committee's decision to reassess billing in this manner was found to be reasonable. Based on the evidence, the court concluded that the committee's decision on this ground and its calculations of the reassessments were within a range of possible, acceptable outcomes.

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G.P. v S.T.W., 2020 SKPC 336

Richmond, December 17, 2020 (QB20306)

Family Law - Child Custody and Access
Family Law - Child Support - Arrears

A trial was conducted in the absence of S.T.W., the mother of J.W., born February 15, 2009, to determine the custody and access arrangements which would be in the best interests of J.W. J.W.'s father, G.P., had interim joint custody and shared parenting with S.T.W. of J.W. since October 30, 2018. S.T.W. gradually faded from J.W.'s life due to substance abuse problems and a turbulent environment, such that at the time of trial, she could not be located and her whereabouts were unknown. G.P. had assumed full parental duties with respect to J.W. as of the trial date. A custody and access report was prepared in advance of the trial recommending that G.W. and S.T.W. have joint custody of J.W, with G.P. having full parenting rights. G.P. was in arrears of a Provincial Court child support order which accumulated prior to October 30, 2018.
HELD: The trial judge reviewed the child custody and access provisions of the applicable legislation, The

Children's Law Act, which requires that custody and access be determined solely by reference to the best interests of the child, having regard to the considerations set out in the Act, and found that as S.T.W. was absent from J.W.'s life and G.P. was a loving and caring parent to the child, it was in the best interests of the child that G.P. have sole custody and full parenting rights. As S.T.W.'s whereabouts were unknown, no access order could be made. As G.P. had full responsibility to care for J.W. and did not have the means to pay the arrears of child support, they were cancelled, and the child support order was rescinded.

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R v Young, 2020 SKQB 338

Klatt, December 18, 2020 (QB20314)

Criminal Law - Motor Vehicle Offences - Sentencing

The accused was convicted after trial of failing to stop after being involved in a motor vehicle accident with intent to escape civil or criminal liability contrary to s. 252(1) of the Criminal Code. Prior to trial, the accused pled guilty to the following Code offences: impaired driving, contrary to ss. 255 and 253(1)(a); dangerous driving contrary to s. 249(1)(a); disqualified driving contrary to s. 259(4); and flight from police in pursuit contrary to s. 249.1(1). The police observed the accused driving a truck they believed might have been stolen. They attempted to execute a traffic stop in an alley, but the accused backed into the police vehicle, hit a power pole before proceeding forward, where he hit a fence. When the officers left their vehicle to approach the accused's vehicle, he drove towards them, and they had to jump out of the way. The police pursued him for some time through a residential area of Regina. Once arrested, the accused admitted to having consumed methamphetamines, which was confirmed through testing. The accused was 22 at the time of the offences committed in December 2018 and had been in custody ever since. The Crown agreed that he should be given credit of 1.5 days, resulting in credit of three years. It argued for a global sentence of four years' imprisonment and a five-year driving prohibition. The defence argued that time served would be an appropriate sentence and the driving prohibition period should be reduced. The accused had a youth criminal record starting at the age of 16. His schooling ended in grade 10. In 2017, he began associating with the wrong people and engaged in substance abuse. That year, he was convicted of 11 offences as an adult, including dangerous driving and theft of a motor vehicle, for which he received a 540-day sentence followed by 12 months' probation. At the time of the current offences, he was subject to a probation order and prohibited from driving.
HELD: The accused was sentenced to imprisonment for 36 months. The global sentence consisted of 22

months for dangerous driving, eight months consecutive for the flight from police, and six months consecutive for impaired driving. The remaining charges warranted six-month concurrent sentences. As a result of the remand credit, the accused had served his sentence but received a four-year driving prohibition because of his previous conviction for driving while disqualified. The court regarded as aggravating factors that the accused violated his previous probation order and driving prohibition. His criminal history suggested that he was unwilling to follow court orders. Although his relative youth might be a mitigating factor, it was not considered so in this case. However, it was mitigating that the accused accepted responsibility for most of the charges he was facing except for the most serious ones of assaulting a police officer with a weapon and failing to remain at the accident scene. The gravity of the offences was high, particularly flight from the police and dangerous driving while disqualified. The accused's moral culpability was high as well. He had been given the opportunity to rehabilitate himself through his probation for his previous crimes and did not take advantage of it.

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R v Watetch, 2020 SKPC 54

Daunt, December 10, 2020 (PC20048)

Constitutional Law - Charter of Rights, Section 7, Section 11(a), Section 24

The accused was charged with aggravated assault contrary to s. 268(2) of the Criminal Code and assault with a weapon contrary to s. 267(a) of the Code. The alleged offences were committed on December 30, 2018 in the Saskatchewan Penitentiary, where both the accused and the victim were inmates. The accused pled not guilty to the charges and brought a Charter application for a stay of proceedings pursuant to s. 24(1). Prior to these offences, the accused had been charged in June 2018 with second-degree murder arising from a riot in the penitentiary. In negotiating a plea agreement with Crown in early 2019 regarding the murder charge, the accused agreed to plead guilty to manslaughter after his lawyer confirmed with the Crown that no charges were pending against him because he was concerned about his legal jeopardy for the assault charges. He was sentenced to 10 years in prison in June 2019. A month later, after the appeal period for the murder charge expired, an RCMP officer drafted an information charging the accused and others with the assault charges of which the accused was unaware until they were read to him in court on August 14, 2019. In his Charter application, the accused submitted that charging him after his guilty plea and sentencing amounted to an abuse of process under s. 7 of the Charter as he had a right to be informed of the full extent of his legal jeopardy

before waiving his right to a trial on the murder charge and that his s. 11(a) Charter right to be informed of the charges without unreasonable delay was breached. At the voir dire, the RCMP officer testified that he received a package in late December 2019 regarding the alleged assaults, prepared by the Security Intelligence Officers (SIO) employed by Corrections Canada at the penitentiary to conduct investigations into inmate infractions. The SIO package indicated that the RCMP should charge the accused. The officer requested that the SIO provide him with a report that was missing from the package which ensured that the inmate was properly identified from video footage for use in court. For unknown reasons, it was not provided until June 2019. The officer swore the information on July 22, 2019 but did not seek a warrant or summons from the justice as he would have when charging a non-inmate. With inmates, the RCMP instead provides a disclosure package to the office of the Crown Prosecutor, who then obtains a production order to produce the inmate to the court, whereupon the inmate is informed of charges at the first court appearance. In this case, the accused was produced for court on August 14, 2019, which was over eight months after the incident, two months after his manslaughter sentencing and 23 days after the information was sworn. The issues were: 1) whether the conduct of the Crown, the SIO, the RCMP and the Crown Prosecutor's office had amounted to an abuse of process; 2) whether the accused's s. 11(a) right was violated; and 3) if so, whether a stay of proceedings was the appropriate remedy.

HELD: The application for a stay was not granted but the court found that the accused's ss. 7 and 11(b) Charter rights had been violated. The appropriate remedy was to exclude the recognition evidence. With respect to each issue it found that: 1) the accused's s. 7 right was breached. The case fell within the residual category of abuse of process. The conduct of each of the state authorities involved connoted sufficient unfairness to contravene the fundamental notions of justice and undermined the integrity of the judicial process; 2) the accused's s. 11(a) rights were violated. The delay was not lengthy but was unreasonable and an example of the systemic violation of the section as a consequence of the RCMP practice not to seek process when swearing an information accusing an inmate of a criminal offence. The practice appeared to be based on the misunderstanding that inmates do not enjoy the same procedural protections as non-inmates charged with offences such as those offered by s. 29 of the Code respecting arrest warrants; and 3) the appropriate remedy was to exclude the recognition evidence. Due to the seriousness of the breaches, the evidence could be excluded under s. 24(2) of the Charter. A stay was not granted because the delay under s. 11(a) had not impaired the accused's right to make full answer and defence, and under s. 7, it was not a case where the conduct of the trial would be prejudiced.

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R v Skorka, 2020 SKPC 49

Kovatch, December 15, 2020 (PC20049)

Criminal Law - Motor Vehicle Offences - Driving with a Blood Alcohol Level Exceeding .08

The accused was charged with one count of driving while his blood alcohol level exceeded .08 and one count of impaired driving. The defense counsel made a Charter application and the matter proceeded as a blended void dire and trial. The evidence concerning the alleged offences was presented by another motorist who had reported to the RCMP that the accused's vehicle was being driven erratically and at high speed. The RCMP officer who responded to the dispatch notice testified that he measured the accused's speed at 150 km/h on the highway, so he pulled the vehicle over. He noticed the odor of alcohol and that the accused had red watery eyes. He admitted that he had been drinking. The officer advised him that he would have to take the ASD test and as they walked to the police vehicle, the accused stumbled. Before putting the accused in the back seat of his vehicle, the officer performed a quick pat-down search. The accused was read the ASD demand and after he had provided a breath sample and failed the test, the office arrested him and advised him of his Charter rights. The accused declined to call a lawyer and was taken to the closest police station for the breath tests. Because the accused's Intoxilyzer readings were very high, the police held him in cells overnight. Before trial, defence counsel requested disclosure from the RCMP and they provided it with the exception of the video film of the accused in the cell because the whole video surveillance system failed and the recording of the cells was lost. The accused alleged that: 1) the Crown's failure to produce the video of the cells was a breach of his right to make full answer and defence; 2) the police breached his right to be free from unreasonable search and seizure when the officer obtained a breath sample in the ASD, and he questioned whether the officer had a reasonable suspicion that the accused had alcohol in his body and whether the seizure of breath samples was authorized by law: 3) his Charter right to be free from unreasonable search and seizure was breached when the officer did a pat-down search; 5) the officer did not have reasonable grounds to make the Intoxilyzer demand; and 6) there was a legal basis to exclude the evidence of the Certificate of Qualified Technician because there was a mistake in the Certificate regarding the air gas lot number of differing from the lot number on the Intoxilyzer instrument.
HELD: The Charter application was dismissed on all grounds. The accused was found guilty of the second count and the first count was stayed on the Kienapple principle. The court found with respect to each of the Charter issues that: 1) there had been no breach by failing to provide the video. The defence had not explained nor provided any evidence why the video might be relevant; 2) there was no breach on the officer's part, because he was justified in making the ASD demand as he was entitled to rely upon the numerous factors that suggested that the accused had alcohol in his body; 3) there was no breach when the officer performed a brief pat-down search because it was minimally intrusive and reasonable for officer safety; 4) the ASD demand was properly made, and when the accused failed the test, the officer had reasonable grounds for the Intoxilyzer

demand; and 5) the mistake on the Certificate did not cast doubt on the validity of the readings and there was no reason not to admit the Certificate into evidence.

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