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Civil Procedure - Pleadings - Statement of Claim - Application to Strike

The self-represented litigant applied to adduce fresh evidence pursuant to Court of Appeal rule 59 and appealed the decisions of Queen's Bench chambers judges in two separate but related civil actions. In the first action, commenced in Yorkton (the Yorkton action), the appellant had filed a "reply to defence" that included several causes of action that had not been pled in her original statement of claim. In light of that, the case management judge (CMJ) ordered her to serve and file an amended statement of claim by December 15, 2017. The deadline was extended twice – the first time at the appellant's request, to February 1, 2018, but she failed to meet it. At a case management conference, the CMJ made an order that by March 21, the Attorney General of Canada (AG) should serve on the appellant and file with the court all necessary materials to seek an order that her statement of claim was to be amended by a stated date, failing which the claim should be struck, and that the appellant was to serve and file her response material by April 27. The hearing date was set for May 8. At the hearing, the appellant argued that she should be given until July 18, but the CMJ rejected that argument and granted the AG's application on the basis its position was reasonable, given the history of the action and the appellant's non-compliance with prior deadlines. He then ordered that she should serve and file the amended statement of claim no later than May 21. The registrar was instructed to issue an order dismissing the entirety of the claim if the document was not filed by 4 pm. The appellant served the AG with it on May 22, as May 21 was a statutory holiday, but she did not deliver it to the court for filing until May 25. The registrar's office refused to accept the amended claim for filing because it did not comply with the requirements set out in Queen's Bench rules 3-72 to 3-74. The AG presented a draft order as per the May 8 fiat and on May 29, the judge dismissed the appellant's original claim and awarded costs against her, although she had a fee waiver certificate (FWC). The second action, commenced in Saskatoon (the Saskatoon action), was brought by the appellant against the AG and four other defendants. The AG applied to strike the claim as an abuse of process pursuant to Queen's Bench rule 7-9(2)(e), arguing that it was identical to the amended statement of claim that the appellant attempted to file in the Yorkton action and that it had been struck by the May 29 order. The chambers judge dismissed the AG's application because the court had not accepted her amended claim for filing in the Yorkton action, so it was never a "live" claim and therefore had not been struck or dismissed. Only her original claim in that action had been dismissed. Thus, filing the statement of claim to commence the Saskatoon action was not an abuse of process. He then considered the deficiencies in the appellant's claim and pleadings and determined that although the application could not be granted for the grounds the AG cited, he would grant it because the claim was technically deficient under Queen's Bench rule 7-9(2)(a) and (c). Although she had an FWC, the judge said that it did not prevent him from awarding costs of $500 against her. The appellant's grounds of appeal were that both judges had erred by failing to make reasonable accommodation for her medical condition and awarding costs against when she held an FWC. She alleged that the judge in the Saskatoon action demonstrated bias against her. Based on the record, the notices of appeal and the parties' submissions, the

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court described the issue regarding the Yorkton action as: 1) whether the CMJ erred in ordering the appellant's claim to be dismissed if she failed to meet the deadline for filing the amended statement of claim; and the issues regarding the Saskatoon action as whether: 2 a) was there a reasonable apprehension that the chambers judge was biased; and b) the chambers judge erred by striking the appellant's claim under Queen's Bench rules 7-9(2)(a) and (c). The appellant's application under Court of Appeal rule 59 was supported by affidavits sworn by mother stating, among other things, that there was evidence of the Saskatoon chambers judge's bias because he had participated in the swearing-in ceremony for a police officer with the same surname.
HELD: The appeal of each decision was allowed and the application to adduce fresh evidence was dismissed. The court found with respect to the application that none of the material in the affidavits met the tests set out in Maitland v Drozda and R v Palmer. The information provided regarding the allegation of bias against the judge in the Saskatoon action would not have affected the result in this case and was not admissible on appeal. It dismissed the appellant's grounds, (i) that the judges erred by failing to make reasonable accommodation for her medical condition as without merit because there was no evidence before either judge as to how her condition affected her ability to conduct her case; and (ii) that costs could not be awarded against her as a holder of an FWC because the Court of Appeal rejected that argument in Yashcheshen v University of Saskatchewan (see: 2019 SKCA 67). It found with respect to each issue that: 1) the CMJ erred in principle. He failed to conduct the analysis required under Queen's Bench rule 4-44 and there was thus no basis for him to dismiss the appellant's claim. Further, pursuant to Queen's Bench rule 4-7 and the foundational rules, CMJs do not have authority to dismiss a claim as a whole. Considering the AG's application afresh and applying the framework set out in International Capital Corporation v Robinson Twigg & Ketilson to the application under Queen's Bench rule 4-44, it found that because the appellant met the first test, there had been no inordinate delay in the prosecution of her case, the appeal was allowed and the CMJ's order and costs award must be set aside; 2 a) there was no evidence to displace the presumption of impartiality accorded to judges. However, the chambers judge's language could have been more benign in describing the deficiencies of the appellant's claim and pleadings. He did not demonstrate bias in his remarks addressing the question of costs in light of his knowledge regarding the appellant's various lawsuits, but he should not have indicated that she should be aware of vexatious litigant procedures in Queen's Bench rule 11-28, as that issue was not before him; and 2 b) the chambers judge erred by striking the appellant's claim on the basis of grounds that the AG had not raised in its application because in doing so, he denied her procedural fairness and the decision must be set aside. A judge has the obligation to ensure that a hearing is fair to all parties, particularly respecting self-represented litigants. An application to strike under QB rule 7-9 must meet the notice requirements of QB rule 6-5(2) so that the opposite party has advance notice of the case that must be met and a fair opportunity to meet it. Pursuant to Queen's Bench rules 1-4(2) and 1-6(4), read in conjunction with Queen's Bench rules 1-3 and 1-7, the chambers judge was empowered to proceed as long as it did not prejudice the other's party's ability to respond to the application. In this case, the judge failed to address whether the appellant had been given adequate notice and opportunity to respond when he expanded the scope of the AG's application in the fashion he did.

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Anderson v Anderson, 2021 SKCA 117

Ottenbreit Caldwell Schwann, September 1, 2021 (CA21117)

Family Law - Family Property Act - Interspousal Contract - Appeal

The appellant, D.A., the petitioner at trial, appealed the decision of the trial judge to give little evidentiary weight to an agreement made between her and the respondent, J.A.A., dated July 19, 2015 (2015 agreement), drafted by D.A. and signed by J.A.A. The uncontroverted evidence was that D.A. intended that the 2015 agreement effect a settlement between them with respect to family property. The marriage was of a short three-year duration, and both parties brought into the marriage considerable property, including investments, pensions, houses, savings, and other personal belongings. During the marriage they together purchased and furnished a home for $430,000.00 (the family home), and each contributed equally to the $50,000.00 down payment, with each of them sharing the mortgage and taxes equally. Also, during the marriage, J.A.A. invested in the company he was working for, Globe-Elite Electrical Contractors Ltd. (Globe-Elite), purchasing 50% of the shares for $225,000.00.

S.A.R. v A.K.L.

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D.A. was strongly opposed to this investment. They separated, and at a gathering of mutual friends, which D.A. called a "reconciliation meeting," presented the draft agreement to J.A.A. After he reviewed it, they both signed, and it was witnessed by two persons at the gathering. Neither party obtained legal advice prior to executing it. The terms of the 2015 agreement were to the effect that each party would retain the property they brought into the marriage free and clear of any claim of the other party; D.A. waived any interest in Globe-Elite and the "resolve" of the family home would "be determined at a later date." D.A. testified at trial that the "resolve" would occur when the market was more propitious for a sale, and at that time, it would be appraised for an outright sale, or to determine the price for a buyout by either D.A. or J.A.A. D.A. continued to live in the family home. In December 2015, D.A. petitioned for divorce. She did not claim a property division. In response, J.A.A. filed an answer and counter-petition in May 2017, claiming a division of family property and stating the 2015 agreement was "signed with no legal advice and under duress." The matter proceeded to trial in 2018 and judgment was rendered on January 30, 2019 (see: 2019 SKQB 35) (trial decision). In his reasons, the trial judge ruled that the 2015 agreement was not an interspousal contract as contemplated by s. 38 of The Family Property Act (the Act) because it was executed without the parties obtaining independent legal advice. He was cognizant that by s. 40 of the Act, he was empowered to consider any agreement between the parties during a proceeding that was not a s. 38 interspousal contract and give it "whatever weight [he] considers reasonable." The trial judge decided that the 2015 agreement was not a binding contract but was "more akin to an agreement to agree" because of the absence of independent legal advice and a failure to reach agreement on essential terms, such as the disposition of the family home. He said that the emotionally charged circumstances of a spousal separation cried out for the involvement of lawyers so the parties could disclose their property to each other and know what they were giving up by contracting out of the Act. He said, further, that not turning their mind to essential terms such as what to do with the family home showed that, to a reasonable observer, no meeting of the minds or a consensus ad idem had occurred, and so no contract was formed. Nonetheless, the trial judge went on to consider the 2015 agreement along with other factors in his final decision on distribution of the family property.
HELD: The appeal court overturned the trial judge and gave great weight to the 2015 agreement. The appeal court found the trial judge had erred in fact and law by ruling that the 2015 agreement was not a binding contract. After a thorough review of numerous case authorities interpreting and applying s. 40 of the Act, including Miglin v Miglin, 2003 SCC 24 (Miglin) and Rick v Brandsema, 2009 SCC 10, which extended the Miglin reasoning concerning contract formation in the context of spousal support to property division disputes, the court set out a series of "sequential steps" which should guide a court's analysis "when dealing with an interspousal agreement under s. 40 of the Act." In applying these to the appeal before it, the court was first to determine if the 2015 agreement was in fact a binding contract. Contrary to the trial judge's ruling that it was not a fully formed contract, the court found the trial judge failed to so find for a number of reasons: the trial judge conflated the absence of independent legal advice in the making of a s. 38 interspousal contract with contract-making generally; erred in finding that no meeting of the minds had occurred between D.A. and F.A.A., since it was apparent to a reasonable observer that F.A.A. took active steps following the agreement commensurate with its terms; and erred by finding that the 2015 agreement was only an agreement to agree because no certainty existed about how to deal with the family home, though the 2015 agreement expressly set out a clear process by which the family home was to be valued and settled. Having found that the 2015 agreement was a valid and binding contract, the court turned to a consideration of the evidentiary weight the trial judge should have given it in his analysis and did so based on two areas of inquiry itemized in Miglin: 1) how was the agreement formed; and 2) did it "match... the original intention of the parties"? The court determined that the appellant provided no evidence which could lead it to conclude that he signed the agreement under duress or that he failed to appreciate what he was doing. In short, no power imbalance was shown by him, especially since the marriage was of short duration, each party's respective property was known to the other, and settling it was not complicated. As to whether the passage of time had caused the terms of the 2015 agreement to no longer be in accordance with the parties' intentions to such an extent that it now fell outside the objectives of the Act, the court held, in accordance with Miglin, that such occurrences as the reduction in value of Globe-Elite were within what could have been foreseen by the parties at the time of the execution of the agreement, and so the agreement could not be said to no longer reflect the intention of the parties.

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S.A.R. v A.K.L., 2021 SKCA 124

Leurer Barrington-Foote Kalmakoff, September 15, 2021 (CA21124)

Family Law - Parenting Orders - Mobility - Appeal
Civil Procedure - Appeal - Application to Adduce Fresh Evidence

The appellant father, S.A.R., took issue with the trial judge's decision to award sole custody of two children of the marriage to the respondent mother, A.K.L., and to grant an order allowing her to relocate the children to Macklin from Lumsden. The former Divorce Act, and in particular ss. 16(1), (8) and (10) thereof, were the governing enactments to be applied at trial. The appellant's grounds of appeal alleged that the trial judge misapprehended the evidence in material respects and as a result failed to reasonably exercise his judicial discretion in arriving at a decision unfavourable to S.A.R. The appellant also wished to introduce fresh evidence on appeal in the form of two of his own affidavits. The appeal court went through the judgment in detail in light of the appeal grounds, with particular attention to the trial judge's reasons for concluding, with respect to the award of custody, that A.K.L. had been the primary caregiver to the children; that S.A.R. was less suitable to be the custodial parent because his actions showed he continued to act out against A.K.L. to the detriment of the children, an example of which was to hire a babysitter when A.K.L. was available to care for the children; that he was less able to understand and deal maturely with their needs; and with respect to the relocation, the trial judge's emphasis on the move being an "enhancement" of the lifestyle of the children in a number of ways, including relieving the financial stress on A.K.L as she had obtained employment in Provost, Alberta (near Macklin), and the children would be living with A.K.L.'s partner, who was a farmer and rancher in the area, and by allowing them to be closer to relatives, including their maternal grandparents.
HELD: The appeal court dismissed the fresh evidence application and the appeal. As to the fresh evidence application, the appeal court concluded that neither affidavit met the tests of "being highly relevant and potentially decisive of the children's best interests," and stated they spoke to very collateral matters far removed from the issues in play, such as referencing a letter from a former boyfriend of A.K.L. and deposing to a conflict of interest because his lawyer had in the past been a lawyer in the law firm of A.K.L.'s lawyer. As to S.A.R.'s argument that the trial judge misapprehended the evidence "that affected the parenting order", the appeal court said that such was not the case since the trial judge throughout his analysis remained focused solely on the evidence which showed what was in the best interests of the children, and applied the correct law by which he was to be guided in that inquiry. Though he may have been mistaken on secondary details such as, for example, that S.A.R. had not secured full-time employment when he had, he could not have been said to have misinterpreted evidence which "affected the final conclusion" in that it was within the trial judge's discretion on the evidence to conclude that S.A.R. intentionally chose not to work so as not to pay child support, a relevant factor to be weighed in the balance in deciding the best interests of the children. Generally, the appeal court held, the appellant's urgings that the conclusions the trial judge arrived at were the result of material misapprehensions of the evidence really amounted to an attempt by the appellant to ask the appeal court to embark on a re-weighing of the evidence, which was not within the applicable standard of review of deference to the judge's fact-finding and weighing expertise.

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R v Robertson, 2021 SKCA 125

Jackson Ottenbreit Caldwell, September 22, 2021 (CA21125)

Criminal Law - Procedure - Admissions - Appeal

The appellant appealed the decision of the summary appeal court judge allowing the Crown's appeal of the trial judge's acquittal following the exclusion of evidence of the ASD and breath test results pursuant to s. 24(2) of the Charter because of breaches of the appellant's rights under ss. 8 and 9 of the Charter. Before the appeal court, it was not contested that during the appellant's trial for the offence of drinking and driving over the legal limit, the Crown conceded at the outset of trial that the arresting officer did not have sufficient grounds to hold a subjective belief that the appellant's ability to operate a motor vehicle was impaired by alcohol, and maintained that concession even though the arresting officer testified that she believed throughout her investigation that the appellant was impaired by alcohol. It was also agreed on appeal that in

accordance with R v Gunn, 2012 SKCA 80, and R v Bernshaw, [1995] 1 SCR 254, the Crown was required to prove the validity of the warrantless search by establishing on a balance of probabilities that the arresting officer reasonably believed on a subjective basis that the appellant was an impaired driver. The Crown conceded that she did not in fact have such a belief, and so in effect admitted the Charter breaches, choosing to argue that despite the breaches, the evidence should not be excluded under s 24(2) of the Charter because the Charter infringements were minor. The trial judge did not agree, ruled the breaches were serious, excluded the material evidence from the trial, and ruled the Crown had failed to prove its case. Before the summary appeal court judge, the Crown argued that the trial judge should not have relied on its concession because it was based on an error of law, and asked that it be withdrawn from the record. The summary appeal court judge agreed with the Crown that he was not bound by a concession at trial on a question of law, and he could permit the Crown to withdraw it, which he did, after which he reviewed all the evidence, including that which the trial judge did not consider because of the admission, ruling that the arresting officer did have the requisite belief, supported on an objective standard, to form reasonable and probable grounds that the appellant was an impaired driver. As a result, he reversed the trial judge on the Charter breach, admitted the evidence of the ASD fail and the breath test results, and convicted the appellant.
HELD: The appeal court allowed the appeal and restored the acquittal. Though it agreed with the summary appeal court judge that the law was such that a court was not bound by a concession involving a question of law, in this case the concession was an admission of fact, and not one of law. The court reasoned that the concession did not force the trial judge to apply an incorrect standard concerning arbitrary detention but was an admission that the evidence fell short of the standard. It went on to say the law was clear that such an admission dispensed with the formal proof of a fact in issue and could not be set aside, even if other evidence at trial contradicted it, as in this case. The policy objective which needed to be supported by this principle was that if admissions of fact could be set aside on appeal, they would become meaningless, with the result that facts in issue would always need to be proven. The appeal court ruled that the summary appeal court judge erred in law by allowing the Crown to withdraw its concession.

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CPC Networks Corp. v McDougall Gauley LLP, 2021 SKCA 127

Ryan-Froslie Leurer Barrington-Foote, September 22, 2021 (CA21127)

Civil Procedure - Pleadings - Statement of Claim - Application to Strike - Appeal
Barristers and Solicitors - Client Files - Appeal
Corporations - Shareholder Remedies - Derivative Action - Leave to Commence - Appeal

The appellant in three appeals, CPC Networks Corp. (CPC), and the appellants in one of them, L.A. and J.A., who were founding shareholders of CPC and now its sole directors, appealed from the decision of a Queen's Bench chambers judge (see: 2019 SKQB 251). The appeals were heard together. The chambers judge's decision related to applications in five actions. All those actions, and others that had previously been resolved, originated in a dispute between L.A. and J.A. and other minority and majority shareholders in CPC. L.A. and J.A. alleged that the latter group had hatched a scheme to acquire the shares held by L.A. and J.A. (the original claim). Relevant to all the proceedings was that in 2013, the majority shareholders obtained a liquidation order (LO) with the consent of L.A. and J.A. and other minority shareholders pursuant to ss. 207(1)(b) and 234(3) of The Business Corporations Act (BCA). A term of the LO was that CPC retained the power to continue the application for leave to commence a derivative action (DA). The liquidator disposed of CPC's operating assets and was discharged by the court in 2015. In 2016, all but one of the directors resigned and L.A. and J.A. were elected as directors of CPC, and all the claims made in the actions brought by them and other plaintiffs that included debt, unjust enrichment, conspiracy, oppression and for breaches of fiduciary duty against former directors of CPC and the respondents were settled except for those against the same respondents named in these appeals. The respondents, R.M. and C.B., are partners in McDougall Gauley (MG), a law firm that represented CPC. MG and R.M. were retained in 2010 by some of the directors who were majority shareholders to represent CPC in an action brought against it by L.A.'s investment company. J.A. and L.A. alleged, and R.M. denied, that MG was also retained to represent the majority shareholders in the scheme at the heart of the original dispute. The position of L.A. and J.A. was that CPC had different interests from the majority shareholders and this placed R.M., and later C.B., in a conflict. By providing

assistance to the majority shareholders in their scheme, CPC incurred such costs that it was forced to liquidate its assets at a substantial discount to pay its debts. MG, R.M. and C.B. withdrew from representing CPC in 2013 and it retained the respondent law firm, Robertson Stromberg (RS), and the respondent, S.S., a partner in the firm. L.A. and J.A. alleged that they too committed various breaches of their duties to CPC during their representation of it. The appellants appealed the chambers judge's decisions with respect to applications made regarding the following: 1) the derivative order. CPC's application for leave to commence a DA against R.M., C.B. and MG (the MG parties), for breaches of fiduciary duty to it as its solicitors, was dismissed. The chambers judge denied the application for leave on the ground that the action against the MG parties would be statute-barred because it was commenced in January and returnable in February of 2012, and on the appointment date of the liquidator in October 2013, the MG parties were no longer CPC's solicitors. Any breaches had to have occurred prior to the date of appointment. She cited s. 5 of The Limitations Act (LA), setting the two-year limitation period from the date the claim was presumed to have been discovered as determined under s. 6 of the LA, and found that as the action against the MG parties would be statute-barred, the application for leave to commence the DA would also be statute-barred. The appellants argued that the judge erred in her decision that the respondents had met the test regarding obtaining leave to bring a DA, such as the expiration of the limitation period, including discoverability. They were not directors of CPC on January 31, 2012 and were only reelected to the board in October 2016 after they settled the original dispute and the directors associated with the majority shareholders resigned. It was only then that the claim was discovered by CPC. Further, there was an arguable issue as to whether L.A. and J.A.'s knowledge of the things specified in s. 6(1) of the LA meant that CPC had that knowledge for the purposes of the discoverability analysis; 2) the documents order. The appellant CPC's application for MG and RS to produce all CPC property in their possession relating to the application for an order pursuant to ss. 207(1)(b) and 234(3) of the BCA directing liquidation and dissolution of CPC was dismissed. After L.A. and J.A. were elected as directors of CPC in 2016, the board of CPC then retained new counsel who demanded, on its behalf, all of CPC's client files from the MG parties, who refused to comply. Their position was that the files were subject to solicitor/client privilege and were part of two of the actions involving CPC shareholders, directors, and lawyers. Their privilege claim was based on L.A. and J.A.'s allegations that they had acted not only for CPC but for members of the majority shareholder group, despite having denied the allegations throughout. The chambers judge dismissed the application. Although the issue of the lawful authority of CPC was not argued, she found the effect of the LO was to limit the authority of the directors to only retain it in continuing the application for the DA. The judge also found that there was a possibility that some of the documents might be privileged. On the appeal, the respondents argued that as the decision was interlocutory, and the appellants had not obtained leave to appeal under s. 8(1) of The Court Appeal Act, 2000 (CAA), the court did not have jurisdiction to hear the appeal under s. 8(2) of the CAA. On the substantive issue, the appellants argued that the judge should not have made her decision on the basis of CPC's authority to apply for delivery of its files, as the issue was not before her; and 3) the strike order. The respondents' application to strike the CPC's statement of claim against R.M., C.B., S.S., MG and RS for damages for breach of fiduciary duty was granted. The chambers judge's decision to strike the claim in its entirety was made pursuant to Queen's Bench rule 7-9(2)(c) on the basis that it was scandalous, vexatious and an abuse of process because: i) she had dismissed the application to commence the DA because it had not proceeded in a timely fashion. She concluded that this meant that this action was nothing more than an attempt to relitigate an action on which the court had already ruled; and ii) she also found that as a result of the granting of the LO, the powers of the directors and shareholders ceased. There was no court order authorizing L.A. and J.A. to commence this action and commencing it was also an abuse of process.

HELD: The court granted each of the appeals. The appellants were awarded costs of $10,000 against all of the respondents. 1) It held with respect to the derivative order that leave should be granted to L.A. and J.A. to bring the DA. The chambers judge's denial of leave and finding that the limitation period had expired should be set aside. It found that the chambers judge erred in the exercise of her discretion regarding whether it was in CPC's best interests to grant leave to commence the DA under s. 232(2)(c) because she failed to consider the merit of the issue of corporate discoverability raised in the context of s. 6(1) of the LA and whether the fact that L.A. and J.A. knew the things specified therein meant that CPC had that knowledge. She therefore erred in her decision to deny the application as not being in the best interests of CPC, based solely on the ground that the claim was statute-barred. 2) The court held with respect to the documents order that on the preliminary issue, it had jurisdiction to hear the appeal as the order was final. The appellant's documents application was to enforce its right to possession of its property pursuant to s. 66(5) of The

Legal Profession Act, 1990. The chambers judge erred in law in her first reason for denying the documents application as the matter had not been raised by the respondents. Further, the LO did not preclude CPC or the directors from making the application. She also erred in law in relying upon her second ground of possible privilege for denying the application. The respondents had consistently denied the allegation that they were in a conflict and deposed that they acted for and took instructions solely from CPC throughout. If the respondents had been retained by the majority shareholders on their own behalf in relation to the same matters, there was a joint retainer. Under such retainer, no privilege attached to their communications with a lawyer acting for both of them. 3) Concerning the strike order, the court found that the chambers judge erred in the application of her discretion to strike the statement of claim in its entirety. Her conclusion that it should be set aside on the basis that it related to claims that were statute-barred was the result of a reviewable error. The reasoning that applied to corporate discoverability in the context of the application for leave to bring the DA applied equally to this action, a claim against all the respondents, and the issue should be considered. The chambers judge also erred in finding that CPC did not have authority to commence the action. Her conclusion that the directors required authorization from a court to commence the action resulted from her errors in law related to the meaning of the relevant provision of the BCA and as well as to the meaning of the discharge order. Neither the LO nor the discharge order spoke to the dissolution of CPC, supporting the position that L.A. and J.A. did not intend for it to dissolved when they consented to the LO. Therefore, the discharge order issued under s. 210(n) of the BCA discontinued the liquidation subject to the terms of the LO. The directors of CPC did not require authorization from a court to commence this action.

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Mitchell v Candle Lake (Resort Village), 2021 SKCA 128

Ottenbreit Whitmore Leurer, September 30, 2021 (CA21128)

Statutes - Interpretation - Summary Offences Procedure Act

The appellant was granted leave to appeal the decision of a Queen's Bench judge, sitting as a summary conviction appeal judge, to dismiss his appeal of a summary offence ticket issued by the respondent pursuant to The Summary Offences Procedure Act (SOPA). The appellant had obtained leave to appeal on the sole issue of whether a ticket issued to him by the respondent, the resort village of Candle Lake, was a nullity and therefore could not be amended. The appellant had commenced construction of a building on his property without first obtaining the necessary building permit from the respondent. A bylaw officer issued the summary offence ticket on October 29, 2019, and the offence was listed on it under two different headings: "Bylaw No." and next to it was written "2007 Planning + Development – Development permit required" and s. 243(1) was referenced; and "Other," beside which was written "Commencement of development, prior to obtaining a development permit. In contravention of Municipal Zoning Bylaw 03/2016 section 3.3(1)". On the same date a second summons ticket was issued. Beside the heading "Bylaw No." was written "2007 Planning + Development Act – continuation of contravention". Section 243(2)(c) was referenced. Opposite the heading "Other" was written "Failure to abide by Stop Work Order dated Oct 17/2019. Continuance of contravention as observed + documented." At trial, the respondent applied to have the first summons ticket amended to delete all the words set out opposite "Bylaw No." and the reference to "section 243(1)" with the result that the only remaining charge was as described opposite the heading "Other." It also withdrew the second summons ticket in its entirety. In his first appeal, the appellant alleged the ticket was a nullity as it was issued under The Planning and Development Act, 2007 (PDA) and there is no provision in SOPA or in The Summary Offences Procedure Regulations, 1991 (regulations) for issuing the ticket under the PDA. The appellant also alleged that the respondent amended the tickets on the day of the trial after previously indicating in writing that it would amend the ticket that was withdrawn, not the ticket that was amended. In response to the first argument, the judge found that the regulations do permit commencement of the information under the PDA by the issuance of a summons ticket. Respecting the second ground, the judge found that the trial judge had the discretion to amend the summons ticket and did so without prejudice to the appellant. Regardless of the two tickets and the amendment, what was important was that the appellant knew and understood the specific offence with which he had been charged so that he could make full answer and defence.
HELD: The appeal was dismissed. The summary conviction appeal judge had not erred in concluding that the ticket was not a nullity and was valid and had not

erred in permitted it to be amended. The remaining charge on the ticket was clearly described, the section of the zoning bylaw was indicated and the appellant's name provided as required by the regulations.

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Cass v Saskatchewan Government Insurance, 2021 SKCA 130

Jackson Schwann Kalmakoff, September 29, 2021 (CA21130)

Automobile Accident Insurance Act - Income Replacement Benefit - Dismissal - Application to Reinstate - Appeal
Statutes - Interpretation - Automobile Accident Insurance Act, Section 113, Section 131, Section 140

The self-represented appellant appealed the decision of the Automobile Injury Appeal Commission to dismiss his appeal, made pursuant to s. 194 of The Automobile Accident Insurance Act (AAIA), from the decision of the respondent, Saskatchewan Government Insurance (SGI), not to restore his income replacement benefit (IRB) pursuant to Part VIII of the AAIA (see: 2018 SKAIA 55). Following a motor vehicle accident in 2016, the appellant suffered physical injuries for which he received IRB under s. 112 and a rehabilitation benefit (RB) under s. 113 of the AAIA, from SGI. In January 2017, an orthopedic surgeon advised the appellant that no further intervention was required and that he could return to work once assessed by a physiotherapist. The appellant then underwent a tertiary evaluation by an interdisciplinary team of health care professionals. The team recommended that he attend a month-long rehabilitation program followed by a month of a graduated return-to-work program. After completing it, the appellant was assessed as being capable of returning to work, although he continued to report pain. He returned to work full-time in April 2017 and SGI terminated his IRB under s. 131 of the AAIA, concluding that he was substantially able to perform the duties of the employment he had held at the time of the accident. SGI then terminated his RB. The appellant did not appeal either of these decisions. He continued to see his own physiotherapist and physicians with complaints of ongoing pain. An MRI conducted in August did not reveal an issue. The appellant left his employment in September 2017 and returned to his home in Ontario. He then applied to SGI to have his IRB and RB restored on the basis that his doctors and physiotherapist agreed that he could not work because of his injury. SGI obtained a file review from its medical consultant and he found that there was no evidence to support ongoing treatment, and that the additional information provided by the appellant would not change his opinion from that of the tertiary team, that he had the ability to return to work. After SGI issued its decision letter advising the appellant that it would not change its earlier decision as his information did not support reinstatement of an IRB, the appellant's physiotherapist in Ontario provided an opinion letter recommending he receive 20 more physio treatments. After the appellant appealed SGI's decision to the commission, it reviewed his case and found that the tertiary assessment report provided the best evidence of his progress from the time of the accident to when it was written. It considered the next period as being the time following his return to work and until leaving his position. It assessed the evidence from his physicians and physiotherapist as unhelpful because it did not comment directly on work capacity but indicated some support for further treatment. For the next period covering up to his appeal in April 2018, the commission regarded the one physiotherapist's report as insufficient as it did not address his capacity to work. It concluded that although the appellant had suffered injuries and had not fully recovered when he returned to work in April 2017, in the absence of subjective and objective evidence to the contrary, coupled with its perception of a lack of motivation on his part, it determined that, on a balance of probabilities, SGI was correct in terminating his IRB. It decided that SGI's decision to end the RB was reasonable at the time but based on the most recent report from the Ontario physiotherapist, the commission varied SGI's decision and directed that he receive 12 more physiotherapy treatments. The appellant appealed the commission's decision, arguing that although it held, following Ballantyne (2015 SKCA 38), that SGI bore the onus of establishing that he could work and was not disabled from working in October 2017 when he applied for reinstatement of benefits, it erred by reversing the onus when it dealt with the evidence. SGI's position was that the commission had erred in its interpretation of Ballantyne and where, as here, an application to reinstate benefits was made, the burden of proof rests with the insured. In spite of the error, however, the commission's decision was correct. The appellant also argued that there was evidence to support that he was unable to work and the commission erred by overlooking this evidence. The tertiary report it relied upon was out of date when he applied

and the report had not considered the physical demands of his position. The commission failed to consider his testimony of ongoing pain.
HELD: The appeal was dismissed. The court found that the commission had erred in considering the appellant's appeal as being under s. 113 of the AAIA as to whether SGI had erred in terminating his benefits, and thereby placing the onus on SGI to prove that the appellant was unable to hold employment when the issue was whether SGI erred in denying the appellant's application to reinstate benefits previously terminated under s. 140 of the AAIA and where the onus was on the insured. The error was irrelevant, however, because under either provision, the commission had to determine whether the appellant was unable to hold employment and its error in holding that SGI bore the onus of proof redounded to the appellant's benefit and had no bearing on the final result. Respecting the appellant's second ground of appeal, it noted that most of the appellant's arguments invited the court to re-examine and re-weigh the evidence, which is not permitted under s. 194 of the AAIA. Such appeals are confined to questions of law. It dismissed the appellant's argument regarding the tertiary report as it had been the basis to terminate and he had not appealed that decision. The commission had not erred respecting the appellant's evidence. It considered the evidence of the file review conducted after the appellant applied for reinstatement, the information provided by his personal physicians and physiotherapist, the MRI report, and his testimony, and concluded that the evidence did not assist in assessing the crucial issue of his capacity to work. It was open to the commission to assign the weight that it did to the tertiary report in preference to the appellant's subjective opinion.

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Yashcheshen v Teva Canada Ltd., 2021 SKCA 135

Jackson Schwann Barrington-Foote, October 14, 2021 (CA21135)

Statutes - Interpretation - Constitutional Questions Act, 2012, Section 8(1)

The self-represented appellant appealed the orders of a Queen's Bench chambers judge that she be designated as a vexatious litigant pursuant to Queen's Bench rule 11-28 and to cancel all fee waiver certificates issued to her pursuant to The Fee Waiver Act. The grounds of her appeal were that the orders violated ss. 7 and 15 of the Charter of Rights and Freedoms. She applied pursuant to s. 8(1) of The Constitutional Questions Act, 2012 for court-appointed counsel to argue the aspects of her appeal related to the vexatious litigant order and the fee waiver order.
HELD: The application was dismissed. The court found that s. 8 of the Act applies only to reference and does not authorize the appointment of state-funded counsel in this appeal, as it was not a reference.

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R v Bear, 2021 SKQB 231

Popescul, August 26, 2021 (QB21233)

Criminal Law - Credibility - Reasonable Doubt - Crown Appeal

The Crown appealed to the summary conviction appeal court against the acquittal of the accused for the offence of operating a motor vehicle while impaired, and asked the court to allow the appeal pursuant to his power to consider an appeal where "the verdict is unreasonable or cannot be supported by the evidence" as set out in s 686(1)(a)(ii) of the Criminal Code and "made applicable" to summary conviction appeals by s 822(1) of the Code. The summary appeal court judge instructed himself in accordance with R v Reid, 2012 SKQB 42, that the standard he was to apply to determine the appeal was whether the trial judge's factual findings were unreasonable in the sense that they were "unsupportable on the available evidence." In this case, the credibility of the accused was at issue: specifically, whether the trial judge's findings on that issue were supportable or so unreasonable as to require intervention by the court. The court reviewed the Crown evidence heard at trial, consisting of that of a civilian witness and the arresting officer, which painted a picture of a highly intoxicated accused who, among other indicia of impairment, swerved all over the road; drove her vehicle into a snowbank, though the roads were described as "standard winter roads;" who told the civilian witness that she was not injured, not appearing to be so; and whom the witness believed was slurring her words and had an odour of alcohol on her breath; who, the arresting officer testified,

was passed out on the vehicle's steering wheel, and in the back seat of which were two empty cans of a vodka-based drink (Rockstar), and numerous unopened ones; who said she was not injured; who was passing out in the back seat of the police vehicle; who, at the detachment had difficulty standing or remaining conscious; and when the breath tests were being taken, kept her eyes closed and was leaning over and had to be caught so as not to fall. The arresting officer did not observe other indicia of impairment such as an odour of alcohol from her breath. He testified as well that he took her to the hospital to be checked, out of caution, given that she had collided with a snowbank. Testimony was also heard to the effect that she remained in hospital for three hours. In response to the Crown case, the accused testified first that she did not recall hitting the snow bank but contrarily, that she did so because the road was slippery; that she only had one sip from a Rockstar, but had no explanation for the two empties in the back seat; that she felt a bit dizzy, nauseous, and had "some minor headaches the next day" but sought no further medical attention. The trial judge reviewed the evidence and dismissed the charge on the basis that, in spite of the evidence of impairment, because the arresting officer formed the opinion that the accused should be taken to the hospital, that he had a concern that her indicia of impairment might have been due to the results of the collision with the snowbank, and ruled he had a reasonable doubt that she was impaired by alcohol, and acquitted her.
HELD: The summary appeal court judge allowed the appeal and entered a conviction, ruling that the trial judge's decision was unreasonable and not supported by the evidence because the evidence of impairment was overwhelming, and the trial judge's doubt about her impairment by alcohol due to possible effects of colliding with the snow bank was speculative, not supported by the evidence and did not amount to a reasonable doubt. Upon his review of R v D.W., [1991] 1 SCR 742, the leading case with respect to reasonable doubt and an accused's credibility, he concluded that the trial judge failed to carefully analyze the accused's evidence and by so doing misapplied D.W., which does not stand for the proposition that the evidence of an accused must be accepted without careful scrutiny. In this case, the trial judge should have rejected her evidence. The court convicted her on the balance of the evidence.

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R v Turgeon, 2021 SKQB 236

Klatt, September 2, 2021 (QB21239)

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08 - Conviction - Summary Conviction Appeal
Constitutional Law - Charter of Rights, Section 9, Section 10(a), Section 10(b), Section 24(2)

The appellant appealed his conviction after trial in Provincial Court for driving while his blood alcohol content exceeded the legal limit, contrary to s. 253(1)(b) of the Criminal Code. Two police officers were the only witnesses at the trial and they testified that early in the morning, they had seen the appellant driving a truck in an erratic and dangerous fashion which they at first believed to be consistent with vehicle theft but later they thought it indicated that the driver was impaired. After stopping the vehicle, the officer questioned the appellant as to whether he had been drinking and he replied that he had had four beers. The officer noticed that the appellant had trouble keeping his eyes open, that they were red and glassy and his speech was slurred, and so advised him that he had a reasonable suspicion that he had alcohol in his body and asked him to take the ASD test in the police cruiser. The accused failed the test and the officer then made the breath demand and advised the appellant of his right to counsel. The officer testified that before taking the appellant's breath samples, he kept him under observation. The appellant was served with a Certificate of Qualified Technician (certificate). A week prior to the trial, the officer was asked by the qualified technician to serve a new certificate on the appellant that conformed to recent Code amendments. The defence brought an application alleging violations of the appellant's ss. 8, 9, 10(a) and 10(b) Charter rights. A voir dire was held. The appellant called no evidence and the trial concluded with the evidence from the voir dire being applied to the trial. The defence argued that the officers' testimony was unreliable and not credible because their evidence was internally inconsistent and inconsistent with the video-recording evidence of the stop. The police did not have the requisite grounds to stop the vehicle, and if the detention was lawful, s. 10(a) of the Charter had been breached when the officer failed to give the appellant reasons for the detention. The defence counsel argued as well that the Crown had failed to provide reasonable notice before trial of its intention to produce the certificate in accordance with s.

320.32(2) of the Code. Because the Crown served her during the trial, the certificate should not have been received into evidence. Crown counsel advised the court that she had learned two weeks before trial that the technician was unable to attend it. She then discussed the newly enacted Code amendments with the defence counsel to determine how the proceed, as this was a transition case. Options included serving a new notice in accord with the amendments or obtaining an adjournment. They agreed on preparing an agreed statement of facts. The defence counsel then withdrew her agreement and the Crown tried to serve the new notice on the appellant, but they could not locate him and were unsuccessful until the day of trial. The defence counsel objected to the Crown speaking about "without prejudice" communications between them. The trial judge reviewed the alleged inconsistencies in the officers' testimony and the video-recording, found that they were not material and accepted the evidence of both officers. She found that no arbitrary detention of the appellant under s. 9 of the Charter had occurred. The officers had a reasonable suspicion to stop the appellant to investigate a potential car theft and after he was stopped, it was reasonable for the officer to continue to detain him to investigate the reasons for his driving. During that lawful detention, the investigation became one of impaired driving. The detention did not become unlawful when the nature of the investigation changed. Respecting the alleged breach of s. 10(a), the judge decided that although the officer failed to inform the appellant of the reason for his detention, he could reasonably be taken to have understood the reason when the ASD demand was made. However, as he was never specifically told of the reasons for his detention, the judge found that s. 10(a) of the Charter had been violated, relying on the decision in Koma (2015 SKCA 92). His s. 10(b) Charter right had not been breached because roadside breath testing was a reasonable limit on the rights to counsel. After conducting a Grant analysis respecting the s. 10(a) breach, the judge found that the officer had acted in good faith and found the breach to have been a minor one with minimal impact on the appellant. She would not exclude the evidence. In considering the issue of whether the notice requirement under s. 320.32(2) of the Code had been met, the judge found that because of the communications between the Crown and defence counsel, the appellant had had reasonable notice that the certificate would be tendered into evidence. The grounds of appeal included whether the trial judge erred: 1) in finding there was no arbitrary detention; 2) in finding no violation of the appellant's s. 10(b) Charter rights; 3) in her Grant analysis, undertaken after finding a breach of s. 10(a) of the Charter; and 4) in admitting the certificate into evidence.
HELD: The appeal was dismissed. The court reviewed the jurisdiction of a summary conviction appeal court under s. 822(1) of the Code and the various standards of review applicable of each of the grounds. It found with respect to each ground that the trial judge: 1) had not erred in her findings of fact. She had not misapprehended the evidence nor erred in her assessment of the credibility and reliability of the officers. Her findings were amply supported by the evidence. She selected and applied the correct principles of law to find that an investigative detention found on a reasonable suspicion is not an arbitrary detention; 2) had not erred in not finding a breach of s. 10(b) of the Charter. She correctly concluded that at the point of the investigation, a roadside breath demand, those Charter rights were suspended; 3) had erred in finding that s. 10(a) of the Charter had been violated based on a narrow interpretation of Koma. In the event that the court was wrong on that point, it found the trial judge had not erred in her analysis of the Grant factors; and 4) had not erred in finding that the preconditions for admissibility of the certificate were met. It was proven that the Crown had served the appellant with a certificate under the predecessor Code provision and he was aware that the Crown intended to rely upon it. The appellant and his counsel were aware of the new certificate and did not request an adjournment to prepare an application to cross-examine the officer who signed it. The judge had not erred in receiving the information from Crown counsel regarding her communication with defence counsel as it explained to the judge the circumstances related to the serving of the notice.

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R v D.M.V., 2021 SKQB 237

Danyliuk, September 3, 2021 (QB21234)

Criminal Law - Reasonable Doubt - Credibility

In the trial of this matter, the judge was required to make findings of credibility to arrive at the facts upon which he was to decide whether the Crown had proven the essential elements of the offence of sexual assault in a case wherein the accused, D.M.V., and the complainant, D.S. gave diametrically opposed

evidence. It was not in issue that D.M.V. was the step-mother of D.S.; that his father, J.S., and D.M.V. lived together "off and on for about 5 years;" that they were living separately during the time of the alleged offending behaviour, but shared parenting time with the children, including D.S.; that J.S. continued to care for his own children, D.S., C.S. and a child with D.M.V named N.V.; that after the separation with D.M.V., J.S. entered into a relationship with R.L., in March 2017; that R.L. moved in with J.S. with her children; and at the time of the alleged offending behaviour, D.M.V. was 31 years old and D.S., 15. The material evidence for the Crown consisted of testimony from D.S., J.S., and R.L.; that of the defence, the testimony of D.M.V. D.S. testified that he had sexual relations with D.M.V. 35 to 40 times at his home, including sexual intercourse, fellatio, and anal sex, from December 2016 to March 2017. He described in detail the first sexual encounter, and a second incident in the master bedroom with other children present on the bed and D.M.V. under the covers, and at which time D.M.V. consented to D.S. putting his penis in her vagina while they were spooning. R.L. testified that D.S. disclosed the sexual activity with D.M.V. to her in January 2018. J.S. testified that D.S. disclosed it to him in January 2018 as well, but separately from R.L. J.S. also described numerous instances of behaviour between D.M.V. and J.S. which he thought were inappropriate, such as sitting very close together under a blanket watching T.V. and hugging and touching each other like people who were dating. J.S. became angry after the disclosure by D.S. and telephoned D.M.V. about D.S.'s accusations. D.M.V. went to the police and gave a statement that D.S. had sexually assaulted her. J.S. took D.S. to the police station to give a statement soon after D.V.S. did, but D.S. did not give a statement at that time, but did a few weeks later after hearing of D.M.V.'s allegations to police, testifying that he was reluctant to initiate proceedings because of how that would affect his brothers.
HELD: The trial Judge convicted D.M.V. of sexual assault based on the evidence of D.S. about the first incident of sexual intercourse, which he had described in detail, and the spooning incident in the master bedroom. He did not convict her of the other 35 or 40 incidents, including the allegation of anal sex not testified to in any detail by D.S. The trial judge embarked on a detailed and thorough review of all the evidence with the four elements of the test set out in R v McKenzie (1996), 141 Sask R 221 (CA) (McKenzie), a restatement of R v D.W., [1991] 1 SCR 742, and endorsed by the case law, as his guide. He considered the first part of the test, which required him to review the evidence to determine if he believed D.M.V. that the only sexual contact between her and D.S. occurred in the master bedroom, and that D.S. had forced himself on her. The trial judge instructed himself that if he believed her evidence, he must acquit her. He concluded he could not believe her evidence because the cumulative effect of the numerous unexplained inconsistencies in her account as between her two statements to the police, her examination in chief, and her cross-examination. These could not have led a reasonable jury, properly instructed, to acquit her. In particular, he referred to her testimony in cross-examination in which she could not explain why in her first statement to the police, she said no sexual activity had occurred but in her second statement, she said there was, but that D.S. forced himself on her. The trial judge also pointed to her blanket denials when the evidentiary burden on her required more detail, and that in many cases her evidence was simply confusing, and contradictory. He then moved on to consider the second part of the test, whether he was unable to decide whom to believe, and that in such a case he was to acquit D.M.V. He was satisfied, on an assessment of all the evidence, that he could believe the evidence of D.S. because, though he was inconsistent in his testimony on minor matters such as the texting between himself and D.M.V., he was credible and reliable on the material aspects of his account, was not "rattled" on cross-examination and gave his evidence in a balanced and measured manner. He found his evidence was corroborated in key areas, in particular, J.S.'s evidence of the closeness under blankets, and the inappropriate touching and hugging between a 31-year-old mother figure and a 15-year-old boy with whom she resided. Next, the trial judge turned to the third element of the McKenzie test, whether the evidence of D.M.V. raised a reasonable doubt in his mind of her guilt, in which case he must acquit. He found her testimony did not cause him to have a reasonable doubt of her guilt. Among numerous other concerns which led him to conclude D.M.V.'s evidence was seriously flawed, he asked why D.M.V. did not produce a calendar she said she kept and which she suggested was accurate concerning dates and other relevant events. Having decided that D.M.V.'s evidence did not cause him to have a reasonable doubt about her guilt, he then moved on to consider whether the balance of the evidence he accepted proved the essential elements of the offence, and in particular whether an assault had occurred, and based on his credibility assessments was satisfied that he had no reasonable doubt that an assault of a sexual nature was committed on D.S. by D.M.V. As well, he instructed himself that although pursuant s. 274 of the Criminal Code, corroboration was no longer a requirement of proof, there was corroborative evidence in the case before him which supported D.S.'s testimony.

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Director under The Seizure of Criminal Property Act, 2009 v Negash, 2021 SKQB 240

Currie, September 9, 2021 (QB21235)

Criminal Law - Drug Offences - Forfeiture
Statutes - Interpretation - Cannabis Control (Saskatchewan) Act
Statutes - Interpretation - Seizure of Criminal Property Act, 2009, Section 7
Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(a), Section 10(b), Section 24(2)

The plaintiff, the director under The Seizure of Criminal Property Act, 2009, applied for an order of forfeiture, pursuant to the Act, of $46,640 that was seized by the police from a vehicle the defendant was driving. The defendant responded that the evidence on which the director's application was based had been obtained in contravention of his Charter rights. He applied for an order striking unlawfully obtained evidence from being considered on the application and/or an order dismissing the director's application under the "interests of justice" exception set out in s. 7 of the Act. The defendant was stopped on Highway 16 by an RCMP officer because his vehicle's tail lights were not on, contrary to s. 230(1) of The Traffic Safety Act (TSA). In his affidavit evidence, the contents of which were uncontroverted, the officer deposed that he stopped the vehicle at 7 pm not because it was dark but because visibility was poor. After the defendant stopped, he asked him for his licence and registration and the defendant replied that he had rented the vehicle in Winnipeg and was on his way to visit a friend in Calgary. The officer stated he thought that the defendant's choice of route to be odd as Highway 1 would have been more direct. He found the accused to be nervous. These observations, coupled with his experience with policing and the fact that he could smell the strong odour of raw cannabis coming from the vehicle's interior, caused the officer to believe that the defendant was committing the offence of transporting an unlawful quantity of cannabis under The Cannabis Control (Saskatchewan) Act (CCSA). He informed the defendant that he would be searching the vehicle pursuant to the CCSA and the defendant left the vehicle. In the search, the officer found $3,690 in bundles bound by elastic. He attested that this volume of cash, bundled as it was, was consistent with other seizures of proceeds of crime in which he had been involved, so he arrested the defendant for possessing proceeds of crime. A subsequent search revealed more bundles of cash, totalling $46,640, as well as baggies containing marijuana and two cell phones. The defendant argued that: 1) the stop was unlawful as it was daylight, he had not breached s. 230 of The Traffic Safety Act by driving without tail lights; 2) the officer had breached his s. 10(a) Charter rights to be informed of the reasons for his detention and of his s. 10(b) right to counsel. The officer had no legal right to elicit information from him as to his travel route, information on which he relied to search the vehicle; 3) the initial warrantless search breached his s. 8 Charter rights. The officer's belief was not reasonable and the search was unlawful. The officer could not have known the volume of cannabis required for an infraction under the CCSA simply on the basis of odour; 4) the officer breached his s. 10(b) Charter rights because he did not inform him of his right to counsel when he detained him to perform the search. All the evidence obtained after the breach should be excluded under s. 24(2) of the Charter; 5) his arrest, based upon an innocuous amount of cash found during the initial search, breached his s. 9 Charter rights as the grounds for his arrest were insufficient. Evidence obtained after the breach was tainted. HELD: The plaintiff's application for forfeiture was granted. The defendant's Charter applications failed, except that the court found that his s. 10(b) rights had been breached, but the evidence obtained subsequent to the breach would not be excluded. Thus, the evidence was available in the application for forfeiture. The court first dealt with the defendant's applications and found that: 1) the traffic stop was lawful based on the officer's uncontroverted evidence that conditions of poor visibility under s. 230(1) of the TSA existed; 2) the defendant was not questioned unlawfully. He had volunteered the information; 3) the search had not breached the defendant's s. 8 Charter rights. The officer's belief was reasonable as it was based on the defendant's nervous behaviour, that he was driving a rental vehicle, had taken an indirect travel route, and the smell of cannabis emanating from the vehicle, in combination with his experience and training. The factors were reliable and were capable of supporting his belief that an offence had been committed and that the evidence of the offence of transporting an unlawful quantity of cannabis would be found in the vehicle; 4) the officer had breached the defendant's s. 10(b) Charter rights as he did not inform him of his right to counsel when he detained him for the purpose of searching the vehicle. After conducting a Grant analysis, the court decided not to exclude the evidence because the officer acted in good faith and the breach

was not serious and had less impact on the defendant because a rental vehicle does not attract a high expectation of privacy. Society's interest in alleged trafficking of drugs being adjudicated on the merits is high; and 5) the arrest was lawful and did not breach the defendant's Charter rights. The officer had the requisite grounds to arrest the defendant based on his experience and the factors enumerated above. The search incidental to the arrest was lawful and not tainted by a Charter breach. The court was satisfied that the cash found in the vehicle search was likely proceeds of unlawful activity, an instrument of unlawful activity, or both, because it was an unusually large amount of cash packaged in a manner that was consistent with trafficking. The defendant had not offered an explanation for any of the circumstances. The "interests of justice" exception in s. 7 of the Act was not applicable.

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Penner v Saskatchewan Health Authority, 2021 SKQB 242

Goebel, September 9, 2021 (QB21236)

Employment Law - Wrongful Dismissal - Evidence
Civil Procedure - Documents - Application to Disclose

The plaintiff applied to have the defendant disclose documents. She had commenced a claim alleging that she was wrongfully dismissed from her employment with the defendant, the Saskatchewan Health Authority (SHA). It denied any liability and defended that it had just cause to terminate the employment contract. Affidavits of documents had been exchanged and questioning had been completed. During the process the plaintiff learned of a series of written communications that had not been disclosed by SHA and brought this application. She argued that the documents were relevant because they related to SHA's investigation into her conduct prior to dismissal and its decision to terminate her rather than pursue less severe disciplinary measures. The SHA explained that the documents were deliberately excluded on the basis that they were not relevant or, if relevant, protected by litigation privilege. The issue was whether the SHA's internal communications respecting its investigation into the plaintiff's conduct prior to her dismissal and its decision to terminate her employment were relevant and subject to disclosure pursuant to The Queen's Bench Rules.
HELD: The application was granted. The court ordered the SHA to serve and file an amended affidavit of documents on the plaintiff within 60 days, disclosing all notes, correspondence, emails, letters or other documents referencing the plaintiff after April 1, 2018, including those documents relating to the SHA's investigation into the plaintiff's conduct and its decision to terminate. The court found that the documents requested by the plaintiff were relevant to whether the SHA had just cause to terminate her employment, as well whether she was treated fairly in the course of her dismissal. The documents must be disclosed with sufficient particulars to allow any objection to their production to be considered fairly.

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Bell/Gagne v Von Richter, 2021 SKQB 246

Megaw, September 15, 2021 (QB21237)

Civil Procedure - Contempt
Statutes - Interpretation - Children's Law Act, 2020, Section 44
Family Law - Custody - Access - Variation

The petitioner, J.B./G. and the respondent, A.R., each applied for an order finding the other respondent, J.W., in contempt of an order of the Court of Queen's Bench. J.W. also brought applications for orders of contempt regarding J.B./G. and A.R. related to the same Queen's Bench order. J.W. further applied for a variation of that order, seeking to have A.R.'s and J.B./G.'s parenting time terminated. The order at the root of these applications was based on a trial judgment rendered in September 2020 to resolve a custody and access dispute between J.W. and A.R., the parents of a young daughter. J.W. was awarded sole custody of the child and A.R. given parenting time of one weekend per month. J.B./G., the maternal grandmother of the child, was declared a person of sufficient interest in the judgment and given parenting time of one weekend per month. J.W. brought a without notice application in December 2020 for return of the child as she had been overheld by A.R. The court granted the order but A.R.

continued to refuse to return the child. J.W. brought another application and the court ordered an ongoing police enforcement clause and costs against A.R. The child was returned, although A.R. did not explain why she failed to abide by the terms of the first order. Another episode of overholding by A.R. occurred again later the same month, apparently assisted by J.B./G. In May 2021, A.R. refused to return the child and the Saskatoon Police Service (SPS) refused to enforce the parenting order as instructed by the December 2020 order. In May 2021, J.W. brought another application without notice regarding A.R.'s failure to return the child. The court ordered that the SPS be named as a third party due to their failure to enforce the terms of the order. A.R. stated that the child had alleged sexual abuse at the hands of J.W. or his roommate. Both the police and Child Protection Services were informed but both indicated that they would not be taking any steps. When A.R. did return the child, J.W. did not immediately resume the parenting plan until he was satisfied that some emotional difficulties the child was experiencing were settled. J.W. stated that the plan had resumed at the time of these applications but reiterated that the child had difficulties when coming back from her parenting times with her mother and grandmother. He alleged that they disparaged him to her and deposed that A.R. had taught the child to steal. A.R. indicated in her affidavit that the order was "not working" and the child should be in J.B./G.'s care. In his application for variation, J.W. relied upon A.R.'s withholding of the child from him, the continual allegations regarding his inappropriate parenting and the negative impact that A.R. was having on the children as constituting a material change in circumstances to warrant variation of the parenting order.
HELD: All of the applications for orders of contempt were dismissed. The application to vary the order regarding parenting time was also dismissed. The court followed the requirements set out in Berg (2006 SKQB 17) to determine the issue of contempt in a family law setting. It found that A.R.'s and J.B./G.'s applications failed to meet the procedural requirements established in Berg, in that they did not provide specific information regarding the event said to ground the finding in contempt. J.W.'s application was dismissed because although it met the procedural requirements, he had not proven contemptuous behaviour beyond a reasonable doubt. J.W. relied on A.R.'s withholding of the child in May 2021 but she stated that there were disclosures of sexual abuse at his home and reported her concerns to the authorities. Although skeptical of her evidence, noting that the trial judge had commented on A.R.'s mendacity and that she had historically disregarded court orders, the court was not satisfied that she was being contemptuous in the circumstances of May 2021. It found that J.W.'s actions after the child was returned to him were not contemptuous of the court order. Concerning the generally cavalier attitude to court orders shown by A.R. and J.B./G., the court warned them that continued disregard might imperil their right to parenting time. The court also directed that a copy of the judgment be delivered to the SPS for review and consideration in light of their decision to disregard the court's direction to enforce the parenting order. J.W.'s application to vary the parenting order had not shown any material change since the trial judgment was delivered. A.R.'s and J.B./G.'s refusal to follow court orders and their complaints about J.W. were well-known to the trial judge. However, in an effort to correct their attitudes and assist them in understanding that they must act in the best interests of the child, the court directed that A.R. and J.B./G. complete the Parenting After Separation and High Conflict Parenting After Separation courses, pursuant to s. 96 of The Queen's Bench Act, 1998. Until they filed certificates of completion with the court, their parenting time would be suspended. None of the parties would be entitled to costs respecting the contempt applications but as J.W.'s application to vary resulted in the order directing A.R. and J.B./G. to improve their parenting skills, costs of $1000 were ordered in favour of J.W., payable jointly and severally by A.R. and J.B./G.

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R v Yates, 2021 SKQB 247

Robertson, September 16, 2021 (QB21238)

Criminal Law - Manslaughter - Sentencing

The accused was found guilty, after trial by Queen's Bench judge alone, of committing manslaughter in 2018, contrary to s. 236(b) of the Criminal Code. The victim was shot and killed during the course of a robbery planned and executed by the accused and another. He was 22 at the time he committed the offence. A Pre-Sentence Report was not requested. The Gladue factors were raised because the accused had Indigenous ancestry and had had trouble fitting in as a result. He had been raised his mother until he was eight when she remarried. The accused began using drugs and alcohol while he was in high

school and suffered a mental health crisis when he was 19 that caused him to become a chronic user of crystal methamphetamine. His relationship with his family deteriorated thereafter. The accused's previous criminal record consisted of convictions for mischief in 2013 and for two impaired driving ones in 2018 and 2019. Since his release from remand in September 2019, the accused had lived with his grandmother, enrolled in the Fresh Start Program, and finished his grade 11. He remained sober during this time. The defence submitted many letters from the accused's family and friends, demonstrating their support for him. The Crown submitted that a 15-year sentence was appropriate and that the court should consider the 15-year sentence imposed on another accused who had participated in the offence and was found guilty of manslaughter.
HELD: The accused was sentenced to 12 years' imprisonment reduced by credit awarded at 1.5 for time served on remand, leaving him to serve 3,745 days. The court canvassed the sentences given in other manslaughter cases. It gave little weight to the sentence imposed upon the other accused in this offence because it resulted from a joint submission after a guilty plea. As well, that individual had a more significant criminal record, including prior assaults and weapons convictions, and he brought the firearm and fired the fatal shot. It also took notice of the prevalence of gun violence in Regina. The aggravating factors included that the accused planned the crime and targeted the victim as a vulnerable person. The accused had fled from the scene after the victim was shot, leaving him wounded on the sidewalk. His degree of moral culpability was high. The mitigating factors included that the accused grew up in a single parent family and experienced cultural conflict. He had expressed remorse for his actions and his behaviour while under house arrest and had taken steps to address his addiction issues and improve his education. He was also now engaged in exploring his Indigenous ancestry, believing that it would help him in his healing journey.

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First National Financial GC Corporation v Maurice, 2021 SKQB 248

Danyliuk, September 16, 2021 (QB21240)

Real Estate - Foreclosure - Application for Solicitor-Client Costs

After a judicial sale of real property, the mortgagee applied under Rule 11-1 of the Queen's Bench Rules for an award approving its legal fees, disbursements and applicable taxes, the total of which was $11,410.15, with the legal fees alone being $8,851.00.
HELD: The court assessed the legal fees at $5000.00 and ordered these, along with disbursements and taxes, be paid to the mortgagee's solicitor from funds presently in court. After a review of Royal Bank of Canada v Lafond, 2009 SKQB 346; CIBC Mortgages Inc. v Greyeyes, 2017 SKQB 313 (Greyeyes), and other cases referred to in these cases, which spoke of benchmark costs known as "standard foreclosure costs", set at $4500.00 by Greyeyes in 2017, the chambers judge agreed with counsel for the mortgagee that the starting point foreclosure costs should be reset at a higher amount to take into account inflation and the increased costs of legal fees since 2017, and determined that the standard foreclosure costs as of the date of his decision should be $5000.00. He went on to say that no factors had been advanced by the mortgagee which would justify an assessment above the new starting point.

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Input Capital Corp. v Gustafson, 2021 SKQB 250

Currie, September 28, 2021 (QB21241)

Statutes - Interpretation - Sale of Goods Act, Subsection 50(3)
Contract Law - Breach - Damages - Calculation

The plaintiff/applicant, Input Capital Corp. (Input), applied for determination of damages pursuant to s. 50 of The Sale of Goods Act, judgment in the amount of those damages, and costs. The application was the culmination of many proceedings that had their origin in the failure of the defendant/respondent (T.B.G.) to deliver specified quantities of canola to the applicant at the end of each year from 2014 to 2020, thereby breaching a series of contracts between the parties. Pursuant to these contracts, Input paid T.B.G. in advance for canola that he agreed to deliver on later dates and he provided Input with security, including a mortgage of lands, for his obligations. These contracts included: i) an

April 30, 2014 streaming canola purchase contract; ii) an April 30, 2014 mortgage of T.B.G.'s lands; ii) a December 31, 2014 streaming canola purchase contract; iv) a December 31, 2014 mortgage amending agreement; and v) a March 31, 2015 agreement amending the December 31, 2014 streaming contract. Input first sued T.B.G. in QBG 2120/15, seeking an injunction, a declaration of trust and a tracing order related to the 2015 crop. It then brought a foreclosure action, QBG 436/18, seeking judgment for all amounts owing by T.B.G. under the contracts, in which it sought enforcement by foreclosure or judicial sale of the mortgaged lands. The concurrent trial of these actions led to a Queen's Bench judge finding that the contracts were unconscionable (see: 2018 SKQB 154) which was reversed by the Court of Appeal ruling that the contracts were enforceable (see: 2019 SKCA 78). The Supreme Court remanded the matter back to the Court of Appeal for reconsideration after T.B.G. applied for leave to appeal. In its consequent reconsideration, the Court of Appeal affirmed its earlier decision and remitted the actions to Queen's Bench for a determination of damages and for enforcement of the security interests (see: 2021 SKCA 56). This application was then made in relation only to QBG 436/18 respecting damages. An application for an order nisi for sale relating to the mortgage was adjourned sine die. At the hearing, Input argued that the terms of the streaming contracts brought them within the rights and remedies described in s. 50 of the Act and asked that damages be assessed according to the market price of canola during the periods in question under s. 50(3) of the Act. It proposed that the market price to be used in the damages calculation was the average market price for canola each year during September and December, and filed evidence published by Statistics Canada establishing such averages. It requested an award of interest under s. 53 of the Act at the rate of five percent per annum because T.B.G. agreed to that interest rate in the April 2014 mortgage. In that agreement, he agreed to pay interest at that rate under the April 30, 2014 streaming contract and under any contracts that related or were ancillary to it. All of the contracts in this action fell under that description. Input proposed that the interest be calculated on a simple non-compounded basis and suggested that dividing the annual amount of interest by 365 provided a daily interest amount and that amount should be multiplied by the number of days from December 31, 2014 to the present to obtain a total interest amount. T.B.G. made a number of arguments against using the market price, amongst which was his submission that the application should be adjourned so that the applicant could produce its transaction records for the periods in which he was to have delivered canola. With these records, the court could determine actual damages under s. 50(2) of the Act rather than simply presuming that the applicant's loss was consistent with the overall market experience under s. 50(3). He also contended that as the application was similar to one for summary judgment, the applicant bore the same evidentiary onus under The Queen's Bench Rules. The court could therefore conclude that no evidence rebutted the s. 50(3) presumption and the applicant must produce its records, thereby providing such evidence.
HELD: The application was granted and damages, including principal and interest, were assessed at $8,809,872.21. Input was entitled to judgment in that amount in the foreclosure action because in it, Input had claimed judgment for all amounts owing by T.B.G. The court found that it was appropriate to determine damages according to s. 50(3) of the Act. It interpreted the provision and agreed with Input that the use of the term "prima facie" in s. 50(3) created a presumption that the measure of damages is to be ascertained according to that subsection, and there was no evidence before the court to rebut the presumption. The rules governing summary judgment applications do not apply to this type of application, and further, if Input's records were relevant to this action, an application for their production should have been made much earlier. It determined that damages to be awarded included the amount of the contract price of $4.5 million Input had paid to T.B.G. It accepted Input's method of establishing the market price for canola during the four-month period of each year and calculated the principal damages owing at $7,241,302. Respecting Input's claim for interest, the court found that T.B.G. owed the applicant $1,568,569 based on the method of calculation proposed. It determined that interest was payable at the rate of five percent on the amount of principal damages pursuant to the mortgage contract on all amounts owing under the two streaming contracts and 2015 amending agreement, because all of them were related to the mortgage.

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Sekerbank T.A.S. v Arslan, 2021 SKQB 256

Layh, October 1, 2021 (QB21242)

Statutes - Interpretation - Enforcement of Money Judgments Act
Debtor and Creditor - Preservation Order - Application to Terminate

The defendants, H.A. and M.A.K., applied for the sixth time to terminate a consent preservation order (PO) granted in January 2014 (see: 2014 SKQB 215; 2017 SKQB 205, aff'd 2018 SKCA 77; 2019 SKQB 119; 2019 SKQB 283, aff'd 2020 SKCA 104; 2020 SKQB 286). By one of its terms, the PO was to remain in place, pursuant to ss. 7(1)(c) and 7(2) of The Enforcement of Money Judgments Act (EMJA), "until the Turkish Court has rendered a final decision on the merits of the Applicant's claim against [H.A.] and until such time as the within action is concluded." The reference to the Turkish Court related to legal proceedings commenced in Turkey by the plaintiff, Sekerbank, a Turkish bank, relating to H.A.'s guarantee of a corporate debt. When it learned that H.A. had transferred shares he owned in a Canadian corporation to a trust managed by M.A.K., the plaintiff commenced an action against the defendants alleging a fraudulent conveyance, the "within action" mentioned in the PO. The latter action could not proceed until the Turkish courts determined whether the guarantees signed by H.A. would result in a judgment against him. In this application, the defendants argued that when the PO was signed, they consented to it only within the context of a specific proceeding in the Turkish court, the "Enforcement Proceedings Without Judgment" (EPWOJ), and it was determined as of February 2020 and did not allow a remedy to the plaintiff against H.A. The defendants acknowledged that in other Turkish proceedings, two debt actions commenced by the plaintiff in April 2014 and now subject to a preservation order based on "Enforcement Proceedings With Judgment," the plaintiff had been successful save for a final adjudication of an appeal by H.A. by the Turkish Supreme Court. They argued that Sekerbank's debt actions were not within contemplation of the parties when they agreed to the PO. The issues were: 1) what was the appropriate interpretation of the PO; and 2) whether the finality of the EPWOJ was a material change in circumstances that vitiated the consent to the PO. HELD: The application was dismissed. The court found that the consent PO was not dependent upon the ultimate disposition of the EPWOJ. Costs of $5,000 were granted in favour of the plaintiff. Respecting each issue, the court found that: 1) it would interpret the words used in the PO by applying a reasonably objective construction of the plain wording of it within the circumstances of the plaintiff's claim against H.A. in Turkey and the fraudulent conveyance action in Saskatchewan, and found that the parties agreed that: i) the plaintiff might obtain a "judgment" regardless of what Turkish proceedings might lead to it, under s. 5(5)(b) of the EMJA; ii) the decision on the plaintiff's "claim" against H.A. had to be final but the specific manner in which the claim was ultimately prosecuted was not specified and could not be inferred from the word "judgment"; iii) a "Turkish Court" must render a final decision, but without restriction regarding through what proceeding it might arrive a such a decision. Although the debt actions did not exist on the date of the PO, that did not obviate the fact that the Turkish courts had rendered a judgment in the plaintiff's favour in these actions, subject to H.A.'s appeal; and iv) the final decision was to be on "the merits of the claim." These words did not confine the merits to a single procedure that was current at the time the PO was executed. The merits could only be definitively determined after the Turkish courts had considered all the potential proceedings; and v) the termination of the PO would occur when "the within action" is concluded, meaning that upon the termination or dismissal of the fraudulent conveyance action. A Saskatchewan court has not determined the merits of that action; and 2) this issue was moot because of the previous finding. However, the court did not accept that any material changes have arisen that point to termination of the PO as contemplated by s. 8 of the EMJA. The dismissal of the plaintiff's claim under the EPWOJ does not constitute a finding akin to "common mistake, fraud, collusion, misrepresentation, duress and illegality" that can vitiate a contract.

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McCulloch, Re (Bankrupt), 2021 SKQB 259

Thompson, October 6, 2021 (QB21244)

Statutes - Interpretation - Bankruptcy and Insolvency Act, Section 69.4

The applicants, two unsecured creditors of the bankrupt, applied pursuant to s. 69.4 of the Bankruptcy and Insolvency Act (BIA) for an order lifting the stay imposed by the bankruptcy on the ground that they would suffer more serious impacts than the commercial creditors if the bankruptcy stay barred their action against the bankrupt. The trustee advised that the bankruptcy was governed under the summary administration process. With applications such as this one increasing the costs of its defence of the bankruptcy assets, it might be required

to make an application to the Superintendent of Bankruptcy to move the administration under ordinary procedures, which might raise administration costs significantly and result in a diminished dividend to creditors. Counsel for the bankrupt supported the trustee's position and submitted that the applicant had not established material prejudice or any other equitable reasons to lift the stay. Granting the application at this stage would not be consistent with the objectives of the BIA.
HELD: The application was dismissed. The court refused to grant the order. It found that the equities did not favour lifting the stay because of the potential for increased costs to other creditors outweighed the benefit to the applicants. Lifting the stay would provide little benefit to them at this stage because there was little for them to realize: the bankrupt's assets were vested in the trustee for the benefit of all creditors or continued to be exempt from execution under The Enforcement of Money Judgments Act. The applicants retained their right, as creditors in the bankruptcy, to make submissions to the court at the time of discharge and to pursue the bankrupt once the administration was complete.

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R v Brown, 2021 SKPC 42

Gordon, September 21, 2021 (PC21040)

Criminal Law - Disclosure - Lost Evidence
Constitutional Law - Charter of Rights, Section 7, Section 8, Section 9

The trial judge was to determine whether the accused's rights under ss. 7, 8 and 9 of the Charter had been breached because the video equipment at the detachment failed to record the accused before, during and after he provided breath samples. The Crown provided evidence that the video recording equipment malfunctioned, and that the malfunction was not known to the police and could not have been known by them. The Crown evidence was also to the effect that the grounds for the reasonable suspicion that the accused had alcohol in his blood, which would justify an approved screening device demand and, if failed, a demand to provide samples of breath in an approved instrument, were that the accused had glassy eyes, flashed his high beams when passing the arresting officer, and said he had something to drink in town. The officer did not testify to the odour of alcohol from his breath.
HELD: The trial judge held that the accused had failed to prove his Charter rights were breached. As to the video recording issue, after referring to well-known case law on the question, she stated that this case was not one of lost evidence because no evidence was created, and, in any event, the accused had failed to show that the video tape recording would have been relevant in the sense that it could have had a bearing on a material issue at the trial, such that its non-existence might limit the accused's ability to make full answer and defence. In this case, the trial judge ruled the defence had failed to raise the case above that of mere speculation that the video tape recording might be relevant. As to the argument that the ASD demand constituted an arbitrary detention and unlawful search and seizure, the trial judge relied on R v Yates, 2014 SKCA 52, reiterating that the threshold of reasonable suspicion is low, and the full constellation of factors presented to the arresting officer must be reviewed by the court in its review of whether the standard has been met, and in this case, it had.

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R v Peterson, 2021 SKPC 47

Kovatch, September 23, 2021 (PC21039)

Criminal Law - Impaired Driving - Defences - Right to Counsel
Constitutional Law - Charter of Rights, Section 9, Section 10(b)

Evidence was led at the trial of this matter that the accused was the operator of a conveyance and was stopped at 10:30 pm by conservation officers. He failed a mandatory roadside screening device demand and, following a demand that he provide breath samples into an approved instrument, was brought to the RCMP detachment at Carlyle. Upon his arrival at the detachment, the accused was provided with rights to counsel which complied with the informational component of the right. He said he wanted to talk to the "family lawyer." The taking of the breath samples was put in abeyance until the accused had the opportunity to exercise his right to consult with counsel. As the accused wished

to consult with K., the "family lawyer," but did not have the telephone number, he asked the qualified technician, F., to contact his father to get the number. F. dialed the father's number for the accused and then allowed him privacy to speak to him, and once the number was obtained, dialed K. for the accused. The call was made at 11:33 pm, and K. did not answer, so F. left a voicemail message, providing the pertinent information. After the accused was unable to contact K., F. asked him if he wanted to call another lawyer or a legal aid lawyer. She provided him with telephone books and referred him to the proper sections. The accused insisted that he would only speak with K. During the observation period prior to the first test being provided, F. again attempted to contact K. on behalf of the accused, and again there was no answer, and a second message was left. F. again asked the accused if he wanted to call legal aid or another lawyer of his choice. He said he would not cooperate until he obtained legal advice from K. F. then said she would proceed with the tests. K. did not call back. Suitable samples of 220 and 210 were obtained from the accused, who did not reside in Carlyle, and had no sober person into whose care he could be placed. RCMP policy was that with readings of 150 and above, the detainee was to be placed in cells until sober to protect the public, including the detainee. The accused argued that his s. 10(b) rights were infringed because he could not dial the telephone himself and was not allowed to speak to the lawyer of his choice. He also argued that he was unlawfully detained in cells until he sobered up in the morning.
HELD: The trial judge rejected the Charter challenge, admitted the certificate of qualified technician into evidence, and convicted the accused. As to the s. 10(b) breach allegations, these were advanced in two ways by the accused: first, whether the dialing of the telephone by F. interfered with the accused's access to counsel of his choice. The trial judge applied R v Restau, 2008 SKCA 147, which was authority for the proposition that the simple act of a peace officer dialing the telephone for the accused did not amount to interference with the exercise of his right to counsel. The second right to counsel argument was that K. was not permitted to consult with counsel of his choice. The trial judge determined that the applicable principle with respect to this question was that of due diligence, that the accused had a duty to exercise his rights to counsel with due diligence, and in this case, by insisting that he would not cooperate with police until he had spoken to K., when K. could not be contacted, did not satisfy that duty. The police did not fail to comply with the implementational requirements of s 10(b). (See: R v Bartle, [1994] 3 SCR 173.) Finally, the trial judge considered the s. 9 "overholding" argument and ruled that the police in this case were correct to hold the accused in cells until the morning given his high readings, and no one being available into whose care he could be placed. (See: R v Scott, 2010 SKPC 81.)

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R v Preston, 2021 SKPC 43

Green, September 24, 2021 (PC21038)

Criminal Law - Impaired Driving - Defences

The accused was charged that within two hours after ceasing to operate a conveyance, he had a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 mL of blood. The Criminal Code provided a defence to the charge if the accused could show on the evidence: 1) that he had consumed alcohol after ceasing to operate the conveyance, doing so with no "reasonable" expectation that he would be required to provide a sample of his breath, and 2) that his drinking was consistent with the results of the breath samples and with his blood alcohol concentration being less than 80 mg of alcohol in 100mL of blood at the time of the collision. The trial judge made the following findings of fact: that the accused was involved in a two vehicle side-swipe collision on a grid road; that his vehicle was rendered inoperable; that from the time of the collision to his arrest, one hour and 17 minutes had elapsed; that the accused had openly consumed alcohol while waiting for the police to arrive; that he was told at the roadside by two persons that it was not a good idea to drink at that time; that he knew it was possible that he "would have to blow for the police"; that that he gave varying accounts of how much and what he consumed at roadside; that he provided samples of his breath, and the certificate was proof that his blood alcohol level was 130 mg in 100mL of blood; and that the written opinion of a qualified toxicologist based on a hypothetical drinking pattern was that the accused's blood alcohol level at the time of the collision was consistent with a reading of 130 mg in 100mL of blood and a blood alcohol level of less than 80 mg of alcohol in 100mL of blood.
HELD: The trial judge convicted the accused. He was satisfied that the Crown

had proven all the essential elements of the offence, and the accused had not proven the defence. First, he found that on the evidence he accepted, it was unreasonable that the accused would not expect to be required to provide a sample of breath, especially since he knew it was possible, he would be required to do so. Secondly, though the opinion of the toxicologist, if accepted, would have satisfied requirement 2) of the defence, because the accused's evidence varied as to his pattern of alcohol consumption, the hypothetical scenario upon which the opinion was based was unreliable, and could not provide proof to satisfy the second requirement of the defence.

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