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.

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***Beauchamp v Beauchamp*, 2021 SKCA 148**

Ottenbreit Whitmore Leurer, 2021-11-23 (CA21148)

Family Property - Interim Property Order - Variation
Family Property - Third Party Interests - Appeal

The Court of Appeal (appeal court) dealt with two separate appeals from decisions of a Queen's Bench case management judge (judge) appointed pursuant to Rule 4-5 of *The Queen's Bench Rules* (Rules). The first appeal considered by the appeal court concerned the terms of the initial order which emanated from the decision of the judge: *Beauchamp v Beauchamp* (19 April 2021) Swift Current, DIV 57 of 2020 and QBG 16 of 2021 (interim farming decision); the second was an appeal by the petitioner husband J.J.B. from the decision of the judge following an application by the respondent wife N.B. to vary the interim farming decision: *Beauchamp v Beauchamp* (19 April 2021) Swift Current, DIV 57 of 2020 and QBG 16 of 2021 (variation decision). The court accepted the findings of the judge that J.J.B. and N.B. owned 29 quarters of land in their own names but

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farmed that land through their corporation New Age and a joint venture agreement called New Age Joint Ventures (joint venture agreement) made between New Age, and the farming corporations of their two sons, G.B., J.B., respectively Beauchamp Farms and Beauchamp Acres, which also had large land holdings. New Age owned the machinery and equipment used pursuant to the joint venture agreement. The court also accepted that the farming enterprise was very large and complex due to the farmland, machinery and other assets being distributed among the various parties who had, prior to the separation of J.J.B. and N.B., agreed to pool their assets and farm together for their mutual benefit. The court also agreed that central to the appeals were a number of proceedings: an interim order made pursuant to The Family Property Act granting exclusive possession of the home quarter to J.J.B. where the shop, machinery and equipment were located (Keene order); an oppression action by J.J.B. to force New Age to give notice of its intention to withdraw from the joint venture agreement; an action by G.B. and J.B. (the sons) and their companies for compensation for labour and services to J.J.B. and N.B.; and proceedings to stay that action by J.J.B., claiming that pursuant to *The Arbitration Act*, the court lacked jurisdiction to hear the claim, which should be heard according to the terms of the joint venture agreement. The court was also cognizant that the parties together had requested the judge be appointed to deal on an urgent and expedited basis with the various disputes between the litigants with a view to arranging a truce between them so that the 2021 crop could be seeded and harvested. The appeal court acknowledged that the parties consented to the matter proceeding in chambers by way of affidavit evidence, submissions of counsel, and written briefs and that all proceedings were to be consolidated so that the interim farming decision would be binding on all parties. In canvassing the proceedings in the court below that resulted in the interim farming decision, the appeal court was aware that the judge was required to do the best he could under time constraints, and that the parties accepted this reality; that contrary to J.J.B.'s wishes, the judge decided he would adjourn his application to stay the action of the sons and their companies; that he varied the Keene order to the extent that J.J.B.'s exclusive possession of the home quarter be subject to conditions, including that he remove any "barricades or other impediments" to accessing the yard so that certain agreed-upon parties could attend the yard to get machinery and tools; that among other terms, the judge ordered that the general operation of the farm be placed in the hands of the son G.B. as his proposal was the most reasonable in that he agreed the joint venture agreement provided a framework for the terms of his order; that as suggested by J.J.B., he ordered that G.B. consult with an agrologist in making farming decisions; that J.J.B. was to return any family property or joint venture property to the home quarter; and that J.J.B.'s proposal that he farm separately from the others was rejected with reasons. The appeal court agreed with the judge that the evidence showed that J.J.B., soon after the interim farming decision, in an effort to circumvent the interim farming decision, had again blockaded the home quarter, hidden machinery and equipment, and

Civil Procedure - Striking Statement of Claim - Jurisdiction - Appeal

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Constitutional Law - *Charter of Rights*, Section 9, Section 10(b)

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accessed corporate funds for his personal use, and that these events led to N.B.'s application and the making of the variation decision, which granted exclusive possession of the home quarter to N.B. in an effort to salvage the 2021 crop year. J.J.B. appealed both decisions to the appeal court on numerous grounds raising primarily evidentiary, procedural, interpretive, and jurisdictional error on the part of the judge, such as: that the judge made decisions on matters not raised by him or the other parties; that no material change had been shown for variation of the Keene order or the interim farming decision; that he misinterpreted J.J.B.'s evidence and submissions concerning the extent of his waiver of the arbitration clause in the joint venture agreement; and that the judge ignored evidence that G.B. was not competent to be in charge of the operation of the farm because he was violent.

HELD: The appeal court under the pen of Leurer J.A. dismissed fresh evidence applications by J.J.B. because the proposed evidence was irrelevant to the issues to be decided and dismissed all grounds of appeal except one concerning a minor order whichthe judge had no jurisdiction to make under *The Family Property Act* (Act) by which the applications were to be determined. He made it clear that the court was to apply a standard of deference to the decisions of the judge as these were for the most part discretionary, and could not be overturned unless: the judge's decision had demonstrated that he had made a palpable and overriding error in his factual findings; had committed an error in principle; had abused his discretion by "disregarding a material fact, failing to act judicially, or if the result is so plainly wrong as to amount to an injustice": *Tyacke v Tyacke*, 2021 SKCA 80. Generally, the court concluded that the judge correctly exercised his discretion within the parameters of the task he was given to perform, which the parties had agreed to, that is, to fashion the rules by which the farm would be managed for the 2021 crop year without prejudicing the property rights of any of the parties, and that the variation decision was also made in the same spirit and was required because the unwarranted conduct of J.J.B. threatened the structure put in place by the interim farming decision. Among the many discretionary decisions of the judge that the court reviewed and upheld were: rejecting J.J.B.'s argument of procedural irregularity in deciding to adjourn his stay application without a formal application by the sons to adjourn it for the reason that a court can deal with matters of procedure on its own motion; rejecting the argument of J.J.B. that the judge breached his duty of procedural fairness by preferring the proposal of the sons and not deciding to choose the proposal of J.J.B. or N.B., the parties to the family property division, because the parties requested and agreed that a case management judge be appointed to negotiate a truce to the family feud for the limited purpose of managing the farm for one year and that, as such, knew that the resultant decision could involve the third party concerns of the sons; and rejected the argument of J.J.B. that the judge misinterpreted the meaning of the phrase "material change in circumstances" in s. 8 of the Act when he varied the Keene order by giving exclusive possession of the home quarter to N.B. in the variation decision because the actions of J.J.B. in "impeding the business operations of the farm" constituted a "material difference in the state of play" when the Keene order was made. In short, the appeal court endorsed the judge's overall handling of this complex matter and showed deference to his decisions.

Criminal Law - Resisting Officers in Lawful Execution of Duty

Family Law - Child Support - Enforcement

Family Law - Custody and Access - Police Enforcement of Order

Family Law - Discontinuance of Proceedings - Assessment of Costs

Family Law - Interim Parenting Order - Relocation

Family Property - Interim Property Order - Variation

Family Property - Third Party Interests - Appeal

Labour Law - Collective Agreement - Arbitration - Effect on Jurisdiction of Court

Labour Law - Labour Relations - Certification Order - Judicial Review

Landlord and Tenant - *Residential Tenancies Act, 2006* - Award of Damages - Appeal

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***Yashcheshen v Law School Admission Council Inc.*, 2021 SKCA 149**

Ryan-Froslie Tholl Kalmakoff, 2021-11-24 (CA21149)

Civil Procedure - Striking Statement of Claim - Jurisdiction - Appeal

The appellant, A.Y., appealed the decision of a judge of the Court of Queen's Bench in chambers (chambers judge), who struck out her claim on the basis that he had no jurisdiction to hear the matter because *The Saskatchewan Human Rights Code* (Code) did not cloak him with the power to adjudicate a claim outside of its legislative framework when in essence the claim was one alleging discrimination. It was not in issue that the appellant issued a statement of claim in contract as well as other causes of action directly to the Court of Queen's Bench, and bypassed the complaint procedure established in the Code; that she claimed damages against the respondent, Law School Admission Council Inc. (LSAC), the body that administered the Law School Admission Test (LSAT), because it failed to accommodate her disabilities, which caused her to obtain lower scores on the LSAT than she would have obtained had her needs been accommodated; and that s. 12 of the Code specifically provides that it is discriminatory for any person to deny another person "any accommodation, service or facility to which the public is customarily admitted or that is offered to the public" and s. 15 of the Code prohibited any person from offering a contract to another person which discriminates against that person "on the basis of a prohibited ground." Before the chambers judge, LSAC had advanced several arguments as to why the statement of claim should be struck other than the jurisdictional one, but he ruled only on it.
HELD: The court, under the pen of Tholl J.A., allowed the appeal and returned the matter to the chambers judge to rule on the other issues advanced by LSAC in its application to strike the appellant's statement of claim. He decided that on a standard of correctness the chambers judge had erred in that, though he found correctly that the jurisdiction of the court was not explicitly "pre-empt[ed]" by the Code, he nonetheless erred in finding that the claim of the appellant had the essential character of a claim in discrimination that ousted the Court of Queen's Bench from considering the claim. The appellant did not plead a contravention of the Code as a cause of action. Instead, the appeal court ruled, her pleadings supported an action in damages for breach of contract, which the court had inherent jurisdiction to hear.

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Landlord and Tenant - *Residential Tenancies Act, 2006* - Interpretation of Lease Terms - Utility Repair - Levy - Appeal

Real Property - Foreclosure - Order Nisi - Selling Agent - Appeal

Statutes - Interpretation - *Enforcement of Maintenance Orders Act*, Section 43, Section 53.1

Statutes - Interpretation - *Saskatchewan Employment Act*, Section 6-45

Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 2(1)(h), Section 44

Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 21(1)

Statutes - Interpretation - *Small Claims Act, 2016*, Section 5, Section 12, Section 24

Torts - Defamation

Wills and Estates - Estate Administration - Application for Appointment as Administrator

***R v McKenzie*, 2021 SKCA 150**

Ottenbreit Ryan-Froslie Kalmakoff, 2021-11-24 (CA21150)

Appeal - Criminal Law - Impaired Driving
Criminal Law - Appeal - Standard of Review

The Crown appealed to the Court of Appeal (court) the decision of the summary appeal court judge (summary appeal judge), reported in *R v McKenzie*, 2020 SKQB 206, allowing the appeal of the respondent from his conviction for impaired care and control of a motor vehicle after trial before a Provincial Court judge (trial judge) on the grounds that the summary appeal judge: 1) misinterpreted the reasons of the trial judge and erroneously found them inadequate; 2) failed to apply the deferential standard of review of palpable and overriding error to the trial judge's findings of fact but instead usurped the trial judge's fact-finding function; and 3) failed to apply the correct standard of review to the question of whether the verdict was reasonable. No facts were in issue at trial, or by the parties on appeal. These were: in the early morning hours a citizen stopped his vehicle upon seeing a vehicle parked in a snowbank with the lights on, the driver's door was open and garbage strewn on the street near the vehicle; he noted the driver was unconscious and slouched behind the steering wheel and was unresponsive to his attempts to rouse him; the investigating officer observed him exit and re-enter the vehicle, and not respond to the officer tapping on the window; after opening the door, the officer noticed a strong smell of alcohol coming from the vehicle and the respondent shut the car off and throw the keys in the back of the vehicle; upon the respondent's exiting the vehicle, he noted a strong smell of alcohol from the respondent's breath, confirmed in the police vehicle; "droopy, watery and glassy eyes", a sway in his walk, unsure footing and a wide stance in his gait, though on an icy surface; no slurring and nothing to raise concerns he did not understand his rights; and that he was parked very close to his residence. The appeal court reviewed the summary appeal judge's treatment of the trial judge's reasons, noting that the summary appeal judge referred to the correct law as contained in *R v Andrews*, 1996 ABCA 23, as followed in such cases as *R v Landes* (1997), 161 Sask R 305 (QB) and *R v A.L.E.*, 2009 SKCA 65, and that he then concluded the trial judge failed to show in his reasons that he appreciated that to prove impaired driving to the criminal standard he must bridge the gap in his analysis between functional impairment and impairment in the operation of a motor vehicle. In addition, the appeal court considered the treatment by the summary appeal judge of the trial judge's factual findings and observed that he embarked on a detailed weighing of the evidentiary value of individual pieces of evidence, and also that he went through each piece of evidence in isolation to see if there were other explanations for the indicia of impairment apart from impairment by alcohol.
HELD: The Crown appeal was allowed, and a conviction entered. First, concerning the summary appeal judge's ruling that the trial judge's reasons were silent on the matter of general impairment versus specific impairment in the operation of a motor vehicle, the appeal court disagreed, stating

Case Name

A.P.R.C. v A.R.S.

Beauchamp v Beauchamp

Belof v Saskatoon Board of Police Commissioners

Bond v Jackson

Bouvier v Bouvier

Double Diamond Distribution Ltd. v Garman Turner Gordon LLP

Ford v Ford

Gavlas v Foliojumpline Publishing Inc.

Henry, Re (Bankrupt)

Input Capital Corp. v Emmel

KDM Constructors LP v International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870

May v Saskatchewan Power Corporation

Meszaros v Meszaros

R v Byblow

that the trial judge's reasons showed he was aware of the distinction by referring to a passage in the trial judge's reasons which showed he was alive to the issue, and appreciated that the case before him was a circumstantial one since no driving evidence had been presented, and as such inferences needed to be drawn from the evidence as a whole about "the affect [sic] of alcohol on Mr. McKenzie's ability to operate a motor vehicle". The appeal court also disagreed that the trial judge's reasons were inadequate and did not permit meaningful appellate review, pointing out that the summary appeal judge did not appear to be impeded in his review by the trial judge's reasons. Secondly, the appeal court considered the summary appeal judge's application of the standard of review of the trial judge's findings of fact, which is: an appeal court will not disturb the findings of fact of a trial judge absent palpable and overriding error, and ruled that the summary appeal court judge questioned a number of the trial judge's findings of fact without deciding they constituted palpable and overriding error, and without any urging from the appellant or respondent that he do so. Thirdly, as concerned the ground of appeal that the summary appeal judge wrongly applied the standard of review required of him when determining whether a verdict is unreasonable in situations where the verdict is founded on circumstantial evidence requiring a trial judge to draw inferences, the appeal court referred to *R v Hoskins*, 2021 SKCA 23, which stated the standard of review is whether "the verdict is one that a properly instructed jury or judge could reasonably have rendered (*R v R.P.*, 2012 SCC 22 at para 9, [2012] 1 SCR 746", and more foundationally, *R v Villaroman*, 2016 SCC 33. In effect, the appeal court stated, the summary appeal judge should have asked himself whether the trial judge's verdict was one which could have reasonably been rendered. The appeal court stated further that the summary appeal judge erred by turning over each piece of evidence in isolation, looking for other possible inferences from that piece of evidence inconsistent with impairment of the respondent's ability to operate a motor vehicle due to alcohol, and in doing so engaged in improper speculation, and usurped the trial judge's fact-finding function to which he owed deference. In doing so, he also erred in law.

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***Saskatchewan Labour Relations Board v SCH Maintenance Services Ltd.*, 2021 SKCA 151**

Ottenbreit Schwann Tholl, 2021-11-25 (CA21151)

Labour Law - Labour Relations - Certification Order - Judicial Review
Appeal - Practice on Appeal - Standing

The Court of Appeal was asked by the Saskatchewan Labour Relations Board (board) to reverse an order of a Court of Queen's Bench judge sitting in chambers (chambers judge) requiring it to produce a voting ballot the board had found was spoiled. (See: *SCH Maintenance Services Ltd. v*

R v Duckworth

R v Ledebur

R v McKenzie

R v Peepeetch

R v Poorman

R v Yates

Rocen v Fraser

Saskatchewan Labour Relations Board v SCH Maintenance Services Ltd.

Sherwood Modular Homes (2012) Ltd. v Gregga

Sran v University of Saskatchewan Academic Misconduct Appeal Board

Stephens v Canadian Imperial Bank of Commerce

Stroich v Stroich

Toronto-Dominion Bank v Sader

Whelan v Chaszewski

Yashcheshen v Law School Admission Council Inc.

Teamsters Local Union No. 395 (22 March 2021) Regina, QBG 2096 of 2020 (Chambers Decision). The appeal court summarized the matter in the proceedings below. As part of a certification process, the employer, SCH Maintenance Service Ltd. (SCH), asked for a copy of the spoiled ballot. Instead of the ballot itself, the board chose to provide a description of it, claiming that the principle of secrecy during voting did not allow it to produce the actual spoiled ballot. Neither SCH nor Teamsters Local Union No. 395 (union) took issue with being provided with a description of the spoiled ballot only, and the certification process proceeded. The board ruled that the agent for the board, appointed pursuant to *The Saskatchewan Employment Act* and its regulations for the purpose of supervising the election, made a reasonable finding that the ballot had been spoiled, and since the remaining valid ballots resulted in a majority vote in favour of certification, ordered as such. (See: *SCH Maintenance Services Ltd. v Teamsters Local Union No. 395* (6 November 2020) Regina, LRB File No 069-20 and 038-20 (Certification Decision)). SHC applied for judicial review to quash the Certification Decision. As required by Queen's Bench Rule 3-57, the board forwarded its record, but did not include the spoiled ballot with it. The chambers judge ruled that he could not properly perform his reviewing function without having the actual ballot as part of the record before him, and ordered it be produced subject to the condition that the original be sealed and opened to be viewed only by himself. He also ordered that the board provide an electronic copy to counsel for SCH and the union for their exclusive use, to be permanently deleted upon conclusion of the rendering of the decision and the appeal period. This procedural decision was not appealed by SHC or the union, who appeared as respondents before the chambers judge, though on opposite sides. The appeal was taken by the board on its own behalf on the ground that the chambers judge "err[ed] in law in requiring the production of a secret ballot governed by s. 6-22 of *The Saskatchewan Employment Act*." The appeal court also dealt with the question of the board's standing before it. The appeal court understood the appeal as being taken on a "principled basis" and did not rest on issues of fact or evidence.

HELD: The appeal court, through Ottenbreit J.A., dismissed the appeal. It found first that the board did not have standing before the appeal court because it appeared as a litigant in a dispute arising from a decision it had made, and by doing so threatened the most bedrock foundation upon which the judicial system is based, by "act[ing] as a party litigant that improperly and directly challenges the jurisdiction of a Court of Queen's Bench judge to make procedural orders within judicial review proceedings." He recognized that a tribunal might be given standing in certain cases to participate in a proceeding such as by providing assistance to the reviewing court on matters particularly within its area of competence or where no party has opposed the application for review of one of its decisions, but the law was clear that a tribunal could not appear before a superior court to directly defend one of its decisions. (See: *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 160.) The true parties to the review, SHC and the union, took no issue with the order of the chambers judge to produce the spoiled ballot or its terms. Secondly, though the finding of lack of standing determined

the appeal, he chose in the interests of appellant guidance to examine the nature of secret balloting and the authority of courts to order secret ballots to be produced as part of an application for judicial review. The appeal court reviewed s. 6-22 of the Act in accordance with established rules of statutory interpretation, observing that these provisions in their ordinary and grammatical sense were intended to maintain the secrecy of the votes "to the extent necessary to keep the individual voters' choices confidential" and as such production for other purposes, such as to a judge during a review application, would not impinge on the intention of the legislature. The appeal court reviewed a number of cases to that effect. In reply to the board's second argument that the Court of Queen's Bench simply had no jurisdiction to request production of the ballot, the appeal court stated that the law recognizes that without express and clear language to oust the inherent jurisdiction of a superior court, that inherent jurisdiction remains in place and includes the right of the chambers judge to order the full record of the board, including production of the ballot to properly fulfill his or her function to review the board's decision. (See: *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74.)

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***Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 152**

Ottenbreit Leurer Barrington-Foote, 2021-11-26 (CA21152)

Civil Procedure - Appeal - Application for Rehearing

The appellant's appeal from the decision of a Queen's Bench chambers to grant an order enforcing a judgment of a Nevada Court was dismissed (see: 2021 SKCA 61). It then applied for a rehearing. It continued to rely on one of its original grounds of appeal, that the Nevada Court lacked jurisdiction to make an order against it in the Nevada proceedings. In the appeal decision, the court's unanimous opinion had been that the appellant's arguments lacked merit. The majority proceeded on the basis that s. 8(b) of *The Enforcement of Foreign Judgments Act* (EFJA) was applicable to the case. Justice Ottenbreit concluded that the jurisdiction of the Nevada Court existed under s. 8(a) of the EFJA in his separate but concurring judgment. The applicant's argument that a rehearing should be conducted rested on the proposition that the majority judgment erred in grounding the original jurisdiction of the Nevada Court in s. 8(b) of the EFJA, as it was not a defendant within the meaning of that provision. When the applicant was asked during oral argument in the hearing of the appeal about the application of s. 8(b) of the EFJA, it argued only that it had not submitted to the jurisdiction of the Nevada Court in relation to a claim against it as a guarantor and it had not appeared voluntarily. The main thrust of the applicant's arguments at the hearing of the appeal related to the jurisdiction of the Nevada Court were based on the substantive and procedural laws of Nevada. Those arguments were rejected by the majority because the enforcing court's focus in analyzing whether a foreign judgment should be registered in the Saskatchewan is not on the laws of jurisdiction in which the judgment was granted. The respondent requested that it be granted solicitor-client costs as per an agreement between it and the applicant. It had not requested costs on this basis at the time of appeal.

HELD: The application was dismissed. The court found that there were no special or unusual circumstances justifying the grant of the extraordinary remedy of a rehearing. The applicant's request rested on an attempt to reframe the issues from what it had

presented in the first instance. To allow it a rehearing would offend the principle of the finality of judgments. It dismissed the respondent's request for costs on a solicitor-client basis because of its failure to comply with Court of Appeal rule 47(5), i.e., to file its memorandum replying to the application within 10 days after service of the notice of motion. The court was not persuaded by the respondent's explanations, believing instead that it did not expect to be held to the requirements of the Rules of Court. Although it had been granted an order allowing its late filing, its dilatoriness had been considered when fixing costs. The applicant was ordered to pay costs to the respondent in the amount of $2,000.00.

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***R v Yates*, 2021 SKCA 153**

Ryan-Froslie, 2021-11-25 (CA21153)

Criminal Law - Judicial Interim Release - Application for Release Pending Appeal

The appellant applied for judicial interim release pending the hearing of his appeal, pursuant to s. 679(3) of the *Criminal Code*. He had appealed from his conviction for manslaughter contrary to s. 236(b) and the sentence of 12 years' imprisonment, imposed by a Queen's Bench judge sitting without a jury. The appellant, a drug addict, had lured a drug dealer to a meeting in order to rob him to obtain drugs. As his plan involved the use of a vehicle, the appellant enlisted the help of another man, K.G. K.G. supplied his gun and his vehicle, which the appellant drove. The dealer got into the back seat with K.G. who proceeded to threaten him with the gun. A struggle ensued and K.G. shot and killed the dealer. Initially, the appellant and K.G. were treated as co-accused, charged with second degree murder and to be tried together. At their preliminary inquiry, their lawyers and the Crown counsel indicated to the Provincial Court judge that they had reached a deal that the two co-accused would plead guilty to manslaughter and a joint submission as to sentence would be made. Guilty pleas were entered and the matter adjourned for sentencing submissions. At the time of the sentencing hearing, the appellant's counsel informed the same judge who had accepted the guilty plea that she had received instructions from the appellant to resile from the plea agreement. The judge then made an order directing the appellant's counsel of choice to withdraw. The appellant did not apply for certiorari regarding that decision. He did not raise it as an issue during the course of his trial before a Queen's Bench judge where the issue was whether the appellant knew or ought to have known that the shooting was a probable consequence of carrying out the robbery as a party to the offence under s. 21(2) of the Code. The appellant's only ground of appeal was that the preliminary inquiry judge erred in law by discharging his counsel of choice, thereby breaching his s. 10(b) *Charter* right, relying upon the Ontario Court of Appeal's decision in *R v McCallen*, 1999 CanLII 3685. He argued that he should receive a new trial as a result of the breach.

HELD: The application was dismissed. The court assessed the three criteria set out in s. 679(3) of the Code and found that although it was satisfied that the appeal was not frivolous under s. 679(a) and that the appellant would surrender himself into custody under s. 679(b), his detention was necessary in the public interest under s. 679(c) after determining that the interest of enforceability outweighed that of reviewability. In so finding, it followed the approach established by the Supreme Court in *Oland* and the Ontario Court of Appeal in *Farinacci* regarding the evaluation of the public interest that involved considering both public safety and public

confidence in the administration of justice. In this case, it was satisfied that the appellant's release would not jeopardize the public's safety but respecting the latter component, it was required to weigh the competing interests of: i) enforceability of judgments, especially in cases involving serious offences; and ii) the reviewability of judgments, in that decisions regarding convictions should be entitled to meaningful review so that the person convicted is not required to serve all or a significant part of their custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful. Applying the enforceability consideration to this case, it found that the appellant had been convicted of one of the most serious Code offences. Both manslaughter and robbery carry mandatory minimum sentences and that increased the weight to be given to the enforceability interest. Concerning reviewability, it found that this interest was not strongly engaged. The Crown had a strong case against the appellant and his sole ground of appeal, while arguable by reason of *McCallen*, was affected by the fact his case was distinguishable from that decision because it was not the trial judge who had dismissed his counsel but rather the Provincial Court judge conducting the preliminary inquiry proceedings. The appellant had not suggested at trial or on appeal that his trial counsel's representation of him was ineffective. In balancing the enforceability and reviewability interests through the eyes of a reasonable member of the public, enforceability outweighed reviewability. The appellant's pre-appeal detention would not likely exceed a fit term of imprisonment for either manslaughter or robbery. The appeal could be set for hearing in an expeditious manner.

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***Toronto-Dominion Bank v Sader*, 2021 SKCA 154**

Ottenbreit Caldwell Leurer, 2021-11-29 (CA21154)

Real Property - Foreclosure - Order Nisi - Selling Agent - Appeal

The appellant, TD Canada Trust, appealed the decision of a Queen's Bench chambers judge declining to grant it an order permitting its counsel to be appointed as the selling officer under an order nisi by real estate listing (see: 2021 SKQB 160). The order nisi for sale granted the appellant the right to bid. The appellant acknowledged before the judge that that case law indicated that a selling officer who is independent of the parties should be appointed to avoid a conflict of interest but it took the position that the court should reconsider the necessity for an independent selling officer where, as in the case of these respondents, they were mortgagors who had granted a non-purchase money mortgage and there was no equity in the property to be sold. In support of this position, the appellant argued that an order for an independent selling officer increased costs, and that such an officer is not required where there is no realistic risk of conflict because the mortgagor and the mortgagee had the same goal of obtaining the highest possible price for the property. A selling officer, regardless of whether the mortgagee's counsel, would still be subject to the supervisory jurisdiction of the court. Additionally, there is no statutory requirement for an independent selling officer in all cases. The judge reviewed the appellant's arguments and found that although it may be open in some circumstances to consider the order requested, the principle of comity prevented him from doing so, citing Queen's Bench decisions from 2002 (*Lundback*, 2002 SKQB 376) to 2020 (*Affinity Credit Union v Algner*, 2020 SKQB 174). He determined that in this case, appointing the appellant's lawyer as selling officer created a conflict of interest and the case law weighed in favour of appointing an independent one. On appeal, the appellant made the same

arguments as it had before the chambers judge and asserted that in relying upon the case law, the judge had committed an error of law by fettering his discretion.

HELD: The appeal was dismissed. The court found that the chambers judge had not fettered his discretion in referring to the principle of comity. In the circumstances of this case, the judge was satisfied that he must exercise his discretion in accordance with the authorities and holding that it was inappropriate to appoint the mortgagee's lawyer as a selling officer because of a real or perceived conflict of interest. The decision to appoint a selling officer is discretionary and reliance solely on comity may constitute a fettering of that discretion where there is insufficient analysis of the relevant factors, but the chambers judge had not committed such an error. He appropriately relied on the body of law developed by the Court of Queen's Bench that demonstrates how a judge shall exercise his or her discretion to order a judicial sale, how it will be conducted and who can be appointed as a selling officer. The appellant's argument before the chambers judge that there was no conflict of interest was not supported by any evidence. Where mortgagees apply for an order appointing their solicitor as selling officer, they must demonstrate to the court that there are compelling reasons why the appointment should made, despite the real or perceived conflict between their interests and those of the mortgagors.

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***Stephens v Canadian Imperial Bank of Commerce*, 2021 SKCA 155**

Schwann Leurer Kalmakoff, 2021-11-30 (CA21155)

Civil Procedure - Queen's Bench Rules, Rule 4-49, Rule 11-22, Rule 11-24, Rule 12-15
Civil Procedure - Court of Appeal Rules, Rule 59
Civil Procedure - Costs

The appellant, a self-represented litigant, appealed the January 2020 decision of a Queen's Bench chambers judge that dismissed her application for the review of the Local Registrar's assessment of costs against her in favour of the respondent bank. The appellant had received the assistance of a lawyer, who was working under the auspices of Pro Bono Law Saskatchewan (PBLS), in drafting the statement of claim (the 2018 action). On August 1, 2019, the appellant filed on a notice of discontinuance of the 2018 action against the respondent without having obtained its consent or leave of the court to do so. Pursuant to Queen's Bench rule 4-49(2), the respondent became entitled to the costs of that action. The respondent submitted a bill of costs in the amount of $3,830.77 to the local registrar in accordance with Queen's Bench rule 4-49(3) in relation to the discontinued action, following which an assessment officer certified the bill of costs. The appellant served the respondent with an application for a review of the assessment pursuant to Queen's Bench rule 11-22 and sought an order under subrules 11-24(1) and (2) that the lawyer who had drafted the claim (PBLS lawyer) be personally liable for the respondent's costs as he had failed to include relevant material facts, join all the relevant parties and plead all the causes of action. The appellant did not specify any particular item in the bill to which she objected and focused in her affidavit on her allegation that she had received ineffective legal representation that was responsible for the costs incurred by the respondent. After filing the discontinuance of this claim, the appellant then filed another statement of claim

on August 12, 2019, to commence a new action (the 2019 action) naming multiple defendants, including PBLS, alleging that the they had conspired, using fraud, forgery, and other unlawful means, to deprive her and her former husband of their property. Amongst her allegations was that the PBLS lawyer had spoliated necessary parties and facts in bad faith. At the hearing of the appellant's application, the chambers judge confirmed the registrar's assessment of costs and observed that the appellant had not complied with Queen's Bench rule 11-22(6)(a) in failing to specify the grounds of her objections. Regarding the appellant's application for an order under Queen's Bench rule 11-24, the chambers judge dismissed it. He noted that the nature of the grounds for her request that the lawyer pay the costs were of the kind typically pursued in a separate court action against PBLS and the PBLS lawyer and the appellant had in fact done so by commencing the 2019 action. In her appeal of the decision, the appellant made three applications under Court of Appeal rule 59 to introduce new evidence before the court, namely her affidavits and other material that had not been before the chambers judge. On appeal, the preliminary issue was whether the appellant's application to admit fresh evidence should be granted. The grounds raised by the appellant were whether: 1) the chambers judge erred by failing to determine whether the appellant's claim in the 2018 action had been properly served on the respondent or whether she authorized its service. She argued that as there was no affidavit of service with the statement of claim on the court file, the action could not proceed because Queen's Bench rule 12-15(1) had been contravened. Further she asserted that the PBLS lawyer had acted without her authority in effecting service, constituting "neglect or other fault" within the meaning of rule 11-24(1), and this justified an order that he be held personally responsible for the costs; 2) the chambers judge erred by giving undue weight to the fact that the appellant had commenced a separate action against the PBLS lawyer when determining the application under Queen's Bench rule 11-24; 3) the chambers judge erred by upholding the discontinued 2018 action as opposed to ordering that those costs be applied to the 2019 action. The appellant stated that that 2019 action was a full rendition of the claim she had intended to make against the respondent in the discontinued 2018 action. It would have been more appropriate for the judge to order that the costs from the discontinued action be applied to the 2019 action; and 4) the chambers judge had applied the Queen's Bench Rules too strictly, in light of the appellant being a self-represented litigant.

HELD: The appeal was dismissed. The applications to admit fresh evidence were also dismissed. The court found that none of the evidence sought to be admitted by the appellant should be admitted. The materials in the applications did not meet the criteria set out in *Maitland* (1983 CanLII 2050), *Palmer* ([1980] 1 SCR 759), and *Cannon* (2021 SKCA 77). Two other applications that the appellant attempted to make were not allowed because they were not filed in compliance with the time requirement set out in Court of Appeal rule 59(2) and, regardless, the material contained in them was not admissible as fresh evidence as none of it had any relevance to the issues on appeal. It found with respect to each ground that: 1) the chambers judge had not erred. The absence of an affidavit of service does not mean an action cannot proceed. Proof of service is required if a plaintiff wishes to seek remedies against a defendant who has not responded. In this case, as the respondent filed a statement of defence, service was deemed to have occurred. The record of communications between the appellant and the PBLS lawyer showed that she had instructed him to serve the statement of claim; 2) the chambers judge had not erred in the exercise of his discretion by giving undue weight to the commencement of the 2019 action by the appellant. There was no clear evidence before him that the PBLS lawyer was guilty of any conduct amounting to a serious dereliction of duty or behaviour in the 2018 action, and in the case of the 2019 action, both PBLS and the PBLS lawyer disputed the appellant's allegations. As there was nothing to provide a basis upon which to award costs against the PBLS lawyer personally, the fact that the appellant had made the same allegation in the 2019 action was a highly relevant consideration and entitled to significant weight; 3) the chambers judge had not erred. The appellant had conceded before him that she was not disputing the respondent's entitlement to costs in the 2018 action. There was no reason in this case to order

that each party bear its own costs in a discontinued action nor was there any legal basis for the judge to have ordered that the costs sought in the 2018 action be applied to the 2019 action. The two actions differed as well: the 2019 action named additional defendants and pleaded different causes of action; and 4) the chambers judge was required under Queen's Bench rule 11-22 to apply a deferential standard of review to the local registrar's assessment of costs. There was no basis to conclude that he failed to do what was necessary to acknowledge the appellant's status as self-represented litigant. Regarding the appellant's application under Queen's Bench rule 11-24(1), there was nothing in the record or in the judge's decisions to show that the appellant had not been treated fairly by the judge or that he failed to provide any accommodation necessary to permit a fair hearing. Costs of $750.00 were awarded to the respondent and to PBLS for the applications to adduce fresh evidence and $1,500.00 to each of them for the appeal proper.

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***Gavlas v Foliojumpline Publishing Inc.*, 2021 SKQB 284**

Currie, 2021-11-01 (QB21273)

Civil Procedure - Pleadings - Statement of Claim - Application to Strike - *Res Judicata*
Statutes - Interpretation - *Saskatchewan Employment Act*, Section 6-45
Labour Law - Collective Agreement - Arbitration - Effect on Jurisdiction of Court
Torts - Defamation

The plaintiff commenced actions in defamation and negligence against the first set of defendants, Foliojumpline Publishing, The Prince Albert Daily Herald and two individuals, and in defamation only against the second set of defendants, the University of Saskatchewan (U of S), S.B., the Chief Athletics Officer, and C.L., Dean of the College of Kinesiology, both employees of the U of S, and Jane and John Doe (collectively, the university defendants). The university defendants made this application for an order striking out the claim against them pursuant to Queen's Bench rule 3-14, objecting to the jurisdiction of the court. The plaintiff had been employed as the head coach of the U of S men's volleyball team from 1992 until 2018, when he was dismissed. He had been approached by a student who asked if he could practice with the team. The student divulged that he had been charged with sexual assault in Alberta and had pleaded not guilty as the sex was consensual. The plaintiff had known this individual since he was a teenager and had coached him in Prince Albert. He allowed the student to practice during the 2016 season and then to play on the volleyball team during the 2017 season. In 2018, the student pled guilty and was given a prison sentence. The plaintiff responded to inquiries from the media defendants about the student and explained that although aware of the charge, he decided the best way to support him was to permit him to play on the team. The situation was further bruited about by other news outlets. One of the individual university defendants told the Members of the Saskatchewan Legislative Assembly that the plaintiff had actively recruited the student knowing that he was facing criminal charges. The Members expressed outrage and condemned the plaintiff's remarks to the media defendants. Following these events, the U of S dismissed the plaintiff from his employment. It issued a written statement to the media, over the names of S.B. and C.L. The statement alluded to an investigation of the U of S's process related to the

screening and recruitment of student athletes and policies related to the conduct of its employees to ensure that they lived up to its values and those of Huskie Athletics. The individual university defendants told members of the media that it was unclear what level of training the plaintiff had received in relation to sexual assault but that the U of S had instituted programs devoted to awareness, education, and training to prevent sexual assault. C.L. further stated that, based on an investigation, no one in the past or current administration was aware of the charges against the student. S.B. informed another coach with Huskie Athletics that the way that the plaintiff had run the volleyball program was a complete and utter disgrace. In May 2020, the plaintiff brought his defamation action against the university defendants, alleging that, contrary to each of the above-noted statements: he had not actively recruited the student and that there was nothing in the U of S's policies and procedures that precluded the student from joining the team; he was never advised of, asked or required to take part in, any sexual assault training programs. He knew that the U of S offered training in preventing and reporting sexual assaults, but it did not educate employees about dealing with students who had been charged with, but not convicted of, sexual assault; numerous U of S employees, administrators, members of Huskie Athletics and the public knew of the charges against the student; and he had had a long and successful record of achieving championships during his tenure as coach. The plaintiff asserted that university defendants' statements were untrue and misleading, designed to scapegoat him and make it appear that U of S had no responsibility for the student or the situation and that the plaintiff had contravened clear and appropriate U of S rules and training. In addition to the plaintiff's civil action, his union grieved the dismissal, and in July 2020, an arbitrator affirmed his dismissal after arbitration occurred pursuant to the collective agreement. A Queen's Bench judge set aside the arbitrator's decision and ordered the matter be reheard by a different arbitrator (see: 2021 SKQB 154). The appeal of this decision was currently before the Court of Appeal. The university defendants applied for an order striking out the claim against them on the grounds that: 1) the court did not have jurisdiction to hear it because the plaintiff was a member of one of the U of S's unions and his dispute was governed by its collective agreement. His allegations against the university defendants were employment matters within the ambit of the collective agreement and fell within the jurisdiction of an arbitrator pursuant to s. 6-45 of *The Saskatchewan Employment Act*; and 2) the plaintiff was attempting to relitigate matters that had already been adjudicated in other forums and the action offended the doctrines of *res judicata*, issue estoppel and collateral attack, constituting an abuse of process.

HELD: The application was dismissed on both grounds advanced by the university defendants. The court found with respect to each of them that: 1) it had jurisdiction to address the plaintiff's claim in defamation. Resolution of the dispute identified in the statement of claim would not resolve a question of the interpretation, application, or violation of the collective agreement. To determine whether this was a "workplace dispute" governed by the collective agreement, and particularly whether the public comments made by the university defendants were made in the context of the workplace, the court reviewed the questions set out in *Phillips v Harrison*, 2000 MCBA 150, and decided that the university defendants' comments were not made to people who would be expected to be informed of workplace problems, except for the remarks made by S.B. to the other U of S coach; and 2) as a result of its conclusion on the first ground, the plaintiff's claim did not offend the doctrines of *res judicata*, issue estoppel or collateral attack, or constitute an abuse of process as the arbitration process would be decided in a different forum.

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***Whelan v Chaszewski*, 2021 SKQB 286**

Kilback, 2021-11-01 (QB21280)

Wills and Estates - Estate Administration - Application for Appointment as Administrator

The applicants, M.W. and P.C., brought an originating application to be appointed as administrators of the estate of their father, M.C., pursuant to *The Administration of Estates Act*. The respondent, D.C., the applicants' half-brother, also applied to be appointed administrator. M.C. died intestate in March 2015. Immediately following his death, D.C. moved into M.C.'s mobile home (the residence) with his family. He averred that he did so to maintain the property and pay the taxes and with the intentions of both purchasing the residence and providing the applicants with their one-third share of its value. Although P.C. asked D.C. to pay rent of $500/month until the estate was settled, the latter would not agree to pay until they arrived at a settlement on the value of the estate. D.C. had undertaken extensive repairs and renovations to the residence and paid all the property taxes, insurance, utilities and maintenance costs since moving in. He attested that he also began taking care of the estate without any formal authority to do so because the applicants were expressly not interested in administering it, so he proceeded to deal with M.C.'s personal items and pay his debts but not his income tax in the absence of his appointment as an administrator. The property statement submitted by D.C. gave the value of the residence at $47,500.00 and the estate's total value at $52,457.00. He indicated that he hoped to obtain a loan to pay out the applicants' share of the value of the residence as he intended to live there. The applicants deposed that D.C. took all the actions he did without their consent and that they had refused his request that they renounce their rights of administration or to act as co-administrators. They further believed that based upon the limited information that D.C. had provided about his dealings with the estate, there were additional estate assets for which there had been no accounting. In their property statement, the applicants listed the value of the residence at $150,000.00 and the total value at $199,763.00. M.W. and P.C. sought additional relief for orders: granting them the right to evict D.C. from the residence; directing a full inquiry into D.C.'s actions with respect to the estate, including his possession and occupancy of the residence under s. 3(2) of the Act; requiring D.C. to pay retroactive and ongoing occupation rent; and directions for resolving the dispute over D.C.'s occupation of the residence.

HELD: The application made by M.W. and P.C. was granted, and they were appointed co-administrators of the estate pursuant to s. 3(1)(a) of the Act, contingent upon filing a bond as required by s. 20. The court dispensed with the requirement to obtain renunciation by D.C. of the right to administration under s. 13(1)(b) of the Act. It ordered him to pass a full accounting of all actions taken in relation to M.C.'s assets and debts within 90 days whereupon the applicants were to apply under s. 3(1)(c) of the Act to pass their accounts in regular chambers with notice to him. The court noted that there was no Saskatchewan authority regarding the criteria to be employed in appointing an administrator where there are competing applicants and it selected and relied on the factors set out in *Raye v Phillip Estate*, 2021 BCSC 387, as applicable. It was persuaded that the applicants were best qualified to meet the factor of having the ability to convert the estate to the advantage of the beneficiaries, as D.C. was in a conflict of interest regarding the value of the residence after occupying and upgrading it. Regarding the applicants' other requests for relief, it held that under its inherent authority, it would grant an order requiring D.C. to provide a full accounting of actions taken in relation to M.C.'s assets within 90 days. However, it could not make a fair and just determination of the value of the residence because of the conflicting affidavit evidence before it and would review the question when the accounts of the estate were passed. There was, as well, no clear evidence on how the value of the residence would be paid out to the beneficiaries if D.C. purchased it as he would have to obtain a loan to do so. It was not fair to him to evict him as proposed by the applicants. The issue of whether D.C. should be required to pay

occupation rent and how much could not be resolved on the information presented. D.C. had not submitted sufficient evidence regarding the value of maintenance work he had performed.

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***Sran v University of Saskatchewan Academic Misconduct Appeal Board*, 2021 SKQB 291**

Gerecke, 2021-11-04 (QB21289)

Administrative Law - Judicial Review

The applicants applied for judicial review of the decision of the respondent, the University of Saskatchewan's Academic Misconduct Appeal Board, dated November 20, 2020. They were students in the College of Arts and Sciences of the University of Saskatchewan (university), and had been enrolled in Biomedical Sciences 240.3, a course offered by the College of Medicine. On January 3, 2020, the course instructor filed a complaint pursuant to the university's *Regulations on Student Academic Misconduct* (regulations), alleging that the applicants had collaborated with one another and cheated on a lab assignment, a midterm and the final examination held in December 2019. The applicants were informed of the complaint and that the hearing date was set down for March 13, 2020, just beyond the 60-day limit set out in s. VII.A.3 of the regulations but the applicants did not object. On March 5, 2020, one of the applicants advised the secretary for the hearing board that the applicants would be represented by a lawyer. On March 6, the secretary responded that the College of Medicine would also obtain legal counsel and the hearing date would be adjourned to give the parties time to prepare. On March 18, the secretary informed the applicants that the hearing would be postponed due to the pandemic. Both the respondent's counsel and the hearing board's counsel asked the applicants separately in April and again in May for the name of the lawyer representing her and the other applicant and were finally informed on May 14 of their counsel's name. On June 8, 2020, the applicants were informed the hearing date was scheduled for August 17. On June 9, their lawyer advised the respondent that they would argue that the hearing board had lost jurisdiction for delay and asked for that issue to be determined before the substantive hearing by way of written submissions. The hearing board issued its preliminary decision on July 15, finding that it had jurisdiction because the words in s. VII.A.3 were directory, not mandatory. It cites as reasons that there were no consequences outlined in the regulations as to what happens if the hearing date should not occur within 60 days and the intent of that provision was to have cases held promptly in accordance with the duty of fairness and natural justice and not to create a procedural barrier where a case would be dismissed automatically if held beyond the deadline. The hearing proceeded on August 17 and the hearing board advised the applicants on August 24 that it had found them guilty of multiple acts of academic dishonesty based on the evidence. It ordered that they be assigned the mark of zero for the course and required each to them to submit an essay on plagiarism and academic misconduct. The applicants appealed the decision, limited to the question of whether, under s. VII.A.3 of the regulations, the hearing board had lost jurisdiction due to delay. The appeal board rendered its decision on November 20, dismissing the appeal. It concluded that the provision is directory, stating that the regulations are and should be flexible enough to allow the hearing board to convene outside of the 60-day period as that period is intended as a guideline. It would not align with

the hearing board's role in upholding academic integrity or the guiding principles of the regulations to interpret the provision to mean that an allegation of academic misconduct would be rendered null on account of a scheduling issue alone. The applicants then made this application.
HELD: The application was dismissed. The appeal board's decision was correct. The court found that the standard of review regarding procedural fairness is correctness, following the Court of Appeal's decisions in *Akpan* (2021 SKCA 129) and *Feng* (2020 SKCA 6). It determined that the procedure was fair in the circumstances and that in consideration of them and the regulations, s. VII.A.3 is directory. It reviewed the jurisprudence regarding mandatory and directory legislative time requirements and then performed the necessary contextual analysis and considered the following factors: i) the regulations establish the university's values, such as that it expects students to have integrity in their academic practice. To interpret s. VII.3.A as mandatory would mean that a failure to meet it would render a complaint a nullity, thus conflicting with the university's commitment to academic integrity because it would result in a student receiving a grade that he or she had not validly earned. The university's role is not only to educate students but to credential them and provide a verifiable standard of what a student has achieved; ii) the university acted reasonably in dealing with the scheduling of the hearing after the state of emergency was declared in March 2020 because of COVID-19; iii) the students had not provided evidence of prejudice. Although asked to identify any summer courses that they thought would be affected by the complaint, they had not identified any. As the applicants had conceded that if s. VII.3.A was found to be directory, the first scheduled hearing date of March 13 was in substantial compliance, the court exercised its discretion to determine that any non-compliance with the regulations was cured and the application failed. The hearing board achieved substantial compliance with the regulations when the original hearing date was scheduled and thereafter. Its issuance of its preliminary and substantive decisions in July and August 2020, respectively, before the start of the next academic year, were in substantial compliance in light of the onset of the pandemic.

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***R v Duckworth*, 2021 SKQB 289**

Klatt, 2021-11-05 (QB21274)

Appeal - Criminal Law - Impaired Driving
Constitutional Law - *Charter of Rights*, Section 9, Section 10(b)

This summary conviction appeal was taken by the accused following a trial for offences under ss. 253(1)(a) and 253(1)(b) of the *Criminal Code*, alleging the trial judge erred in law by not finding on the evidence that the appellant's right to counsel pursuant to s (10)(b) of the *Charter* had been infringed. The Crown also appealed to overturn the sentence of a fine of $1000.00, an amount below the mandatory fine of $2000.00. on the ground that the trial judge erred in law by finding an infringement of the appellant's right to be free from arbitrary detention contrary to s. 9 of the *Charter* or that he erred in law by imposing a sentence of less than the mandatory minimum. The appellant accused appealed on three grounds: 1) that his waiver of rights to counsel was equivocal and unclear; 2) that his rights to counsel should have been provided to him after the breath demand, not before; and 3) he should have been informed of the breath result after the first test since if the reading was above the legal limit his jeopardy had changed and he then

had a right to call a lawyer again. The grounds of appeal of the Crown were:1) that the trial judge erred in law in his interpretation of the arrest provisions of s. 497(1.1) of the *Criminal Code* by finding that high alcohol readings alone were not a reason for the continued detention of an arrested person; and 2) that even if a s. 9 breach had been made out by the appellant, the trial judge's remedy of reducing the mandatory fine was an error of law as no evidence was presented at trial that could have amounted to "particularly egregious" conduct by the police. The summary appeal court judge (appeal judge) was satisfied that the facts germane to the appeal were uncontested. After a roadside stop of the motor vehicle operated by the appellant following a civilian complaint of a possible impaired driver, the investigating officer believed she had reasonable grounds to suspect the appellant had alcohol in his body and made an ASD demand. The appellant failed the test, was arrested for impaired driving and given his rights to counsel, followed by the breath test demand. When an officer asked the appellant whether he wanted to call a lawyer, he stated, "Yes, I guess. I don't know" and the investigating officer (now the arresting officer) said to him that it was his right to call a lawyer and again gave him his rights to counsel, to which he said "No." The arresting officer repeated back to him "No?" and he said "No." The appellant was transported to the detachment without delay, and following the required procedural steps, provided a first sample. At that time, he asked the qualified technician what his reading was. The qualified technician did not reply to the request. He stated in evidence that it was his practice not to do so, since, in the event of a reading above the legal limit, the test subject might refuse to provide a second sample. He testified further that he was never told this practice was wrong. Given the high readings, the arresting officer decided to lodge the appellant in cells until sober. She did not consider any alternatives, including releasing him to a responsible and sober adult. No evidence was presented about the length of the appellant's stay in cells or how he came to be released. The arresting officer agreed with defence counsel that the appellant showed no obvious signs of impairment, and also that he appeared to understand all directions given him. The appellant did not testify at trial.

HELD: The appeal judge dismissed the appellant's appeal from the decision of the trial judge denying the appellant's s. 10(b) *Charter* motion and rejected the Crown's appeal of the trial judge's ruling that the appellant's s. 9 *Charter* rights had been breached but allowed the Crown's sentence appeal. In doing so, she reviewed the summary conviction appeal powers of the *Criminal Code*, found at s. 822(1), which incorporates, with necessary modification, ss. 683 to 689 of the Code. She also instructed herself as to the standard of review she was to apply, in this case one of correctness, since she was to examine whether the trial judge had properly applied the relevant law to the accepted facts and whether by doing so had committed a material error. In her analysis, she applied case law which she accepted as authoritative or persuasive to all the issues to be decided. First, as to the appellant's appeal of the s 10(b) ruling, she found that the evidence showed that the appellant was clearly informed of his right to counsel without delay, and nothing on the evidence showed that his waiver of those rights at roadside was equivocal, unclear, or made without full and complete information concerning his jeopardy. She reasoned the argument of the appellant that it was a reversible error for the trial judge not to have ruled that providing rights to counsel before the breath demand fell short of the informational component of the s 10(b) rights was incorrect because the demand and the rights to counsel followed within seconds of each other in circumstances that could not confuse the appellant as to his jeopardy, being the provision of breath samples in an impaired driving investigation. To find otherwise, she said, would give rise to a formalistic, technical approach to the *Charter* which was rejected by the Supreme Court in *R v Schmautz*, [1990] 1 SCR 398. As to the qualified technician declining to tell the appellant the result of the first test, she applied the law concerning change in jeopardy which does trigger the requirement of fresh *Charter* rights to counsel, in particular *R v Black*, [1989] 2 SCR 138, where the jeopardy of the detainee changed from attempted murder to firstdegree murder. The appeal judge contrasted this case to the situation of the appellant and concluded that whatever the first breath test reading might have been, the potential jeopardy remained the same. As to the Crown sentence appeal, she reasoned that the trial judge had

erred in law by ruling that nothing in s. 497(1.1) of the *Criminal Code* justified the appellant's further detention on the evidence before him and that ended the inquiry. She said that the trial judge erred by not going further and looking at whether the Crown had failed to show that his detention was justifiable in accordance with a wider public interest concern. In this case, however, no evidence had been presented about what the arresting officer considered to decide whether a public interest concern was raised which required that the appellant continue to be detained until sober. Lastly, the appeal judge allowed the Crown's appeal from sentence on the authority of *R v Nasogaluak*, 2010 SCC 6, which she found was authority for the proposition that, though a mandatory minimum sentence may be reduced because of "particularly egregious forms of state misconduct in relation to the offence and to the offender," such was not the case here, and she imposed the minimum fine of $2000.00.

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***Henry, Re (Bankrupt)*, 2021 SKQB 292**

Thompson, 2021-11-08 (QB21269)

Bankruptcy and Insolvency - Conditional Discharge

The Superintendent of Bankruptcy (superintendent) opposed the automatic discharge from bankruptcy of J.D.H., as did the trustee in bankruptcy (trustee), on two grounds. In considering the application, the registrar in bankruptcy (registrar) focused on one ground only, that J.D.H. "brought on, or contributed to the bankruptcy… by unjustifiable extravagance in living…pursuant to s. 173(1)(e) of the [*Bankruptcy and Insolvency Act*]." The registrar made findings of fact based on the bankruptcy records and evidence, which included the statement of affairs of J.D.H., the information relating to the affairs of the bankrupt, the transcript of his sworn testimony elicited by the official receiver (OR), the OR report, and his affidavit. The registrar reviewed these materials and concluded that J.D.H. bore an evidentiary burden to disprove on a balance of probabilities that he had acted dishonestly in the bankruptcy by failing to declare as an asset his RRSP in the amount of $750,000.00, which he had valued at $19,710.00; in failing to disclose a cabin jointly owned with his spouse from whom he was separated but not divorced, which he valued at $300,000.00; in paying spousal support without a court order in an amount equal to 89% of his salary in order to reduce his income in the bankruptcy; in amassing in 2018 a further $500,000.00 in unsecured debt to refurbish and upgrade his home and cabin, and by profligate spending using five credit cards and failing to make payments on them, though he had carried considerable debt for a number of years, including income tax arrears of $150,000.00; and by then transferring that unencumbered home valued at $400,000.00 and unencumbered cabin valued at $300,000.00 to his spouse. J.D.H. assigned in bankruptcy in October 2019. The registrar took notice of personal and family difficulties in J.D.H.'s life, including mental illness suffered by his daughter.

HELD: The registrar ruled that J.D.H. had failed to rebut the presumption arising from the trustee's opinion that he was dishonest in the bankruptcy by failing to disclose assets, arranging with his spouse to reduce his income through inflated spousal support payments, by making non-arm's length transfers of property to his spouse, and by recklessly amassing credit card and credit facility debt prior to the bankruptcy to increase his debt prior to the assignment in bankruptcy. She ordered that upon payment of $120,000.00 to the trustee in bankruptcy, he was eligible to apply to the registrar for his discharge. After reviewing the policy objectives of the law of bankruptcy, which are "to provide the unsecured creditors with an equitable system of distribution in which to

deal with the bankruptcy estate" and "to relieve honest but unfortunate debtors from the crushing burden of debt so that he or she can be financially rehabilitated," the registrar concluded that these objectives could only be supported by a reasonable disposition in this case which acted as a deterrent to others who had designs to abuse the bankruptcy regime.

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***A.P.R.C. v A.R.S.*, 2021 SKQB 294**

Robertson, 2021-11-09 (QB21281)

Family Law - Interim Parenting Order - Relocation

The petitioner, A.P.R.C., the biological father of a child born of A.R.S. in 2020 (the child), and cared for by A.R.S.'s cousin, S.M., since birth, applied for an interim order to relocate the child to Dartmouth, Nova Scotia, his home. He also sought primary residence of the child, reasonable access for A.R.S. and S.M., sole decision-making, and other relief. In the alternative, he asked for "access of no less than 30 days with the child in Nova Scotia." The chambers judge made findings of fact in the matter on affidavit evidence, including that: A.R.S. had voluntarily given up custody of the child to S.M., and though not present at the application, expressed in text messages to A.P.R.C. that she had done so because the child was "literally everything [S.M.] ever wanted," referring to her as the "adoptive Mom," and declining to give A.P.R.C. contact information at the behest of S.M.; S.M. resisted access by A.P.R.C. to the child, though he requested it regularly, but acquiesced to one video call, and as a result he had little chance to foster a meaningful relationship with him; and S.M. confused her desire to have the child with the child's best interests.
HELD: The chambers judge first recognized S.M. as a person of sufficient interest pursuant to ss. 6 and 9 of *The Children's Law Act* (Act), with equal standing to A.P.R.C., and then found that he favoured A.P.R.C.'s proposal as being in the best interests of the child, though on an interim basis, and without the benefit of a full hearing at a trial he was not prepared to allow the child's relocation to Nova Scotia. Instead, he agreed with A.P.R.C.'s alternate proposal, and ordered among other terms that A.P.R.C. have "reasonable and generous parenting time with the child" but if such could not be agreed on, he was to "take the child with him to Nova Scotia for the month of December 2021, the month of March and the months of June and July 2022, at which time parenting time shall be reviewed by this Court." In coming to this decision, the court reviewed the non-exhaustive factors for determining the best interests of the child listed in s. 10(3) of the Act and the relocation factors listed in s. 15 of the Act, concluding that, though he appreciated that S.M. was the "psychological parent" of the child, the factors which tipped the balance in this case in favour of A.P.R.C. were as per s. 10(3)(c), because S.M. was not willing to "support the development and maintenance of the child's relationship with the other parent"; and ss. 15(1)(a) and (b), because the reasons for the relocation were to foster the child's relationship with the biological father of A.P.R.C. With respect to the weight to be given to the fact A.P.R.C. was the biological father to the child, he reviewed *T.K. v C.E.*, 2021 SKCA 138, and the cases referenced in it, and agreed that the Act had clarified that though there was no presumption in favour of a biological parent, this factor could have decisive weight in some circumstances. Ultimately, the chambers judge concluded that the evidence showed S.P. was more concerned with her best interests than those of the child.

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***Meszaros v Meszaros*, 2021 SKQB 295**

Megaw, 2021-11-10 (QB21282)

Family Law - Discontinuance of Proceedings - Assessment of Costs
Civil Procedure - Discontinuance - Costs

The petitioner mother discontinued her applications in family law proceedings for variation of the parenting arrangement as well as her applications seeking to have the children attend a particular school and to set child support amounts both retroactively and prospectively. The respondent father then discontinued his application to vary child support and adjourned sine die another of application related to counselling for the parties' children. The parties had three children during their marriage and after trial, the judge ordered that the parties continue to share parenting and determined their level of income and the consequent child support to be paid. Two of the children experienced the condition of selective mutism (SMC) as well as general anxiety and the parties had different understandings and approaches to the assessment and treatment of these conditions (see: 2019 SKQB 21). After the judgment was made, other problems ensued including the rupturing of the relationship between the eldest child and the father and the parties' disagreement regarding the treatment of that child's condition. Five of eight applications following judgment were brought by the mother. Her major application was to obtain a variation of the parenting regime because she had married an Alberta resident and requested that the children be relocated to Cochrane from their home near Regina. She also sought to have sole decision-making authority regarding the children and further sought to have the father's parenting time supervised. The father responded by opposing these applications and brought three of his own. Some of the matters contained in the various applications were summarily dismissed by the trial judge, such as the mother's request for supervision of the father's parenting time and to have him found in contempt (see: 2020 SKQB 230). Other matters were left for trial. The viva voce hearing commenced in March 2021. After the mother's evidence was submitted, she determined that because of her marital problems with her new spouse, she would remain in Saskatchewan and not seek any change to the current parenting regime nor the father's actual parenting. She advised that she would not be proceeding with her various applications and wished to abandon them. The father consented, subject to the determination of costs. The mother submitted that she should not be faulted because of the situation with her new spouse and be held responsible for costs in the proceedings. She also argued that the various applications could be categorized into discrete parts so that her successes could be itemized such as in her application for relocation, she had been successful because there had been an initial finding of a material change in circumstances. Finally, the mother argued that an award of costs in these circumstances would have a detrimental impact on the children.

HELD: The court ordered that the petitioner mother pay costs to the respondent father. It reviewed Queen's Bench rules 15-96 and 11-1 regarding the exercise of its discretion on the issue of costs in family law proceedings. Its considerations under the latter rule included that the mother had initiated and then abandoned the proceedings as well as the complexity and importance of the issues to the parties, and determined that the father was entitled to costs. The court referred to its 2020 judgment to enable it to do so. Specifically, it ordered the mother to pay costs to the father as follows: i) $1,000.00 for her application requesting a report from the

children's psychologist, which had been dealt with by the 2020 judgment; ii) assessed in accordance with column 2 of the family tariff regarding her application to vary the parenting judgment. Respecting the aspect of that application that sought to have the father's parenting time supervised, it was found to have been made inappropriately without evidence and the father would receive $1,500.00; and iii) $1,500.00 regarding the application to find the father in contempt, which resulted from an incomplete review of the evidentiary base required. It declined to order costs to the mother respecting the father's applications. The mother's argument that awarding costs would be detrimental to the children was rejected as issues of financial responsibility had not been factored into any aspect of this litigation. The evidence showed that she initiated the litigation to permit her to relocate to Alberta not only because of her new relationship, but for a variety of other reasons. Costs would not be ordered based upon discrete portions of each application. It found that the mother's application had been to fundamentally change the existing parenting regime and it could not be classified as successful because she had abandoned her claims. Thus, there had been no final determination of whether the material change found should result in any change to the parenting arrangement.

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***Rocen v Fraser*, 2021 SKQB 296**

Layh, 2021-11-15 (QB21277)

Civil Procedure - Pleadings - Statement of Claim - Application to Amend
Civil Procedure - Application to Strike Statement of Claim - Scandalous, Frivolous, or Vexatious

The defendant nurses in an action in which the plaintiffs, the wife and son of a deceased man who had been cared for in hospital (G.R.), and who claimed relief against them akin to defamation, applied for summary judgment dismissing the claim. In advance of the summary judgment application, the plaintiffs brought an application for leave to amend the statement of claim. The chambers judge reviewed the affidavits and pleadings filed by both sides and reviewed the facts and proceedings. He found: that as a result of what the plaintiffs believed was ill treatment of them at the hands of the defendants during the convalescence of G.R. at the hospital, the plaintiffs made a formal report to the investigation committee of the Saskatchewan Registered Nurses Association (SRNA), who investigated the matter and found no misconduct on the part of the nurses; by necessity, in order to investigate the matter fully, the investigator was required to speak to the defendants, who provided their response to the allegations, in the course of which they said that the plaintiff wife of G.R. "would yell at and belittle hospital staff," that "she would pace, glare and use an aggressive tone," and the plaintiff son, C.R., became "very angry in his father's hospital room…[and] waved his hands and blocked [the nurses'] exit from the room;" pursuant to s. 28(7) of *The Registered Nurses Act* (Act), the written report of the investigation committee was privileged and the use of statements or evidence given by the defendant nurses during the investigation was absolutely barred from being used in any other proceeding; the plaintiffs never accepted the findings of the investigation committee, launching a sustained verbal attack on the SRNA, involving complaints to the SHA, various persons at SRNA, numerous agencies, government departments, and media, the recurring theme of which was that the defendant nurses had lied about them, and the SRNA accepted these lies; and the statement of claim quoted large sections of the SRNA written report. The defendants opposed the application for amendment

because they argued the proposed amendments would be struck pursuant to Rule 7-9 as they did not disclose a reasonable cause of action and were scandalous, frivolous, or vexatious.

HELD: The chambers judge dismissed the application to amend the claim, concluding that the amendments were a disguised attempt to circumvent s. 28(7) of the Act by redrafting the quoted sections of the written report, removing any reference to the SRNA, and adding persons to whom the libelous words were allegedly repeated. The proposed pleadings, he said, were entirely too vague as to "when, where, and to whom the [defamatory words] were spoken" to give the defendants proper notice of the claim against them and did not plead any allegation which would amount to harm to the plaintiffs' reputation. He also decided that the proposed amended claim was scandalous, frivolous, or vexatious because it was a collateral attack on the decision of the SRNA and not brought for a legitimate claim for relief under a recognized cause of action but as a tactic by the plaintiffs in their ongoing siege on the SRNA.

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***R v Peepeetch*, 2021 SKQB 297**

Layh, 2021-11-15 (QB21283)

Criminal Law - Controlled Drugs and Substances Act - Possession for the Purposes of Trafficking - Hydromorphone

The accused was charged with two counts of possession of fentanyl and methamphetamine contrary to s. 4(1) of the *Controlled Drugs and Substances Act* (CDSA) and one count of possession of hydromorphone for the purpose of trafficking contrary to s. 5(2) of the CDSA. The accused was in a vehicle with its owner, a woman who was known to the police as a member of the local drug subculture. Both and he and the woman were arrestable for certain charges and the police were tracking the woman by her GPS ankle monitor. When the monitor stopped moving at a gas station, officers drove to the location and approached the vehicle. They observed the accused outside the vehicle and asked him if he was alone. The accused said that he was but the officers then noticed the woman was crouched down in the front passenger side. They were each arrested on the other matters. Subsequent to a search incident to arrest, the police seized four dime bags containing fentanyl and crystal methamphetamine from the centre console of the vehicle. CCTV footage taken at that time showed the vehicle stopped at the gas pump and recorded the accused leaving the vehicle and throwing a bag into the windshield washing station next to the gas pump and then approaching the officers. The bag was later retrieved by the police and found to contain 782.8 mg pills of hydromorphone worth $31,280.00 in street value. The accused, a 36-year-old man, had been living with his father on a nearby First Nation reserve after being released from prison. He testified that he was a user of crystal meth, fentanyl and hydromorphone and had used drugs since he was 14. He had known the woman in the vehicle for four years and had seen her four times since his release from prison to purchase drugs from her. He had seen her in possession of drugs on prior occasions but had not seen her sell drugs. On the night in question, he said that he had not seen her put any hydromorphone in the console of the truck. When they stopped for gas and saw the police approaching, the woman had thrown a bag of pills onto the accused's lap. After his initial shock, he realized what they were and the woman told him to throw the pills into the garbage. He did so immediately. He admitted that he could have given them to the police but had made a mistake. He

knew he was helping the woman but he had just reacted on the spur of the moment.
HELD: The accused was found not guilty of the three counts. The court found with respect to the first two counts that it believed the accused and accepted his evidence that he did not know of the drugs and did not have possession of them. The woman who owned the truck was known to sell drugs and it was unlikely that the accused would open any compartments without her invitation. Regarding the third count, it found that although the accused knew he had drugs in his physical possession, he handled the bag of pills in haste and that did not meet the requirements to prove he had the requisite control or the necessary *mens rea* for possession. Without possession, the accused had not trafficked and was thus acquitted on the third count.

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***Sherwood Modular Homes (2012) Ltd. v Gregga*, 2021 SKQB 298**

Klatt, 2021-11-15 (QB21284)

Landlord and Tenant - *Residential Tenancies Act, 2006* - Interpretation of Lease Terms - Utility Repair Levy - Appeal
Landlord and Tenant - *Residential Tenancies Act, 2006* - Award of Damages - Appeal

The appellant landlord appealed from the decision of a hearing officer of the Office of Residential Tenancies (ORT) that found a utility levy it had charged to the respondent tenants was unlawful and granted awards to the tenants that included repayment of rent abatement as well as aggravated damages in the amount of $100.00 for each tenant (see: 2020 SKORT 1744). The appellant rented sites to the respondents for their mobile homes on its trailer park property. Some of the respondents had signed leases in 2010 and the others had signed theirs in 2012. The appellant acquired utilities in bulk from SaskPower and the City of Regina and then charged its tenants. According to the terms of the leases, the appellant was responsible for metering, charging, administering, maintaining and repairing the water/sewer and power infrastructure. After a water main broke in 2018, the appellant recouped the repair costs of $25,000 by charging a levy to all tenants by increasing the utility cost first by $20 and then later, $45 per month. The respondents objected to this levy and were told in writing by the appellant that they would be subject to a rent increase if they did not agree to pay the monthly levy fee. They submitted documents to support this claim. Prior to these proceedings, two other applications had been brought to the ORT by other tenants against the same landlord regarding the charges levied: *C.E. v A.N.*, 2018 SKORT 581 and *Rilkoff v Sherwood Modular Homes*, 2020 SKORT 581. The landlord was successful in *C.E.* because the tenant argued that the landlord was overcharging water/sewer and electricity rates. The hearing officer determined in that case that the lease agreement allowed the landlord to adjust the utility rates but the issue of whether the landlord could increase utility rates by including the costs for repair of the infrastructure was not before him. In *Rilkoff*, the tenants had been successful in their argument that the landlord had wrongfully charged them utility repair levies. In this case, the hearing officer followed the decision in *Rilkoff* and found that the appellant was the provider of utilities to the respondents. He considered ss. 2(o)(ii), 43(2), and 49(1)(b) and (4) of *The Residential Tenancies Act, 2006* and held that the levy charged to the tenants represented an impermissible increase to the charge for a service or facility, there was no agreement with the tenants in accordance with s. 43(2) nor an order granting permission under s. 70 of the Act, and nothing in the lease agreement would support the charging of it. Further, ss. 49(1)(b) and 49(4) of the Act

obliged the landlord to keep the premises in a good state of repair and any term that imposed that responsibility on the tenants would be void. The officer rejected the appellant's argument that pursuant to a clause in the 2012 lease, it was entitled to increase utility rates. The officer interpreted the clause in the 2012 lease as capable only of meaning that the appellant could raise rates in the event that SaskPower or the City raised theirs, but would not include that the tenants would pay additional costs for repairs. He awarded aggravated damages to the respondents because he found that the appellant had acted in wilful disregard of the Act and jurisdiction of the ORT. It had persisted in charging the levy after the *Rilkoff* decision, filed the same defence in this application as it had in *Rilkoff*, and threatened the respondents to comply. The issues were: 1) whether the hearing officer erred in concluding that the appellant's levies for the repairs to the water main break at the trailer park were not utility charges that could be borne by the respondents; and 2) whether the hearing officer erred in imposing aggravated damages on the appellant. The appellant claimed that there was no evidence of threats.
HELD: The appeal was dismissed. The court found that the hearing officer had not erred in: 1) finding that the appellant was not entitled to impose a levy for the repair of the water main. The hearing officers in this case and in *Rilkoff* correctly decided the issue by reference to ss. 2(o)(ii), 43(2), 49(1)(b) and 49(4) of the Act. The clause in the 2012 lease could not be interpreted to support the appellant's position that it could charge a levy for the repairs. It also dismissed an issue raised by the appellant at the hearing of the appeal that a clause in the 2010 lease that differed from the 2012 clause allowed it to charge such a levy respecting those respondents. The terms of the lease clearly established the costs for which the tenant would always be liable and they did not include damages for a water main break. The hearing officer's analysis of the 2012 lease was equally applicable to the terms of the 2010 lease; and 2) in awarding aggravated damages. Under s. 70(6)(c) of the Act, a hearing officer may award damages in any case where it is just and equitable in the circumstances to do so. The equitable discretion cannot be exercised punitively. The court regarded the officer's decision as to damages with deference and noted that in this case, there was oral and documentary evidence upon which he could grant a just and equitable award on the basis he had.

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***May v Saskatchewan Power Corporation*, 2021 SKQB 299**

Scherman, 2021-11-17 (QB21285)

Civil Procedure - Queen's Bench Rules, Rule 5-4, Rule 5-27
Civil Procedure - Questioning - Application to Determine Validity of Questions

The applicant plaintiff applied for an order that the proper officer of the respondent defendant re-attend oral questioning and answer 17 questions that it had refused to answer after its counsel objected to them; an order permitting the plaintiff to continue with the questioning that might arise from the answers provided; and an order to reseal affidavits sworn by the plaintiff and her counsel. The plaintiff, a former employee of the defendant, claimed damages for wrongful dismissal. She claimed, amongst other things, compensatory damages with reference to the compensation she would have earned had she continued to work during her reasonable notice period. Her contract of employment included entitlement to payment under a Short Term Incentive (STI) program

based upon corporate and individual performance. She had received compensation under the STI program in 2014 and her counsel asked for production of documents related to the program results for 2015 through 2017. Counsel for the defendant provided three documents that identified the calculations related to compensation paid to vice presidents who had achieved the highest ratings under the STI program for the years requested. The names of the individuals were redacted. During the questioning of the defendant's proper officer, she agreed that the documents contained the calculations for the STI payouts. Other questions put to the officer were refused on the basis that they sought information about the documents related to the compensation of employees other than the plaintiff, their identities and positions of the individuals, all of which was irrelevant. Counsel for the plaintiff explained that the questions were asked so that he could interpret the document in question, which conveyed information as codes. The plaintiff submitted the transcript of questions and objections of the proper officer to the questions to the court to decide the validity of the questions pursuant to Queen's Bench rule 5-27.
HELD: The applications were allowed. The court ordered that the proper officer of the defendant re-attend at oral questioning and answer the 17 questions posed by the plaintiff's counsel at the previous questioning and that the proper officer was then to answer questions flowing from her answers. The affidavits were ordered to be sealed until further order of the court. The defendant was ordered to pay costs of $3000.00 because of the complexity of the application. The plaintiff's request for solicitor-client costs was denied as it was not appropriate to award them on the basis of refusals to answer, regardless of their invalidity. It found that the questions objected to were of clear relevance. The documents were admissible at trial and clearly relevant to the material issue regarding the compensation the plaintiff would have received during a period of reasonable notice. The formula, methodology and principles by which STI compensation was calculated by the defendant during 2015, and potentially during each of 2016 and 2017, were clearly material and relevant matters in the action. The questions asked by the plaintiff were directed at understanding the documents themselves and were not only relevant, but necessary. The defendant's objection based on the possible disclosure of identity was not valid. Such concerns do not override the plaintiff's right to ask proper and relevant questions in relation to the relevant documents. Queen's Bench rule 5-4 codifies the common law rule imposing an implied undertaking to preserve the confidentiality of information obtained on production of documents and questioning. The information about the defendant's vice-presidents' compensation is required by s. 5(1) of *The Crown Employment Contracts Act* and is freely available on the internet.

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***R v Byblow*, 2021 SKQB 300**

Layh, 2021-11-18 (QB21278)

Criminal Law - Motor Vehicle Offences - Impaired Driving Causing Bodily Harm
Criminal Law - Motor Vehicle Offences - Dangerous Driving Causing Bodily Harm

The accused was charged with driving while her ability to operate the vehicle was impaired by alcohol and that impaired operation caused bodily harm to her passengers, contrary to s. 255(2) (since rep.) and dangerous driving causing bodily harm contrary to s. 249(3) (since rep.) of the *Criminal Code*. While the accused was driving a truck on a highway near Ituna in July 2018 about 11 pm

with three passengers, the vehicle veered into the ditch, hit an approach, and rolled over. The road and weather conditions were good. All the passengers were injured and one of them sustained a spinal cord injury that left her a T3 paraplegic. The accused admitted that she was the driver and there was bodily harm suffered because of the accident. She did not testify. Each of the three passengers did testify at the trial. The witness who sat in the front seat of the vehicle, and who suffered the spinal cord injury, testified that the accused had been drinking before she drove and continued to drink while she was driving the truck. As the witness had known the accused since they were children, she opined that her behaviour would change after she had been drinking and her conduct while driving was consistent with such a change, describing the accused as talking to everyone in the vehicle and looking constantly at her cell phone to select music. The witness said that she believed that the accused was driving fast and estimated her level of intoxication at 5 out of 10. Each of the other witnesses were in the backseat of the vehicle. They both testified that the vehicle was swerving while the accused was driving at speeds of up to 120 km/hour, that she was drinking and looking at her cell phone. They asked her to keep her eyes on the road and at the time the truck left the road, the accused was looking at her cell phone. When asked if they thought that the accused was impaired, one witness said: “A little bit, yes.” The other witness said: “She was.” He said that he could tell because “[s]he was very talkative, very loud, very distracted, as well as swerving on the gravel road, as well as changing rates of speed quite frequently.” A motorist who arrived at the scene of the accident noted a strong smell of alcohol emanating from the vehicle. One RCMP officer testified that she could smell alcohol coming from the accused but not overwhelmingly. The accused admitted that she had been drinking. The accused failed the ASD test. Another officer testified that he could not smell alcohol coming from the accused and that the only sign of impairment was that her speech was slow. The Certificate of Analysis submitted by the Crown showed readings of 70 and 60 milligrams in 100 millilitres of blood taken approximately three hours after the accident. An expert in alcohol absorption testified that by working backward from the time of the readings to the time of the accident, he could estimate that a person’s blood alcohol would be 93 to 125 milligrams in 100 milliltres of blood, assuming that no alcohol was consumed either within 30 minutes prior to or after 11 pm. He opined that the consumption of alcohol slows down brain activity and information processing and the complex task of driving is adversely affected by it, especially since judgment and reaction time are slowed.

HELD: The accused was found guilty of both charges of impaired driving and dangerous driving causing bodily harm. It accepted the witnesses’ evidence as both reliable and credible. The court found that the Crown had proven beyond a reasonable doubt that the accused’s ability to drive was impaired by alcohol. Further, it concluded that the alcohol consumption that impaired the accused’s ability to avoid driving off the highway and into the approach was a significant contributing cause of the accident and hence of serious bodily harm to the passengers. Regarding legal causation, it found that the accused’s moral responsibility for the passengers’ injuries had not been alleviated because of any intervening occurrences. The evidence established that the accused’s driving was dangerous to the public having regard to all of the circumstances, including leaving the highway and striking an approach without any impediment of vision, condition of the road, adverse weather conditions, mechanical malfunction or for any other reason.

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***Bond v Jackson*, 2021 SKQB 301**

Megaw, 2021-11-19 (QB21286)

Family Law - Custody and Access - Police Enforcement of Order

The respondent applied for an order permitting her to list and sell the family home and also sought direction respecting the enforcement of a current order prohibiting the petitioner from having parenting time with the parties' children. The respondent had brought the same matters before the court in an earlier application made in May 2021 (see: 2021 SKQB 158). Prior to that hearing, the petitioner had consistently resisted complying with any previous court orders and his conduct in the proceedings had been highly improper. At the May hearing, the court declined to order the sale of the house until the matter proceeded to pre-trial conference or further evidence was presented. A pre-trial conference had occurred but as the petitioner did not appear appropriately at it and could not participate, nothing had been resolved. Since then, the respondent had received a demand letter from the solicitors of the mortgagee as the petitioner, who continued to reside in the residence, had not made any payments on the mortgage or other indebtedness held by Affinity Credit Union. In the May judgment, the petitioner's parenting time was suspended and he was restrained from being in contact with the respondent. From the evidence before it then, the court was concerned that the children might be at risk when they were with respondent. Because of his erratic behaviour, it ordered pursuant to its power under s. 96 of *The Queen's Bench Act, 1998* that the petitioner undergo psychiatric evaluation. The Regina Police Service and the RCMP divisional headquarters and the local detachment nearest the petitioner's residence were given copies of the judgment. However, the respondent advised the court that in October and again in November 2021, the petitioner went to the children's school and attempted to interact with them. The school staff intervened and notified the RCMP but they declined to attend at the school or be involved. The respondent deposed that she had been told by the RCMP that because of the wording of the current order, they could not enforce it.

HELD: The application for the listing and sale of the house was granted. The court ordered that the property be listed for sale with a registered real estate agent in Saskatchewan. In the event an offer to purchase is received, the parties were directed to seek the court's approval for the completion of any sale. It was appropriate for the respondent to be given the opportunity to preserve any equity left in the home. With respect to the enforcement of the order suspending the petitioner's parenting, the court ordered again that the petitioner was not to have parenting time in accordance with the May judgment and further directed that it extended to a prohibition on him having any contact with the children until the requirements of the May judgment were fulfilled. It ordered the police enforcement agency involved be directed to enforce the terms of this judgment regarding the prohibition. A copy of the judgment was to be delivered immediately to the officers in charge of the RCMP headquarters in Regina and the White Butte detachment. If any difficulty in enforcing the subject order occurred, the matter was to be returned to the court on three days' notice. If the return involved the non-enforcement or the failure to enforce the order, such return was to include service of the application on the police agency and any officers who declined such enforcement and the agency and the officers were to be represented to make submissions at any subsequent proceeding.

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***KDM Constructors LP v International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870*, 2021**

SKQB 302

Crooks, 2021-11-22 (QB21290)

Civil Procedure - Applications - Originating Applications - Application for Interim Stay

The applicant, KDM Constructors LP, filed two applications simultaneously in October 2021. The first was an originating application for judicial review of two decisions of the Saskatchewan Labour Relations Board issued in August and September 2021 (see: 2021 CanLII 77359; 2021 CanLII 101129) that related to the determination of the appropriate unit of employees for collective bargaining, dismissing the applicant's constitutional question and ordering that the votes be tabulated. The second, an application without notice, was filed seeking an interim stay of the order of the board regarding the counting of the ballots arising from the certification vote, pending the outcome of the judicial review application. The second application was heard on October 20, 2021.The chambers judge refused to grant an order for a stay under Queen's Bench rule 3-60 without notice to the respondent union and in the absence of any evidence other than the assertion of the applicant's counsel that it was appropriate to do so. The judge directed that, to preserve the status quo, he would adjourn the application for 21 days to permit the applicant to serve the respondent with notice and to file whatever supporting material it intended to rely upon at the hearing of the motion in chambers. The applicant then brought this application with notice to the respondent but did not file any further materials. Its counsel argued that where there is an automatic imposition of a collective agreement without the right to bargain, as in this case, under ss. 6-69 and 6-70 of *The Saskatchewan Employment Act*, no evidence was required. It relied upon *Verdient Foods* (2019 SKQB 288). The respondent opposed the application and requested that the ballots be counted.

HELD: The application was dismissed. The court had regard for the three factors set out in *RJR-MacDonald* in deciding whether to exercise its discretion to grant a stay in the form of an interim injunction, with the onus resting on the applicant. It noted that the same factors are applicable as tests to determine whether to grant a stay of proceedings to preserve the status quo. It found that the applicant had not satisfied the onus upon it, particularly after it had been given the opportunity to file evidence. Although it had met the first test that there is a serious question to be tried, it had not met the second test as it had not provided any evidence of irreparable harm that might flow from the implementation of the board's decision. The *Verdient* decision was not applicable to this discretionary stay application. Regarding the third test, the court was satisfied that the balance of convenience favoured the respondent.

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***Bouvier v Bouvier*, 2021 SKQB 303**

Keene, 2021-11-23 (QB21291)

Civil Procedure - Costs
Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process

The applicant brought an originating application requesting an order directing the respondent to provide an accounting of all rental and any other income received from eight quarters sections of farm land from June 2017 until December 31, 2020. She had received the eight quarters pursuant to a Queen's Bench judgment granted under *The Family Property Act*, but the respondent had appealed the judgment and continued to remain in possession of the lands and to receive all the income derived from them until the Court of Appeal dismissed his appeal on November 26, 2020. The applicant argued that she was entitled to the relief and remedies claimed because of the doctrines of unjust enrichment and constructive trust. The respondent opposed the application on the basis that the issue raised by the applicant of receiving revenue from the post-judgment land had been considered in the appeal judgment (see: 2020 SKCA 133) and, accordingly, the doctrine of res judicata applied. As the action disclosed no reasonable claim, was frivolous, vexatious and an abuse of process, contrary to Queen's Bench rule 7-9(2)(a), (b) and (c), it should be struck entirely pursuant to rule 7-9(1)(a).

HELD: The originating application was struck pursuant to Queen's Bench Rule 7-9(1)(a). The action was an abuse of process because it offended the doctrine of res judicata. The court agreed with the respondent that this issue had been before the Court of Appeal as indicated in paragraph 41 of its judgment and it should have been argued in that forum rather than by filing an originating application under an entirely separate court file a year later. It granted costs of $2,500 to the respondent because of his success and because the applicant had abandoned a significant portion of the application shortly before the return date. The costs order was made on the condition that the respondent pay the applicant all still-outstanding costs ordered by the Court of Queen's Bench and Court of Appeal within 30 days. If he failed to pay the entire amount then this order for costs would be automatically vacated and considered null and void without any need by any party to apply to court for directions.

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***Stroich v Stroich*, 2021 SKQB 304**

Keene, 2021-11-23 (QB21292)

Statutes - Interpretation - *Enforcement of Maintenance Orders Act*, Section 43, Section 53.1

The self-represented applicant sought a six-month stay of enforcement of a maintenance order. He provided an affidavit in support of the application in which he stated that, without the stay, he would experience undue hardship. His deposed that his basic needs had to be met and his multiple medical and dental expenses had to be paid and these costs were necessary for him to live and enable him to make spousal support payments. The applicant also requested that the suspension of his driver's licence be lifted.

HELD: The application for suspension of enforcement proceedings was dismissed. The applicant had not met the evidentiary burden of supplying "valid reasons" for the suspension as required under s. 53.1 of *The Enforcement of Maintenance Orders Act*. His affidavit merely explained his concerns and he did not provide any financial, medical, or reliable third-party information to assist the court. It also dismissed the application for lifting the suspension of the applicant's driver's licence pursuant to s. 42 of the Act as his arrears exceeded three months, contrary to s. 43(1)(a) and he had not provided an evidentiary basis under s. 43(1)(b) to establish

that his health would be seriously threatened by the driving suspension.

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***Ford v Ford*, 2021 SKQB 305**

Keene, 2021-11-23 (QB21293)

Family Law - Child Support - Enforcement
Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 21(1)

The Director of Maintenance Enforcement brought an originating application, returnable March 23, 2021, on behalf of T.F.M., the wife of the respondent, D.F. The application was made pursuant to s. 21(1) of *The Saskatchewan Farm Security Act* (SFSA), seeking an order declaring that the SFSA did not apply to the enforcement of maintenance arrears between the applicant and respondents in relation to a quarter section of farm land. T.F.M. held a joint tenancy in the land and was thus named as a respondent but she advised that she supported the application that would result in the sale of the land. The application arose due to the respondent's failure to pay support to T.F.M. as ordered in a Queen's Bench judgment issued in 2009. The judgment was filed with the Maintenance Enforcement Office (MEO). The respondent owed arrears of over $206,105.00 and he had not made a voluntary payment to MEO since December 2014. The MEO registered the judgment in the Saskatchewan Judgment Registry and created an enforcement charge against the land now the subject of this application. The subject land met the definition of "farm land" under s. 2 of the SFSA. The MEO instructed the Sheriff's office to seize the land and the seizure was registered as an interest against it. In order for the sheriff to sell it in accordance with s. 44 of *The Enforcement of Maintenance Orders Act* and *The Enforcement of Money Judgments Act* (EMJA), the MEO was required by s. 21(1) of the SFSA to make this application for an order that subsection did not apply. The Court Report prepared by the Farm Land Security Board concluded that the respondent had no ability to service the judgment debt and was not making a sincere and reasonable effort to meet his obligations. The report stated that the respondent had not provided it with information regarding his financial situation other than to say that he had no financial resources. He indicated that he wished to vary his maintenance arrears but had not applied to do so since 2015 and had not communicated with the board nor the MEO regarding any current applications. The farm land was not a homestead and was not being farmed. The application had been was adjourned numerous times since March 2021, either at the request of the respondent or his agent, a non-lawyer, or because the respondent or his agent failed to appear at the scheduled court dates. It was also adjourned in early November to permit the respondent's agent to make an application to vary child support. At the hearing, the chambers judge dismissed it without prejudice to re-apply to address deficiencies. As at the time of the hearing of this application, the respondent had not pursued the variation application. The issues were: 1) whether the respondent had a reasonable possibility of meeting his obligations under the judgment; 2) whether the respondent was making a sincere and reasonable effort to meet his obligations under the judgment; and 3) whether it would be unjust or inequitable according to the spirit and intent of the SFSA if the order were granted.

HELD: The application was granted. The court made an order pursuant to s. 21(1) of the SFSA declaring that the subsection did not apply to the seizure and sale of the farm land for the purpose of enforcing maintenance arrears. The issues related to the joint tenancy of the farm land should be addressed in an application for an order confirming the sale pursuant to s. 160.1 of *The Land Titles Act, 2000*. It found with respect to each issue that: 1) it was satisfied, based on the report, that the respondent did not have a reasonable possibility of meeting his obligations under the judgment; 2) the respondent was not making a sincere and reasonable effort to meet those obligations. His intention to change his debt obligations did not mean that he was making the required efforts to satisfy the judgment; and 3) it would be just and equitable to grant the order. The land in question was not being used for farming and the respondent did not appear to be engaged in farming at all. The judgment debt pertained to support of children and with the sale of the land, the proceeds could be applied to that purpose.

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***Input Capital Corp. v Emmel*, 2021 SKQB 306**

Layh, 2021-11-25 (QB21294)

Contract Law - Interpretation - Streaming Canola Purchase Contract
Civil Procedure - Summary Judgment - Genuine Issue Requiring Trial
Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 2(1)(h), Section 44

The plaintiff, Input Capital Corp., applied for summary judgment in its action against the defendants pursuant to a mortgage, seeking $574,397.00 and either foreclosure of the mortgage or sale of the land. In February 2015, the defendants, T. and T.E. (the E. family), and their corporation, TSE Operating Service Ltd. (TSE), signed a streaming canola purchase contract (contract) with the plaintiff. Under its terms, they agreed to grow and deliver 350 tonnes of canola each crop year between 2015 and 2020 in exchange for an upfront payment of $504,000.00. Additionally, the plaintiff agreed to make crop payments to the E. family of $60 per tonne of canola upon delivery to it. On the same day, the E. family executed the mortgage over their 24.5-acre acreage to secure their obligations under the contract. Their acreage met the definition of "homestead" under s. 2(1)(h) of *The Saskatchewan Farm Security Act* (SFSA). The E. family and their eight children resided on the acreage, operated their farm through TSE and leased their farm land and equipment. Because the mortgaged land was the E. family's homestead, they and the plaintiff applied for and obtained an exclusion order from the Farm Land Security Board under s. 44 of the SFSA. In September 2015, the plaintiffs, the E. family and TSE amended the terms of the contract. The plaintiff advanced a further $84,000.00 in exchange for a further delivery of 350 tonnes of canola in the 2021 crop year. Consequently, the E. family were required to deliver 2,450 tonnes of canola to the plaintiff from the years 2015 to 2021. In 2015, the E. family delivered 350 tonnes of canola to the plaintiff. In 2016, they delivered none. In 2017, they delivered 360.495 tonnes of canola. Because the E. family did not make any deliveries in 2016, the plaintiff applied 350 tonnes of canola to the E. family's outstanding obligations from 2016 and the remaining 10.495 tonnes to the E. family's delivery obligations for the 2017 crop year. On November 9, 2017, it demanded the E. family to account for the undelivered canola. On April 25, 2018, the plaintiff repeated its demand and served the E. family with statutorily-prescribed notices to enforce the mortgage. In this proceeding,

the plaintiff also applied to amend its statement of claim to add TSE as a defendant, pursuant to Queen's Bench rule 3-72. Although TSE was named as a party to the contract and its corporate officers signed the agreement, the plaintiff had not named TSE as a party to the action. The E. family defended the action and objected to the amendment. Amongst their defences, they asserted that the contract was a loan which was reduced to $252,389.00 by their calculations of the market value of canola they had delivered and when they tried to repay this amount the plaintiff considered that the amount outstanding exceeded $500,000.00. Under the contract, the E. family acknowledged that they received a further advance of $84,000 in September 2015 with an amending agreement to the contract. Because the mortgage did not contemplate securing any readvancements, this advance was unsecured. They further argued that the mortgage was protected from foreclosure because the plaintiff misled the board in its s. 44 application under the SFSA because, although it supplied a copy of the mortgage, it did not provide a copy of the contract. As well, the September advance required a new exclusion order. Regarding the proposed amendment to the plaintiff's statement of claim, the E. family and TSE conceded that despite the expiry of the limitation period under s. 5 of *The Limitations Act* (LA), that s. 20 of the LA permitted the adding of a party but opposed it on the ground that they would suffer prejudice if TSE were added, as TSE was entitled to litigant certainty.

HELD: The applications for summary judgment and to amend the statement of claim were both denied. The court found with respect to the application for summary judgment that the plaintiff had not met the burden of proving that there was no genuine issue requiring a trial. There were too many genuine issues that could not be summarily resolved on the affidavit evidence before it. It could not assess damages even if it were able to summarily determine liability as it could not understand the plaintiff's extremely complicated calculations of the E. family's debt under the contract, and the plaintiff had not mentioned the relationship of the calculations to the terms of the mortgage. Other issues that would require trial were whether the board would have granted an exclusion order if it had known of the liability that the E. family would incur under the contract and also, whether a further exclusion order was required when the plaintiff made the September advance. Respecting the application to add TSE as a party, the court found that it was not able to determine whether TSE was entitled to be served with the statutorily-prescribed notices under the *Farm Debt Mediation Act*, the *Bankruptcy and Insolvency Act* and the SFSA, nor whether the notices were served upon it, as only the E. family received them. As well, as the plaintiff's statement of claim would have to be amended as it referred only to default under the mortgage and TSE was not a signatory to it.

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***R v Poorman*, 2021 SKPC 55**

Kovatch, 2021-11-26 (PC21043)

Criminal Law - Arrest Without Warrant
Criminal Law - Resisting Officers in Lawful Execution of Duty

Following a trial for charges of assault of a peace officer engaged in the lawful execution of his duty and disarming a peace officer engaged in the lawful execution of his duty of his conducted energy weapon, the trial judge made the following findings of fact on the

evidence: a 911 call was made from a home located at Abernathy to the RCMP detachment at Fort Qu'Appelle at 4:45 am. The caller identified two people fighting in her home, a male, B.J.P., and a female, M.Q., whom she wanted removed from the home. On the way to the house, the members attending, Constable Martin Stregger (Cst. Stregger) and Corporal Ryan Burns (Cpl. Burns) learned that B.J.P. and M.Q. had left the 911 caller's house and were now at another residence. The officers attended there and from outside the house observed a male laid out on a couch. They did not see the female at that time. After a long time knocking on the door by one of the peace officers, B.J.P. and M.Q. came to the back door located on a raised deck, and B.J.P. opened it. Cpl. Burns explained why they were there. B.J.P. and M.Q. did not want to let them into the house since they had no warrant and had no right to come into their home. They were aggressive and insulting to the officers, and B.J.P. repeatedly pointed his finger at Cpl. Burns' face. At one point, Cpl. Burns noticed some dried blood on M.Q.'s face and placed his foot in the door frame so it could not be closed. He asked Cst. Stregger to call the person who called 911 to find out who had been assaulted in her house but did not get the information he wanted. On the premise that M.Q. had been assaulted and by B.J.P., Cpl. Burns told him he was under arrest, and grabbed him by the arm. B.J.P. pulled Cpl. Burns through the open door. Cpl. Burns slipped to the floor, at which point B.J.P. punched him in the head a number of times. Cpl. Burns got his taser and turned it on, which caused B.J.P. to back away. Cpl. Burns then noticed that M.Q. was yelling, screaming, and striking Cst. Stregger. He hoped to arrest her and place her in custody, and so used his taser on her, which had no effect. B.J.P. grabbed the taser from him and pushed him toward the open back door. His heels hooked the door jamb and he fell backwards across the deck and down the stairs. He heard Cst. Stregger screaming. He broke a window with his baton. B.J.P. put his arm through the opening in the window and Cpl. Burns grabbed it, handcuffing him to the door handle. The accused's defence was that Cpl. Burns had no reasonable grounds to arrest him and so was not acting in the lawful execution of his duty.

HELD: The trial judge dismissed the charges, ruling that Cpl. Burns did not have reasonable grounds to believe B.J.P. had committed an indictable offence at the time he forcefully entered his home to arrest him, a prerequisite to the lawful execution of his duty. As such, the Crown had failed to prove an essential element of the offence. In his analysis, the trial judge reviewed numerous authorities with respect to the sanctity of the home, commenting that the courts guarded this right jealousy, subject only to a number of well-defined exceptions aimed at maintaining the "public good." He recognized that the leading authority with respect to 911 complaints was *R v Godoy*, [1999] 1 SCR 311, but distinguished it in this case, stating it could not be used to "justify an entry or invasion into Mr. Poorman's home." His reasons for not following that authority in this case were: 1) there were no exigent circumstances, since other avenues of investigation were available such as talking to the 911 caller to clarify the situation or speaking to M.Q. apart from B.J.P. to see if she had been assaulted by him; and 2) steps like these were a necessary prelude to forming reasonable grounds to believe an indictable offence was committed such as to justify a warrantless forced entry into the home. Upon a review of the case law concerning reasonable grounds, including his own decision *R v Kahnapace*, 2020 SKPC 9, in which he relied heavily on *R v Shinkewski*, 2012 SKCA 63, the trial judge recognized that a reasonable ground to believe has two components, a subjective and an objective one. The arresting officer must have a subjective belief that an indictable offence has been committed before arresting a person under s. 495(1)(a) of the *Criminal Code*, and that belief must be deemed objectively reasonable by a reviewing court. The trial judge concluded that in the circumstances, Cst. Burns did not hold a subjective belief that M.Q. had been assaulted since if he had such a belief, he would not have asked for a clarification from the 911 caller as to who had been assaulted, and also concluded that if he had held that subjective belief, it was not a reasonable one, since he had no cogent grounds to believe M.Q. had been assaulted by anyone. He stated that the dried blood on M.Q. was not proof of an assault, and neither was the information Cst. Burns had that the 911 caller wanted people who were "fighting" out of her house.

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***R v Ledebur*, 2021 SKPC 58**

Beaton, 2021-11-24 (PC21044)

Criminal Law - Mandatory Alcohol Screening - Minimum Fine
Constitutional Law – *Charter of Rights*, Section 12

Following a guilty plea to a charge of refusing to provide a breath sample pursuant to a mandatory alcohol screening (MAS) demand, the offender, A.V.L., argued at his sentencing hearing that the minimum fine of $2000.00 amounted to cruel and unusual punishment contrary to s. 12 of the *Charter*, and that a discharge should be imposed. The sentencing judge found the following facts central to her determination of the sentence: the offender was stopped by a peace officer while operating a motor vehicle for having a dirty, unreadable license plate; he had no alcohol in his blood; a demand was made of him by the officer that he provide an MAS roadside sample of his breath, which he refused to do; the offender became angry and agitated, yelled obscenities, and called the officer racist; though the officer informed him of the legal consequences of a refusal and "tried to reason with him," S.V.L. continued to be extremely agitated and could not be reasoned with, to the point that the officer was concerned for his well-being and held him in cells for 11 hours until he calmed down; A.V.L. was 29 years of age, had no criminal record, and was of Mexican-German descent; he had been stopped by police numerous times in 2020, including just recently, and believed he had been stopped because of his race; and he was confused concerning the mandatory nature of the demand because he had no right to counsel at roadside.
HELD: The sentencing judge imposed the mandatory minimum fine of $2000.00 following a reasoned analysis of the prevailing case law concerning the principles governing the application of s. 12 of the *Charter*, especially *R v Lloyd*, 2016 SCC 13, *R v Nur*, 2015 SCC 15, and *R v Smith* (1987), 58 CR (3d) 193 (SCC). From her review of this case law, she gleaned the following *dicta*: she was first to determine what the appropriate sentence should be absent the mandatory minimum, keeping in mind the principles and objectives of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*; next, she was to determine whether the minimum sentence was "grossly disproportionate" to the sentence she would have imposed; and she was to defer to the will of Parliament in implementing its sentencing objectives except in the clearest case of infringement of the s. 12 *Charter* right. She then applied this law to the specific offence and offender before her. She reasoned that because of the continuing death and injury caused by motor vehicles operated by impaired drivers, Parliament, by doubling the fine for refusing an MAS demand when the minimum fine for the offence of impaired driving was $1000.00, was signaling its intention to remove more impaired drivers from the roads before they caused death or injury. She stated that in this legislative scheme, it could not be mitigating for a sober driver to refuse to provide a breath sample. She next applied the fundamental principle of proportionality, and considered mitigating and aggravating factors and parity to the offender and the offence, finding that it was mitigating that A.V.L. believed he did not need to provide a breath sample and that he was not an impaired person trying to impede the investigation, though the mitigating effect of this factor was lessened because he became agitated and refused to listen to the police about his legal obligations; and he was detained in cells for 11 hours without any facts being presented to justify it. With all this in mind, she indicated she would impose a sentence of $1000.00 but for

the mandatory minimum. She felt it was not in the public interest to impose a discharge as to do so would encourage more refusals of MAS breath demands. She then turned to the second branch of the test, whether the minimum sentence was grossly disproportionate to the sentence she would have imposed and concluded it was not grossly disproportionate in relation to A.V.L. himself or to any other reasonably foreseeable hypothetical offenders charged with this offence.

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***Belof v Saskatoon Board of Police Commissioners*, 2021 SKPC 60**

Jackson, 2021-12-03 (PC21046)

Statutes - Interpretation - Small Claims Act, 2016, Section 5, Section 12, Section 24

The plaintiff applied for further document production from two of the defendants, a police officer and the Saskatoon Board of Police Commissioners. All of the defendants, the officer, the board, the Saskatchewan Police Commission and the Government of Saskatchewan, applied to be struck from the claim pursuant to ss. 12(6)(a) and (l) of *The Small Claims Act, 2016* (SCA). The plaintiff brought his small claims action in the Provincial Court, Civil Division, for damages for lacerations and contusion injuries he suffered from a police service dog during the course of his arrest in May 2017. Under s. 12(4) of the SCA, parties are required to bring to the case management conference all relevant documents. Several case management conferences had occurred prior to this application, and the officer and the board had previously provided the plaintiff with significant document production including records related to the episode, a summary of the officer's training and the commission's policy and standards for training and handling of service dogs. In his affidavit, the officer deposed that the plaintiff's complaint to the commission had been found to be unsubstantiated, no disciplinary proceedings had occurred and no criminal investigation or charges undertaken. Additional documents sought in this application included any documents: related to the 2018 decisions to find the officer unfit for duty, to terminate him, and the arbitration resulting in his reinstatement; the officer's personnel file related to handling or mishandling a service manual or a weapon, use of force and examples of excessive use leading to criminal charges or complaints and misunderstandings of rights under the *Charter*; and the collective agreement between the board and the members of the Saskatoon Police Service. With respect to their applications, the defendants relied upon ss. 12(6)(a) and (l) of the SCA. It was within the jurisdiction of the Provincial Court to strike them from the claim under s. 12 and they distinguished the Court of Appeal's decision in *Williams* (2011 SKCA 66) because their application would not decide the claim under s. 24(1) (now s. 26) of the SCA. Further, ss. 12(6)(a) and (l) were amendments to the SCA that occurred after *Williams*. The plaintiff countered by arguing that *Williams* was authority that a preliminary application, such as this one, was beyond the jurisdiction of the Provincial Court. The plaintiff's counsel also invited the court to disregard s. 10 of *The Police Act, 1990* (Act) and judicial authority such as *Munir* (2015 SKQB 250) to find that the corporate defendants should not have statutory immunity. He argued that it would be an appropriate time to do so given society's current questioning of the power of police and police oversight agencies. The statistics showed that the groups most commonly harmed by police actions are people of colour and the mentally ill. It was wrong to deprive members of such economically-disadvantaged groups most likely to be injured by the police of any ability to be compensated for such injuries.

HELD: The plaintiff's application was dismissed. The defendant's applications, excepting that of the police officer, were granted and they were struck from the claim. The court found that the plaintiff's application for the documents was an attempt to introduce similar fact evidence to assist in proving the plaintiff's claim and was presumptively inadmissible. Regarding the issue of relevance, it decided that in the absence of rules of process for its civil proceedings, it would use the modern approach to determining the issue of relevance developed the Court of Queen's Bench and the case law developed pursuant to Queen's Bench rule 5-18. In this case, any further document production of the requested material would at best only be of "debatable, potential or marginal materiality" and therefore contrary to the consideration of proportionality, as granting it would add extended delay and expense. Furthermore, the documents were not relevant because, based on the plaintiff's desire to use them to challenge the statutory immunity of officers and oversight agencies, they did not relate to a matter in issue as particularized by the pleadings. Regarding the defendant officer's application, the court dismissed it because the plaintiff's pleadings specifically raised facts that, if established at trial, could demonstrate the officer's intention to cause harm or that he was criminally negligent and possibly demonstrating an absence of good faith, thereby depriving the officer of statutory immunity under s. 10(3) of the Act. The other defendants' applications were allowed and they were struck from the claim. No evidence was required to make that decision. The plaintiff had not pleaded any facts to substantiate his claim against the other defendants in scienter, negligence, breach of fiduciary duty and the *Charter*. The court was bound by the Queen's Bench decision in *Munir* and found that vicarious liability cannot extend to the defendants even if the officer was found to be responsible under ss. 31 and 32 of the Act. It declined the plaintiff's invitation to disregard the statutory immunity granted to these defendants under s. 10 of the Act and by judicial authority. As a statute-based court, intended to provide an efficient forum for the recovery of debt and damages, it did not have jurisdiction to deal with constitutional or precedential challenges.

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