Case Mail

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R v Hoskins, 2021 SKCA 23

Richards Schwann Tholl, February 16, 2021 (CA21023)

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Criminal Law - Appeal - Unreasonable Verdict

After trial by judge alone (CRM 7/18 (QB), Estevan), the appellant, D.H., appealed his conviction for the offences of sexual assault and trafficking in a controlled substance on the grounds of uneven scrutiny, a faulty D.W. analysis, insufficiency of reasons, and unreasonable verdict. At trial, the complainant, R.R., had testified that while in the company of D.H. during the span of two days, he had purchased cocaine which she had inhaled while they were both at the home of D.L., along with D.L. and a Daniel, whom she did not know, and in a hotel room with D.L. alone. She testified that she was a recovering addict, and that D.H. knew that, and

had induced her to consume the cocaine. She was 19 years of age and D.H. was in his early 30s. She testified to having some alcohol at a bowling alley and a bar prior to meeting up with D.H. and going to D.L.'s residence. R.R. testified that she blacked out at some point and woke up at D.L.'s kitchen table, where she consumed cocaine, along with vodka, until 6:00 am. She recalled moving to a couch and D.H. sitting too close to her. She testified that D.L. asked her and D.H. to leave around 4:30 pm. D.H. also testified they were asked to leave at that time, but D.L. testified it had been much earlier. R.R. said she and D.H. left, went to a hotel a rented a room, where the two did more cocaine and drank whiskey. She testified she did not want to go to the hotel room but said nothing to D.H. because she was confused and did not know what to do. She said she was never an assertive person. In the hotel room, she went in and out of consciousness due to the cocaine and alcohol but became aware that D.H. was having rough sex with her and choking her with his hand. Afterwards, she gathered up her clothes, but D.H. wanted to have sex with her again, and pulled her towards him by the legs, at which time she said "No, no. no, no." D.H. nevertheless had sexual intercourse with her again. She then left the hotel. Evidence of the cab driver who drove R.R. and D.H. to the hotel was to the effect that R.R. had done little talking. R.R. had testified that she had done most of the talking. Video from the hotel lobby showed R.R. touching D.H.'s clothing, and not appearing intoxicated, or in any distress. Photographs were taken by the police which showed extensive bruising to her body, including her wrists, but not her neck. D.H. denied supplying R.R. with cocaine, causing any bruising, or that R.R. had not consented to the sexual intercourse. A peace officer who attended R.R.'s residence about 45 minutes after she left the hotel testified that R.R. was disoriented and reserved, with very red eyes and exceptionally dark circles under her eyes. These observations were confirmed by S.S., her fiancÃ©, who said she was incoherent, confused, emotional, and shaking. She told the officer with hesitation that the sex had been consensual. D.L.'s testimony for the defence was to the effect that no cocaine had been consumed at her residence. She admitted, though, that she did not answer her door when the police came to her residence; that when she did talk to the police, she said R.R. had not been at the apartment, and that she told a concerned friend of R.R. that she had not seen R.R. at the relevant time.

HELD: The appeal was dismissed. As to the ground of appeal concerning uneven scrutiny, the appeal court panel had some doubt, following the Supreme Court appeal ruling in Mehari (2020 SCC 40), that uneven scrutiny existed or constituted a separate ground of appeal. Nonetheless, the panel was prepared to consider the ground on the basis that it could constitute a distinct error of law, though one which was very difficult to advance successfully. A ruling about credibility at trial amounts to a finding of fact, which is unassailable absent a palpable and overriding error when viewed in the light of the evidence. If it were otherwise, an appellant would be asking the appeal court to substitute its view of the evidence for that of the trial judge, something it has no jurisdiction to do, as to do so would infringe on the deferential standard owed the trial judge in making those factual findings. For uneven scrutiny to rise to an error of law, the appellant must show that in scrutinizing the evidence, the trial judge made a methodological error, which means showing that the

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trial judge applied a standard of assessment to the evidence that had the effect of diminishing the persuasive weight he gave to the evidence favouring the defence. The court thoroughly reviewed the evidence the trial judge accepted or rejected and found that his credibility findings were supportable by the evidence and did not amount to a faulty standard of assessment of the evidence unfavourable to the appellant. In particular, the court was of the view that the appellant, in advancing the argument that the evidence proved that R.R. exaggerated her level of intoxication at the time of the sexual intercourse, had failed to show that the trial judge had no rational basis for accepting her evidence that she had been plied with alcohol and cocaine for most of two days. The court said that the trial judge was alive to the significance of the hotel video and had dealt with it in his summary of the evidence, and it could not be said that the video was determinative of R.R.'s intoxication later in the hotel room. The court also found that the trial judge had a rational basis for rejecting the evidence of D.H. and D.L. that no cocaine had been administered to R.R. He pointed to the independent evidence about D.L. not opening the door to the police, denying to them that R.R. had been at her apartment, and her denial to another person that R.R. had been with her, from which the trial judge could reasonably infer that D.L. had been lying about D.H. supplying cocaine to R.R. As D.H.'s and D.L.'s accounts of events in the apartment mirrored each other, the trial judge had a rational basis to find that if the credibility of one collapsed so did the credibility of the other. The appeal court rejected the uneven scrutiny argument because the appellant had not shown a methodological error in the trial judge's assessment of the evidence as it related to credibility, the sole issue at trial. The appeal court went on to consider whether the trial judge's reasons for conviction were sufficient as required in Sheppard and R.E.M. A trial judge's reasons for conviction may amount to reversible error if, in the context of the case, they do not clearly impart to the parties at the trial, the public, and a court of appeal how the judge arrived at his or her decision to convict. The trial judge need not address every point raised by the defence, only the salient ones relevant to the issues at the trial, and the trial record can also be used to supplement and clarify the trial judge's reasoning process. Though the appeal court would have preferred fuller reasons by the trial judge on some live issues at trial, no reversible error of law had been shown as the path to conviction was sufficiently illuminated by his reasons and the trial record. The appeal court's analysis of the uneven scrutiny argument was relevant to this ground as well. No fault was found with the trial's judge's credibility assessment, as required by D.W., because his reasons showed that he had not treated the trial as a credibility contest between the accused and the complainant but appreciated that he must view all the Crown evidence to be satisfied of the accused's guilt beyond a reasonable doubt, which he did. Lastly, in considering the ground of appeal concerning unreasonable verdict, to succeed, the appellant was required to show that the evidence clearly contradicted the trial judge's findings of fact and the inferences drawn from them, such that a palpable and overriding error had been made. The hotel lobby video was not evidence of this kind as it did not contradict the evidence of R.R. as to her condition in the hotel room.

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South East Cornerstone School Division No. 209 v Oberg, 2021 SKCA 28

Ryan-Froslie Schwann Leurer, February 22, 2021 (CA21028)

Administrative Law - Judicial Review - Procedural Fairness - Breach of Duty - Appeal
Statutes - Interpretation - Education Act, Subsection 215(3)
Professions and Occupations - Teachers - Conduct - Discipline - Appeal

The appellant, the Board of Education of the named School Division, appealed from the decision of a Queen's Bench chambers judge to quash the board's decision to remove the respondent from his position as a high school principal and demote him to teacher (see: 2020 SKQB 96). After conducting an investigation of the incident in question and having received a report with recommendations, the board passed a resolution adopting the latter and asked the respondent to attend a meeting with it to show cause why his contract of employment should not be amended, pursuant to s. 215(3) of The Education Act, to exclude his principal's duties (the first decision). The respondent exercised his right to the hearing and presented his evidence. The board then passed a resolution, stating that it had reviewed same and it would uphold its first decision (the second decision). The respondent then applied for judicial review of appellant's two decisions. The chambers judge reviewed the process that the board was required to follow pursuant to s. 215 of the Act, the board's own policies and investigation manual, and assessed the process against the factors set out in Baker Lake that resulted in her finding that the board owed the respondent a high degree of procedural fairness in the process it employed to come to its decisions and it had breached its duty three times. The first two breaches occurred when it failed to provide sufficient particulars of the allegations against the respondent during the investigation and then failed to provide him with a fair opportunity to respond to them during the investigation. It committed the third breach when it failed to provide an explanation as to why it rejected the respondent's show cause submissions in their entirety in its second decision. The judge found that the board's decisions were void ab initio and further that the penalty it imposed was unreasonable in light of the Act, the board's administrative policies and the relevant factual and legal limitations establishing reasonable alternative outcomes in such situations. The issues were whether the chambers judge erred: 1) in concluding the board had breached its duty of procedural fairness owed to the respondent; 2) in determining that the breach vitiated the board's decisions; 3) in concluding that the board's decision to demote was unreasonable; and 4) if the process was procedurally unfair or the demotion was unreasonable, what remedy was appropriate?
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge had not erred: 1) in her conclusion that the board had thrice breached its duty. She had not misapprehended the scheme prescribed by the Act for removing principals from office. It approved the judge's handling of multiple sub-

issues raised by the appellant that related to her determination of the content of the duty; 2) in determining that the breaches rendered the decisions void ab initio, consistent with Dunsmuir. In this case, the judge correctly concluded that the consequences of the breaches affected the outcome of both of the board's decisions; 3) in her finding that the penalty was unreasonable and in her reasons. It was appropriate for her to look to common law employment principles for the purpose of assessing the reasonableness of the board's actions when it purported to alter the terms of the respondent's employment contract for cause-related reasons. The board failed to consider whether the respondent's misconduct justified the removal of his principal's duties in light of mitigating factors or whether taking progressive disciplinary measures was available; and 4) the only appropriate remedy was for the court to substitute its decision for that of the board because any other solution in this case would be unreasonable. The board had only two options under s. 215: to remove the respondent's duties as principal or retain them. As its decision was unreasonable, there could be only one outcome.

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R v Serafino, 2021 SKCA 29

Richards Schwann Kalmakoff, February 26, 2021 (CA21029)

Criminal Law - Appeal - Sentencing
Criminal Law - Probation Orders - Banishment Clause

The appellant appealed only the imposition of a banishment clause in a probation order made following his guilty plea to a charge of criminal harassment. The charge arose following his very public and extended campaign of terror directed to his neighbour in the Village of Abernathy. The village council required the appellant to remove propane tanks from his property and the neighbour, who was a councillor for the village, delivered a letter to the appellant to that effect. Thereafter, over a period of several months, the appellant harassed and intimidated the neighbour and his family, including a 7-year-old girl. The harassment included threats that, as he had been convicted of manslaughter, he should come out of retirement; he was going to get a gun; was going to go over to his neighbour's house and gun him down. This last threat led to his arrest and a charge of criminal harassment. On sentencing, he was given a term of imprisonment, followed by a probation order for 18 months, with a condition that he not attend the Village of Abernathy except with the permission of his probation officer or the court. The sentencing judge imposed this condition though neither the prosecutor nor the defence requested it, and without giving counsel the opportunity to make submissions about whether imposition of this banishment clause was justified.

HELD: The appeal was allowed and the banishment clause deleted from the order. The sentencing judge made an error in principle which was likely to have had an impact on sentencing by not allowing the appellant's counsel and the prosecutor to make submissions or call evidence on the appropriateness of the banishment clause before he imposed it. Though such a condition was permitted by s. 732.1(3)(h) of the Criminal Code, by not hearing from counsel, he lacked essential evidence which he needed to determine whether the impact of such a clause on the offender amounted to punishment, its effect on the community, and how it might affect the offender's rehabilitation, among other relevant considerations. Imposition of a banishment clause was exceptional (see: R v G.N., 2019 NUCA 5) and was not to amount to punishment because probation orders were intended to be primarily rehabilitative (see: Shoker, 2006 SCC 44; Proulx, 2000 SCC 5; Duguay, 2019 BCCA 53). As such, the sentencing judge need to strictly adhere to procedural fairness considerations, including the right to a hearing. The right to be formally heard prior to a sentencing judge imposing conditions in a probation order is legislated in ss. 723(1) and (2), and failure to comply with that provision is an error of law requiring the intervention of the Court of Appeal.

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Big River (Rural Municipality) v Pettigrew, 2021 SKCA 30

Jackson Ottenbreit Caldwell, February 26, 2021 (CA21030)

Municipal Law - Bylaws - Zoning - Interpretation - Appeal

The appellant, a Rural Municipality, appealed from the decision of the Planning Appeals Committee of the Saskatchewan Municipal Board in which the committee directed the appellant to issue a development permit to the respondents to allow them to build a detached garage on their property (see: 2019 SKMB 124). Because of the possibility of flooding in that area, the appellant's zoning bylaw required: that all new structures, including garages, be built at or above a safe building elevation (SBE) of 495.5 m. above sea level; and that a potential builder obtain a foundation development permit (FDP). Before construction continued upon completion of the foundation, the builder then had to obtain an above-foundation development permit (AFDP). After the respondents obtained an FDP from the appellant, they proceeded to build using an alternative method to achieve the SBE by employing wet flood proofing, a system that resulted in a deviation from the appellant's requirement for a stipulated height. Upon completion of the foundation, the appellant refused the respondents' application for an AFDP because the land surveyor's SBE report indicated the height of the garage's foundation was not compliant. The respondent commenced building their garage anyway and the appellant's

development officer issued a stop-work order and enforcement order instructing them to remove the above-foundation construction. After ceasing construction, the respondents appealed to the appellant's Development Appeals Board, asking for a retraction of both orders, for a variance and for the approval of a building permit. They submitted that the foundation for a non-inhabitable garage need not be built to the SBE and that the definition of "flood proofing" in the zoning bylaw permitted wet flood proofing as an alternative. The board rejected the respondent's interpretation of the bylaw and found that the development officer had not erred by making the enforcement order. The bylaw had been contravened because the floor joists were not above the estimated SBE and no AFDP had been obtained. It said it would not be appropriate to grant them a variance from the strict application of the SBE under s. 221(d) of The Planning and Development Act, 2007 (PDA) because it would grant the respondents a special privilege over neighbouring properties and amount to a relaxation that would defeat the intent of the bylaw. When the respondents appealed to the Municipal Board Appeal Committee, it vacated the enforcement order and ordered that an AGDP be issued by the appellant. It accepted the respondents' submission that wet flood proofing should be allowed as a means of attaining the SBE for non-inhabitable structures. Alternatively, it would have granted a variance. It did not address the board's finding that the respondents had violated s. 62(1) of the PDA but found that the board erred by finding the foundation contravened the permit because the definition of "flood-proofing" in the bylaw was flexible and open-ended and did not exclude wet flood proofing. The foundation did not contravene the bylaw because its definition of flood proofing did not rule out wet proofing for accessory buildings and the board should have granted the respondents a variance. The appellant's application for leave to appeal the committee's decision under s. 33.1 of The Municipal Board Act (MBA) was granted on stipulated grounds. The respondent applied to admit fresh evidence that showed that the surveyor erred when he determined that the garage's foundations were below the SBE.

HELD: The appeal was allowed. The application to admit fresh evidence was denied, the committee decision was set aside and the board's decision restored. The court determined that the standard of review applicable to the committee when hearing an appeal from a decision of the board under s. 221(d) of the PDA is to review for material error of fact, law or development principles. This standard would be further examined regarding a specific question of law in a pending appeal: E.Z. Automotive v Regina (City), 2019 SKCA 38. It found with respect first to the respondent's application to adduce fresh evidence (to show that the SBE used in the surveyor's report was inaccurate) that the Palmer factors might be inapplicable to appeals under s. 33.1 of the MBA, but on the assumption that they applied, it held that the evidence was not relevant to any of the questions for which leave had been granted. It cited further reasons for dismissing the application. The court found that the committee erred: 1) by failing to address the infringement of s. 62(1) of the PDA by overlooking findings that the respondents had not applied for nor received an AFDP and instead considering whether the AFDP should have issued; 2) by ordering that an AFDP should issue. It did so despite the fact that the respondents had not applied for such a permit in breach of s. 62(1) of the PDA and the bylaw. It also erred

in the manner in which it interpreted the PDA, the Official Community Plan and the bylaw and by giving the bylaw's definition of "flood-proofing" a meaning that it could not bear. It further erred by implying a distinction between habitable and non-inhabitable buildings; and 3) in granting a variance. As it had concluded that an AFDP should have been issued, it stated that it would grant a variance out of abundant caution. However, it erred in its approach to and interpretation of the criteria set out in s. 221(d) of the PDA. The appellant was awarded the costs of the appeal but the court did not have the authority to grant costs respecting the appeals to the board and committee.

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Kemp v Kemp, 2021 SKCA 31

Caldwell Schwann Leurer, March 2, 2021 (CA21031)

Family Law - Child Support - Interim - Appeal

The appellant appealed the decision of a Queen's Bench judge regarding an interim child support order. She had applied under the Divorce Act and The Family Maintenance Act for support pursuant to s. 3 of the Guidelines for the parties' two children and requesting imputation of income to the respondent. However, the respondent had earlier applied for judgment under the parties' joint petition that sought an order of divorce and child support. The chambers judge granted the divorce and ordered the appellant to pay $133 per month in child support, having regard to the parties' interspousal agreement. The background to the appeal was that the parties had originally signed an interspousal agreement that dealt with custody, parenting arrangements and child support. Later, under the joint petition, the parties claimed no remedy regarding the children because the issues had been resolved by the agreement. It provided for joint legal custody with the children having their primary residence with the appellant and that they would be in the respondent's care from Thursday to Sunday morning. The children would be taken to their daycare at 8 am, picked up by the respondent and remain with him until Sunday. Regarding child support, the parties agreed that the respondent would pay $200 per month calculated pursuant to the Guidelines and s. 7 expenses were to be shared equally, in proportion to their incomes. Information regarding the parties' annual incomes would be exchanged each year and child support reviewed. Among the grounds of appeal was that the chambers judge erred in failing to apply s. 3 of the Guidelines and in finding shared parenting.
HELD: The appeal was dismissed. The court noted that as with all interim orders, the parties should proceed to pre-trial and trial. It found that the chambers judge had not erred. It reviewed the interspousal agreement which

established child support. As its validity had never been challenged, the chambers judges' respective fiats were based upon their interpretation that the calculation of child support was to be determined based on a simple set off. Under its terms, the obligations of each parent were calculated under the Guidelines' Tables. In the fiat appealed from, the judge interpreted the agreement to say that the respondent's income was $60,000 going forward, and she imputed that amount to him in 2018, and that the appellant's income was $69,265 on the basis of the evidence. When set off, she found the appellant was to pay $133 per month to the respondent for child support. The judge's assumption that the agreement set forth a shared parenting regime was reasonable given its terms. Although it was not clear as to whom to attribute parenting during the eight hours of daycare time on Thursdays, the judge correctly applied ss. 3 and 9 of the Guidelines in her calculation of child support on the basis of a reasonable assumption that the parties had had a shared parenting arrangement as set out in their agreement and as had been directed under the previous fiat.

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R v Kishayinew, 2021 SKCA 32

Jackson Barrington-Foote Tholl, March 2, 2021 (CA21032)

Criminal Law - Assault - Sexual Assault - Conviction - Appeal
Criminal Law - Assault - Sexual Assault - Sentencing - Appeal

The appellant appealed from his conviction for sexual assault and his sentence of four and half years in prison (see: 2017 SKQB 177; 2017 SKQB 340). After the Court of Appeal allowed the conviction appeal and consequently did not address his sentence appeal (see: 2019 SKCA 127), the Crown appealed the conviction decision to the Supreme Court. It allowed the appeal, restoring the conviction and remanding the sentence appeal to the Court of Appeal for determination (see: 2020 SCC 34). In doing so, it had regard to the information that had been submitted at trial. The appellant was 35 years old at the time of sentencing. The Pre-Sentence Report (PSR) described him as a member of the Yellow Quill First Nation. His father had attended residential school and it affected his relationship with his son negatively. Both of his parents abused alcohol and he witnessed domestic violence. After his parents separated when he was five, his mother raised him as a single parent. The moved frequently and his mother physically abused him so child protection services were often involved. He began drinking when he was 12 and using hard drugs at 18. When he committed this offence, he was intoxicated. Although he had three children, his relationships had all ended and had involved substance abuse and domestic violence. His employment had been sporadic and he relied on social assistance

for most of his life when he was not incarcerated. The grounds of appeal were whether the trial judge had: 1) erred in relying on the risk assessment in the PSR. During the trial, errors were found in the PSR and it was questioned because it was the first one prepared by the author involving a sex offender; 2) put too much emphasis on the assessment that the appellant was at high risk to reoffend sexually. The author of the PSR administered standard risk assessment tools to determine the probable risk as being high. The appellant argued that two of those tests are now regarded as flawed and cannot be used to measure the risk of sexual reoffending for an Indigenous person, and he submitted two publications from Public Safety Canada as new evidence; 3) improperly relied on the appellant's lack of remorse as an aggravating factor; 4) erroneously believed that the appellant had suggested four years' incarceration would be an appropriate sentence; and 5) imposed a demonstrably unfit sentence?

HELD: The appeal was allowed. The original sentence was set aside and the court substituted a sentence of four years of incarceration. The appellant was given credit for 17 months for pre-sentence custody, leaving a period of 40 months to be served. The sentence was imposed as a result of the court finding that the trial judge had committed two errors in principle in determining the original sentence that permitted it to substitute its own determination. It found with respect to each issue that: 1) the trial judge had not erred. The appellant's defence counsel at trial had not objected to the report during sentencing and as a result, the alleged problems would not be considered on appeal; 2) there was no basis to conclude that the trial judge placed undue emphasis on the risk assessments. It refused to permit the appellant to raise problems with the PSR. This was a new issue on appeal as the defence had not raised it at the time of sentencing and the evidence had not been before the trial judge. It would not consider the publications as no formal application to admit fresh evidence had been made and they were not the type of documents of which it could take judicial notice; 3) the trial judge erred in his considering the appellant's lack of remorse as an important aggravating factor and this error in principle had an impact on the sentence. It should have been treated as a neutral factor. The appellant was entitled to continue to maintain his innocence without being punished for doing so; 4) the trial judge had erred in principle when he noted incorrectly the appellant's defence counsel suggested a four-year sentence, as she had explicitly stated that she took no position on the length of incarceration; and 5) it had to determine an appropriate sentence as result of the effect of the two errors in principle. The starting point for a major sexual assault for an offender with no criminal record was a sentence of three years' incarceration to be adjusted based on its of specific circumstances of the offence and the appellant. No mitigating factors existed and the aggravating ones were that the appellant: had a lengthy criminal record including multiple assault convictions and had been on bail for one at the time he committed this offence; had a high risk to reoffend generally and sexually; and the offence had a serious impact on the victim. The appellant's level of moral culpability was high in that he took advantage of a vulnerable person. The court took into account his personal circumstances affecting his moral culpability in the presence of multiple Gladue factors and found they lowered his moral culpability, but in weighing all the elements, his responsibility remained high.

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R v Okemaysim, 2021 SKCA 33

Richards Schwann Tholl, March 3, 2021 (CA21033)

Criminal Law - Assault - Sexual Assault - Conviction - Appeal
Criminal Law - Assault - Sexual Assault - Sentencing - Appeal

The appellant appealed from his conviction for sexual assault contrary to s. 271 of the Criminal Code and from his sentence of 40 months less time served. He was 19 and the complainant 13 years of age when the offence was committed. The complainant gave a video-recorded statement to the police that was tendered at trial pursuant to s. 715.1 of the Code and testified at trial. She and two other young girls were drinking heavily while they were in the appellant's bedroom with him. Due to her extreme intoxication, she passed out. She was shown a video filmed by her friend of her vomiting beforehand, but had no personal recollection of it. During the night she wakened briefly to find the appellant having sex with her but was unable to protest and blacked out again. In the morning, she and the appellant were in his bed together and he said that they had not had sex. When she asked him if he knew she was 13, he said no and queried why she hadn't told him but she advised him that she and her friends had done so during the party. As the complainant was menstruating, she was surprised upon wakening to find that she did not have a tampon. She inserted one and later, having gone to the police, the tampon was seized. It was analysed and found to contain DNA from both parties and the appellant's semen. One of the complainant's friends testified at the preliminary inquiry and her testimony mirrored in large part that of the complainant, describing her vomiting and level of intoxication. The witness said that when she and her sister left the party, knowing that the complainant was unable to look after herself because of her intoxication, the appellant offered to look after her and said that he would put her into his mother's bed. The version of events provided by the appellant consisted of a voluntary statement he gave the police at the station and his testimony. His versions varied in that in his statement, he said he was not intoxicated and denied sexual contact with the complainant. After learning of the prospect of a DNA analysis, the appellant stated that after becoming drunk and passing out, he wakened to find the complainant had initiated sex with him. He believed she was 17. He testified at trial that he couldn't remember the complainant's age being discussed at the party. The trial judge found as fact that: the three girls had partied in the appellant's bedroom; the complainant was sufficiently incapacitated that she could not walk home and had been left behind by her friends in the appellant's bedroom; and his DNA was present on her tampon. He found the complainant's story credible as far as her spotty memory permitted and it was supported in part by the witness' evidence. He found the appellant

had sexually assaulted the complainant when she was almost completely incapacitated. The accused's story was not credible because it changed throughout his statement and the trial. In sentencing, the judge noted the most significant aggravating factors as being that the appellant had been in a position of trust because of the assurances he gave the complainant's friends and that the assault had impacted her to the extent that she could not bring herself to file a victim impact statement. After considering the appellant's age and his understanding that alcohol was the cause of his criminal activity as mitigating as well as the presences of Gladue factors, the judge decided a sentence of 40 months was appropriate. The grounds of appeal regarding the conviction were that the judge erred in finding certain evidence to have corroborated the complainant's testimony and erred in his treatment of various other aspects of the evidence. Regarding the sentence, the judge erred in treating the lack of a victim impact statement as evidence that the sexual assault had affected the complainant in a significant way and by failing to take into account time that he had spent on electronic monitoring. He also contended that the sentence imposed was unfit.

HELD: The conviction and sentence appeals were dismissed. The court found with respect to the grounds for conviction appeal that the trial judge had not erred: 1) in his findings regarding the complainant's credibility in the context of this case. He considered her testimony regarding her state of intoxication, subsequent vomiting and passing out was corroborated by her friend's evidence. The judge treated the complainant's evidence as a "story" because she did not have direct recollections due to her intoxication and the story had been corroborated by the witness's evidence as well as the appellant's. It was clear that the judge had not relied on the complainant's vomiting as being corroborative of the sexual assault but rather, found her version of events was credible and supported in part by other evidence; 2) by failing to understand that the reliability of the complainant's testimony was a key issue. He framed his findings in terms of her evidence's credibility but he was also aware of its reliability. Because of the complainant's extreme intoxication, he approached her evidence with great caution, noting that her memory was spotty, but still concluded her story was credible. Regarding sentencing, the court found that the trial judge had not erred: 3) in his consideration of the absence of the complainant's victim impact statement. His comment related to the Crown's sentencing submissions including that the author of the pre-sentence report had learned from the complainant's grandmother, with whom she lived for two years after the assault, that the complainant suffered from serious effects caused by the assault and was unable to complete the statement due to her stress. The judge considered this information as an aggravating factor under s. 718.2(a)(iii.1) of the Code; 2) in failing to consider the appellant's 141 days on electronic monitoring prior to trial as a mitigating factor in sentencing him. There was no evidence provided to the judge that the monitoring involved hardship or limitations on the appellant's liberty; and 3) in determining the length of sentence. It was not demonstrably unfit. In this case, the appellant, who was in a position of trust, assaulted a sleeping or unconscious child. It had a significant impact on her.

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Unifor Canada, Local 594 v Consumers' Co-Operative Refineries Limited, 2021 SKCA 34

Jackson Ottenbreit Kalmakoff, March 9, 2021 (CA21034)

Labour Law - Strike - Interim Injunction - Appeal
Constitutional Law - Charter of Rights, Section 2(b), Section 2(d)

The appellant, Unifor Canada, appealed against a decision of a Queen's Bench chambers judge to grant an interim injunction to the respondent employer, Consumers' Co-Operative Refineries, to restrain picketing by the appellant's members on December 24, 2019. On December 17, 2019, the respondent had applied for an ex parte order pending the full hearing. The judge granted an interim injunction subject to terms that included that union members could stop people crossing the picket line for a maximum of five minutes to convey information regarding the labour dispute. At the full hearing held on December 23, the affidavit material before the chambers judge covered the period from December 5 to December 13. She found that each side had attempted to intimidate the other and the appellant was delaying access to vehicles carrying replacement workers, supplies and fuel into and out of the respondent's refinery complex. The judge took note of the rights of the appellant but found that the respondent had established a strong prima facie case that the manner of picketing during the first week of the lockout was unlawful, as the apparent purpose of some of it was not to disseminate information but to intimidate those entering the facilities. The judge determined that the appellant had since taken control of the unlawful behaviour and issued an order restraining it from interfering with people entering or leaving the respondent's property except for the purpose of conveying information to a maximum of 10 minutes or until the recipient of the information indicated a desire to proceed, whichever came first. The appellant described the last part of the order as the "drivers' exception" (DE). The court heard the appeal in May 2020 regarding the injunction but reserved its decision. After the dispute was settled in June 2020, the parties were asked to file further submissions regarding the order as it was no longer operative. The preliminary question before the court was: 1) whether the appeal, confined only to consideration of the question of whether it was appropriate for the order to include the DE term, was moot and if so, should the court exercise its discretion to determine that aspect of the appeal; and 2) if yes, whether the chambers judge erred by imposing the DE and if such a term was a reasonable injunctive restraint on the appellant's right to picket and the exercise of its members' ssd. 2(b) and (d) Charter rights in the circumstances of this case. HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the appeal was moot. It was appropriate for it to exercise its discretion to determine the second issue pursuant to the decision in Borowski. Judicial resources would not be wasted because the full hearing had already occurred and it was in the interests of justice to determine one aspect of the appeal. Labour disputes are often settled before a court

can consider them; and 2) the standard of review applicable for injunctions is one of deference subject to the exceptions described in Strom (2020 SKCA 112). It reviewed the jurisprudence regarding injunctions granted in labour disputes and their various terms, and s. 2 Charter issues that arose thereunder. The chambers judge had not erred in including the DE in the terms of the order. The order affirmed free access to and the right to use the employer's property, while also recognizing the need to protect the picketers' rights to freedom of expression and association. By including the DE, the judge balanced the rights of the appellant's members, the respondent and third parties. The jurisprudence clearly supported the addition of the DE as an exercise of her discretion in balancing the rights of all the actors that the picketing would affect. She found that the situation at the picket line was confrontational and took into account the appellant's complaint that the five-minute delay was insufficient time to convey its message, but she also found that long delays could cause tensions to rise and acknowledged in the DE that a third party has the right not to listen.

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R v Probe, 2021 SKQB 15

Scherman, January 18, 2021 (QB21050)

Criminal Law - Corruption and Disobedience - Breach of Trust by Public Officer

This matter was a retrial of the trial judge's acquittal of the accused (T.P.) of an offence contrary to s. 122 of the Criminal Code (see: R v Probe, 2018 SKQB 176 (Probe QB)). The Court of Appeal in R v Probe, 2020 SKCA 5 (Probe CA) ruled that the trial judge made an error in law that required appellate intervention by failing to consider whether T.P.'s breach of s 144(2) of The Municipalities Act (Act), which resulted in his removal from office as councillor and a bar from running for office for a period of time (see: Sherwood (Rural Municipality) v Probe, 2018 SKQB 24), might amount to a serious and marked departure from the standard of conduct required of a municipal official which might rise, along with other evidence, to the commission of a criminal act. The Court of Appeal did not disturb any of the findings of fact made by the trial judge in Probe QB. T.P., a councillor with the RM of Sherwood (RM) during all times relevant to the evidence presented at trial, required legal representation at an inquiry ordered by the minister responsible for municipal government and conducted in 2014 to determine whether the then reeve should be removed from office for being in a conflict of interest as a result of the potential sale of land he owned to the RM. T.P. incurred legal fees of $50,000.00 because of the inquiry, which the RM council had voted to reimburse, and which were paid to him. Other council members were also reimbursed legal fees. However, through legal action, angry ratepayers in

the RM were able to have the bylaw allowing the reimbursement of fees nullified. T.P. was re-elected councillor in an RM election in 2015. As a result of public pressure and during the time of T.P.'s tenure, council attempted to pass a bylaw authorizing legal action to recover the reimbursements of legal fees. At a duly convened meeting of council for that purpose, T.P. did not recuse himself from the information sessions and the deliberations of council, and in fact moved and voted on a motion to table the motion to take action to collect the amounts reimbursed, a clear conflict of interest. Also during his time in office, council debated whether to approve a major development in the RM which would result in the purchase of land owned by the new reeve, J.P. T.P. voted against a bylaw to approve the sale for reasons which he stated on the record involved traffic safety concerns. The reeve's wife expressed her displeasure with T.P. for voting as he did. On February 1, 2016, soon thereafter, while both these contentious matters were outstanding, T.P. and J.P. met at a restaurant to talk. J.P. had a recording device on his person of which T.P. had no knowledge. On the retrial, the Crown evidence consisted of an agreed statement of facts, the audio tape of the meeting, the transcript of the audio tape, and the evidence of J.P. T.P. testified in his own defence.

HELD: The trial judge found T.P. not guilty, primarily on the basis that the Crown had failed to prove that T.P.'s conduct was such a serious and marked departure from the conduct expected of a public official that it amounted to a criminal offence. First, he ruled that the findings of fact made by the trial judge in Probe QB were binding on him based on the principle of issue estoppel and could not be reconsidered in the retrial. This principle also applied to any findings of which the trial judge had a reasonable doubt, and included (1) at the meeting T.P., did not demand or offer forbearance from J.P. with respect to the matter of the legal fees, (2) did not agree to change his vote to approve the development in the RM, and (3) did not express a non-public good purpose. The evidence on the retrial did not convince the judge that T.P. intended a quid pro quo: that J.P. would use his influence as reeve and oppose any motion to pursue collection of the legal fee reimbursements in exchange for which T.P. would vote in favour of the development in the RM. The judge on the retrial did find as a fact proven beyond a reasonable doubt that T.P. had lobbied J.P. concerning the legal fee question. T.P. had in fact stated "I'm lobbying you a little bit on legal fees..." Based on the definition of "lobby," which included the legitimate activities of professional lobbyists, and that T.P. had been clear in much of what he had said and done officially, that he believed attempting to collect the reimbursed legal fees was a waste of money for the RM and the development at the proposed site was a traffic hazard, the retrial judge ruled that T.P.'s motives were mixed; they were both for the public good and for his own benefit, and therefore his conduct could not amount, beyond a reasonable doubt, to a criminal departure from the required standard of behaviour required of a public official acting for the public good. Dealing with T.P.'s violation of s 144(2) of the Act and whether this violation could amount to criminal breach of trust, the retrial judge ruled that in this case it could not. Under the section, "No member of a council shall attempt in any way, whether before, during, or after the meeting, to influence the discussion or voting on any question, decision, recommendation or action to be taken involving a matter in which the member of council has a conflict of interest." First, as provincial legislation, it

could not create a criminal offence. Secondly, he acknowledged that the discussions at the meeting with J.P. should never have happened and that T.P. was in a clear conflict of interest by participating and voting at the council meeting against a bylaw to collect the legal fees, which potentially meant he would lose $50,000.00. However, the retrial judge was cognizant that s 122 was only intended to punish those whose actions clearly departed from the standard required of a public official, and he was not satisfied a violation of s 122 in the circumstances did not rise to that level. Though it was not strictly necessary for him to do so, having found that an essential element of the actus reus had not been proven by the Crown, he thought it appropriate to examine whether the mens rea requirement was proven in the case. In applying R v Boulanger (2006 SCC 32), the leading case with respect to the elements of s 122, the retrial judge considered the heightened mens rea requirement there mandated. Heightened mens rea requires that, to obtain a conviction, the Crown must prove beyond a reasonable doubt that the accused specifically intended by his actions to have the general effect of betraying the public trust, of being dishonest, partial, corrupt or oppressive or acting for a non-public good purpose, all of which, beyond a reasonable doubt, he could not find T.P. intended.

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Medernach v Nutrien Ltd., 2021 SKQB 31

Danyliuk, February 2, 2021 (QB21038)

Civil Procedure - Queen's Bench Rules, Rule 7-2, Rule 7-5

The plaintiff sued the defendant for wrongful dismissal. After the defendant filed its statement of defence, the matter went through mandatory mediation in October 2019. In April 2020, the plaintiff brought an application for summary judgment before disclosure of documents or questioning had occurred. At the hearing, the judge ordered the defendants and the plaintiff to serve and file affidavits within three weeks. At that time, the summary judgment application and the defendant's application to cross-examine affidavits filed by the plaintiff were before the chambers judge. He adjourned the summary judgment application sine die and ordered the cross-examination to proceed on dates agreed upon by counsel. After this arrangement had been made, the plaintiff sought the defendants' disclosure of documents within the main action and took the position that cross-examination could not occur until he received proper disclosure. The same chambers judge issued a fiat indicating that the cross-examinations were to proceed as arranged and that they were not contingent on the disclosure of documents in the context of the main action. No appeals were taken from the chambers judge's fiats. The plaintiff's counsel engaged in heated correspondence with both the defendants' counsel and the local

registrar and eventually asserted that he was unilaterally withdrawing the summary judgment application. At the request of the registrar, the matter was set down for a hearing in chambers.
HELD: The plaintiff was allowed, in the circumstances, to withdraw his application for summary judgment. He was ordered to pay costs of $3,500, assessed under Column 2 of the Tariff, for the abandonment of the application as well as for the chambers appearance required by the unilateral withdrawal. He was not permitted to make a further application pursuant to Queen's Bench rule 7-2 without leave of the court under rule 7-5(8). It could be made by application without notice provided a copy of all material filed on the leave application was sent to the defendants' counsel. The court rejected the plaintiff's counsel's assertion that he had an absolute right to unilaterally withdraw an application for summary judgment, but accepted it here as a fait accompli. The plaintiff's counsel could not ignore the order given by the first chambers judge regarding cross-examination. It reminded all counsel that they must treat the registrar and the registry staff with respect and not attempt to force the registrar to adjudicate issues. The consequences of this conduct included an award of costs to the defendant under Queen's Bench rule 11-1. The court decided that this was not an appropriate case for solicitor-client costs.

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Holmes v Jastek Master Builder 2004 Inc., 2021 SKQB 32

Scherman, February 3, 2021 (QB21051)

Civil Procedure - Summary Judgment - Application to Dismiss
Civil Procedure - Queen's Bench Rules, Rule 5-12

The plaintiffs applied for an order under Queen's Bench rule 5-12 requiring the defendants to disclose their financial statements, and those of all of their subsidiaries, for the years 2007 to 2020. They did so pursuant to their earlier application for summary judgment under Queen's Bench rules 7-2 to 7-6. They claimed for damages they had suffered as a result of the latter's breach of contract, and punitive damages flowing from alleged breaches of fiduciary duty by the defendant, Jastek, and its independent breach of its duties of honest performance of the contract to build condominium units. The action had been commenced as a result of a decision of a Queen's Bench judge in 2017 regarding the plaintiffs' class action proceeding against the defendants, certified in 2010. In the 2017 judgment, the judge found that the claims of breach of fiduciary duty and for damages suffered by individual class members fell outside the certified class issue and were dependent on the individual positions of the plaintiffs. Thus, the specific issues needed to go forward on an individual

basis. The plaintiffs' application came before the case management judge. The defendants filed their notice of application for an order dismissing the plaintiffs' application for summary judgment and for an order directing that the matter proceed to trial in the ordinary way and to dismiss the plaintiffs' application for production of financial records. The defendants argued that their application to dismiss was based on an analogy to decisions under Queen's Bench rule 7-1: they were asking the court to declare that summary judgment would not be appropriate, as it is an exception to the general rule that litigation proceeds in the normal course and in the circumstances, summary determination was not a proportionate, timely or cost-effective approach. Further, disclosure and questioning had not occurred regarding the alleged breaches and individual efforts to mitigate, and s. 14 of The Class Actions Act permits the court to make any order it considers appropriate. The plaintiffs opposed the defendants' application on numerous grounds.
HELD: The plaintiffs' application for production of the defendants' financial records was granted and the defendants' application for dismissal of the plaintiffs' summary judgment application dismissed. Enhanced costs of $4,000 were assessed against the defendants, jointly and severally, for their meritless application and they were further ordered to pay costs of $1,500 to the plaintiffs for their successful application. The court found that summary judgments are not an exception to the general rule that litigation will proceed in the normal course since the adoption of the new Queen's Bench Rules in 2013. The defendants had failed to take the opportunity provided to them after the 2017 judgment and the plaintiff's application in December 2020 to pursue disclosure of documents and questioning, file their response affidavit evidence, or apply for leave to cross-examine each of the plaintiffs on their affidavits. In making their application, the defendants were asking the case management judge to make a preliminary ruling that summary judgment was not appropriate in the absence of evidence to be placed before the summary judgment judge and ignoring the clear intention and direction of The Queen's Bench Rules and the decisions in Hryniak and Tchozewski. Under s. 14 of the Act, the responsibility to make the determination of whether the summary process is a more proportionate, expeditious and less expensive means to achieve a just result than holding a trial lies with the summary application judge. Regarding the plaintiffs' application for disclosure, it found that there was a real probability that the plaintiffs would establish an entitlement to punitive damages and the defendants' financial statements would be relevant to the proper assessment of those damages. Delaying production of the financial records until after a finding of entitlement to punitive damages would further delay and add expense to this action that was already 14 years old. There was no evidence that the defendants would be prejudiced by having to make disclosure now, and implied undertakings of confidentiality obviated concerns of potential mischief.

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Jones v Jones, 2021 SKQB 34

Crooks, February 4, 2021 (QB21029)

Wills and Estates - Estate Administration
Civil Procedure - Costs - Solicitor-Client Costs

The executors of an estate applied for an order allowing and passing their accounts and discharging them as personal representatives of the estate. The self-represented respondent, E.J., and his wife, D.J., opposed the application and applied for direction from the court regarding the management and administration of the estate, damages for the breach of minutes of settlement and punitive damages. The executors then brought an application to strike the respondent's application, alleging that D.J. had no standing and the relief sought was not available under Part 16 of The Queen's Bench Rules. In this case, the testatrix, Edna J., who died in 2015, left a will in which she named three executors, two of whom were her sons and the third her nephew. The executors applied for and received letters probate in 2016. After their counsel withdrew in April 2017, one of the executors, the testatrix's son E.J., and his wife, D.J., made an application seeking revocation of the grant of probate and an order for the will to be proved in solemn form amongst other relief. The other executors retained new counsel to oppose the application, who remained as their lawyer thereafter. They filed an application to require E.J. to comply with the instructions in the will or alternatively, to remove him as an executor for his refusal to cooperate in the administration of the estate. The chambers judge adjourned the matter but advised D.J. that she had no standing. She responded by filing a power of attorney granted to her by E.J. to represent him in legal matters. When the matter proceeded, another judge ordered that D.J. was ineligible to represent E.J. under s. 30 of The Legal Profession Act, 1990 and then removed E.J. as an executor. He found that the executors had not acted contrary to their obligations under the will and adjourned the application to prove the will to permit E.J. to obtain legal advice (see: 2017 SKQB 388). Afterward, the parties reached an agreement and entered into minutes of settlement in April 2018 to resolve all outstanding matters related to the will and otherwise. Pursuant to it, a consent order was issued terminating the prohibition on the distribution of assets, and all applications were withdrawn. In January 2019, E.J. brought an application requiring the executors to file an accounting within 30 days and they complied. After the court designated the local registrar as the examining officer pursuant to Queen's Bench rule 16-53(2), the officer issued a certificate under rule 16-55. It noted that there were three remaining issues: the total legal fees for core and non-core items charged by the executor's lawyer; an item listed in the final accounting for costs incurred for clearing and cleaning the testatrix's house submitted by one executor; and two items listed for payments from the estate to two individuals described as reimbursements. At this point, the executors made the instant application. The respondents raised many concerns regarding the management of the estate, particularly the amount of legal fees incurred on behalf of the executors and how to allocate fees between the parties.
HELD: The court granted the application for the executors' account to be passed but dismissed their application to be discharged without prejudice to bringing a further application. It granted their application to

strike the respondent's application and assessed costs in the amount of $4,000 payable by E.J. respecting that application and solicitor-client costs payable by E.J. on the application for the passing of accounts. The respondents' application was struck in its entirety. The court noted that the administration of what had been a straightforward estate had been unduly complicated by D.J.'s relentless interference in it, in spite of the order that she had no standing to do so. It would not deal with any issues relating to the minutes of settlement as there was no application before it to enforce them. It could not grant the application for discharge because there were outstanding issues related to the minutes and the executors' intention to make adjustments to the final accounting. With respect to the issues identified in the certificate, it found that the: the legal fees for core services had been appropriately calculated pursuant to Schedule I "C" of the Queen's Bench Tariff. Regarding the fees for non-core services, it decided not to direct the statement of account for taxation as it would be contrary to the Foundational Rules. After reviewing the multiple objections raised by the respondents, it determined the legal fees incurred were reasonable and necessary but for a charge for seven hours. A vast amount of the costs were caused by D.J.'s excessive communication with counsel and by involving the police, oil companies and banks, all of which required investigation and response by counsel; the disbursements paid to executor from the estate for his costs and labour associated with the house cleaning were permitted; and the disbursements to the individuals from the estate were allowed. The final amount of the outstanding statement of account would be apportioned: 5 percent to be allocated to the estate and to be shared equally by the beneficiaries; 10 percent to be allocated to the executor, K.J.'s distribution from the estate: and 85 percent to be allocated to E.J.'s distribution from the estate.

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Toronto-Dominion Bank v Janzen, 2021 SKQB 38

Robertson, February 5, 2021 (QB21033)

Civil Procedure - Queen's Bench Rules, Rule 3-3, Rule 3-6
Statutes - Interpretation - Queen's Bench Act, 1998, Section 22

The plaintiff, Toronto-Dominion Bank, brought an action for judgment against the defendant for her credit card debt. The plaintiff's law firm issued the claim in the judicial centre of Regina. When the plaintiff made an application without notice to extend the time for service and for substitutional service on the defendant, the court granted it regarding the extension but dismissed the other request with leave given to provide better evidence. The court also referred the plaintiff to Queen's Bench rule 3-3(1) because it questioned why the

action was commenced in Regina when the defendant's residence was identified in the statement as being in Saskatoon. The law firm's letter in response explained that it commenced most actions for unsecured collection files, which are usually undefended, in Regina because the courthouse was equipped to deal with the volume thereof. This approach was consistent with Queen's Bench rule 3-3(3), permitting an action to be commenced at any judicial centre subject to a defendant's right to request a transfer under rule 3-6. The court disagreed with this interpretation and again dismissed the application. Counsel for the plaintiff argued the effect of the decision was to dismiss the entire action and requested the court to reconsider as there was no mechanism within the Queen's Bench rules permitting a plaintiff to request a transfer of proceedings. The issues were whether: 1) an action, in general, can be commenced at any judicial centre; and 2) the court can order a change of venue at the request of the plaintiff.
HELD: The application for substitutional service pursuant to the court's reconsideration of the original decision was granted under Queen's Bench rule 12-10 in light of the better evidence provided by the plaintiff regarding efforts to serve the defendant. The court noted that the meaning of Queen's Bench rule 3-3(3) must be established by what the Legislature intended in The Queen's Bench Act, 1998 and specifically regarding s. 22 as the authority for the rule. It reviewed the legislative history of the Act, the expressions of legislative intention behind its amendments and the case law considering s. 22 and its predecessors. It found with respect to each issue that: 1) an action, subject to specific exceptions, may be commenced in any judicial centre. The plaintiff was entitled to commence its action in the judicial centre of Regina; 2) the court can, on its own initiative under the discretion conferred upon it by s. 22(9) of the Act or upon application by any party, transfer an action to another judicial centre.

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R v Haywahe, 2021 SKQB 43

Acton, February 12, 2021 (QB21040)

Criminal Law - Reasonable Doubt
Criminal Law - Defences - Self-Defence

The accused was charged with aggravated assault after he stabbed his friend J.J. in the back with a kitchen knife following a day of being punched in the head by J.J. to the point that he was bleeding from the nose and mouth and covered in bruises. The accused and J.J. had been drinking whiskey throughout the day at the accused's apartment while the assault was in progress, and the punching continued in front of witnesses during

a drive in a vehicle. Prior to the stabbing, the accused had implored J.J. to stop punching him, but he refused. The accused believed he had no choice but to get a knife from the kitchen and threaten J.J. with it to get him to stop punching him, but he would not, and the accused stabbed him in the back with the knife. That did not end the matter, as J.J. continued to punch the accused after being stabbed while on top of the accused and holding the accused's wrist with the knife in it.
HELD: After referring to the self-defence provisions contained in s. 34 of the Criminal Code, and citing numerous cases with respect to the application of D.W., including Groshok (2019 SKCA 39), Levac (2020 SKQB 171), and Dinardo (2008 SCC 24), the trial judge found that he believed the testimony of the accused and the other defence witnesses, which raised a reasonable doubt that the Crown had proven the lack of the element of self-defence, and acquitted the accused.

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Bierman v Haidash, 2021 SKQB 44

Layh, February 11, 2021 (QB21043)

Statutory Torts - Violation of Privacy

The parties consented to proceed by summary judgment under Rule 7-2 of the Queen's Bench Rules in an action for violation of privacy, a statutory tort created by The Privacy Act (Act). The application judge agreed that the matter could proceed to judgment summarily on affidavit evidence, as the parties indicated that the evidence contained in them was all the evidence they intended to present at a trial. In coming to a decision in the action, the application judge was required to determine liability based on a series of examples and considerations set out in Act, which did not define the tort but left it to the courts to delineate its parameters and to fix its boundaries. As very little case law had interpreted the Act to this point, the application judge was guided by principles of statutory construction and judicial reasoning to come to a decision, supplemented by the reasoning in Peters-Brown v Regina District Health Board (1995 CanLII 5943). The applicant, J.B., brought a claim under the Act against S.H., a medical doctor, alleging that he had accessed her health records, in particular her list of medications, without her consent for the purpose of giving these records to her husband during child custody proceedings. J.B. was not a patient of S.H. but he knew J.B.'s husband, who was a medical doctor with whom S.H. had worked in the past. S.H. admitted that he had accessed J.B.'s basic biographical profile for two minutes, nothing else, and certainly not her medications. He denied passing any confidential information to J.B.'s husband. He deposed that he accessed J.B.'s profile as well as those of 17

other persons as a training exercise for his spouse, who worked with him on a pilot project to integrate the electronic medical record systems, EMR and PIP. J.B. had no evidence that S.H. had passed this information to her spouse except that somehow her husband had referred to some of her health records during the family law proceedings. She claimed she was highly sensitive to violations of her privacy. She stopped taking necessary medications for her long-standing mental health problems because she feared her husband would use this information against her in the custody proceedings. As a result of complaints made by J.B. to the College of Physicians and Surgeons (CPS), S.H. pled guilty to unprofessional conduct and was ordered to pay costs of $2500.00. The particulars to which he pled guilty did not differ from those he deposed to in his affidavit. J.B. also made a complaint to the Privacy Commissioner's office, whose report censured S.H. for accessing the records of all 18 persons, especially since these persons were not his patients. The specific nature of the privacy infringement found by the privacy commissioner was also no different from that described in the evidence on the application for summary judgment.

HELD: The appellant's claim was allowed. Damages of $ 7500.00 and fixed costs of $3000.00 were ordered. The application judge determined liability and quantum by answering the following questions: (1) Did S.H. act wilfully? (2) Did S.H. have a claim of right to access the information? (3) Did J.B. have a reasonable expectation of privacy? (4) What was the exact nature of the violation of privacy? (5) How were damages to be quantified? As to question (1), he defined "wilful" as meaning an intentional, knowing and voluntary act, but not a negligent, inadvertent or accidental act, and found that S.H. had acted wilfully as he voluntarily, intentionally and knowingly chose to use J.B.'s name as it was helpful for the pilot project, and similarly chose to look at the biographical profile. With respect to question (2), because S.H. accessed the confidential information of a member of the public, and not one of his patients, for which the pilot project was designed, he could not justify accessing it. Concerning question (3), the application judge found that J.B. had a reasonable expectation of privacy in her health records. As a member of the public, and not a patient of S.H., she would not have expected him to access her records and had the right to expect that he would not do so. Question (4) was at the heart of the inquiry and required the application judge to make findings concerning the seriousness of the violation of privacy. In doing so, he rejected the appellant's charge that S.H. had accessed J.B.'s medical history and had given that history to her husband. He found that no evidence had been presented by J.B. to that effect. He characterized S.H.'s act as "benign blundering." In answering question (5), the quantum of damages to be paid, he first directed himself that in accordance with the Act, plaintiffs need not prove specific damages to obtain an award. He then reviewed damage awards in other jurisdictions, some as high as $36,000.00 for flagrant privacy violations and some as low as $50.00, for minimal infringements, and settled on the amount of $7500.00.

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Royal Bank of Canada v Turkey, 2021 SKQB 45

Robertson, February 16, 2021 (QB21041)

Civil Procedure - Service - Extension of Time

The applicant applied ex parte to extend the time for substitutional service of a statement of claim on the defendant under Rule 13-1 of the Queen's Bench Rules, which requires service of a statement of claim within six months of issuance but allows for that time to be extended on application to the Court before or after the expiration of the time for service. In this case, the claim was issued on March 5, 2019. On May 8, 2019, the appellant applied for an order for substitutional service, which was denied, but on a new application, substitutional service was granted on August 12, 2019, by serving the claim "on any adult found present at the residence located at 876-108th Street, in North Battleford, Saskatchewan, and if no adult is found, by posting the documents to the door of the said residence." This order was never issued. Well after the six-month period for service had expired, on January 28, 2021, the applicant applied for an order extending the time for substitutional service of the claim. The defendant had been communicating with the applicant prior to the expiry of the service period. The applicant instructed counsel in November 2019 to wait until its settlement negotiations with the defendant were conducted, and then to "stand down" from serving the claim due to COVID-19 concerns.
HELD: The application was denied. After a thorough review of the case law fleshing out what principles should guide a judge in exercising judicial discretion to allow or deny such an application, and in considering in particular Jahnke v Thomas (2017 SKQB 161), the chambers judge concluded that the interests of justice required that he deny the application. The applicant had the onus to show why the order should be granted and had failed to do so. First, the chambers judge found that the plaintiff was responsible for the delay, and had no valid explanation for failing to issue the order for substitutional service, or for not availing itself of the very simple process for execution of service, and though the defendant would not suffer any prejudice in defending the claim, the judge was mindful that a change of culture in the system was required, and in the interests of justice, claims needed to be resolved as quickly as possible (see: Hryniak v Mauldin).

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Bank of Montreal v Smith, 2021 SKQB 47

Scherman, February 18, 2021 (QB21045)

Debtor-Creditor Law - Receivership

As was its right as a prior secured creditor whose security interest was registered under the Bank Act, The Bank of Montreal (BMO) had applied for and been granted an order for the appointment of a receiver under The Bankruptcy and Insolvency Act (Act) to collect loan amounts owing by a farming partnership (the debtors). The receivership order granted BMO the right to seize the debtors' assets, and accordingly it caused to be seized 96,000 bushels of canola of the debtors. The order contained a term which permitted BMO to disclaim any contracts entered into by the debtors with a third party. Such a term was statutorily sanctioned by s 243(1) of the Act. Prior to the order being issued, one of the debtors had entered a sale agreement (contract) with a corporate grain buyer (Richardson) for the sale of 165,345 bushels of canola to Richardson and had delivered 65,000 bushels of canola pursuant to the contract. The contracted prices were between $10.30 and $10.45 per bushel. After the receiver was appointed, the price of canola rose to $14.70 per bushel, so that if the canola were sold in the open market and not delivered to Richardson, the receiver would receive $413,000 more in the receivership. BMO applied to the court for approval of its intention to disclaim the contract with Richardson. Richardson opposed the application.
HELD: Relying primarily on the expertise of Frank Bennett, Bennett on Receiverships, 3d ed (Toronto: Thomson Reuters, 2011) and Bennett's review of the relevant case law, the chambers judge allowed the application by BMO to cease to perform and to disclaim the contract on the basis that the receiver was under an obligation to BMO and other secured and unsecured creditors to maximize the return from the debtors' assets. He reviewed the equities as between all the parties in the case. Equity required that the receiver carefully review whether honouring the contract would be to the advantage of the receivership. Richardson argued that the receiver was able to fully collect BMO's debt from other assets, and did not need to sell the canola to do so. The chambers judge relied on the judicially recognized principal of marshalling of assets, which required liquid assets, like canola, to be realized first, followed by non-liquid assets, and that the principle of marshalling of assets maximized value for all creditors in the receivership. Generally, the chambers judge was satisfied that equity and fairness to all parties, based on their standing before the court in accordance with the priority of their rights to share in the receivership assets, favoured disclaiming the contract. Richardson was simply a party to a sale contract and not a creditor. It could bring action against the debtor with whom it had contracted.

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Abbott v Saskatchewan Power Corporation, 2021 SKQB 49

Currie, February 18, 2021 (QB21052)

Torts - Negligence - Duty of Care
Statutes - Interpretation - Snowmobile Act, Section 32, Section 34(1)(b)

This civil action proceeded to summary judgment on filed expert reports, transcripts of questionings of the parties, affidavit evidence of witnesses and cross-examination on the affidavits. The hearing judge was satisfied that pursuant to Rules 7-2 to 7-8 of the Queen's Bench Rules and Hryniak v Mauldin, this action should proceed to summary judgment; nothing would be gained by hearing viva voce evidence since few facts were available to determine the specifics of the accident. The hearing judge was first required to determine what evidence should be allowed and excluded RCMP reports, materials and photographs for which no proof of authenticity had been provided by the plaintiffs. He was also required to carve out what evidence was within the expertise of the expert witnesses, and to determine the weight to be given to those opinions when he was in doubt as to what materials formed the basis of the reports or the opinions. The plaintiffs were the spouse and the estate of the deceased (the plaintiffs). The deceased (T.A.) died in a collision with a guy wire attached to a SaskPower power pole while operating a snowmobile in a ditch and not on a marked or designated snowmobile trail. SaskPower admitted that it had a duty of care to T.A. as an operator of a snowmobile, but denied it had not met the standard of care required by s. 34 of the Snowmobile Act (Act) or that the plaintiffs had satisfied the onus required by s 32 of the Act to prove that the deceased had not operated the snowmobile negligently.
HELD: The action was dismissed. Generally, as recognized by the judge in his reference to Casbohm v Winacott Spring Western Star Trucks (2019 SKQB 44, aff'd 2021 SKCA 21), a plaintiff must establish the nature of the standard of care which the defendant must meet to succeed in his or her action. In this case, that standard is set by s 34(1)(b) of the Act. SaskPower will only be in breach of its duty of care to snowmobilers if it "does or has done a wilful act with reckless disregard of the presence of the person or the person's property." The hearing judge found that the express wording of s 34(1)(b) as to the standard of care was clear and unambiguous, and no evidence had been presented to show SaskPower had performed a wilful act. The plaintiffs alleged an omission on SaskPower's part by failing to adequately inspect the power pole, which could not be a wilful act as it would not be an act at all but an omission. In any event, SaskPower had shown that its inspections and pole maintenance were within industry standards. Section 32 of the Act also barred a successful claim in this case because the plaintiffs bore the onus to show that the accident was not due to T.A.'s negligent operation of the snowmobile, and this the plaintiffs had failed to do.

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Smith Building and Development Ltd. v Wynward Insurance Group, 2021 SKQB 54

Megaw, February 25, 2021 (QB21049)

Insurance - Contract - Interpretation

The plaintiff, a corporation in the business of owning and renting commercial premises, owned a number of properties that were insured by the defendant insurance company. When one of the plaintiff's commercial buildings was destroyed by fire in 2016, the defendant declined coverage and the plaintiff brought this action. It claimed under the policy, the replacement cost value of the building and loss of rental income as well as punitive damages and solicitor-client costs. When the plaintiff first purchased the building in 2008, its principal, Smith, applied to the defendant for a policy for replacement cost (RC) coverage, and this type of coverage was confirmed on the request for a quote. When the policy was renewed in 2014, a note attached to it identified the coverage as RC valuation. The building was occupied by sole tenants until 2012 when the tenant obtained the plaintiff's permission to sublease some of the commercial space to two sub-tenants, one of which was a motorcycle club. After the main tenant terminated its lease in 2016, the plaintiff consented to the sub-tenants remaining in the building. Once the main tenant vacated, Smith completed a walk-through of the premises in February 2016 and found nothing out of order and the rental arrangement continued. When fire destroyed the building three months later in April 2016, the fire chief determined it was caused by arson but neither the plaintiff nor the sub-tenants were implicated. The plaintiff advanced its claim on the policy immediately. Early in the investigation of the claim by the defendant's senior claims examiner, he conducted an internet search. He believed the results showed that the motorcycle club was affiliated with the Hell's Angels biker gang. As a result, the defendant denied the claim on the ground that a material change in the risk had occurred not because the sub-tenant was a motorcycle club but because it was associated with the gang. It cancelled all of the plaintiff's policies with it. At trial, the defendant argued that the policy did not provide RC but actual cash (AC) value coverage because the policy stipulated that AC value was the limit of coverage if that was the lesser of the figures available. As well, if RC coverage existed, it would have been shown as an endorsement on the policy, and it was not. The defendant's senior executive could not explain the discrepancy between what the documents said and what the plaintiff thought was AC value coverage. It also asserted that in any case, the plaintiff's failure to rebuild the building within a reasonable time following the fire resulted in the plaintiff forfeiting its right receive RC coverage to the limit of the policy. Smith testified he could have rebuilt the building had he received RC funding. The issues were: 1) what kind of policy the plaintiff had; 2) whether the plaintiff was entitled to recover loss of rentals under the policy; 3) whether the plaintiff had forfeited the right to receive RC coverage; and 4) a) what is the law respecting material change in risk; and b)

had there been a material change in this case? The defendant alleged that the material change was the existence of an outlaw motorcycle gang being a sub-tenant. It abandoned its claim that the plaintiff had not informed it of the sub-tenants.
HELD: The plaintiff was awarded judgment of $693,690. The court found with respect to each issue that: 1) the plaintiff was entitled to RC coverage to the maximum of $640,000 available under the policy. The plaintiff understood that it had an RC policy and that was the contract it entered into. The fact that it was not contained in a policy endorsement did not affect what the plaintiff thought it was entering into and that which was represented to it as having been entered into. There was no evidence that the defendant took the steps required of it under s. 8-10 of The Saskatchewan Insurance Act to notify the plaintiff of any differences between the application and the policy; 2) the plaintiff was entitled to recover loss of rentals of $35,400, representing the monthly rental income to the policy limit of 12 months; 3) it was not satisfied that the plaintiff would not have been able to finance the construction of the building or would not have rebuilt it, had the insurance proceeds been paid; and 4) a) that definitions of material change are provided under ss. 103(6) and 128 of the Act. The duty to disclose a material risk by the insured is one of good faith. The determination of whether something is considered material to the insurance contract is a question of fact. The onus to establish it resides with the insurer; and b) the defendant failed to establish on a balance of probabilities that the motorcycle club had the alleged connections to the Hell's Angels and that it being a sub-tenant was evidence of a material change in risk. The evidence provided by Smith satisfied it that the plaintiff did not have the requisite knowledge of the existence of either a Hell's Angels connection or anything untoward about the motorcycle club. It decided that this was not an exceptional case justifying an award of punitive damages. The defendant's denial of insurance coverage based upon a questionable investigation was wrong but did not constitute malicious or high handed conduct. It would not award solicitor-client costs because nothing in the actions of the defendant in the conduct of the litigation called out for censure.

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Lesy v Lesy, 2021 SKQB 56

Megaw, February 25, 2021 (QB21055)

Family Law - Custody and Access - Children's Law Act
Family Law - Custody and Access - Grandparents - Persons of Sufficient Interest

The chambers judge was asked by the grandparents of a four-year-old child, I.L., to be declared persons of sufficient interest in accordance with The Children's Law Act (Act), and to be granted an order that I.L. reside with them and that they make all decisions for the child. I.L. was born on November 16, 2016. She and her father resided with the petitioners from her birth until December, 2020, when he and I.L. moved to Brandon. Custody and access with respect to I.L. and her parents, the respondents, were resolved in a prior proceeding. The mother withdrew from I.L.'s life in December, 2017, though she appeared at the hearing.
HELD: The petitioners' application to be declared persons of sufficient interest in the life of I.L. was dismissed. The chambers judge was unable to find that the petitioners' role in the life of I.L. had risen from that of loving grandparents to a parenting role akin to that of I.L.'s father. Guided by D.L.C. v G.E.S., 2006 SKCA 79 (D.L.C.), the chambers judge conducted an analysis of the criteria to be considered under s. 6(1) of the Act to determine whether the petitioners had standing as persons of sufficient interest so as to have the right to a determination that it was in the best interests of I.L. for them to assume a parenting role. As directed by D.L.C., the chambers judge considered the following criteria in arriving at his ruling: the duration of the involvement of the petitioners with I.L.; the level of intimacy and the quality of the relationship between the petitioners and I.L.; how the relationship between the petitioners and the child was represented to the world; and the financial support provided to I.L. by the petitioners, and concluded that none of the criteria raised the petitioners' status vis-a-vis I.L. beyond that of loving grandparents and could not displace the presumption that the respondent father was the parent and caregiver of I.L.

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