Case Mail

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This matter commenced with a finding in March of 2016 by the sentencing judge that the offender was a long-term offender and not a dangerous offender: R v Jesse Bird, 2016 SKPC 37 (first designation decision). The Crown appealed the first designation decision on the basis that the sentencing judge made an error in law in placing too high a burden on the Crown to prove the offender was a dangerous offender by requiring it to show that the necessary pattern of behaviour demonstrated by the offender's criminal offending inclusive of the predicate offence was similar in nature or in kind or arose from the same type or circumstances of offending. The sentencing judge did not have the benefit of the decisions in R v McCallum, 2016 SKCA 96 (McCallum), and R v Wilton, 2016 SKCA 13 (Wilton), which found otherwise, as these had not yet been issued at the time. The Court of Appeal allowed the Crown appeal and ordered the sentencing judge to hold a new hearing to

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reconsider the nature of the pattern of behavior of the offender as required in light of McCallum and Wilton. A new hearing was held, and upon reconsideration, the sentencing judge found on July 5, 2017 that the offending did demonstrate patterns of behaviour sufficient to establish the required degree of dangerousness for such a designation (second designation decision). The offender then appealed the second designation decision on a ground of appeal arising from the decision in R v Boutilier, 2017 SCC 64, [2017] 2 SCR 936 (Boutilier). Boutilier was decided after the second designation decision was rendered, and overturned R v Szostak, 2014 ONCA 15, 118 OR (3d) 401 (Szostak), upon which the sentencing judge had relied in his required analysis of the treatability and manageability of the offender. He did so, however, in the context of what penalty to impose on the offender, and failed to consider these criteria in his analysis of whether the offender's criminal behaviour rose to the level of a dangerous offender due to his intractability and inability to surmount his criminality, as now required by Boutilier.
HELD: The appeal was allowed, and a long-term offender designation was made. Since the sentencing judge had failed altogether to consider the evidence of treatability and manageability of the offender in the context of the dangerousness analysis - the designation stage - as required by Boutilier, and followed in appeal cases including R v Parfitt, 2019 SKCA 55, he had erred in law. The appeal court pointed out that the sentencing judge had decided in the penalty stage of sentencing that the offender was treatable and manageable in the community, and as such it could not be said that if the same reasoning had been applied at the designation stage, that reasoning would not have had a material effect on the designation.

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Caldwell Barrington-Foote Tholl, March 10, 2021 (CA21036)

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Wondrasek v Fenchurch General Insurance Company

The appellants (investment firms Mosten, Atwater and Ituna) and the respondents (three insurance companies) each appealed and cross-appealed the decisions of a Court of Queen's Bench judge in three separate chambers applications in which he interpreted both a universal life insurance policy (ULP) and The Saskatchewan Insurance (Licence Condition) Amendment Regulations, 2018 (2018 Regs). In each case, an appellant brought an originating application pursuant to s. 11 of The Queen's Bench Act, 1998 and Queen's Bench rule 3-49(1)(d) seeking a determination of the rights of the insured under a ULP issued or assumed by one of the respondents. The judge heard the applications consecutively. After these hearings, the 2018 Regs were passed for the purposes of s. 34 of The Saskatchewan Insurance Act (1978 Act) and became effective October 26, 2018. As judgment had been reserved, the judge sought the parties' submissions regarding the effect of the passage of the 2018 Regs on the ULPs as, ostensibly, they prohibited licensed insurers from using an insurance contract as an investment vehicle for insureds independent of its life insurance purpose. The judge then rendered three separate but similar decisions. In each, the judge dismissed the insured's application for declaratory relief because the declarations sought were not supported on his interpretation of the insurer's ULP, as a standard form life insurance contract, did not "provide for unlimited stand-alone investment opportunities" within a side account. The judge also interpreted the 2018 Regs as having "only prospective effect", from which it may be inferred that he found the 2018 Regs did not interfere with the insured's rights under a contract for life insurance entered into prior to their enactment (see: 2019 SKQB 76; 2019 SKQB 77; and 2019 SKQB 75). Each appellant appealed primarily on the ground that: 1) the judge erred in his interpretation of their ULP; and each respondent cross-appealed primarily on the ground that that: 2) the judge erred in finding the 2018 Regs did not affect the ULPs as they had been entered into prior to the 2018 Regs' enactment. After the appeal was heard, the Legislature repealed the 1978 Act and replaced it with The Insurance Act (2015 Act), effective January 1, 2020. The 2018 Regs remained in force under s. 2-5.1 (2020 Reg) of The Insurance Regulations (Regulations) for the purposes of s. 2-28(1)(e) of the 2015 Act, prohibiting licensed insurers from engaging in certain activities. The Legislation Act (LA) came into force after the judgment issued, and s. 2-2 of the LA required the court to interpret both versions of the legislation and the respective regulations. Consequently, the court regarded the live issues in the cross-appeals to be whether the law prohibited and still prohibits the respondents from receiving or accepting deposit funds from the appellants in excess of the restrictions imposed under the Regulations. Thus, while the current law is the 2015 Act and 2020 Reg, the judge's reasoning when interpreting the 2018 Regs was not moot and the parties' allegations of error in that regard in the cross-appeals remained relevant.
HELD: The Mosten and Atwater appeals were allowed and the judge's interpretation of the ULP in their cases was set aside. The Ituna appeal was dismissed. The respondents' cross appeals were allowed in part and the judge's interpretation of the 2018 Regs was set aside. They and the 2020 Reg were interpreted and construed as prospective legislation and were universally applicable to all licensed insurers in Saskatchewan from the date of enactment. The court established that the ULPs were standard form contracts with precedential value and

the standard of review of correctness applied. As with all contracts, the ULPs must be interpreted in accordance with the approach described in Sattva. The court found with respect to: 1) the appellants' ground of appeal, that the judge erred in characterizing the ULPs as life insurance contracts (LIC) and wrongly interpreting them as such and also by his characterization of the word "premium," finding it had an established meaning and was universally understood in the context of the insurance industry as a legal term of art. The judge's analysis of the law based upon these errors was therefore irrelevant to the issues of standard form contract interpretation. Thus the court would interpret the ULPs afresh utilizing the Sattva approach. After reviewing each of the ULPs individually, and ascertaining the meaning of the word "premium" as used therein as an amount paid by the insured to the insurer, it declared that the Mosten and Atwater ULPs did not limit the: amount an insured may pay to the insurer as premiums, nor when or how often the former pays them, nor the premiums an insured may contribute to the side account, and did not authorize the insurer to refund or reject premiums paid by an insured. However, the court found that the text of the Ituna ULP differed from the other two. The word "premium" used throughout it had the ordinary meaning given to it by its dictionary meaning: an amount paid for or to maintain a contract of insurance. Therefore, the Ituna ULP did not permit an interpretation that would allow for a stand-alone investment purpose under the side account. Although based upon a different interpretation of the ULP and the word "premium," the court agreed with the judge's decision to deny it declaratory relief and dismissed the appeal. The court found with respect to 2) the respondents' ground of appeal, that the judge erred in interpreting the temporal effect of the 2018 Regs by failing to follow the approach adopted in Rizzo ([1998] 1 SCR 27), although he correctly found that they were prospective. Because of this error in approach, the court interpreted the 2018 Regs afresh and in particular, whether s. 3.1(2), containing prohibitions on the amount an insurer may receive under an LIC, applied to ongoing contracts entered into prior to its enactment. It determined that: i) the 2018 Regs could not be interpreted: as declaratory in the absence of any indication in it or the context to support such a construction; or as retroactive or retrospective as there was no clear expression of same as required by s. 2-10(1) of the LA; ii) after reviewing the words in the 2018 Regs and the 1978 Act in their grammatical and ordinary sense regarding the temporal effect, s. 3.1(2)(a) and (b) prohibit licensed insurers from taking funds in excess of those required to pay the premium for LICs during the eligible period; and iii) under s. 2-11 of the LA, "an enactment is be construed as applying to circumstances as they arise." In this context, then, determining whether the 2018 Regs covered LICs in existence before their enactment necessitated construing the 1978 Act's scheme and object and thus those of the 2018 Regs pursuant to s. 10-2 of the LA. After reviewing the legislative history and intent and relevant case law since the inception of insurance legislation in 1913, the court found these enactments were intended to provide consumer protection in the insurance industry by imposing restrictions and controls over insurers to achieve that end. As the 2018 Regs were remedial, they would be interpreted as having prospective application to licensed insurers universally in respect of LICs (excepting variable contracts) in order to be harmonious with the scheme and object of the 1978 Act, the 2018 Regs, and

legislative intent. As section s. 3.1 of the 2018 Regs and s. 2.-1.1(2) of the Regulations were found to be much the same, the court concluded after interpreting them that the Regulations, like the 2018 Regs, were prospective with universal application to all licensed insurers and LICs.

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R v Nelson, 2021 SKCA 37

Ottenbreit Leurer Kalmakoff, March 11, 2021 (CA21037)

Criminal Law - Parties to Offence
Criminal Law - Appeal - Totality of Evidence
Criminal Law - Appeal - Scope of New Trial

This appeal by the Crown from the acquittal of the respondent of an offence contrary to s 65(2) of the Criminal Code of participating in a riot while masked (R v Nelson (Sask QB), CRM 140/19, JCPA, 10 Jan 2020) was brought on the grounds that the trial judge had erred in law by not considering the applicability of ss 21(1)(b) or (c) to the evidence; and erred in law by applying the criminal standard in a piecemeal fashion and not to the totality of the evidence. The Crown requested the appeal be allowed and a new trial ordered. The evidence established that at the outset of a full-blown riot at the Prince Albert Penitentiary which resulted in the death of an inmate and $3,000,000.00 in property damage, the respondent had painted security camera lenses in the cell block with the intention of preventing prison officials from recording the riot. There was evidence accepted at trial that the respondent was masked during these activities, and evidence about the dilemma faced by inmates who wished not to participate in a riot but who were locked in the cell block with no access to a locked cell, and who were forced to feign participation in the riot to avoid retribution from the rioters. The trial judge convicted the respondent of mischief and obstruction of justice for painting the security cameras but acquitted him of participating in a riot while masked, ruling that he could not find beyond a reasonable doubt that he was involved in the actual riotous behaviour.
HELD: The Crown appeal was allowed, and a new trial ordered. As to the law of parties legislated in s. 21(1)(b) and (c) of the Code, the appeal court found that the trial judge erred in law by not reviewing the evidence to determine whether the respondent was a party to the offence of participating in a riot by aiding and abetting those who participated in the riot by painting the lenses of the security cameras. The trial judge referred to R v Banks, 2012 NBQB 132 (Banks), where the trial judge did review the evidence as to whether the accused might have aided and abetted the principal offender, and expressly rejected that possibility. The respondent

argued that, as the trial judge had reviewed Banks in his analysis of whether the respondent was a party to the riot, he did not err in law because by implication he had considered and rejected the idea that the respondent was a party. The court rejected this submission because the trial judge did not expressly turn his mind to whether the respondent's act in painting the security cameras could constitute aiding and abetting the rioters. The court found that the trial judge relied on Banks for another purpose: to find that the respondent could not be a party to the actual riotous behaviour because he might simply have been in proximity to the rioters as a result of being locked in the cell block and not in fact one of the rioters. He failed to consider whether painting the camera lenses could, in and of itself, amount to aiding and abetting the riot, and so erred in law. Though the court accepted this, it dismissed the Crown argument that the trial judge committed an error in law by applying the criminal standard of reasonable doubt to each piece of evidence and not to the evidence in its totality. The law recognizes that to do so may diminish the persuasive effect of the evidence as a whole and may also cause pieces of evidence to be removed from consideration and so erroneously whittle down the Crown's case. In examining whether the trial judge did commit this error, the court relied on R v CÃ´tÃ©, [1942] 1 DLR 336 (SCC) and R v Morin, 2017 SKCA 38 (Morin), and concluded that it must take the trial judge at face value when he expressly stated he had self-instructed on the criminal standard of proof and applied that standard to the essential elements of the offence on the totality of the evidence, and not on each piece of the evidence. In his self-instruction, the trial judge also applied R v Alves, 2014 SKCA 82. The court further pointed out that a trial judge did not need to refer to every piece of evidence to safeguard himself from a charge that he failed to consider the evidence in its totality, and that in accordance with the reasoning in R v Bramley, 2009 SKCA 49, no error of law can be committed when the trial judge does not specifically refer to relevant evidence or live issues unless the trial record as a whole shows that in not doing so he failed to appreciate the value of that issue or evidence to his verdict. Lastly, the court found after a review of R v Cowan, 2020 SKCA 77, which fully explained the conduct and fault requirements for proof of aiding and abetting, that the failure of the trial judge to properly address the evidence of painting the camera lenses and the relevance of attempting to obstruct, pervert or defeat the course of justice contrary to s. 139(2) of the Code were sufficiently material errors for a new trial to be ordered, the scope of which "shall be limited to whether [the respondent] is guilty of the charged offence as an aider or abettor."

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Total Oilfield Rentals Limited Partnership v Saskatchewan (Finance), 2021 SKCA 40

Richards Ottenbreit Ryan-Froslie, March 17, 2021 (CA21040)

Appeal - Taxation - Provincial Sales Tax
Appeal - Taxation - Provincial Sales Tax - Interpretation of Rent

A partnership, Total Oilfield Rentals Limited Partnership (Total), which leased equipment to the oil industry and provided hauling services for such equipment, was assessed sales tax (PST) for money it received in respect of the hauling of leased equipment in the amount of $ 277,240.96. The leases were not conditional on the lessee agreeing to have the equipment hauled by Total and the hauling contracts were negotiated separately from the leases. The Minister responsible for the administration of The Provincial Sales Tax Act, RSS 1978, c P-34.1 (Act) was of the view that the hauling fees were taxable as being incurred in respect of the equipment leases. Total did not agree that it should be liable to pay tax on the hauling contracts and appealed the assessment to The Board of Revenue Commissioners (BRC), which upheld the assessment on the basis that s 5(7) of the Act makes the hauling fees taxable because "rent" is defined in the Act as including consideration paid for services related to the lease of tangible personal property, such as transportation services related to the equipment leased by Total. Total appealed this decision to the Court of Queen's Bench (See: 2017 SKQB 317) and it was upheld by the chambers judge, who ruled that the decision was reasonable for BRC to make on the facts as presented and the relevant legislation. Total did not agree and appealed to the Court of Appeal.
HELD: The appeal court dismissed Total's appeal of the chambers judge's decision. The parties agreed that the standard of review to be applied was that pronounced in Vavilov v Canada (Minister of Citizenship and Immigration), 2019 SCC 65, (Vavilov), an appellate standard, because the appeal of BRC's decision to the Queen's Bench was a statutory appeal. Therefore, as stated by the appeal court, "in considering the Board's decision, questions of law are to be reviewed for correctness. Questions of fact and mixed fact and law are to be reviewed on the palpable and overriding error standard unless, with respect to matters of mixed fact and law, there is an extricable error of law." As the appeal was in large measure to be determined by the interpretation of the provisions of a taxation statute, the appeal court considered the rules of construction for such legislation and recognized that the overarching rule codified by s 2-10(2) of the Legislation Act, commonly known as the interpretive approach, required modification in its application to taxation statutes. To provide taxpayers with certainty in organizing their affairs for purposes of tax planning, the interpretive lens is to be focused on the letter of the statute, known as the textual approach, but may be widened, in the event of ambiguity, to include a contextual or purposive approach. It is the lawful right of the taxpayer to have confidence in the letter of the statute. (See: Canada Trustco Mortgage Co. v Canada, 2005 SCC 54) With all of this in mind, the panel found Total's argument limiting the meaning of rent to consideration paid only within the confines of the lease of the property itself so as to exclude monies paid to transport the leased property, "artful", but unsustainable in the face of the plain meaning of the definition of "rent" in s 3(1)(g) of the Act, which broadly encompasses consideration paid for any services in respect of the property which is the subject of the lease, and which, perforce, must include money paid for hauling said equipment.

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Barth v Saskatchewan (Social Services), 2021 SKCA 41

Caldwell Barrington-Foote Tholl, March 19, 2021 (CA21041)

Civil Procedure - Frivolous and Vexatious Proceedings

The applicants, the Minister of Social Services (Minister) and L.F.B., brought an application under Rule 46.2(1) of the Court of Appeal Rules for an order preventing the respondent, T.A.B., from filing any further appeals or applications without leave of the court and to strike the appeals he had already commenced pursuant to Rule 46.1(1). The applicants submitted that the respondent "habitually, persistently, and without reasonable cause commenced frivolous and vexatious proceedings." The respondent brought numerous appeals and applications concerning various orders made in the Court of Queen's Bench related to custody proceedings in respect of the son of T.A.B. and L.F.B., and procedural matters related to those proceedings. He had filed eleven appeals and applications between December 11, 2019 and February 26, 2021, most of which had complex procedural histories both in the court below and in the Court of Appeal, including: the dismissal of an application to extend the time to tax a former lawyer's accounts; the dismissal of an application for orders to remove lawyers for L.F.B. and the Ministry, to prevent the filing of a custody and access report, and to have L.F.B. cited for contempt; the granting of an order in favour of L.F.B. and the Ministry adjourning a child protection hearing brought as a result of a complaint by T.A.B. against L.F.B.; the granting of sole interim custody of the child to L.F.B. with supervised access to T.A.B. and ordering costs of $2000.00 dollars against T.A.B.; the dismissal of an application to order school records from the Ministry of Education; the granting of interim child and spousal support orders in favour of L.F.B.; the dismissal of an application to extend the time to apply for Skype access; the dismissal of an application to adjourn a pre-trial conference; the dismissal of an application to remove L.F.B.'s counsel; the granting of a judgment for divorce and an award of costs; and an appeal against a certificate ordering him to pay his lawyer's legal fees. Some of T.A.B.'s appeals had previously been quashed for being manifestly without merit. Of those not quashed outright, some T.A.B. had failed to perfect for various reasons. T.A.B. had paid none of the costs awarded against him.
HELD: The application was allowed, and an order made barring the respondent from filing any further appeals or applications without leave of the court. The court declined to strike the appeals T.A.B. had already commenced, but ordered that they be consolidated. The court recognized that access to justice by litigants was a restraint to the application of Rule 46.2(1), so that access to the court was to be restricted only in "the clearest and most compelling circumstances." However, the court also appreciated that permitting frivolous

and vexatious proceedings clogged access to justice for those with meritorious claims. After reviewing a number of case authorities concerning the need to maintain access to justice and to prevent the abuse of the court caused by frivolous and vexatious proceedings brought "habitually, persistently and without merit", the appeal court was guided in its determination by Lang Michener Lash Johnston v Fabian (1987), 37 DLR (4th) 685 (Ont SC (H Ct J)), which supplied a checklist of relevant factors the court applied to the present case, leading it to find that most of these factors were relevant, especially: that many of the appeals were manifestly without merit; the grounds of appeal were rolled forward in subsequent appeals; unfounded accusations of malfeasance were made against lawyers; the appeals were brought for improper purposes including harassment and oppression of a respondent, in this case L.F.B.; and the respondent had failed to pay awards of costs, which factor was expanded to include the cost of time and energy caused by T.A.B.'s persistent failure to follow the guidance of the registry staff and court staff to assist him in complying with the rules of court.

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Wondrasek v Fenchurch General Insurance Company, 2021 SKQB 30

Crooks, February 2, 2021 (QB21027)

Civil Procedure - Queen's Bench Rules, Rule 7-5
Insurance - Contract - Interpretation

The defendant, an insurance company, applied for summary judgment to dismiss the plaintiff's claim for long-term disability benefits pursuant to an insurance policy with it. The plaintiff agreed to a summary disposition. The parties submitted an agreed statement of facts, the medical evidence and affidavits in support of their positions. The plaintiff was employed as a miner's assistant and was a member of employee group insurance plan. The policy provided short-term disability benefits (STDBs) and long-term disability benefits (LTDBs) that covered the employee for two years if unable to perform the duties of their "own occupation" (OOBs) and then to age 65 if the employee qualified for "any occupation benefits" (AOBs). The plaintiff initially qualified for STDBs and they were converted by the defendant to LTDBs as OOBs in April 2012 because she was diagnosed with a heart condition that required surgery and the implanting of a pacemaker in May 2013. At the end of the OOBs period, the defendant advised the plaintiff that she did not qualify for any AOBs and that her LTDBs had ended as of May 2014. Although the plaintiff's two appeals of the decision were denied, the defendant arranged a functional capacity evaluation of her in July 2014 that found that she could not return to her own occupation because of her heart condition, but she could work as long as she was sedentary. It took

the position that the medical evidence supported their determination that the plaintiff had the ability to return to non-physical sedentary employment as at April 2014 when her OOBs converted to AOBs and that the plaintiff had failed to provide updated medical evidence to establish her continued disability. The plaintiff agreed with the conversion date was the time at which the determination should be made whether she qualified for AOBs. She submitted that medical information from her cardiologist, her family doctor and an occupational health physician assessment conducted by a neurologist in 2018 indicated that she was not medically able to perform any occupation. Although the plaintiff's heart condition was the original basis of her OOBs, her claim evolved to include issues related to carpal tunnel syndrome in her hands. The plaintiff submitted medical information regarding this condition as the basis for AOBs to the defendant in June 2014 and during her two appeals of the defendant's decision.
HELD: The application for summary judgment was granted and the plaintiff's claim was dismissed. The court reviewed and applied the burden of proof analysis set out in Lameman. It found that the defendant had met the burden of establishing that there was no genuine issue requiring trial. The medical information and independent evaluations relied upon by it supported its determination that the plaintiff was able to return to non-physical employment. It did not find that the plaintiff had met the burden to refute the defendant's evidence. When the medical information was reviewed collectively and specific to the conversion date, there was significant evidence showing that the plaintiff was able to return to sedentary employment.

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R v Reid, 2021 SKQB 42

Popescul, February 9, 2021 (QB21042)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Refusal to Provide Breath Sample - Acquittal - Appeal

The Crown appealed the acquittal of the self-represented respondent after trial in Provincial Court of the following Criminal Code charges: impaired operation of a conveyance contrary to s. 230.14(1)(a); willfully obstructing a police officer by giving a false name and date of birth contrary to s. 129(a); and failure or refusal to comply with a breath demand contrary to s. 320.15. At trial, two RCMP officers testified that they found the respondent passed out in the driver's seat of a van in a farmyard at 7:30 pm. She was difficult to rouse, her speech was slurred, her breath smelled of alcohol, she appeared confused and disoriented and she had difficulty walking. She gave her name and date of birth. After arresting her for impaired driving, the officers

took the respondent to the detachment where they asked her identity and birth date again and she provided the same name and date. While the Breathalyzer machine was being readied, the respondent acknowledged her real name and said that she had used her sister's name and birth date. The officer administering the test and the other officer said that the respondent appeared to understand the procedure and that she was obliged to provide a breath sample. After she failed three times to provide a sample and tried to leave the room, the respondent was charged with refusal as well as the other offences. The respondent, representing herself, testified that while visiting the town, she walked to the local bar around 1 pm and consumed three beers. About two hours later, she accompanied three girls she had met in the bar to a house party on the local reserve. At the house, someone asked her if she wished to buy some "Molly" but she declined as she did not use drugs. After returning from the bathroom, the respondent finished her beer and noticed that her vision changed and she knew that it wasn't due to intoxication. When she tried to leave, the girls attacked her outside and she was hit with a beer bottle on the side of her head and everything became blurry. She said that thought that the police had been called and that everyone was leaving. She noticed a van nearby with its engine running, and she got in and drove off to escape from the girls. In answer to a question from the judge whether she thought she was able to drive, the respondent said that she didn't know; her vision was blurred but she saw things that weren't there. After first testifying that she didn't remember anything after being hit on the head, the respondent admitted that in cross-examination that she did remember driving from the party and acknowledged that the officers were telling the truth regarding what happened after she was wakened. The trial judge acquitted the respondent because she believed her testimony. While there was no direct evidence that the respondent's drink was spiked, the judge drew the inference that it was and that the blow may have affected her cognitive and motor skills. Her alcohol consumption did not account for her impairment but as a result of involuntarily ingesting some narcotic, her ability to drive was impaired. The respondent's involuntary intoxication negated the mens rea required for impaired driving. As well, the judge found that the respondent had met the requirements for the defence of necessity and she had no legal alternative but to drive and acquitted her. Regarding the other charges, the judge found that the offences required specific intent and because the respondent testified that she didn't know her own name because she was not in her right mind, she was found not guilty of obstruction. Based on the respondent's evidence, the judge acquitted her of refusal to provide a sample because she had a reasonable doubt that the respondent had understood the demand or the consequences of not complying because she was not in her right mind. The Crown's appeal of the acquittal was on the basis that the judge's decision was legally incorrect.

HELD: The appeal was allowed. The acquittal for each charge was set aside and the respondent found guilty. The matter was remitted to the trial court for sentencing. The court found that the trial judge erred in her decision with respect to: 1) the impaired driving charge. Although the standard of review required deference to the judge's decision on credibility, it was an unreasonable decision because it was one that a properly instructed jury could not have reasonably rendered. Other than stating that she believed the respondent, the

judge failed to provide sufficient reasons to permit an appellate court to review it. She ignored or disregarded critical features of the evidence, drew speculative inferences and made findings of fact contrary to the evidence. Further, the judge erred in law by concluding on the facts that the defence of necessity was not negated by the Crown. The record showed that the Crown had proven beyond a reasonable doubt that the three elements of necessity were absent and the defence failed; 2) the obstructing a police officer charge. Her decision was unreasonable and not supported by the evidence: and 3) the refusal of a lawful demand charge. The judge's decision was completely unsupported by the evidence. The respondent never stated that she did not understand the demand or the consequences of not blowing. In total, the evidence showed that the respondent did understand and purposely refused to comply. It was appropriate to enter guilty verdicts rather than order a new trial because absent the legal errors, guilty verdicts were inevitable based on the known facts. The finding of guilt respecting impaired driving and refusal did not engage the Kienapple rule because the offences were distinct. However, the court left it to the Crown to decide whether it would seek a conviction and sentence for both charges.

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Farm Credit Canada v Palmer, 2021 SKQB 50

Danyliuk, February 18, 2021 (QB21053)

Debtor-Creditor Law - Saskatchewan Farm Security Act

After complying with all notices, waiting periods and mediation required by The Saskatchewan Farm Security Act (SFSA), the mortgagee, Farm Credit Canada (FCC), applied pursuant to s 11 of the SFSA for an order that FCC was not barred from commencing foreclosure on mortgaged farmland of the mortgagor farmer, D.G.P., who chose not to participate in any of the prescribed proceedings, including mediation and the preparation of the report to the court mandated by s 12 of the SFSA. The court was required to give this report primary consideration. The loan agreement made the mortgage payable on demand and was a security enforceable against all of D.G.P.'s indebtedness to FCC. D.G.P. failed to make the contracted payments and was in default on all four of his credit facilities in the sum of $ 442,000.00 on June 4, 2019, when demand was made by FCC for payment of the full amount owing by D.G.P., who had not made a payment toward the mortgage since May 2019, and none since demand was made. D.G.P. attended the first chambers date under s 11 of the SFSA on December 8, 2020, which was adjourned to February 2, 2012 as D.G.P. represented to the chambers judge that he would cooperate with the Farmland Security Board (FLSB) in the preparation of the report. Prior to the first

chambers appearance, two separate iterations of the report had been filed with the court, and on January 29, 2021, a third was filed in advance of the February 2, 2012 chambers date, at which time the application was heard. Pursuant to s 13(a) of the SFSA, the chambers judge is to presume the farmer has a reasonable possibility of meeting his mortgage obligations (viability) and is making sincere and reasonable efforts to meet those obligations (sincerity). By s 18 of the SFSA, the burden of proof is placed on the mortgagee to disprove viability and sincerity and in his or her determination of whether the mortgagee has done so, the chambers judge shall give primary consideration to the report prepared by the FLSB as required by s 12 of the SFSA. HELD: The chambers judge allowed FCC's application and ordered that s 9(1)(d) of the SFSA did not apply, thus lifting the bar to commencement of mortgage foreclosure proceedings by FCC against the mortgaged farmlands of D.G.P. In allowing the application, the chambers judge heavily criticized the report and the FLSB for numerous reasons, including that: the report lacked details concerning essential information, even though D.G.P. represented that he would cooperate with FLSB in preparing the report; it did not include basic documentation when such would have been expected; it overvalued the mortgaged farmland; it failed to address the possible effect on viability of the family property settlement between D.G.P. and his spouse; it failed to treat the mortgage as it should have at law, as a demand mortgage; the report failed to provide analysis or information concerning D.G.P.'s viability now, and not in the future following a hypothetical restructuring of his debt; it failed to be objective in its determination of the farmer's sincerity; and generally, in preparing the report, FLSB exceeded its powers under the SFSA by usurping the function of the court (i.e., to determine viability and sincerity) by failing to be free of bias in favour of D.G.P. In support of his view that FLSB consistently failed to meet its mandate to assist the court in determining s 11 applications, the chambers judge relied on numerous case authorities and scholarly publications bearing on the full history of farm protection legislation, and on Lemare Lake Logging Ltd. v 3L Cattle Company Ltd., 2016 SKQB 230. As a result, though the chambers judge gave primary consideration to the report as required, he gave it little weight. He found on the whole of the evidence that FCC had met its burden of proving that D.G.P. had no reasonable prospect of meeting his debt obligations and had not sincerely attempted to do so. By not making any payment in 20 months, D.G.P. demonstrated he either could not or would not do so, which disproved both viability and sincerity on his part. FCC needed only disprove one or the other for its application to be allowed.

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T.A. v C.D., 2021 SKQB 52

Brown, February 18, 2021 (QB21047)

Family Law - Access and Custody

The trial judge was required to determine custody and access of a six-year-old child, D.A. The evidence accepted by the trial judge was that D.A. had resided with his maternal aunt, C.D., since birth. His biological mother, T.A., had voluntarily relinquished him to C.D. because she was unable to care for him due to substance abuse and personal instability. Through great strength of character, she was able to surmount her problems, recovering from her addictions and successfully completing university degrees, including one in social work. T.A. had beaten her drug and alcohol abuse and was ready to parent D.A. C.D. was not prepared to give up D.A. to T.A., and reluctantly meted out access, such that T.A. was required to obtain an interim court order for access in February, 2019. D.A. required a structured home life. He tended to be physical with other children and adults. Because of her parenting style, a large extended family, and other children in her home with whom D.A. could learn proper behaviour by example, he was more controlled when living with D.A. C.D. could not offer a home in which D.A.'s siblings or extended family would be involved in his life. C.D. had a much more relaxed approach to parenting which did not suit D.A.'s need to learn how to control himself. Unlike T.A., she had a lax attitude towards school attendance. T.A. was also prepared to encourage D.A.'s growth in all areas of his background: his Aboriginal and Roman Catholic roots and learning both Cree and French. C.D. exclusively encouraged his Aboriginal heritage, and was opposed to his learning French. D.A. had a strong bond with both C.D. and TA.

HELD: The trial judge made a final order that TA have sole custody, that hers be the primary residence of D.A. and that C.D. have specified access to him pursuant to The Children's Law Act, 1997 (Act), and in particular, ss 3, 6, 8, and 9, which he was cognizant obliged him to consider only the best interests of the child in his balancing of the various non-exhaustive factors he was to have in mind in coming to his decision. He was guided in his task by Gordon v Goertz, [1996] 2 SCR 27, and A.O. v T. E., 2016 SKCA 148 which were authority to the effect that the law of child custody had evolved from parental rights to custody of children to a focus on the bests interests of the child in custody disputes, and also affirmed that a biological connection by a parent to a child continues to be an important factor, to the point that where the scales of justice are evenly balanced, this factor may tip the scales in favour of the biological parent. In this case, the trial judge emphasized the following factors: the home environment proposed to be provided for D.A., the quality of D.A.'s relationships with the parties and other family members, D.A.'s personality, character and emotional needs, the status quo, and biological parentage, in coming to his conclusion that D.A.'s best interests were to be cared for by TA.

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R v Singh, 2021 SKQB 55

Keene, February 25, 2021 (QB21054)

Criminal Law - Summary Conviction Appeal
Criminal Law - Application to Adduce Fresh Evidence - Appeal

The appellant was charged on November 2, 2018 with failing to provide a breath sample by ASD while in the care and control of a motor vehicle, contrary to s 254(2)(b) of the Criminal Code. For 18 months prior to the trial and for a portion of the trial, the appellant was represented by counsel, but following an adjournment and for the remainder of the trial, including the defence case, he was unrepresented. The Crown called one police witness (Mills) who testified that he observed the appellant in the driver's seat of a vehicle with its engine running and that, as his breath smelled of alcohol, he believed on a reasonable suspicion that the appellant may be impaired by alcohol, and so made an ASD demand to provide a breath sample for screening purposes, which the appellant refused to provide. The Crown did not call a second officer (Parnell) who had also dealt with the accused at the roadside and had arrested him for impaired driving, but had failed to provide him with his rights to counsel. These interactions of the appellant with Mills and Parnell were fully recorded on video by the officers, but the video was not put in evidence by the Crown. Counsel for the appellant had received full disclosure, including the anticipated evidence of Parnell and Mills and a copy of the video, but had not brought a Charter application for a breach of the appellant's rights to counsel under s 10(b) of the Charter. At trial, the appellant testified in a confused and incoherent manner and was unclear as to his reasons for not providing a breath sample. The trial judge did not have the benefit of the evidence of Parnell or the video when he convicted the appellant. Counsel for the appellant on appeal applied to adduce the video in evidence.
HELD: The summary appeal court judge referenced R v Dirksen, 2021 SKCA 6, and allowed the application to adduce the video tape in evidence, allowed the appeal, and ordered a new trial. The appellant was unrepresented and did not know the importance of the video evidence to his defence. It was clearly relevant to a potential defence of reasonable excuse for not providing a breath sample and a potential Charter application pursuant to s 10(b); it was reliable and credible evidence; and it was expected the video would have affected the result of the trial had it been before the trial judge. In effect, the summary appeal court judge was persuaded that during the conduct of the trial there had been a miscarriage of justice in that the conviction was unreasonable and could not be supported by the evidence produced at trial.

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Twin Creek Dairy Ltd. v Young's Equipment Inc., 2021 SKQB 57

Mitchell, February 25, 2021 (QB21056)

Civil Procedure - Application to Exclude Parties from Questioning

The plaintiff, Twin Creek Dairy Ltd. (TCD), having brought an action for damages in a products liability case alleging a faulty sprayer system, sued the dealer, Young Equipment, and the distributor, CNH, as defendants. Young Equipment added the manufacturer (Capstan) as a third party. TCD applied for an order of exclusion of all other parties at the questioning of one party pursuant to Queen's Bench Rules 5-1(1), 5-18, and 5-29 on the basis that such an exclusion order was necessary to prevent a tailoring of evidence by the defendants and the third party that would restrict the conduct of a meaningful questioning.
HELD: The application was denied. The chambers judge underwent a review of the salient considerations in his determination of whether such an order should be made and, in particular, relied on Milgaard v Saskatchewan (1995), 136 Sask R 29 (Milgaard), following the four factors listed therein while keeping in mind that an order for exclusion is exceptional because parties to litigation have an inherent right to be present at the questioning of another party (See: Chatfield v Bell Mobility Inc., 2013 SKQB 372). The court also kept in mind that the applicant had the onus to show cause by way of evidence that the order should be made, though that onus was not a heavy one. The Milgaard factors are as follow: (1) whether the court record and the pleadings suggest the questioning by the parties will cover the same ground; (2) whether credibility will be in issue; (3) whether the parties are adverse in interest; and (4) whether there is no prejudice to the excluded party. After a review of the factors in light of the evidence and court record, the chambers judge held that the applicant had not met its onus to show cause that it was likely the defendants and third party would gain any tactical advantage from the answers of the plaintiff (applicant) and allow them to tailor their evidence or collude in their testimony at trial. Somewhat tangential to the thrust of the Milgaard factors but also part of the analysis in Milgaard was the consideration as to whether the presence of the parties at the questioning would unduly restrict the conduct of a meaningful examination. With all these factors in mind, and following a review of numerous cases for and against exclusion, the chambers judge reasoned that the parties were very much adverse in interest as shown by the cross-claims by Young Equipment and CNH against each other, and the adding of Capstan as a third party by Young Equipment; each party was pointing the finger at the other, and so would not collude; credibility would not be a central issue upon which success or failure at trial would be determined; all parties were corporate entities represented by separate counsel, which would attenuate the risk that motives of personal interest might colour the proceedings and allow for counsel to be present; costs would be increased as a result of the order and the proceeding would be protracted, thus prejudicing the defendants and third party; and the interests of justice favour denying the application.

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