Case Mail

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K.G.K. v L.T.K., 2021 SKCA 12

Jackson Ottenbreit Caldwell, January 22, 2021 (CA21012)

Appeal - Family Law - Interim Order - Custody
Family Law - Custody - Appeals - Standard of Review

The appellant, K.G.K., was the respondent in an action for custody of four school-age children brought under The Children's Law Act by L.T.K., and she sought to set aside the Interim Order issued pursuant to a fiat dated September 20, 2020 (September fiat), granting the parties joint custody and shared parenting of the children, and ordering K.G.K. to return them to the family farm close to Clair, near Moose Jaw. K.G.K. had unilaterally relocated the children without a court order or agreement with L.T.K. The appeal court recognized that an appeal of an interim order was not ordinarily within the court's jurisdiction, and it could not rewrite an interim order. The court was required to assess the reasoning of the chambers judge in making the interim order with considerable deference since he was required to exercise much judicial discretion in sifting through the myriad

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facts and evidence. The scope of review is "delimited and narrow," and such orders cannot be overturned for an apparent omission in considering relevant factors unless the apparent omission amounts to a material error, or an error which erodes the very foundation upon which the decision was made. Where there appears to be a failure to consider relevant factors or evidence, "the appellate court may conduct a review of the evidenceâ€¦ to determine whetherâ€¦ [the chambers judge] has forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Perre v Edwards, 2001 SCC 60). A majority of the panel on appeal rejected K.G.K.'s core argument: that in making the interim order, the chambers judge erroneously interfered with the right of the children to benefit from her role as their "primary parent."

HELD: The appeal was dismissed with costs in a 2:1 decision. The court conducted a detailed review of the chamber judge's decision-making process: his weighing of the evidence; whether he omitted to consider a relevant factor; the emphasis he placed on the various factors he was to consider; whether he was working within the required legal framework; and whether he exercised judicial discretion in a reasoned manner. The majority concluded that the chambers judge correctly instructed himself throughout his analysis on the overarching principle in interim child custody applications, that the courts are to be guided solely by reference to the best interests of the child in the interim, before final adjudication, in making an interim custody order. A parallel consideration in the case before the chambers judge was how to reconcile the best interests of the children in the interim with the policy of the courts not to be seen to be endorsing self-help measures taken by a parent in removing the children from the other parent without a court order or an agreement with that parent. The majority agreed with the chambers judge that removing children unilaterally and disrupting the status quo can only be sanctioned by the courts in cases where this action is taken in compelling circumstances. The majority agreed that no such compelling circumstances were presented to the chambers judge in this case, and that the reasons provided by the appellant were for her benefit and not that of the children. The children had been removed from a home life in which they benefitted from the joint parenting of K.G.K., who was the primary caregiver, and L.T.K., who was a hands-on parent as much as possible when not managing his large grain farm. The children's physical, emotional and psychological needs were being satisfied. They were happy and contented with their lives. The chambers judge rightfully recognized that at law, both parents are in a shared parenting relationship with their children unless otherwise agreed between them or if that relationship is altered by court order. The court agreed further that the law no longer recognizes the concept of primary parent, a holdover from the now-defunct tender years doctrine. The majority upheld the chambers judge's decision that in the interim, the childcare arrangement should be returned to the status quo pending final determination, as there were no compelling reasons for the children to be removed and the status quo was in their best interests in the interim.

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Mental Health and Addiction Services v S.B., 2021 SKCA 18

Ryan-Froslie Schwann Leurer, February 1, 2021 (CA21018)

Administrative Law - Procedural Fairness - Breach of Duty - Appeal
Civil Procedure - Court of Appeal Rules, Rule 59
Statutes - Interpretation - Mental Health Services Act, Section 24.1

The appellant, the Saskatchewan Health Authority, appealed the unreported decision of a Queen's Bench judge (QBG 2554/19, JCR) to order funding for family visits to a person subject to a long-term detention order (LTDO) granted pursuant to s. 24.1 of The Mental Health Services Act (MHSA). The appellant argued that the judge did not have the jurisdiction to make that order and further, he failed to provide procedural fairness to the appellant before making the funding order. The respondent, S.B., was the subject of the appellant's application for the LTDO. At the hearing, the only issue was where S.B. would be detained. S.B. and her mother, who participated with next-of-kin status, both wanted her to be placed in the mental health unit of the acute care hospital located near the family's residence rather than at the province's only residential mental health centre located further from her family's home. S.B.'s psychiatrist testified at the hearing that it would benefit her to have the support of her family. However, the judge granted the order requested by the appellant that S.B. be placed at the centre since it could best meet her treatment needs. He ordered that the appellant work with S.B.'s mother to arrange monthly family visits, including payment for the cost of the trips, although none of the parties had raised the matter of funding at the hearing. Some preliminary issues were raised at the appeal by S.B.'s mother and S.B. The former applied: 1) to adduce evidence under Court of Appeal Rule 59(1) that had not been in existence at the time of the hearing in Queen's Bench. Also, S.B. contended 2) that the court did not have jurisdiction to hear the appeal because the MHSA and its regulations were silent as to the right of appeal, and the MHSA sets out its own appeal process regarding LTDOs under s. 24.1, involving applications for review by the Court of Queen's Bench. Also, persons detained under s. 24.1 are deemed to have a "general lack of capacity to instruct counsel." Pursuant to s. 13 of The Mental Health Services Regulations, the duties of official representatives appointed to assist individuals facing applications for LTDOs do not include assisting with appeals. Further, it is well-established practice under the MHSA for people affected by an LTDO to raise reviewable issues in the Court of Queen's Bench, relying upon the decision in Saskatchewan (Regional Director Mental Health in Patient Services, Regina Qu'Appelle Health Region) v M.M.R. (M.M.R.) (2016 SKQB 108). Finally, S.B. submitted that because an LTDO is interlocutory, leave to appeal is required by s. 8 of the Act. The appellant argued that: 3) the judge had no jurisdiction to order it to fund family visits under s. 24.1(3) of the MHSA nor the inherent jurisdiction to designate how government

monies are to be spent; and 4) the judge made the order without notice to the parties and without giving it an opportunity to be heard, thereby denying it procedural fairness.
HELD: The appeal was allowed and the portion of the decision requiring the appellant to fund family visits was set aside. The court found that: 1) S.B.'s mother's application to adduce evidence could not be granted because it was not relevant to the issues raised by the appellant; 2) S.B.'s objections were without merit. It had jurisdiction to hear the appeal both under s. 7(2)(a) of The Court of Appeal Act, 2000, as the silence in the MHSA was not sufficient to take away the general right of appeal, and from a Queen's Bench decision made pursuant to s. 24.1 pertaining to the granting of LTDOs under the MHSA or its Regulations. A review under s. 24.1(4) is not the same as an appeal, and M.M.R. was inapplicable. A person subject to an LTDO has the right of appeal under s. 7 of the CAA and they are not deemed by the MHSA to have a lack of capacity to instruct counsel. Finally, an LTDO under s. 24.1 of the MHSA is not interlocutory in nature and thus leave to appeal is not required. Respecting the appellant's grounds of appeal, it found that: 3) the judge did not have jurisdiction under s. 24.1 of the MHSA to make the order for government monies. If the Legislature had intended to fund family visits to mental health patients, it would have said so; and 4) the judge breached the duty of procedural fairness. He raised and determined the funding issue on his own motion, without notice to any of the parties and without giving them the opportunity to be heard. The matter would not be remitted back to the Court of Queen's Bench as a result of finding that the judge did not have jurisdiction to make the order.

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R v Goforth, 2021 SKCA 20

Caldwell Leurer Barrington-Foote, February 2, 2021 (CA21020)

Criminal Law - Unlawful Act - Homicide
Criminal Law - Objective Mens Rea - Failure to Provide Necessaries

This appeal by two joint accused from convictions of the offences of second-degree murder, manslaughter, and unlawfully causing bodily harm following a jury trial (see: 2016 SKQB 75) raised grounds of appeal concerning the application of the modified objective standard test for penal negligence to the mens rea elements of s. 215 of the Criminal Code, the predicate offence upon which the unlawful act element of these offences was to be proven beyond a reasonable doubt. The uncontroverted evidence was that the accused were husband and wife (Ms. Goforth and Mr. Goforth) who were foster parents to two female children, who came into their care aged three and two years (the girls). The wife assumed primary care of the girls on a day-to-day

basis, with all that that would generally be understood to entail, and including, at the most basic, the provision of food, liquids, and medical intervention when required. She was a homemaker who did not work outside the home. She had successfully raised their son to adulthood. The husband was the breadwinner who worked long hours as a carpenter, each day leaving home before the girls were awake and coming home in the evening, where the wife served him and the girls supper, after which Mr. Goforth believed Ms. Goforth bathed them and put them to bed. Mr. Goforth was never involved in their day-to-day care; never bathed them or saw them without clothing. Mr. Goforth believed the girls were thin and were fussy eaters but that they did eat at supper, though less so two months before the events forming the basis of the offences. He said about twice per month they would be sick, but Ms. Goforth would nurse them back to health. Mr. Goforth said he never saw sores or abrasions on them but did see bandages on them. He said generally that he trusted Ms. Goforth to properly care for the girls and did not observe anything about their care which he thought required his intervention. Though the girls came to the Goforths in apparently good health, on July 31, 2012, about nine months after the girls came into their care, the older girl went into shock and was taken to hospital where she died from complications arising from malnutrition and dehydration. She was emaciated to the point that her bones were protruding under the skin. She had starved to death. The young girl was also in extremis due to severe malnutrition and dehydration but survived without any apparent long term health problems. The girls had been deprived of sufficient food for a minimum of three to four weeks, and of liquids for 24 to 48 hours. They had never had any medical attention during the estimated period within which they were denied necessary food and liquids. The appeal court panel judges focused their analysis on the trial judge's charge to the jury with respect to the mens rea element of the predicate offence of failing in the legal duty to provide the necessaries of life to a child under sixteen years or one who was incapable of withdrawing from a parent's care and thereby endangering the life or endangering the health of the child permanently; and in failing in that legal duty markedly departed from the societal standard expected of a reasonable prudent parent who, in the circumstances, should have foreseen that this marked departure from that objective standard would cause the endangerment of the life and permanent health of the child. Under s. 215, a foster parent has the same legal duty as a natural parent. In conducting this analysis, the appeal court panel had reference to the seminal cases on penal negligence in general, and with respect to the mental intent requirements of s. 215; in particular, Naglik, Javanmardi, Beatty, Hundal, Stephan, Pappajohn. and Creighton. Ultimately, proof of the actus reus elements of the predicate offence were not in issue, except to the extent these elements may have been confused with the mental intent elements in the jury charge. The panel was also required to consider when an appeal court must rectify a trial judge's charge to the jury, and whether in this case there was a reasonable possibility the erroneous charge concerning mental intent could have influenced the jury's fact-finding function, and in so doing were guided by case authorities which included Knox, MacKinnon, Newton, and Owusu.
HELD: The majority held that the appeal by Mr. Goforth from the convictions of manslaughter and unlawfully

causing bodily harm be allowed and a new trial ordered. The panel was unanimous that Ms. Goforth's appeal from second degree murder and unlawfully causing bodily harm be dismissed. Ms. Goforth's counsel had appealed primarily based on inconsistent verdicts. The appeal court panel found the argument had no merit because the evidence upon which the jury could have convicted Mr. Goforth of manslaughter and unlawfully causing bodily harm and the evidence in relation to Ms. Goforth's convictions of second-degree murder and unlawfully causing bodily harm were quantitively and qualitatively distinct; and that this difference was at the core of Mr. Goforth's appeal being allowed. As to Mr. Goforth's appeal, first, the majority could not be satisfied that the trial judge, in charging the jury concerning the application of the modified objective standard test for determining mens rea in penal negligence cases, had not failed to adequately impart to the jury that, if the evidence raised a reasonable doubt that Mr. Goforth, in the circumstances presented to him, in particular that Ms. Goforth was taking care of the food, liquids, and health needs of the girls, reasonably and honestly believed he was not neglecting the legal duty required of him, he had not acted unlawfully as required to prove the offences. In the circumstances he was unable to act in conformity with the required standard of care because he honestly and reasonably believed that he had met that standard. The majority agreed with the dissenting judge that personal characteristics of an accused, such as intelligence, education, experience, and beliefs about child rearing, have no application in determining the objective mental intent element of s. 215. The majority found that the trial judge's charge on the mental intent element erroneously directed the jury's attention to the uncontested elements of the actus reus, such as the physical condition of the girls, but failed to direct the jury as to how the household arrangements and the delegation of duty of care by Mr. Goforth to Ms. Goforth may have prevented him from reasonably and honestly appreciating that he was failing to meet his legal duty towards the girls. Secondly, the majority found that there was a reasonable possibility the trial judge's jury charge, which conflated the less onerous foreseeability requirement of manslaughter and unlawfully causing bodily harm, being that on an objective basis the bodily harm must be foreseen to be more than trivial or transitory, with the more onerous foreseeability requirement of s. 215, which requires the foreseeability of endangerment to the life or the permanent health of the child. The trial judge repeated this error ten times in her charge. As a result, the majority held the jury may have been confused concerning the foreseeability requirement of s. 215, in such a way that the path to conviction to be considered by the jury would have been less steep than it should have been. Lastly, the majority was of the view that the trial judge failed to adequately explain to the jury the essential concept of marked departure from the standard of care of a reasonable parent.

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Saskatoon (City) v The Canadian Nationalist Party Inc., 2021 SKCA 22

Jackson Tholl Kalmakoff, February 9, 2021 (CA21022)

Civil Procedure - Appeal - Interlocutory or Final Decision
Civil Procedure - Appeal - Leave to Appeal - Nunc Pro Tunc
Civil Procedure - Queen's Bench Rules, Rule 2-34

The respondent, the City of Saskatoon, applied pursuant to Court of Appeal rule 48.1 to quash the appellant's appeal. The appellant, a political party styled as the Canadian Nationalist Party (CNP), commenced an action in Queen's Bench against the respondent because it had denied its requests to use space in Saskatoon City Hall for electoral purposes. It claimed damages under the Charter of Rights and a declaration that the respondent had infringed its ability to compete in the 2016 federal election. The appellant was represented by Mr. Patron, its sole director, who was not a lawyer. The respondent had obtained an order from a Queen's Bench judge under Queen's Bench rule 2-34(2) directing the appellant to have legal counsel and to take no further steps in the proceedings except through a lawyer. His reasons were that the training and expertise of a lawyer were required due to the complexity of the Charter feature of the action and to avoid lengthening the proceedings (unreported, QBG 220/20, JCS, Dec10/20). The appellant then filed a notice of appeal and sought an order that Patron be granted leave to represent it. The grounds for the respondent's application to quash the appeal were that the chambers decision was interlocutory, the appellant had failed to obtain leave to appeal, and that in the circumstances, leave should not be granted nunc pro tunc.
HELD: The respondent's application was granted and the appeal was quashed. The court found that the chamber judge's decision was interlocutory as it was a procedural order and therefore leave to appeal was required under s. 8 of The Court of Appeal Act, 2000. It would not grant leave nunc pro tunc because under the first Rothmans (2002 SKCA 119) test regarding merit, the appeal was prima facie destined to fail on the basis that the chambers judge was exercising his discretion when he made the order pursuant to Queen's Bench rule 2-34(2). Therefore, his decision was subject to the standard of review of deference. The judge had not misapprehended or failed to consider relevant evidence or made a palpable or overriding error of fact and, consequently, the appellant had failed to clear the first test set out in Rothmans and leave nunc pro tunc could not be granted.

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C.H. v S.F., 2021 SKCA 24

Caldwell Schwann Leurer, February 10, 2021 (CA21024)

Administrative Law - Procedural Fairness - Breach of Duty - Appeal
Civil Procedure - Court of Appeal Rules, Rule 59

The appellant appealed from the decision of a Queen's Bench judge that granted the respondent's application for an order giving him sole interim custody of the parties' two children, thereby altering the previous interim parenting arrangement of joint custody in place since 2010. The judge provided no reasons for his decision and the order issued the next day. Neither the appellant nor her counsel attended the hearing by telephone as planned. Her counsel had been served two days before the scheduled hearing with an affidavit sworn by the respondent that contained objectionable material. As there was no time to file a notice of objection, the appellant's counsel sent a letter by fax to the local registrar, confirming her understanding that the matter would be heard in chambers the next day and providing telephone numbers where she and the appellant could be reached, and advised that the judge should be informed that she had significant concerns with the affidavit. She asked the registrar to provide the letter to the chambers judge. Just prior to the hearing, the lawyer sent an email to the respondent's counsel seeking an adjournment to deal with the new matters and to permit her to file a notice of objection. The respondent's counsel agreed to the adjournment. However, the matter was not adjourned. After the hearing, the respondent's counsel advised the appellant's counsel that she told the judge that the appellant wanted an adjournment, but her client opposed it and the judge proceeded because he did not agree with an adjournment. The appellant's counsel then investigated why she had not been telephoned by the court to advise her when the hearing started, and found that it was because the court had changed its practice to notify counsel or parties by email. She then discovered that the email was in her junk mail folder, so she had not seen it. She immediately contacted the registrar's office, describing what had happened and requesting that the matter be reopened. She was informed that the judge would not reopen it, as the order had issued. The appellant appealed on the grounds that she had been denied procedural fairness because the judge proceeded in her absence and that of her counsel and he had erred by failing to provide reasons and by failing to reopen the matter when he learned that she wished to make representations. Preliminary to the appeal, she also applied to introduce two affidavits as evidence in it. The first was sworn by her and spoke to the circumstances explaining why neither she nor her counsel appeared at the chambers hearing. The remainder of it, and the second affidavit sworn by a friend, related to parenting issues.
HELD: The appeal was granted and the matter remitted to the Court of Queen's Bench for a re-hearing. The

application to adduce new evidence was allowed in part and only the portions relating to the non-appearance of the appellant and her counsel were admitted, having met the four factors test set out in Maitland v Drozda (1983 CanLII 2050), etc. The court found that in this case, the exceptional circumstances required that the chambers judge reconsider the order he had made in the absence of the appellant and her counsel. It was necessary to set the order aside because the serious interests at stake in the applications before the chambers judge demanded that the appellant be heard in the interests of fairness. The judge's failure to provide any reasons constituted a second and independent breach of the duty of fairness.

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Tatum v JS Martell Enterprises Inc., 2021 SKCA 25

Caldwell Schwann Leurer, February 17, 2021 (CA21025)

Civil Procedure - Default Judgment - Application to Set Aside - Appeal

The appellant appealed the decision of a Queen's Bench chambers judge to dismiss his application to set aside a 2010 default judgment pursuant to Queen's Bench rule 10-13. The chambers judge had granted the respondent's application to renew the default judgment for an additional 10 years. The chambers judge found that the appellant had failed to satisfy the second and fourth steps set out in Brent Gedak Welding (2019 SKQB 243). The appellant argued that the chambers judge had erred in finding that he had not provided a satisfactory explanation for failing to respond to the statement of claim in 2010 and in finding that the respondent would suffer serious prejudice if the default judgment were set aside. He pled that had been addicted to Oxycodone at the relevant time, but the chambers judge found this did not provide a satisfactory explanation for failing to deal with the respondent's claim. The chambers judge also found that opening up the default judgment would cause great prejudice to the respondent, as both principals of the respondent corporation had died since it issued. The current principal of the respondent did not have the ability to adduce evidence to respond to the appellant's proposed defences.
HELD: The appeal was dismissed. The standard of review for the chambers judge's exercise of his discretion is one of deference subject to limited exceptions, and the court found that the judge had not committed any of the errors falling within those exceptions. The appellant had not persuaded it that the chambers judge erred in any way that would have undermined his findings that the appellant failed to provide a satisfactory explanation as to why he had not defended the action and more importantly, that he had given too much weight to the question of prejudice caused to the respondent.

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R v Mehari, 2021 SKCA 26

Whitmore Leurer Kalmakoff, February 19, 2021 (CA21022)

Criminal Law - Conviction - Appeal - Reconsideration of Grounds
Criminal Law - Evidence - Uneven Scrutiny - Appeal to Supreme Court

A majority decision was rendered by the Court of Appeal in 2020 allowing the appellant's appeal on the ground that the trial judge had erred by applying greater scrutiny to his evidence than he had to the complainant's. The appellant's other grounds were consequently not addressed. In his dissenting opinion, Leurer J.A. dismissed the appeal on all of the appellant's grounds (see: 2020 SKCA 37). On appeal of this decision, the Supreme Court found that the trial judge had not erred and remitted the matter to the Court of Appeal to decide the grounds of appeal that had not been addressed (see: 2020 SCC 40). Consequently, the court invited the parties to provide further written submissions and received a submission only from the appellant. HELD: The appeal was dismissed. The court found with respect to the grounds of appeal remitted to it that it was not persuaded by either the appellant's original arguments or his supplemental submissions for the reasons given in the dissenting opinion.

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Moore v Hurst, 2021 SKCA 27

Ottenbreit Caldwell Schwann, February 18, 2021 (CA21027)

Statutes - Interpretation - Public Employees Pension Plan Act, Section 25

The appellant appealed the decision of a Queen's Bench chambers judge and his subsequent order directing the Public Employees Pension Board to determine the value of the respondent's share of the appellant's pension for the purposes of carrying out the division of it under The Family Property Act. The parties had entered into an interspousal agreement in 1999 when their marriage ended, agreeing that they would share the appellant's pension equally pursuant to the rules and regulations of the pension plan. The appellant failed to provide the

agreement to the predecessor of the board at the time of separation. When the respondent learned of the appellant's retirement in 2017, she provided a copy of the agreement to the board and sought her share of the pension. The board valued her share at a value much higher than it had had in 1999 due to investment growth. The appellant contested the valuation and asked the board to conduct an audit and recalculate the respondent's share. The board did so but maintained its original valuation. It notified the appellant that he had 30 days to object under ss. 24 and 25 of The Public Employees Pension Plan Act (PEPPA). The appellant did not object nor seek judicial review of the board's decision but filed an originating application pursuant to s. 25(5) of PEPPA and Queen's Bench rule 3-49(1)(d)(i). At the chambers hearing, the judge interpreted s. 25(5) of PEPPA as granting only the board the right to seek directions from the court, but since no objection had been made to the appellant's initiation of the application, he would consider it. He found that the application was properly made under s. 25 and he was authorized by the provision to make the above-mentioned order. HELD: The court found that the order issued was a nullity and employed its inherent jurisdiction to set it aside. The board's decision stood. It found that that the chambers judge had erred in his decision regarding jurisdiction to hear the application. Pursuant to s. 6 of PEPPA, the decisions of the board are final, although subject to judicial review. The appellant had not sought such relief. As the Court of Queen's Bench lacked jurisdiction, so did the Court of Appeal under s. 10 of The Court of Appeal Act, 2000 (CAA). Under s. 7(2) of the CAA, only the board has a statutory right to seek direction from the Court of Queen's Bench under s. 25(5) of PEPPA.

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Smith Building and Development Ltd. v Wynward Insurance Group, 2021 SKQB 25

Megaw, January 28, 2021 (QB21024)

Civil Procedure - Queen's Bench Rules, Rule 9-25

The defendant, an insurance company, applied pursuant to Queen's Bench rule 9-25 to reopen the trial of the action to introduce a replacement cost endorsement form as an exhibit. The plaintiff opposed the application on the bases that the defendant failed to satisfy the test to permit such reopening and that the document was not relevant to the insurance policy at issue. The defendant's grounds for making the application to reopen and to mark as an exhibit a document identified as "replacement cost endorsement form" was that the intention of the parties with respect to the exhibit, the policy of insurance, had been to enter the entire insurance policy. The proposed form was part of the insurance contract under The Insurance Act. The form related to how the

defendant treated replacement cost issues, specifically, rebuilding by the insured. The plaintiff had advanced a claim for replacement cost coverage and the insurance policy did not provide for such coverage. It relied on the contents of the original application for insurance together with certain documentation prepared by the defendant to argue that it was entitled to that coverage and specifically relied upon s. 8-10 of the Act. The document had been in the possession of the defendant's counsel before the commencement of the trial but had not been seen by counsel for the plaintiff until the time of this application. Defendant's counsel noted that s. 8-10 of the Act had not been pleaded by the plaintiff, and he had not been previously aware of this provision of the act. As a result, the defendant sought to put into evidence what its replacement cost insurance would be if it were compelled to provide it. Its counsel acknowledged that it was a tactical decision on his part not to put the form to the defendant's principal officer when he testified at trial.
HELD: The application was dismissed. The court applied the two-part test for reopening trial set out in Scott v Cook (1970 CanLII 331) to determine that: 1) the proposed evidence, if presented at trial, would not change the result. The form was not part of the policy and could not now affect the issue of coverage. It was never disclosed and not part of any of the other papers presented at trial; and 2) the evidence had been available to the defendant and its counsel, but counsel chose not to use it for tactical reasons. Although counsel was unaware of s. 8-10 of the Act, the replacement cost coverage was the central issue before and during trial. Therefore, the terms of the endorsement form would have been relevant to the insurer's assertions both of a lack of replacement coverage or a limit on the availability of replacement coverage.

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R.Y.H. v Y. Ltd., 2021 SKQB 28

Danyliuk, February 1, 2021 (QB21037)

Torts - Sexual Assault - Damages

The plaintiff brought an action against the defendants for damages arising from a sexual assault. The personal defendant, L.E.Y., was the employee of the corporate defendant. They filed a statement of defence but it had been struck and they were noted for default. The plaintiff then applied for assessment of her claim for general, aggravated, special, and punitive damages and loss of past and future income. The defendants were notified but they did not participate in the application. In 2014, the plaintiff had travelled from Saskatoon to northern Saskatchewan by bus but she had to take the last leg of the journey in the defendants' truck as the sole passenger because the bus company had sub-contracted the most northerly portion to the defendants. During

the trip, L.E.Y. sexually assaulted the plaintiff. She resisted but could not flee as she was recovering from knee surgery. Eventually L.E.Y. ceased his sexual assault and told the plaintiff she was "lucky" because he would reimburse her for the bus fare. After she reported the assault to the RCMP, L.E.Y. was charged with, and pled guilty to, sexual assault. The plaintiff was 50 years old at the time of the offence and suffered consequences from its commission, described by her as major depressive disorder (MDD), post-traumatic stress disorder (PTSD), anxiety, insomnia, suicidal ideation, fear and humiliation. She reported that after the offence, her seven-year relationship with her partner had ended and her relationships with romantic partners, family and friends had been damaged. She was prescribed medication to deal with anxiety and depression. The evidence submitted by the plaintiff consisted of two notes from her psychiatrist describing the plaintiff as suffering from MDD, PTSD and chronic pain and as at 2020, she continued to have trouble sleeping, and experienced nightmares and semi-regular crying spells. The plaintiff submitted a claim for $203,000 for loss of past and future income based upon data from the Saskatchewan Detailed Occupational Outlook 2019-2023 regarding the income of taxi drivers. The plaintiff had worked on a casual basis as a taxi-driver in the past but was unemployed at the time of the offence due to her knee problem. She advised that she was no longer capable of returning to that work due to her fear of men and psychological problems. Her counsel was unable to obtain any further evidence on this point.

HELD: The court awarded the plaintiff approximately $126,900 in damages, pre-judgment interest and costs calculated under Column I. The defendants were jointly and severally liable as the corporate defendant was held vicariously liable for L.E.Y.'s acts. The court noted that in Saskatchewan, the focus in sexual assault cases is on the effects on the victim and not the severity of the sexual assault itself. It found that the plaintiff had established her entitlement to damages for non-pecuniary loss and assessed the quantum based on the principles set out in ABC v XYZ (2020 SKQB 190), following Nova Scotia v B.M.G. (2007 NSCA 120), which in turn listed the factors considered by the Supreme Court in Blackwater (2005 SCC 58). L.E.Y. breached his position of trust and committed the offence in a remote location where help was unavailable and the plaintiff was vulnerable. The assault was singular but violent and included a physical assault. The vulnerability of the plaintiff was heightened by L.E.Y.'s committing it in a remote location. The defendant was a 60-year-old man who held a position of trust, and that he breached it was a factor in this case; and the consequences to the victim were marked and lasting. In determining quantum related to each head of damage, it found in favour of awards of: $100,000 for general and aggravated damages; $1,483 for special damages; and $25,000 for punitive damages, because of the element of breach of trust and taking advantage of the plaintiff. The callous remark made by L.E.Y. was also considered in the award. The plaintiff's claim for present and future loss of income was not allowed as there was no evidence submitted to allow the court to assess it.

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Yashcheshen v Allergan Inc., 2021 SKQB 33

Tochor, February 3, 2021 (QB21028)

Civil Procedure - Queen's Bench Rules, Rule 1-3, Rule 7-9, Rule 11-28

The self-represented plaintiff made a without notice application to seek leave to file a statement of claim against a pharmaceutical corporation, two physicians and a regional health authority. Her application was required because she had been declared a vexatious litigant pursuant to Queen's Bench rule 11-28 (see: 2020 SKQB 160). The issues were: 1) what was the legal test to decide if a vexatious litigant should be granted leave to commence a proceeding? Neither the Saskatchewan's Queen's Bench Rules (QBR) nor any of the province's enactments set out a legal test. Further, Queen's Bench rule 11-28(1) does not set out what procedure must be followed; and 2) whether leave should be granted in this case.
HELD: The application for leave to commence was dismissed. The court reviewed the background to vexatious litigation provisions and those jurisdictions that provide a test for determining whether leave should be granted and selected the two-part test set out in s. 40(3) of the Federal Courts Act (FCA), which states: "the court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding." It found with respect to each issue that: 1) the FCA test was compatible with the core concepts expressed in the QBR, including their purpose under rule 1-3 and, specifically, rule 7-9(2)(a)(b) and (e) governing applications to strike pleadings on the basis that they disclose no reasonable cause of action, are scandalous, frivolous or vexatious; or are otherwise an abuse of process, respectively. Rule 7-9 provides guidance in this type of application. As the order made against the plaintiff under Queen's Bench rule 11-28 did not impose terms and conditions on the plaintiff for seeking leave or what requirements to meet, the court would not impose any further steps upon her before seeking leave; and 2) the pleadings were examined in light of Queen's Bench rule 11-28 taking into account the latitude to be extended to a self-represented party as described in Harpold v Saskatchewan (Corrections and Policing), 2020 SKCA 98, but within the "within reason" limits set out in Robin Hood, Thirsk and Reisinger. Applying the tests, it determined that the plaintiff's proposed claims against: 1) the pharmaceutical company did not meet either part of the FCA test; 2) the two physicians had not met the first part of the FCA test; and 3) the Health Authority had not met either part of the FCA test.

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Director under The Seizure of Criminal Property Act, 2009 v Lariviere, 2021 SKQB 35

Mitchell, February 4, 2021 (QB21030)

Forfeiture - Seizure of Criminal Property

The Director appointed pursuant to the The Seizure of Criminal Property Act, 2009 (the Act) applied for forfeiture of cash and a 2008 Dodge Nitro motor vehicle (Dodge) to Her Majesty the Queen in Right of Saskatchewan, which the Director claimed were proceeds of unlawful activity, as well as instruments used, or likely or intended to be used, in unlawful activity, resulting in the acquisition of other such proceeds. The terms "proceeds," "instrument" and "unlawful activity" were defined in s. 2, the interpretation section of the Act, and in s. 7. The application judge was to determine whether the Director on a balance of probabilities had proven through the filed affidavits that the respondents had obtained the cash through unlawful activity and used the Dodge as an instrument in furtherance of that criminal activity, and, if so, whether forfeiture of the proceeds would not be in "the interests of justice" (s. 7 of the Act). In this particular case, a Traffic Safety Act stop was made of the Dodge, which was registered to the male passenger (Lariviere). The female operator (Moss) was found by the peace officer to have been placed on release conditions for trafficking charges, which required her to submit to searches of any vehicles in which she was located, and a search of her person. The vehicle search resulted in the seizure of $2,280.00 in a large bundle of primarily $20.00 bills, cell phones and numerous firearms and other weapons, various controlled drugs such as marijuana, cocaine and heroin, and packaging for the trafficking of drugs. Lariviere was searched and found on him were cash in the amount of about $1,000.00, mostly in $20.00 bills, and small amounts of methamphetamine and cocaine, and white powder on a cell phone. A search by warrant was conducted of the house Moss and Lariviere shared. Located there were functioning digital scales, notes with names and addresses, a handheld taser, and a box of 40 caliber bullets with 18 shells in the box. At the time of the application, trafficking charges against Lariviere which arose from the search and seizure were stayed. Lariviere and Moss's evidence was that the cash on him was payment for welding work, and other cash had been gathered from the house, which he and Moss were required to vacate due to a pest infestation. His evidence about the Dodge was that it was bought from money from an estate, and it had been given to an acquaintance who must have used it for illegal activity, and that as to the marijuana, it was for medical purposes, for which he had a medical authorization card.
HELD: The director's application for forfeiture of the cash and the Dodge was allowed. First, the presence of the cash, largely $20.00 bills, the drugs and firearms, both on Lariviere, in the Dodge, and the items seized from the house, created a strong suspicion that the cash was proceeds of drug trafficking and that the Dodge had been used to sell the drugs which resulted in the obtaining of the cash. Once the Crown had presented strong circumstantial evidence related to the proof requirements of the Act, the respondents were then to present credible evidence in rebuttal, which the respondents failed to do. Their affidavits offered only bald

assertions without any corroborating evidence such as receipts and other documentary evidence, which would have been easy to provide if they existed. The application judge also found that the stay of Lariviere's trafficking charges was of no consequence since no proof had been presented by Lariviere that the charges were stayed for reasons which might have bearing on the application. As to the final determination, that forfeiture of the cash and the Dodge was in the interests of justice, the application judge referenced Mihalyko (Re), 2012 SKCA 44, in which the Court of Appeal decided that the term "interests of justice" was to be interpreted as requiring proof from the respondent Lariviere that forfeiture would have a "manifestly harsh and inequitable result" to him. He presented no such evidence.

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R v Bird, 2021 SKQB 36

Elson, February 4, 2021 (QB21031)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Jury Trial - Sentencing
Criminal Law - Sentencing - Aboriginal Offenders

The sentencing judge was required to sentence an Indigenous offender convicted of sexual assault at the conclusion of a jury trial. As with any jury trial, he did not, therefore, have the benefit of formulated findings of fact relevant to fashioning a just and fair sentence. As such, the court turned to the legislated assistance provided by s.724 Criminal Code, and the case authorities, Ferguson and Brown, to guide the fact-finding process. Under s. 724(2), the sentencing judge "must accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" and may, in addition, find any other "relevant fact that was disclosed by the evidence at trial to be proven, or may hear evidence presented by either party with respect to that fact." From these proven facts, the sentencing judge must then accept all implications both express or implied capable of being drawn from them. Where the factual implications to be drawn are ambiguous, the sentencing judge must independently determine the relevant facts, and such facts are deemed to be proven. By s. 742(3), the sentencing judge cannot consider an aggravating factor which the evidence at trial cannot support beyond a reasonable doubt. As to all other relevant facts, the court must be satisfied of their proof on a balance of probabilities. In this case, the sentencing judge was able to find, based primarily on video clips tendered in evidence, that the offender had touched the complainant in a sexual manner; that she did not consent to the touching; and that the offender knew she did not consent, but the evidence left the judge in doubt about the

nature or the extent of the sexual touching. The complainant had no recollection of what she had been subjected to at the hands of the offender, due to being unconscious from the consumption of alcohol. The offence was committed in the parking lot next to the Northern Lights Casino, which was equipped with security cameras capable of surveying the parking lot and the adjacent street. The street was busy, with both vehicular and pedestrian traffic. In the video clips, the jury would have observed, at various points in time, the offender touching the non-responsive complainant in her crotch area more than once; pulling her clothing to her ankles, so she was naked from the waist down; her legs being spread; the offender pulling down his own trousers and lying on top of the complainant; and the offender trying to pull his and her clothing back up when a pedestrian stopped at the scene.

HELD: The offender was sentenced to 32 months' imprisonment, a DNA order, firearms prohibitions and a SOIRA order for life. The sentencing judge turned to the purpose and principles of sentencing contained in ss. 718 to 718.2 of the Criminal Code, and determined that denunciation and deterrence were of primary importance in determining sentence in the case. He was mindful of the fundamental principles of proportionality, and parity, that sentences should be increased for aggravating factors and decreased for mitigating factors, and the principle that all available sanctions other than imprisonment should be considered, with particular attention given to the circumstances of Aboriginal offenders. A PSR had been filed to assist the court, which contained risk assessments, as well as his extensive criminal record, which included a prior sexual assault. No victim impact statement had been filed. Though the court could not find beyond a reasonable doubt from the video evidence that the offender had penetrated the victim, he did find a serious infringement of her bodily integrity, while unconsciously exposed and in full view of persons using the busy street and sidewalk. The sentencing judge had observed the victim's expressions of humiliation at trial when she viewed the video evidence. The PSR revealed an offender who resisted dealing with his offending risks, especially his alcohol abuse, and who expressed no remorse for his actions, continuing to deny his guilt after the presentation of the evidence and the guilty finding of the jury. Risk assessments showed that he was at a very high risk for general recidivism and for sexual offending. As to the Gladue factors, and the cases following Gladue, including Ipeelee, Chanalquay, Slippery and Delorme, the court recognized that the offender was an Indigenous person and a member of the Montreal Lake Cree Nation who would have suffered from "generational factors" as a result, though these were not strongly demonstrative in his case, and could not "overwhelm" the need to impose a significant term of imprisonment in order to emphasize the principles of general and specific deterrence. After a consideration of cases with similar facts to the one before him, including Cappo, Kasokeo, Sawchuk and Nippi, the sentencing judge saw fit to impose the 32-month sentence of imprisonment.

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Smuk v Regina (City), 2021 SKQB 37

Robertson, February 4, 2021 (QB21032)

Judicial Independence - Apprehension of Bias

The City of Regina (City) had denied the appellant's application for access to records in the possession of the City. At this stage, a two-part appeal pursuant to The Local Authority Freedom of Information and Protection of Privacy Act, SS 1990-91, c L-27.1, was paused in order for the judge on the appeal to consider his ethical position upon the appellant indicating on the record that "he was not sure how comfortable he was with someone who had worked as a lawyer for the City hearing this appeal." The appeal judge had been a lawyer for the City, which included time as City Solicitor, but had left his employment with the City in 2008.
HELD: The appeal judge chose not to recuse himself from the appeal, basing his decision on principles contained in the current version of Ethical Principles for Judges (Ethical Principles), published by the Canadian Judicial Council. Overriding all is the need to preserve the confidence of the public in the judicial system and in the integrity of the decision-making process of the judiciary. He concluded that the independence of the judiciary was not to be compromised, and so only the judge can decide for himself or herself whether he or she is in a conflict of interest, or whether the circumstances would raise an apprehension of bias in "a reasonable, fair minded and informed person." The decision to recuse must be weighed against considerations of accountability, such as burdening colleagues with extra work, and the added expense and time to the public arising from withdrawal by a presiding judge. Also, the judge must be vigilant that a request by counsel for a judge to recuse himself or herself is not a delay tactic or "judge shopping" as discussed in Patel v Saskatchewan (Health Authority), 2020 SKQB 194. The presumption of impartiality of a judge resulting from his or her oath of office can only be set aside when there is cogent evidence raising a real likelihood of bias in the case at hand (Ayers v Miller, 2019 SKCA 2; Aalbers v Aalbers, 2013 SKCA 64). Suspicion is insufficient. The judge in this case had no recollection of having had any involvement with the appellant, nor of any confidential information relevant to the matter at hand, and the parties were not aware of having dealt with the judge during his time as solicitor with the City. Ethical Principles also recognized that the longer the interval of time between the judge's prior position and being the sitting judge in a matter, the less likely, if he or she had confidential information, would he or she be able to put it to use for or against a party, thus reducing any real conflict of interest or apprehension of bias. In this case, more than ten years had passed.

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R v Cantre, 2021 SKQB 39

Hildebrandt, February 5, 2021 (QB21039)

Criminal Law - Sentencing - Negligence Causing Bodily Harm
Criminal Law - Aboriginal Offender - Sentencing

The accused was convicted after trial by judge of criminal negligence and causing bodily harm to a victim by shooting him with a loaded firearm contrary to s. 221 of the Criminal Code (see: 2020 SKQB 309). The offence was committed while the accused and the victim were both hunting. The trial judge found that the accused had shot the victim even as he waved his arms and shouted multiple times: "don't shoot." The accused made an intended hurried shot in low light, which involved a substantial marked departure from the care required and a wanton and reckless disregard for the lives and safety of others. The victim's injury was serious and required surgery and in their victim impact statements, he and his wife described his ongoing pain and disability and his suicidal ideation. The accused did not stop to help the victim nor did he inform anyone to seek medical assistance for the victim. He lied to the police during the investigation and during his trial. In the Pre-Sentence Report (PSR), the author noted that the accused did not take responsibility for the offence. Because the accused was a member of the Makwa Sahgaiehcan First Nation, the author addressed the Gladue factors present in his life. His parents separated when he was five and he went into foster care with his siblings. They all suffered emotional, physical and sexual abuse in the foster homes. When he was eight, he was returned to his mother's custody and experienced poverty and discrimination. The accused's life worsened when he was sent to a residential school in grade 10. His mother died when he was in grade 12 and he then moved back to the community where he was born and had remained there since. At the time of the offence, he was 42. His criminal record involved assault convictions between 1993 and 1996. He gained accreditation in mental health and addictions services as well as in trades. He was active in Aboriginal cultural practices, helped his community and gave instruction in hunter safety and traditional hunting practices. The accused had been employed for all of his adult life. He and his spouse had been together for 20 years. The Crown submitted that this case was a unique situation and that the accused should be sentenced to either two to three years' or four to five years' incarceration depending upon the court's view of when the accused saw the victim before the shot was taken. The defence argued that an appropriate sentence in recognition of the principle of parity would be a fine and a minimal period of imprisonment but acknowledged that a conditional sentence was not an option pursuant to s. 742.1(e) of the Criminal Code.
HELD: The accused was sentenced to imprisonment for two years and six months. The court found that the accused had seen the victim before he shot him. It took into account the principles of denunciation and

deterrence in constructing the sentence and noted that although the aggravating factors were significant, the accused's cultural history, personal background and circumstances must be considered as well as how he had improved himself and helped his community. The court regarded the aggravating factors as including that the accused had: failed to take reasonable precautions while hunting, especially in light of his expertise and that did not believe he was shooting prey; not stopped to help the victim nor reported the accident; and not expressed any remorse. The mitigating factors considered were that the accused had demonstrated stability in his life and family relationships, having overcome the challenges of his childhood. Although he required programming for substance abuse, the accused might benefit from counselling to address any underlying issues that may have contributed to his conduct.

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Eaton v University of Regina, 2021 SKQB 40

McCreary, February 8, 2021 (QB21034)

Statutes - Interpretation - Local Authority Freedom of Information and Protection of Privacy Act

The applicant, a professor employed by the respondent University of Regina (U of R), appealed to the Court of Queen's Bench from the U of R's decision to decline to follow the recommendations made by the Saskatchewan Information and Privacy Commissioner regarding the access to information request she had made to the U of R pursuant to s. 6 of The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIP) for information respecting fossil fuel research conducted between 2006 and 2017. Upon receipt of the applicant's initial request, the U of R generated a spreadsheet of potentially relevant research projects and informed her that only after it had reviewed of the files would it decide what information to disclose or whether there were exemptions pursuant to LAFOIP. It limited its disclosure to the titles of the projects and the amount of funding each received, again subject to any other applicable exemption. The Privacy Commissioner's report, issued after the applicant had appealed the U of R's decision to it, made various recommendations including that the U of R regard its spreadsheet as its response to the applicant's request and that it release the names of funding agencies and the units that received funding. The U of R declined to provide that information and maintained that the identity of the funder of the academic research (identity information) and the department that received the funding were to be exempted under s. 17(3) of LAFOIP as they were "details of academic research." The court determined, in a preliminary decision, that the appeal would proceed after it had reviewed a sealed copy of the spreadsheet (see: 2019 SKQB 127). On the appeal

proper, the issues were: 1) what was the standard of review and who bears the onus; 2) whether the identity information constituted "details of academic research" so as to exempt U of R from disclosure pursuant to s. 17(3) of LAFOIP; and 3) if so, whether the U of R had reasonably exercised its discretion in refusing to disclose the identity information under that section.
HELD: The application was granted. The respondent was not entitled to refuse to disclose the identity information under the discretionary class of exemption claimed by it as a "detail of academic research" under s. 17(3) of LAFOIP. The court found that the applicant's request for identity information and units in receipt of funding did not fall within the class exemption. As it was possible that such information might be protected from disclosure by other exemptions under LAFOIP and because the form of the spreadsheet had not provided complete information, it was not appropriate to order that it be disclosed at this point. The U of R must therefore demonstrate on specific evidence why an enumerated exemption applied to identity information for a specific research file, failing which, it must disclose it. It found with respect to each issue that: 1) the appeal was a hearing de novo under s. 47(1) of LAFOIP and it was not required to give deference to the Commissioner's recommendation, nor to the U of R's decision to deny portions of the applicant's request. Because there is a presumption that the records should be disclosed under ss. 5.1 and 51 of LAFOIP, the U of R had the burden to establish that the records should not be disclosed; 2) the identity information did not constitute "details of academic research" under s. 17(3) of LAFOIP. After applying the principles of statutory interpretation in accordance with Rizzo, it determined that the purpose of the legislation is to promote openness, transparency and accountability in public institutions such as the U of R and the purpose of s. 17(3) is to protect academic freedom and foster competitiveness, but the exemption it provides must be interpreted in a limited, specific way. The ordinary meaning of "details" suggests that a specific and pointed connection should exist between the record requested and the academic research such that disclosure of the former would disclose, directly or indirectly, the particulars of a research project. Other concerns raised by the U of R regarding specific harm that might be caused by disclosure of identity information and possible threat to academic freedom were rejected; and 3) it was unnecessary to consider this issue given the previous finding.

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Leier v Probe, 2021 SKQB 41

Klatt, February 8, 2021 (QB21035)

Wills and Estates - Fiduciary Duty to Administer
Wills and Estates - Removal of Executors

The applicant (Christopher), the son of the deceased (Margaret), who had died testate, applied to the court to have the respondent (Barrie), the executor of the estate, removed as executor. Prior to becoming executor, Barrie had been Margaret's attorney pursuant to an Enduring Power of Attorney dated April 19, 2013 (POA) until Margaret's death on July 8, 2019 from complications of dementia. She had been residing with Barrie in Regina since September, 2013. Christopher retained counsel for the purpose of obtaining a proper accounting of Barrie's management of his mother's assets while he was her sole attorney. Initially, Barrie ignored the lawyer's requests for disclosure of the relevant records; but once the Public Trustee approached him, he provided limited records. Christopher was required to obtain a court order compelling production of all relevant records and a complete accounting of Barrie's administration of the POA. Barrie supplied some further incomplete records and a ledger which he claimed fully itemized his handling of the assets. Upon reviewing the materials provided, Christopher believed that Barrie had mismanaged Margaret's money and assets. In particular, Barrie had loaned money belonging to Margaret to his daughter for her to purchase a house. He then sold that house to buy a rental property, which he transferred to Margaret when the rental property failed to sell, compensating himself $170,000.00 for the transfer, though the rental property was appraised at $110,000.00 at the time of the transfer to Margaret. He could not explain his higher valuation of the property. Barrie made a large number of debit transactions out of Margaret's accounts by way of withdrawals, cheques and credit card purchases. The total of these transactions during his administration of the POA was $1,358,000. Barrie had failed to prove that many of these transactions had been in Margaret's best interests. As to the administration of the estate after Margaret died, Barrie had unilaterally withheld a specific bequest to one of Margaret's beneficiaries for reasons unrelated to the estate administration.
HELD: Invoking the court's inherent jurisdiction to supervise estate matters, the hearing judge ordered that Barrie be removed as executor. Applying the principles set out in Figley and Sinclair, she concluded that Barrie had neglected his fiduciary duties as attorney for Margaret under the POA by demonstrating a failure of honesty, capacity, and fidelity. He had not acted in Margaret's best interests. As an example, he had placed himself in a conflict of interest by loaning money to his daughter from Margaret's assets. Though Barrie's lack of fidelity related to his role as attorney under the POA, the hearing judge had no confidence that his lack of honesty, capacity, and fidelity would not continue with his management of the estate, and so was required to remove him as executor.

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Williams v Elite Property Management Ltd., 2021 SKQB 46

Danyliuk, February 17, 2021 (QB21044)

Interpretation - Residential Tenancies Act, 2006, Section 70(6)

The appellant, a tenant in one of the respondent's buildings, appealed from the decision of a hearing officer of the Office of Residential Tenancies (ORT) to grant an order for possession of the appellant's rental unit based on late payment of rent (see: 2020 SKORT 2568). The appellant had resided in the unit since 2011 and was frequently late with her rent. She received social assistance and, at the hearing before the officer, advised that her late payments were caused by the time it took the Ministry of Social Services to send her social assistance cheque. In the past, the appellant had successfully appealed the granting of an order for possession based on rent arrears for the same reason (see: 2012 SKQB 215). In this case, the hearing officer decided that the appellant's difficulties with the Ministry regarding her assistance payments was not germane to the issue of her obligation to pay her rent when due, and as it had been in arrears for more than 15 days when the appellant had been served with the notice of eviction, the order for possession should be granted. The officer noted that the appellant had paid the rent in full since receiving the notice of eviction. The issues on appeal were: 1) the appropriate standard of review; and 2) whether the hearing officer erred in law by failing to consider s. 70(6) of The Residential Tenancies Act (RTA) in reaching his decision, and in particular, what was "just and equitable" in the circumstances. The appellant's counsel filed her affidavit on the appeal to provide additional facts. He argued that the law on filing affidavits pertaining to judicial review in general ought to be applied to RTA appeals.

HELD: The appeal was allowed. The hearing officer's decision and the order for possession were quashed and matter remitted back to the ORT for a new hearing before a different hearing officer. Evidence should be presented regarding the appellant's difficulties with the Ministry to provide the necessary context to determine whether granting an order for possession would be just and reasonable. Preliminary to its decision, the court stated that as a general rule, it was not inclined to allow affidavits to be filed on RTA appeals, because they are appeals on the record. The facts on the record were sufficient in this case for it to deal with the issue. Further, a judicial review and an RTA appeal were distinguishable. It found with respect to each issue that: 1) an appeal under s. 72(1) of the RTA was subject to the appellate standard of review; and 2) the hearing officer erred in law when he failed to exercise his discretion under s. 70(6) of the RTA by not considering whether the order he granted was just and equitable in all of the circumstances. He did not interpret the RTA fully or meaningfully by adopting such a narrow approach to the matter, especially when the same issue had been litigated by the same parties in 2012 and the plaintiff had been successful. It had been demonstrated that she had had problems with her social assistance payments but that she always paid her rent in full.

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Francis (Rural Municipality) v Helfrick, 2021 SKQB 48

Robertson, February 18, 2021 (QB21046)

Municipal Law - Bylaws - Zoning - Enforcement

The applicant, the Rural Municipality of Francis, applied for an order to require the respondent to comply with an order to remedy (OR) issued by its development officer (DO) under s. 242 of The Planning and Development Act, 2007 (PDA). The respondent built a shop in 2016 on land he owned within the appellant's jurisdiction but without having first obtained a development permit as required by the appellant's zoning by-law and in spite of stop work orders the appellant issued. The building's location violated the setback requirements of the relevant zoning by-law. The respondent's request to re-zone his land so that the building would conform to different setback requirements was refused by the appellant's council. No appeal was taken. The DO issued an OR pursuant to s. 242(5) in January 2018. The respondent's appeal to the development appeals board was dismissed and the OR confirmed: the respondent was either to remove or relocate the building by July 1, 2018. This decision was not appealed and thereafter the respondent applied for and received a development permit numerous times but failed to complete the work. The last one was granted with a completion date of September 30, 2020 and expired without the work having been completed. The DO issued a final OR stipulating that compliance be achieved within 30 days. No appeal was taken, and in December, the appellant filed this originating application pursuant to s. 242(10) of the PDA for the order described above. It requested an award of solicitor-client costs or costs on enhanced basis, relying upon ss. 369(1)(c) and 372 of The Municipalities Act (MA) and Queen's Bench rules 11-1(3) and (4). At the hearing, the respondent conceded the contraventions of the appellant's zoning bylaw and s. 243 of the DA.
HELD: The application was granted. The court was satisfied on the law and in the circumstances of this case that the requested relief should be granted and ordered that the work necessary to remedy the non-contravention be completed by June 15, 2020. It would remain seized of the matter and adjourned the file to June 8, 2021, at which time the parties could report on progress. If the work could not be accomplished by that date, then either party could apply for an extension at that time and, if the order had been satisfied, the appearance was not required. It authorized the inspection for compliance with the bylaw and the order under s. 242 of the PDA and s. 362 of the MA. Although the appellant's taxpayers would bear the cost of the respondent's intransigence, an award of solicitor-client costs was not warranted. The request for enhanced costs under Column III was denied but costs of $5,000 under Column I of the Tariff granted. If payment was not made by May 1, 2021, the amount of the award might be added to the respondent's property taxes as allowed by s. 369(1) of the MA.

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R v Dittmer, 2021 SKPC 17

Brass, February 17, 2021 (PC21010)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Impaired by Drug - Evidence

The accused was charged that he had operated a conveyance while his ability to do so was impaired by alcohol or a drug contrary to s. 320.14(1)(a) of the Criminal Code. An RCMP officer stopped the accused's vehicle because he rolled through a stop sign and failed to signal a turn. The officer noticed that the accused also appeared to be trying to hide something that was in the console beside him where the officer found cannabis and a pipe. The accused admitted that he had smoked cannabis in the vehicle some four hours before the stop. The accused did not display any signs of impairment and advised the officer he had not taken his medication that day for treatment of his bipolar disorder. The officer arrested him and made the Drug Recognition Evaluation (DRE) demand. At the detachment, the accused was tested by another officer qualified to administer the DRE. That officer completed the DRE five hours after the accused said that he had smoked cannabis. He concluded, based on the accused's mellow attitude, red face, breath odour of cannabis and his poor performance on a number of the DRE tests that the accused was not capable of operating a vehicle and made a demand for a urine sample. The sample showed THC present but did not indicate how much. The officer stated that the results were similar, though, to those of someone who was sober. The accused testified that he had smoked cannabis for 40 years to alleviate anxiety and had done so that morning because he had slept poorly the previous night at his mother's house. He had not taken his bipolar medication that day because he forgot to bring it with him for his visit to his mother. He smoked the cannabis in the vehicle to escape his mother's notice. His balance had been poor for many years. He had rolled through the intersection because he didn't want to use his clutch because his transmission was malfunctioning.
HELD: The accused was found not guilty. The court found that pursuant to s. 320.12(d) of the Code, the officer's DRE evidence was admissible, as was his expert opinion, but that after it considered all the evidence, and specifically, the lack of evidence that explaining the effect of cannabis by a regular user of 40 years and the effect of cannabis on a person who smoked it more than four hours before being stopped and being tested, it was left with a reasonable doubt that the Crown had proven the charge against the accused.

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R v Kortmeyer, 2021 SKPC 10

Green, February 19, 2021 (PC21008)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Refusal to Provide Breath Sample
Constitutional Law - Charter of Rights, Section 7, Section 8, Section 9, Section 10(b)

The accused was charged with impaired driving and failing or refusing to comply with a breath demand under s. 320.27(2) of the Criminal Code. He was stopped by an RCMP officer because the latter observed that the accused was not displaying a licence plate and failed to signal his intention to turn, and he was charged as well with these offences under The Traffic Safety Act. While speaking to the officer after the stop, the accused said he had had one beer. His passenger admitted to being intoxicated. The accused was asked to take an ASD test pursuant to s. 320.27 of the Code, which he failed, and he was then arrested. While in the police vehicle and later at the detachment, the accused made a number of statements to the officer before he had spoken to a lawyer, admitting, for example, that he had made a mistake by drinking and driving. At the detachment, the accused was placed in an interview room and given a phone book. Three officers made over 20 attempts to contact the accused's chosen lawyer but were unable to reach him, so the accused was advised that he could speak to Legal Aid duty counsel. The accused did so, but was dissatisfied with the call. Further unsuccessful attempts were made to reach another lawyer in the same firm. The accused advised that he did not want to speak to any other lawyer. After devoting an hour to their attempt to contact the lawyers, the officer directed that the observation period commence. The accused said that he wasn't refusing but wanted to speak to his lawyer. The officer explained to him what constituted refusal but the accused repeated his earlier statement and was then charged. Although the officers had intended to release the accused at that point, they decided to keep him in a cell overnight because they did not know to whom they could release him. At a voir dire, the defence made a number of applications, including: 1) under s. 52 of the Constitution Act, 1982 (CA), claiming that s. 320.27(2) of the Code, the Mandatory Alcohol Screening provision, violated his ss. 7, 8, 9 and 10(b) Charter rights, and was not saved by s. 1; 2) under s. 24(2) of the Charter, to exclude the accused's statements made to the officer at the stop and the detachment before he was given a chance to contact a lawyer because his ss. 7 and 10(b) rights were breached; and 3) under s. 24(1) for a stay of proceedings because his s. 9 Charter rights were violated when the police failed to release him after he was charged and kept him in custody until morning.
HELD: The applications were dismissed except for that relating to the accused's s. 9 Charter right. The court found the accused's right was violated because of overholding. The matter would proceed to trial. The court found with respect to each application that: 1) s. 320.27(2) of the Code violates s. 8 of the Charter but is saved by s. 1 and does not violate ss. 7, 9 and 10(b) of the Charter, and s. 320.27 applied to the accused. Its jurisdiction regarding its constitutionality was limited to its determination that the provision applied to the

accused. It found that neither ss. 8 or 9 of the Charter were breached by the provision, following the Provincial Court's decision in Morrison (2020 SKPC 28), nor ss. 9 and 10(b), following Pratt (unreported, Alberta PC) and Orbanski (2005 SCC 37). Its conclusion regarding s. 9 was applicable to s. 7 as well. The provision was saved by s. 1, as the tests set out in Oakes had been satisfied; 2) the accused's statements were admissible for the purpose of substantive proof of the offences because they were not made in response to the officer's questions or overall inquiry; 3) the accused's rights under s. 10(b) were not violated. The officers provided him with a reasonable opportunity to contact his chosen lawyer or any lawyer, and the accused had not been reasonably diligent in exercising his right to consult one; and 4) the accused's rights under s. 9 were violated by the amount of time he was held in custody after his arrest. It was satisfied there was no legal basis for his detention given the knowledge the police had. It would not grant a stay, however, because the breach resulted from a mistake made honestly and without malice and there was no nexus between it and the charges. The matter would be considered in sentencing if the accused was convicted of any of the offences.

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R v Thompson, 2021 SKPC 13

Lang, February 19, 2021 (PC21009)

Criminal Law - Weapons Offences - Sentencing
Criminal Law - Sentencing - Aboriginal Offender - Gladue Report

The accused was charged and convicted of seven counts related to weapon offences under the following Criminal Code provisions: 1) possession of a loaded prohibited firearm without authorization, contrary to s. 95(1)(a); 2) carrying a firearm in a careless manner, contrary to s. 86; 3) possession of a weapon for a purpose dangerous to public, contrary to s. 88; 4) carrying a concealed weapon without authorization, contrary to s. 90; 5) possession of a firearm without registration, contrary to s. 92(1); 6) possession of a firearm obtained by an offence, contrary to s. 96(1); and 7) possession of a firearm while prohibited by court order, contrary to s. 117.01. He was convicted under two other separate counts of breaching an undertaking. The accused was apprehended in a residential area of Regina. The police had initially seen him with a backpack which he wasn't wearing at the time he was stopped and when they located it, it contained a loaded sawed-off shotgun and 12 additional shells. At trial, he denied any knowledge of the weapon, but at his sentencing hearing, he took responsibility and expressed contrition for carrying it. The accused, an Aboriginal man, was 36 years old at the time of sentencing and had amassed a criminal record of 101 Criminal Code convictions since 1997.The

author of a Gladue Report reported that both of the accused's parents were members of First Nations communities and his mother had attended residential school, as had the accused himself. His mother physically abused him and drank excessively and it was possible that as a result, the accused suffered from Fetal Alcohol Spectrum Disorder (FASD), though it had not been formally diagnosed. Both parents had been drug dealers. They moved their family of 12 children to urban centres, resulting in cultural loss, and because the family was transient, school attendance was disrupted. Negative interactions with the police were common and became normalized. The accused indicated that he wanted to pursue education and obtain employment upon release from prison. He wanted to address his addiction issues and was ready to change because he was tired of jail. The Crown conceded that the convictions related to one offence and recommended sentences of: 5 years for the first count; 18 months consecutive for the seventh; and concurrent sentences for the remainder of the convictions. The defence argued that based on the Gladue Report and the accused's possible FASD, his sentence should reflect a rehabilitative approach: 18 months and probation for the first count, six months consecutive for the seventh and all other sentences to be concurrent. As well, the defence asserted that court should award extra credit for time on remand because of the harsh conditions experienced by prisoners during the COVID-19 pandemic lockdown.

HELD: The accused was sentenced to 49.5 months consisting of: 60 months for the first count, reduced by 23.5 months' enhanced credit for pre-trial custody; 12 months for the seventh count, to be served consecutively; and one year for each of the other five counts related to weapons, to run concurrently; and for the breaches of undertakings, 30 days concurrent for one and one month for the second to run consecutively to the fifth and seventh count. Pursuant to the Gladue Report, the court recommended that the accused be considered for entry to the Willow Cree Healing Lodge for its programming. In constructing the sentence, the court concluded that the accused's offences were extremely serious and that the Supreme Court's decision in Nur (2015 SCC 15) was relevant. The Gladue and FASD consideration were also relevant but of diminished importance due to the accused's significant and lengthy criminal record. However, the restorative aspect of the accused's sentence would be achieved through incarceration in the federal system so that he could avail himself of the programming he needed. This also protected the public. The aggravating factors the court considered included that the accused: was in possession of a loaded prohibited firearm while under a lifetime prohibition order which he had previously breached; was carrying it in the downtown area of the city; and had a significant and continuous criminal record. Because the accused had not admitted guilt during trial, and perjured himself, his admission was not a mitigating factor. Those factors that were considered as such were his circumstances, his possible FASD, and his apparent change in attitude and desire to leave his life of crime. The defence submission that the accused's sentence should be reduced because of the impact of COVID-19 on his time in custody failed because it had not brought a s. 12 Charter challenge to s. 719(3.1) of the Code nor submitted evidence to support its claim.

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XY and s. 487.05 Criminal Code, Re, 2021 SKPC 19

Agnew, February 25, 2021 (PC21011)

Criminal Law â€“ Special Procedure and Powers - Forensic DNA Analysis - Application for DNA Warrant
Statutes - Interpretation - Criminal Code, Section 487.05

The police applied for a DNA warrant with respect to the suspect, XY, pursuant to s. 487.05(1) of the Criminal Code. The information to obtain set out that the suspect was seen taking the keys to a vehicle which was stolen later that day or evening but there was no evidence as to who stole it. The vehicle was recovered eight days later with a cigarette butt in it. DNA was found on it and the DNA belonged to a person of the same sex as XY. The application was based on the desire of the police to see if the suspect's DNA matched that found on the cigarette butt.
HELD: The application was dismissed because the court found that it was not satisfied that it was in the best interests of the administration of justice to issue the warrant. It held that the requirement in s. 487.05(2) that a judge must consider all relevant matters in determining whether to issue a warrant was in the best interests of the administration of justice. It found that the application met the enumerated requirements set out in the section but could not succeed because of the intrusiveness of taking a DNA sample that would not provide the police with much additional evidence of XY's culpability, given the length of time that elapsed between the time it was stolen and then found. Had the vehicle been recovered shortly after being stolen, the presence of XY's DNA in it could be significant.

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