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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***R v St. Cyr*, 2021 SKCA 169**

Caldwell Barrington-Foote Tholl, 2021-12-28 (CA21169)

Criminal Law - Dangerous Offender Designation - Indeterminate Sentence - Appeal

The appellant was designated a dangerous offender pursuant to Part XXIV of the *Criminal Code* (see: 2018 SKQB 295). He did not appeal his dangerous offender designation but only the indeterminate sentence imposed on him pursuant to ss. 753(4)(a) and (4.1) of the Code, and sought to have it set aside. He argued that the sentencing judge had erred in numerous ways that led him to unreasonably conclude that no measure other than an indeterminate sentence would adequately protect the public. The judge further failed to consider whether to impose a sentence of 20 years or more pursuant to s. 753(4)(c) of the Code, which could adequately protect the public from his commission of murder or a serious personal injury offence.
HELD: The appeal was dismissed. The court found that the judge's imposition of an

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indeterminate sentence in this case was reasonable. Regarding the appellant's position that the judge had not considered imposing an enhanced conventional sentence for the predicate offence under s. 753(4)(c), it observed that no submissions had been made to him in that regard, and it was not convinced that such a sentence would be appropriate since it does not comport with s. 718 of the Code. It noted that such a sentence had been recognized by the Ontario Court of Appeal in *Spilman* but it did not have to decide whether it would adopt its reasoning as it would not justify such a sentence in this case, regardless.

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***Janvier v Saskatchewan (Workers' Compensation Board)*, 2021 SKCA 170**

Ottenbreit Caldwell Ryan-Froslie, 2021-12-30 (CA21170)

Administrative Law - Judicial Review - Workers' Compensation Board - Appeal

The appellants appealed the decision of a Queen's Bench judge to dismiss their application for judicial review of a decision of the Saskatchewan Worker's Compensation Board (WCB) (see: 2018 SKQB 175). The appellants were injured in an incident at the refinery operated by the respondent employers, Consumers Co-operative Refinery and Federated Co-operatives. The appellants alleged that the respondents had acted in bad faith and argued before the WCB that as a result, they could bring a civil action to recover damages against the respondents and the civil immunity clauses in *The Workers' Compensation Act, 2013* did not bar them from doing so. The respondents sought and obtained a ruling from the WCB that ss. 43, 168, and 181 of the Act barred such an action. The appellants also raised issues regarding the constitutionality of the barring provisions under the *Charter* and s. 96 of the *Constitution Act, 1867*. The respondents took the position that the WCB should not address the constitutional questions at all and that notice should be given to the Attorney General (AG) pursuant to *The Constitutional Questions Act, 2012* (CQA). The WCB did provide the AG with notice and advised the parties of it and that they would be given opportunity to make submissions. The appellants objected to notice having been given and the WCB initially responded by saying that notice was required under the CQA, but later said it had relied on an internal policy that notification should be provided to the AG 14 days prior to a hearing. The appellants protested because the notice had not been given within that period but the WCB said that it had jurisdiction to determine its own procedure. The appellants then declined the WCB's invitation to respond to the AG's submissions regarding the issue of constitutionality and

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advised that they would challenge the board's conduct in court. Amongst their arguments in the judicial review application, the appellants submitted that the WCB's conduct respecting constitutional notice and obtaining the AG's submission raised a reasonable apprehension of bias. The chambers judge dismissed all of the appellants' arguments. Respecting the alleged bias, he applied the Supreme Court's test for it in such circumstances as set out in *Committee for Justice and Liberty* ([1978] 1 SCR 369), and found that nothing the WCB had done created the substantial ground necessary to conclude that there was a reasonable apprehension of bias. On appeal, the appellants argued that the chambers judge had erred: 1) by finding that no reasonable apprehension of bias arose from the board's request for and receipt of submissions from the AG on the constitutionality of the barring provisions and on its jurisdiction to answer constitutional questions; 2) by dismissing their constitutional challenges, finding that there was an insufficient causal connection between the barring provisions and interference with the security of the person under s. 7 of the *Charter*. He erred as well in dismissing their position that if the barring provisions of the Act prevented their civil action involving a claim of bad faith, that would preclude access to the superior courts and was outside the authority of the provincial legislature under s. 96 of the *Constitution Act, 1867*; and 3) by finding that the WCB's interpretation of the barring provisions was reasonable and correct. They alleged that it had not addressed the issue. They repeated their assertion that a worker's civil claim that an employer has acted in bad faith should fall outside the barring provisions because it creates an incentive for employers to create dangerous workplace environments.

HELD: The appeal was dismissed. The court found that the chambers judge had selected and applied all of the proper standards of review and had: 1) not erred in concluding that the WCB's conduct respecting the AG was appropriate, had been carried out in a procedurally fair manner and had not given rise to a reasonable apprehension of bias. It adopted the judge's reasons for dismissing this ground; 2) had not erred in his analysis of s. 7 of the *Charter*. The appellants' right to sue in tort for workplace injuries is not an interest protected by s. 7. His answer to the appellant's question regarding s. 96 of the *Constitution Act* was correct as well. The board's exclusive jurisdiction to resolve disputes arising out of workplace injuries was well-established and is constitutionally sound; and 3) had not erred in his review of the WCB's decision. As the standard of review was reasonableness, the judge acknowledged that the WCB's decision, given the decision in *Pasiechnyk* ([1997] 2 SCR 890), was correct in concluding that as the appellants' injuries had been sustained during the course of their employment, all of causes of action were automatically prohibited under the barring provisions. The court rejected the appellants' attempt to reframe the issues on appeal to have it conduct an inquiry *de novo* into the issue of constitutionality.

R v J.D.H.

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***Nelson v Teva Canada Limited*, 2021 SKCA 171**

Caldwell Ryan-Froslie Kalmakoff, 2021-12-30 (CA21171)

Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(e)
Civil Procedure - Pleadings - Statement of Claim - Application to Strike - Abuse of Process - Appeal

The appellants appealed from the decision of a Queen's Bench chambers judge to grant the respondents' application to strike their action against them and others as an abuse of process pursuant to Queen's Bench rule 7-9(2)(e). The judge struck the action because he found the appellants were acting contrary to the terms of the release of claims and barring provisions of a settlement approval order in an Ontario class action against Boehringer Ingelheim Ltd. (see: 2011 ONSC 1942). He concluded that the appellants' class action constituted a collateral attack against the settlement order and was therefore an abuse of process.
HELD: The appeal was allowed and the Queen's Bench decision was set aside. The court found that the chambers judge erred in principle under Queen's Bench rule 7-9(2)(e). He failed to address the first question necessary to determine whether it was "plain and obvious" that the appellant's action was an abuse of process. The plaintiffs' claim had raised an arguable issue which was whether the settlement approval order barred the continuation of their action. The judge had made palpable errors in his fact-finding that led to his conclusion that the settlement order had disposed of the appellants' claim.

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***Choquette v Viczko*, 2022 SKCA 11**

Leurer, 2022-01-24 (CA22011)

Civil Procedure - Appeal - Notice of Appeal - Application to Extend Time

The self-represented prospective appellant (the applicant) applied for an order extending the time within which to appeal as required by s. 9(2) of *The Court of Appeal Act, 2000*. The applicant sought to appeal the decision of a Queen's Bench chambers judge approving the sale of land by the respondent executrix pursuant to a will. The judge dismissed the applicant's action, relying first on

his interpretation of s. 50.5(1) of *The Administration of Estates Act* and in the alternative, on his determination that he could approve the sale regardless, under s. 50.5(4)(b) of the Act (see: 2021 SKQB 167). That chambers decision was dated June 3, 2021. The applicant had been represented by counsel at the chambers hearing but at some point before the decision was rendered, she apparently decided to represent herself, though her counsel did not withdraw until September 21. The applicant served her incomplete notice of appeal on July 2, 2021 and submitted it for filing on July 9 at the Court of Appeal's registry office. The staff contacted her on July 14 to advise her that the notice of appeal would need to be amended before it could be filed, and that she would have to ask the respondents' counsel if they agreed to the late filing of the amended notice. On July 16, the applicant re-served the respondents' counsel with the amended notice and she submitted it to the registry on July 28, unaccompanied by any consent to its late filing. On July 28, the applicant contacted respondents' counsel to ask if they would consent to an extension of time to file the notice but the counsel replied, as required, to her lawyer, with whom she apparently continued to communicate. On September 14, the registry staff informed the applicant by email that, absent consent from the respondents, she would require an order extending the time to appeal, and provided her with upcoming chambers dates and a blank form of notice of motion. The applicant acknowledged receipt and said that she had not received any agreement from the respondents, so would proceed with the notice of motion to extend the time for filing. The staff reminded her again on October 18 of the requirements she had to meet if she intended to proceed with an appeal. Six weeks later, the applicant served and filed her notice of motion to extend the time. In her affidavit filed in support of the application, the applicant deposed that she was not fully aware of the *Court of Appeal Rules* and documents. The issue was whether it was just and equitable that the applicant be afforded an extension of time to appeal from the chambers decision under ss. 9(2) and (6) of the Act and Court of Appeal rule 10(1).

HELD: The application was dismissed. The court found that it was not just and equitable to grant an extension of time to appeal. It reviewed the application under the four factors it used to assess whether to extend the time to appeal, being whether: the party possessed a *bona fide* intention to appeal within the appeal period; the respondent would suffer prejudice; the party had acted with reasonable diligence or had a reasonable explanation for the delay; and had an arguable case. It concluded that while the applicant met the first two factors, she had not satisfied the third and fourth. With respect to the delay, it found that the applicant had not provided a reasonable excuse for approximately three months of the five-month delay in bringing her application. It accepted, as the applicant had deposed, that a self-represented litigant may be uncertain how to proceed and that waiting for the respondents' consent was reasonable, but sometime between July 28 and September 14, the applicant unequivocally knew that she would have to proceed with a contested application. It noted too, that it could not infer in the circumstances that delay occurred after July 28 because the applicant was waiting for some reply from the respondents. She should have known that the respondents' counsel was not able to reply to her direct communications in July. It determined that the applicant had not presented a viable basis for an appeal. In her notice of appeal, she had not identified an error relating to the chambers' judge's reasoning in his decision, in the alternative, that he would approve the sale under s. 50.4(b) of the Act. However, it observed that it might have granted the application despite the delay on the basis that the applicant might have had an arguable case respecting the chambers judge's interpretation of s. 50.5(1) of the Act.

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***Dubois v Saskatchewan*, 2022 SKCA 15**

Richards Whitmore Schwann, 2022-01-31 (CA22015)

Civil Procedure - Appeal - Moot

The applicants, the Government of Saskatchewan, the Provincial Capital Commission (PCC) and Regina Police Service (RPS), sought to have the appellants' appeal quashed on the basis that it had become moot. The appellants had established a protest camp in 2018 near the Legislative Building in Wascana Centre, a provincially-owned park administered by the PCC pursuant to *The Provincial Capital Commission Act* (PCC Act). The camp had not complied with the bylaws of the PCC. The protesters ignored a notice under *The Trespass to Property Act* to vacate the area and the PCC, with the assistance of the RPS, began to dismantle the camp. The removal of the protestors and the structures they had erected, such as a ceremonial teepee, commenced on June 15 but by agreement, the protestors were given more time to dismantle the teepee and extinguish their sacred fire. However, they failed to do so and on June 18, PCC's employees and RPS officers arrested the six appellants and they were held in custody for several hours before being released without charge. The PCC then posted signs where the camp had been located, advertising that erecting tents and making fires was prohibited. On June 21, the protestors re-established the encampment. The PCC sought assistance from the RPS but they would not participate unless they were asked to enforce a court order. On June 25, the government and the PCC applied for, and obtained, leave to commence an action under *The Recovery of Possession of Land Act* (RPLA). The matter was not pursued due to ongoing negotiations with the protestors. On July 16, the appellants filed an originating application in the Court of Queen's Bench, seeking declarations from it that the dismantling of the camp and their arrest and detention on June 18 had violated their rights to freedom of expression and to be free from arbitrary detention and imprisonment under ss. 2(b) and 9 of the *Charter*. On July 17, the government and PCC filed a fresh application for an order under s. 3(1) of RPLA requiring the protesters to vacate the camp, and the PCC asked for an order pursuant to ss. 7-7 and 7-11 of the PCC Act compelling the protesters to comply with the bylaws. The appellants then notified the provincial and federal Attorneys General that they intended to argue that s. 3 of the RPLA was constitutionally invalid. After the hearing for these various applications, the chambers judge dismissed the appellants' application (see: 2018 SKQB 241). She granted orders that compelled the appellants to vacate the camp, pursuant to ss. 3 and 4 of the RPLA; restrained them from unlawfully using any land in Wascana Centre pursuant to ss. 7-7 and 7-11 of PCC Act; and compelled them to comply with the bylaws. In February 2020, they appealed from the decision, asserting that the judge erred in a number of ways and requesting that the decision be quashed and for declarations that: the June 18 actions of the government and RPS unjustifiably interfered with the appellants' s. 2(b) rights; the RPS' decision on June 18 to arrest and detain them unjustifiably interfered with their s. 9 *Charter* rights; and specific bylaws of the Wascana Centre Bylaws were inconsistent with freedom of expression under s. 2(b) of the *Charter* and were of no force or effect. In July 2020, a similar protest camp was established in Wascana Centre by a different individual. After the PCC posted a notice of trespass and sought an order directing the protesters to comply with the bylaws and the government sought an order under the RPLA, the protester filed a notice of constitutional question advising of his intent to impugn the constitutional validity of the relevant parts of the bylaws and the notice of trespass as violations of s. 2(a), (b) and (c) of the *Charter*. In his decision, the Queen's Bench judge distinguished the decision in this case, finding that the notice of trespass and bylaws infringed the individual's freedoms and could not be justified. The judge suspended his declaration of

the bylaws' invalidity for six months to allow the PCC to draft new ones. No appeal was taken from his decision (see: 2020 SKQB 224). In March 2021, the PCC repealed the bylaws and replaced them with three interlocking ones. The respondents then made this application to have this appeal struck on the basis that the repeal of the bylaws and their replacement has rendered it moot with respect to the appellants' grounds regarding the alleged violations of ss. 2(b) and 9 of the *Charter*. They also argued that a declaration that the appellants' rights under s. 9 of the *Charter* were infringed would have no practical consequence.

HELD: The application was dismissed. The court found that the appellants' appeal with respect whether to their ss. 2(b) and 9 *Charter* rights were offended by the dismantling of the camp could not have been rendered moot by the repeal of the bylaws. Further, the appellants also alleged that in their arrests, there had been violations of ss. 129, 139 and 495 of the *Criminal Code* by the respondents that infringed their s. 9 *Charter* rights, and such arguments were not dependent on the validity or legal status of the bylaws. It also rejected the respondents' submission that a "bare declaration" as to whether their s. 9 *Charter* rights were violated would have no practical effect, because they confused the question of mootness with the separate question of whether a declaration would be an appropriate or available remedy should a *Charter* breach be established. In this case, there is a live issue as to whether the appellants' *Charter* rights were violated and, if so, the court would have to consider whether a declaration would be an appropriate remedy.

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***Goertzen v Goertzen*, 2022 SKQB 3**

Megaw, 2022-01-06 (QB22007)

Family Law - Division of Family Property - Unequal Distribution
Family Law - Division of Family Property - Dissipation
Family Law - Spousal Support

The parties married in 1990 and separated in 2017. There were two children of the marriage. Although now adults and financially independent, they lived with the petitioner husband and were estranged from the respondent. The petitioner, together with the children, left the family home in 2017 without having advised the respondent of their intentions. The parties had previously separated in 2010 and at that time, the petitioner moved into a house he had purchased without the respondent's knowledge. The respondent's relationship with the children since 2017 had been almost completely severed. The marriage had been unhappy and both parties alleged that the other had abused them but the respondent provided evidence that the petitioner had been emotionally, verbally and physically abusive to her and she suffered mental health problems as a result. She had received counselling and support from the domestic violence unit of Regina Family Services for the last 10 years. The respondent, aged 58 at the time of trial, had been a stay-at-home mother by agreement of the parties. During the marriage she became a registered nurse but never worked as one. After the separation, the respondent was employed for a period as an operating room attendant but left the position because of the requirements to upgrade her education and then attempted, unsuccessfully, to reinstate her RN designation. Through an employment re-entry program, the respondent had begun working on a casual basis at an office. She had remained in the family

home since the separation and had earned no income. Although the petitioner paid the utilities and property taxes for 2019, he did not pay any further amounts. In 2018, the respondent obtained an order from the court that the petitioner pay interim spousal support of $6500 per month based on his annual income of $187,660. The petitioner did not make the required payments and the respondent's attempt to enforce the order resulted in the bank freezing the petitioner's account. He had paid various lump sum amounts later. The respondent cashed in spousal RRSPs between 2014 and 2018 and had taken out credit cards in her own name and incurred debt. Regarding the family home, the parties' major asset, the parties had been involved in a dispute as to its sale price and whether to use a realtor. The respondent was successful in selling the house without a realtor and obtained a price higher than the listing and what the petitioner had wanted. As a result, she submitted that she should receive an unequal division of the net proceeds of its sale under s. 22 of *The Family Property Act*, and suggested either the funds in excess of the value assigned to the property in 2017 in the parties' original property statements or above the price advocated by the petitioner. The applicant also sought to be compensated for her own efforts and spending to repair, renovate and upgrade the property for the purposes of sale. The presentation of the petitioner's evidence included that he had been a self-employed chiropractor since 1982. Now 62 years old, the petitioner said that his practice had declined because of the effect of the pandemic and for other reasons. Due to arthritis, he expected to retire soon and he estimated that the practice would have no current value if he tried to sell it, basing his opinion on another chiropractor's experience in the sale of his practice. The petitioner had always operated his practice as a sole proprietorship and conducted his business through his personal bank account and credit card. His officer was located in a building he built in 1986. In 2015, without the knowledge of the respondent, he sold a one-half interest in the building to a physician who moved her practice into it. He used the funds to pay the mortgage on the family home. In 2019, the physician purchased the remaining half-interest without any formal written agreement. The petitioner also began to run his complete personal and business finances through accounts over which the physician had both involvement and authority. The petitioner did not explain whether the deposits into this account constituted his entire income. Other financial arrangements with the physician included his renting a house from her as his personal residence. He testified that he had not provided support to the respondent when he left in 2017 because he thought that she was employed and then later, could not pay the monthly support because he did not have the funds. After the 2019 sale to the physician, he had made a lump sum payment to the respondent. In her testimony, the physician used the word "shelter" when she discussed the financial arrangements between her and the petitioner. The respondent argued that the value of the petitioner's chiropractic practice should include the value of his half-interest in the building because the sale was suspicious. The value should also include the hard assets of his office. The petitioner sought to have the respondent's redemption of RRSPs and credit card debt for the two-year period prior to the issuance of the petition be regarded as dissipation of family property, saying that he was not informed of these activities. He claimed the amount dissipated pursuant to s. 28 of the Act to be $125,000. The respondent testified that the petitioner was aware of the redemptions and in any event, she required funds to live on as he was not paying spousal support. Although the petitioner's original position was that the respondent should not receive spousal support, he conceded at the time of trial that she was entitled to it for an indeterminate period but argued that she should be or become self-sufficient. Amongst the issues respecting the division of family property were whether: 1)a) the value of the proceeds of the sale of the family home should be divided unequally; 1)b) the respondent was entitled to compensation for her efforts in arranging the sale of the house; 1)c) the respondent was entitled to recover expenses she incurred in preparing the house for sale; and 1)d) the sale proceeds should be shared equally; 2) the respondent had dissipated family property by cashing in RRSPs; 3) the valuation date for the respondent's

and the petitioner's RRSPs; and 4) the value of the chiropractic practice. The issues respecting spousal support were: 5) the incomes of each of the parties; and 6) the entitlement of the respondent to spousal support, retroactively and going forward. HELD: The court ordered that the proceeds of the sale of the family home be divided equally between the parties and that the petitioner should pay monthly spousal support, both retroactively to 2018 and commencing immediately and until further order or by agreement. It found with respect to each issue that: 1)a) it would not order an unequal division of the proceeds of sale of the family home. None of the claims made by the respondent constituted the "extraordinary circumstances" required by s. 22(1)(a) of the Act. The evidence did not explain the increase in the value of the house between the dates of the 2017 property statement and sale; 1)b) it declined to order the respondent receive a separate amount as compensation for preparing the property for sale. The respondent had not presented evidence to support her claim to avoid the requirements of s. 22 of the Act; and 1)c) it would allow the expenses the respondent claimed. It rejected the petitioner's argument that since the respondent lived in the house, many of the expenses were for maintenance that she should have paid because the house was the parties' joint responsibility and the reason that the respondent lived there alone, without funds, was not by choice, and did not justify saddling her with the maintenance costs; and 1)d) the parties should share equally the net proceeds of sale of the home ($941,390) and equally share the arrears of property taxes, the payment of house insurance premiums and the general maintenance costs from the date of separation to the date of sale; 2) the respondent had not dissipated family property as defined by the Act and the petitioner's claim was dismissed. The evidence showed that during the two-year window the respondent had no other available funds and that prior to it, the petitioner had removed her from his credit card and was not providing her with any funds although he was paying the household's expenses. It found that the petitioner knew that the respondent was cashing the RRSPs at the time and said nothing. While redeeming RRSPs could, in the appropriate circumstance, be considered dissipation, the amounts here, when considered on an annual basis, were not such as constituted squandering. The spending of the funds had not jeopardized the family finances nor could they have threatened the petitioner's retirement plans; 3) the valuation date of the parties' RRSPs would be: the date of application for those RRSPs cashed in by the respondent, as part of the family property available for distribution. It would consider the quantum of spousal support to which she was entitled without reference to the RRSPs; and as at the date of trial for the petitioner's RRSPs because the increase in value was due only to market forces; 4) the practice was valued without including the $150,000 from the first sale of the petitioner's half-interest. As suspicious as the circumstances were, it was not the equivalent of dissipation and the petitioner had used the funds to pay down the family home's mortgage. The hard assets were valued by using the undepreciated capital cost set out in the petitioner's income tax return. As the practice continued to operate, the potential sale value was determined on the basis of the evidence given by another chiropractor who had recently sold his practice. Regarding issues relevant to spousal support, the court found that: 5) it would impute income to the respondent of $24,000 per annum, based on the minimum hourly wage. It did not find self-sufficiency to be a significant consideration and was not a realistic prospect at this time because of the respondent's age, the length of time she was out of the workforce and inability to requalify as an RN or to find employment. It would not impute income to her based on her decision not to complete the educational requirements for her position as an OR attendant. The petitioner's income for support purposes would be based on a three-year average of gross billings and was determined to be $127,854. None of his excuses that his business was declining because of the pandemic or other factors was accepted. His income tax returns did not accurately reflect his actual income available for spousal support purposes. Many of his deductions were not supported by evidence. His claim for the rent he paid to the physician as a deduction was not accepted; 6) the respondent was entitled to spousal support,

based upon the length of the marriage, the respondent's strong compensatory claim, the lifestyle enjoyed by the parties prior to separation, the economic hardship she had suffered and considering that the only item of family property of value was the family home. It granted the respondent's claim for retroactive spousal support except for the 2017 year because she had received funds from the RRSPs and from the petitioner but her claim for 2018 was allowed. The appropriate amount for monthly spousal support owed by the petitioner for 2018 through 2022 was: $5,366; $4,656; $4,580; $4,215 and $3,768, respectively. It had not considered how the petitioner's abuse would have affected the respondent's rights regarding support if he had not conceded that his obligation to pay existed. As at January 1, 2022, the petitioner was to commence payment and to continue every month thereafter until varied by the court or further agreement.

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***R v J.D.H.*, 2022 SKQB 6**

Scherman, 2022-01-07 (QB22010)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Acquittal

The accused was charged with committing various sexual assaults between the years 2017 to 2019, when the complainant was 12 to 14 years of age. At the time of trial, the complainant was 16. The accused began a common-law relationship with the complainant's mother in 2003 and they began cohabiting in 2008. The complainant and the accused both regarded him as being her stepfather. She had not told anyone about the alleged assaults until late 2019 when she made certain disclosures to a school counsellor. In early 2020, the complainant provided two separate statements to the police that were audio/video recorded, both of which were admitted into evidence. She also testified at the preliminary inquiry and at trial. The accused testified in his own defence and denied any sexual assault occurred. During the majority of time in the salient period, the complainant, her mother and her two younger brothers, the accused's biological children, resided in an apartment after leaving a house they shared with the accused. The complainant's mother testified that because her relationship with the accused began to deteriorate, she and the children moved to the apartment. However, the accused began to spend significant time there. As the complainant's mother was working different shifts in her job and the accused was not employed, he was able to help her with child care. The complainant's mother described that: the accused as more of a disciplinarian than she was, and would impose sanctions such as taking the complainant's cell phone; she never witnessed the accused doing anything inappropriate with the complainant; and the complainant had had mental health problems and she had sent her for counselling around 2014. In cross-examination, the complainant's mother said could not remember whether it had been the accused who recommended that the complainant go for counselling, in response to his assertion that he had instigated it. The complainant described numerous incidents of sexual assaults that occurred. She described an occasion when the accused told her she looked "sexy" and "like [she was]… 16". Other than alleged incidents when the accused quickly touched her buttocks and her breasts when others were around, he would finger her vagina through her clothes in the apartment's living room at night when she and the accused were alone watching television together. She could not recall specifically

whether her mother was asleep or at work but her siblings would be in bed. Her mother slept in a room adjacent to the living room and left her door open. The accused often asked her to massage his feet and would pay her to do so. At times he would expose himself during the massages and she would go to her room. In September 2019, she testified that when everyone was out of the house, the accused asked her: “do you want me to” and told her that if she agreed to let him finger her, he would give her phone back to her. They went to into the bedroom and the accused laid on top of her on the bed and pulled down her underpants and began fingering her. He asked her if she wanted to have sex with him and she declined and then left the room. The complainant testified that once when the accused had taken her phone away, he had reviewed the contents, learning that she was questioning her sexuality and engaging in role playing with friends. When questioned as to details about the alleged incidents, the complainant could not remember and explained that she was suppressing or had blocked a lot of things and was working to recover memories. In the accused’s testimony, he specifically denied that any of the alleged incidents had happened but acknowledged that he and the complainant often sat together on a sofa watching television and he frequently asked her to massage his feet, including paying her on occasion. He believed that he had a good relationship with the complainant but said that around the age of 10, the complainant’s personality changed and she became distant from everyone. Before then, though, he had suggested to the complainant’s mother that she go for counselling and he continued to recommend it when she was 11 and again when she began living in the apartment. The defence argued that the complainant’s evidence was flawed and she should not be found credible because of inconsistencies in the evidence she gave in her statements, the preliminary inquiry and at trial. She was unable to provide reliable details. When cross-examined, she responded frequently that she did not remember.

HELD: The accused was found not guilty. The court found that after weighing all the evidence, the accused was probably guilty of one or more instances of sexual assault on the complainant, but it was not sure and thus was obligated to acquit him. Although it found the complainant’s evidence to be credible and the accused’s not credible, it noted that although the complainant’s evidence was generally reliable, the inconsistencies, inability to recall details and reference to trying to recover repressed memories diminished the weight it could ascribe to the overall reliability of her evidence. It considered the complainant’s mother’s testimony that she never saw anything inappropriate and she and the other children were nearby, so the probability of observation was high. The complainant’s involvement with fantasy play and the suppression of her memories, although not explored at trial, raised problems. Finally, the accused testified that he repeatedly suggested that the complainant go for counselling and it was a reasonable inference to draw that it was unlikely that an individual would encourage counselling of a child whom he was sexually abusing. However, the accused’s evidence was neither credible nor reliable. It found that his conduct showed a pattern of grooming and he had pressed the complainant to have sex with him after he discovered the contents of her cell phone. This evidence, and that the accused said the complainant looked sexy and 16, was unrefuted – he never addressed it, and it was not challenged by the defence in its cross-examination of the complainant.

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***Mercer Estate v Moose Jaw Board of Police Commissioners*, 2022 SKQB 8**

Danyliuk, 2022-01-11 (QB22008)

Administrative Law - Judicial Review - Workers' Compensation Board Appeal Tribunal

The applicant, the Estate of J.M., brought an application for judicial review of the decision of the respondent, the Workers' Compensation Board Appeal Tribunal (appeal board). The applicant represented J.M. (the deceased), a police officer employed by the respondent, the Moose Jaw Board of Police Commissioners (Commissioners) from 1998 to 2016, when he committed suicide. The deceased's career as a police officer with the Moose Jaw Police Services (MJPS) had been primarily devoted to dealing with the families of victims who had died as a result of violent and traumatic events. The deceased was having increased difficulties with his mental well-being in 2015. He was depressed, anxious, and suffering from panic attacks. It appeared he had both work and personal sources for his depression and anxiety. In the years leading up to his suicide, the deceased was under psychiatric care and received counselling. Treatment was ineffective and his mental health declined but he refused some help, including hospitalization. The deceased was reluctant to disclose his issues with personnel in his workplace because he thought that it would jeopardize his career but he did discuss his problems with a retired police chief and a physician with whom he had a personal friendship. After his death, the MJPS contacted the Workers' Compensation Board (WCB) to see if the deceased's family was entitled to any WCB benefits given his mental health issues and suicide. Police records of some of the over 1,000 calls at which that the deceased attended were submitted. Numerous individuals, including the people in whom the deceased had confided such as his wife, the retired police chief and his physician friend provided information to the WCB regarding the panic attacks, nightmares and flashbacks he experienced and their own observations of the symptoms of PTSD he displayed. In the initial claims entitlement decision, the applicant's claim was denied on the basis that the traumatic occurrences experienced by the deceased as a police officer were determined not to be the "predominant cause" of his mental health issues, described as major depressive disorder. The decision was expressly based on an internal policy, WCB Policy 01/2009 Injuries – Psychological. The WBC found that it was not a work-related injury as the circumstances did not meet the criteria in the policy, specifically, "the trauma from the series of events is the predominant cause of the diagnosed disability" but rather, that personal problems were the predominant cause. After making two unsuccessful attempts to reverse this decision in the appeals process of the WCB, the applicant eventually appealed to the appeal board. It advanced the argument that the previous considerations of the deceased's situation by WCB failed to consider PTSD in any real fashion. It provided the information from the aforementioned individuals to the appeal board, arguing that as a whole, the evidence indicated strongly in favour of a finding of PTSD. The board referred the matter to a WCB medical consultant, a doctoral candidate in psychology, who was given the deceased's medical history and files, but not the information from his widow and the aforementioned individuals. The author of the review report responded to specific questions posed by the appeal board, including whether his diagnosis related to the workplace injury, and noted that it appeared that explanation of his deceased's experiences as a police officer had not been raised before his death. The author relied on the predominant cause test set out in WCB's policy. The appeal board denied the applicant's claim. It took the view that the evidence established that the deceased's health care providers had made a fixed determination that the root cause was linked to the deceased's personal issues, as well as some family issues. The evidence weighed more heavily against the acceptance of the claim and therefore s. 23 of *The Workers' Compensation Act, 2013* did not apply. Aside from questions related to the appropriate standard of review and the applicable legislative framework, the applicant argued in the judicial review application that the appeal board's decision: 1) was unreasonable; specifically, because: a) its interpretation and application of s. 28.1 of the Act was unreasonable; b) it misapprehended the evidence in not considering the

totality of same; and c) it unreasonably applied s. 23 of the Act in reaching its decision such that the decision was unreasonable. The parties agreed that the applicable standard of review was one of reasonableness.

HELD: The application was granted. The appeal board's decision was quashed and the matter remitted back to it to be reconsidered, with further evidence if required. The applicant was entitled to costs based on Column 2 of the Tariff. The court concurred with the parties that the standard of review was reasonableness and applied the Supreme Court's decision in *Vavilov*. It adopted the approach to the *Vavilov* analysis taken in *Premier Horticulture Ltd.* (2020 SKQB 77). It examined the statutory scheme of workplace insurance established by the Act generally as well as ss. 23 and 28.1 specifically, noting that s. 28.1 created a presumption in the worker's favour. Although there is no definition of "traumatic event" in the legislation, s. 28.1 provides that where psychological injury is diagnosed, it is presumed to have arisen in the course of the worker's employment unless the contrary is proven. The WCB's Policy and Procedure Manual, however, did set out the criteria to be met to satisfy the presumption and included a definition of "traumatic event" for WCB's use. The court found with respect to the applicant's arguments that: 1) the appeal board's decision was unreasonable. It had not dealt with the statutory presumption prescribed by s. 28.1 of the Act; a) the appeal board's decision regarding s. 28.1 and its reasons were unreasonable. It placed undue emphasis on the manual, and its contents were not in accord with the statute. The appeal board failed to understand and give proper effect to the statutory presumption and assessed the evidence in light of its unreasonable interpretation of the law. The appeal board took on a role of persuasion to rebut the presumption in favour of the applicant when it can only properly perform the role of assessor. In this case, the MJPS was not opposed to the applicant's claim for benefits, and thus no one was seeking to rebut the presumption. The appeal board went on to violate the principles set out in *Chapman* (2017 SKQB 134) respecting the evaluation of evidence under s. 23 in the context of the statutory presumption, nor did it apply the presumption as directed by the decision in *Pierson* (2020 SKQB 144), a decision that the court explicitly adopted. Finally, the appeal board incorrectly gave primacy to the manual by using the test of "predominant cause", a test not found in the legislation, and ignored the proper application of the test set out in the statute; b) the appeal board failed to properly assess and account for the totality of the evidence before it. The MJPS supported the applicant's claim and there was ample evidence provided in the record that supported that the applicant suffered workplace stress and trauma; and c) it would not give effect to this point separately because the board's failure to deal with s. 23 was part of the second argument described above and supported the applicant's position that the appeal board failed to adequately deal with the evidence before it.

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***Standing Buffalo Dakota First Nation v Yuzicapi*, 2022 SKQB 7**

McMurtry, 2022-01-11 (QB22005)

Aboriginal Law - Reserves and Real Property - Housing

The Standing Buffalo Dakota First Nation (SBFN) applied for an order of possession under Queen's Bench rule 10-28, permitting the removal of the respondents, V.Y. and R.R., from the houses on the First Nation reserve that they each leased from the SBFN and for an order for immediate possession under Queen's Bench rule 13-7 because of the time elapsed since the eviction date. Each of the respondents had signed lease agreements with SBFN in 2019 that set out their obligations as tenants. The SBFN's Housing Policy

provides that on 30 days' notice, the Housing Authority may evict a home owner or renter for just cause. The provision listed multiple acts and omissions that constituted just cause. The policy also provided for an appeal by an elector of the SBFN of decisions of the Housing Authority, conducted under the Appeal and Dispute Resolution Policy (appeal policy). It did not set out a process for initiating the appeal except to say that where a dispute arose, the parties were to meet within 10 days and make all reasonable efforts to resolve it, failing which, a tribunal would be established to deal with it within the next 10 days. The SBFN's Housing Co-ordinator served each of the respondents with eviction notices on August 12, 2021. The notice advised them that the Chief and Council had terminated their leases and ordered them to vacate the premises by August 31, 2021, but they had not done so. V.Y. did nothing in response to the notice but R.R. deposed that he had filed an appeal under the policy on September 24 by filing a request form with the Office of Residential Tenancies (ORT). Apparently, at some point, the SBFN had initiated proceedings with the ORT to regain possession of the houses. V.Y. had not. In the co-ordinator's affidavit, submitted by SBFN to establish just cause and grounds for eviction in the case of V.Y., she deposed that she had seen many individuals visiting the leased premises for short periods of time. Further, V.Y. had: failed to pay the full rent each month; left used intravenous needles and alcohol containers around the premises; had appeared high and/or intoxicated on several occasions; and held loud parties that disturbed her neighbours. In response to the application, V.Y. deposed on October 20, 2021 that she requested the right to invoke the appeal policy. Respecting R.R., the co-ordinator and others deposed in affidavits that he had not paid his full monthly rent, and left used intravenous needles in and around his house, and the house was in poor repair and filthy. R.R. responded saying that he did not pay his full rent, but disputed the amount owed and explained that the needles were left by medical personnel who administered his medication intravenously. He also sought to appeal the eviction notice under the appeal policy.

HELD: The SBFN was entitled to possession of the houses but the court's decision was reserved, subject to the condition that it and the respondents resolve the dispute or establish a tribunal within 20 days of the fiat. The parties were to advise the court within 31 days of the fiat as to the result of the tribunal proceedings.

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***Wassermann v Saskatchewan (Highways and Infrastructure)*, 2022 SKQB 17**

Mitchell, 2022-01-19 (QB22013)

Civil Procedure - Queen's Bench Rules, Rule 3-71

The applicant, a proposed defendant in the class action brought by the proposed plaintiffs (the respondents herein) regarding the Humboldt Broncos bus crash, brought an application pursuant to Queen's Bench rule 3-71. It requested an order directing counsel for the respondents to furnish it with further and better particulars related to the proposed class members whose claims may be affected by *The Workers' Compensation Act, 2013*. It had previously served an extensive request for particulars upon the respondents and counsel had served their reply. Asserting the reply was inadequate, the applicant repeated its request twice more but still found the replies unsatisfactory and initiated this application. Subsequent to its commencement, the applicant filed its statement of defence and applied for summary judgment. Counsel for the respondents asserted in this application that information

related to the applicant's requests that was within the knowledge of the respondents had already been provided to counsel for the applicant in their responses to the prior notices for particulars. The balance of the information sought was either outside the respondents' knowledge at this time or irrelevant to a determination of the common issues in the proceeding. They submitted that, at this time, they did not know the identities of the persons who may fall into the various proposed classes, and it would place an undue burden on their counsel to have try to determine those persons' identities before certification.

HELD: The application was dismissed. The court noted that an order for particulars is a discretionary remedy and should be made only if necessary. In the context of a class action, it concluded that the applicant and the other proposed defendants know the case they need to meet and do not require further particulars from the respondents. The information sought by the applicant was not necessary at this point. It was effectively asking the court to direct the respondents to disclose legal arguments they would advance at the certification hearing. In terms of general civil procedure, the applicant had already filed a statement of defence, so it could not be argued that the particulars were necessary to allow it to plead intelligently.

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***Moore v Public Employees Pension Board*, 2022 SKQB 18**

McMurtry, 2022-01-20 (QB22014)

Administrative Law - Judicial Review - Public Employees Pension Board

The applicant applied for judicial review of the Public Employees Pension Board (board) decision to divide his pension between him and his former spouse. He sought to have the decision quashed and to prohibit the board from taking any further action in the matter. The applicant and his former spouse entered into an interspousal agreement in 1999 and one of its terms provided for the equal division of the applicant's pension pursuant to the rules and regulations of the pension plan. It required him to provide a copy of the agreement to the pension plan administrators. He did not do so. He retired in 2017, his former spouse learned of it in 2018, and she provided the board (which had replaced the predecessor board for public employee pensions) with a copy of the agreement and sought her share of the pension. It valued her one-half interest as at the date of separation at $43,448 and added the accrued investment return on that amount. The applicant asked the board to conduct an extensive audit of the pension and to recalculate his former spouse's share. It did so but maintained its initial valuation of $203,000. The board notified the applicant that it had the documentation it needed to carry out the division of the pension and advised him he had 30 days to object pursuant to ss. 24 and 25 of *The Public Employees Pension Plan Act (*PEPPA). The applicant did not object to the division as required under s. 25(2) but instead incorrectly brought an originating application pursuant to s. 25(5) of PEPPA and Queen's Bench rule 3-49(1)(d)(i) in which he sought to have his former spouse's share of the pension confined to the $43,448 owing to her at the date of separation plus interest. The applicant appealed the decision of the Queen's Bench judge and the Court of Appeal determined that the judge's decision was a nullity because the Court of Queen's Bench lacked jurisdiction: under s. 6 of PEPPA, the board's decisions are final, although subject to judicial review. The applicant then brought this application. Amongst his arguments was that the board did not have

jurisdiction to divide his pension because the division vested his half of it in his former spouse and the power to vest resides only with the Court of Queen's Bench under s. 12 of *The Queen's Bench Act, 1998*. He also argued that the board's decision was procedurally unfair, having violated the principle of audi alteram partem, because it decided the matter after his former spouse made her application to it and before it contacted him. The applicant asserted that the standard of review of the board's decision was correctness.

HELD: The application was dismissed. The third party, the applicant's former spouse, was entitled to enhanced costs on the application because she had had to answer two applications and an appeal solely to enforce an agreement between the parties. This was an appropriate case for judicial review because the applicant had failed to object to the board under s. 25 of PEPPA, and thus his only remedy was to bring the judicial review application. The standard of review of the board's decision was presumed to be reasonableness in accordance with *Vavilov* but it was unnecessary to establish it because regardless, the board's decision was correct. The court found that the board had not erred in its decision to divide the pension. It reviewed the jurisdiction of the board as set out in PEPPA and found that under s. 24(2)(b), it was permitted to rely on a separation agreement to divide a member's pension. The board had performed that function and established the amount to which the applicant's former spouse was entitled. It found that the board's decision-making process was fair, impartial and open in the context of the statutory scheme in PEPPA and had fulfilled its duty of fairness to the applicant.

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***Canadian Blood Services v Saskatchewan Union of Nurses, Local 98*, 2022 SKQB 19**

Layh, 2022-01-19 (QB22015)

Labour Law - Arbitration - Judicial Review

The applicant, Canadian Blood Services, sought judicial review of an arbitrator's award respecting a grievance under a collective agreement between it and the respondent, the Saskatchewan Union of Nurses. It sought an order quashing the award and remitting the grievance to the arbitrator for reconsideration. The grievance arose because the applicant denied the request of an employee, a member of the respondent union, for "family leave" under the collective agreement so she could attend her son's wedding on a scheduled workday. The applicant permitted her to take a day of vacation leave instead. The respondent filed a grievance on her behalf. The matter went to arbitration and the sole issue before the arbitrator was the interpretation of article 39.09 of the collective agreement, "Family/Pressing Necessity Leave," that stated it was intended to provide the necessary time to attend to the needs of individuals for whom the employee had a duty of care. The grievor was the only witness at the arbitration and she testified that she enjoyed a close relationship with her son and felt obliged to be at his wedding as his parent and because she was participating in the ceremony. Her son did not suffer from any physical or mental disabilities. It was not argued that there was a religious need for her to attend the wedding. The applicant acknowledged that both the grievor and her son had a strong preference that she attend the wedding but her preference was not her need. The arbitrator found the issue was whether the employee's attendance at the wedding met the requirement of being "to attend to the needs" of her son and whether the clause should be interpreted to equate the word

"needs" with 'necessity' or merely 'useful'. He distinguished the award in *Pioneer Village* (2001 CarswellSask 932) and found that "needs" here required some measure of necessity and something serious and significant, more than just personal preference. In this case, the only evidence was provided by the grievor respecting her son's needs and it was not extensive. He accepted the respondent's point that there is a meaningful level of support provided by a parent being present at her adult child's wedding and granted that although there was no evidence adduced to prove the point, he found it to be a matter of common sense and general knowledge. The son's need was an emotional/psychological one for the grievor to provide support by being present and to participate in the ceremony. In the article, "needs" are not restricted to physical needs and he could see no reason that the term would not also include emotional/psychological needs in appropriate circumstances. The arbitrator agreed with the respondent's position that that the employee should have been allowed to take the day as family leave. The applicant argued that the award was unreasonable because: 1) the arbitrator's reasons were not internally consistent. The arbitrator first determined the principles by which he would interpret the word "needs" in the clause as: only the needs of the son should be considered; "needs" means something more than personal preference; and the word refers to something necessary rather than something useful, but then abandoned those principles in his application of them to the evidence and instead focused on the grievor's desire to attend; and 2) it was not tenable given the evidence before the arbitrator. The respondent had not provided the requisite evidence. The parties agreed that the appropriate standard of review was reasonableness as set out in *Vavilov*.

HELD: The application was granted. The award was quashed. The court held that it was not an appropriate case to remit back to the arbitrator and substituted its own decision that the day that was granted to the employee to attend her son's wedding did not qualify as family leave pursuant to the article in the collective agreement. It found that the award was unreasonable because: 1) the arbitrator first stated a test and then applied facts largely irrelevant to it. He adopted a second test that focused on the wrong person, the grievor, and changed the test of serious and significant need to one of personal preference; and 2) the arbitrator relied on generalizations that he adopted as "common sense" and thereby relieved the respondent of its duty to prove the breach of the article by providing either more or different evidence to substantiate what the son's needs may have been to have the grievor attend his wedding rather than relying upon generalizations.

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***R v Kerr*, 2022 SKPC 2**

Jackson, 2022-01-11 (PC22002)

Criminal Law - Motor Vehicle Offences - Driving with a Blood Alcohol Level Exceeding .08
Criminal Law - Evidence - Identity of Accused

The accused was charged with: driving while his ability to operate a vehicle was impaired by alcohol and causing bodily harm to the victim, contrary to ss. 253(1)(a) and 255(2) of the *Criminal Code*; driving with a blood alcohol level exceeding the legal limit; and causing an accident resulting in bodily harm to the victim, contrary to ss. 253(1)(b) and 255(2.1) of the Code. The accused alleged in his defence that he had been the passenger and the other individual, E.M., had been driving when the accident occurred. The

accused and E.M. had each consumed two drinks before they got into the vehicle. They had been at E.M.'s farm and his roommate testified that when they left, he saw the accused get into the driver's seat and E.M. sit in the passenger's. While proceeding down a gravel road, the vehicle began to fishtail and then entered a ditch where it rolled over. When a passing motorist saw the accident, she stopped and found E.M. lying in the ditch, severely injured but still conscious, while the accused was walking around, talking on his phone and apparently uninjured. An RCMP officer arrived at the scene and testified that he made the same observation of where the occupants of the vehicle were and their respective conditions. E.M. advised that he had been the passenger. The accused denied that he had been driving and said he was in the front passenger seat with his seat belt engaged. The officer inspected the vehicle and noted that only the passenger side window had been smashed, the passenger side seat belt was fully retracted and the driver's side seat belt was pulled out and locked in that position. He concluded that E.M. was the passenger given the extent of his injuries and that he appeared to have been ejected as an unrestrained occupant from that seat, whereas the accused was uninjured, corresponding to his having been restrained by the seat belt. The accused was detained and subsequently registered a fail on the ASD. He was arrested and taken to the hospital. Blood samples taken there showed a blood alcohol content (BAC) of 117 milligrams percent. From expert read-back analysis, it was estimated that his BAC at the time of the accident was between 152 and 187 milligrams percent. Another police officer was qualified as an expert in motor vehicle collision reconstruction. He testified the cause of the accident was human error, consisting of driving at an elevated speed, allowing the car to drift side to side, rotate across the road, enter the ditch, trip and roll. The passenger would have been ejected through the window after it smashed. The passenger seat belt was reeled up and fully retracted and had not been in use at the time of the accident, and injuries sustained by an unrestrained passenger would be expected to be severe. The driver's seat belt was extended and locked, and the D-ring above the driver's seat showed burns and striations caused by force exerted upon it. Severe injuries would not be expected of one in the driver position as a result, but some bruising to the left shoulder down to the right hip might have occurred. E.M. testified that he was the passenger and that he had not been wearing his seat belt. The accused was driving at approximately 80 km/h when he hit a grade change in the gravel and lost control of the vehicle. He remembered his head hitting the windshield and the side window and then flying through the air. He suffered fractures to his wrist and both femurs. His head was bleeding and full of glass fragments. The defence called the accused and his wife to testify. The accused said that the victim was driving and could not remember if he was wearing his seat belt. He could recall only entering the ditch and was knocked out but regained consciousness after the vehicle stopped. He unbuckled his seat belt and hoisted himself through the broken window. He was not injured by the glass from it. Although the hospital staff had X-rayed his left shoulder after he presented with tenderness, they found no serious injuries. However, his wife testified that he developed red marks that were much more visible the day following the accident.

HELD: The accused was found guilty of both charges. At the time of sentencing, the Crown could advise on which count it would seek conviction and the other one would be judicially stayed pending the expiration of the appeal period. The court found that it did not believe the accused, nor was it left in any doubt by his evidence, and preferred and accepted E.M.'s evidence. It accepted the evidence of the roommate as an independent, impartial and reliable witness that he had seen the accused enter the driver's side of the vehicle at the relevant time. The expert evidence regarding the rollover and the character of injuries that would be suffered supported E.M.'s testimony.

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***R v Oliphant*, 2022 SKPC 5**

Jackson, P.C.J., 2022-01-25 (PC22004)

Criminal Law - Motor Vehicle Offences - Impaired Driving
Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08
Criminal Law - Motor Vehicle Offences - Evidence - Presumption of Accuracy
Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 10(b)

The accused was charged with one count of impaired driving contrary to s. 320.14(1)(a) of the *Criminal Code* and one count of having had blood alcohol equal to or in excess of .08 percent within two hours of ceasing to drive, contrary to s. 320.14(1)(b) of the Code. The defence brought a *Charter* application, alleging that various breaches had been committed and the trial proceeded by way of blended voir dire. The Crown called the investigating RCMP officer as its sole witness on the voir dire and trial proper and the defence called no evidence. The officer observed the accused driving out of town at an excessive speed at 12:45 am and effected a traffic stop. The vehicle pulled over on the highway in an appropriate manner. Although the officer found the driver, the accused, to be polite, cooperative, and had no difficulty in responding to questions and producing documentation, he formed a suspicion that the accused had alcohol in his body. His grounds were that the accused admitted that he had just left the bar where he had consumed two beers, the last one being five minutes before leaving. He could smell alcohol on the accused's breath and that he had glossy eyes. The officer testified that he asked the accused to accompany him to the police vehicle to conduct an ASD because of officer safety concerns rather than administering the test at the side of the road. He explained that he was alone with the accused in a remote area and further, it was dark and cold. Just before the accused entered the back seat of the cruiser, the officer ran the back of his hand along the accused's rear waistband. He explained that he did so to check for weapons to avoid the consequences of the detainee having a weapon in the police vehicle. Because the accused had just drunk a beer, the officer read the formal ASD demand and waited ten minutes before administering the test. The accused failed and the officer arrested him, made the formal breath demand and gave him the police warning. The officer read him his right to counsel but left out the word "now" as printed on his card. He said that he omitted the word because he had no means to effect the right on scene. The accused responded negatively to the question regarding consulting a lawyer. At the station, the accused asked to use a washroom. Although all cell activity was usually continuously monitored, the officer discovered months later that there had been a computer malfunction and there was no video footage of the accused's time using the toilet. Two 15-minute observation periods were conducted prior to testing which yielded readings of 90 mg. percent and 80 mg. percent respectively. The officer acknowledged that his conduct during the second observation period had not been consistent with his duties because he was texting and reading on nine occasions. The officer prepared the requisite documentation and served it on the accused and then drove the accused to his home. He had prepared and forwarded the disclosure package to the Crown before trial for dissemination to defence counsel. The defence raised as an issue whether the Crown could rely upon the "Certificate of a Qualified Technician - Approved Instrument Print Out" in this case because the Subject Test document had not been attached to the Certificate. Although signed by the Qualified Technician, he

had failed to certify it and therefore it did not meet the requirements of s. 320.33 of the Code. In its *Charter* application, the defence argued that: 1) the accused's ss. 8 and 9 rights had been breached by the officer's administration of the ASD in the police vehicle. It should have been conducted at the roadside to be constitutionally compliant with s. 8 of the *Charter* as found in *Aucoin* (2012 SCC 66). The pat-down search conducted prior to the accused entering the vehicle was also a violation of the accused's s. 9 *Charter* rights; 2) the accused's s. 10(b) rights had been breached when the officer unnecessarily placed him the police vehicle to conduct the ASD tests, thereby exceeding the permissible delay to comply with his right to counsel as set out in *Thomsen* ([1988] 1 SCR 640), and by the officer's failure to include the word "now" in the question "do you wish to call a lawyer?" as the accused would not be certain of the immediacy of his right; 3) the accused's ss. 7, 8 and 9 rights were violated because the disclosure of the video monitoring had not been made. The defence sought to make an additional *Charter* argument at the close of the trial, to seek a stay of proceedings based on the missing disclosure, and the Crown objected; and 4) the accused's s. 8 rights had been infringed by the officer's failure to perform proper observation during the period prior to the second breath sample being taken.
HELD: The accused was found not guilty of either charge. The court found respecting the impaired driving count that the Crown had not proven beyond a reasonable doubt that the accused's ability to operate a conveyance was impaired by alcohol. The physical signs of the accused's sobriety were more indicative of alcohol consumption than impairment. Neither the driving nor the demeanour described by the officer indicated impairment. It determined that the Crown could not rely upon the presumption of accuracy, and accordingly, the accused was found not guilty on the second count. The Crown had not proven the necessary elements of s. 320.14(1)(b) in the second count because the purported approved instrument printout was not certified as required by s. 320.33, and the s. 320.34(1) disclosure requirements relating to the results of the system blank tests and calibration tests required by s. 320.31(1)(a) of the Code had not been met. Regarding each of the alleged breaches of the *Charter*, it found that: 1) the accused's ss. 8 and 9 rights had not been violated in the circumstances. *Aucoin* had been distinguished in Provincial Court decisions in this province. In an ASD situation, there was an ongoing investigative detention until the test was completed. It accepted the officer's explanation for conducting the ASD in the police vehicle primarily on the basis of officer safety concerns. His search of the accused was also justified on that basis and was reasonable and necessary. The search itself was at the de minimis threshold and would not have warranted any *Charter* relief even if it had determined it had constituted a breach; 2) the accused's s. 10(b) rights had not been violated. It had already dealt with the question of the propriety of placing the accused in the police vehicle. The officer acted diligently to administer the ASD test in the police vehicle. The decision in *Knoblauch* (2018 SKCA 15) was a complete answer to the defence's argument regarding the omission of the word "now". As the accused had not testified, there was no evidence respecting his understanding of the immediacy of his rights; 3) there had been no *Charter* breaches. The Crown could not disclose the video, as it did not have it, and the evidence had not been destroyed or lost intentionally or through negligence. The defence had an obligation to have pursued disclosure deficiencies and it had not made any inquiries. It would be procedurally unfair to entertain the stay application without the Crown having been given the opportunity to prepare its case; and 4) a *Charter* remedy is not available in this case based upon a deficient observation period, in accordance with the decision in *McManus* (2019 ABQB 829) as endorsed by the Saskatchewan Court of Queen's Bench in *Shaw* (2021 SKQB 210).

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