Case Mail

The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 23, No. 12 **June 15, 2021**

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Richardson v Richardson, 2021 SKCA 58

Whitmore Leurer Tholl, April 9, 2021 (CA21058)

Appeal - Review of Court of Appeal Chambers Decisions

The applicant was in the process of attempting to perfect an appeal he filed in the Court of Appeal (appeal court) on December 15, 2020 from various interim orders made in the Court of Queen's Bench (QB Court) on December 11, 2020 in an ongoing family law proceeding, being DIV 70 of 2020, Battleford (December QB Fiat). In advance of the appeal, he filed two applications before the appeal court in February 2021, seeking various forms of prerogative relief from the orders made in the December QB Fiat. In the applications, he alleged numerous grounds as to why the December QB Fiat should be overturned, in particular that it was in contravention of "the UN Torture Convention," was made as a result of terrorist activity and torture at the hands of various entities and persons, and the criminal activity of such entities and persons, including the "freemasons," "the rogue agents of Innovation Credit Union," "the Court of Queen's Bench for Saskatchewan,"

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Civil Procedure - Queen's Bench Rules, Rule 7-1, Determination of a Question
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counsel for the respondent, the RCMP, the Provincial Court of Saskatchewan, the law firm of the respondent, various justices of the Court of Queen's Bench and the appeal court, and a long list of private individuals. The applications were heard before a justice of the appeal court sitting in chambers March 8, 2021 (Regina, CACV3745) (CA chambers fiat), and dismissed by him, first, because a chambers judge does not have the authority to grant prerogative relief, but assuming he did, though s 11 Court of Appeal Act (Act) gives the court the power to "grant relief in the nature of a prerogative writ", a superior court is not subject to prerogative relief as it is not an inferior court, but has concurrent jurisdiction with the appeal court (see: R v Balfour Moss, 2006 SKCA 35) and a remedy is provided for relief from its decisions by way of appeal. In addition, the chambers judge went on to find that, were the decisions of the QB Court subject to review via s 11 of the Act, the applicant had failed to show that the QB Court had exceeded, usurped or refused to exercise its jurisdiction, and if no such jurisdictional error was made, the decisions of the court in the December QB Fiat were within its power to make, and not subject to review under s 11 of the Act.
HELD: The appeal court upheld the decision of the chambers judge, finding he made no errors which would permit it to discharge or vary his order as provided by s 20(3) of the Act, and that he acted fairly "as a neutral adjudicator". The appeal court did, however, choose to redirect its approach to the matter somewhat by emphasizing that it was fundamentally an appeal court, that by s 3(1) of the Act "it is a superior court of record having appellate jurisdiction", and though under s 11 of the Act it may "exercise original jurisdiction to grant relief in the nature of a prerogative writ," in conformity with its statutorily created authority as a superior court with appellate jurisdiction, it will exercise that jurisdiction rarely and in exceptional circumstances only. Examples of such exercises of its original jurisdiction are summarized in Geller v Saskatchewan (1985), 48 Sask R 239 (CA), and are limited primarily to situations where the Court of Queen's Bench itself is a party to or otherwise drawn into a claim for prerogative relief.

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Nadeau v Nadeau, 2021 SKCA 69

Ottenbreit Caldwell Schwann, April 28, 2021 (CA21069)

Appeal - Statutory Interpretation - Limitation of Actions

Roger Nadeau (Roger) appealed the decision of a chambers judge in a summary determination application who decided in favour of his brother, David Nadeau (David), finding that his claim against Roger by way of set-off and counterclaim of the amount Roger owed to David pursuant to demand loans was neither statute-barred nor

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Criminal Law - Assault - Assault Causing Bodily Harm - Sentencing
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prohibited by Rule 3-47 of the Queen's Bench Rules (see: 2020 SKQB 136). Roger commenced an action for breach of fiduciary duty by David in his capacity as the executor of the estate of Paul Nadeau (estate), their father, claiming that David had breached his duties as executor by improperly withholding title and possession of farmland he was to inherit from the estate (the land). David's counterclaim and set-off concerned demand loans, a significant portion of which were governed by a written agreement called an Indemnification and Charging Agreement and Grant of Right of First Refusal (ICARFR), made in 2000, which tied the estate, the land, Roger, David and their mother, who held a life interest in the land, in a legal relationship with respect to the land involving an encumbrance on Roger's rights in the land to secure the loans. David demanded payment of the demand loans in August 2016. Roger did not pay any of the amount due pursuant to the demand, and commenced his action against David, to which David responded by filing his set-off and counterclaim on or about March 10, 2017. The chambers judge was required to determine whether The Limitations Act, 2004 (Act) or The Limitation of Actions Act, 1978 (former Act) governed David's right of action. She found by the rules of construction that s. 10 of the Act, an enactment specifically directed to time limits for commencing claims for payment of demand loans, replaced the limitation period established by the former Act, which was based on common law principles. She determined that the transitional provisions of the Act were not applicable to David's right of action because s. 10 enacted a substantive change to the commencement of the limitation period for demand loans. She also ruled that although a set-off under Rule 3-47 could not be maintained, an equitable set-off was available to David. Roger's appeal was brought on two grounds: 1) that the chambers judge erred in deciding that s. 10 of the Act displaced the limitation period set by the former Act, and 2) an equitable set-off was not available to David.
HELD: The court dismissed Roger's appeal. As to ground 1), the appeal court agreed with the chambers judge's ultimate decision with respect to this issue but disagreed with her that the transitional provisions of the Act did not apply to a determination of the governing limitation period in this case. The court proceeded to an interpretation of the Act, and in particular its transitional provisions, emphasizing that the Act effected a fundamental change in the law of limitation periods. No longer will the date when the cause of action crystallized, and the common law limitation period associated with that cause of action govern, but instead, the date the cause of action should have been discovered by a claimant will prevail in commencing the clock on a general two-year limitation period. "Discovery" is a defined term in s. 6 of the Act. It sets out four factors which, when known or when they ought to have been known by the claimant, will amount to a claim being discovered. In this case, one factor only was in issue, s. 6(1)(d), that David ought to have known that a "proceeding would be an appropriate means to seek a remedy." With the overarching principle of discoverability in mind, the appeal court then turned to an analysis of the applicability of the transitional provisions of the Act, and in doing so referenced case law also considered by the chambers judge, Johnson v Johnson, 2012 SKCA 87, Hare v Hare (2006), 83 OR (3d) 766, Rodway v Reardon, 2019 SKCA 99 and Jones v Smith, 2017 SKQB 63, Olesen v Hrenyk, 2013 SKPC 69, Saskatchewan (Highways and Infrastructure) v

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Mortgage - Foreclosure - Judicial Sale - Order Nisi - Confirmation of Sale
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A.M.D. v M.R.M.

Alliance Seed Corporation v Fournier

Bearboy v Hardy

Venture Construction Inc., 2020 SKCA 39, and Winacott Spring Western Star Trucks v Moore Industrial Ltd., 2013 SKCA 88. The transitional provisions of the Act are subsections 31(1) to (7), with the transitional or "effective date" being the date the Act came into force: May 1, 2005. As required by the transitional provisions, the appeal court wended its way through a complex route to a conclusion, and first determined that the transitional rules applied because David's claim was based on "acts or omissions that took place before the effective date" and he had not commenced a proceeding with respect to his claim before the effective date. (See: s. 31(2)(a) and (b)). Having determined that David's claim met this threshold requirement, the court then found that s. 31(5) of the Act was the applicable section because s. 10 of the Act was a new limitation period with respect to demand loans, and the limitation period under the former Act had not expired before May 1, 2005, the effective date. The court further narrowed its inquiry to an analysis of s. 31(5)(a), finding that David's claim against Roger for payment of the demand loans had not been discovered prior to the effective date, and therefore the Act as a whole was applicable to the determination of the applicable limitation period, and with it, s. 6(1)(d), the discovery principle, and when David knew or should have known a proceeding would be an appropriate means to enforce payment of the demand loans owed to him by Roger. The court was satisfied that it was reasonable for David to make a demand for payment of the loans before commencing a proceeding to enforce them. Following default of payment, by the operation of ss. 5 and 10 of the Act, the limitation period to take proceedings did not expire until August 2018, and as he commenced his proceedings for set-off and counterclaim on March 10, 2017, he was within the two-year limitation period established by the Act. The appeal court then turned to ground 2) of Roger's appeal and agreed that an equitable set-off was available to David as found by the chambers judge, since it was inequitable for Roger, in the context of the ICARFR, to be able to advance his claim concerning the transfer of the land without David having the right to claim the monies owed to him by Roger. The chambers judge erred by finding that the set-off and the counterclaim were on a similar footing with respect to David's right to plead them. By Rule 3-47(2)(c), a set-off can only be pleaded if the plaintiff's action and the set-off arise from "the same dealings, transaction or occurrence," which was clearly the case because of the ICARFR; but a counterclaim, which is governed by Rule 3-42, may be pleaded purely on the basis of convenience at trial, and no proximity requirements need be shown to maintain it.

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A.M.D. v M.R.M., 2021 SKCA 71

Richards Caldwell Schwann, May 3, 2021 (CA21071)

Family Law - Child Custody and Access - Interim Order - Appeal

A.M.D., the petitioner in a family law proceeding, who had applied for sole interim custody of the child of the relationship, Q.M., and supervised access to by the father, M.R.M., appealed the decision of the chambers judge granting joint custody and equal shared parenting. A.M.D. first sought to have fresh affidavit evidence admitted on appeal, and secondly advanced that the chambers judge erred by misapprehending or ignoring what she argued was overwhelming evidence that it was dangerous for Q.M. that M.R.M. be granted anything other than supervised access to the child because of his alleged history of drug abuse and family violence, and argued that the chambers judge erred by making an order not in the best interests of Q.M. Being unable to decide between the parties because of irresolvable assertions and denials by M.R.M. concerning allegations of drug abuse and family violence presented in the affidavit evidence, and the limited evidence concerning matters directly related to the best interests of Q.M., the chambers judge, keeping in mind the interim nature of his orders, and that pursuant to s. 8(c) of The Children's Law Act, 1997 (Act), he must be alive to the presumption that both parents start on an equal footing as regards custody, he ordered as he did since he did not have any basis to displace the presumption.
HELD: The court denied the fresh evidence application and dismissed the appeal, setting the standard of review as one which presented an appellant with a high hurdle to overcome due to the fact-based and discretionary nature of interim custody applications. The chambers judge's evidentiary rulings, findings of fact, and decisions attracted considerable deference, though such could be set aside if the chambers judge misapprehended or failed to consider relevant evidence or made palpable and overriding errors in his findings of fact. As to the fresh evidence application, the court recognized that with respect to determining what parental arrangements are in the best interests of a child, a flexible approach may be taken. Such evidence will be admitted if it could not have been adduced at the hearing, is highly relevant, potentially decisive and credible. The new affidavit evidence the appellant sought to adduce deposed to some bruising to Q.M.'s forehead and ear on separate occasions while in M.R.M.'s care and a double hearsay statement claiming that he smelled of alcohol when picking up Q.M. from daycare. M.R.M. deposed that the bruising was accidental, and the accusations were harassment not worthy of a response. The court found that the evidence was not relevant, decisive, or credible, and suffered from the same limitations as the affidavit evidence at the hearing in that it was controverted in every respect. The appeal court also ruled that the chambers judge did not err in principle by misapprehending or failing to consider relevant evidence, but on the contrary did consider the evidence and did not find it helpful, and pointed in particular to the surreptitious recordings appended to the affidavits filed by A.M.D. upon which the appellant placed a great deal of weight. On review, these contained no depiction of any relevant conduct by M.R.M. The appellant also placed much weight on a safety plan prepared by the Ministry of Social Services (MSS) at the time of the separation of the parties, which she argued had been ignored by the chambers judge, but the appeal court stated that he was right to give it little weight as it had been rendered irrelevant when the MSS closed its file with respect to Q.M. The appellant also urged the court

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to overturn the decision of the chambers judge on the basis that he committed an error in principle by failing to give any consideration to family violence and the best interests of Q.M. as specifically required by 10(3)(j) and 10(4) of the Children's Law Act, 2020. Though the appeal court was alert to the need to carefully review allegations of family violence, it found in this case that the evidence before the chambers judge was too contradictory to permit him to find M.R.M. had committed acts of family violence. Also, in argument concerning the chambers judge's treatment of the best interests of Q.M. as required by ss 8 and 9 of the Act, A.D.M. argued that the chambers judge gave so little consideration to her role as the primary parent to Q.M. that he committed an error in principle. As with the other grounds of appeal, though it recognized that the relationship of a child to a parent must be considered, the court could not find the chambers judge committed an error in law in this regard because the evidence was insufficient to prove the foundational requirement that in fact the status quo was that A.D.M. was the primary parent. Lastly, A.D.M. advanced in argument that the chambers judge failed to consider and apply The Victims of Interpersonal Violence Act, which was rejected by the appeal court because the evidence before the chambers judge was insufficient to prove interspousal violence had occurred.

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R v Gamble, 2021 SKCA 72

Richards Caldwell Kalmakoff, May 3, 2021 (CA21072)

Appeal - Criminal Law - Sentencing - Aboriginal Offender - Gladue Report

M.G. appealed his sentence of 7.5 years in the penitentiary for the offence of aggravated assault on the ground that the trial judge erred in principle by not ordering the preparation of a government-funded Gladue Report, thus limiting essential information he required to fashion a just and fair sentence for M.G. and resulting in one that was demonstrably unfit. The facts were not in issue on appeal. M.G. was the ringleader of a group of gang members who unlawfully confined the victim and tortured him for several hours by beating him, using a hot knife to tattoo "IP" and "TSK" on his chest, and cutting off the tip of his left-hand ring finger. The victim was able to escape by breaking a window. During the sentencing process, the trial judge ordered a pre-sentence report (PSR) pursuant to the Criminal Code, which underwent two revisions on his order, mostly at the request of M.G. through his counsel. The revisions were intended to address shortcomings and contradictions in the report concerning M.G.'s Gladue factors, such as whether M.G. had attended residential school, the effect of his offending on his home community, and how his father's gang activity in the same gang may have

influenced his criminal behaviour. On the adjourned date of sentencing, M.G. applied for a Gladue Report and called evidence in an attempt to prove that PSRs were inadequate to the task of fully informing the trial judge with respect to Gladue issues that might reduce M.G.'s moral blameworthiness. M.G.'s affidavit was filed and two witnesses testified at the hearing: the probation officer who prepared the PSR and its revisions, who testified that Gladue Reports were superior to PSRs and probation officers did not have the time or resources to fully canvass the required information, and a qualified expert able to give testimony about Gladue Reports. In his decision (2019 SKQB 327), the trial judge, though he had no doubt he had the power to order a government-funded Gladue Report, chose to exercise his discretion not to do so in this case. He was of the view that the evidence presented did not satisfy him that PSRs are generally inadequate in providing the required information and it was not clear a PSR was inadequate. He did not accept the evidence of the expert witness, stating that in the absence of national standards as to the content of Gladue Reports, he could not say that her evidence was more than her personal view of what should be included in such a report. The trial judge also disagreed with the expert that M.G.'s degree of participation in the preparation of reports should not affect their persuasive weight. Finally, he stated that there is no required form in which the information concerning the background of an Aboriginal offender is to be provided. Submissions of counsel are one form by which such information may come before the court. In his sentencing decision, the trial judge reiterated that he was satisfied he had the information he needed to properly sentence M.G., as required by s 718.2(e) Criminal Code. HELD: The appeal was dismissed. As to the standard of appeal, the court reviewed the trial judge's sentence in accordance with R v Friesen, 2020 SCC 9, which required the appeal court to intervene only in cases where 1) the sentencing judge made an error in principle which might reasonably have had an impact on the sentence; or 2) the sentence was demonstrably unfit. As to 1), the appeal court took account of the significant degree of discretion a judge must exercise in deciding whether he or she has the information required to satisfy the strictures of s 718.2 (e) of the Criminal Code. The Court of Appeal should interfere with the exercise of his discretion in making that decision on a standard of reasonableness; and in respect to ground 2), the appellant must overcome a very high hurdle to show a sentence is demonstrably unfit (see: R v Lacasse, 2015 SCC 64). In this case, the court could not find the trial judge fashioned a sentence that was demonstrably unfit, given the highly individualized nature of the sentencing process. As concerns the contention of the appellant that the trial court erred in principle in not ordering a Gladue Report in these circumstances, the court could not say the decision of the trial judge was unreasonable. It agreed with him that the PSR and its revisions were not defective in any manner that required a Gladue Report to supplement them and supplied a sufficient review of M.G.'s background for sentencing purposes. The appeal court, upon a review of the influential cases Gladue ([1999] 1 SCR 688), Ipeelee (2012 SCC 13) and Chanalquay (2015 SKCA 141) and associated cases and scholarship, endorsed the trial judge's ruling not to order the requested report, stating that he had the information he needed because he was to take judicial notice of "broad systemic and background factors affecting Aboriginal people generally" as these provide the necessary context. Any individualized information

he needed could be obtained in a variety of ways, stating that the emphasis was to lie on "substance not formâ€¦ content not packaging." The appeal court reviewed the arguments of M.G. as to what further information would have been gained by the trial judge by way of a Gladue Report, and agreed with him that some questions might have no answer, or the information sought would be unhelpful to his deliberations. As an example, the appeal court asked how it would assist to know more about M.G.'s work history when he was facing a lengthy penitentiary term. In the final analysis, the court found no fault with the trial judge, who accepted that M.G.'s "dystopian childhood" did reduce his moral culpability but not to such an extent as to displace other sentencing principles and goals such as deterrence, denunciation, and general protection of the public achieved by removing M.G. from society.

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R v L.T.N., 2021 SKCA 73

Richards Schwann Kalmakoff, May 6, 2021 (CA21073)

Appeal - Criminal Law - Sentencing - Aboriginal Youth - Gladue Factors

The youth (L.T.N.) appealed his sentence of 12 years' incarceration in a penitentiary for offences contrary to ss. 244(1) and 244.2(1)(a) of the Criminal Code. The facts of the offences were not disputed. These revealed that L.T.N. discharged a .22 calibre rifle during a three-day spree. He fired through a living room window of a residence where a person was sitting; fired two bullets through windows at a McDonald's restaurant in the early morning hours; discharged three shots at an employee outside a Pizza Hut restaurant, striking her twice, once in a major artery of her thigh, causing serious blood loss; and shot at a person outside the same McDonald's, the bullet hitting him in the buttocks and passing through his scrotum. The firearm used in these shootings was found by city workers in a parking lot next to the McDonald's, along with a cache of firearms, a handmade silencer and .22 calibre ammunition. In a warned statement, L.T.N. admitted to being a gang member and the "ringleader" of those involved in the offences, that he had control of the weapons horde and that he used the silencer and the cover of darkness to facilitate the commission of the offences. He said the offences were directed at a rival gang member and a person believed to be a witness to his criminal activity. The sentencing judge had before her various reports and information about L.T.N.'s personal background. At the time of the offences, he was almost 17 years of age. He was an Aboriginal youth whose personal background consisted of a litany of neglect and abuse of all kinds from infancy, including having his leg broken and a bowel perforated by a metal pipe wielded by his stepfather when he was 12 months of age. He

was taken from the custody of his mother and placed in 25 different foster homes, from which he routinely ran. He had achieved only a Grade 9 in school. He was diagnosed with partial Fetal Alcohol Spectrum Disorder and Auditory Processing Disorder. He had a history of mental illness, including depression and self-harming by lacerating himself and swallowing objects, and placing objects in his eyes. He had attempted suicide by hanging. Though his biological father had very little contact with him, he had introduced him to the gang life. Each offence with which he was charged required at a minimum four years of incarceration. The sentencing judge was required by s 718.2(e) of the Criminal Code, Gladue and Ipeelee to consider for all offenders but with particular attention to the circumstances of Aboriginal offenders "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community." Because he was a youth, and the Crown sought to sentence him as an adult, she was required to determine under s. 72 of the Youth Criminal Justice Act (YCJA) whether the presumption of diminished moral blameworthiness had been rebutted and whether a youth sentence would hold L.T.N. accountable for his crimes. Also, as she was sentencing L.T.N. for a series of similar offences against separate individuals, she was required to consider whether to sentence L.T.N. consecutively for each offence and whether and how to apply the totality principle. L.T.N. appealed to the Court of Appeal, asking that the sentence of 12 years be reduced because, first, the sentencing judge erred in failing to give due consideration to s 718.2(e) and adequate weight to the Gladue factors relevant to the case, and secondly, because the sentencing judge erred in imposing a sentence that which was demonstrably unfit.

HELD: The appeal court dismissed the appeal. As to the standard of appeal, in accordance with Friesen, Lacasse and Suter (2018 SCC 34), the appeal court stated that absent an error of law, a sentence will not to be overturned for an error in principle unless the sentencing judge exercised her discretion unreasonably. The sentencing judge's numerous decisions involve the balancing and weighing of many factors, and therefore require that the appellate judge apply a high degree of discretion throughout her analysis, and the reasonableness standard maintains the need for deference to her role. An error in principle must also have had an impact on the sentence. To overturn a sentence on the ground that it is demonstrably unfit, the appellant faces a very high hurdle, one which has been described in the case law as requiring that the sentence be "clearly unreasonable," "clearly or manifestly excessive" or represents a "substantial and marked departure" from a just and fair sentence. The standard of reasonableness in this case was further focussed by the appeal court on a determination of whether the sentencing judge adequately kept at the forefront of her mind throughout the sentencing process the particular circumstances of L.T.N. as an Aboriginal offender and, having given this due consideration, whether she fashioned a sentence which took into account all applicable goals and principles of sentencing, with proportionately being central to that process. The appeal court ruled that her decisions throughout the sentencing process demonstrated that she always kept in mind the personal characteristics of L.T.N. and she actively applied them to her analysis. For instance, in considering s. 72 of the YCJA and whether the presumption of diminished moral blameworthiness had been rebutted, she weighed

L.T.N.'s unfortunate background against the deplorable facts of the offending behaviour, including the harm done to the victims and the community, and noted that his ability to carefully plan and execute the crimes was unaffected by that background. L.T.N. argued that the sentencing judge no longer applied the Gladue factors once she had decided to impose a penitentiary term. The appeal court demonstrated that such was not the case, that she applied Gladue factors as best she could, she was constrained by the minimum sentence provisions, and that she properly applied the restraint and totality principles with L.T.N.'s personal characteristics in mind, finding rightfully that L.T.N.'s sentence should be imposed consecutively. She was satisfied that his moral blameworthiness was diminished and that was to be reflected through the restraint and totality principles, by sentencing LT.N. to the minimum four-year sentence for the two s. 244(1) offences to be served concurrently and a consecutive sentence of five years for the two s. 244.2(1)(a) offences, for a total sentence of 14 years. She found that for L.T.N., 14 years would be too be too harsh and crushing, and thus reduced it to 12 years. The appeal court concluded that as the proportionality principle along with the subordinate sentencing principles and Gladue factors had been carefully considered by the sentencing judge, her sentence was reasonable, and as such could not be demonstrated to be unfit.

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Regina Bypass Design Builders v Supreme Steel LP, 2021 SKCA 82

Ottenbreit Barrington-Foote Kalmakoff, May 26, 2021 (CA21082)

Statutes - Interpretation - Builders' Lien Act, Section 5(2)

The appellant, Regina Bypass Design Builders (RBDB), appealed the decision of a Queen's Bench chambers judge that dismissed its application for a declaration that The Builders' Lien Act (BLA) did not apply to any work performed by or on behalf of it for the Regina Bypass project (see: 2019 SKQB 256). The Crown had entered into a contract with the SGTP Highway Bypass Limited Partnership (SGTP) for the design and construction of the project (the prime contract). SGTP entered into a contract with RBDB whereby it passed to RBDB all the obligations it undertook in the prime contract. RBDB retained Supreme Steel (Supreme) to provide and install the steel girders for the project's bridges. Supreme performed its work under the subcontract and, in October 2018, served RBDB with a written notice of lien in relation to its work. RBDB took the position that the BLA did not apply to its subcontract with Supreme because the nature of the project fell within the scope of s. 5(2) of the BLA, and when Supreme refused its demand to vacate the lien, RBDB made its application. The chambers judge found that the exemptions provisions in s. 5(2) of BLA apply only to

those parties who contract directly with the Crown and, as such, do not limit the application of the BLA as between a non-government contractor and its subcontractors, even where the work performed is in relation to a public improvement or government-owned highway project. RBDB's grounds of appeal were that the chambers judge erred by: 1) failing to interpret s. 5(2) of the BLA in its entire context, in its grammatical and ordinary sense and in a manner that was harmonious with its scheme and the intent of the legislature; 2) interpreting s. 5(2)(a) of the BLA as being limited to contracts between the Crown and a contractor, as opposed to any situation where services or materials are provided in connection with a contract entered into under the BLA as the section requires; and 3) interpreting s. 5(2)(b) to mean an extension of the exemption in s. 5(2)(a) to "other Crown entities" such as municipal corporations, as opposed to any situation where service or materials are provided in connection with the construction or improvement of a street or highway owned by the Crown as the section requires. HELD: The appeal was dismissed. In the majority judgment, the court found that the standard of review of correctness applied to questions of statutory interpretation and the proper approach to that interpretation involved the modern principle articulated in Rizzo and s. 2-10 of The Legislation Act. After determining that the grammatical and ordinary sense of the words in s. 5 could bear more than one interpretation, it reviewed: the context and purpose of the BLA and how the provision comports with the scheme and object of the legislation; the legislative intent and history of the section; the jurisprudence considering the provision; and the presumptions in conventions of legislative drafting. It concluded that the chambers judge was correct to determine that s. 5(2) of the BLA renders it applicable only to the Crown and those parties who contract directly with it, in the prescribed circumstances set out in s. 5(2)(a) or (b). The text can be reasonably read through such an interpretation and it is a plausible meaning that is harmonious with the scheme and purpose of the legislation. The judge gave s. 5(2) a broad and generous interpretation that preserves the benefit of the exemption for the Crown in appropriate circumstances while enhancing business efficacy and retaining certain benefits that the BLA provides for contractors and subcontractors further down the construction pyramid. In his dissenting opinion, Ottenbreit J.A. held that he would allow the appeal. He found that s. 5(2) of the BLA applies to the Crown as well as to all contractors in the construction pyramid that supply services and materials in connection with the infrastructure projects described in s. 5(2)(a) and (b). He found that there was no basis to depart from the ordinary meaning of the text after conducting his own review of: the scheme and object of the BLA; the legislative history; and the jurisprudence related to s. 5(2). The legislature intended to carve out the exemptions identified in s. 5(2) as well as in other provisions in the BLA. Construing the ordinary meaning of the section should not be subordinated to consideration of the objects and purposes of the BLA, as Supreme suggested. The chambers judge erred in not granting a declaration that the BLA did not apply in relation to any services or materials provided by or on behalf of RBDB regarding the project or, alternatively, that it did not apply in relation to any services or materials supplied by Supreme in relation to its subcontract with RBDB. In interpreting s. 5(2) as being restricted only to the Crown and a prime contractor but not to any other person or company providing services and materials to a public project that fit

into the categories, the judge committed multiple errors. For example, he did not interpret s. 5(2)(a) and (b) as creating two distinct exemptions to the builders' lien process and failed to analyze what was meant by "in connection with." He erred by using the purpose-driven interpretive approach advocated by Supreme that the exemption must give way to the beneficial main object of the BLA.

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Blake v Smith, 2021 SKQB 95

Keene, April 5, 2021 (QB21111)

Family Law - Interim Spousal Support
Family Law - Child Support - Retroactive

The petitioner brought an interim application requesting imputation of income to the respondent, orders for current and retroactive spousal support and current and retroactive child support. The respondent then applied for an order imputing income to the petitioner and for her to provide further financial income information relating to her new spouse. The parties cohabited from 2000 to 2016 and their one child was born in 2001. Before their separation, they lived together on the ranch where the respondent continued to reside and which he continued to operate. During the relationship, the petitioner helped with the ranch but had the primary responsibility for child care. She acquired expertise in horse-breeding during the marriage but because of financial need, sold her horses for $248,000 over the three years following separation. In 2018, the petitioner issued her petition for spousal and child support and division of family property and served it upon the respondent with a notice to file and disclose income. The respondent filed his counter-petition putting into issue all of the petitioner's claims. They each filed their financial and property statements wherein the petitioner's and respondent's income for 2018 were shown as $10,600 and $13,560 respectively. The petitioner deposed in the affidavit filed in support of her application that her annual income was currently $5,000. She said that after the separation in 2016, the child, then aged 15, lived with her but had also resided with the respondent about a third of the time, and the respondent refused to provide child support. For his part, the respondent contended his income should be set at $13,000 per annum and disputed the petitioner's version of where their son had lived with her and for how long. He further argued that the court did not have jurisdiction to adjudicate the claim for retroactive child support. The petitioner had not served her application for retroactive child support on him when their child was still a child within the meaning of The Family Maintenance Act. As her 2018 service of the notice to disclose was made in the context of an original

application, the "Henry exception" was not applicable.
HELD: The court found that it could not make a decision regarding the petitioner's claims for spousal support on either basis nor for retroactive child support in the context of her interim application because of the lack of, or conflicting, evidence. The matter should proceed to pre-trial conference or trial. It adjourned sine die the respondent's application to obtain financial disclosure from the petitioner to allow her time to reconsider her decision not to provide same. Regarding the claims for imputation of income, it noted the problems associated with establishing farm income but it placed the respondent's income at $49,000 and the petitioner's at $24,000. It found that it had jurisdiction to deal with the petitioner's claim for retroactive child support even though this was an original and not a variation application. The claim was made, in effect, in September 2018 when the petition and claim for child support were issued and served on the respondent with notice to file income information and notice to disclose. At that time, their child was still a child for the purposes of child support. Since the service of a notice to disclose financial information is functionally equivalent to service of an application for child support, the necessary triggering event occurred while their child was still a dependent child by applicable statutory definition. The issue remaining to be determined at pre-trial or trial was where the child resided after the separation.

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R v Sewap, 2021 SKQB 103

Scherman, April 5, 2021 (QB21112)

Criminal Law - Reasonable Doubt
Criminal Law - Evidence - Circumstantial Evidence
Criminal Law - Evidence - Identification

The trial judge was required to determine whether the Crown had proven beyond a reasonable doubt the guilt of the accused, M.S., who was charged with the offence of aggravated assault against a fellow inmate at the Saskatchewan Penitentiary. The trial judge determined the admissibility of video tape and recognition identification evidence and admitted it. He then weighed that evidence to decide whether the Crown had proven beyond a reasonable doubt that M.S. was one of the persons who assaulted the victim. There was no issue at trial that the victim had been severely beaten on the stage of the penitentiary gymnasium by four inmates in a planned and coordinated attack on him involving numerous other inmates.
HELD: The trial judge first ruled on a voir dire as to the admissibility of video tape footage of areas of the

penitentiary relevant to his determination, which included a gymnasium and stage, corridors leading to the gym, and other areas adjacent to it. The main issue on admissibility of the video evidence was whether the footage was of sufficient clarity and quality to be admitted. He ruled that it was capable of being considered in the trial proper, and any deficiencies with quality and clarity went to the weight of the evidence. In his analysis, he relied on R v Nikolovski, [1996] 3 SCR 1197 (Nikolovski), which assisted him with his admissibility ruling and also with how he was to direct himself on the use of such evidence. As to the matter of recognition identification evidence, which consisted of the evidence of a corrections officer who knew M.S. well because he dealt with him habitually for over a year during his rounds and other duties, the trial judge ruled that for that reason it was reliable and was relevant because it assisted him in identifying M.S. in the video tape footage. He was assisted in his voir dire analysis with respect to admissibility and use at trial of the recognition evidence by R v Leaney, [1989] 2 SCR 393; R v Knife, 2011 SKQB 443; R v Wilson, 2016 SKQB 311; R v Tatum, 2020 SKQB 61 and R v Field, 2018 BCCA 253. After dealing with the admissibility of the evidence, the trial judge considered whether this evidence was direct or circumstantial, because if direct, the only question was whether it was true and reliable, but if circumstantial, then he was required to decide whether the only reasonable inference to be drawn from it was the one proffered by the prosecution. The trial judge ruled, again referring to Nikolovski, that the video evidence was real evidence and therefore direct. To a certain extent, it was also testimonial evidence and therefore worthy of persuasive value in and of itself, and the evidence of the security guard was direct as it pertained to the identification of M.S. in the video footage. The evidence, however, was also circumstantial because the video tape footage did not show M.S. assaulting the victim and the corrections officer was unable to identify M.S. assaulting the victim. After a review of the foundational cases, R v Lifchus, [1997] 3 SCR 320, on the meaning of reasonable doubt generally, and R v Villaroman, 2016 SCC 33, on reasonable doubt as it applies to circumstantial evidence, the trial judge ruled that it would be necessary for him to be able to draw an inference from the evidence which excluded any other reasonable innocent explanation, that M.S. had participated in the assault, in order to find him guilty beyond a reasonable doubt. Upon conducting a detailed examination of the video tape footage in conjunction with the recognition evidence of the corrections officer, which allowed him to follow the movements of M.S. onto the stage and the manner in which his movements implicated him in the planned and coordinated attack on the victim through his involvement in events proceeding, during and after the assault, the trial judge was satisfied that the only reasonable inference he could draw was that he was a participant in the assault, and therefore guilty beyond a reasonable doubt.

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Alliance Seed Corporation v Fournier, 2021 SKQB 96

Robertson, April 6, 2021 (QB21087)

Civil Procedure - Contempt - Warrant for Committal - Arrest

The plaintiff obtained an order of contempt in March 2021 against the defendant, Fournier, after he failed to provide documents and attend questioning in April 2019. The order provided that the defendant was to appear in court, and subject to release from custody only on payment of $10,000. The warrant of committal then issued. It set the date for the defendant to appear in court and directed peace officers in Saskatchewan to arrest him and convey him to a Provincial Correctional Centre to be imprisoned for seven days or released if he paid the $10,000. The warrant and order were served on the defendant but he did not attend court. He had not been arrested because the RCMP declined to do so. The plaintiff applied to the court for an order to deal with the defendant's continuing contempt.
HELD: The court authorized the issuance of a new warrant of committal for civil contempt authorizing the arrest of the defendant under Queen's Bench rule 11-27 and for him to be brought to court. Due to the defendant's residence outside of Regina, his arrest would be postponed until pandemic travel restrictions into Regina were lifted. It specified that the warrant should be executed by the RCMP. As such warrants are rarely issued, and as the RCMP detachment closest to the defendant's residence had been unsure as to how to proceed, the court wished to allay any of its concerns. The RCMP is the provincial police force in Saskatchewan and therefore the appropriate service to execute the warrant. Once arrested, the police may transport the defendant to the Regina Correctional Centre and he may be held there until arrangements are made for his appearance in court.

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Farm Credit Canada v Hamdorf, 2021 SKQB 97

Tochor, April 6, 2021 (QB21088)

Mortgage - Foreclosure - Judicial Sale - Order Nisi - Confirmation of Sale

The plaintiff, Farm Credit Canada (FCC), applied for an order confirming the sale of farmlands. It had obtained an order nisi for sale of the lands in October 2020, to which the defendant mortgagors, B. and D. Hamdorf, had consented. Under that order, they were given 90 days to redeem the mortgaged lands. In March 2021, they had consented to an order extending and amending the order nisi for sale. Pursuant to these orders, a selling officer was authorized to market and sell all the mortgaged lands. After reviewing the bids, the officer

accepted the highest bid. The proposed purchase price considerably exceeded the upset price. At the commencement of this application for confirmation, the defendants opposed it. Their primary objection was that the selling officer did not need to sell all the mortgaged lands to pay off the indebtedness. He should not have sold the land as a block but should have taken into account their interests and refrained from selling their home quarter. Other defendants, T. Hamdorf and C. Zinn, the son and daughter-in-law of the aforementioned defendants, took a similar position because they owned one of the quarter sections that comprised the mortgaged lands identified in the order nisi, and contended there was no need for the officer to include their parcel in the sale given the overall value obtained from the purchase of the other parcels. FCC submitted that the selling officer was obliged by the order nisi to sell the lands in strict compliance with its terms. In the tender process, it would be impossible for the officer to know whether offers would exceed the upset price. Further, any objections to the order nisi should have been made when the order was contemplated, not after the officer had accepted an offer from a third party. Neither of the objecting parties suggested that any terms of the orders nisi had been breached nor that any impropriety had occurred in the sale process.
HELD: The application was granted. The court found its discretion in this kind of application was governed by the terms of the order nisi and the general law. The order nisi directed the officer to sell "all the mortgaged lands" and in the absence of any irregularity, it was obliged to confirm the order for sale. The jurisprudence indicates the importance of protecting the integrity of the sale or tender process and the prospective purchaser's interests.

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R v Clarke, 2021 SKQB 99

Popescul, April 6, 2021 (QB21098)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Summary Conviction Appeal - Appeal Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(a), Section 10(b), Section 24(2)

The Crown appealed a ruling made in a Charter voir dire during the trial of offences contrary to ss 253(1)(a) and 253(1)(b) of the Criminal Code, which had resulted in the exclusion of essential evidence from the Crown case and acquittals being entered. In the same voir dire, the trial judge upheld the validity of a search warrant and production order following a Garofoli hearing (see: R v Garofoli, [1990] 2 SCR 1421). The Crown advanced grounds of appeal to the effect that the trial judge erred in principle by ruling that the respondent's

rights under ss 8, 10(a) and 10(b) had been violated, and if there were Charter breaches, the trial judge erred in principle by excluding that evidence under s 24(2). The respondent was operating a snowmobile at a high rate of speed and collided with a parked pick-up truck, propelling him and the snowmobile into the air. The respondent fell off and, upon landing, suffering serious head injuries. He was transported to the local hospital at Southend for assessment and treatment and was met there by a peace officer, who asked a nurse to take a blood sample from him, though he had no warrant or any other legal authority to have one taken. The nurse took a sample but then destroyed it as she had second thoughts about the legality of having taken it. Not having the sample, the peace officer then decided to make a blood demand, and without permission went into the trauma room where the nurses were treating the respondent and started the process of making the formal demand for a sample of blood. The respondent appeared to be able to understand what the peace officer was saying. Before the blood demand process was concluded, the respondent was taken from the trauma room and transported by air ambulance to La Ronge and then to the Royal University Hospital (RUH) in Saskatoon. On the same day as the accident, a blood sample was taken at the RUH for legitimate medical purposes. Two days later, this blood sample was seized by police on the strength of a search warrant, and later, the hospital records showing the blood alcohol level of the respondent at the time the sample was taken were seized on the authority of a production order. The blood sample was sent to a qualified toxicologist with the RCMP lab for the purpose of analyzing the blood alcohol level of the respondent at the time of the collision. The toxicologist's report indicated that the respondent had a blood alcohol level of between 388 and 517 milligrams of alcohol in 100 milliliters of blood at the time of the accident. In the Charter voir dire, the trial judge found that the request by the peace officer that the nurse take a blood sample without a warrant was a serious breach of his right to be free from unreasonable search and seizure, and his interference with the respondent in the trauma room was a breach of his privacy rights. She also ruled that as the respondent was detained, he had a right to counsel and a right to know why he was being detained. She then conducted a s 24(2) analysis and determined that all evidence of blood alcohol content including the blood sample, hospital records and the toxicologist report should be excluded from the trial. Following a review of R v Jobb, 2021 SKQB 4, R v Helm, 2011 SKQB 32 and R v Mahamud, 2020 SKCA 21, the summary appeal court judge set out the standards of review of Charter rulings: findings of fact are not to be set aside if they are reasonably capable of supporting the trial judge's conclusions; the interpretation and application of the evidence to the Charter is a question of law to be reviewed on a correctness standard; and s 24(2) rulings are to be reviewed on a deferential standard, but subject to being overturned for reasons which include errors in principle.
HELD: The appeal was allowed and a new trial ordered on both counts. The appeal was decided on an interpretation of the phrase "evidence was obtained in a manner" contained in s 24(2) and its interpretation in the case law, including R v Moyles, 2019 SKCA 72 (Moyles), which adopted the reasoning in R v Pino, 2016 ONCA 389 (Pino). If a judge concludes that evidence was obtained in a manner which infringed or denied a person's Charter rights, she is to exclude that evidence if its admission would bring the administration of

justice into disrepute. In Pino, as considered in Moyles, evidence is not obtained in a manner which infringes or denies a person's Charter rights unless the evidence, on a generous approach consistent with the purpose of 24(2) is "connected to the breach either causally, temporally or contextually", and to determine if it is so connected, the trial judge must consider the entire chain of events which led to the breach, whether the evidence and the Charter breach were part of the same transaction or course of conduct in a manner which is not too tenuous or remote. On this appeal, the summary appeal court judge determined that there was no connection between the events at the Southend Hospital and the evidence obtained at the RUH pursuant to judicial authorization. The evidence obtained and the actions of the peace officer at Southend had no relation to each other, whether temporal, causal, or contextual, and the chain of events was severed by the obtaining of the search warrant and the production order for the blood sample and the hospital records.

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C.E. v T.K., 2021 SKQB 108

Richmond, April 9, 2021 (QB21113)

Family Law - Custody and Access - Interim
Family Law - Custody and Access - Mobility
Statutes - Interpretation - Children's Law Act, 2020

The parties requested an interim determination of the parenting arrangement for their three-year-old daughter. After they had initially brought separate actions and made applications respecting the care and parenting of their child, a chambers judge directed a viva voce hearing because of the volume and contradictory nature of the evidence. At that hearing, the petitioner, C.E., the birth mother of the child, requested sole custody and the court's permission for her to relocate with the child to Ontario. The respondent, T.K., C.E.'s common law spouse, wanted to share parenting with C.E. The parties had met online and the petitioner, who was then employed as a naturopathic doctor in Ontario, moved to live with the respondent at her acreage in White City. At some point the respondent lost her full-time employment and the parties decided to work together to establish a naturopathic clinic and business in White City while the respondent continued to care for the acreage and some animals. After the petitioner received artificial insemination, the child was born in July 2018. The parties shared child care responsibilities for the child following her birth but as the petitioner was the primary economic support for the family, she returned to the clinic and the respondent looked after the child during the days. The parties' relationship deteriorated and each of them blamed the other. In her

testimony, the petitioner described the respondent as controlling, angry and constantly so critical of her that she was often emotionally distraught. The respondent denied her the use of her cell phone and attempted to prevent her from staying in touch with her family in Ontario. The petitioner also alleged that the respondent had pulled her hair, punched her and threatened her with a knife. The respondent responded by saying that the petitioner had hit her too and described the petitioner's behaviour as being manipulative. She accused C.E. of lying and being dishonest and claimed such conduct provoked her anger. On the day they eventually separated, the petitioner alleged that T.K. pushed her, accidentally knocked down the child, and then locked her out of the house. The petitioner provided evidence of a job offer she received in Waterloo that would allow her to make $300,000 per annum and she would not have any managerial duties that consumed her time in running her clinic. Her business in White City was suffering and she could not meet her overhead. If she was allowed to move to Ontario, her brother and his wife would be able to help her with child care, and with her employment income she would be able and willing to pay for the respondent's travel costs to exercise her right to have regular access.
HELD: The petitioner's interim application was allowed but her request for sole custody was denied. The court ordered that she could move with the child to Ontario. It found that it was in the best interests of the child in this case to permit the relocation. Under s. 16(1) of The Children's Law Act, 2020 (CLA 2020), the burden imposed upon the person proposing the move under s. 16(1) was not applicable here as it was an interim application and the burden was consequently shared by both parties. The petitioner had provided compelling evidence to support her application. Although each party was capable of parenting, the status quo here was not determinative. After reviewing each of the factors set out in s. 10 of the CLA 2020 to determine the best interests of the child, it was satisfied that there was family violence as defined in s. 10(j) and a pattern of coercive and controlling behavior on the respondent's part toward the petitioner had been demonstrated. Her conduct had an impact on the child in that the respondent prevented her from knowing her extended biological family. However, it was not convinced that the respondent should be disenfranchised from sharing decision-making responsibility with the petitioner regarding the child. Under the new provisions in the CLA 2020, the respondent is recognized as a parent.

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Yashcheshen v Law Society of Saskatchewan, 2021 SKQB 110

Tochor, April 14, 2021 (QB21104)

Civil Procedure - Vexatious Litigant - Application for Leave to Commence Action
Civil Procedure - Queen's Bench Rules, Rule 11-28

The self-represented plaintiff applied for leave to commence an action against the defendants for their failure to accommodate her pursuit of a licence to practice law. Her application was required because she had been declared a vexatious litigant pursuant to Queen's Bench rule 11-28 (see: 2020 SKQB 160).
HELD: The application was dismissed. Because neither the Queen's Bench Rules nor any provincial legislation identifies a test to be used in this type of application, the court followed and applied the test set out in s. 40(3) of the Federal Courts Act that it had employed in Yashcheshen v Allergan (2021 SKQB 33). It found that the applicant had not established the proposed proceedings were not an abuse of process or that there were reasonable grounds for them. The applicant's current claims in her proposed action included discrimination and breach of The Saskatchewan Human Rights Code, negligence and breach of fiduciary duty. She was attempting to relitigate the same issues that had been disposed of in previous judgments (see: 2019 SKCA 67, leave to appeal to the Supreme Court denied; and 2020 SKQB 2020 CanLII 97854; 2020 SKQB 209; and 2021 SKQB 33).

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Royal Bank of Canada v Gordon, 2021 SKQB 111

Danyliuk, April 14, 2021 (QB21114)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 9

The applicant, the Royal Bank of Canada, applied pursuant to s. 11 of The Saskatchewan Farm Security Act (SFSA) for an order that s. 9(1)(d) did not apply to the mortgage granted by respondents in favour of the applicant. The respondents granted the mortgage in 2011 in the amount of $550,000 and secured it against a quarter section of farm land, their homestead. They fell into arrears and had not made a payment since March 2019. As at March 2021, they owed $360,845. The mortgage matured in July 2020 and was not renewed. The applicant served them with the required statutory notices and the financial review and mediation required by the SFSA occurred. The matter was not resolved and the Farm Land Security Board's report was filed in March 2021. The report described the respondents' difficulties as emanating from problems with seeding equipment and indicated if their lawsuit against the manufacturer were successful, there might be a reasonable possibility of them meeting the mortgage obligations. Further, the board noted that the respondents began exploring options for refinancing in 2020 after being served with the notices.

HELD: The application was granted. The court ordered that s. 9(1)(d) of the SFSA did not apply to the mortgage. It found that the applicant had met the onus of proving that the respondents did not have a reasonable possibility of meeting their obligations under the mortgage nor had they made a sincere and reasonable effort to do so. It first had regard for the board's report as required by the SFSA and held that the board had clearly and intentionally exceeded its jurisdiction. It had not answered the question of whether, on the facts as they presently existed, the respondent had a reasonable possibility of meeting their obligations. It enumerated the flaws in the report, such as its authors raising the possibility of re-amortizing the debt, whereas the total amount of money owing under the mortgage was due as it had matured. The respondents had not made a sincere or reasonable effort to pay as they had not made a payment for over 24 months. It had no concerns that granting the order to the applicant would violate the equitable considerations required by s. 19 of the SFSA. The respondents had not presented a plan nor made a payment or expressed any intention of doing so.

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Ghiasi v Huntley, 2021 SKQB 112

Robertson, April 14, 2021 (QB21105)

Civil Procedure - Interlocutory Injunction
Condominiums - Parking Stall Dispute

The applicant, P.G., and the defendant, D.H., were purchasers of adjacent condominium properties. Pursuant to the Condominium Act, each was entitled to one parking stall for his designated use. At the time of the transfer of title of the condominium to D.H., the transferring entity gave title to three parking stalls to D.H. in error. Ownership of parking stalls is registered under The Land Titles Act, and so ownership of the erroneously transferred parking lots was shown on title as belonging to D.H. The disputed parking stall was located within a locked and gated parking compound that was opened by a remote control. P.G. rented his condominium unit and his tenants used the disputed parking stall and possessed the remote control for two years. When they moved out, D.H. obtained the remote without the consent of P.A and refused to give it back to him. As a result, P.A. had no access to the disputed parking lot. P.A. brought an action and sought to have the remote control returned to him pending conclusion of the action.
HELD: The application was allowed. In applying the five requirements set out in Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership, 2011 SKCA 120, for the granting of an

injunction, these being 1) whether the cause of action had merit; 2) whether irreparable harm was likely to the applicant if the injunction were not granted; 3) whether the balance of convenience favoured the applicant; 4) whether the overall equities and justice required the order; and 5) whether the applicant has given a legally enforceable undertaking to the defendant to pay damages which might be sustained should the plaintiff fail in his action. The chambers judge was satisfied that the applicant had proven all five requirements. D.H. was obviously attempting to take advantage of the error on title, which would likely not be allowed as a defence at trial. The Condominium Act legislated one parking stall per condominium and The Land Titles Act permitted rectification of title in circumstances where title of a bona fide purchaser for value would not be affected, as in this case. D.H. also availed himself of extra-judicial measures by, in effect, wrongly converting the remote control. P.G. had acted in a fair and reasonable manner throughout these events. He would be deprived of the use of a parking stall pending the conclusion of the action. Being required to park on the street in a commercial area of the city would be highly inconvenient, and not quantifiable in damages. D.H.'s actions were not such that it could be said the overall equities and justice favoured his position.

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Nelson v Wagner, 2021 SKQB 113

Scherman, April 16, 2021 (QB21107)

Wills and Estates - Solicitor-Client Privilege
Civil Procedure - Queen's Bench Rules, Rule 5-15

This matter was an application by originating application for an order to commence proceedings to prove a will in solemn form for undue influence and to set aside a transfer of land for the same reason. The applicant sought disclosure of the files of the solicitor who prepared the will and the land transfer documents. Counsel for the solicitor opposed disclosure of the documents because of solicitor-client privilege, arguing that such privilege could not be lifted until the court had ordered the action alleging undue influence to proceed.
HELD: The Court ordered that the solicitor's files be disclosed to the applicant, referring to his decision in Choquette v Viczko, 2017 SKQB 191 following Geffen v Goodman Estate, [1991] 2 SCR 353 (Geffen). In Geffen, the Supreme Court adopted a principled approach to the lifting of solicitor-client privilege in situations where a deceased person, whether by will or prior to his or her death, has settled property on persons and the need arises to determine to whom the property belongs by ascertaining the true intentions of the testator or settlor. In such circumstances, justice requires that solicitor-client privilege be lifted for the purpose of

assisting in furthering the wishes of the deceased person. The chambers judge agreed with counsel for the solicitor that a threshold requirement must be satisfied before such an order is made so as to prevent the bringing of groundless actions for the sole purpose of gaining possession of documents held by lawyers. He was satisfied that in this case, the material filed showed a sufficient basis in support of the allegation of undue influence that solicitor-client privilege ought to be lifted for purposes of the application and prior to the order to commence proceedings, and also reasoned that such disclosure would assist counsel in settling the dispute or most efficiently conducting the proceedings.

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Wesolowski v Spicer, 2021 SKQB 115

Mills, April 16, 2021 (QB21115)

Real Property - Partition and Sale - Proceeds of Sale - Division

As joint tenants, the applicants owned an undivided one-half interest in two adjacent properties and the respondent owned the other one-half undivided interest. After the parties agreed to the sale of the properties under an agreement for sale and the proceeds of sale ($545,000) were paid into court, they applied for an order directing how those proceeds were to be divided. The applicants had first brought an originating application in 2018 for sale of the properties under The Partition Act which was affected by the parties then agreeing to the sale. In this proceeding, the applicants, in particular Fred Wesolowski (F.W.), requested a division greater than 50 percent of the sale price to him based on the equities of the situation under The Partition Act. Among his claims were for: i) compensation in the amount of $30,247 for securing a purchaser for the property; ii) two-thirds of the proceeds of the sale because he had originally purchased one of the properties that possessed more frontage than the other and hence had greater value and because he had made the mortgage payments for a period of time as well as paying for renovations; and iii) one half of the difference between the original offer of $650,000 and the eventual sale price of $545,000 because the respondent had not agreed to the original offer.
HELD: The court ordered the net sale proceeds would be divided equally between the applicants and the respondent. It clarified first that it was not necessary for the applicants to bring another originating application regarding the division of the proceeds as the court could decide that issue simply by allowing a notice of application to permit an amendment under Queen's Bench rule 3-72 to their original application for an order for sale under s. 4 of the Act. F.W. had not met the onus of establishing on a balance of probabilities his

entitlement to a greater share to displace the presumption of division in accordance with his proportionate share. It denied F.W.'s claims in large part because he had not provided sufficient evidence to allow it to conclude it would be equitable for him to receiver greater than one-half under the equitable considerations set out in s. 5 of the Act. It denied his claim to: i) compensation for finding the purchaser in the absence of any agreement or evidence that the parties had discussed payment to any of them for efforts they might expend in selling the property; ii) to two-thirds of the proceeds based upon his original purchase because it was contrary to the facts and no evidence had been provided to support the alleged expenditures; and iii) the difference between the sale prices because the initial offer was conditional and there was legal uncertainty whether the predecessor owner of the respondent's interest had capacity to agree to the sale.

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Rafan v Rauf, 2021 SKQB 117

Brown, April 20, 2021 (QB21116)

Civil Procedure - Family Law Proceedings - Costs

After a trial was held regarding the division of family property and the amount of child support owed by the petitioner father, the parties requested that costs be left to be determined, if sought (see: 2020 SKQB 107). They then each sought an award of costs. The petitioner argued that as he had obtained a more favourable judgment regarding family property and a finding that he had overpaid child support, he was entitled to costs. The respondent argued that the petitioner had made the matter more complex, lengthy, contentious and costly by pursuing his belief regarding the profitability of her child-care business in the context of the valuation of family property. Regarding pre-trial applications, the respondent had initiated one related to whether the petitioner's claim for income reduction was justified. He had failed to provide an explanation for his reasons for relocating to Nova Scotia, which had caused his income reduction. The second application in 2020 involved the petitioner subpoenaing the principal of the school at which the parties' child attended. The issues were whether costs should be awarded to one of the parties given: 1) the outcome of the trial; 2) the issues addressed during trial; and 3) various pre-trial applications in which costs were to be in the cause or left to the trial judge.
HELD: The petitioner was entitled to costs of $2,000. The court reviewed the jurisprudence associated with costs in family law proceedings as prescribed specifically by Queen's Bench rule 15-25 and the general rule found in rule 11-1. It found with respect to costs that: 1) the petitioner was successful at trial in the two noted

aspects and would be awarded $2,500; 2) both parties had complicated the issues at trial; and 3) $500 should be deducted from the award to the petitioner for the 2018 pre-trial application. It made no order of costs in relation to the 2020 application in the particular circumstances. Setting off the cost of the two applications against each other would not be a fair and equitable exercise of discretion.

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Bearboy v Hardy, 2021 SKQB 118

Scherman, April 21, 2021 (QB21117)

Civil Procedure - Queen's Bench Rules, Rule 7-1, Determination of a Question
Statutes - Interpretation - Automobile Accident Insurance Act, Section 40.1, Section 104
Statutes - Interpretation - Automobile Accident Insurance (Benefits) Amendment Act, 2016, Section 41.16, Section 41.17, Section 92(7)

The plaintiffs commenced action against the defendants seeking economic loss and other damages arising from the death of Angelina Checkosis in an automobile rollover that occurred in August 2012, which they said was the sole fault of the defendant, Leslie Pete, who was operating his vehicle while intoxicated and who also died in the rollover. The administrator representing the plaintiff Checkosis' estate also sued in her own name as she had been a passenger in the vehicle and was injured. The defendants admitted that the accident was caused by the negligence of Pete without admitting any of the specific grounds of negligence pleaded in the statement of claim. The parties agreed that the following issue could be decided under Queen's Bench rule 7-1: "[d]oes s. 12 of The Fatal Accidents Act (FAA)... allow the [p]laintiff to bring an action for non-economic losses under The Automobile Accident Insurance Act (AAIA 1978)... against an impaired driver who dies without being charged or convicted of an impaired driving offence, and if not, do the 2016 amendments to [the AAIA] (AAIA 2016), effective November 30, 2016, apply retrospectively, so as to allow the plaintiff to bring an action for non-economic losses under [the AAIA 1978 and/or the FAA] against the driver?"
HELD: The court's answer to both questions was no. The defendants were awarded costs of $3,000. It reviewed the principles of statutory interpretation and applied them to the provisions of the AAIA 1978, and found regarding the first question that s. 40.1 was unambiguous and excluded any right of action stemming from bodily injuries arising out of an automobile accident that occurred on or after the date that Part III of the AAIA came into effect. In this case, the accident occurred after the coming-into-force of Part III. The exceptions to s. 40.1 provided in s. 104(2) (now repealed) that an action for damages to recover non-loss

against an insured if the loss was caused by a vehicle and as a result of the operation of it was convicted of an offence under ss. 253(a) or (b), 245(5) or 255(2) or (3) of the Criminal Code were also unambiguous in that a conviction was required, not simply impairment as the plaintiffs suggested. Regarding the second question, it found that the legislature did not intend the AAIA 2016 amendments in ss. 41.16 and 41.17, that now permit an action where a deceased operator under the influence of alcohol or drugs to the extent of being incapable of proper control of a vehicle, to apply retrospectively based on the transitional language of s. 92(7) of the AAIA 2016. Part IV of the AAIA 1978 as it existed prior to the date of the 2016 amendments did not include ss. 41.16 and 41.17. The transitional language of s. 92(7) expressed a very clear intention on the part of the legislature that the amendments made in 2016, including ss. 41.16 and 41.17, were prospective. As Pete was never convicted of one of the offences specified in s. 104(2)(a), the plaintiffs did not have a cause of action as permitted by s. 104. The Tariff of Costs did not have a specific item for Queen's Bench rule 7-1 applications. The court awarded costs of $3,000 to the defendants on the basis that such applications were comparable to summary judgment applications classified as column 2 in complexity.

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Pillar Capital Corp. v Swift River Farms Ltd., 2021 SKQB 119

Scherman, April 21, 2021 (QB21118)

Mortgage - Foreclosure - Judicial Sale - Order Nisi - Confirmation of Sale
Civil Procedure â€“ Queen's Bench Rules, Rule 10-13
Statutes - Interpretation - Land Titles Act, Section 18
Statutes - Interpretation - Queen's Bench Act, 1998

The plaintiff applied for an order confirming a sale of lands pursuant to an order nisi. The lands had been mortgaged by the defendants. The defendants also applied under Queen's Bench rule 10-13 for an order to open up a noting for default, granting them leave to file a statement of defence and setting aside the order nisi for sale. In addition, D.L., a lessee of a large portion of the mortgaged lands, requested and was granted leave to be added as a party to the proceedings with the consent of the other parties. The background to these applications began when the plaintiff brought an action for foreclosure of lands mortgaged to it by the defendant, Swift River Farms (SRF), in September 2020 after having obtained an order a month earlier that s. 9(1)(d) of The Saskatchewan Farm Security Act did not apply to the mortgage. In October 2020, it was granted an order nisi for judicial sale by real estate listing of the mortgaged lands. SRF and the other defendants had

been served with the statement of claim but did not file defences and were noted for default. They did not oppose the application for the order nisi but at the hearing, one of the defendant directors of SRF requested an extended redemption period because it intended to sell the property. The chambers judge fixed the redemption period at 120 days, ending on March 6, 2021. On October 17, 2020, SRF listed the lands for sale, describing them as vacant. No sale was effected and after the expiry of the redemption period, the lands were listed for sale pursuant to the order nisi, effective March 10 and an offer was accepted by the selling officer with all conditions removed by March 23, 2021. D.L. advised that on March 1, 2021, he entered into agricultural leases of the mortgaged lands with SRF, for a term that would end on December 31, 2021 or when the 2021 crop was harvested. He registered claims of miscellaneous interests based on the lease agreements to 19 parcels of the mortgaged lands. The selling officer was advised of the leases on March 11, 2021 and then D.L. learned that the lands were subject to foreclosure proceedings. A defendant director of SRF deposed that SRF did not know the selling officer had entered into an agreement for sale of the lands until March 23. The issues were: 1) whether the defendants' application to open up the noting for default, granting leave to file a statement of defence and setting aside the order nisi for sale, should be granted. SRF argued that it made the application as soon as possible in light of the fact that it had previously contractually agreed not to defend a foreclosure action in a forbearance agreement it made with the plaintiff. The plaintiff's position was the application should be dismissed. Queen's Bench rule 10-13 applies only to applications to set aside default judgments obtained by the administrative procedure of noting for default. This application was an improper collateral attack on the judgment of the court, and SRF should have pursued an appeal. SRF would have to be held to an enhanced test to demonstrate exceptional circumstances; 2) if not, should the plaintiff's application for an order confirming the sale of the mortgaged lands be granted; and 3) if yes, did the court have jurisdiction to determine whether the purchaser's title would be subject to the leases claimed by D.L.? He took the position that under ss. 13, 14 and 18 of The Land Titles Act (LTA), the purchaser's title would be subject to the implied interest of his leases of less than a three-year term, as he was in actual occupation. The plaintiff argued that its mortgage had priority as it was first in time in registration on title and a final decree of judicial sale operates to vest title in the purchasing party free of all interest arising subsequent in time to the mortgage.

HELD: The plaintiff's application was granted and the defendants' application was dismissed. The court granted an order confirming the sale of the mortgaged lands to the purchaser. The purchaser's title to the subject lands would not be subject to the lease interests claimed by D.L., pursuant to the order approving judicial sale. Costs were left to be dealt with by the court as they may entail special unique considerations. If the parties could not agree on costs, they may bring an application for assessment. The court found with respect to each issue that: 1) the order nisi was a judgment of the court and SRF's application was an impermissible collateral attack on it. SRF had been served with the plaintiff's application and had appeared at the hearing. Applications under Queen's Bench rule 10-13 are confined to default judgments obtained by administrative procedure of noting for default within the Registrar's office. There were no exceptional

circumstances here to justify the court exercising its inherent jurisdiction to set aside the judgment. It provided nine reasons for concluding no such circumstances existed here, among which were that: SRF's contractual undertaking not to file a defence was made in return for the plaintiff granting it additional time to meet its then current mortgage obligations, and if it failed to pay its indebtedness within that extension, then it would not defend and the plaintiff was entitled to foreclose. The agreement had not prevented SRF from raising concerns it had with the order nisi application; SRF had failed to take any steps to redeem the mortgage after it was granted 120 days to do so; SRF's grant of leases to D.L. was in breach of its loan agreement with the plaintiff and might also have been in contempt of the court's order for judicial sale; and many parties had relied and acted upon the order nisi and if would be unfair and inequitable if the judicial sale process were interrupted or stopped. 2) There was no reason not to confirm the sale and it would undermine the entire judicial sale process and the purpose it serves if it were not confirmed; and 3) it would deal with this matter because that was in the interests of all the parties, despite the fact that D.L. had not made a formal application or presented evidence. It would make assumptions, not findings of fact, that D.L. and SRF had not acted improperly in entering into the leases and that D.L. was in occupation. It found there was no conflict between the LTA regarding registration and priorities of title and The Queen's Bench Act, 1998 and The Chancery Procedure Amendment Act, 1852 governing the court's powers relating to foreclosure, orders for judicial sale and vesting. The D.L. leases were not in existence when the plaintiff obtained its mortgage, and under foreclosure law, a final order of foreclosure operates to vest title in the mortgagee free and clear of all interests that came into existence after the registration of the mortgage against title.

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Ingram v Saskatchewan Government Insurance, 2021 SKQB 122

Meschishnick, April 21, 2021 (QB21120)

Civil Procedure - Queen's Bench Rules, Rule 7-1, Determination of a Question
Statutes - Interpretation - Automobile Accident Insurance Act, Section 188

The plaintiff commenced an action against the defendant, Saskatchewan Government Insurance (SGI). He was involved in a vehicle rollover in July 2015 and suffered a spinal cord injury and consequential quadriplegia. In this application made pursuant to Queen's Bench rule 7-1, the plaintiff requested that the court determine a point of law, saying that to do so would largely determine the action. The background to the case was provided in an agreed statement of facts. SGI received a report in January 2016 from its medical consultant advising it

that the plaintiff's injury met the definition for catastrophic status. In its decision letter of March 2017, SGI agreed to pay the plaintiff an income replacement benefit (IRB) based on that type of injury commencing in July 2015. The same consultant reiterated his conclusion in March 2018 after being asked to review the file by SGI, and it then informed the plaintiff in its decision letter in March 2018 that he would receive a permanent impairment benefit. In February 2020, SGI wrote a decision letter to the plaintiff saying that it had obtained a third opinion from its medical consultant and changed its opinion to the effect that the plaintiff was no longer suffering from a catastrophic injury. It re-adjudicated the matter, withdrew its March 2017 decision letter and replaced it with a new one that changed his IRB to the level based on his two years of previous employment.
The questions posed by the plaintiff were: 1) whether SGI's decision to pay the plaintiff an IRB based on catastrophic injury was a "decision made or action taken by the insurer pursuant to Part VIII" and final and conclusive pursuant to s. 188 of the Automobile Accident Insurance Act (AAIA), to be reviewed only in accordance with Division 11; and 2) was the reduction of the plaintiff's IRB a legislated deduction? He argued that SGI unlawfully reassessed his injuries and lowered his IRB as its decision in 2017 was final and that decision was subject only to appeal as provided by ss. 191 to 194. Further, the AAIA does not contain a provision expressly permitting SGI to reassess the plaintiff's impairment from catastrophic to non-catastrophic and to readjust his benefits, whereas under ss. 126 and 135, IRBs can be adjusted in circumstances other than catastrophic injury.
HELD: The court answered no to the questions. It held that: 1) s. 188 could not be interpreted to make SGI's earlier decision that the plaintiff had incurred catastrophic injuries final and conclusive; and 2) assuming the assessment of the injuries was correct, the plaintiff would be paid the benefits as mandated by the AAIA. If, as the plaintiff suggested, the claim could not be continued on the basis of this decision, he could confirm that by filing a notice of discontinuance and no costs would be ordered. The court reached its determination after reviewing the principles of statutory interpretation of the AAIA found in the Court of Appeal's decision in Holt (2018 SKCA 7), which followed and refined the approach set out in Ballantyne (2015 SKCA 38). The purpose of the AAIA and the payment of IRBs under Part VIII is to provide fair benefits and for enhanced benefits in the case of catastrophic injuries. When the AAIA is read as a whole, the legislature could not have intended in enacting s. 188 to make the initial assessment of catastrophic injuries final and not subject to review even if circumstances changed. That interpretation would allow the plaintiff to receive a benefit that he would not otherwise be entitled to receive. Whether the plaintiff no longer suffered from such injury was not at issue in this application.

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R v Parfitt, 2021 SKQB 123

Elson, April 22, 2021 (QB21124)

Criminal Law - Assault - Assault Causing Bodily Harm - Sentencing
Criminal Law - Dangerous Offender Designation - Appeal - New Sentencing Hearing

The accused was the subject of a second Part XXIV hearing under the Criminal Code. He had been convicted after trial of multiple offences and in June 2016, he was designated a dangerous offender (DO) and sentenced to a determinate sentence of 10 years. After pre-sentence credit, the sentence to be served was six years and eight months, followed by a 10-year long-term supervision order (LTSO). The accused appealed his conviction, designation and sentence. The Court of Appeal (CA) dismissed his appeal against conviction and allowed it against his designation and sentence (see: 2019 SKCA 55). It followed the Supreme Court's 2017 judgment in Boutilier that had been rendered a year after the accused had been designated and sentenced. The court found that the trial judge had erred by failing to find that the Crown had not proven beyond a reasonable doubt the essential elements of intractability and a high likelihood of harmful recidivism, and had not considered treatability. The court ordered that the accused receive a second hearing. The counts that had been before the CA, the focus of the new hearing, were breaking and entering a dwelling house and committing the offence of assault causing bodily harm and committing the indictable offence of assault, both contrary to s. 348(1)(b) of the Criminal Code. The evidence presented by officials with Correctional Services Canada (CSC) and parole officers at the first hearing spoke to the accused's risk assessments and how he had conducted himself during community sentence orders in the past. The psychiatrist who had conducted an assessment of the accused in 2015 under s. 752.1 of the Code reported his findings, including that there was a high likelihood that he would commit an act of violence in the future but he would benefit from treatment interventions of an intensive nature, targeting substance abuse, spousal and general violence. With appropriate treatment, the psychiatrist reported, there was a realistic possibility that his risk could be reduced enough that he could be safely managed in the community. At the second hearing, evidence was given by CSC officials regarding a new standardized program, the Integrated Correctional Program Model (ICPM), which had been introduced into federal penitentiaries in the prairies after the accused began his sentence. Apparently, the accused did not receive the benefit of this programming at the Saskatchewan Penitentiary (SP) because he had been transferred to the Drumheller Institution in 2017. While there, however, he did participate in a medium intensity version of the program until June 2019, when his appeal was decided. As a result, he was then was returned to the SP and his treatment was interrupted. One of the Drumheller program facilitators testified that the accused's risk factors had not been properly identified at the SP and after they were corrected to achieve more focused programing, the accused actively participated in and successfully completed a three-month program. She reported that the accused had shown moderate improvement in all his risk factors and that there was reason for optimism in his future. The same psychiatrist interviewed the accused again to update his opinion and found improvement in the accused's mental and physical health and that he was dealing well with his ADHD and

substance abuse issues. The accused expressed his desire to change. The psychiatrist opined that risk management of the accused in the community was a viable option in the foreseeable future but that his release should not occur immediately but rather be gradually phased and closely supervised. The Crown again sought a DO designation under s. 753(1)(a) of the Code based upon the predicate offences and the accused's lengthy history of violent and violence-related offences. It recommended a determinate sentence of three years from the date of pronouncement, followed by a 10-year LTSO. The defence argued that the accused should be released on parole and protested that if the Crown were successful, the accused's total time in custody would exceed the sentence he would have served under the sentence set aside by the CA. The issues were whether the Crown had proven: 1) beyond a reasonable doubt that the accused posed a high likelihood of harmful recidivism; and 2) that the accused's harmful behaviour was intractable within the meaning described in Boutilier.
HELD: The accused was designated a long-term offender under s. 753(5) of the Code related to the first count of the indictment against him, in keeping with the conclusions of the CA judgment. He was sentenced to a further two years' imprisonment from the date of this judgment. On the second count, the accused received a sentence of four years' imprisonment concurrent with the time already served. The court recommended that he receive further programming of the high intensity nature that had been recommended by the psychiatrist five years earlier. It found with respect to each issue that: 1) the Crown had proven that the accused posed a high likelihood of harmful recidivism although there was optimistic evidence otherwise; and 2) the Crown had not proven that the accused's harmful behaviour was intractable. Therefore, he could not be designated a DO.

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L.J.S. v P.L.M., 2021 SKQB 124

Brown, April 22, 2021 (QB21121)

Family Law - Custody and Access - Person of Sufficient Interest
Statutes - Interpretation - Children's Law Act, 2020, Section 8

The petitioner, K.S., the grandmother of a 13-year-old granddaughter, M., applied pursuant to s. 8 of The Children's Law Act, 2020 (CLA, 2020), to be declared a person of sufficient interest (PSI) and granted a parenting order in relation to M. The respondent, L.J.S., M.'s father, sought sole custody and exclusive parenting and opposed K.S.'s application. In the event it was granted, he opposed her having any significant involvement with M. During the marriage of M.'s parents and after they separated, M.'s life had been troubled

by their drug addiction and family violence. The parties submitted affidavits in support of their respective applications. The evidence was somewhat confusing and often conflicting. K.S. averred that she had looked after M. many times during her childhood and provided refuge to her and her mother when the latter was struggling. She alleged that M. disclosed to her that L.J.S had assaulted both her and her mother and used M. as a courier for drug deals. K.S. stated that often there were no groceries in the family's home and she had paid for food for M. and her mother as well as M.'s clothing, school supplies and fees. She became M.'s primary caregiver from the time her mother was hospitalized in December 2020 until her death in February 2021. At that time, L.J.S. obtained a without notice order requiring M. to live with him. However, when the police and Ministry of Social Services attended at K.S.'s home to enforce the order, M. advised them that she did not want to leave and would run away if forced to live with L.J.S. For reasons that were not clear, M. then began residing with her uncle in Assiniboia. L.J.S. denied K.S.'s claims and contested whether M. had been in her care at the times she stated. He explained that when he had obtained an order for the care of M., he was charged shortly afterward with assault. The charges were stayed in September 2020. K.S. advised that the charges were stayed because M. was a critical witness and was afraid to testify. The issue was whether K.S.'s relationship with M. was sufficient to enable her to become a PSI in relation to M., and if so, whether that meant it was in M.'s best interests to have formal parenting time or court-ordered access with her grandmother. HELD: The court declared K.S. a PSI. As the evidence was conflicting and incomplete, it could not make a decision regarding long-term parenting or access. It ordered the matter to proceed to an expedited pre-trial and if not resolved there, to a two-day expedited hearing where each party would present evidence and be cross-examined. It would be necessary to make findings on a number of outstanding issues, such as the circumstances concerning the assault charge. Until the pre-trial, M. would continue to live with her uncle and was to be parented by L.J.S. for specific times on certain days for successive three-week periods. The amount of time would increase if there were no incidents. K.S. would have overnight access to M. for one day each week. Regarding the issue of whether K.S. should be declared a PSI, the court adopted the two-step test set out by the Court of Appeal in G.E.S. (2006 SKCA 79) under s. 6 of The Children's Law Act, 1997, the predecessor to s. 8 of the CLA, 2020. In cases such as this, K.S. met the requirements of the test. Her biological connection with M. was one consideration given to family members making a PSI application and she had also established the necessary closeness of her connection with M. because her evidence demonstrated that her role had moved beyond that of a normal grandparent in her relationship with M. It reviewed M.'s relationship with each party, noting her fear related to K.J.S. and her need for stability and counselling. It identified that there had been family violence under s. 10(5) of the CLA, 2020.

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Sewell v Sewell, 2021 SKQB 125

Brown, April 23, 2021 (QB21122)

Family Law - Child Support - Interim - Variation

The petitioner applied to vary an interim child support order granted in January 2021. At that time, she had been paying support to the respondent for the child of their marriage. She had remarried and advised the court that she was expecting another child in March 2021 and sought to reduce her support payment. In addition, she advised that she would be requesting a further reduction in the amount of support she paid when she went on maternity leave. The respondent opposed considering that event at the time because it had not yet occurred and questioned whether it was a basis for varying a child support obligation. The court instead imputed income of $60,000 per annum to the petitioner under s. 19 of the Guidelines because she had, without providing an explanation for her reasons, resigned from her position to join her husband in his business venture to work at a much-reduced income. It left for future determination whether the amount imputed to the petitioner should be reduced due to having a child and going on maternity leave. When she brought this application, the petitioner had not yet had the child but had begun her maternity leave early. The petitioner argued that because her income had been reduced, s. 19 was no longer available to impute the level of income ascribed to her in the January order. The question was whether it would be manifestly unfair or unjust not to alter the child and spousal support terms of that order given the petitioner's claim to a lower income due to her maternity leave. HELD: The application to vary the interim child support order was not granted but not dismissed outright. The court remained seized of the matter and if the petitioner applied again and submitted sufficient evidence regarding her financial situation, it would consider the matter. However, the petitioner had not submitted her reasons for taking an early maternity leave and the evidence before it in this application did not establish that it would be manifestly unfair or unjust to not further the existing interim order at this point. Additional circumstances other than merely being on a maternity leave were necessary to vary the January order because, then as now, the child had not yet been born.

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R v Moya, 2021 SKQB 128

Robertson, April 28, 2021 (QB21123)

Courts - Judges - Disqualification - Bias

The accused applied for disqualification of the assigned trial judge on the grounds of actual or reasonable apprehension of bias based upon the decisions the judge had made regarding a number of the accused's pre-trial applications. Amongst the accused's allegations of bias included that the judge: made decisions contrary to the accused's position; failed to disclose his animus towards the accused; and made reference in one decision to the accused's grounds in making an application under s. 276 of the Criminal Code as being "clearly implausible or contradictory."
HELD: The application was dismissed. The test for a reasonable apprehension of bias had not been met. The judge decided that he would not recuse himself from the trial. The assigned trial judge reviewed the accused's grounds and found that an informed person viewing the matter would have thought it more likely than not that he would not decide the issue fairly. The fact that his decisions regarding the pre-trial applications were not favourable to the accused did not establish bias. He did not possess animus towards the accused and there had been no complaint about his conduct in court towards him. His reference to implausible or contradictory evidence was a statement of the legal requirement to accept affidavit evidence in the first stage of a s. 276 application.

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Walker v Mitchell, 2021 SKQB 126

Danyliuk, April 27, 2021 (QB21125)

Civil Procedure - Queen's Bench Rules, Rule 1-3, Rule 1-6, Rule 4-31, Rule 7-9, Rule 11-1, Rule 11-7, Rule 11-8

The defendant lawyer applied for an award of double costs relating to a formal offer to settle served upon the plaintiff in 2018. The defendant had been sued by the plaintiff, a former client, in December 2017. The defendant argued that the claim was statute-barred and eventually brought an application in 2019 to strike the claim pursuant to Queen's Bench rule 7-9. The Queen's Bench chambers judge struck the claim in his judgment of January 2020 and awarded costs of $500 to the applicant defendant. The plaintiff's appeal of that decision was dismissed (see: 2020 SKCA 127). In this application, the plaintiff raised as issues that: 1) the chambers judge had already awarded costs that covered the entire action; and 2) the defendant's formal offer to settle, which proposed that if the plaintiff discontinued his action, the defendant would not seek costs, contained a drafting error. In the standard form, one of the references to double costs was inadvertently omitted. As a result, the defendant applied to the court under Queen's Bench rule 1-6 to cure the error as an irregularity.

HELD: The defendant was awarded costs of the action in the amount of $4,000, but not double costs. The court found with respect to each issue that: 1) the chambers judge's award pertained only to the costs of the application and the defendant remained entitled to costs for the balance of the action. It relied on the evidence that the defendant had provided the draft bill of costs to the plaintiff in the amount of $3,349 after the chambers judge's decision was rendered. Assuming that the judge would have been aware of relevant factors and law governing costs in this type of action that would warrant the costs as indicated by the defendant's draft bill, it would not make sense for him to award only $500 for the entire action. Further, the defendant's application under Queen's Bench rule 7-9 was interlocutory, and pursuant to Queen's Bench rule 11-8, costs of all interlocutory applications must follow the result. Such applications are also subject to the considerations expressed in foundational rule 1-3; and 2) the defendant had not met the onus of proving that relief under Queen's Bench rule 1-6 should be granted to permit his claim for double costs. The defendant's error was a substantive one that could not be cured under that rule. Under Queen's Bench rule 4-31, the consequence of the error was that the formal offer to settle was not valid and could not be saved by rule 1-6. As the defendant was presumed to have known the contents of his own documents and had then taken the step of applying to strike the plaintiff's claim, Queen's Bench rule 1-6(3) also prevented the court from granting curative relief. However, relying on the decisions in Bourque, Balzer and George (2016 SKQB 44, 2019 SKQB 340, and 2020 SKQB 99 respectively), the defendant was awarded costs of the action set at $4,000 without reference to the Tariff as the successful party under Queen's Bench rule 11-7. As the offer was found to be fair, costs were assessed under Queen's Bench rule 11-1(4)(f). It took into account that the plaintiff had taken the dispute further than necessary under Queen's Bench rule 11-1(4)(g).

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R v Zabihullah, 2021 SKQB 127

Mitchell, April 30, 2021 (QB21126)

Constitutional Law - Validity of Legislation - Criminal Code, Section 278.92(1), Section 278.92(2)(b), Section 278.94.2(2)
Courts and Judges - Stare Decisis
Courts and Judges - Judicial Comity
Criminal Law - Evidence - Cross-Examination - Sexual Assault Complainant - Electronic Records

The accused was charged with committing offences under ss. 266 and 273 of the Criminal Code. His counsel filed a Charter application requesting that ss 278.92(1), 278.92(2)(b) and 278.94(2) be ruled a violation of ss. 7 and 11(d) of the Charter that could not be saved and that they be struck as constitutionally invalid. The applicant asserted that the provisions had already been declared unconstitutional by a Queen's Bench judge in her decisions in R v Anderson (see 2019 SKQB 204; 2020 SKQB 11). The courts in Saskatchewan had subsequently followed Anderson when asked to adjudicate on the constitutionality of the provisions, applying the principle of judicial comity. The issue was whether, in this case, the court should apply judicial comity and grant the application or depart from the principle. The Supreme Court had granted leave to appeal in two decisions from other jurisdictions regarding the constitutionality of the provisions. The cases would be heard during the fall term. These appeals of constitutional rulings made prior to the conclusion of the criminal trial were possible only under s. 40 of The Supreme Court Act, which permits an appeal to the Supreme Court with leave of a judge of the highest court of final resort in the province.
HELD: The court allowed the applicant's constitutional challenge and declared ss. 278.92(1), 278.92(2)(b) and 278.94(2) of the Criminal Code to be of no force and effect, following the decision in Anderson. It applied the principle of judicial comity. The applicant was directed to follow the procedure set out in R v Shearing (2002 SCC 58) regarding the records relating to the complainant. It found that it was not bound by stare decisis or the principle of judicial comity to follow Anderson. It did not find the reasoning in Anderson to be persuasive but decided it would be more prudent in these circumstances to follow it because: 1) the Supreme Court would soon hear the appeals mentioned above; 2) to decline to follow Anderson would mean that the applicant's trial, commencing in June, would proceed in a different manner from all other sexual assault trials that have been or will be held after Anderson in Saskatchewan, and that would not be desirable; and 3) to decline to do so could further delay the trial, which would also be an undesirable result.

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Cabiles v Erbach, 2021 SKQB 129

Brown, May 3, 2021 (QB21127)

Family Law - Custody and Access - Mandatory Family Dispute Resolution

The petitioner issued and served the petition on the respondent on January 15, 2021. Before receiving an answer, he applied for an order providing him with access to the parties' child in February. The respondent did not provide an answer and counter-petition until March 10, beyond the time period allowed by the Queen's

Bench rule, but she had not been noted for default. In the counter-petition, she sought relief that raised new matters. Before the determination of the interim application could occur, the amendments made to The Queen's Bench Act, 1998 (QBA, 1998) by The Miscellaneous Statutes (Family Dispute Resolution) Amendment Act, 2018 became effective on March 1, 2021. The Act also affected The Children's Law Act, 1997 and The Family Maintenance Act, 1997, both of which pertained to this proceeding. Under s. 44.01 of the QBA, 1998, mandatory family dispute resolution (MFDR) must precede court applications at the Judicial Centre of Regina, which was designated under s. 7.4 of The Queen's Bench Regulations. Section 44.01(3) provides that the parties must participate in the MFDR after the close of pleadings. The issue was whether the parties were required to attend MFDR, given that the petition was issued and served prior to March 1, 2021 but the answer and counter-petition was served and filed after the effective date of provisions amending the QBA, 1998. HELD: The interim application was not granted as the parties should proceed to MFDR in Regina. The court remained seized of the matter depending on the outcome of that process. It found that the close of pleadings in this case occurred after March 1, 2021 and, therefore, that MFDR must occur prior to the application being brought. It reviewed s. 7.4 of The Queen's Bench Regulations that indicates that pleadings close when the reply is served and filed or the time for doing so has expired, as well as considering the descriptions of what constituted "close of pleadings" in Queen's Bench Rules 15-17 and 15-15(4) and when the time for serving and filing a reply expires under rule 15-14 for answers and rule 15-15 for counter-petitions. When the respondent's counter-petition was served on March 10, the petitioner would have had to reply if he wished to oppose it. Therefore, the time allowed for it was after March 1.

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