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Bryant Estate v Stuart, 2021 SKCA 54

Richards Caldwell Kalmakoff, April 7, 2021 (CA21054)

Statutes - Interpretation - Trustee Act, Section 55
Wills and Estates - Estate Administration - Accounting - Appeal

The appellant, the executor of the estate of his father, Franklin Bryant (EFB), appealed the decision of a Queen's Bench chambers judge to dismiss his application to require the executrix of the estate of Alice Bryant (EAB), Franklin's mother, to provide an accounting. Alice Bryant died in 2015. In her will, she left certain property to three of her children, made specific bequests to all of her grandchildren and divided the residue of her estate equally. She named her daughter to be the executrix. The estate was never probated. Franklin died in 2017 and the appellant became his executor. As he understood that Franklin was to have received a share of the EAB, he believed that would be a factor in the completing of his duties. He deposed that the only distribution from EAB was $1,000 that he and his siblings received as part of their father's inheritance. He

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asked Alice's executrix many times for a copy of her will, but she refused to provide it. The appellant brought an originating application in the Court of Queen's Bench seeking various orders under The Administration of Estates Act but at the hearing, the estate pursued only an order for an accounting. In her decision, the chambers judge noted that a copy of Alice's will had been provided to the EFB just before the hearing and then dealt with the application for an accounting by finding that as a grant of probate of letters of administration had not been granted, s. 35(1) of the Act did not apply. The judge observed that the court had inherent jurisdiction to order it but she declined to do so because there was no evidence before her that there had been misconduct such that an accounting was necessary. The EFB appealed the decision. In the appeal, it relied exclusively on s. 55 of The Trustee Act, 2009. Although this provision had not been brought to the attention of the chambers judge, the respondent EAB did not object to this ground being raised on appeal.
HELD: The appeal was allowed. The court ordered the executrix of the EAB to provide the administrator of the appellant EFB with an accounting. The EFB was entitled to costs payable by the EAB, but if the latter were unable to pay, the executrix was to pay personally because there had been no reasonable basis for her to refuse the request for accounting. It reviewed the creation of a scheme under which an executor, having obtained letters probate, is required to file accounts under the Act and Division 5 of Part 16 of The Queen's Bench Rules. Respecting s. 55(2) of The Trustee Act, it found that it was not necessary for a beneficiary to show cause as a precondition to obtaining an order for accounting. A judge should make such an order under that subsection if a beneficiary has made a request that is reasonable in light of the all of the relevant circumstances and that request has been denied or not acted upon by the trustee.

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Input Capital Corp. v Gustafson, 2021 SKCA 56

Richards Caldwell Leurer, April 8, 2021 (CA21056)

Contract Law - Unconscionability - Appeal - Reconsideration

This judgment of the Court of Appeal (CA) represents its response to a remand order issued to it by the Supreme Court of Canada (SCC) to reconsider the judgment it rendered after the appellant's initial appeal (see: 2019 SKCA 78). In that instance, the appellant, Input Capital, appealed the decision of a Queen's Bench judge that found that its contracts with the respondent, Gustafson, a farm corporation, had been unconscionable and set them aside, but it had been granted judgment against the respondent on the basis of unjust enrichment (see: 2018 SKQB 154). The appellant appealed the trial decision on the general ground that the trial judge had erred

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in fact and in law in his interpretation of the doctrine of unconscionability (DU) related to: 1) the relevant attributes or characteristics of the weaker party; 2) the necessary degree of inequality between the parties; and 3) the necessary degree of improvidence in the bargain struck. After reviewing the DU, the CA set aside the trial judge's findings on unconscionability and remitted the matter to the Court of Queen's Bench for determination of damages and enforcement of the security agreements. It found with respect to each ground that the trial judge had erred: 1) in principle by failing to consider evidence relevant to the question of whether there was an inequality of bargaining power between the parties; 2) in law in his approach to the degree of inequality of bargaining position required to invoke the principle of unconscionability because on the evidence, the respondent had failed to establish the required degree of inequality; and 3) by misapprehending the contractual relationship between the parties, leading him to incorrectly conclude that the contracts were unconscionable and thus, void and unenforceable. The respondent Gustafson then applied to the Supreme Court for leave to appeal. However, as the SCC then decided the case of Uber Technologies Inc. v Heller that involved the DU in June 2020 (2020 SCC 16), it remanded this case, pursuant to s. 43(1.1) of the Supreme Court Act, for disposition by the CA in accordance with Heller, wherein it refashioned the language of the DU and clarified the framework for its application. It held that: i) the analytic framework for assessing whether a transaction is unconscionable is a two-part test: proof of inequality in the position of the parties and of an improvident bargain; ii) unconscionability may be established without proof that the stronger party has knowingly taken advantage of the weaker; and iii) courts must take a contextual approach to determining whether a transaction is unconscionable.
HELD: The CA affirmed its initial decision. It interpreted the SCC's remand order to mean that its initial decision had not been overturned or vacated, nor did it predetermine the outcome of the reconsideration: it could either affirm or vary it. The remand order would not entail revisiting issues that Heller had not addressed. Following the SCC's direction, the CA would reconsider the case that underpinned its decision a second time, with the benefit of the SCC's guidance as set out in Heller. It then applied Heller as it affected three facets of its analysis of the trial decision: whether inequality of bargaining power existed between the appellant and respondent; whether the appellant had knowledge of the inequality of bargaining power; and whether the contracts constituted an improvident bargain in the context. It interpreted Heller as touching upon three facets of its analysis of the trial decision. It examined each of the three requirements of Heller against its initial decision and found that it would not vary its initial decision with respect to: 1) the analytic framework on the question of proof it had employed. After reviewing the analytic Heller framework and the SCC's confirmation of its 1992 decision in Norberg ([1992] 2 SCR 226), the CA regarded the two-part test it had applied in the initial appeal and found it that it had used the same analytic approach, albeit in different words, that required proof of inequality in the positions of the parties and of an improvident bargain; 2) regarding knowledge of inequality. Its analysis of it in its initial decision was consistent with Heller. It had dismissed the appellant's ground of appeal that the trial judge erred in concluding there was no requirement that the stronger

Mount Hope (Rural Municipality) v Chamberlin

R v Johnson

R v Kytwayhat

R v Moya

R v Nezcroche

R v Nikdima

R v Shuler

R v Veilleux

Ross v Willow Creek (Rural Municipality)

Royal Bank of Canada v Ahmed

Silzer v Saskatchewan Government Insurance

Soiseth v Hill

Teamsters Canada Rail Conference v Canadian National Railway Company

Toronto-Dominion Bank v Ho

Wakaw (Town) v Canadian Union of Public Employees, Local 885

party have knowledge of inequality of bargaining power. The trial judge had addressed the issue of knowledge in a manner that was consistent with Heller and the court had not interfered with his analysis. As it had inferred from the trial decision that the judge found the appellant had such knowledge, it was also irrelevant in this case that proof of unconscionability may be established without proof of knowledge; 3) regarding its findings concerning inequality and improvidence in the context of this case. It agreed with the parties that Heller had lowered the bar for a finding on unconscionability, and in reconsidering its initial decision in light of this, it concluded it would not make a different disposition related to unconscionability. It confirmed its finding that the trial judge erred in law in his approach to the degree of inequality of bargaining position required to invoke the principle of unconscionability. Contrary to the trial judge, it found that the respondent had failed to establish that its financial distress was so acute that it overcame its ability to engage in autonomous, self-interested bargaining with the appellant. Although the standard in Heller described it as: "when one party cannot adequately protect their interests in the contracting process," it was a distinction without a difference in the context of this case. Specifically, the trial decision had not explained how the evidence of the respondent farming corporation's financial difficulties displaced the law's normal assumptions about free bargaining. It reconsidered its finding on improvidence, although unnecessarily, because inequality of bargaining position had not been established. It affirmed its conclusion that the bargain struck under the contracts was not improvident.

Jastek Master Builder 2004 Inc. v Holmes, 2021 SKCA 57

Leurer, April 8, 2021 (CA21057)

Civil Procedure - Appeal - Leave to Appeal
Civil Procedure - Summary Judgment - Application to Dismiss

The applicants, three corporate defendants, sought leave to appeal from two orders made by a Queen's Bench chambers judge (see: 2021 SKQB 32). The plaintiffs' class action against the defendants was certified in 2010. They had initially obtained summary judgment against the defendants in 2017 in that action but the judge directed that their claims of breach of fiduciary duty and for damages suffered by the individual class members should proceed on an individual basis. On December 3, 2020, the plaintiffs had filed their notice of application for summary judgment (SJ) to assess each individual class members' damages suffered as a result of the defendants' breach of contract and further seeking punitive damages. They also filed of a notice of application

endorsed by the *Citation Guide for the Courts of Saskatchewan*.

for an order requiring the defendants to disclose their financial statements as well as those of their subsidiaries from 2007 to 2020. The defendants then applied to the chambers judge, who had also been appointed the case management judge for the case, but not assigned as the summary judgment application judge, for an order dismissing the plaintiffs' application for SJ and directing the matter proceed to trial. After the hearing, the chambers judge dismissed the defendants' application to dismiss the application for SJ and granted the plaintiffs' application for disclosure.

HELD: The application for leave to appeal was dismissed. The court found 1) that the defendants' proposed grounds of appeal with respect to their application to stop the plaintiff's SJ application did not have the merit or importance required under the Rothmans test. It found, in terms of merit, that the intention of The Queen's Bench Rules is that a determination of whether SJ summary judgment may or may not be appropriate is to be made in the context of a determination of the SJ application itself, and not to permit the effect of the defendants' application: to predetermine that the plaintiffs' application would fail. It found that the proposed appeal was not of sufficient importance either. The chambers judge had not ruled that the process was an appropriate procedure to determine the issues presented by the plaintiffs for final judgment but simply rejected the defendants' arguments that the hearing of the SJ application should be preempted; and 2) the defendants' proposed appeal from the order granting the plaintiffs further disclosure lacked merit and importance. Regarding merit, it considered the defendants' argument that financial statements were only relevant to determination of whether punitive damages should be ordered. However, both the entitlement to, and quantification of, punitive damages would be at stake in the SJ summary judgment application and the defendants were attempting to bifurcate the SJ application itself. The chambers judge had explained that he was not prepared to delay disclosure in this case because a finding of liability for breach of contract had already been made. The potential merit to their proposed appeal was tied to whether the plaintiffs were entitled to proceed at this point with their SJ application in which they sought to quantify the purchasers' claim for punitive damages. Regarding importance, there was no basis upon which to stop the SJ summary judgment application from going ahead; and 3) it could not grant the defendants' application to dismiss the production order. The court affirmed the chambers judge's reasons for allowing disclosure in the context of the further arguments presented by the defendants regarding merit. They also failed to demonstrate that the proposed appeal on this ground had importance as the resolution of disclosure issues by case management judges is commonplace and involves the exercise of discretionary authority, always subject to a deferential standard of review.

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Silzer v Saskatchewan Government Insurance, 2021 SKCA 59

Schwann Leurer Kalmakoff, April 15, 2021 (CA21059)

Administrative Law - Appeal - Standard of Review

This matter came before the Court of Appeal (appeal court) pursuant to s 194 of The Automobile Insurance Act (Act), which permits an appeal with leave of the appeal court on questions of law alone. The appeal may be taken directly from a decision of the Automobile Injury Appeal Commission (Commission). The appellant complained that she was injured in an automobile accident on October 14, 2014 and disagreed with the ruling of the three-person panel of the Commission, reported in Silzer v Saskatchewan Government Insurance, 2018 SKAIA 33 (causation decision), that she had not established a causal link between the accident and her medical ailments. Following this decision, she also pursued an appeal before a one-person panel of the Commission in a separate hearing to determine whether she was out of time to appeal the decisions contained in a series of letters from the Commission terminating the various benefits she had received from the Commission. In Silzer v Saskatchewan Government Insurance, 2018 SKAIA 46 (limitation decision), it was decided that the appellant had failed to file her appeal to the Commission in time. With respect to the causation decision, the appellant advanced as grounds of appeal that the Commission misapprehended or misinterpreted the evidence and therefore erred in law, and also acted in bad faith, though that ground had not been argued before the panel or included in the notice of appeal. In challenging the limitation decision, in addition to the fresh bad faith argument, she added a claim of perjury against the Commission's counsel. As clearly explained by the appeal court, s 194 of the Act gives the appeal court jurisdiction to hear appeals from errors of law exclusively, and not findings of fact, which include findings concerning the credibility of witnesses. If an appeal is allowed by statute to a superior court from the decisions of inferior tribunals and boards, as ruled in the seminal case, Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65, and as applied in Van de Sype v Saskatchewan Government Insurance, 2020 SKCA 18, questions of law are to be reviewed on a correctness standard. The appeal court recognized that findings of fact and credibility may "ground" an error of law where the Commission "arrived at its decision based on no evidence, irrelevant evidence, overlooked material evidence or in any way misapprehended the evidence" (see: Murphy v Saskatchewan Government Insurance, 2008 SKCA 57).

HELD: The appeal was dismissed for numerous reasons, but primarily on the basis that the appellant's grounds of appeal did not raise questions of law. At the hearing to determine whether the automobile accident was the cause of the appellant's medical complaints which resulted in the causation decision, the appellant's argument that the Commission acted in bad faith was not considered because it had not been pursued before the Commission and had not been included as a ground of appeal in the notice of appeal. The appeal court agreed with the Commission that to allow her to present a new argument on appeal would be highly prejudicial to it, as it could not now tender evidence in response. In arriving at its ruling in the causation decision, the Commission relied primarily on the expert opinion evidence of Dr. M., who was qualified as an independent

medical evaluator and independent medical consultant without objection from the appellant, and who was contracted by SGI to perform a causation analysis of the case. After what was described by the appeal court as a thorough and well-reasoned analysis by Dr. M. both in her report and in her testimony of the extensive medical records generated as a result of the claim, including the notes of the appellant's own doctors and the testimony of the appellant's own orthopedic surgeon, whose opinion matched her own, she testified that the appellant's back pain and memory problems were "more likely than not" to have been caused by degeneration of her back bones as a result of advanced arthritis, and that any effects of the automobile accident, most likely soft tissue injuries, had resolved very soon after the accident. She was able to counter the arguments of the appellant in a well-reasoned manner, based on the admissible evidence, which was more than sufficient for that purpose. As an example, the appellant advanced the position that medical reports of bone density scans showed a bone mineral density which contradicted the view that the disc fracture was caused by advanced disc degeneration. In reply, Dr. M., who had reviewed the scans and the reports, testified that the arthritis was so thick in the area of the fracture that it was not possible to conclude how dense the bone was. In the final analysis, the appeal court found that, as the appellant was alleging errors on the part of the Commission which involved the reasonableness of its acceptance of the evidence of Dr. M., her appeal must fail. She did not demonstrate that the Commission arrived at either the causation decision or the limitation decision based on no evidence, irrelevant evidence, or evidence that was overlooked or misapprehended.

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R v Nikdima, 2021 SKCA 60

Whitmore Schwann Barrington-Foote, April 14, 2021 (CA21060)

Criminal Law - Appeal of Sentence - Sentencing Principles
Appeal - Criminal Law - Sentencing - Sexual Assault Causing Bodily Harm

This matter was a Crown appeal of a sentencing decision following trial, reported in R v Nikdima (18 December 2019, Regina, CRM 47 of 2017). The offender, G.N., was found guilty of the offence of sexual assault causing bodily harm contrary to s. 272 of the Criminal Code and sentenced to three years' incarceration in a federal penitentiary. The Crown appealed on a number of grounds it argued amounted to reviewable errors of principle, including that 1) the sentencing judge failed to adequately engage in an analysis of the principle of proportionality, which required him to consider the degree of moral culpability of the offender and the seriousness of the circumstances of the criminal behaviour, and did so by failing to reconcile the principle of

parity with that of proportionality; 2) the sentencing judge wrongly allowed sexual assault myths and stereotypes to infiltrate the sentencing process; and 3) the sentencing judge treated the absence of aggravating factors as mitigating ones. No appeal was taken from the findings of fact upon which the sentencing judge fashioned his sentence. The sexual assault occurred during a first date while G.N. and the victim were walking in the country, having driven there in his vehicle. Following some consensual kissing, the victim testified G.N. became more aggressive in his advances to the point that the victim felt unsafe and retreated to the vehicle where, she testified, she was unable to escape. Sexual activity, including vaginal intercourse was forced on her by G.N. The judge had a reasonable doubt that the Crown had proven an absence of consent up to the point where G.N. penetrated the victim anally with his penis, which caused her to scream in pain, and G.N. to withdraw, only to resume anal intercourse with her after first reengaging in vaginal intercourse, which caused her to again scream in pain, until he ejaculated. The sentencing judge had no reasonable doubt that the Crown had proven an absence of consent by the victim from the point where she first screamed in pain, and also no reasonable doubt that G.N. knew she did not consent. The victim's physical injuries included a three-centimetre laceration in her anal area. She also had serious emotional trauma resulting in anxiety, depression and loss of sexuality.

HELD: The appeal court allowed the Crown appeal, reasoning that the sentencing judge made errors in principle which had an impact on the sentence. He had done so: 1) by relying on case law which was not comparable to the case before him except superficially in the seriousness of the injuries suffered by the victims, and in doing so, failing to truly grapple with the moral blameworthiness of G.M. and the gravity of the offence. Ultimately, the court did not individualize the sentencing process as required by s 718.1 of the Criminal Code and fleshed out by R v Lacasse, 2015 SCC 64 (Lacasse) and R v L.V., 2016 SKCA 74 (L.V.); and 2) in erroneously finding, contrary to R v Leroux, 2015 SKCA 48, an absence of an aggravating factor to be a mitigating factor, in particular, that G.N. did not use violence not intrinsic to the offence itself and did not use aggression, confinement, trickery or alcohol. Finally, after a review of L.V., Lacasse and R v MacLeod, 2018 SKCA 1, the appeal court determined that these errors in principle led the sentencing judge to impose an unfit sentence and corrected this error by increasing the sentence to three years and six months, as the appeal court had the authority to do (see: R v Gamble, 2014 SKCA 101).

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Double Diamond Distribution Ltd. v Garman Turner Gordon LLP, 2021 SKCA 61

Ottenbreit Leurer Barrington-Foote, April 14, 2021 (CA21061)

Statutes - Interpretation - Enforcement of Foreign Judgments Act

The appellant, Double Diamond Distribution, marketed Dawgs brand footwear in Canada for USA Dawgs Inc. (Dawgs) It appealed the decision of a Queen's Bench chambers judge to grant an order requested by the respondent pursuant to The Enforcement of Foreign Judgments Act (EFJA) to recognize a judgment it obtained in the United States Bankruptcy Court for the District of Nevada. The judge ordered the appellant to pay $605,825 (CDN). The respondent, a Nevada law firm, was retained by Dawgs to represent it in the Nevada bankruptcy proceedings, conditional upon payment of $25,000 and an unconditional guarantee from the appellant to pay its fees and disbursements incurred in its representation of Dawgs. In the proceedings, the appellant was represented by legal counsel and participated in the Nevada proceedings. During them, the respondent brought an application for the allowance of compensation for its services and expenses and also sought judgment against the appellant. In August 2018, The Nevada court granted the respondent judgment for $450,428 (US) and ordered that Dawgs and the appellant were jointly and severally liable for payment. The respondent applied to the Saskatchewan Court of Queen's Bench for the order recognizing the Nevada judgment in December 2018. It asserted that the appellant had been validly served with the Nevada application and attorned to the jurisdiction of the Nevada proceedings. In support of its application, it filed the affidavit of one of its partners summarizing the appellant's guarantee and the proceedings in the Nevada court. She attested that: the appellant had legal representation in the proceedings; neither it nor Dawgs had appealed from the Nevada order and the deadline to do so had passed; and the judgment remained unpaid excepting $25,000. The appellant's cross-examination of the affiant during the chambers hearing formed part of the record. The appellant's chief executive officer filed two affidavits in response saying that he had signed and understood that the appellant was providing a guarantee of the agreement with respondent. Advising that he was not a lawyer, he provided other information about the background to the Nevada proceedings and described issues related to the agreement and the respondent's conduct, alleging that the assertion in the partner's affidavit was false and a misrepresentation. He claimed that the appellant still had the ability to appeal the Nevada judgment. The appellant made four arguments before the chambers judge and of them, the two relevant to its appeal of his judgment were that he erred in finding that: 1) the Nevada court had jurisdiction to grant the judgment. The judge had concluded that since neither the appellant nor Dawgs had appealed the Nevada judgment, the appellant's claim that it lacked jurisdiction was an attempt to mount a collateral attack on the judgment. The appellant also argued that although the Nevada court had jurisdiction over the Dawgs bankruptcy, it did not have authority to grant a judgment on its guarantee. Further, it could not render a judgment against a non-debtor who had not consented to the jurisdiction of the Nevada court; and 2) the respondent had proven that the Nevada order was final and the appeal period had expired. The judge found that the law pertaining to proof of that fact was governed by s. 4 of the Canada Evidence Act (CEA). As the appellant's CEO was not qualified to give an expert opinion, the respondent's partner's affidavit provided the only admissible expert evidence regarding the Nevada judgment's finality and the appeal period's expiry. Her

status as a partner with the respondent did not disqualify her from giving an expert opinion. The appellant argued the judge erred in this finding because: i) the respondent had not proven that the Nevada appeal period had expired as required by s. 4(b) of the EFJA. It submitted that the onus was upon it as a judgment creditor; ii) the partner's affidavit evidence was not admissible as required by s. 4(c) of the EFJA. It had not been given notice of the respondent's intention to rely on it as providing expert opinion evidence; and iii) the partner should not have been qualified as an expert because of her personal stake in the outcome of the application. HELD: The appeal was dismissed. In his judgment, Leurer J.A., with Barrington-Foote J.A. concurring, found with respect to each ground that the chambers judge: 1) had not erred. The respondent had asserted, in effect, that the Nevada court had jurisdiction pursuant to s. 8(b) of the EFJA and provided evidence in the partner's affidavit. In applications to register a foreign judgment, a Saskatchewan court does not have authority to inquire into the details of the substantive and procedural law on which such a judgment is based because of the nature of the obligation that it is being called to enforce is limited to the obligation created by the foreign judgment; and 2) had not erred in his conclusions regarding the finality of the judgment and the expiration of the appeal period. He had erred in allowing the respondent's expert evidence but the error had no consequence to the outcome of the appeal. Regarding each of the appellant's arguments related to this issue, the court: i) interpreted the EFJA and its predecessor, The Foreign Judgments Act (FJA), and determined that the appellant bore the evidential burden related to the non-expiration of the Nevada appeal period. It had received notice of the respondent's intention to enforce the judgment in Saskatchewan and it failed to adduce any evidence on the point; ii) found that the judge acknowledged that proof of the applicable appeal period required expert opinion evidence as required by s. 4 of the CEA. He correctly considered the Court of Appeal's decision in Arslan (2016 SKCA 77) regarding the admissibility and weighing of expert evidence given by a party's counsel in an application to register a foreign judgment under the EFJA; ii) determined the judge had not erred, since the appellant received notice of the respondent's intention to rely on the partner's evidence as expert opinion because it noted the same in its reply brief filed in the application; and iii) determined the judge erred by failing to assess what a reasonable observer would think of the partner's stake as required by White Burgess (2015 SCC 23). Her direct personal pecuniary interest in the outcome of the application disqualified her from being able to give admissible expert opinion evidence. In a separate opinion, Ottenbreit J.A. concurred that the appeal should be dismissed but for different reasons. He found with respect to each ground that the chambers judge had: 1) not erred in finding that the Nevada court had jurisdiction thereby permitting enforcement of the judgment under s. 4(a) of the EFJA, because under s. 8, there was clear evidence that the appellant had submitted to the jurisdiction of the Nevada court; and 2) correctly concluded that the Nevada order was final, thereby not refusing to register it under s. 4(c) of the EFJA despite having erred by failing to make a finding, as required by Mohan ([1994] 2 SCR 9) and s. 4(3) of the CEA, that the respondent's partner was an expert qualified to opine on Nevada law. In the absence of his analysis, the court found it could perform it and concluded that on the evidence before the judge provided in the transcript of the cross-examination of the

respondent's partner on her credentials and expertise, he would have properly concluded that she was entitled to give expert testimony. Further, the judge correctly found that the appellant's CEO was not qualified as an expert and the only reliable evidence regarding the finality of the Nevada judgment was that of the respondent's partner.

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Teamsters Canada Rail Conference v Canadian National Railway Company, 2021 SKCA 62

Caldwell Leurer Barrington-Foote, April 21, 2021 (CA21062)

Administrative Law - Judicial Review - Arbitration
Labour Law - Collective Agreement - Arbitration - Judicial Review - Appeal

The appellant, Teamsters Canada Rail Conference, appealed the decision of a Queen's Bench chambers judge made in favour of the respondent's application for judicial review of an arbitrator's decision (see: 2019 SKQB 245). The arbitration resulted from a grievance filed by the appellant on behalf of a member, an employee of Canadian National Railway (CN), the respondent. After CN received two complaints regarding offensive racial comments made by the employee on his personal Facebook page and that allowed readers to identify him as an employee of CN, it investigated the matter for alleged conduct unbecoming of an employee of CN pursuant to article 117 of the collective agreement (CA). Before an investigation hearing was held under 117.2, a third complaint was made to the respondent's ombudsman. At the hearing, CN failed to provide copies of the complaints. The appellant's representative requested full disclosure but CN's investigation officer said that he was providing all evidence in his possession or that would be relied on for the purpose of the investigation. CN terminated the employee for cause the next day and the appellant filed a grievance, noting in the statement of facts that the ombudsman had received a complaint from a party unknown to the appellant. CN declined an appeal by the appellant whereupon it proceeded to arbitration through the Canadian Railway Office of Arbitration and Dispute Resolution (CROA) as provided by the CA. Under a Memorandum of Agreement (MOA) between these parties and others, the CROA provides a specialized, expedited and unique arbitration process. Before arbitration, the appellant filed an ex parte statement of issues in which it admitted the offensive character of the grievor's off-duty comments but submitted they had not violated CN's company policy as they had not adversely affected it, its employees or customer, and sought reinstatement. Before the CROA hearing, the respondent advised the appellant that it intended to call evidence and provided additional disclosure as to the complaints and its responses, and would call a witness to speak to the impact of the

employee's comments upon its business. The appellant tried to amend its statement of issue to include that the respondent had violated article 117.2 and the discipline assessed ought to be ruled void ab initio and expunged. The respondent refused to consent to the proposed amendment. At the hearing, the arbitrator found that the amendment should have been made and that the appellant's right to argue article 117.2 was not precluded because of the respondent's initial non-disclosure and the investigating officer's assurances. In considering the issue of whether article 117.2 had been breached, the arbitrator reviewed the CROA's unique nature and its emphasis on the importance of fairness and disclosure at the pre-arbitration investigation stage, a responsibility assigned solely to the parties and upon which CROA arbitration decision-making relied. He also reviewed relevant past decisions of the CROA. He held that while not every minor non-disclosure triggered a violation of this type of provision in a CA, it had been breached here. He followed an earlier CROA decision that held a termination was void ab initio where documents relating to the complaints released just before the hearing were keystone documents upon which that respondent had based its decision to terminate. Disclosure of all material documents to a grievor is a basic element of a fair and impartial investigation. He also considered the potential impact of three judicial decisions, Dunsmuir, Alberta Union of Provincial Employees (AUPE) and Alberta Health Services, on the issue of whether the breach still rendered the subsequent discipline of the employee as void ab initio and found that those authorities had not. The arbitrator held that a long line of CROA authorities still applied which held that the discipline was rendered void ab initio. He stated that the distinction between the judicial authorities and the CROA cases was the latter relied not only on simple contract interpretation, but also express contractual terms, as well as on due process and fairness concerns inherent in the structure of the CROA arrangement. He explained that the integrity of the CROA investigatory process was important to the integrity of the expedited form of arbitration. Further, a breach could not be cured after the investigation was complete and termination had occurred. In the conduct of the judicial review, the Queen's Bench chambers judge selected and applied the reasonableness standard of review set out in Dunsmuir to the issue of whether the decision to void discipline ab initio was reasonable. The judge found that while the arbitrator's reasoning was transparent, his reference to "express contractual terms" as a factor that distinguished the CROA and the judicial authorities he cited, was unintelligible. She also found that it was unreasonable for him to identify the only two options as either "voiding discipline ab initio or fundamentally altering the entire CROA & DR (Dispute Resolution) arrangement". The judge did not expressly conclude that finding the termination to be void ab initio was not justifiable on the facts or the law. She nonetheless remitted the matter to be determined on the merits. On appeal, the respondent agreed that the failure to disclose the documents constituted a breach of article 117.2.

HELD: The appeal was allowed. The arbitrator's decision that the termination was void ab initio was restored. The court noted its role on an appeal from a judicial review decision is to determine whether the chambers judge selected the correct standard of review and correctly applied it, whereupon it would step into the shoes of the lower court and review the administrative tribunal's decision in accordance with that standard. Thus, in

this appeal, it would step into the shoes of the chambers judge and review the award. The issues on this appeal related to the interpretation and application of the CA by the arbitrator and whether his decision that the discipline imposed on the employee was void ab initio as a result of the breach was unreasonable. The parties agreed that the reasonableness standard applied and the chambers judge had correctly identified the reasonableness standard adopted in Dunsmuir. Since her decision, the Supreme Court had clarified the process of reasonableness review in Vavilov. The court selected and applied certain principles derived from Vavilov that were relevant to the issues in this appeal and found that the chambers judge's reasons were not consistent with them. Her concern for the language used by the arbitrator to explain why he distinguished AUPE and Alberta Health Services did not comport with the Vavilov requirement that in applying the reasonableness standard, the reviewing court must analyze the decision as a whole. In this case, the arbitrator's reasoning was intelligible. He explained what he meant based on the existence of express contractual terms and on the due process and fairness concerns inherent in the CROA arrangement. Further, the approach taken by CROA authorities and the arbitrator emphasize systemic rather than case-specific concerns, focusing on the need to protect the integrity of the unique CROA system adopted in the MOA to meet the particular needs of employers and employees in this industry. The judge also violated the Vavilov principle that among other things, a court is not to ask what decision it would make in the place of the administrative-decision-maker but rather to address whether the decision they made was reasonable. Here, it was for the arbitrator to determine the remedy as long as his decision was both justified and justifiable and not for the judge to identify other options. Further the judge should have remitted the matter to the arbitrator to consider other options but instead remitted the matter to him to conduct a hearing on the merits and thereby substituted her decision for his as to the appropriate remedy and strayed into territory reserved to him.

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R v Johnson, 2021 SKCA 63

Ryan-Froslie Leurer Tholl, April 16, 2021 (CA21063)

Criminal Law - Firearms Offences - Possession of Firearm - Conviction - Appeal

The appellant appealed from his conviction for three Criminal Code charges: possession of a prohibited firearm without a licence contrary to s. 92(2); possession of a loaded prohibited firearm contrary to s. 95(1)(a); and possession of a firearm while prohibited by order made pursuant to s. 109, contrary to s. 117.01 (see: 2018 SKQB 322). He also applied for leave to appeal his sentence. After trial and conviction by a Queen's Bench

court judge sitting without a jury, the appellant was given a seven-year global sentence comprised of six years for the s. 95(1) offence, four years concurrent for the s. 92(2) offence and one year consecutive for the s. 117.01(1) offence. While investigating a report that a gun had been fired in an apartment, the Saskatoon police found the appellant lying on a couch in the apartment. An officer testified he became suspicious after seeing the appellant fidgeting while his arms were alongside his body before he responded to the order to put his hand up. After he left the couch, the officer found a .22 calibre rifle with a sawn-off barrel under the seat cushions. The appellant testified that he had been severely intoxicated the night before and after arriving at the apartment, fell asleep on the couch and had no knowledge of the weapon. The grounds of the conviction appeal were whether: 1) the trial judge erred in law by placing an impermissible onus on the appellant to disprove his level of intoxication. He reiterated that his testimony about his intoxication and falling asleep right after arriving at the apartment without knowledge of the presence of the gun meant that he could not have had the necessary intention to possess the rifle; and 2) the verdict was unreasonable because it was unsupportable by the evidence. The officers who testified had not provided evidence of his intoxication. There was no direct evidence that he entered the apartment with a firearm or had seen or handled it, and no trace of his fingerprints or DNA had been found on it. The grounds of the appellant's application for leave to appeal his sentence were that an appropriate global sentence would have been five years. He submitted that the trial judge erred by failing to instruct himself on the legal range of sentences for his offence and failing to take Gladue factors into account. He also argued that the sentence was too high and all of the cases relied upon by the judge were distinguishable.

HELD: The appeal against conviction was dismissed. Leave to appeal the appellant's sentence was granted but his appeal was dismissed. Regarding the conviction appeal, the court found with respect to each ground that: 1) the trial judge had not erred. He had not placed an impermissible burden of proof on the appellant. There was nothing in the judge's reasons to support the contention that he placed an onus on the appellant to establish anything in relation to his state of mind. The judge simply did not believe the appellant's evidence that he was so intoxicated that he was unaware of the gun, assessed the Crown's case against the D.W. framework and found him guilty after conducting the assessment; and 2) the verdict was reasonable. It reviewed the judge's findings regarding the three points raised by the appellant and concluded that there was an evidentiary basis for a reasonably instructed trier of fact to find the appellant guilty. Respecting the appellant's application to appeal his sentence, the court decided that it would not interfere.

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R v Kytwayhat, 2021 SKCA 67

Caldwell Schwann Barrington-Foote, April 20, 2021 (CA21067)

Criminal Law - Motor Vehicle Offences - Flight from Police Officer - Conviction - Appeal
Criminal Law - Evidence - Identity of the Accused - Appeal

The appellant appealed his conviction after trial by judge alone in Provincial Court for committing the offence of flight from a peace officer contrary to s. 320.17 of the Criminal Code. An RCMP officer testified that he had seen the appellant as a passenger in the front seat of a truck in Loon Lake. He recognized the appellant because he had had multiple dealings with him before, his hair was dyed bright red and the officer had recently seen his picture on a high priority notice posted at his detachment. As the officer was aware of an outstanding warrant for the appellant, he pulled the truck over when he next saw it a short while later. At the time of the stop, another person was driving the truck but he exited the vehicle and the appellant took the driver's seat just before it sped away. A high-speed chase ensued and after the truck was eventually stopped again, the appellant was sitting in the back seat. The appellant called no evidence at trial. He argued that the arresting officer's identification of him was unreliable due to the officer's short and stressful encounter with him during the roadside stop. He pointed to a number of issues such as: that the officer's initial identification of him was based on the officer seeing him through the truck's rear-view mirror; that the officer's first sighting of him as a passenger and then as driver was tainted by confirmation bias; and that the officer could be in error because of cross-racial identification. The trial judge considered identity to be the sole issue. He found the officer's evidence to be credible and reliable. His initial identification of the appellant was based, with good grounds, on recognition. Because the second episode of identification occurred within two hours of the first, the judge found it to be reliable and he was left with the officer's uncontroverted evidence. The judge went on to address the appellant's specific concerns about reliability in a manner consistent with the tests set out in R v Bigsky (2006 SKCA 145) and found on the totality of the evidence that the appellant was guilty. On appeal, the appellant argued that the conviction was unreasonable and could not be supported by the evidence. He submitted that the trial judge erred by failing to analyze and instruct himself regarding the frailties of the officer's eyewitness evidence and in dismissing the possibility that another person may have driven the truck away from the traffic stop.
HELD: The appeal was dismissed. The court found that the trial judge had not reached an unreasonable verdict or one that was unsupported by the evidence. It found with respect to each ground that the trial judge not erred. The appellant failed to point to any palpable and overriding error in the assessment of the evidence. The judge had addressed the frailties of eyewitness evidence. Although he did not cite Bigsky in his oral reasons, the transcript showed that he focused on that issue. In this case, the officer's identification was not based upon a fleeting glance. The judge took into account the limitations in the circumstances under which the officer had identified the appellant and it was open to him on the evidence to conclude that the officer's identification was reliable. The trial judge also examined the appellant's argument that someone else might have been driving.

Although the judge had mistakenly found that the appellant was one of two individuals in the front seat of the truck at the roadside stop, he found that the error was immaterial: the officer recognized the appellant as the driver because he knew him.

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R v Shuler, 2021 SKCA 68

Barrington-Foote, April 14, 2021 (CA21068)

Criminal Law - Application for Court-appointed Counsel

The appellant appealed his conviction and sentence and applied to the Court of Appeal pursuant to s. 684 of the Criminal Code for appointment of counsel to represent him. He had been found guilty after trial by a Provincial Court judge of sexual interference contrary to s. 151 and unlawful confinement contrary to s. 279(2) of the Criminal Code. The Crown appealed the appellant's sentence. Legal Aid appointed one of its lawyers, Jill Drennan, to represent the appellant on the Crown sentence appeal, but it refused to appoint counsel to represent him on his appeal of both conviction and appeal. The appellant then made this application. After the decision regarding it was reserved, the appellant accepted Ms Drennan's offer to represent him on his sentence appeal pro bono with the agreement of the Registrar, leaving only the matter of appointment of counsel to represent him in his conviction appeal. In his notice of appeal, the appellant's only ground was that he was denied a fair trial because he was denied counsel and had to represent himself. He had concerns regarding the DNA evidence and inconsistencies in the complainant's evidence at the preliminary hearing and he felt these were inadequately addressed at trial. He explained that during the course of his trial, two different counsel representing him resigned or withdrew, and in each case, neither had completed cross-examining him while on the witness stand. After the appellant advised the trial judge that he had only a grade two education and couldn't read well, the judge refused to order the appointment of a third counsel to represent him. He found that the issues were not complex and the appellant, whom he believed had exaggerated his illiteracy and had not diligently exercised his right to counsel, could receive a fair trial with his assistance. The judge released the appellant from the witness stand and held that, if he wished to continue the cross-examination, he would have to apply to do so and ordered appointment of counsel for that purpose. The counsel so appointed informed the court he had been instructed not pursue the application. The evidence to support this application indicated that the appellant did not have sufficient means to obtain legal assistance. With the consent of Crown and Court Services counsel, Ms Drennan advised that in her view, the appellant was simple and

unsophisticated and as the issues arising from his concerns about trial fairness and representation were complicated, he would have limited ability to marshal his case.
HELD: The application was granted. The court found that the appellant had met the test set out in Ermine (2010 SKCA 73) that the appeal had merit due to the trial judge's refusal to grant an application for court-appointed counsel. It agreed that the appellant could not effectively present the appeal because of the complexity of the issues and it would assist the court to have a lawyer represent him.

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Royal Bank of Canada v Ahmed, 2021 SKQB 102

Danyliuk, April 6, 2021 (QB21099)

Civil Procedure - Foreclosure Proceedings

The Royal Bank of Canada (RBC) applied for leave to commence foreclosure proceedings against a mortgagor whose loans were secured by two mortgages against his home and who had fallen into default. RBC failed to comply with the rules and procedures established by the Land Contracts (Actions) Act, 2018 (Act), which require that a notice of application for foreclosure in the prescribed form, a copy of the mortgages and reasonable evidence of the land value, and an affidavit "setting out the state of the mortgage" must be served on the mortgagor and the Provincial Mediation Board (Board) before the application for leave is filed with the court. The Act makes all of the Queen's Bench Rules applicable to the proceedings under it, and by Rules 10-39(2) and 6-6, the required affidavit material must be served on the mortgagor and the Board along with the notice of application, then filed with the court as an initial affidavit. In this case, RBC served the notice of application and a copy of the two mortgages on the Board, but included a copy of only one of the mortgages along with the notice of the application on the mortgagor. No affidavit setting out the state of the loan account was served as required on the Board and the mortgagor, nor was it filed with the court with the notice of application and proof of service at the time of the initial filing of material. RBC filed the required affidavit regarding the state of respondent's account under the mortgage on March 25, 2021, in advance of hearing date of April 1, 2021, but did not serve it on the mortgagor or the Board.
HELD: The chambers judge chose to adjourn the application for leave to foreclose and allow RBC to correct the procedural shortcomings of its application, though he indicated he could have dismissed it outright. The court commented that the legislated requirements and the Rules served a fundamental purpose in giving the

mortgagor and the Board essential information that would allow the mortgagor to meaningfully respond to the application and the Board to make an informed decision as to whether or not to intervene in the matter.

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Toronto-Dominion Bank v Ho, 2021 SKQB 104

Robertson, April 7, 2021 (QB21100)

Civil Procedure - Foreclosure Proceedings
Civil Procedure - Dispensing with Service

This matter was an application for an order dispensing with service of a notice of application to commence foreclosure proceedings on one of the mortgagors to the subject property (C.V.H.) and an order granting leave to commence foreclosure proceedings. The other mortgagor (H.T.K.N.) had been personally served with notice and did not oppose leave. The facts accepted by the chambers judge on the evidence presented were: the Toronto-Dominion Bank (TBD) had lent $164,000.00 dollars to the mortgagors on the strength of a mortgage registered against the property purchased (1101 McTavish) in October 2013; the mortgage was considerably in arrears and in default; by any measure, no equity existed in 1101 McTavish; TDB was not seeking a deficiency judgment; 1101 McTavish was unoccupied; C.V.H. had left Saskatchewan and his whereabouts were unknown, though TBD had made reasonable efforts to locate him; no form of substitutional service was likely to be successful; C.V.H. was likely to know that foreclosure proceedings were commenced; and, as the other mortgage H.T.K.N. had consented to the granting of leave to commence foreclosure proceedings, it was also likely that C.V.H. would not oppose the granting of leave.
HELD: Both applications were allowed, and for fundamentally the same reasons. Rule 12-10(3)(d) of the Queen's Bench Rules allows for an order dispensing with service of documents supported by an affidavit setting out "the grounds on which an order dispensing with service of the document should be made." The chambers judge observed there was little case authority in Saskatchewan concerning dispensing with service of documents, but upon a review of the few that had been reported, and cases from other jurisdictions, concluded that the considerations he should have in mind in determining whether such an order should be made are: 1) such an order is exceptional and rare, given the fundamental right of a person to be heard before a decision is made against his interests, and should only be granted 2) after diligent efforts have been made to locate and serve him; 3) he cannot be found; 4) no form of substitutional service is likely to bring him notice;5) he knows or has reason to expect legal action; 6) it is unlikely he would dispute the action; and 7) the order is not against

the interests of justice. On the evidence, the chambers judge granted the order dispensing with service and granted leave to commence the foreclosure action.

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Wakaw (Town) v Canadian Union of Public Employees, Local 885, 2021 SKQB 105

Clackson, April 7, 2021 (QB21101)

Administrative Law - Arbitration - Collective Bargaining Agreement - Interpretation

The town applied to overturn the decision of an arbitrator appointed pursuant to a collective bargaining agreement (CBA). The arbitrator found that a clause in the CBA known as Art. 25.01 did not give the town the right to dismiss an employee without cause by paying the employee in lieu of providing notice as agreed to by the union and the town and described in Art. 25.01. The decision was reported at 2020 CanLII 47164 (Sask LA) (arbitration award). The town hoped to convince the reviewing judge that the standard of review of the arbitration award should not be the default standard of reasonableness, but a more onerous standard of correctness. If the reviewing judge was unconvinced that correctness was the applicable standard of review, then it argued the arbitrator's decision was arrived at through an unreasonable analysis of the meaning of Art. 25.01 and inappropriate application of the notion of bad faith. Both sides of the matter agreed that Art. 25.01 was not commonly seen in CBAs and was unusual in its wording.
HELD: With the seminal case, Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65, as his guide, the reviewing judge first considered the town's attempt to elevate the standard of review from one of reasonableness to the stricter one of correctness. He referred to Vavilov, which identified two legal categories other than constitutional questions for which the rule of law would attract a correctness standard, these being: 1) that the question to be answered is a question of law of central importance "to the legal system as a whole"; and 2) that the arbitrator erred in law in her interpretation of Art. 25.1. The reviewing judge dismissed both arguments, determining first that the interpretation of a unique clause in a CBA could not have wider implications for the system of justice, and secondly, as the arbitrator had done what she had been asked to do by the parties, that is, interpret Art. 25.1, her analysis did not fall outside the parameters of her mandate, and so was not a question of law requiring the application of a correctness standard. He went on to rule, however, that her decision failed to meet the reasonableness standard of review, which he determined required that the arbitrator engage with the evidence and the applicable law in a true analytical process from which her decision logically emerged, which she had failed to do. He found instead that the arbitrator relied on prior arbitrations

of little precedential value which found against a dismissal without cause but which she admitted were factually distinct from the case she had to decide, both in terms of the dispute and the clause being interpreted, and therefore made a faulty leap in logic in relying on these in interpreting Art.25.1, causing her to err by presuming what the parties may have intended. Similarly, her decision that the town had acted in bad faith in the way it dismissed its employee was based on faulty reasoning which equated an absence of good faith with the presence of bad faith. The application of the town was allowed, and the matter returned to the arbitrator for "reconsideration and decision according to law."

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Ross v Willow Creek (Rural Municipality), 2021 SKQB 106

MacMillan-Brown, April 8, 2021 (QB21102)

Municipal Law - Council Members - Disqualification

C.R., a disqualified member of an RM council, appealed to the Court of Queen's Bench pursuant to s 148(2.1) of The Municipalities Act (MA) to have the resolution of council declaring her seat vacant set aside. C.R. had refused to resign from council after becoming disqualified from acting as a councillor due to a conflict of interest. She participated in a meeting of council via Zoom during which the subject matter discussed by council concerned the termination of her mother's employment with the RM and her threat to sue the RM. C.R. had feigned that she would leave the meeting, recognizing that she would be in a conflict if she participated, but clandestinely stayed in the meeting with her camera and microphone off and recorded portions of it concerning her mother, who subsequently wrote a letter to the RM saying she would be taking action against them due to a recent tape recording.
HELD: The appeal judge did not hesitate to find that C.R. was in a conflict of interest as her actions clearly showed she intended to further the private and financial interests of her mother, a "family member", as defined in s 141 of the MA, by imparting confidential information she would not otherwise have had except by secretly participating in the meeting, and therefore breaching her obligation to act only in the public's interest. The appeal judge referenced ss 141 to 149 of the MA in her determinations, and considered Sherwood (Rural Municipality) No. 159 v Probe, 2018 SKQB 24, and Shellbrook (Rural Municipality) No. 493 v Muller, 2015 SKQB 346, ruling that C.R.'s breaches of her fiduciary duties as a public officer by a flagrant conflict of interest were not mistaken or inadvertent, and were too serious to warrant lifting her disqualification or imposing a lesser measure, and upheld the council resolution to vacate her seat.

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BTA Real Estate Group Inc. v Family Fitness Inc., 2021 SKQB 107

Elson, April 8, 2021 (QB21103)

Debtor-Creditor Law - Bankruptcy and Insolvency
Debtor-Creditor Law - Fraudulent Conveyances

This application was brought by BTA Real Estate Group Inc. (BTA), a commercial landlord, to realize the personal property of Family Fitness Inc. (FFI), a corporation that owned and operated a number of gyms in the City of Regina (Regina) and rented space from BTA. BTA held a general security agreement (GSA) dated September 26, 2013 in all personal property of FFI, now owned or subsequently acquired, and all property derived from any dealings with that personal property. FFI defaulted on its rent payments, and BTA demanded payment of the defaulted rent on May 7, 2019, which at that time stood at $645,000.00. FFI did not make any payment and a receivership order issued from the Court under the terms of the GSA on October 13, 2020, at which time FFI was in debt to BTA in an amount exceeding $1,000,000.00. Failing a sale of the business and assets of FFI by way of a court-approved auction in accordance with a sale and investment solicitation process (SISP), in which the only bid, and one below the reserve bid, was made by a corporation tied to FFI, the receiver entered into a sale approval and vesting order (SAVO) approved by the court permitting BTA to take possession of the assets of FFI. BTA wished to marshal all the assets and personal property of FFI as defined by the GSA, and claimed it also included gym memberships acquired by FFI from the owners of a number of gyms in Regina (Calfit). The sale of the memberships was reduced to writing in three asset purchase agreements prepared by solicitors and executed on January 22, 2018. FFI purchased all Calfit's rights in the memberships, which had a market value based on how many of the members transferred their memberships to FFI. FFI was to pay for the memberships in part by monthly installments, but failed to make the required payment in April 2020, which prompted Calfit to demand payment of the remaining balance of $146,628.00. FFI was wholly controlled by one individual, S.K., who also owned 35% of a second corporation known as SMI, also in the gym business in Regina. S.K. also had personal influence on the other shareholders of SMI. On May 12, 2020, FFI transferred the memberships in a cursory handwritten document to SMI, the consideration for which was solely the assumption of FFI's debt to Calfit, SMI was to resume the payments owed; however, with all gyms closed due to COVID, payment was unlikely. No valuation of the memberships or the specific purchase price for them was stipulated in the agreement. FFI never informed BTA that it had sold the memberships to SMI. On January 25, 2021, soon after the abortive auction under the SISP, SMI filed a

trademark application to register a logo design for the name "Evolution Fitness", under which name SMI and FFI had operated since February, 2017, and which BTA argued was done in bad faith under s 4(2)(1) of the Bankruptcy and Insolvency Act. BTA urged the court to void the membership transfer from FFI to SMI as a fraudulent conveyance, and if not, to find that all rights in the memberships had vested in BTA when FFI acquired them so that FFI had no rights in the memberships to convey to SMI. As to the bad faith argument, BTA sought a declaration to that effect which would allow the court to make an order it saw fit.
HELD: The judge on the application chose not to take up the bad faith claim of BTA. As to the other two issues to be decided, 1) the court agreed that the transfer of memberships from FFI to SMI was a fraudulent conveyance, and 2) by the terms of the GSA, all rights in the memberships at the time they were acquired by FFI from Calfit attached in favour of BTA. With respect to the finding that the transfer of the memberships was a fraudulent conveyance, as BTA chose to rely on The Fraudulent Conveyances Act, 1571 (UK), 13 Eliz 1, c 5 and not on The Fraudulent Preferences Act, the justice turned to that body of law in his analysis. Relying in large measure on Moody v Ashton, 2004 SKQB 488, and the authorities relied on in that case, both judicial and scholarly, he focused on two essential elements determinative of the question: 1) did the evidence prove on a balance of probabilities that FFI intended to defraud BTA, and 2) was the sale of the memberships for no or nominal consideration? As to the intent to defraud, the court applied the reasoning in Dougmoor Realty Holdings Ltd., Re (1967), 10 CBR (NS) 141 (Ont. HC), which introduced the concept of "badges of fraud", indicators of dishonest intent on the part of the transferor, and include any number of factors indicative of an absence of bona fides with respect to the conveyance, and which may raise a presumption of fraud, depending on their number or evidentiary weight, to be disproved by the transferor. In this case, the justice concentrated on four of these: 1) given FFI's burdensome debt to BTA, which it had owed for about three years, and for which demand had been made, collection proceedings were imminent; 2) FFI transferred the memberships secretly, and failed to disclose such to BTA; 3) S.K. was the operating mind of both FFI and SMI, and retained control of the membership rights; 4) the consideration for the conveyance of the shares was inadequate, and though assumption of debt may constitute fair value, in this case, that debt did not equal the market value of the memberships, and no market value of the membership rights had been incorporated into the transfer agreement. Turning to the matter of the vesting of the membership rights in BTA at the time they were conveyed to FFI, he determined that a purposive interpretation of s 4(d) of The Personal Property Security Act (PPSA) was required in accordance with Rizzo & Rizzo Shoes ([1998] 1 SCR 27), and though he agreed with FFI that the conveyance of the membership rights was a "a transfer of an unearned right to payment pursuant to a contract to a transferee who is to perform the transferor's obligations pursuant to the contract", ruled that, though the PPSA did not apply to such transfers, this exclusion did not mean a security interest was not created. The PPSA was not intended to touch the law with respect to the creation of security interests but to establish a uniform registration process for such interests. As such, by the terms of the GSA, BTA acquired a

security interest in the membership rights upon their transfer of the memberships from Calfit to FFI. In the final analysis, the court voided the transfer of the membership rights, and vested them in BTA free and clear.

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Soiseth v Hill, 2021 SKQB 109

Turcotte, April 9, 2021 (QB21106)

Civil Procedure - Queen's Bench Rules, Rule 3-81
Family Law - Spousal Support - Interspousal Agreement - Waiver
Family Law - Division of Family Property - Interspousal Agreement

The plaintiff, B.L.S., applied to consolidate two actions she had commenced. In the first she sought divorce and spousal support under the Divorce Act (DA) and division of family property under The Family Property Act (FPA) against the defendant, T.L.H., her husband. In the second, she sought damages against the defendant, her former lawyer (NorsaskLaw Prof. Corp. and Richard Gibbons), for professional negligence, breach of fiduciary duty and breach of contract arising from Gibbon's role in advising and preparing an interspousal contract (IC) between her and T.L.H. that was executed in 2013. Both T.L.H. and Gibbons opposed the application on the basis of an insufficient legal nexus between the two claims. T.L.H. applied for summary judgment to dismiss B.L.S.'s petition because the IC was a complete answer to her claims. In opposing the summary judgment application (SJA), B.L.S. argued that there were genuine issues for trial. B.L.S. initiated her actions after she learned in 2014 that she would have to pay additional income tax because her spousal support payments were included in her income whereas she understood the payments made by T.L.H. pursuant to their IC represented non-taxable payments towards the equalization of family property between the parties. She alleged that Gibbons never advised her otherwise. Both T.L.H. and Gibbons contested this allegation. All of the evidence presented was by affidavit and none of the parties sought cross-examination on them. B.L.S. and T.L.H. originally jointly retained Gibbons in April 2012 to assist them in preparing a draft IC but by August 2012, Gibbons terminated the joint retainer, advising that he could only represent B.L.S. after that time, and T.L.H. then obtained another lawyer. Neither party objected to Gibbons' continuing to represent B.L.S. The contents of the IC were complicated and detailed as a result of the need to keep the farming operation viable, the large amount of debt owed by the parties and the plaintiff's need for economic support and retirement income. The issues were: 1) whether this was an appropriate proceeding for summary judgment; 2) if so, should B.L.S.'s claims for spousal support and family property division be dismissed? This

question included considering whether: i) the IC met the technical requirements of s. 38 of the FPA; ii) B.L.S. had received independent legal advice in the circumstances of this case; iii) if so, had that advice satisfied the technical requirements of both s. 38 and the first stage of the Miglin analysis; iv) were there circumstances present that rendered the IC unconscionable or grossly unfair under s. 24 of the FPA; and v) should B.L.S.'s claim for spousal support under the DA be dismissed under the two-stage Miglin analysis; and 3) if not, should B.L.S.'s two actions be consolidated?

HELD: The application for summary judgment was granted in part. The application to consolidate the proceedings was dismissed. The court found with respect to each issue that: 1) this was an appropriate case to decide by SJA because the detail in the affidavit evidence was sufficient to assess the two-stage analysis from Miglin to determine the weight to be accorded to the waiver of spousal support in the IC as it related to B.L.S.'s petition for support under the DA. However, the application for division of family property under the FPA must proceed to trial as the information before it was incomplete regarding the value of some family property outside of what had been included in the IC, and it remained to be divided pursuant to s. 24(3) of the FPA; 2) B.L.S.'s claim for spousal support should be dismissed but due to the outstanding family property to be valued, her action could proceed to trial; i) the IC met the technical requirements of s. 38 of the FPA; ii) B.L.S. received independent legal advice. Both she and T.L.H. consented to Gibbons representing only B.L.S. when the dual retainer was terminated by Gibbons, which occurred prior to the parties completing their negotiations regarding separation and the IC; iii) the legal advice given to B.L.S. by Gibbons met the technical requirements of s. 38 of the FPA or as it may relate to the first stage of part one of the Miglin test. This finding was not relevant to B.L.S.'s action against Gibbons and the issue of the competency of his legal advice. Based on the evidence, B.L.S. and Gibbons had all the information required to assess, and, in Gibbon's case, to advise on, both the distribution of family property provided for under the IC against the framework provided for division of property under the FPA and the factors and objectives under the DA relative to spousal support; iv) in the circumstances, the IC was neither unconscionable nor unfair under s. 24 of the FPA. When the IC was negotiated, B.L.S. was not suffering from any frailties that were exploited by T.L.H. As noted, she had all the necessary information pertinent to the FPA and DA and received independent legal advice. It examined all of the instances where B.L.S. alleged the IC was unfair and concluded that none of them rendered it "grossly unfair." The unintended tax consequences of her spousal support were not a ground to set aside the agreement nor did the facts support a claim for rectification; and v) the SJA to dismiss B.L.S.'s claim for spousal support was granted although her petition would not be dismissed because changes might occur in the future that were unanticipated by the IC and could be addressed then if required. Regarding the application of the two-part Miglin test to the IC, it was found that at the time it was executed, it was in substantial compliance with the DA for the reasons identified with respect to both aspects of stage one of the Miglin analysis and under stage two of it, there was no evidence presented at this time of a change in circumstances; and 3) if its decision to

grant the SJA rendered was wrong, it would decide alternatively that under Queen's Bench rule 3-81, the actions should not be consolidated because they involved different parties, causes of action and legal issues.

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Mount Hope (Rural Municipality) v Chamberlin, 2021 SKQB 114

Mitchell, April 19, 2021 (QB21108)

Municipal Law - Expropriation - Compensation

The applicant, the Rural Municipality of Mount Hope, sought an order pursuant to s. 7 of The Municipal Expropriation Act (MEA), setting the appropriate level of compensation to be paid to the respondents for expropriation of their land. In 2017, the applicant discovered that the respondents owned a parcel of land on which one of its community wells was located. It had passed a bylaw in 2007 stating that the well was designated as a municipal well for the purpose of providing its residents and others with water. It attempted to negotiate a purchase of the land but no agreement was reached. The applicant then passed a bylaw in 2017 authorizing the expropriation of the land pursuant to s. 3 of the MEA. It retained a land appraiser to prepare an appraisal report. The report estimated that the market value of the land as at 2017 was $1,535. The respondents would not accept this sum and the applicant made this application. The administrator of the applicant testified that its objective in acquiring the land was to ensure residents had access to clean drinking water and it needed physical access to the parcel to maintain the pumphouse. He strenuously denied the question put to him by the respondent's counsel that the applicant's ulterior purpose was to acquire the working gravel pit on the property. One of the respondents testified that he used the aggregate from the gravel pit for repairs to his ranch when needed and had seen other people, including workers for the applicant, enter the land to help themselves to aggregate. He said that he would consider selling the material in the future. The appraiser who had prepared the 2017 report testified as the applicant's first expert witness. He explained his credentials and experience as an appraiser of agricultural lands and indicated that at the time he prepared his report, the land was zoned as agricultural. The highest and best use would be as farmland and to establish its market value, he used the direct comparison approach. The value of $1,535 was based on sale prices of comparable land. On cross-examination, he said that he was not qualified to undertake a below ground analysis. The respondents retained an expert to evaluate the amount of aggregate and its value. Their expert testified that he had acquired knowledge of aggregate evaluations from 12 years of practical experience. In his report, he described the materials taken from five test sites but admitted the samples were not analyzed. He estimated the value of the

aggregate to be $421,000 after extraction and screening. The applicant obtained the court's permission to hire an engineer to conduct an aggregate assessment of the land and submit a report. This expert report was admitted and the author testified as to his credentials and experience conducting such assessments. He and his staff retrieved aggregate from nine test pits and had the samples analyzed. Most of the samples fell into the categories of two types of sand, and in his opinion, there was an insufficient amount of gravel on the land to produce crushed gravel. He calculated the market value of the amount of aggregate available at $11,875. He indicated that due to the location of the well, no extraction could take place until a hydrogeological site investigation, required by provincial authorities, had been conducted. The issue was to decide on a fair and reasonable compensation to be paid to the respondents.
HELD: The applicant was ordered to pay $11,875 to the respondents for the land it expropriated. The respondents were awarded taxable costs to include reasonable fees paid to their expert for his report and testimony, as it was because of his evidence that the applicant had undertaken further investigation into what amount of compensation was reasonable. The court selected and followed the two-stage test set out in White Burgess respecting the admissibility of expert evidence. It found first that all of the expert evidence presented in this case met the criteria for admissibility. It assessed the weight it would give to the expert evidence and the position of the parties. In this case, the amount of $11,875 was preferable and most reliable based on the methodology and analysis employed in the assessment.

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R v Moya, 2021 SKQB 116

Robertson, April 20, 2021 (QB21109)

Criminal Law - Assault - Sexual Assault
Criminal Law - Evidence - Conduct of the Complainant - Application to Cross-Examine

The accused, charged with offences against the complainant contrary to ss. 271, 246(a) and 348(1)(a) of the Criminal Code, made an application under s. 276 of the Code to cross-examine the complainant and her mother about the complainant's alleged asexuality. The accused's previous s. 276 application had been dismissed and this decision should be read in the context of the first decision (see: 2020 SKQB 319). The defence submitted that the application was not required because the provision applies to questions about sexual activity and asexuality is not sexual activity. Alternatively, the defence submitted that if s. 276 applied, the purpose of the cross-examination was permitted because it pertained to the credibility of the complainant. The

accused deposed in his affidavit in support of the application that the complainant informed him at the beginning of their relationship that she thought that she might be asexual but over time, she had become comfortable enough to initiate sex with him. She was not asexual during their relationship, said that she was sexually attracted to him and behaved as if she were. He affixed to his affidavit a statement given by the complainant's mother that described her daughter as asexual. The defence argued that if the complainant did not enjoy sex, presumably because of her asexuality, but led the accused to believe she did, then this showed she was untrustworthy. The defence argued this premise entitled it to cross-examine the complainant and her mother about the complainant's sexuality and sexual desire.
HELD: The application was dismissed. The court first found that s. 276 applied to the application because the proposed cross-examination would inquire into the complainant's prior sexual activity. It was unnecessary to decide whether s. 276 applies to sexual inactivity. It found that the proposed evidence was not relevant under the first stage of the two-step inquiry required under s. 276.1 of the Code. The defence had failed to show how the proposed evidence was relevant to an issue outside of the statutory bar established in s. 276(1) and (2). It dismissed the defence argument that the mother's statement raised a serious issue over the complainant's credibility because the accused's own affidavit showed that there was no contradiction in statements made by the complainant. It also rejected the defence's alternative theory to support the proposed cross-examination because it appeared to link the failure of the accused to gauge the level of desire of the complainant to engage in previous sexual relations to the question whether she consented or communicated her consent. Following the Court of Appeal's decision in Graham (2019 SKCA 63), it found the proposed cross-examination was clearly for an impermissible purpose under s. 276(1)(a) and not capable of admission because it was not even facially relevant.

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Jones v Stooshinoff, 2021 SKQB 120

Danyliuk, April 21, 2021 (QB21110)

Civil Procedure - Costs

The defendant, Nicholas Stooshinoff, operating under his name as a personal legal corporation, had acted on behalf of the executors of an estate. The plaintiffs had disputed the handling of the estate and pursued litigation multiple times, and eventually the matter was resolved and their claims dismissed (see: 2021 SKQB 34). The plaintiffs then commenced another claim against numerous defendants, including Stooshinoff, alleging that he

had paid his legal fees from trust without consent. He applied first to strike out the self-represented plaintiffs' statement of claim against him but when the matter was eventually argued in chambers, he sought only costs of the action. In discussions between the defendant's lawyer and the plaintiffs in March 2021, the lawyer presented them with a discontinuance of claim form with the "no costs" provision added to the standard form. The completion of the form was subject to a deadline. When the plaintiffs failed to return the executed form by that date, the defendant's lawyer applied to strike their claim. They then returned the form four days after the deadline and filed the discontinuance 11 days after that, but insisted the "no costs" provision was still effective. They applied for an order declaring the defendant a vexatious litigant and asked for costs of $10,000. The issues were: 1) whether the action against the defendant been formally discontinued; 2) the proper order as to costs. The defendant sought solicitor-client costs, or alternatively costs on an elevated scale; and 3) whether the plaintiffs' order should be granted.
HELD: The court found with respect to each issue that: 1) the plaintiffs' action against the defendant was discontinued; 2) it would order fixed costs of the entire action, including this application against the plaintiffs, jointly and severally. An award approaching double costs was appropriate, although the court listed all of the grounds in this case where the plaintiffs' behaviour related to the litigation would have supported an award of solicitor-client costs against them. Such an award had been made against the plaintiffs in the previous judgment of their other claim; and 3) it would not grant the plaintiffs' order.

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R v Nezcroche, 2021 SKPC 27

Segu, April 7, 2021 (PC21017)

Criminal Law - Assault - Assault Causing Bodily Harm - Sentencing
Criminal Law - Sentencing - Conditional Sentence Order

The offender was initially charged with the offence of aggravated assault. Following a re-election by the Crown to proceed by summary conviction on the lesser included offence of assault causing bodily harm, which capped the possible sentence at two years less a day, and the offender's guilty plea to that charge, the sentencing judge considered whether a conditional sentence order (CSO) was a justifiable sentence in this case. The facts and circumstances in the matter accepted by the sentencing judge were that the offender and the victim were asked to leave a party where they engaged in a consensual fight during which the offender availed himself of a large hunting knife carried on his person and stabbed the victim five times in the back. He

then left the scene and went home to sleep, where the knife was found next to him. He was under the influence of alcohol and cocaine at the time of the stabbing. The victim's injuries were serious, the stab wounds deep. He lost much blood, and his esophagus was injured such that he needed assistance in breathing. He was treated at the Royal University Hospital. At the time of sentencing, he continued to suffer ill effects from his injuries and psychological harm. The offender was a 22-year-old Aboriginal male who abused substances, which he began to use when he was 15. His parents had separated when he was young, and he was raised by his grandmother. Prior to the offence, the offender had been suffering from depression, which led to a failed relationship. At sentencing, his emotional problems were controlled, in large measure due to the birth of a daughter. He was a first-time offender, and though on release terms for over a year, was mostly compliant. He was from the Buffalo River Dene Nation and had been employed.
HELD: The sentencing judge imposed a sentence of imprisonment of 18 months to be served in the community while bound by the terms of a CSO, as allowed by s 742.1 of the Criminal Code, being satisfied that such a sentence was consistent with the fundamental purpose and principles of sentencing, as codified in ss 718 -718.2. Emphasizing the cardinal principle of proportionality, which requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender and the accompanying principle of parity, as explained in R v Arcand, 2019 SKQB 13, which dictates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, he reviewed the aggravating and mitigating factors relevant to the offence and the offender, and the comparable sentences for the offence of assault causing bodily harm imposed in previous sentencing decisions. He determined that, though the offence was very serious, and the responsibility of the offender high, primarily because of the circumstances of the stabbing, the number and depth of the wounds, the lasting effects of the stabbing on the victim, and the offender's disregard for the victim, in spite of these factors, the mitigating circumstances were such that the imposition of a CSO was in accordance with the purpose and principles of sentencing. Among the list of mitigating circumstances weighing in the balance were the offender's status as an Aboriginal person; his youth; the absence of a criminal record; the remorse shown by his guilty plea; his compliance with his release terms; and the rehabilitative steps he had taken prior to sentencing.

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R v Veilleux, 2021 SKPC 28

Schiefner, April 16, 2021 (PC21018)

Criminal Law - Investigative Detention
Constitutional Law - Charter of Rights, Section 8 - Unreasonable Search and Seizure

Police detained S.J.V., whom they located in the driver's seat of a motor vehicle on a dirt road near a commercial business minutes after a security alarm was engaged there on a Sunday when all other businesses in the area were closed. In his exchange with the police as to why he was there, S.J.V. provided questionable reasons for his presence. Police saw various small tools in the vehicle which could be used for breaking and entering as well as a duffle bag. Police asked S.J.V. if they could look inside the duffle bag, and he said go ahead, but also said the bag was not his, and the vehicle belonged to his wife. He was not told he did not need to consent to the search. The duffle bag was searched and a sawed-off shot gun and 5 rounds of ammunition for it were found in the bag. Prior to the trial proper, a voir dire was conducted to determine whether these items were obtained in breach of S.J.V.'s right to be free from unreasonable search and seizure. The investigation later revealed that no entry had been made to the business and no property was missing.
HELD: The trial judge on the voir dire concluded that S.J.V had been detained and his right to be free from unreasonable search and seizure had been infringed because the police had not obtained a valid waiver from S.J.V. of his right not to have the vehicle searched. Though S.J.V. did give ostensible consent to the search and seizure of the duffle bag by telling the police to go ahead and search it, he was not informed by the police that his consent could be withheld, and so not being fully informed of this choice, no valid waiver of his right under s 8 was given. Nonetheless, the court also went on to find that as S.J.V. had disavowed any connection with the bag, he could not then claim any privacy rights in it, though he continued to have a right to privacy in the vehicle itself, which was breached when the police reached into the vehicle to seize the bag without obtaining his specific consent to enter the vehicle. Because a potential breach of S.J.V.'s s 10(b) rights to counsel was revealed during the voir dire but no submissions were made by counsel concerning whether there was a breach or how it might interplay with the s 8 breach, the court did not conduct a s 24(2) analysis, but adjourned it pending further submissions of counsel.

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