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Double Diamond Distribution Ltd. v Garman Turner Gordon LLP, 2021 SKCA 89

Leurer, June 9, 2021 (CA21089)

Civil Procedure - Court of Appeal Rules, Rule 15, Rule 20(1), Rule 47(2)

The appellant applied for a re-hearing pursuant to Court of Appeal rule 47(2) that would not be heard until later in 2021, following the dismissal of its appeal from the decision of a Queen's Bench chambers judge to allow the respondent law firm to register a Nevada judgment as a judgment of the Court of Queen's Bench (see: 2021 SKCA 61). In the hearing of this application in Court of Appeal chambers, the appellant requested an order stating that the Court of Appeal decision should be stayed and no enforcement of the Queen's Bench judgment should take effect until such time as the re-hearing occurred and a formal judgment issued. In essence, it sought the declaration that the effect of the service of its application for re-hearing is to continue the stay of execution pursuant to Court of Appeal rule 15(1) that was put in place by the operation of its original notice of appeal. The appellant conceded that as it could not meet the test for a stay set out in RJR-MacDonald,

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the purpose of the application was to obtain a legal opinion. It could not cite any authority to support its request except for the inherent jurisdiction of the court. The respondent opposed the application on a number of grounds but indicated that it had not attempted execution of the Queen's Bench judgment.
HELD: The application was dismissed. The chambers judge found even if he had jurisdiction under Court of Appeal rule 20(1) to grant declaratory relief in this circumstance, he would decline to do so in the absence of an evidentiary record as to the proceedings being taken in the Court of Queen's Bench. It was therefore impossible for him to say if anything was occurring that was contrary to Court of Appeal rule 15, if it is applicable at all. A Queen's Bench judge would be able to interpret the Court of Appeal Rules to determine if actions taken by the respondent were appropriate in light of the appellant's outstanding application for a re-hearing.

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Amalgamated Transit Union, Local 615 v Saskatoon (City), 2021 SKCA 93

Jackson Schwann Tholl, June 25, 2021 (CA21093)

Labour Law - Labour Relations Board - Judicial Review - Appeal
Administrative Law - Saskatchewan Labour Relations Board - Judicial Review - Appeal

The appellant, Amalgamated Transit Union, Local 615, appealed the decision of a Queen's Bench judge to dismiss its application for judicial review of two decisions of the Saskatchewan Labour Relations Board. The background to this application and the appeal was lengthy and complicated. The appellant represents the transit workers employed by the respondent, the city of Saskatoon. While an unfair labour practice (ULP) application made by the appellant in April 2014 against the respondent was pending before the board, on September 20, 2014 it locked out the workers and, two days later, amended its bylaw governing its workers' pension entitlements. In response, the appellant filed a second ULP application (the lockout application) with the board, alleging a violation of s. 6-62(1)(l)(i) of The Saskatchewan Employment Act (SEA) because the respondent had violated the statutory freeze created by the first ULP application. It claimed damages and payment for monetary and pension losses suffered during the unlawful lockout and a restraining order respecting any further lockout action pending the board's final decision on the first ULP application. It also applied for an interim order immediately restraining the respondent from continuing the lockout, commencing any lockout proceedings, or making changes to wages pending final resolution of the lockout application. The board issued an interim order on September 26 restraining the respondent from enacting any further changes to

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the pension plan but did not restrain further lockout action. The appellant was given leave to renew its lockout application on or after October 3 when the board would hear the first ULP application. It did so on that date and decided the first ULP application in favour of the appellant. After that hearing, the board did not award any further relief. It heard the lockdown application and issued its decision on October 17, holding that the respondent violated s. 6-62(1)(l)(i) of the SEA when it locked out its workers and made unlawful changes to employment conditions. It ordered the respondent to cease its lockout and to refrain from declaring another one until it had complied with s. 6-34 of the SEA and paid compensation to the members of the appellant for its unlawful lockout for the period during which the first ULP application was pending. The parties were to attempt to resolve quantum of losses arising from the lockout, failing which they could request the board to reconvene to hear evidence and argument on the issue. The board reserved the matter regarding compensation arising from the changes to working conditions and pension. On October 20, the respondent ended its lockout. The board released its reasons for the lockout decision on October 21, stating that the respondent had been ordered to pay compensation to the appellant but by agreement of the parties, the board heard no evidence or argument at the hearing as to the quantification of such losses other than as to the period "during which this compensation would be payable." The board's opinion was that the compensation should be limited to the period from September 20 to October 3, when it decided the first ULP application. It was not satisfied that compensation was appropriate for the period after the statutory freeze had been lifted. The board issued its decision regarding the respondent's changes to the bylaw and held that it had no force and effect on the workers' pension for the period from June 3 to October 3, 2014. However, the appellant believed that it was entitled to compensation beyond October 3 for the balance of the lockout period until October 20, which would amount to $600,000 in wages. It brought another ULP application and claimed damages because the respondent had not served a new lockout notice after October 3. After a hearing, the board issued its decision finding the claim for damages to be an impermissible attack on the lockout decision because the panel had clearly decided compensation was limited during the period precluded by the first ULP application. The appellant should have applied for a reconsideration of the decision if it was unhappy, and the board had been under the impression the parties had resolved the issue. The board then converted the damages application into an application to reconsider the lockout decision, determined that the criteria for same had not been met, and dismissed the appellant's ULP claim. The appellant's application to the Court of Queen's Bench for judicial review was successful: the board's damages decision was quashed. The respondent appealed that decision to the Court of Appeal and it found that the appellant was entitled to apply to the board for a reconsideration of the lockout decision (see: 2017 SKCA 96). The appellant then did so, asking the board to amend the October 17, 2014 lockout final order and the lockout decision, specifically to extend the compensation period. With the appellant's consent, the board treated the matter before it as an application to reconsider the lockout decision. The respondent also applied to the board requesting that it dismiss the application on the grounds of delay but the board denied that application, citing its decision in Hartmier (2017 CanLII 20060). The board noted that

[R v McGuire]

[R v Moya]

[R v Pahl]

[Sabic v Sabic]

[Sydor v Sydor]

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although the delay was inordinate, the appellant had been pursuing its claim and justice could be best achieved by considering the reconsideration application. The board then refused the appellant's application to reconsider the lockout decision based on its review of the Remai factors and, in particular, concluded that the panel responsible for the lockout decision had not breached the duty of fairness because the parties had agreed that no evidence regarding quantification of losses other than during the period from September 20 to October 3, and if the appellant had wanted to submit other evidence and make other arguments, it should have done so during the hearing of the lockout application. The appellant then made an application to the Court of Queen's Bench for judicial review of the board's: a) decision not to reconsider (the refusal decision); and b) original decision regarding the lockout (the lockout decision). The respondent submitted that the judicial review application of the lockout decision should be dismissed for undue delay pursuant to Queen's Bench rule 3-56(3). The chambers judge dismissed the appellant's application for judicial review of both of the board's decisions. In considering: a) the refusal decision, the judge found the standard of review was reasonableness because the appellant's procedural fairness allegation was with respect to the lockout decision, not the refusal decision. He determined that the board's refusal decision was reasonable; b) the lockout decision, he exercised his discretion and declined to judicially review the decision because of undue delay, as to allow it would be contrary to the administration of justice. He made those findings after applying the two-part test set out in Henry (1999 CanLII 12241) (Henry) as well as the board's test for delay regarding unfair labour practices under s. 6-111(3) of the SEA, set out in its decision in SGEU v Saskatchewan (2009 CanLII 30466) (SGEU). The delay of four years since the board rendered its decision was undue and the delay had prejudiced the respondent because of staff turnover. Under the second step in Henry, the judge determined that to permit the application would be contrary to the administration of justice. On appeal of the chambers judge's decision respecting the refusal decision, the issues were: 1) whether he erred by applying the reasonableness standard of review. The appellant argued that he should have applied the standard of correctness because the fifth factor in Remai deals with the procedural fairness of the prior decision: was there a breach of natural justice; 2) if not, had he erred in his application of the reasonableness standard? The appellant argued that he had misapplied the standard by granting the board much too large a margin of appreciation in the refusal decision. The stringency of the standard will vary, based on context; 3) if so, what was the remedy? Regarding the chambers judge's decision on the board's lockout decision, the issues were: 4) what was the applicable standard of review? 5) having regard for the appropriate standard of review, had the chambers judge erred in principle by finding undue delay under step one of the Henry test and by dismissing its application under step two in the absence of harm to the respondent or to the administration of justice; and 6) if so, what was the remedy?
HELD: The appeal was dismissed. Respecting the refusal decision, the court found that: 1) the chambers judge had not erred in applying the reasonableness standard. In a reconsideration decision, the board does not conduct the equivalent of an appeal or judicial review. Rather, pursuant to the privative clause under s. 6-115 of the SEA, the board has a very narrow power to reconsider. It properly reviewed its prior decision in light of

the relevant jurisprudence and applied the Remai factors. Secondly, the reasonableness standard applies because the judge was asked to review the board's refusal to reconsider the lockout decision with a view to whether the board had applied the Remai factors reasonably, not whether the board had breached the duty of procedural fairness. He was not entitled to step into the shoes of the board and substitute his view as to whether the board had breached the audi alteram partem rule; 2) the chambers judge had correctly found the board's decision to be reasonable. The court undertook its own review of the board's decision, as required by the decision in Dr. Q. (2003 SCC 19), conducting it deferentially in light of s. 6-115 of the SEA. It found that the board's refusal decision was transparent, intelligible and rational. It was not unreasonable for it to conclude that the appellant's position before the board at the lockout application was ambiguous and it had failed to clarify it after the lockout continued past October 3; and 3) it was not necessary to consider this as result of the previous findings. Respecting the lockout decision, it found that: 4) the deferential standard applies to a review of a discretionary decision under Queen's Bench rule 3-56(3), as established in Gjerde (2016 SKCA 30) as well as generally, and as restated in Kot (2021 SKCA 4); 5) the chambers judge had not erred in his assessment of the facts and identifying Henry as governing his discretion but he erred when he selected the board's test set out in SGEU, as it did not apply. Under Queen's Bench rule 3-56(3), there is no fixed time limit for making judicial review applications and deciding whether undue delay occurred in making one requires different considerations. However, the judge had not erred in applying the Henry test, finding that the delay was undue delay and proceeding to review would be contrary to good administration. Its reasons differed, however, regarding the first step: the delay of four years was undue and the appellant's explanation was inadequate. Before it initiated the 2019 judicial review application, the appellant had had the benefit of numerous board decisions indicating that it regarded the damages issue as having been decided. The judge had not erred in that the delay was contrary to good administration because otherwise, it would have allowed the proceedings to start again with a new litigation strategy; and 6) it was not necessary to consider this issue as a result of the previous findings.

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Puetz v Tocher, 2021 SKQB 156

Goebel, May 26, 2021 (QB21159)

Family Law - Child Support - Interim
Civil Procedure - Queen's Bench Rules, Rule 3-78
Statutes - Interpretation - Federal Child Support Guidelines, Section 5

The petitioner applied for an order that the respondent provide interim child support to her. The parties had had one child, now aged 12, who had been in sole care of the petitioner since birth. The respondent had never resided with the petitioner nor co-parented his daughter and he brought a separate application, pursuant to Queen's Bench rule 3-78, asking that a third party be added to the proceedings on the basis that he stood in the place of a parent to the child and as such, child support should be apportioned between them. The respondent's allegation of such a relationship was disputed. The issue was whether the respondent, the biological parent, could reduce his child support obligation by demonstrating that the party he sought to add stood in the place of a parent to her. The respondent relied upon s. 5 of the Federal Child Support Guidelines.
HELD: The respondent's application was dismissed. The petitioner could proceed with her interim child support application. The court found that the respondent had failed to demonstrate any justiciable issue that supported his application to add the proposed third party. The court found that even if it were determined that the proposed third party stood in place of a parent to the child, it would not reduce any child support owing by the respondent. A non-custodial biological parent cannot invoke s. 5 of the Guidelines even though a non-custodial step-parent is concurrently liable to pay child support.

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Greenwood v Greenwood, 2021 SKQB 161

Goebel, May 28, 2021 (QB21160)

Civil Procedure - Queen's Bench Rules, Rule 10-11
Family Law - Division of Family Property - Pension - Survivor Benefits

The applicant, D.G., sought an order declaring her entitlement to 45 percent of the survivor benefits being paid to the wife of her deceased former spouse, S.G., as well as to add that wife, C.G., as a third party to the proceedings. The respondent named in the application was the estate of S.G. The applicant and S.G. divorced in 1980 after 27 years of marriage. S.G. married C.G., the wife currently receiving survivor benefits, in 1982. Pursuant to a matrimonial property judgment granted in 1981, a portion of S.G.'s employment pension benefits were vested in the applicant (see: 12 Sask R 287 (UFC)). The applicant could not arrange with S.G.'s employer, Canadian National Railway (CN), to vest a portion of his pension in her name. It was not until 1985 with the passing of the Pension Benefits Standards Act, 1985 that such federally-regulated pension benefits could be divided on marriage breakdown. Learning of S.G.'s retirement in 1987, the applicant brought an application naming him and CN as respondents in which she sought a declaration that S.G. be declared a

trustee of her interest in the pension benefit payments, but the parties reached an agreement that she would receive a percentage amount. An order was granted in 1990 by the same judge who had rendered the 1981 decision. Carter J.'s order stated that further to her 1981 judgment, the applicant's interest in the respondent's pension benefits would be fixed at an amount equal to 25.26 percent of the benefits received by him from CN, reflecting contributions made by him from 1981 to 1987. Due to problems she encountered with the CRA regarding her tax obligations, the applicant applied to and obtained directions from the court in 2008 regarding the 1990 order. Aside from tax issues, the applicant did receive the 25.26 percent portion until the death of S.G. in 2019. After S.G.'s death, C.G. began receiving a monthly survivor benefit from CN. The applicant's request to C.G. to be paid a portion of these benefits was refused and the applicant made this application. The applicant's request for relief was made under ss. 21(2)(c), 26(2) and 45 of The Family Property Act (FPA) but her intent was to obtain an order interpreting and enforcing the order to which she was entitled under the judgment made under The Matrimonial Property Act. She argued that under the 1981 judgment, "pension benefits" should be interpreted to include all possible future and contingent interests that the pension might provide, including death and survivor benefits. The issue was whether the applicant was entitled to a portion of the survivor benefits paid to C.G. pursuant to previous court orders.
HELD: The application was dismissed. The court found that its authority to interpret the previous court orders was pursuant to Queen's Bench rule 10-11, not the FPA, as the applicant was not S.G.'s spouse. The role of the court in interpreting a previous order is quite limited. It found that the 1990 order was the basis of the applicant's proprietary interests in S.G.'s pension benefits. That order and the 2008 order specified that she was entitled to the pension benefits received by S.G., not death or survivor benefits. Further, the applicant had not provided evidence to support a finding that her interest in his "pension benefits" in 1981 would have included some value reflecting a contingent survivor benefit, and nothing in the reasons for judgment indicated that it was included.

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Sabic v Sabic, 2021 SKQB 165

Smith, May 31, 2021 (QB21164)

Family Law - Spousal Support - Lump Sum
Family Law - Division of Family Property

The petitioner issued her petition in 2015. At trial, she sought spousal support, division of family property and costs. The parties emigrated from Yugoslavia to Canada in 1993 and were married that year. They had three children and the marriage was traditional with the petitioner taking care of them and the home. However, she began working in a meat-packing plant in 2003 where she continues to work. The parties separated in 2013 with the two youngest children staying in the care of the petitioner. The respondent never filed an answer or counter-petition to the petition in 2015 but shortly thereafter, the court granted a non-dissipation order against him. In August 2016, the court ordered him to pay interim spousal support of $1,800 per month commencing that month. It imputed income to him of $100,000 after he failed to file meaningful disclosure. The respondent did not pay anything to the petitioner voluntarily following the order. He continuously resisted court orders demanding that he disclose his income and assets and, as at the time of trial, previous costs awarded to the petitioner totaled $57,554. Respecting the petitioner's claim for spousal support, she requested that she be paid in a lump sum due to the respondent's intransigence. Her counsel suggested the sum of $82,560 would be appropriate, reflecting net spousal support of $1,378/month for a five-year period. He based the amount of support on the petitioner's income of $31,800 and the respondent's income of $100,000 as imputed in the 2016 order. He argued that the court should use that amount and provided the facts known about the income the respondent received from his business, rental and investment sources to substantiate it. Counsel for the petitioner submitted a table of family assets at the time of the petition that showed the assets of the respondent having a value of $3,121,989 and those of the petitioner being $17,296. At trial, the respondent testified that he owed a variety of debts and those amounts should be deducted from the family property. For example, he said that in 2003 he borrowed the sum of $427,000 from his brother in Bosnia which he repaid in 2019, despite the non-dissipation order. He argued that the sum should must be deducted from family property as a loan owing to his relatives.

HELD: The parties were granted a divorce. The court granted judgment to the petitioner in the amount of $1,447,510. It ordered that the respondent pay spousal support in a lump sum of $82,560 and trial costs of $65,000 as well as the $57,000 he owed for the outstanding costs awards. For the purposes of spousal support, it accepted the respondent's imputed income and awarded support in a lump sum payment to the petitioner as appropriate under s. 15.2(1) and (3) of the Divorce Act. After dismissing the respondent's claim of family loans to be deducted as a fabrication, the court assessed the value of the total divisible family property at $3,121,989 so that the petitioner's half-share would be $1,382,510. She was granted a security interest in all of the respondent's present and after-acquired property to continue while the indebtedness was outstanding. The court awarded costs of $65,000 to the petitioner on the grounds that the respondent had never complied with various orders respecting disclosure, breached the non-dissipation order and never made a voluntary payment.

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Nunweiler v Nunweiler, 2021 SKQB 166

Smith, June 1, 2021 (QB21165)

Family Law - Custody and Access - Joint Custody - Primary Residence

The parties sought an order for divorce and to determine which of them should be the primary custodial parent. They had married in 2016 and their son was born in 2017. They separated in 2019 and since that time had a shared parenting arrangement of week-on/week-off custody of the child. The respondent mother had moved to Beaumont, Alberta at the time of separation and the petitioner resided in Saskatoon, so they each drove to Lloydminster to exchange the child. This arrangement had been ordered by the court in 2019 on an interim basis after the petitioner applied to the court when the respondent resisted giving him parenting time. As the child would start school in September 2022, the parties had to address the issue of his primary residence, as shared parenting would no longer be an option. The petitioner owned his own home and while the child was with him, he attended Montessori school. The maternal grandmother and his paternal grandparents either lived in Saskatoon or would be moving there shortly and the child had a relationship with all of them. As the petitioner shared custody of his nine-year-old son from a previous marriage, his second son would have a sibling. The respondent rented a home in Beaumont and had close friendships with other women. Recently, her father had started to visit her and his grandson. She had a 13-year-old son from a previous relationship who lived with her. The evidence of the income of each of the parties adduced for the purposes of child support showed that the petitioner was a minority shareholder in a business from which he derived dividend income of $134,000 per annum but the dividends were funded in full by his father. The respondent's income was $16,630. HELD: The parties were granted a divorce and the court ordered that they would have joint custody of their son and shared parenting would continue until August 2022. At that time, his primary residence would be with the petitioner with the respondent having specified access. Although they would remain joint decision-makers for their child, the petitioner would have sole and final decision-making authority regarding education and health matters if agreement could not be reached between him and the respondent. Until September 2022, the petitioner would pay the net sum of $1,030 per month to the respondent in for child support. The amount was a set-off of their support obligations based on their respective incomes of $134,000 per annum (imputed) and $16,630. As of September 2022, the petitioner's child support obligations would cease and the respondent would pay $114 per month to the petitioner. He would be responsible for 90 percent of s. 7 expenses incurred for the child. The amount of child support payable under the order was subject to recalculation by the Saskatchewan Child Support Recalculation Service if eligible. The court observed that it would not have hesitated to order a shared parenting regime had the respondent not maintained her opposition to living in

Saskatoon or its environs. It reached its decision regarding custody after reviewing the factors set out in s. 16(3) of the Divorce Act to assess the best interests of the child. It found the each of the parties were equally good parents and could provide satisfactory homes. It determined that by reason of extended family and, in particular, the conclusion that the petitioner would be willing to ensure the child's regular parenting time with the respondent (which was not reciprocated by the respondent), that the petitioner's home in Saskatoon presented a better environment and better potential for him to develop as a student and eventually as an adult.

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Sydor v Sydor, 2021 SKQB 169

Megaw, June 4, 2021 (QB21166)

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

The petitioner originally applied for relief in the spring of 2018, seeking the respondent's financial information. She submitted that the delay in proceeding was due to the respondent's tactics. She then made this application for orders: 1) compelling the respondent to provide disclosure in accordance with the notice to disclose and to file income information; 2) setting ongoing child support and determining child support from March 1, 2018; 3) setting ongoing spousal support and determining spousal support from March 1, 2018; 4) restraining the respondent from disposing of the family property; 5) allowing her and appraisers access to the real property involved in the litigation; and 6) costs. The parties began living together in 1994 and married in 2000. They had two children, now aged 12 and 15. The parties separated in 2018. Until April 2020, their primary residence had been with the petitioner but they then began to live in a shared parenting arrangement with both parents. The respondent had paid funds to the petitioner, but not regularly. The parties agreed that the petitioner was primarily responsible for child care during the marriage. She commenced operating a home-based business during the marriage that continued after separation. Her 2019 net income was $17,992. The respondent argued that income should be imputed to the petitioner under s. 19 of the Guidelines and certain of her expenses deducted should be added back into income. The respondent's personal income was based on ownership of two commercial properties from which he derived rental revenues. The evidence regarding his income was incomplete. He also was a shareholder in a corporation that owned one commercial building that was rented to a tenant. He deposed that the various commercial properties required significant repairs and proposed the cost of same be deducted from the corporate income. The petitioner argued that all of the net

income of the corporation before taxes should be included in the respondent's income.
HELD: The petitioner's application for interim relief was granted in part. The court found respecting each application that: 1) it would adjourn the matter sine die. Although the respondent had provided disclosure, it accepted the petitioner's suggestion that she should not have to bring another application to obtain further disclosure; 2) it would set the annual income of the petitioner at $17,992 and that of the respondent at $191,000. It found no reason to impute income to the petitioner. In determining the income available to the respondent for support purposes under s. 18 of the Guidelines, the respondent's claimed cost of repairs was not permitted; 3) the interim child support payment, based upon their respective incomes, was $264 per month by the petitioner and $2,537 per month by the respondent as at January 1, 2021. At this interim stage, it would apply the set-off of support obligation without performing a complete analysis under s. 9 of the Guidelines. It declined to order support retroactively to the date of separation, following the direction given in Graham v Tomlinson (2010 SKCA 101); 4) spousal support in the amount of $3,520 per month was payable by the respondent. The evidence showed that the petitioner was entitled on compensatory and non-compensatory grounds. It ordered the respondent's payment to commence January 1, 2021 and declined to order it retroactively to the date of separation for the reasons stated regarding retroactive child support; 4) it was not appropriate to make a restraining order on the evidence pursuant to s. 29 of The Family Property Act; 5) the request for access to the buildings by appraisers had been granted by the respondent and it should be extended to the petitioner; and 6) costs of $1,500 were awarded to the petitioner as she had been generally successful. Costs were also warranted because the matter included considerable affidavit evidence, difficulties determining the respondent's income and delay caused by trying obtain disclosure from him in order to do so.

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Holliday v Prairie Heights Condominium Corporation, 2021 SKQB 171

Elson, June 4, 2021 (QB21173)

Statutes - Interpretation - Condominium Property Act, Section 101

The applicant applied for an order, pursuant to s. 101 of The Condominium Property Act, appointing an administrator of the condominium in which she resided as a tenant. The application had been adjourned a number of times and at this hearing, one of the owners of units in the building, Bozek, requested that the matter be adjourned again. The condominium units had been managed by the respondent Prairie Heights Condominium Corporation (PHCC) and the PHCC board. All but one of the board members had resigned and

by February 2021, it had ceased holding meetings. In May 2021, the Saskatoon Fire Department ordered the closure of the building after a water leak developed in it and also due to constant vandalism, squatting, illicit drug use and a recent homicide. More than half the units in the buildings had been closed by the Director of Community Operations after he obtained a community safety order (CSO) pursuant to The Safer Communities and Neighbourhoods Act. According to the affidavits filed by the applicant and another tenant/owner, problems such as squatting, illicit drug use, and inadequate heat and water began occurring in the building in 2015. The police attended at the building constantly. The affiants deposed that many of the problems were attributable to the tenants of two owners, the respondents Bozek and Lindholm. The latter died in 2021 and his estate now owned the units. Bozek stopped paying condominium fees on some of his units and was in arrears of more than $60,000. The CSO closed all 15 units owned by Bozek and the 11 units owned by Lindholm. The Director also attested to the difficulties created by Bozek's conduct for the board, the police, the property managers and the Safer Communities and Neighbourhoods program (SCAN). The board had hired three security companies in 2020, but they had either terminated the arrangements or become too expensive so that in January 2021, no security was available. In his request for a further adjournment for a month, Bozek asserted that the problems of PHCC could be solved with a new board and a competent property manager. HELD: The application was granted and an administrator was appointed under s. 101 of the Act for an initial term of 180 days. The order set out the terms of his appointment, standing in the place of PHCC, to include the power to levy condominium fees, such as contributions to the common expenses fund. The court found that according to the authorities, the appointment of an administrator was a drastic step and this case, the circumstances warranted it. The PHCC and its board had effectively ceased to exist. Bozek played a central role in creating these circumstances and the court had no confidence in his promises.

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Holmes v Justanother Farm Ltd., 2021 SKQB 172

Tochor, June 9, 2021 (QB21167)

Civil Procedure - Queen's Bench Rules, Rule 2-24, Rule 7-9(2)(a)

The individual and corporate defendants were named in an action against them brought by the plaintiffs in their personal capacities, Hattie Holmes (H.H.) and Bruce Morrison (B.M.) The individual defendants, Kevin and Beverley Greenan (the Greenans), applied for orders: 1) striking the plaintiff's claim against them pursuant to Queen's Bench subrules 7-9(2)(a) and (e); 2) removing B.M. as a plaintiff pursuant to Queen's Bench rule 2-

24(1); and 3) permitting them to file a late application to strike an affidavit filed by the plaintiffs on the grounds that it was filed beyond the required time period and some of the information in it was in breach of the implied undertaking rule. The source of the dispute between the parties was an agreement made in 1998 between John Holmes (J.H.) and the corporate defendant, JFL, wherein the former provided a quantity of wheat for which he was to be paid $144,000. Periodic payments were made to J.H. but at the time of his death in June 2019, the plaintiffs alleged that a balance of $76,000 was outstanding. H.H., the wife of the deceased, was the sole beneficiary of his will and under the agreement had been named as the transferee of his interest in the payment upon his death. B.M., the son-in-law of the deceased, was a co-executor of his will. The plaintiffs pleaded that the Greenans had failed to cause JFL to pay J. H., alleging that they induced a breach of contract and conspiracy. No further facts were pleaded. The plaintiffs submitted that as the Greenans were the sole directors and shareholders of JFL, they were its operating mind. They sought to pierce the corporate veil and attribute personal liability to the Greenans for the actions of JFL in not paying J. H. The Greenans acknowledged the dispute as to any amount owing under the agreement but submitted the action could only proceed against JFL and not against them in their personal capacity. With respect to their application to strike, they argued that the plaintiffs' claim did not disclose a reasonable cause of action under Queen's Bench rule 7-9(2)(a) because it did not disclose same against them in their personal capacity. In their application to remove B.M., they contended that he had no claim against any of them. The plaintiffs argued that he was a proper party under Queen's Bench rule 2-24(1) and s. 10(a) of The Administration of Estates Act by virtue of his role as executor.
HELD: The Greenans' applications were granted respecting the striking of the plaintiffs' claim against them under Queen's Bench rule 7-9(2)(a). The claim made on behalf of B.M. was also struck and he was removed as a plaintiff. The court found with respect to each of the applications that: 1) the plaintiffs' action must be struck. After applying the two-stage test in Agmotion (2018 SKQB 100), the plaintiffs' pleadings met the first part because the Greenans were the only officers of what appeared to be a closely-held corporation, but because their pleadings did not disclose any allegations of the conduct required to pierce the corporate veil, they did not meet the second part of the test. Consequently, it was unnecessary to address the application under Queen's Bench rule 7-9(2)(e). The plaintiffs' request, made at the hearing, for an opportunity to amend their claim was denied. They would not be allowed to plead different facts to support a different claim; 2) the statement of claim disclosed no cause of action for B.M. in his personal capacity against the defendants. He was only named in his personal capacity in the claim. Even if he had been named as the co-executor of J.H.'s estate, it was still questionable whether he was entitled to be a party when the interest of J.H. was transferred to H.H. upon his death; and 3) the application for late filing was granted but the application to strike the affidavit was dismissed. The breach of implied undertaking rule did not apply in the circumstances.

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R v McGuire, 2021 SKQB 176

Currie, June 10, 2021 (QB21168)

Constitutional Law - Charter of Rights, Section 7
Criminal Law - Preliminary Inquiry - Committal for Trial - Certiorari

The accused applied for an order of certiorari to quash his committal to stand trial after a preliminary inquiry and an order of mandamus directing the Provincial Court to re-open the preliminary inquiry and compelling the Crown to produce a witness for cross-examination. He also applied for relief under s. 24(1) of the Charter on the basis that his s. 7 Charter rights had been violated at the preliminary inquiry. At that time, Crown counsel had advised the judge that it would be making an application under s. 540(7) of the Criminal Code to tender certain photographs without proof of continuity. The defence counsel suggested that if the person in the photographs and the photographer would not be testifying, he would apply to cross-examine them under s. 580(9) of the Code. The Crown assured the court and the defence that the photographer would be testifying. After the Crown closed its case without calling the photographer, the defence asked the judge to order the Crown to produce her for cross-examination under s. 540(9), but he declined to do so. At the conclusion of the preliminary inquiry, the judge committed the accused to stand trial. The defence made these applications arguing that the judge had committed a jurisdictional error in concluding that he did not have authority to make the requested order.
HELD: The applications were dismissed. The court found that the judge had not erred and did not commit a jurisdictional error and dismissed the applications for certiorari and mandamus. After reviewing the transcript, it found that the judge made his decision to refuse the defence application with the knowledge that he had discretion under s. 540(9) of the Code to direct the Crown to call the photographer and decided not to make the order pursuant to his discretion. Respecting the accused's Charter application, it found that the accused's s. 7 Charter rights had not been breached. The accused had not suffered any unfairness. Although it seemed as if the defence was misled by the Crown so as to abandon his s. 540(9) application, he took the opportunity at the close of the Crown's case to renew his application, which remedied the unfairness. The judge's decision to dismiss the application had not breached the accused's s. 7 Charter rights either, as the Supreme Court held in S.J.L. (2009 SCC 14) and Bjelland (2009 SCC 38) that there is no Charter right to cross-examine a witness at a preliminary inquiry.

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R v Pahl, [2021 SKQB 179]

Mitchell, June 11, 2021 (QB21176)

Statutes - Interpretation - Criminal Code, Section 320.31(1)
Criminal Law - Motor Vehicle Offences - Impaired Driving Causing Bodily Harm
Criminal Law - Motor Vehicle Offences - Driving with a Blood Alcohol Exceeding .08
Criminal Law - Conveyances Offences - Aircraft - Impaired Operation

The accused was charged with operating an aircraft in May of 2018 while impaired and causing bodily harm and while his blood alcohol level exceeded the legal limit contrary to ss. 253(1)(a) (now s. 320.14(2)) and 253(1)(b) (now s. 320.14(1)(b)) of the Criminal Code, respectively. The offences were alleged to have been committed prior to the coming into force in December 2018 of the amendments made to those provisions pursuant to An Act to amend the Criminal Code, SC 2018, c 21. However, under s. 32(2) of the amending legislation, the accused's trial was subject to the new provision, s. 320.31(1) of the Code. This section relates to the conclusive proof of a person's blood alcohol concentration provided by evidence of breath samples taken into an approved instrument operated by a qualified technician. Prior to trial, the defence brought a Charter application alleging that the accused's s. 10(b) Charter rights had been breached and a blended voir dire/trial commenced. The Crown called as witnesses the passenger in the accused's plane, two individuals who saw it crash and assisted the accused and passenger afterward, two attending RCMP officers and the Breathalyzer qualified technician (QT). The accused testified on his own behalf. The judge dismissed the Charter application and the results of the breath sample tests were admitted into evidence, showing 190 and 180 milligrams of alcohol in 100 millilitres of blood for each test (see: 2020 SKQB 75). The Crown and defence evidence was incorporated into the trial proper when proceedings recommenced. The accused took the passenger for a flight in his single engine plane. It crashed within a few minutes after takeoff, and the passenger suffered a serious laceration to the top of his head. At trial, he testified that the accused did not seem to have been drinking and he hadn't seen him consume liquor, nor did he detect an odor coming from the accused. After the crash, he bled profusely and was treated in hospital. After witnessing the plane descend quickly, the passenger's co-worker drove to the site and transported him to the hospital. The co-worker testified that the accused seemed to walk normally after the accident and had not smelled of alcohol. The other witness, a nurse who saw the crash, assisted the passenger on site. She testified that the accused appeared to walk and speak normally but she could smell alcohol coming from him when he sat her in truck waiting for medical help to arrive. She advised the RMCP officers of her observations when they arrived at the scene. One officer testified that the smell of alcohol was overwhelming when he opened the door of the ambulance where

the accused was sitting. He advised the accused that he was being detained for the purpose of obtaining a breath sample on the ASD and made the demand. The accused failed the test, was arrested and later provided breath samples at the detachment. The other officer investigated the scene of the accident and found a cooler containing two empty drink containers just outside the aircraft. The liquor store receipt was stamped with the date and time of purchase, a couple of hours before the accident. The accused confirmed that he had purchased the alcoholic beverages. The very experienced QT who administered the Breathalyzer tests testified that he could smell alcohol on the accused's breath. He stated that the machine had passed a diagnostic test, an air blank test, a calibration check and a second air blank test before the accused provided his breath samples. Regarding the calibration check, the QT testified that the alcohol standard was "air gas" signed by an analyst certifying that it was good for use. There were no issues with the calibration of the alcohol standard on May 22, 2018. In addition to the QT's testimony, the Crown entered as exhibits: i) two signed certificates of an analyst dated May 1 and July 4, 2017, respectively; ii) certificate of a QT dated May 22, 2018 and notice of intention to produce certificate dated May 23, 2018; and iii) certificate of a QT dated January 8. 2019. The latter two exhibits represented the old and new versions of the certificates. Respecting the first charge, the defence argued that the accused's demeanour and behaviour were not those of an impaired person. Respecting the second charge, the defence argued that the Crown had failed to prove the accused's blood alcohol levels beyond a reasonable doubt. She submitted that the Crown's exhibits, the two certificates of an analyst described in i) above, were inadequate. They failed to identify the "target value of an alcohol standard that is certified by an analyst," which is required by the closing words of the new provision, s. 320.31(1)(a) of the Criminal Code. She submitted that the certificate must identify both the "target value" and the "alcohol standard" in order to comply with this new provision. Failing that, it was not possible for the Crown to rely on the "evidentiary shortcut" available to it under s. 320.31(1)(a), as each certificate of an analyst was inadmissible. The QT's testimony was hearsay and also inadmissible. She relied upon authorities such as R v Flores-Vigil (2019 ONCJ 192) and after trial, brought to the attention of the judge the recent decision of the Alberta Court of Appeal in R v Goldson (2021 ABCA 193) (Goldson). The Crown asserted that the requirements of 320.30(1)(a) of the Code were satisfied in this case because an analyst only had to certify the alcohol standard and, consequently, it could rely on the evidentiary shortcut created by the section. If not, the QT's testimony respecting the approved instrument and its operation, together with the printout results, were admissible and reliable evidence in the absence of the two certificates of an analyst. In addition, the Crown pointed to the newly enacted s. 320.22 of the Code.

HELD: The accused was found guilty of both charges. The court found that the Crown had proven beyond a reasonable doubt that the accused was operating an aircraft while he was impaired and while his blood alcohol level exceeded the legal limit and that while operating the aircraft, he caused an accident resulting in bodily harm to the passenger. Respecting the first charge, it took into account the evidence provided by the testimony of the nurse, each of the officers and the QT that the Crown had proven the accused was impaired. It also

found that because of the seriousness of the plane crash, attributable to pilot error, the accused's behaviour had been a "marked departure from normal" as described in R v Cramer (2019 SKCA 118). Further, the injury suffered by the passenger met the requirement for bodily harm. Regarding the second charge, it found that the Crown could rely on the statutory presumption of accuracy set out in s. 320.31(1) of the Code to prove the accused's breath sample test results were accurate and reliable. It interpreted the wording of s. 320.31(1)(a) of the Code to mean that an analyst must certify only the alcohol standard, either by way of viva voce evidence or a statutorily-recognized certificate of an analyst, and not the target value. The decision in Goldson supported that interpretation.

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D.S. v K.C., 2021 SKQB 178

Richmond, June 15, 2021 (QB21175)

Family Law - Custody and Access - Primary Residence
Family Law - Child Support
Statutes - Children's Law Act, 2020, Section 10, Section 15, Section 16

The petitioner and the respondent both sought to have the court determine the primary residence of their four-year-old daughter, either in Eatonia, Saskatchewan or Drayton Valley, Alberta, respectively, and then to establish the child support obligations they would each bear. They had lived together since 2015, but had not married. For most of their relationship they had resided in Eatonia and they separated in June 2019. Although the respondent had been the primary caregiver after the child's birth, both parents were equally involved in her care after the respondent returned to work. The respondent mother, aged 24, grew up in Drayton Valley and wanted to return there with the child to be closer to her parents and extended family. When she decided to separate from the petitioner, the respondent took the child with her to Drayton Valley without the petitioner's consent and had no contact with him for 26 days. After she returned to Eatonia, the parties had been parenting the child on a 2-2-3 schedule pursuant to an interim court order. The child was thriving under this arrangement and had strong bonds with both parents. She attended daycare with her first cousins in Eatonia and spent extensive time with her paternal grandparents, aunts, uncles and cousins. However, the child was attached to the respondent's family too. In support of her wish to relocate to Drayton Valley, the respondent advised that her plan was to start her own in-home esthetics business there and she had also obtained part-time employment at a care home. She had found a daycare that would provide for part-time child care and also planned on

relying on her family to assist her. Her income was not yet known but income of $38,000 per year was imputed to her. She proposed that the child would have her primary residence with her and she have sole decision-making authority. The petitioner would have parenting time three weekends per month and on holidays and the parties would meet halfway between their two communities to exchange the child on Fridays with a return on Sundays. The respondent believed she could help pay for travel costs by working more and with family help. The petitioner's parents and extended family lived in Eatonia and although he was employed as a land agent earning $91,387 in 2020, he intended eventually to take over the running of the family farm. It was his preference that the current parenting arrangement and decision-making continue but he did not have a plan for care for the child once the respondent relocated other than to suggest that the child would remain in his primary care and continue to attend the same daycare/playschool.
HELD: The court ordered that the parties would each parent the child on alternating weeks until September 2021, whereupon the child would have her primary residence with the petitioner. The respondent would have parenting time for ten-day periods each month beginning on a Friday and ending on Sunday of the following week. As at September 2022 when she started attending kindergarten, the respondent would have specified parenting time of 10 days per month to be coordinated with the school calendar so that the child would not miss more than two school days each month. The arrangement would be altered in September 2023 when the child commenced school full-time and she would then spend one long weekend per month with the respondent. The parties would continue to have joint decision-making responsibility respecting the child. Their respective child support obligations would vary to reflect the shared parenting regime and the transition to the petitioner having primary care of the child. As the petitioner had the means to assist with travel costs, the respondent's child support obligations would be reduced by $150/month when she relocated to Drayton Valley, pursuant to s. 17 of The Children's Law Act, 2020. The court first decided that the parties would have the burden of proving whether the relocation was in the best interests of the child under s. 16(4) of the Act, rather than imposing the burden only upon the respondent under s. 16(1). It reviewed each of the factors set out in s. 10 to establish what was in the best interests of the child as well as the additional considerations required by s. 15 for cases involving relocation. It found, among other things, that the parties were both capable of meeting the child's needs and she was equally attached to them both and to their respective families. It would be disruptive for her to move from her home in Eatonia and even if the respondent would be happier returning to Drayton Valley, it would be in the child's best interests nonetheless. It would also be contrary to her best interests to spend the amount of time traveling between her parent's residences that the respondent's proposed plan would necessitate. The petitioner's life and employment were stable and having the child remain in his care in familiar surroundings was in her best interests.

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R v Crookedneck, 2021 SKQB 183

Hildebrandt, June 21, 2021 (QB21179)

Criminal Law - Sentencing - Firearms Offences
Criminal Law - Sentencing - Aboriginal Offender

The accused was convicted after trial on the following offences: carrying a shotgun in a careless manner contrary to s. 86(1) of the Criminal Code (count 1); possession of a firearm knowing that he was not the holder of licence contrary to s. 92(1)(a) (count 5); possession of a firearm knowing that the serial number had been removed contrary to s.108(1)(b) (count 7); willfully obstructing a police officer by giving a false name contrary to s. 129(a) (count 8); failing to comply with a probation order not to consume alcohol, cannabis or drugs contrary to s. 733.1(1) (count 9); and possession of a firearm while prohibited from doing so by an order made pursuant to s. 109(1), contrary to s. 117.01(3) of the Code (count 12). At the sentencing hearing, the facts concerning the accused and the offences were established that the RCMP were called to the Ahtahkakoop First Nation because a young man was seen carrying what appeared to be a short-barreled, sawed-off shotgun. After observing a man carrying a gun, the officers followed him when he fled into a house. They located him and then found a loaded 12-gauge shotgun. They testified that the accused was very intoxicated. The officers eventually confirmed the man's identity as that of the accused after he gave them a false name and date of birth. Counsel for the Crown and defence indicated that a pre-sentence report was not being requested after the accused's convictions were entered, but the Crown acknowledged that he was of First Nations descent. The defence submitted that the accused, a 23-year-old Indigenous man and member of the Pelican Lake First Nation, had been affected by many Gladue factors. His parents attended day school and were possibly residential school survivors. They abused alcohol and did not take care of their children, who grew up in impoverished circumstances. The accused believed that his mother may have consumed alcohol while she was pregnant because he had learning and behavioural problems. He began drinking and using drugs at the age of 12 and became an alcoholic. However, he had remained sober while in remand for 10 months and he expressed his desire to stay sober by taking programming. The accused's schooling ended in grade 10. At the time of sentencing, he was serving a two-year sentence for robbery.
HELD: The accused received a global sentence of 965 days or approximately 32 months and credit for 210 days in remand, leaving him to serve 755 days in prison. The sentences imposed upon him were to be served consecutively to the sentence he was currently serving. He was prohibited from possessing a firearm for 10 years. The court ordered that on count 12, a serious offence, the accused was to serve 365 days' imprisonment consecutively to all other sentences imposed. The remainder of the sentences for each count were to be served

concurrently and they were set at: 540 days' imprisonment for count 1; 600 days' imprisonment for count 5; 120 days' imprisonment for count 7; 120 days' imprisonment for count 8; and 120 days' imprisonment for count 9. In constructing the sentences, the court considered as mitigating the Gladue factors, the accused's personal circumstances, his youth and his potential for rehabilitation. The aggravating factors were that he was on probation for assault with a weapon at the time of the offences and disregarded a firearms prohibition order only four months after it was made. As probation had not worked, it decided that a significant custodial sentence was required to meet the objectives of deterrence and denunciation and to enable the accused to avail himself of programming while in custody to overcome his substance abuse and criminal activity.

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R v Loreth, 2021 SKQB 184

Dawson, June 21, 2021 (QB21180)

Criminal Law - Controlled Drugs and Substances Act - Possession for the Purpose of Trafficking - Cocaine - Sentencing

The accused pleaded guilty to the following charges: possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA) (count 1); possession of morphine contrary to s. 4(1) of the CDSA (count 2); possession of cocaine contrary to s. 4(1) of the CDSA (count 3); possession of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the CDSA (count 4); and failing to comply with the condition of a release order to possess only one cell phone contrary to s. 145(5)(a) of the Code (count 7). The first two charges, counts 1 and 2, were committed in March 2020 when the police found the accused, apparently unconscious, in her vehicle with cash in the amount of $405 and drug paraphernalia that included a score sheet, 33 individual packages of cocaine and five morphine pills. The accused admitted to having used cocaine, morphine and Percocet on the date she was found. She pleaded guilty to impaired driving and received a fine and driving prohibition. The other charges were laid after the police searched the accused's home as they had received information that she was trafficking from it. They found $105 in cash, nine drug pipes, three score sheets, three cell phones, two of which belonged to her children, and 45 grams of methamphetamine packaged in dime bags and a gram bag. They also found 22.9 grams of cocaine to which the accused had pleaded guilty to simple possession. There was no evidence presented that the cell phones were being used for drug trafficking. The Crown conceded that the accused's classification was as a low-level trafficker. The pre-sentence report (PSR) described the accused as a 39-year-

old woman with severe drug addiction. At the time of the offences, she was living with three of her four children and was supporting them with government assistance funds and occasional child support received from their fathers. The accused finished grade 12 and her primary occupation as an adult had been as a caregiver to her children. At the time of arrest, she had been a self-employed house cleaner. The accused began drinking and using marijuana at 14. From the age of 20 until she was 36, the accused had used cocaine and crack on a daily basis. In 2018, she began selling drugs to support her habit. The accused expressed her deep regret over her conduct and the impact it had had on her children and family and expressed her intent to get help to overcome her problems. The accused was assessed at medium risk to re-offend that could be managed through targeted interventions to address the primary contributing factor, her drug addiction. Her parents were very supportive and would supervise the accused after she was released into their care to reside with them. Her three children were in the guardianship of her sister. The PSR author indicated that it was reasonable for the accused to receive a community-based sentence given that the accused had only one other conviction for driving over the limit in 2004. A number of letters filed on behalf of the accused commended her for her attempts at recovery. The Crown submitted that a global incarceral sentence of 4.5 years less time on remand was appropriate. The defence's position was that 20 months less enhanced credit for time on remand, with the mandatory ten-year firearm prohibition, would be a proper sentence.
HELD: The accused was sentenced to a total sentence of 28 months less enhanced credit for time on remand, so that she would serve 426 days from the date of judgment. The sentence was to be followed by 12 months' probation subject to mandatory conditions, including that the accused was not to possess or consume alcohol or drugs and must participate in assessment and programming for drug addiction. With respect to the sentences for each charge, the court ordered that for the more serious charges of trafficking in count 1, the sentence of 10 months was reduced to 300 days to be served consecutive to the sentence of 540 days for count 4. Regarding the possession charges, the accused was sentenced to 90 days' imprisonment for count 3 and 30 days' imprisonment for count 4, both to be served concurrent to count 1 and consecutive to count 4. In constructing the sentence, the court considered that the accused was a low-level trafficker, primarily selling to friends and other addicts to support her own use. The quantity of hard drugs in her possession was small. The accused had pleaded guilty and expressed remorse. She had attempted to address her addictions while in custody and actually chose to remain in pre-trial custody because she knew that during the pandemic it would be the only place where she would receive treatment. Her PSR was positive and so were letters of support filed on her behalf. After release, she would have support from her parents and her sister.

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Lawless v Avalerion Corp., 2021 SKQB 185

Wilkinson, June 24, 2021 (QB21181)

Statutes - Interpretation - Enforcement of Money Judgments Act, Section 5(5)(b)

The plaintiff brought an application pursuant to The Enforcement of Money Judgments Act (EMJA) for a preservation order (PO) against all the assets of the defendant, Avalerion Corp. (Avalerion), and in the alternative, he sought an order for an accounting of all revenues from leases of aircraft earned by Avalerion. The application was made subsequent to the plaintiff bringing an action against Avalerion, the defendants, Campling and his wholly-owned corporation, 600418 Saskatchewan (600418), Avalerion Canada Ltd. (AC Ltd.) and the other named defendants, for wrongful dismissal from his position with Avalerion and AC Ltd., and also to seek oppression remedies under federal and provincial business corporation legislation, alleging that the defendants had acted against his interests. He sought an unspecified quantum of damages for dismissal and misrepresentation. His claim in oppression came out of his employment with Avalerion, as he had been given a 25 percent share in it and became a party to a unanimous shareholder agreement (USA) with Campling and another defendant. After his dismissal, the plaintiff was asked to resign as an officer and director of the corporations and to sell his shares for $519,999. The sale price was purportedly established by a clause in the USA. His grounds were that Avalerion would not have the financial ability to satisfy any judgment he might obtain in his oppression suit for recovery of the fair market value of his shares in it and his associated claim for damages for wrongful dismissal. Avalerion opposed the plaintiff's application for the PO, arguing that he had not met the statutory requirements and criteria for granting one as set out in s. 5(5)(b) of the EMJA. The issues were whether: 1) the criteria under s. 5 of the EMJA were satisfied; 2) a bond of $5,000 proposed by the plaintiff was sufficient security; and 3) the plaintiff was entitled to a full accounting of lease revenues received by Avalerion.
HELD: The application was dismissed. The court found with respect to each issue that: 1) the second criterion set out in s. 5(5)(b) of the EMJA had not been satisfied. Although the plaintiff's claim was a recognized cause of action under s. 5(5)(b), he had not provided sufficient evidence of risk to himself nor that the judgment enforcement was likely to be frustrated in the absence of a PO; 2) the amount of security proposed was insufficient based upon the decision in National Police of Colombia v Dash 224, LLC (2014 PECA 16) because of the value of Avalerion's assets; and 3) it would not grant the accounting order because of insufficient evidence and the potential misuse of confidential information by the plaintiff.

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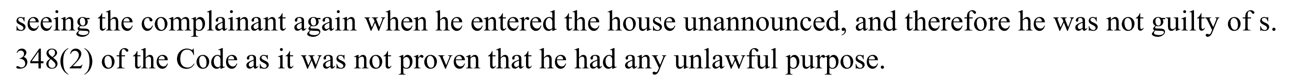
R v Moya, 2021 SKQB 186

Robertson, June 25, 2021 (QB21182)

Criminal Law - Assault - Sexual Assault - Conviction

The accused was charged with committing a sexual assault contrary to s. 271 of the Criminal Code, attempting to render the person he assaulted incapable of resistance by choking her contrary to s. 246(a), and breaking and entering a dwelling house with intent to commit an indictable offence contrary to s. 348(1)(a). The charges were laid after the complainant alleged that the accused, with whom she had been in a romantic relationship for approximately a year and a half, had sexually assaulted her. She testified that he came to her parent's residence where she resided. At the time, they were each aware that their relationship was ending. After they entered her living quarters in the basement of the house, the accused followed the complainant into her bedroom. He put his hand on her throat and pushed her back onto her bed. The grip did not constrict her breathing but it had the effect of controlling her movement. The complainant testified that she said "please stop" before the accused began intercourse and he replied "I have to do this." The accused denied that this exchange occurred and said that the complainant had responded to his embrace and kisses before he had intercourse with her but as he did, she said "no no no" almost immediately and he ceased. Other inconsistencies between their versions included that the complainant said that she had not kissed nor embraced the accused before he pushed her down onto the bed and she said that he alone removed her pants, but he testified in re-direct that she had helped him. The accused's defence was that the complainant consented to sexual relations and if she did not, he had an honest belief in communicated consent, relying on the evidence that she responded to his advances, helped him to remove her pants and had said nothing indicating a lack of consent until intercourse began, whereupon he stopped. A number of days after the alleged sexual assault, the accused testified that he wanted to see the complainant because she was blocking his calls. He went to the house early in the morning, entered it through the unlocked back door and went into the basement. When the complainant appeared to realize that someone was in the room, he left the house. The complainant told her mother who called the police. The accused was then charged with the offence under s. 348(1)(a) of the Code. HELD: The accused was found guilty of sexual assault and not guilty of choking or breaking and entering with intent. Regarding the sexual assault charge, the court noted that there were significant differences between the versions provided by the complainant and the accused and thus applied the three steps of the D.W. analysis and found that: 1) it accepted the complainant's evidence that she had not consented and that the accused knew she had not. It did not believe his denial; 2) the accused's evidence did not raise a reasonable doubt. It did not believe his version of events; and 3) the Crown had proven the elements of the offence under s. 271 of the Code after considering all the evidence. Respecting the choking charge, it found that there was a reasonable doubt whether the accused intentionally attempted to choke the complainant for the purpose of committing sexual assault. Although the accused had held the complainant by the throat, the force applied was light and did not impair breathing. The court also had a reasonable doubt that the accused had any purpose other than



seeing the complainant again when he entered the house unannounced, and therefore he was not guilty of s. 348(2) of the Code as it was not proven that he had any unlawful purpose.

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