Case Mail

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Statutes - Interpretation - Enforcement of Money Judgments Act, Section 94

The appellant, Farm Credit Corporation (FCC), appealed the decision of a Queen's Bench chambers judge. The facts on which her fiat was based were that the respondent, a farmer, entered into a number of purchase-money security (PMSI) agreements in 2012 and 2013 respecting pieces of farm equipment with John Deere Financial. It assigned the PMSIs to Nelson Motors (Nelson). In 2014, FCC extended credit to the respondent and in exchange for it, he granted FCC a security interest in all of his present and after-acquired personal property. The respondent was currently in default of his payment obligations to FCC. After the respondent defaulted on his security agreements with Nelson, it seized and sold the farm equipment. After satisfying the terms of its security agreements, a surplus of $78,000 remained. It paid it into court pursuant to s. 60(4) of The Personal

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Property Security Act (PPSA) and notified all other potentially interested parties, including FCC. The respondent applied to the Court of Queen's Bench under s. 66 of the PPSA for an order releasing the funds to him for the purposes of securing farm implements necessary for farming operations and therefore exempt from seizure. FCC opposed the application and claimed the proceeds under its general security agreement, asserting that the funds represented proceeds resulting from the sale of non-exempt equipment, seized and sold by Nelson pursuant to a purchase-money security interest (PSMI) in it. The chambers judge held that the farm equipment was exempt property under s. 66(d) of The Saskatchewan Farm Security Act (SFSA) and the respondent was entitled to claim an exemption in the surplus proceeds with a proviso that they were to be used to secure the respondent's remaining farm equipment because the respondent had agreed with another PMSI that the proceeds would be used to prevent the seizure of other farm equipment. The issues as defined by the court were: 1)(a) Is there a common law principle at stake? The appellant submitted that Supreme Court recognized in McDiarmid and Heritage, a principle of statutory interpretation to the effect that exceptions to common law principles are to be construed narrowly; 1)(b) in general terms, what principles guide the interpretation of the exemption provisions of the SFSA and what is the role of strict construction; 2) in specific terms, how should s. 70(2)(a) of the SFSA be interpreted? The appellant submitted that the s. 66 exemption removes chattels that are covered by PMSIs and therefore the surplus proceeds remaining after a PMSI is satisfied are non-exempt. Relying on a claim of strict construction, it argued that that since s. 68 derogates from its contractual right to seize, s. 70(2)(a) should be strictly construed in its favour; 3) when a PMSI holder sells equipment exempt under s. 66(d) of the SFSA and the sale generates surplus proceeds, are they the exempt property of the farmer? How should this issue be resolved in light of s. 94(8) of The Enforcement of Money Judgments Act (EMJA)? The chambers judge's analysis of the respondent's exemption rights was based upon the parties' arguments before her. The parties then raised for the first time on appeal, questions concerning the application of the EMJA. The appellant argued that if the common law did recognize an exemption in the proceeds of sold goods, that principle no longer exists because s.94 of the EMJA, related to the distribution of surplus proceeds does not refer to the SFSA; and 4) whether the chambers judge erred by ordering that the surplus proceeds be applied to PMSI debts held for other allegedly exempt property.
HELD: The appeal was dismissed except with regard to the chambers judge's proviso regarding the use of the funds by the respondent and that was set aside. The court found with respect to each issue that: 1)(a) the principles in McDiarmid have no application to the appeal. There is no common law principle at stake from which the Legislature has created an exception. Exemption legislation is an integral part of the provincial credit regime in Saskatchewan and construing s. 70(2) of the SFSA is a legislative exception to a legislative regime; 1)(b) although cases such as Hetherington stated that exemption statutes should be construed strictly, that is no longer the law in Saskatchewan. The general principles guiding interpretation are provided by s. 2-10 of the Legislation Act and the modern principle of statutory interpretation established in Rizzo. Under them, the courts have been required to adopt a purposive analysis in every case of statutory interpretation and under

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Bell ExpressVu, other principles of statutory interpretation enter the interpretive exercise only in the event of ambiguity, where the words of a provision can bear two or more plausible meanings all of which may accord with the intentions of the statute. Only in such cases is the principle of strict construction applicable; 2) that there is only one plausible interpretation of s. 70(2)(a) consistent with the Legislature's intent. The Legislature has granted the PMSI creditor a special status. Only a PMSI creditor can seize and sell an exempt asset that is secured by a PMSI. The provision is not a general declaration of non exemption for all purposes. Since there is only one plausible interpretation, there is no need to resort to the principle of strict construction. It removes exemption protection provided by ss. 66 and 68 in order to permit a PMSI creditor enforce its security interest in an otherwise exempt asset that is secured by such a creditor's PMSI; 3) the surplus proceeds were exempt and must be paid to the respondent. Before the EMJA, the common law in Saskatchewan was that where surplus proceeds are generated from a forced sale of exempt tangible personal property, they were also exempt. The Legislature's enactment of s. 94(8) of the EMJA did not indicate an intention to change the common law in relation to a farmer's entitlement to the surplus proceeds from the forced sale of an exempt asset; and 4) it was unnecessary to determine whether the chambers judge had erred, as the respondent no longer had assets secured by another PMSI and as a result, the money must be paid to him. How he used the money would determine whether it remains exempt.

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R v Wolfe, 2021 SKCA 39

Caldwell Schwann Kalmakoff, March 16, 2021 (CA21039)

Criminal Law - Murder - Jury Trial - Appeal
Appeal - Criminal Law - Predicate Offence - Unlawful Confinement
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The joint appellants, G.W. and C.H., appealed their respective convictions for first degree murder and second degree murder of R.S. G.W.'s grounds of appeal were grouped under the umbrella of miscarriage of justice and C.H.'s grounds were various: unreasonable verdict, the partial defence of provocation, and the failure by the trial judge to charge the jury with a Vetrovec caution. R.S. was killed in a house fire that was deliberately set. He died of asphyxiation from smoke inhalation and carbon monoxide poisoning. The heart of the Crown's case

Statutes - Interpretation - Enforcement of Money Judgments Act, Section 94

Statutes - Interpretation - Uniform Building and Accessibility Standards Act, Section 17
Administrative Law - Orders and Judgments - Contravention - Appeal - Doctrine of Collateral Attack

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Carrier v University of Saskatchewan

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Farm Credit Canada v Gustafson

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Manderscheid v Humboldt Smiles Dental Studios Inc.

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PCL Construction Management Inc. v Expocrete, An Oldcastle Company

was the evidence of J.P., a participant in the events surrounding the death of R.S., and of witnesses to whom the appellants made inculpatory statements. The evidence against C.H. also included formal admissions by her in a warned statement. The evidence heard by the jury was that G.W., C.H., R.S. and J.P. had gathered in the home of J.P., where they drank alcohol and consumed methamphetamine over several hours. R.S. was a newcomer to this group, but was welcomed by them when he contributed a stolen bottle of vodka to the gathering. All four eventually succumbed to the effects of imbibing these substances and fell asleep. C.H. was awoken by R.S. on top of her, rubbing his body against her and groping her. She pushed him away from her, and then saw J.P. in a state of undress, woke her and told her R.S. must have raped her. C.H. and J.P. believed that R.S. was HIV positive. C.H. then woke G.W., described to him what she believed happened, and told G.W. to beat up R.S. At this point, G.W. and C.H. punched R.S. in the face, and struck him in the head with a vodka bottle. C.H. then gave G.W. a knife, and G.W. used it to slice R.S. on his torso, arms and stomach. R.S. went into a bathroom. G.W. sprayed oven cleaner around the bathroom door frame, and tried to light it, but was unable to do so. C.H. found lice treatment and applied it to a pillow, which G.W. was able to light on fire. G.W. pushed a large flat screen TV in front of the door, and held it in place to prevent R.S. from exiting the bathroom. The pillow was on fire. The TV fell onto the burning pillow. The TV was burning and melting, producing large quantities of smoke. R.S. left the bathroom, covered in blood, and asking for help. He moved to a back bedroom. G.W., C.H. and J.P. left the house, and asked others to help them establish an alibi. Later, they and another witness, C.K., returned to the house, and did not see R.S. They did not see any flames, but the house was full of smoke and it was difficult to breathe. The house burned down, and once access was safe, police went in and found R.S.'s body in the back bedroom.
HELD: The appeal of both accused was dismissed unanimously. The court first considered the appeal of G.W., who argued that his appeal should be allowed as the trial judge's jury charge was functionally inadequate because she failed to properly instruct the jury concerning an improper jury address by the prosecutor and because the trial judge failed to provide proper jury instructions in relation to evidence crucial to G.W.'s defence. The court disagreed that the jury charge was improper in that, on a functional approach, "read as a whole [it] properly equipped the jury to decide the case according to the law and the evidence" (see: R v.Barton, 2019 SCC 33), and could not therefore be demonstrated by the appellant to have amounted to a miscarriage of justice as permitted by s. 686(1)(a) of the Code (see: R v Davey, 2012 SCC 75; R v Khan, 2001 SCC 86). Specifically, the appellant, G.W., urged the appeal court to find a miscarriage of justice in a failure by the trial judge to instruct the jury that the prosecutor omitted to tell the jury that formal admissions made by C.H.in a warned statement and accepted in evidence at the trial were not to be considered in the case against him. At law, the inculpatory admissions were evidence against C.H., but not against G.W. The appeal court reviewed the jury charge as it pertained to the uses which could be made of specific pieces of evidence in a joint trial, including the warned statement of C.H., and noted that the trial judge clearly told the jury the warned statement of C.H. could not be used against G.W., generally explaining to the jury that each accused

R v BLS Asphalt Inc.

R v Gore

R v Kearsey

R v Millie

R v Wolfe

Scobie v Thiessen

Wood Mountain Lakota First Nation No. 160 v Goodtrack

Yorkton (City) v Mi-Sask Industries Ltd.

must be treated separately and what evidence would be relevant and admissible with respect to each of them. Next, the appeal court considered the claim of G.W. that the trial judge had failed to properly instruct the jury on the evidence relevant to the mens rea element of murder. As before, the appeal court pointed to portions of the jury charge where the trial judge specifically set out for the jury with illustrative evidence, in particular that of J.P., the defence of G.W. that he had no intention to kill R.S. because he believed R.S. had exited the bathroom and left the house when the fire appeared to have snuffed itself out, and because he said he had settled his issue with R.S. by assaulting him. Lastly, G.W. attempted to persuade the appeal court that the trial judge's instructions to the jury failed to emphasize to the jury crucial evidence that R.S. had not been unlawfully confined when he died because he was able to escape from the bathroom, and so it was open for the jury to find he was not guilty of first-degree murder under s 231(5)(e) of the Code. The appeal court rejected this argument because it misstated the law with respect to constructive murder committed while the victim is unlawfully confined. In circumstances where the accused has unlawfully confined or attempted to unlawfully confine a person, and during that time, meaning to cause the death of the person, commits an unlawful act which causes the death of that person, the accused will be guilty of first degree murder when the unlawful act causing that person's death is committed at a point in time when the person has been confined or his confinement has been attempted. In this case, the appeal court said the culpable unlawful act was the intentional setting of the fire by G.W., which was done when R.S. was unlawfully confined, both by physical restraint in the bathroom and by emotional coercion induced by fear of G.W. and C.H., which ultimately caused his death by asphyxiation. As such, the death of R.S. was caused when R.S. was unlawfully confined. Whether he was able to exit the bathroom after the pillow was set on fire was irrelevant to the analysis of constructive first degree murder as contemplated by s 231(5)(e) of the Code. In the result, the trial judge was not required to tell the jury that R.S.'s escape from the bathroom was an intervening act cutting the chain of causation between the unlawful confinement and the death of R.S., as it was not such. The court's analysis of the applicability of s 231(5)(e) was directed by the reasoning in R v Harbottle, [1993] 3 SCR 306 and R v Pritchard, 2008 SCC 59. Lastly, the appeal court found that the appellant had failed to show a miscarriage of justice occurred because of alleged incompetence on the part of G.W.'s trial counsel. In substance, G.W. advanced that, against his wishes, his trial counsel conceded that he played a role in R.S.'s death but did not mean to cause his death. G.W. on appeal argued that this concession could only lead the jury to conclude he had personally set the fire. The appeal court was not persuaded that this decision was ill-advised, since there were a number of scenarios other than the actual setting of the fire which could lead the jury to convict G.W. of manslaughter and, in any event, the evidence against G.W. was so overwhelming that the concession could have no effect on his conviction for murder. Turning to C.H.'s grounds of appeal, the appeal court first considered the ground that the conviction was unreasonable or unsupported by the evidence as allowed by s 686(1)(a)(i) of the Code, in that the trial court failed to properly explain to the jury that as the evidence against C.H. was circumstantial, the jury could only convict her if the inference of guilt to be drawn from that

evidence was the only reasonable conclusion available on the evidence (R v Villaroman, 2016 SCC 33). The appeal court recognized that the trial judge need not instruct the jury that it must first reject all other possible explanations arising from the circumstantial evidence before convicting, but only needed to direct it to consider the evidence as a whole and whether the Crown had proven beyond a reasonable doubt that the circumstantial evidence could not reasonably support any other conclusion but the guilt of the accused. In any event, the direct evidence itself could have led the jury to a conviction of second degree murder. C.H. then advanced that the verdict was unreasonable since it was inconsistent with G.W.'s conviction for first degree murder, but the appeal court rejected this argument as it could not find that the verdicts were irreconcilable, and on the evidence, it was open to the jury to find that C.H.'s involvement in the murder left it with a reasonable doubt that she was a participant in his unlawful confinement. The analysis of the court with respect to unreasonably inconsistent verdicts was governed by the reasoning in R v Pittman, 2006 SCC 9 and R v Goforth, 2021 SKCA 20. The appeal court also found no basis for overturning the jury trial on the grounds of an erroneous jury charge on the partial defence of provocation as enacted by s 232(1) of the Code or for the alleged failure of the trial judge to make a Vetrovec caution as it pertained to the evidence of a Crown witness, J.O., who testified to inculpatory statements C.H. made to him. As to the partial defence of provocation, the court ruled that, though the trial judge had not specifically used the term aggravated sexual assault in her charge, she clearly explained the elements of the defence of provocation and the applicable evidence. In particular, she expressly asked the jury to consider how C.H. might have reacted believing that her friend J.P. had been raped by someone who was HIV-positive. The appeal court also turned aside the argument that the trial judge made a reviewable error in her charge by not providing a Vetrovec caution, stating that she had exercised her discretion properly by choosing to warn the jury to carefully weigh J.O.'s evidence instead, especially since a Vetrovec caution would have required her to dwell on J.O.'s evidence, which might have prejudiced C.H. in her defence.

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Manderscheid v Humboldt Smiles Dental Studios Inc., 2021 SKCA 42

Ottenbreit Schwann Tholl, March 19, 2021 (CA21042)

Administrative Law - Dental Disciplines Act
Administrative Law - Settlement Privilege

This matter was an appeal from an interlocutory order of a Queen's Bench Court chambers judge dismissing the application of K.M. for production of a Consent to Conditions Agreement (CAA) made between M.A., a member of the College of Dental Surgeons of Saskatchewan (college) and the college, which concluded disciplinary proceedings against her. M.A. had provided dental services to K.M. consisting of the extraction of two teeth which K.M. alleged had caused him medical problems. K.M. filed a formal complaint against M.A. with the college, and commenced an action in negligence against M.A, one of the defendants to the action and the respondent on the chambers application below and on the appeal. K.M. was seeking production of the CAA for purposes of the negligence action, as he believed it would contain material relevant to the action and to the questioning of M.A. in that action. The chambers judge denied the application, agreeing with M.A. that The Dental Disciplines Act (Act) did not prohibit the resolution of discipline complaints by way of a CAA and that the CAA was protected from disclosure to a third party by the principle of settlement privilege. Though K.M. had demanded a copy of the CAA in writing personally and through counsel, the college, though it initially stated to K.M. before entering the CAA with M.A. that it would consult with him and obtain his consent, changed its mind and negotiated the CAA without K.M.'s involvement. K.M. did not make the college a party to the application. K.M. argued on appeal that the governing statutory authority, the Act, did not allow the college to resolve discipline claims by way of a CAA and further that the chambers judge erred by finding the principle of settlement privilege applied to prevent disclosure of the CAA to K.M.
HELD: The appeal was dismissed. The court directed itself on the standard of review to be applied: that the interpretation of a statute is to be scrutinized for correctness, and a determination that privilege is properly invoked is a question of mixed law and fact to be reviewed on a standard of palpable and overriding error. The first question the appeal court considered was whether the Act allowed a discipline complaint to be resolved by recourse to a CAA, and since the Act did not specifically address the use of a CAA, the court was required to engage rules of statutory interpretation, in particular the overarching rule known as purposive analysis as mandated by s. 2-10(1) of The Legislation Act, to make that determination. Reasoning that the purpose of the Act was to protect the public from the misconduct or incompetence of its members, any ambiguity in the legislation should be interpreted in a way that conformed to that objective. Central to that purpose is a procedure for disciplining members who fail to meet the required standard of conduct and competence. The Act required the formation of a professional conduct committee (PCC), which was empowered to investigate complaints against members, and as a result of its investigation take one of a number of courses of action, including recommending discipline proceedings. These powers also included recommending that no further action be taken: s 29(2)(b)(ii) of the Act. M.A. argued and the chambers judge agreed that on a purposive interpretation of the Act, the PCC acted within its power to decide that no further action ought to be taken because M.A. had entered into a CAA. Requiring the consent of a complainant before entering into a CAA would be contrary to the aim of the Act to effectively discipline its members. The court agreed with this reasoning. Next, the appeal court embarked on an analysis of the ground of appeal involving the chamber

judge's ruling that settlement privilege protected M.A. and the college from being compelled to produce and disclose the CAA to K.M. Applying the leading case on the question, Hollinger Inc. (Re), 2011 ONCA 579, and the criteria enumerated therein for making a finding of settlement privilege, the appeal court upheld the chambers judge's findings that the PCC and M.A. were 1) involved in a litigious dispute, as M.A. was aware that a discipline hearing was an option the college could use, and she might suffer penalty as a result; 2) the evidence clearly showed that both M.A. and the college intended the CCA to be confidential; and 3) the CAA was intended and was in fact a full settlement of the discipline proceedings. Finally, the court indicated that as the college was a signatory to the CAA, it was entitled to assert privilege against K.M., and as it was not made a participant at the chambers hearing to do so, the appeal court would not have granted relief to K.M.

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Yorkton (City) v Mi-Sask Industries Ltd., 2021 SKCA 43

Caldwell Schwann Barrington-Foote, March 19, 2021 (CA21043)

Statutes - Interpretation - Enforcement of Money Judgments Act, Section 5 - Appeal

The appellant, the City of Yorkton, appealed the decision of a Queen's Bench chambers judge that denied its application for a preservation order (PO) pursuant to s. 5(5) of The Enforcement of Money Judgments Act (EMJA) (see: 2020 SKQB 183). The judge found as a fact that the funds available to the respondent compared to the appellant's claim for damages resulted in the former's inability to satisfy the judgment if the latter were successful. He then found that the appellant failed to discharge the onus of proving that judgment enforcement would be partially or totally ineffective because of the lack of evidence as to the terms of the respondent's insurance. As the proof was the starting point of whether a court could be satisfied that a PO is prima facie justified, the onus was on the defendant to prove one or all of the conditions in s. 5(5)(b)(i), (ii) or (iii). The appellant was granted leave to appeal the decision (see: 2020 SKCA 109) on three grounds, being whether the chambers judge erred: 1) in law as to the burden of proof borne by an applicant for a PO pursuant to s. 5(5) of the EMJA; 2) in law or mixed fact and law by deciding that the appellant was obliged to provide further evidence as to the respondent's insurance coverage relating to the underlying action; and 3) by failing to grant a PO as a result of committing these errors.
HELD: The appeal was allowed and the appellant was granted a PO. The court found the standard of review respecting the first ground was correctness whereas the second ground involved deference to the discretion held and exercised by the judge. Because the finding of fact in this appeal was based on affidavit evidence, the

standard was palpable and overriding error. It found with respect to each ground that: 1) prior to determining the first one, it would undertake a review of: i) the difference between an evidential burden (EB) and a persuasive burden (PB). Where a party bears the EB in relation to an issue, it must either adduce or point to evidence on the record that is sufficient to raise the issue, although it does not bear the burden exclusively as the evidence may be adduced by the other party. If the EB has been satisfied, the court is not required it to decide in favour of the party that bears that burden but rather, if the evidence meets the EB, it can decide the issue in accordance with the applicable standard of proof. The party who bears the PB or burden of proof in relation to an issue in civil matters must prove it to the civil standard of proof: on the balance of probabilities. Where the party fails to prove the issue to that standard, they will lose on that issue. If the judge can reach a conclusion in relation to an issue, the PB does not play a part in the decision-making process because it is only if the evidence is so evenly balanced that the judge cannot reach a conclusion that the persuasive burden becomes relevant. In those circumstances, the party that bears but has failed to discharge the PB will lose on that issue; and ii) the application of these principles to interpreting s. 5(5) of the EMJA. Using the approach set out in Rizzo and established in s. 2-10 of The Legislation Act, it interpreted s. 5(5) as meaning that the judge can grant a PO if he or she has concluded that the conditions described in (a), (b) and (c) exist. Where, as here, s. 5(5)(b) applies, the judge can grant a PO only if they have concluded that: it is likely enforcement of a judgment will be partially or totally ineffective; if an order is not granted; that ineffectiveness will result from such things as damage, dissipation, and destruction in dealing with the property; and that ineffectiveness will not result from a disposition of a property for a purpose specified in s. 5(b)(i),(ii) or (iii). The requirement to convince the judge that these conditions exist is the PB. That would mean the judge must be convinced on the civil burden, being a balance of probabilities; and iii) how the foregoing conclusion applies to the case law, in particular, the judgment in Avramenko (2014 SKQB 96) and others citing it. None of those decisions distinguished the EB from the PB in s. 5(5)(b) applications in that they did not discuss whether the fact there is evidence that is sufficient to constitute a prima facie case means the judge may exercise discretion to grant relief without having first decided they are convinced or persuaded by that evidence. Although the judge's decision in Avramenko was correct respecting the evidentiary threshold, the court questioned his description that the onus shifted to the defendant when the burden was met. Rather, it was correct to say the defendant had only a tactical burden to adduce evidence or lose once the EB was met. Also, the judge's description that the plaintiff bears the burden of making out a prima facie case was misleading, because the EB can be met regardless of whether the plaintiff has adduced sufficient evidence. It found that the persuasive authority respecting the nature of the burden on an applicant under s. 5(5) is that found in the decisions of the Court of Appeal in Arslan respecting s. 8 of the EMJA (see: 2016 SKCA 77). Thus, contrary to the parties' position in this case that an applicant for a PO need only demonstrate a prima facie case, the court held that while the EB in a s. 5(5) application is that the plaintiff must adduce or point to evidence that constitutes prima facie proof of the conditions noted above, the PB is proof that those conditions exist on a balance of probabilities. If the

court is unable to conclude on a balance of probabilities that those conditions exist, the plaintiff will not succeed. Respecting the first ground, the court found that the chambers judge failed to distinguish between the EB and the PB, resulting in an error in law as to the nature and operation of the burden of proof. In his identification of the burden of proof imposed on the appellant as an applicant for a PO by s. 5(5) of the EMJA, the judge cited Avramenko for the proposition that the plaintiff must establish a prima facie case but did not distinguish between the EB and the PB and thereby erred in law by concluding that absent evidence to the contrary, prima facie evidence or prima facie proof on an application for a PO results in a compelled fact determination, rather than a permissible fact determination; 2) the judge erred by concluding that the appellant had not made out a prima facie case and thus erroneously concluded that he was obliged to adduce further evidence as to the respondent's insurance. He made a palpable and overriding error in assessing the facts due in part to his legal errors relating to the EB and PB. Given the evidence led by the appellant, the respondent had a tactical burden to disclose the relevant evidence and the appellant was not obliged to adduce that evidence by cross-examining the respondent's affiant for the purpose of demonstrating that it was likely there would be insufficient insurance cover a claim; and 3) by failing to grant a PO as a result of the errors he made with respect to the first two grounds. He should have found that the appellant met the PB because the respondent is likely unable to satisfy a judgment in whole or in part. A PO should have been granted, too, because the respondent proposed to use the amount remaining from the funds from the auction and building proceeds to pay for costs associated with winding up. The court found that winding up cannot be interpreted as being consistent with the ordinary sense of "carrying on business" and would not fall within the s. 5(5)(b)(ii) exception. Such expenditures would increase the shortfall suffered by the appellant. The matter would not be remitted back to the chambers judge. Contrary to the respondent's position that because the judge had not decided whether it should be entitled to an exemption to pay legal expenses or as to the amount of security that the appellant should be required to post, the court did not have the necessary evidence under s. 12(1)(d) of The Court of Appeal Act, 2000 to make an order that could have been made by the judge, the court found that there was sufficient evidence before it to do so. The appellant should have addressed security for costs in its application under s. 5(7) of the EMJA but that was not fatal to its case. In the circumstances, the appellant was ordered to pay security in the amount of $50,000.

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Mitchell v Candle Lake (Resort Village), 2021 SKCA 44

Schwann Leurer Kalmakoff, March 24, 2021 (CA21044)

Statutes - Interpretation - Uniform Building and Accessibility Standards Act, Section 17
Administrative Law - Orders and Judgments - Contravention - Appeal - Doctrine of Collateral Attack

The appellant, Mitchell, the owner and director of the appellant construction company, Steveco (the appellant), appealed the decision of a Queen's Bench judge that granted the application made by the respondent, the village of Candle Lake, pursuant to s. 23 of The Uniform Building and Accessibility Standards Act (the Act), for an order directing the appellant to comply with its stop-work order issued under s. 17 of the Act. After the appellant's place of business was destroyed by fire, the respondent's administrator informed the appellant that before a replacement building could be constructed, a building permit would be required. Because the building permit submission that followed was deficient, the administrator advised the appellant of the corrections he should make and to contact the respondent's building inspector. The respondent's community safety officer noticed construction was occurring on the appellant's site and, having learned from the building inspector that no building permit had been issued, she posted a stop-work order on the site. The inspector issued another stop work order a few days later when construction continued that stated that the Act had been contravened because of the absence of the permit. The appellant did not appeal the order to the Saskatchewan Building and Accessibility Standards Appeal board under s. 18 of the Act. Two months later, he delivered an application for a permit and plans approved by an engineer. He averred that the administrator told him then that he could resume construction. However, the administrator deposed that she told the appellant that the application was still incomplete in February. The respondent then applied to the court for a compliance order under s. 23 of the Act. The appellant brought an application for judicial review in mandamus compelling the respondent to issue a permit. The chambers judge found as fact that: the respondent issued its stop work order under s. 17 of the Act; the inspector had had the appellant's application before him when he issued the order and had provided detailed reasons to the appellant outlining the reasons why the application was deficient; and the appellants had not appealed the s. 17 order under s. 18 as permitted by the Act. He concluded that the order remained in effect as it had not been overturned by an appeal and granted the requested order. The mandamus application was adjourned at the request of the appellant's counsel to permit filing of additional material. Among the grounds of appeal was whether the chambers judge erred in failing to allow the appellant to challenge the validity of the s. 17 order in the context of the respondent's subsequent enforcement proceedings. The appellant submitted that a Queen's Bench judge can only grant an order under s. 23 if the underlying order is a valid, properly issued order under s. 17 of the Act. In this case, it was not, as the ongoing construction without a permit, although required by s. 14 of the Act and the respondent's bylaw, was not a contravention of a building or accessibility standard and thus the s. 17 order was not properly issued and could not be enforced under s. 23 of the Act.

HELD: The appeal was dismissed. The court concluded that the Legislature did not intend to allow a party to collaterally attack the validity of a s. 17 order in the context of subsequent proceedings to enforce compliance with it. It found that the chambers judge had not erred. In preliminary comments, it noted that the appellant

had not appealed the judge's finding of fact that the respondent's order to remedy the contravention was issued pursuant to s. 17, that the order stated the appellant was in contravention for commencing construction without a permit, and that the appellant had not appealed the order under s. 18. Although the judge had not referred to the doctrine of collateral attack in his conclusion, it was implicit in his observation that if the appellant had been concerned about the validity of the order, his recourse was to appeal under s. 18 and because he failed to do so, the order was a properly ordered issued s. 17 order at the time of the respondent's application. Respecting the doctrine of collateral attack, it held that the doctrine was not limited to situations involving a subsequent criminal prosecution for non-compliance with an underlying order, as established in Maybrun ([1998] 1 SCR 706), and it extended to circumstances such as these where a party ignores a regulatory appeal process and then seeks to challenge an administrative order in subsequent administrative compliance proceedings, following Sarg (2002 ABCA 174) and St. Clements (2013 MBCA 65). It then analyzed the factors set out in the Maybrun framework to resolve the question of what forum the Legislature intended should make a determination respecting the validity of a s. 17 order. The analysis satisfied it that the Legislature had not intended to permit a collateral attack in the context of subsequent proceedings to enforce compliance. If the appellant believed the order to be invalid, the statutory appeal mechanism should have been used.

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Scobie v Thiessen, 2021 SKCA 47

Richards Ryan-Froslie Barrington-Foote, March 26, 2021 (CA21047)

Family Law - Custody and Access - Interim - Appeal

The appellant father appealed the decision of a Queen's Bench chambers judge that granted an interim order for custody and access and child support, current and retroactive, pertaining to the seven-year-old daughter of the parties. The parties had separated in June 2018 after cohabiting for six years. They continued to live in the same small town where their own parents resided. The order was made in response to applications brought by each of them: the appellant's was brought pursuant to The Children's Law Act, 1997 (CLA, 1997) and the Family Maintenance Act, 1997, seeking interim joint custody and shared parenting with the respondent and child support based on s. 9 of the Guidelines; and in response, the respondent claimed primary residence of the daughter and that the appellant have access on alternating weekends with child support based upon s. 3 of the Guidelines and retroactive support from July 2018 to June 2020 in the amount of $19,200. In the affidavit

evidence presented at the hearing, the appellant averred that that from July, 2018 to July, 2019, the parties had continued to parent their daughter much as they had during their relationship, and when either party needed assistance caring for their daughter, the appellant's mother would provide child care. However, when he sought to formalize this arrangement in July 2019, the respondent stopped asking the appellant's mother for help and unilaterally reduced his time with their daughter to alternating weekends. He stated that he paid the monthly installments of $1,275 for the respondent's car loan in lieu of child support. The payments totaled $20,390. In response to an allegation made by the respondent, he adduced evidence showing they had come from his personal bank account. The respondent attested that she had always been the primary caregiver of their daughter and following separation, the appellant only spent time with her on alternating weekends. She had not required help from the appellant's mother since July 2019, but did not provide evidence as to who was responsible for the majority of child care when she was at work. The respondent said that it was the corporation that paid her car loan payments as part of her overall settlement to resign as a corporate shareholder from the parties' closely-held corporation. She described the appellant as an uninvolved parent and as having anger issues, alleging that he had punched walls. The appellant denied this general assertion and there were no allegations that either parent ever physically abused their daughter. It was also uncontroverted that she had a close and loving relationship with both parents. The chambers judge granted the relief set out in the respondent's draft order that the daughter would have her primary residence with the respondent and the appellant would have reasonable and generous access. He altered the draft order to read "every second week" from "every second weekend". The annual income for the appellant and respondent was found to be $108,900 and $33,875 respectively. Based upon s. 3 of the Guidelines and the parenting arrangement, the appellant was ordered to pay $917 per month for child support commencing in July 2020 and to pay $19,200 in retroactive child support up to June 2020. The judge did not provide any reasons. The respondent's counsel sought but did not receive clarification of the order from the judge, particularly regarding the provision for access. The appellant interpreted it as meaning that he was to parent his daughter every second week while the respondent believed it to mean that he would have reasonable and generous parenting time every second week. The appellant appealed the whole of the judge's decision, excepting the contested provision. The appellant advanced four grounds of appeal but the court dealt with only the first: whether the chambers judge erred in law by failing to provide adequate reasons.

HELD: The appeal was allowed and chambers judge's decision was set aside. On the basis of the affidavit evidence, the court substituted its own decision. It made an interim order that the parties should have joint custody and have a shared parenting arrangement. The matter of prospective child support was remitted to the Court of Queen's Bench for determination and retrospective child support would be left for determination by the trial judge. The court found that the chambers judge erred by failing to provide adequate reasons in the context of this case because of the controverted evidence respecting the appellant, such as the nature of his role in parenting, what the status quo parenting arrangement had been and whether he had anger issues, all of

which were relevant to determining what was in the best interests of the child. There was also controverted evidence regarding retroactive child support in light of the car loan payments made by the appellant. The judge's order regarding the parenting arrangement was ambiguous, and if he intended the parties to share parenting, then some explanation of s. 9 of the Guidelines was necessary. Alternately, if awarding primary residence of the child to the respondent, the judge was required to explain why, as the evidence was uncontroverted that both parties were capable parents who could provide a suitable home. In substituting its decision to grant an interim order, the court took into account ss. 6(5)(a) and 8 of the CLA, 1997 and held that in determining the best interests of the child, all of the relevant factors must be balanced. Which parent was the primary caregiver formed only part of that inquiry, whereas the chambers judge seemed to rely upon that factor. The order for a shared parenting arrangement would affect prospective child support from April 2021, when s. 9 of the Guidelines would apply. For the period from February 2020 to March 2021, s. 3 of the Guidelines applied. However, due to deficiencies in the evidence, such as the parties' failure to provide financial information to satisfy the requirements of s. 21 of the Guidelines, the issue of prospective child support was remitted to the Court of Queen's Bench for determination. Concerning the issue of retroactive child support, the matter was better left to the determination of the trial judge because of the controverted evidence respecting whether a child support agreement existed and whether there had been a parenting arrangement for the period in question.

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Carrier v University of Saskatchewan, 2021 SKQB 59

Danyliuk, March 2, 2021 (QB21059)

Administrative Law - Judicial Review - Universities

The Applicant, J.C., a student at the University of Saskatchewan (US), sought relief from the court from decisions of the College of Arts and Science (college) of that university which affected his academic standing, in particular, the decision made in the fall of 2018 to allow him a retroactive withdrawal from his geology class after he missed his mid-term exam but took no steps to make it up, and the decision to disallow him from attending classes for the 2019-2020 school year due to poor academic performance. J.C. had previously been required to discontinue his program for the 2017-2018 school year for the same reason. The college had a process in place which provided a right of appeal from decisions made which affected a student's academic standing, of which J.C. availed himself. The college-level appeal resulted in a ruling by the college that J.C.'s

suspension for the 2019-2020 academic year was served and since he was permitted to continue his program in 2020-2021, his appeal was unnecessary, and would not be considered; and as to the retroactive withdrawal following the missed exam, that was an accommodation made to him, and an appropriate one. J.C. filed his application with the court in October, 2020 and also appealed the college-level decisions to the university in November, 2020, as was his right under The University of Saskatchewan Act (Act). Both the university-level appeal and the court application were running side by side. Among various forms of relief, J.P. sought damages against the US.

HELD: The chambers judge dismissed the application, and awarded costs against the applicant, finding 1) firstly, that counsel had failed to comply with Rules 3-49 and 3-56 of the Queen's Bench Rules, which govern the procedure for bringing an application for judicial review of the decisions of boards and tribunals; 2) secondly, that the application confused private and public law doctrines; 3) thirdly, that the application was premature; and 4) fourthly, that the matter of the missed exam and voluntary withdrawal from the class was too dated. 1) The application was not properly framed: it did not state the grounds by which the court might review the decisions of the college or the university, nor did it provide the court with a certified copy of the record of the college's decision. 2) The application was misconceived: as reasoned in Taheri v Buhr, 2021 SKCA 9, judicial review is designed to perform a supervisory function intended to serve a public law good by preventing public tribunals and boards from exceeding, abusing or failing to exercise their statutory functions, and is not designed to handle private claims between individuals in tort or contract. 3) The application was premature: the applicant had not exhausted his rights of appeal at the university level under the Act. Barring any exceptional circumstances, a court will only embark on a review once all other relief has been exhausted and a final decision of the appeal board or tribunal has been rendered (see: Nadler v College of Medicine, University of Saskatchewan, 2017 SKCA 89). 4) Finally, the application was too dated. The decision by the college on the matter of approving a retroactive withdrawal by J.C. from the geology class was made in October 2018, and the application for relief against it was filed with the court in October 2020. Rule 3-56 codifies the reasoning gleaned from the case authorities concerning when an application will be found to be too late. It will be found to be too late when it has been unduly delayed, and an order would cause substantial hardship to any person or would substantially prejudice the rights of any person or would be detrimental to good administration. The chambers judge, following a review of Henry v Saskatchewan (Workers' Compensation Board) (1999), 172 DLR (4th) 73 (Sask CA), interpreted "undue delay" to mean a delay which is long and has not been satisfactorily explained, and found that the delay was too long and no satisfactory explanation was made for it, and found that to allow the application to proceed would be detrimental to the good administration of the law, in particular because it is in the interests of justice that claims against universities be determined within a reasonable time, especially since no impediments prevented J.P. from "assiduously asserting his rights."

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Hryciuk, Re (Bankrupt), 2021 SKQB 61

Elson, March 4, 2021 (QB21060)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 66
Statutes - Interpretation - Bankruptcy and Insolvency Act, Section 67(1)(b)
Bankruptcy and Insolvency - Exemptions - Homestead - Appeal

The appellant, Richardson International Limited, appealed pursuant to an application under s. 192(4) of the Bankruptcy and Insolvency Act (BIA), from a decision of the Registrar in Bankruptcy (registrar) that granted an exemption claim made by the bankrupt who had assigned in bankruptcy in December 2016. The registrar had granted her a suspended discharge in the decision (see: 2019 SKQB 159). The bankrupt and her husband held joint title to land that they had farmed land for some years prior to his death in 2005. Due to financial difficulties, the bankrupt sold several parcels of the farmland in 2012. After assigning into bankruptcy, her unsecured liabilities were determined to be $245,500. Of it she owed $231,200 to the appellant, her principal debtor. The homestead exemption claim pertained to a parcel consisting of eight acres with an estimated value of $275,000. A hearing regarding the exemption was held before the registrar pursuant to s. 192(1)(j) of the BIA. The registrar accepted the bankrupt's evidence and her findings of fact included: that the bankrupt was involved in a farming partnership and had had a historical involvement with the operation; had permit books, applied for and received tax and fuel rebates available to farmers and had paid farm insurance premiums; her yard contained her son's farming equipment as well as bins; and the majority of her bankruptcy debt, including the loan to the appellant, was incurred to support a family farming operation. Based on these findings, the registrar was satisfied that the bankrupt had demonstrated a history of farming and as at the date of bankruptcy, was engaged in the business of farming which met the definition of a farmer within the meaning of s. 65 of the SFSA. The evidence established that she had not severed her involvement in and support for the operation, and thus the degree of her engagement was sufficient to trigger homestead protection. Through the combined operation of s. 67(1) of the BIA and s. 66(k) of the SFSA, the bankrupt's claim for a homestead exemption was allowed and the value of the property was removed from the assets divisible amongst her creditors. The grounds of appeal, as defined by the court, were whether the registrar: 1) erred when she considered the bankrupt's history of farming in her interpretation of s. 65 of the SFSA; and 2) if not, had she erred in concluding that the bankrupt had not severed herself from her farming history?
HELD: The appeal was dismissed. The court established the standard of review applicable to the appeal under

s. 192(4) of the BIA as lying on the spectrum regarding questions of mixed fact and law. It would review the registrar's interpretation of the word "farmer" defined by s. 65 of the SFSA as a question of law that was subject to the standard of correctness, but whether or not the facts as found by the registrar met the correct interpretation, her decision was entitled to deference, absent palpable and overriding error. It found with respect to each ground that the registrar had: 1) not erred in her interpretation of s. 65 and in particular by taking into account the bankrupt's farming history. To do so was consistent with the jurisprudence that the nature of a farming operation cannot be determined by isolating circumstances at a particular time; and 2) not erred in concluding that the bankrupt had not severed herself from her history of farming as the conclusion was well supported by the evidence.

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Colistro v Joint Medical Professional Review Committee, 2021 SKQB 62

Bardai, March 8, 2021 (QB21065)

Appeal - Administrative Law - Physicians - Billing Practices

The appellant, R.C., a licensed radiologist and physician, was ordered to repay to the Ministry of Health billings of $797,777.22 rendered for services he provided between August 12, 2013 and March 16, 2015 which the Joint Medical Professional Review Committee (JMPRC) ruled were not payable because they did not conform to acceptable medical billing practices. The JMPRC is a statutory body created by The Saskatchewan Medical Care Insurance Act (Act) with broad authority under s 49 to review billing practices of physicians and to order repayment of any billings it finds to be overbilled, erroneous, unnecessary or excessive. It has the power to establish its own procedures. Subsection 6(1) of the Act makes services of physicians to patients ("beneficiaries") payable if they are provided in accordance with the prescribed schedule and assessment rules in the schedule. Generally, the JMPRC assesses billing practices by reviewing billing patterns of physicians, but is not required to do so, and may use any method or gather any information it deems necessary to perform its supervisory function. Pursuant to ss 49.21(1) to (4) of the Act, the physician has a right to appeal an order of the JMPRC as of right to the Court of Queen's Bench, which may affirm or vary the order, refer the matter back to the committee to reconsider it, quash the order or substitute its own order.
HELD: The chambers judge affirmed, quashed, and referred back different parts of the order. With the relevant background and legislative footing in place, the chambers judge then oriented himself in his analysis by a review of the standard of review applicable to the case before him, which he recognized was pronounced in the

seminal authority, Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 and followed in Abrametz v Law Society of Saskatchewan, 2020 SKCA 81, requiring the reviewing court to apply the same standards of review to administrative decisions from which an appeal is provided as would an appeal court to decisions of a lower court: questions of law, including construction of statutes, are scrutinized on a correctness standard; questions of fact on a standard of deference and palpable or overriding error; questions of mixed law and fact where no question of law is extricable on the same deferential standard; and a deferential standard also applies to discretionary decisions, which will not be disturbed except in the event of errors in principle, misapprehensions of or failures to consider material evidence, failures to act judicially or reaching a clearly wrong decision which would result in an injustice. He then listed the grounds of appeal of R.C., namely, that JMPRC erred in deciding: 1) that R.C. had submitted inappropriate billings for obstetrical ultrasounds; 2) that R.C. had submitted inappropriate billings for flow studies; and 3) that R.C. had submitted inappropriate billings for technical components. As to the first ground, the chambers judge found that JMPRC made no palpable and overriding error in finding that a specialized and expensive type of obstetrical ultrasound performed in the first trimester was not medically necessary because it would not do any more than the less sophisticated and less expensive ultrasounds could do, even though R.C. thought, since such use was not expressly prohibited, these billings must be repaid. As to the second ground which, unlike the first, did not require an interpretation of the Schedule, the chambers judge agreed with JMPRC that the billing pattern of R.C. as compared to the Schedule was not in accordance with that of other radiologists in like circumstances, and 85% must be repaid; and as to the third ground, which concerned billing for technical components such as ownership of equipment and billing for supervision of personnel, the chambers judge accepted JMPRC's argument that the correct interpretation of the Schedule limited billing for use of equipment to that owned by R.C., which was not the case with respect to the equipment on the evidence, but as concerns supervision, the chambers judge found that the evidence showed that JMPRC made a ruling it did not have the jurisdiction to make because it based its decision on concerns related to inadequate supervision of personnel, a competence issue and outside the jurisdiction of JMPRC. JMPRC's mandate was to consider only whether the supervision was done, not whether it was done competently. Further with respect to the second ground, as JMPRC gave inadequate reasons for arriving at repayment of 85% of the billings, it made an error of law which required judicial intervention. The chambers judge concluded that JMPRC's decision with respect to ground 1 was affirmed, with respect to ground 2, affirmed the decision that no palpable and overring error was made that much of R.C.'s work was medically unnecessary. but referred it back to JMPRC to review and provide reasons as to why 85% of the billings should be repaid. As to ground 3, the repayment order with respect to equipment was affirmed, but the repayment order for supervision was overturned.

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Kin Enterprises Inc. v RNF Ventures Ltd., 2021 SKQB 63

Currie, March 8, 2021 (QB21061)

Statutes - Interpretation - Limitations Act, Section 5, Section 6, Section 31

The plaintiff, Kin Enterprises Inc., applied for summary judgment to determine the question of whether its claim was barred under The Limitations Act (LA) or its predecessor, The Limitation of Actions Act (LAA). The plaintiff owned a building that was constructed and completed in 2003 and the defendant, RNF Ventures (the contractor), was the general contractor in the construction of the building. The defendant, aodbt Architecture Interior Design (the architect) prepared the design and inspected the construction. The plaintiff claimed for loss arising from the contractor's alleged construction defects and from the architect's alleged design defects and inspection failures, all relating to a roof leak. Both defendants pleaded that the owner did not commence this action within the applicable limitation period under either the LA or the LAA. The plaintiff's application sought that those specific pleadings be struck out. The architect also applied for an order dismissing the plaintiff's claim against it on the basis that it was statute-barred. Shortly after completion of the building in February 2003, the plaintiff reported water leaking from the roof to the contractor and the architect and both observed it. In February 2004, the contractor advised the owner that the leak was the plaintiff's maintenance problem and it pursued the contractor's suggestions to resolve it until March 2007, when it reported to both defendants that the roof continued to leak despite maintenance. They inspected the building, and in May 2007, the contractor informed the plaintiff and architect that the problem was not caused by faulty construction or design and maintenance was still the solution. The plaintiff retained an engineering company in July 2008 to inspect and ascertain the cause of the leak and it identified construction deficiencies in August. The plaintiff determined by September 2008 that its insurer would not pay the repair costs. It did not send the engineer's report to the defendants until August of 2009. The architect agreed with the report and informed the contractor in October, at which point the contractor expressed its intention to commence repair. In May 2010, the contractor advised the plaintiff by letter that due to its problems with the new roofing subcontractor, it would bear the cost of the repair. After completion of the work in 2011, the roof continued to leak and the contractor conveyed its intention to try to fix the problem but did not commence any work and then stopped responding to the plaintiff. Eventually the leaks stopped after the roof was repaired by another contractor in 2013-2014. The plaintiff commenced the action against the defendants in March 2014, claiming reimbursement for approximately $1,000,000 for the cost of the second repair. The plaintiff relied on the decision in Presley v Van Dusen (2019 ONCA 66). It argued that it knew or ought to have known under s. 6(1)(a)-(c) of the LA when it received the engineer's report in August 2008 that the leak could be the result of the

errors of the defendants but because it relied upon the contractor's assurance that it would repair the roof, and as it continued to rely on the contractor and the architect, it could not reasonably have known or ought to have known that pursuing litigation against the defendants was appropriate. When it learned in June 2012 of the contractor's refusal to repair, then s. 6(1)(d) of the LA became operative and the two-year limitation period began. As its claim was commenced in March 2014, the action was not statute-barred. The issue was when the plaintiff knew, or ought to have known, that suing the defendants would be an appropriate means to seek the remedy its loss arising from the roof leak problem under s. 6(1)(d) of the LA.
HELD: The plaintiff's application for summary judgment to strike out the defendants' pleadings was dismissed. The architect's application for judgment dismissing the claim as against it was granted. The plaintiff's claim against the contractor and the architect was statute-barred. The court determined that this was an appropriate case to be decided by summary judgment. After reviewing the provisions of the LAA and the LA, it found that the LA applied pursuant to s. 31(5) based upon its determination that the claim was discovered after May 1, 2005 when the LA came into force. Regarding the issue of when the plaintiff knew or ought to have known that a proceeding would be an appropriate means to seek to remedy the roof leak under s. 6 of the LA, it concluded that it was in September 2008 when it received the engineer's report. This case differed from Presley because here, the plaintiff did not provide the engineer's report to the defendants until a year after receiving it. If it had sent the report in a timely fashion, the plaintiff would have been seen to have been actively pursuing the alternative to litigation of relying on the knowledge and expertise of the defendants, satisfying the intent of s. 6(1)(d). All four elements set out in s. 6(1) had arisen, the claim was discovered at that point and the two-year limitation began to run. With respect to the claims regarding the conduct of the contractor and the architect before May 1, 2005, s. 31(5)(a) of the LA provides that the LA applies. There was nothing in the LA that indicated that the contractor's commitment to effect repairs in May 2010 had any effect on when the period began to run.

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Catcher v Catcher, 2021 SKQB 64

Rothery, March 8, 2021 (QB21062)

Statutes - Interpretation - Children's Law Act, 2020, Section 6
Family Law - Custody and Access - Jurisdiction

The petitioner, the respondent and their three children lived in Alberta until May 2020 when the petitioner father moved to Saskatchewan for an employment opportunity. In July 2020, the respondent and the three children moved to Quesnel, B.C. In January 2021, the petitioner issued a petition that sought joint custody of the children and also filed a notice of application in which he sought interim joint custody of the children, an order returning them to Kamsack and an order of interim primary residence of the children if the respondent did not relocate to within 100 km of Kamsack. The respondent filed a notice of application in February 2021 that sought a declaration that Saskatchewan did not have jurisdiction over the issue of custody. At the same time, she petitioned for sole custody of the children in B.C. Counsel argued the application in Saskatchewan regarding jurisdiction on the basis of the legislation in force at that date, being Part III of The Children's Law Act, 1997 (CLA, 1997). Because the respondent had filed an affidavit in response to the petitioner's in support of his application for interim custody, the petitioner's counsel asserted that the respondent had attorned to the Saskatchewan jurisdiction regardless of her objection to it and therefore s. 15(1)(c) of the CLA applied.
HELD: The application was dismissed. The court found that Saskatchewan did not have jurisdiction. It had not rendered this fiat prior to March 1, 2021, the coming into force date of The Children's Law Act, 2020 (CLA, 2020), it was therefore required to consider the application under s. 83 of CLA, 2020. Under s. 6, which governs jurisdiction, it was clear that Saskatchewan did not possess it relating to applications for a parenting order because the children were not habitually resident here at the time the application was made nor were they physically present. There was no evidence of wrongful removal of the children by the respondent. It was unnecessary to consider s. 7 of the CLA 2020 because the B.C. Supreme Court had already assumed jurisdiction in February 2021. Had the CLA, 1997 been applicable, the court would have found that legislation had replaced the common law and because it required the respondent's consent to Saskatchewan jurisdiction, Saskatchewan had no jurisdiction over the children.

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Huard v Winning Combination Inc., 2021 SKQB 65

Acton, March 9, 2021 (QB21063)

Civil Procedure - Queen's Bench Rules, Rule 4-44
Civil Procedure - Class Actions - Application to Strike

The defendant, Winning Combination, a manufacturer of natural health products, applied pursuant to Queen's Bench rule 4-44 for an order to strike the plaintiffs' statement of claim for want of prosecution. It had begun

selling a non-prescription drug in Canada in October 2006 but was unable to market it after July 2007 because of licensing problems and thereafter, the product not been available for purchase in Canada. The statement of claim with the proposed representative plaintiffs had been issued in 2009 in a class action. The judge appointed to hear the certification application dealt with some preliminary applications in 2010 but was then appointed to the Court of Appeal and another judge was designated in December 2011. No further steps had been taken in the litigation by either party since then and the second judge had also been appointed to the Court of Appeal in the interim. Therefore, defendant's application was brought in Queen's Bench chambers. It argued that the action had been outstanding for 12 years and this affected its ability to obtain financing as it suffered significant prejudice because it had to disclose the lawsuit in its financial statements. The twelve-year delay in prosecution meant it had difficulty in defending itself as the acts alleged by the plaintiffs occurred prior to 2007 and adducing evidence had become an issue. Since then, many of the employees involved in the product were no longer employed by it and it had moved its office and changed computer systems.
HELD: The application was granted and the plaintiffs' claim was struck. The court found that it had jurisdiction to decide a preliminary application relating to a proposed class action in chambers as there was no designated judge. Under Queen's Bench rule 4-44, it considered that the delay of 12 years in pursuing a certification application was unacceptable. It determined that the delay was inexcusable after reviewing the eight factors. The plaintiffs had not provided any reasonable justification as to why the action had not been prosecuted. Regarding the public interest factor, the court relied on Duzan (2011 SKQB 118) as establishing that it does not owe a duty to protect to protect the interests of potential class members in a prospective class action that has not been certified, and that was true in applications for dismissal for want of prosecution. Costs of the application and the action were awarded to the defendant.

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R v Millie, 2021 SKQB 69

Dawson, March 16, 2021 (QB21067)

Appeal - Summary Conviction Appeals
Appeal - Unreasonable Verdict
Appeal - Rape Myths

This matter was a summary conviction appeal by the Crown, as permitted by s. 813 of the Criminal Code, of the trial judge's acquittal of the accused for the offence of sexual assault (see: R v A.M., 2019 SKPC 68). The

court found that it was open to the Crown to appeal on grounds which included errors of law, errors of mixed law and fact, and errors of fact, including credibility rulings, and by incorporation of ss 686(1) and (2) of the Code, to ask that the appeal be allowed and the verdict set aside or a new trial ordered where "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence." The Crown was of the view that the trial judge's acquittal was unreasonable because he made palpable and overriding findings of fact resulting in a verdict which could not be supported on any reasonable view of the evidence. Specifically, the Crown argued that the trial judge made palpable and overriding errors of fact with respect to the complainant's evidence and improperly relied on rape myths in his assessment of her evidence, which led him to wrongly diminish her credibility to such a degree that the verdict of acquittal could not be supported on any reasonable view of the evidence. At trial, the complaint testified that the accused entered her bedroom at night and fondled her breasts. She contradicted herself as to the position the accused was in on the bed when he was assaulting her and the amount of time it took for the assault. The accused also advanced the defence at trial that the complainant had a motive to fabricate the sexual assault because she wanted to reunite with her boyfriend and thought the sexual assault accusation would draw the boyfriend back to her.
HELD: The court dismissed the appeal, and in doing so agreed that the trial judge had mistaken the complainant's evidence, and that this error of fact did influence his view of the credibility of her evidence; however, the erroneous factual findings and the resulting diminishment of her credibility did not lead him to acquit the accused. Instead, he conducted a proper D.W. analysis, ruling that he did not fully accept the evidence of either the complainant or the accused, but on the evidence of the defence as a whole, had a reasonable doubt about the guilt of the accused. As such, the errors of fact made by the trial judge in relation to the Crown evidence could not amount to an unreasonable verdict, and, therefore to an error of law. Similarly, the court did not agree with the Crown that the trial judge allowed his verdict to be influenced by rape myths, that the complainant was more likely to fabricate evidence for romantic reasons or that honest sexual assault victims will immediately come forward publicly. The trial judge correctly considered the evidentiary value of the defence of fabrication as presented at trial, and did not "[rely] on generalizations or stereotypes that are abstract," and, as such, made no error.

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Kleiner v Airgid, 2021 SKQB 70

Rothery, March 16, 2021 (QB21073)

Family Law - Spousal Support - Consent Judgment - Application to Terminate

The petitioner applied for a review of spousal support awarded to the respondent, his former wife, under a consent judgment granted in November 2015 that encompassed parenting and spousal support. In his application, the petitioner sought an order from the court terminating all spousal support payable to the respondent after November 2020. The respondent submitted that she continued to require spousal support. Under the terms of the consent judgment, the petitioner was to pay the respondent $400 per month for a period of 10 years, to November 2025, but it would be reviewable in November 2020 for the purpose of determining whether such support should be terminated or varied, due to: the respondent's health; her ability to become self-sufficient; and either party's relationship status. The affidavit filed by the respondent contained a review of the medical issues she had had since 2003 when she began receiving monthly Canada Pension Plan disability payments, two years prior to her marriage to the petitioner. She exhibited letters from her physician and optometrist that explained that her medical conditions were chronic and likely to cause more disability over time. Information provided regarding the respondent's ability to become self-sufficient during the five years since the judgment included that she was now 53 and had not been employed since 2003. She had been fully occupied for the past five years looking after the medical and dietary needs of the parties' two teenage daughters and defending them in the face of the petitioner's position that they did not have medical and dietary needs. The petitioner attested in his affidavit that he and his second wife were divorcing and he would have to pay child support for the two children of that marriage. As a result of that obligation, his payments to the respondent were untenable.

HELD: The application was dismissed and the petitioner's support obligations would continue until the end of November 2025. The court was satisfied by the respondent's evidence that her health had not improved and in fact would worsen, and that therefore she had little ability to become economically self-sufficient. The parameters of review under the consent judgment did not require the court to reduce or terminate the petitioner's obligation to pay spousal support to the respondent because he had incurred more financial obligations to others since the date of the judgment. The petitioner's new obligations were governed by s. 10 of the Guidelines and he would have to make an undue hardship application to the trial judge in his divorce action.

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Cimmer v Lunemann, 2021 SKQB 71

Currie, March 17, 2021 (QB21068)

Civil Procedure - Queen's Bench Rules, Rule 6-13
Civil Procedure - Application for Summary Judgment
Civil Procedure - Application to Intervene

The plaintiff applied for summary judgment (SJ) in his action against the defendant, Lunemann, that he had acquired sufficient shares in the corporation that owned a lodge from the defendant. Subsequently, the Niessners, non-parties to the action, served notice of their application for an order granting them intervenor status (IS application) in the application for summary judgment. Ms Niessner's affidavit in support of the application deposed that she and her husband owned the lodge. She averred that she was a plaintiff in two actions against the plaintiff: one in Saskatchewan that involved allegations that he had attempted to take control of the lodge; and the second in New Jersey that certain agreements between the parties in the SJ application were void. If successful in that action, she would register the decision in Saskatchewan as relevant to the issue in her first action. The plaintiff then brought an application for an order granting him leave to cross-examine (CE application) Ms Niessner on her affidavit. He argued that it would be appropriate to do so because the scope of cross-examination would relate not only to the contents of the affidavit, but to the issues relating to her IS application and to issues relating to his SJ application. The plaintiff also raised whether the Niessners had sufficient interest in the SJ application and whether adding them as intervenors would advance or improve that process. He contended that cross-examining Ms Niessner would elicit evidence on these subjects.
HELD: The plaintiff's CE application was dismissed. As the IS application had been adjourned, the court directed that it may be returned for hearing in chambers. The court found that the plaintiff had not established in the CE application that it would assist in resolving the IS application. It rejected the plaintiff's argument that it was appropriate to consider his CE application in the context of his SJ application, because Ms Niessner's affidavit had been filed in support of the IS application and because she had no standing to file anything respecting the former application unless her latter application were granted. Thus, it would consider the application for CE on her affidavit, regarding issues relevant only to the application for IS. It considered primarily the sixth question of the eight part test set out in Wallace (2009 SKQB 178) for granting leave to cross-examine on an affidavit pursuant to Queen's Bench rule 6-13. It described the question as whether the cross-examination of Ms Niessner on her affidavit would assist in resolving the IS application and whether there was a sincere, legitimate need for clarification of the information deposed to by Ms Niessner. It found that the affidavit provided evidence that could form the basis for a conclusion that the Niessners had a sufficient interest in the SJ application, there was no need for clarification of Ms Niessner's evidence in the SJ application, and there was no sincere need for clarification of the information provided in it.

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Wood Mountain Lakota First Nation No. 160 v Goodtrack, 2021 SKQB 72

Robertson, March 17, 2021 (QB21069)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 21

The plaintiff, Wood Mountain Lakota First Nation, applied for an order: that s. 21(1) of The Saskatchewan Farm Security Act (SFSA) did not apply to judgment enforcement against farm land owned by the defendants; and to attenuate the period of time to dispose of the defendant's interest in the farm land pursuant to s. 104 of The Enforcement of Money Judgments Act (EMJA) to June 1, 2021. The defendants were the registered owners of the farm land. In July 2015, the plaintiff obtained judgment against them for $1,500. The judgement was not appealed from and was registered in the Judgment Registry against the farm lands on June 1, 2016. It remained unsatisfied. In August 2019, the plaintiff obtained judgment against the defendants for $246,425 (see: 2018 SKQB 230) which was registered against the farm land on January 2019. Both parties appealed the judgment. The Court of Appeal dismissed the defendants' and allowed the plaintiff's appeal, increasing the damage award to $408,486 and awarding costs of $5,000 (see: 2020 SKCA 10). This judgment was registered against the farm lands in March 2020 and in May, the plaintiff filed a notice of intention (NOI) to foreclose with the Farm Land Security Board. The defendants were served with it in mid-July 2020. The Dispute Resolution Office closed mediation on October 28 and the following day the defendants served the plaintiff with their application for an extension of time to appeal and for leave to appeal the Court of Appeal decision to the Supreme Court (SCC), but they did not apply for an order to stay the enforcement of that judgment. The sheriff seized the lands in November 2020 and in December the board issued its report. In it, the board reviewed the history of the litigation to the time of defendants' applications to the SCC. It noted that following the service of the NOI, the defendants did not engage in the process of financial review and mediation as prescribed by the SFSA, and the file was closed. In November, it agreed to the defendants counsel's request to it to delay preparing the report until the SCC rendered its decision. It made findings that it had insufficient information to reach a conclusion regarding whether the defendants had a reasonable possibility of meeting the obligations of the judgment and that the defendants had not made any payments. Until the defendants exhausted all their legal remedies, the board was not prepared to override the presumption of sincerity implicit in the SFSA. When the SCC dismissed the defendants' applications in February 2021, the plaintiff then filed these applications.
HELD: The applications were granted and the orders granted as requested with the exception that the time period under s. 104 of the EMJA would expire on July 16, 2021. The court found that s. 21(1) of the SFSA did not apply. It arrived at this conclusion after it reviewed the statutory presumption of viability and sincerity and

the requirement to give primary consideration to the board's report pursuant to ss. 13(1) and (2), the burden of proof on the applicant imposed under s. 18(1), and whether to make an order under s. 11 if it was not satisfied that it was just and equitable to grant the order pursuant to s. 19 of the SFSA. In considering the board's report, it did not accept its conclusion that the presumption of sincerity applied. It found that the board had erred: in applying the statutory presumptions, because it is explicitly stated in s. 13(1) that such presumptions apply to the court application, not the report; by failing to draw an adverse inference from the defendants' failure to participate in mediation as set out in s. 12(9); and by accepting ongoing litigation as a reason for their failure to participate. Therefore, the court would draw an adverse inference from the defendants' failure to participate in the board's review, both as to viability and sincerity. Respecting viability, it found that the plaintiff had satisfied its burden. The farm was found not to be viable on the evidence that the defendants had not made any payment at all toward the 2015 judgment. It was satisfied that the plaintiff had met the burden to prove that the defendants had not made a sincere and reasonable effort to meet their obligations. Regarding s. 19, it was satisfied that it was just and equitable to make the order according to the purpose and spirit of the SFSA. The defendants had put their interests ahead of the public interest when they refused to cooperate with the plaintiff and caused significant foreseeable loss of revenues to the plaintiff. It authorized the sheriff to dispose of the farm lands to satisfy the judgments on or about July 16, 2021, twelve months from the service of the NOI, thereby giving the defendants four months from the date of this judgment to make arrangements either to satisfy the judgments or make provision for their cattle.

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Foord v Coomaran, 2021 SKQB 74

McMurtry, March 18, 2021 (QB21071)

Landlord and Tenant - Residential Tenancies Act, 2006 - Appeal
Administrative Law - Procedural Fairness - Breach of Duty
Interpretation - Residential Tenancies Act, 2006, Section 33, Section 82.1

The landlord appealed from the decision of hearing officer of the Office of Residential Tenancies (ORT) to return to the respondent's security deposit of $700 to her (see: 2020 SKORT 1771). The appellant alleged that he had not received the hearing notice delivered by email as it had gone to his junk mail folder. The ORT file indicated that the appellant was served the hearing notice by email on September 1, 2020 advising that the hearing was scheduled for October 19, 2020, but the officer's decision was rendered on September 24. When

asked for an explanation by the court, the ORT advised that in the September 1 email, the landlord was asked to pay the full security deposit in trust by September 23. As he failed to do so, the hearing was cancelled and the decision made ex parte. In the decision, the officer identified that the parties had been advised by email about the meeting and the appellant instructed to pay the security deposit and he failed to do so by the date set in the email. As the appellant failed to follow the procedure for retaining the security deposit in s. 32 of The Residential Tenancies Act, 2006 (RTA), she relied upon s. 34 to order the appellant to pay it to the respondent. HELD: The appeal was allowed, the decision set aside and the matter remitted to the ORT for a new hearing. It found that hearing officer had committed an error of jurisdiction in the absence of service upon the appellant and breached the duty of fairness. In her decision, she failed to examine whether the ORT had provided the appropriate notice to the appellant under s. 33 of the RTA, that a hearing notice must be served by ordinary mail, nor did she address her reasons for exercising her discretion under s. 82.1 to deem the appellant served with the hearing notice.

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PCL Construction Management Inc. v Expocrete, An Oldcastle Company, 2021 SKQB 76

Robertson, March 18, 2021 (QB21072)

Civil Procedure - Queen's Bench Rules, Rule 5-12

The defendant, Expocrete, applied pursuant to Queen's Bench rule 5-12 for an order compelling the plaintiff, PCL, to provide better responses to undertakings given in questioning. The plaintiff's action for damages against Expocrete for breach of contract or negligent misrepresentation was based upon its reliance upon information by provided by Expocrete in the process of submitting its bid to build Mosaic stadium. When Expocrete declined to enter into a subcontract with the plaintiff, it was forced to find another supplier for precast concrete sections in the upper level of the stadium at a higher cost than that quoted by Expocrete. During the questioning of the plaintiff's proper officer, Expocrete asked questions of her that were relevant to show whether its quote was actually incorporated into the plaintiff's bid and the undertakings were given. After PCL gave its reply, Expocrete then submitted this application. By the time of the hearing, Expocrete still sought responses to undertakings to provide the complete estimate book and lump sum proposal because the plaintiff provided redacted copies of the former and refused to provide the latter. Expocrete argued that it was entitled to the entire document after the plaintiff provided unredacted estimate books relating to the precast portion of the project for the upper bowl. The plaintiff argued that the requested documents were not material

to the action. It used Expocrete's quote for precast concrete seating for the upper bowl portions of the stadium project only and not for the lower bowl. Therefore, it should not be required to disclose the full documents. They were irrelevant to the issues in dispute and were commercially sensitive.
HELD: The application was granted. The court ordered the plaintiff to fulfil its undertakings and produce copies of the complete estimate books and the lump sum proposal. The general rule is for entire documents to be produced, and the plaintiff had not met the onus to show that the portions redacted were irrelevant and that there was a real likelihood of serious harm from their disclosure that could not be addressed by the usual protection of the implied undertaking in Queen's Bench rule 5-4. The plaintiff had not satisfied the court that an exception should be made. The financial calculations found in these damages were relevant to quantification of damages, and the plaintiff could not simply assert that they were irrelevant to the issues in dispute or commercially sensitive.

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EOS Canada Inc. v Watzke, 2021 SKQB 77

Layh, March 19, 2021 (QB21074)

Debtor and Creditor - Assignment of Debt - Champerty
Statutes - Interpretation - Choses in Action Act, Section 2, Section 4, Section 5

The plaintiff, EOS, a collection agency, applied for summary judgment against the plaintiff in an action based on its rights as an assignee of a debt obligation owed by the plaintiff to Canadian Tire Bank. The defendant, using her residential address for the purposes of her application, acquired a credit card from Canadian Tire Bank in June 2010. It provided her with a disclosure statement that indicated her initial credit limit would be $11,000 with an annual interest rate of 25.99 per cent. It included a clause permitting the bank to assign the account without the consent of the cardholder and that there was an obligation to notify it if the cardholder changed her address or email address so as to be able to receive statements and other information. By 2017, the defendant had failed to make payments on her account and the bank sent statements to a new address that the defendant had provided as her business address. In October 2018, EOS purchased debts from the bank, including the defendant's. It sent her an acquisition notice to the most recent address it had for her provided from a credit report advising her that it had acquired the rights of the bank respecting her account and formally demanded payment of the full balance then owing of $14,531. The defendant claimed she never received the notice but it had not been returned to the plaintiff. When multiple telephone messages to her were left

unanswered, EOS issued a statement of claim and served it upon her. She delivered a statement of defence but did not attend required mediation with the Dispute Resolution Office. The plaintiff then brought this application. The self-represented defendant originally raised numerous defences in her statement but after filing a number of briefs, it appeared that her defence was that the action offended the principles of champerty and maintenance still in force in Canada, preventing the buying and selling of debts.
HELD: The application was granted. The plaintiff was granted judgment. The court found that this was an appropriate case for resolution by summary judgment under Queen's Bench rule 7-5. It found that the doctrine of champerty does not prevent assignment of debts and the defendant had failed to consider s. 2 of The Choses in Action Act, which expressly permits an assignment of a debt and for the assignee to bring an action in his own name as though he were the original person to whom the debt was owed. Section 4 requires the statement of claim must advise the debtor of the chain of assignments, not a previous notice. Respecting the defendant's claim that she did not receive notice of the assignment, it stated that the plaintiff's claim remained valid. Although s. 5 of the Act provides consequences to an assignee who fails to provide notice to the debtor, they related to defences that the debtor can exert against the assignee, but in this case, the defendant had not asserted any valid defences against the bank or EOS. Furthermore, s. 4 was pertinent to the question of notice.

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R v Kearsey, 2021 SKPC 18

Hinds, March 8, 2021 (PC21012)

Criminal Law - Break and Enter with Intent to Commit Indictable Offence
Criminal Law - Robbery - Armed Robbery

The accused was charged with a total of 10 offences arising from a break and entry and armed robbery of a house. The Crown entered a stay of proceedings on one count and invited the court to acquit the accused on another count. Individuals who lived in the house in question and police officers who attended there and apprehended the accused and his two co-accused testified on behalf of the Crown. The three co-accused, who were all masked, first broke into the house and then entered the bedroom of the two of the residents and robbed them. One resident testified that the men had shot guns and had hit him on the head with one. During the course of the robbery, one of the inhabitants hid in her closet in the basement bedroom and called 911. Different officers arrived at the scene at different times and testified that they saw three men leaving through the front door, and when they saw the officers, they turned and ran back to the house, leaving through the back

door and trying to escape by climbing fences. One officer caught and arrested one of the co-accused, Brass, who dropped a loaded sawed-off rifle on the ground. Another officer stopped and arrested the co-accused, Sayer. A third officer was able to apprehend the accused, who dropped a black pistol and folding knife onto the ground at that time. Sayer, now in a witness protection program, also testified. He said that he was the Vice President of the Indian Mafia gang and the other two accused were soldiers in it and all of them made the plan to rob the house where they believed they would find drugs and money. He testified that they stopped en route for the accused to get the sawed-off rifle, a gun used by the Indian Mafia, that he then carried and concealed until they were in the house. During the robbery, one of the residents was hit on the head with the gun. Sayer maintained that neither he nor Brass had any weapons on them during the commission of the offences. The weapons were tested and the sawed-off rifle was found to be a prohibited firearm under ss. 2 and 84(1) of the Code. The pistol was found to be an air gun and not deemed a firearm within s. 84(3) of the Code. At the time of the offences, the accused was prohibited from possessing any firearm or ammunition. The Crown argued that the accused formed a plan with the two co-accused and agreed to break and enter the house and commit a robbery while using a firearm. It submitted that all three men were active participants in the offences and were joint principals to these offences and the other firearm possession charges. In the alternative, the three men were all parties to the offences under s. 21(1) of the Code.
HELD: The accused was found guilty of the Criminal Code offences of break and entry and committing an armed robbery using a firearm contrary to s. 348(1)(b); wearing a mask with intent to commit an indictable offence contrary to s. 351(2); possessing a firearm knowing he was not the holder of a licence contrary to s. 92(1); possession of a loaded firearm without a licence contrary to s. 95(1)(a); and possessing a firearm while being prohibited from doing so by an order under s. 109(2), contrary to s. 117.01(1). The court found that it was satisfied that the evidence proved beyond a reasonable doubt that the accused and the two co-accused formed a plan and agreed to commit break and enter and robbery using a firearm. It was unable to determine exactly who possessed the firearm and used it in the course of the robbery but all of the men knew that the rifle would be shown to the residents of the house to intimidate them. The Crown had proven joint possession under s. 4(3)(b) of the Code. Therefore, the accused was guilty of the offences as a co-principal to the break and entry and armed robbery. Alternatively, he was liable as a party to the offence. The court gave itself a Vetrovec warning regarding Sayer's evidence. It accepted most of it, although it questioned whether he was credible in saying the accused carried the rifle. Otherwise, Sayer's evidence was important to the Crown's case against the accused as, without it, the Crown would have had only a circumstantial case against him.

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R v Gore, 2021 SKPC 22

Kovatch, March 15, 2021 (PC21013)

Constitutional Law - Charter of Rights, Section 7, Section 11(b), Section 24
Criminal Law - Evidence - Disclosure - Conditions

The thirteen accused, members of Unifor, were on the picket lines in support of Unifor's labour dispute with the employer, Federated Cooperatives Limited. After the employer obtained an injunction regarding the manner in which picketing could be conducted, Regina police officers attended at the employer's refinery site and the 13 accused (the accused) were arrested and charged with willfully obstructing peace officers in the execution of their duties by attempting to prevent the enforcement of the order granted in the injunction, contrary to s. 129 of the Criminal Code, and with committing mischief, contrary to s. 430(4) of the Code, by willfully interfering with the lawful use of the employer's refinery complex. All the accused were represented by the same counsel. The Crown agreed to defence counsel's request for disclosure and provided it to him with trust conditions, such as maintaining control of the items and prohibiting dissemination. The trial was delayed by the pandemic. Many of the accused lived outside the province and were unable to travel and it became difficult for them to come back to meet with counsel in order to review disclosure and provide instructions. The defence then requested that the Crown remove some of the restrictive trust conditions so that disclosed materials could be reproduced and disseminated to his clients. However, the Crown would not agree to remove restrictions on a number of video recordings of the incidents at the picket line so that the defence could make copies on DVD and distribute them to the accused. It proposed to apply for a Muirhead order that would prevent the accused from disseminating the videos to any other party and prevent usage of them for any purpose other than trial preparation. The defence rejected this proposal as being unnecessary and imposing unwarranted restrictions and took the position that the Provincial Court did not have jurisdiction to make such an order. The defence then brought a Charter application alleging that the right of the accused to make full answer and defence and to a fair trial had been infringed by the Crown's refusal to make disclosure and requested as a remedy under s. 24(1) that the court order full disclosure of the videos without any restrictions regarding reproduction and dissemination. The issues were: 1) whether there had been a Charter breach; and 2) whether the Provincial Court had jurisdiction to make a Muirhead order and if so, should it prevent dissemination of the videos?
HELD: The Charter application was dismissed and a Muirhead order was issued that permitted the Crown or the defence counsel to make copies of the videos and distribute one copy to each accused. Except for the Crown and defence counsel, no one could copy, reproduce, store or transmit any portion of the videos and they could be used only for the purpose of trial preparation. The court found with respect to each issue that: 1) there had been no breach of the Charter. The right to disclosure is not absolute and the Crown has discretion to impose conditions upon disclosure. The courts have stated that generally speaking, the condition preventing dissemination is justified to protect third party rights in the information. In this case, the Crown had made full

disclosure and dealt with the matter in accordance with standard practice, and that was not affected by the inconvenience to the accused caused by the pandemic. The imposition of a Muirhead order was reasonable and did not affect the right of the accused to make full answer and defence; and 2) it had jurisdiction to make a Muirhead order preventing dissemination of the videos as part of its control over its own process. It would exercise its discretion to make such an order here, as it was satisfied that the Crown's concern that if video evidence for the trial were released before it was held, it would become a publicity campaign.

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R v BLS Asphalt Inc., 2021 SKPC 25

Brass, March 30, 2021 (PC21015)

Provincial Offences - Occupational Health and Safety

The trial judge was called upon to decide whether BLS Asphalt Inc. (BLS), a corporation that operated a crusher gravel pit, was guilty of offences contrary to The Occupational Health and Safety Act (Act) and its regulations by 1) failing to provide any information, instruction, training, and supervision necessary to protect the health and safety of its workers who clear chutes for crusher conveyer belt systems as required by s. 12(c) of the Act which resulted in the death of a worker, T.L., contrary to ss. 3-78(g) and 3-79 of the Saskatchewan Employment Act; 2) by failing to ensure that stopping devices on the crusher conveyer belt were in direct view, within easy reach and readily identifiable by the operator as required by s. 135(2) of the Act, resulting in the death of T.L.; and 3) by failing to provide an effective safeguard for a dangerous moving part of a machine as required by s. 137(1)(a) of the Act, resulting in the death of T.L. The trial court found beyond a reasonable doubt on the evidence presented that T.L.'s primary work for BLS was to operate a loader to move gravel to an area where a second loader operator fed a hopper with gravel which was then carried on conveyor belts to be crushed and sorted into piles depending on grade. The subject conveyer belt was propelled by tail pulleys that moved the conveyer belt at 350 feet per minute. There was a gap between one section of tail pulley and the edge of a portion of the conveyer belt, creating a risk that a worker might come into contact with the tail pulley roller units. This happened to T.L, who slipped while attempting to clear a chute of gravel with a shovel, and was killed from loss of blood. His leg was wrapped around a pulley roller unit. No cover had been installed on top of this danger spot, though it was designed to allow for that and though one had been installed elsewhere along the conveyor belt system. BLS. provided its workers with a safety manual and pointed out dangerous pinch points and no-go zones, which included the area where T.L. was killed. BLS held annual safety

orientations and had assigned a number of workers as supervisors for each shift. T.L. knew about the dangerous parts of the machine and the no-go areas and pinch points. The supervisor did not direct T.L. to help shovel the gravel from the conveyor belt. A control tower overlooked the whole crusher system, and was equipped with control switches to stop and start the entire system or parts of the system, and an emergency stop button on the control. Another emergency stop button was situated outside just below the control tower. Other non-functioning emergency stop buttons were located on the crusher. The control operator, who also had the task of supervisor, was not in the tower at the time of the accident as he was unclogging the chute next to T.L. He saw T.L. slip and grab onto a railing before he fell onto the conveyer belt. He could not have reached the emergency stop button in time to prevent T.L.'s death. Clogged chutes are common, and any of the workers might set to work unclogging them. BLS amended its safety manual to include safety procedures for unclogging chutes following the death of T.L., which only took a few days to do. Finally, there was no evidence that T.L. was under the influence of drugs or alcohol at the time of the accident.

HELD: The trial judge found that the Crown had proven beyond a reasonable doubt that BLS had failed to provide information, instruction, training, and supervision necessary to protect the health and safety of its workers when clearing the chute; had failed to provide an effective safeguard at the point where a worker might come into contact with a dangerous moving part; but found that BLS had not failed to have an identifiable stopping device in direct view and readily available to the supervisor, as required by the relevant legislation. The trial judge instructed himself as to the actus reus and mens rea requirements of strict liability offences. He considered R v Sault Ste. Marie (City), [1978] 2 SCR 1299 the leading case with respect to regulatory offences such as these, and also the more recent decision of R v Viterra Inc. 2017 SKCA 51. He stated that the Crown must prove the elements of the offences beyond a reasonable doubt, and if it succeeded in doing so, in order to avoid conviction, the defendant must establish on a balance of probabilities that it exercised due diligence, that is, on an objective standard, it took all reasonable steps in the circumstances to eliminate the particular harm the relevant legislation was enacted to prevent. The principles of causation and foreseeability are germane to the due diligence defence. The trial judge, though acknowledging that BLS had some safety information, instruction, training, and supervision in place generally, it did not specifically have such in place as was necessary to protect workers who might clear the chutes on the crusher. The trial judge rejected the argument made by BLS that it was not an insurer for T.L., and that regardless of any possible void in training and supervision, which was denied, T.L. was the author of his own misfortune by doing a job he knew was risky and which he was not directed to do. The trial court interpreted the legislation generously so as to achieve its objective of protecting workers, ruling that the section required information, training, instruction and supervision for all its workers, not only those who usually clear the chutes. As BLS had updated its safety manual to include training information with respect to the clearing of chutes in a matter of days following T.L.'s death, the trial judge considered whether such was an admission by BLS that it had not been in compliance with the Act, and ruled that in this case he could so find, as he was in agreement with the

reasoning in R v Superior General Partner Inc. (2019 SKPC 40) about the relevancy of a quick and easy fix in such cases. As to the failure to install an effective safeguard on the tail pulley, the trial judge found that none had been put in place, and the defence of due diligence advanced by BLS was denied since BLS knew that covers should be installed as some had previously been installed on other tail pulleys, and the machinery had been designed to allow for covers to be put in place. As to the stopping device requirements, the trial court found the Crown had not shown that the statutory requirements had not been satisfied, so that the actus reus was not proved, and BLS was not called upon to mount a defence to that charge.

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