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

Volume 23, No. 10 **May 15, 2021**

Subject Index

Administrative Law - Judicial Review - Procedural Fairness - Breach of Duty

Appeal - Application to Extend Time to Appeal
Appeal - Criminal Law - Dangerous Offender Designation

Appeal - Interlocutory Injunction
Appeal - Application to Lift Stay Pending Appeal

Appeal - Wills and Estates - Proof of Will in Solemn Form
Civil Procedure - Queen's Bench Rules, Rule 16-46

R v Maung, 2021 SKCA 45

Caldwell Leurer Tholl, March 25, 2021 (CA21045)

Criminal Law - Assault - Aggravated Assault - Convictions - Sentencing - Appeal

The self-represented appellant was convicted of aggravated assault under s. 268(1) of the Criminal Code and breach of an undertaking contrary to s. 145(3) of the Code. He had been sentenced for an earlier assault (first assault) and breach of undertaking that occurred in May 2019. After being sentenced for those offences, another judge convicted the appellant of an earlier breach of an undertaking relating to communicating with the victim of the first assault in April 2019. That judge sentenced him to 15 days of concurrent imprisonment for the April breach. In December 2020, the same judge convicted the appellant of assaulting the victim a second time and breach of an undertaking in October 2019. For those convictions, he was sentenced to four months consecutive to the sentence imposed for the first assault. The appellant abandoned his initial grounds of appeal but raised new arguments for appealing against his global sentence. He submitted that: 1) due to the

[Civil Procedure - Summary Judgment - Genuine Issue Requiring Trial](#)
[Real Property - Sale of House - Failure to Disclose Defect - Patent or Latent Defect](#)
[Torts - Fraudulent Misrepresentation](#)

[Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)](#)
[Criminal Code - Motor Vehicle Offences - Failure to Provide Breath Sample](#)
[Summary Conviction Appeal - Providing Identification During Traffic Stop](#)
[Summary Conviction Appeal - Amending Information](#)

[Criminal Law - Appeal - Dangerous Offender](#)
[Criminal Law - Sentencing - Indeterminate Sentence - Appeal](#)

[Criminal Law - Assault - Aggravated Assault - Convictions - Sentencing - Appeal](#)

[Criminal Law - Assault - Sexual Assault - Sentencing](#)
[Criminal Law - Sentencing - Indigenous Offender](#)

[Criminal Law - Motor Vehicle Offences - Driving While Impaired](#)
[Constitutional Law - Charter of Rights, Section 9](#)

[Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08](#)
[Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(a) - Appeal](#)

arithmetical miscalculation of remand time owing to him, the mistake caused a longer sentence; and 2) he had been sentenced twice for the first breach.
HELD: The appeal was dismissed. The court found that: 1) there was no error in the judge's calculation of the sentence and calculation of time given in credit for remand. The appellant erred because he factored earned remission into the equation and done so at the wrong stage of the calculation in order to determine his early release date; and 2) upon review of the warrants of committal, the appellant had not been sentenced twice for the May breach.

© The Law Society of Saskatchewan Libraries [Back to top](#)

Turtle v Valvoline Canadian Franchising Corp., [2021 SKCA 46](#)

Leurer, March 25, 2021 (CA21046)

Appeal - Interlocutory Injunction
Appeal - Application to Lift Stay Pending Appeal

The applicants, Kara Turtle (K.T.) and Dad's Oil Change Limited (KTDOC) and Sneer Enterprises Ltd. (SE), sought a stay of an interlocutory injunction granted in the Court of Queen's Bench on March 3, 2021 (Valvoline Canadian Franchising Corp. v Turtle (3 March 2021) Saskatoon, QBG 476 of 2020 (Sask QB) [chambers decision]) pursuant to Rule 15 of the Court of Appeal Rules. The injunction had forced the shuttering of the oil change business of KTDOC. The applicants appealed the chambers decision to the Court of Appeal. The appeal first came before the appeal court chambers judge on March 9, 2021 and was set to be heard on an expedited basis on April 16, 2021. The stay application was heard on March 12, 2021, also on an expedited basis, and was adjourned for decision with conditions. The decision was rendered on March 25, 2021. The gist of the matter as revealed by the evidence accepted by the Court of Appeal chambers judge involved alleged breaches of franchise agreements made between the franchisor, Valvoline, and the franchisee, SE, of two Great Canadian Oil Change (GCOC) business locations. Valvoline alleged in its action against the applicants that K.T., the sole director, shareholder, and officer of both KTDOC and SE, incorporated KTDOC and diverted SE's assets to it in order to circumvent the franchise agreement but continue to enjoy the advantages of the goodwill and promotional power of a national franchise, without incurring any of the obligations of a franchisee. In effect, Valvoline charged that K.T., as directing mind of the corporation, caused SE and KTDOC to breach the non-competition clauses of the franchise agreement At the chambers hearing, Valvoline argued the three-part test enunciated in RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1

Family Law - Child Support - Federal Child Support Guidelines

Family Law - Child Support
Family Law - Spousal Support

Family Law - Child Support - Interim - Variation
Family Law - Spousal Support - Interim - Variation
Statutes - Interpretation - The Family Maintenance Regulations, 1998, Section 21.33

Family Law - Custody and Access - Interim
Statutes - Interpretation - Children's Law Act, 2020, Section 10

Family Law - Custody and Access - Mobility Rights - Primary Residence

Family Law - Division of Family Property - Appeal

Insurance - Contract - Interpretation

Landlord and Tenant - Commercial Lease - Breach - Termination - Application for Relief from Forfeiture

Municipal Law - Tax Assessment - Assessment Appeals Committee - Appeal
Municipal Law - Tax Assessment - Classification of Land
Statutes - Interpretation - Municipalities Regulations, Section 39(b)(i)

Real Property - Lease - Sand and Gravel Lease - Profit à Prendre - Appeal

SCR 311 (RJR-MacDonald) and followed faithfully in numerous cases since then, advancing that it had a meritorious claim against the applicants, would suffer irreparable damages if the injunction were not ordered, and as it had undertaken before the court to pay to the applicants any damages resulting to them from the injunction in the event its action was unsuccessful, the balance of convenience favoured the granting of the injunction. The irreparable damage alleged by Valvoline consisted of an unquantifiable loss due to KTDOC's interference with the operations and diversion of customers away from the franchise by: using GCOC coupons, trademarks and signage, causing customer confusion; having confidential internal market information about GCOC; and fundamentally, if KTDOC's oil change business were allowed to continue, the loss of confidence by the franchisees in GCOC's ability to maintain the value of its franchises because of the pirating activities of entities like KTDOC.
HELD: The chambers judge allowed the application in part and with conditions, with the result that KTDOC could reopen its oil change business until the appeal of the chambers decision was heard and decided. In arriving at his decision, the chambers judge reasoned that the application to lift the stay of the injunction pending the appeal was to be governed by the same principles, though modified to account for the shorter period of time in issue, which guided the chambers judge in her chambers decision, and which would frame the appeal court's scrutiny of that decision; these being encapsulated in RJR-MacDonald, and applied in such decisions as Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc., 2011 SKCA 120. The three-part test requires, first, that the applicant present evidence that its claim demonstrate a serious issue to be tried; secondly, the evidence must satisfy the court that the applicant will suffer irreparable harm and that any loss it might suffer will not be compensated by payment of money; and thirdly, and of greatest weight; that the balance of convenience favoured the granting of the injunction: that is, whether upon a "compendious" consideration of the equitable and other considerations, the irreparable harm to the applicant if successful at trial would be greater if the injunction were not granted than the irreparable harm that would be suffered by the respondent should the claim be successfully repulsed at trial. Finding that the first and second parts of the test had been proven by Valvoline without difficulty, that its claim was meritorious and had a reasonable chance of success in the long run, and that it was reasonable that it might incur irreparable harm without an injunction in place up until the trial, he went on to find that the heads of damage advanced by Valvoline before the chambers judge were of a kind which would accumulate over the length of the action, and not during the period of an expedited appeal; but on the other hand as concerned KTDOC over the short term of the expedited appeal, a reasonable risk existed that it would lose market share it was not likely to regain, would lose business revenue, and if the business continued to be shuttered, it would need to lay off employees, who would then become unavailable to it should the business reopen. On a balancing of the equities, and justice between the applicants and respondent, the chambers judge exercised his discretion by lifting the injunction for the appeal period and allowing KTDOC to reopen its business, but without any involvement whatsoever of K.T.

[Contract Law - Interpretation - Appeal]

[Statutes - Interpretation - Cities Act, Section 307, Section 329, Section 367]
[Municipal Law - Bylaw - Community Standards - Order to Comply]

[Statutes - Interpretation - Municipalities Act, Section 195(5)]
[Municipal Law - Assessment Appeal - Saskatchewan Assessment Manual]

[Statutes - Interpretation - Traffic Safety Act, Section 2, Section 137, Section 241.1(2)]

Cases by Name

A.G. v J.G.

Abbey Resources Corp. v Saskatchewan Assessment Management Agency

Belmonte Home Ltd. v Temple Insurance Company

Cao v Saskatchewan (Economy)

Carruthers v Carruthers

Freeborne Developments Ltd. v Corman Park (Rural Municipality)

Hawryliw v Smith

Juraville v Armstrong

Ly v Regina (City)

McStay v Berta Estate

N.M. v T.M.

© The Law Society of Saskatchewan Libraries Back to top

Freeborne Developments Ltd. v Corman Park (Rural Municipality), 2021 SKCA 48

Jackson Tholl Kalmakoff, March 30, 2021 (CA21048)

Municipal Law - Tax Assessment - Assessment Appeals Committee - Appeal
Municipal Law - Tax Assessment - Classification of Land
Statutes - Interpretation - Municipalities Regulations, Section 39(b)(i)

The appellant, Freeborne Developments, appealed pursuant to s. 33.1 of The Municipal Board Act, from the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board relating to the tax assessment of three properties owned by the appellant located in the jurisdiction of the respondent, the Rural Municipality of Corman Park (see: 2019 SKMB 71). In 2007, the appellant purchased agricultural land. It initially intended to develop the land as an industrial park and successfully applied to the respondent in 2011 to have it rezoned from agricultural to rural industrial park. The change was effected in 2012 by a zoning bylaw. The appellant's planned development did not occur and it continued to use the land as agricultural land. In 2017, the land was again rezoned to "light industrial district" and the appellant advertised it as commercial property when it tried to sell it. Although the respondent continued to assess the land for tax purposes under the agricultural classification from 2012 to 2014, an assessor had determined the land should be classified as "commercial and industrial" for the purpose of property tax assessment. The respondent then changed its tax classification and assessed it as such from 2015 through 2018. The appellant's tax obligation increased from $925 in 2014 to $24,600 in 2017. The appellant appealed the assessor's determination to the Board of Revision (board) in 2018. The board allowed the appeal (see: 2018 SKMBR 3440022). It ruled that the land was properly qualified as "other agricultural" for the purpose of tax assessment based upon s. 39(b)(i) of The Municipalities Regulations. The respondent's appeal to the committee succeeded as it found that the board's decision was unreasonable, based on the evidence and the legislation. It had erred: first by misquoting s. 39(b)(i) of the Regulations by omitting the word "potential" from the actual wording of the section regarding the classes of property respecting "other agricultural," which reads "for which the predominant potential use is cultivation, determined as the best use that could reasonably be made of the majority of the surface area." Secondly, it determined the board had erred by failing to consider s. 39(f)(i) of the Regulations, which provides that under classes: "commercial and industrial" includes only land. "used or intended to be used for business purposes." The committee found that, based on the evidence before the board, it was clear the land was acquired for industrial purposes and had been rezoned at the request of the appellant. Through these

[Phillips v Phillips]

[R v Deckert]

[R v Getz]

[R v Hansen]

[R v Jackson]

[R v Kelln]

[R v Maung]

[R v Pelly]

[R v T.S.1]

[Restaurant Sahib Jee Inc. v Prairie Oasis Travel Plaza Inc.]

[Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)]

[Turtle v Valvoline Canadian Franchising Corp.]

[Van de Voord v Van de Voord]

Disclaimer
All submissions to Saskatchewan courts must conform to the Citation Guide for the Courts of Saskatchewan.
Please note that the citations contained in our databases may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

errors, the board erred by concentrating on the current use of the property in allowing the appeal and failed to have regard to the extensive factual matrix concerning acquisition, rezoning and potential sale of the property. The grounds of appeal were whether the committee: 1) correctly identified the errors in the board decision; 2) correctly identified the manner in which s. 39 of the Regulations should have been applied in the circumstances; and 3) correctly identified the factual matrix in which to apply s. 39.
HELD: The appeal was dismissed. The court noted that the committee had applied a standard of reasonableness to its review of the board's finding of fact, mixed fact and law based upon the Court of Appeal decision in City Centre Equities (2018 SKCA 43) and queried whether that standard had been changed by Vavilov, but it was not necessary to decide that issue. Because the parties proceeded on the basis that the committee properly instructed itself and because it found that the board had committed a material error of law, it was permitted to intervene and either confirm or modify the board's decision. Regarding each ground, the court confirmed: 1) the committee's finding that by overlooking the word "potential," the board erred by focusing only on the predominant use of the land. The committee was correct in finding that the board's failure to consider s. 39(f)(i) of the Regulations was an error. The court pointed out that under s. 196(3) of The Municipalities Act (MA), the initial assessment is presumed to be correct and unless the party appealing it can establish on the balance of probabilities that the assessor has erred in fact, law or assessment principles and practices, the board cannot intervene. Although the board found that the land had been rezoned industrial at the appellant's request, there was nothing in its reasons to indicate that it considered what that request said about its intended use of the land or that it looked beyond the present use in determining whether the appellant had overcome the presumption that the initial assessment was correct; 2) the committee correctly identified the manner in which s. 39 of the Regulations should have been applied. When interpreting them, the MA and other related legislation in accordance with s. 2-10 of The Legislation Act, the plain wording of ss. 39(b)(i) and 39(f)(i) means that an assessor's classification decision must be based not only on current predominant use, but with reference to future possibilities; and 3) the committee had correctly identified the factual matrix to determine the proper classification of the land based on the appellant's intention to develop it as an industrial park, its subsequent zoning application and then advertising it a commercial property in its effort to sell it. It considered the evidence that properties adjacent to the appellant's land were zoned and assessed as commercial land and being used as a light industrial park. Having made these findings, the committee's decision to reinstate the assessor's original classification determination under s. 39(f)(i) of the Regulations was correct. The board had no authority to intervene, so the committee was correct to reinstate the assessor's original classification. It was therefore unnecessary for the court to resolve the question whether s. 39(b)(i) should be prioritized overs. 39(f)(i).

© The Law Society of Saskatchewan Libraries Back to top

R v Deckert, [2021 SKCA 49]

Kalmakoff, March 31, 2021 (CA21049)

Appeal - Application to Extend Time to Appeal
Appeal - Criminal Law - Dangerous Offender Designation

The prospective appellant (L.C.D.), designated a dangerous offender (DO) in January 2001 for offences committed in April 1986 (predicate offences) and for which he was not arrested until 1998, applied for an order granting him an extension of time to appeal as permitted by s. 678(2) of the Criminal Code. The DO designation was imposed on January 17, 2001 following a hearing wherein evidence was called by the Crown to prove that L.C.D. met the criteria for such a designation, as required by ss 753(1)(a)(i) and (ii) Criminal Code, and for an indeterminate sentence. (See: R v Deckert, 2001 SKQB 26 [sentencing decision]). Prior to being arrested for the predicate offences, and while at large, L.C.D. committed two other sets of offences in 1987 and 1990 and was imprisoned in the penitentiary for four and seven years respectively. The second set was committed soon after he had been released on day parole. The predicate offences and the 1987 and 1990 offences were found by the sentencing judge to form a pattern of offending, an essential finding in a DO application. In all three sets of offences, which the chambers judge described as "horrific", the applicant violently assaulted three women sexually, two in their homes after he broke in, and one in a convenience store in which she worked. In all three sets of offences, he struck the victims in the face, and on two occasions used a weapon, a knife and a hockey stick, while masked. One victim was tied with an electrical cord, and another was slashed with a knife. One of the Crown witnesses, A.L., an expert witness who prepared the required psychological assessment of L.C.D. and testified at the sentencing hearing, was convicted of three counts of sexual assault on January 28, 2013. His appeal was dismissed on April 23, 2014, and his application for leave to appeal to the Supreme Court was dismissed on October 23, 2014. L.C.D. was aware A.L. had been charged in 2010. Two of A.L.'s victims were sexually assaulted while they were his patients, one on multiple occasions. A.L. had conducted a psychiatric assessment of one of L.C.D.'s victims in relation to a criminal charge. The applicant alleged that A.L.'s subsequent criminal convictions would have discredited his testimony at the sentencing hearing, and as a result that evidence would not have been included at the hearing, and the remaining evidence could not have resulted in the same outcome.
HELD: The application for the extension of time to appeal was dismissed. The chambers judge considered himself bound by the governing authorities, R v Walker, 2017 SKCA 91, and R v Dustyhorn, 2017 SKCA 82, in his analysis of the legal principles to be applied when considering such a request. First, he proceeded on the basis that allowing an appeal to go forward after a delay of 20 years would generally be "inimical to the proper

administration of justice." He then applied the governing legal principles, including the interests of justice. These are: 1) explanation for the delay; 2) prejudice to the Crown; 3) merit of the appeal; and 4) the interests of justice. He found first that the delay should be divided into two parts, the first from the date of the sentencing decision, January 17, 2001, to the day A.L.'s criminal proceedings concluded on October 23, 2014, and the second from October 23, 2014 to January 27, 2021, the period between the conclusion of A.L.'s criminal proceedings and the filing of the notice of appeal and application. As to the first period, he stated L.C.D. had proceeded with sufficient haste since he could do nothing about the effect of L.A.'s evidence on his case until he was convicted and had exhausted all legal recourse; but as to the second period, L.C.D. delayed in taking the required steps to perfect his appeal by wasting time waiting for unnecessary information and generally not explaining what appeared to be a lack of urgency in filing the application and notice of appeal. Next, the chambers judge did not agree with the Crown that it would be prejudiced at a new hearing because of the passage of time. He reasoned that the availability of a transcript of the initial proceeding addressed that concern. The balance of the analysis was devoted to the third legal principle, that of the merit of the proposed appeal. The only ground which would be advanced on appeal by L.C.D. was that the evidence of L.A. at the sentencing hearing had been discredited to such an extent by his subsequent convictions for sexual assault that it could not have been considered, and the decision could not stand. At the beginning of his analysis, the appeal court chambers judge determined that if the appeal were allowed to proceed, the standard of appeal would be one of reasonableness. Would the fresh evidence of L.A.'s convictions cause his evidence to be scratched from the record, and if so, would the sentencing decision be one which could reasonably have been made? The analysis then focused on whether L.A.'s convictions could be admitted as fresh evidence in accordance with the Palmer test (R v Palmer, [1980] 1 S.C.R. 759). That could only happen if the fresh evidence "call[ed] into question" the reasonableness of L.C.D.'s DO designation. The chambers judge found that none of the activity for which L.A. was convicted occurred prior to his testimony at the sentencing hearing and could not "directly touch on the testimony the witness gave in the proceeding under appeal or render that evidence inadmissible." What is more, he also reasoned that the exclusion of L.A.'s evidence from the hearing would not call into question the reasonableness of the sentencing decision because there was sufficient other evidence led at the hearing, including the circumstances of the offences, the testimony of a second expert witness that L.C.D. was a "primary psychopath" and that of correctional staff as to his reluctance to admit his offending and to participate in offender specific programming, which could sustain the decision to impose an indeterminate sentence of imprisonment. He then rested as he had begun, with the conclusion that to allow the appeal to proceed would not be in the interests of justice.

© The Law Society of Saskatchewan Libraries
Back to top

R v Pelly, 2021 SKCA 50

Ottenbreit Barrington-Foote Tholl, April 1, 2021 (CA21050)

Criminal Law - Appeal - Dangerous Offender
Criminal Law - Sentencing - Indeterminate Sentence - Appeal

The Crown appealed the imposition of a determinate sentence of imprisonment and a 10-year long-term offender order following a sentencing hearing under Part XXIV of the Criminal Code (R v Pelly, 2018 SKQB 160 [sentencing decision]), which resulted in the respondent being designated a dangerous offender (DO), primarily on the ground that the sentencing judge committed an error in law in her application of ss 753(4) and (4.1) of the Code, and in her application of the general sentencing provisions of Part XXIII of the Code, in particular ss 718.1 and 718.2, by allowing Part XXIII factors to overwhelm the sentencing principles she needed to consider to correctly exercise her discretion under ss 753(4) and (4.1) of the Code. In particular, the Crown argued the trial judge erred in law by over emphasizing the principles of proportionality and the remedial measures directed to Aboriginal offenders, when ss 753(4) and (4.1) required her to give primary consideration to protecting the public from a person who had been declared a DO. The respondent was an Aboriginal offender who had committed over 50 offences since the age of 13, including a violent home invasion robbery, a robbery with violence, a major sexual assault, numerous assaults, assault with a weapon, and the predicate offence of aggravated assault. He lived a highly dysfunctional childhood, and at the time of the psychiatric assessment, was diagnosed with borderline personality disorder and cognitive limitations. He abused drugs and alcohol and had done so all his life. His substance abuse was a strong factor in his loss of self-control leading to violent behaviour, yet he showed no inclination to stop using alcohol or drugs. He was incarcerated for all but 12 months of his adulthood, and as a result was highly institutionalized. He always reoffended while on release conditions or statutory release. He was sentenced to three penitentiary terms, two of which were served to warrant expiry. He refused programming to address his criminogenic risk factors while in the penitentiary, including sexual offender treatment, and failed to fully participate in the few programs he did attend. The psychiatrist who prepared the report and testified at the hearing and the corrections officers who had worked with him were not hopeful that the respondent would be able to complete the very intensive programming required to even begin to consider whether he might be releasable on conditions at some point in the future.
HELD: The Crown appeal was allowed and the court reconsidered the appropriateness of the determinate sentence and long-term offender order in light of the particular sentencing objectives expressed in ss 753(4) and (4.1), which presume that a person found to be a DO is to be sentenced to an indeterminate period of incarceration in a penitentiary "unless [the court] is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will

adequately protect the public against the commission by the offender of murder or a serious personal injury offence." First, the court focused on the meaning of the phrase "reasonable expectation," because a reasonable expectation of adequate protection of the public can be attained by lesser measures than an indeterminate term of imprisonment in the penitentiary. After a consideration of R v Bunn, 2014 SKCA 112 and R v Sanderson, 2018 MBCA 63, the court accepted that a reasonable expectation is a "belief that something will happen, as opposed to the mere possibility" (R v Lawrence, 2019 BCCA 291). With this standard, the court went on to determine whether it could be satisfied on the evidence adduced that lesser measures would adequately protect the public from future serious violent offences at the hands of the respondent, and found that it could not be so satisfied, in particular because: he had not demonstrated in the past that he could be in the community on conditions without inflicting serious bodily harm on members of the public; he was not prepared or was unable, due to mental and psychological limitations, to take the necessary high intensity programming and treatment as an initial step to reducing his risk of perpetrating violence on others; his dependence on alcohol was so ingrained that he could never have another drink without risking physically hurting others. Next, the court considered the interplay between concepts of moral blameworthiness and the application of that principle to Aboriginal offenders in cases such as Gladue and cases following it. The court recognized that by R v Boutilier, 2017 SCC 64, the general principles of sentencing contained in Part XXIII apply to ss 753(4) and (4.1) but in a more restricted manner, given the emphasis on protection of the public from persons declared DOs contained in Part XXIV; the difference being that the deleterious effects of colonization, residential schools, and high incarceration rates cannot justify a sentencing judge declining to impose an indeterminate term of imprisonment where the conditions for imposing one have been met, though Gladue factors must be taken into account and may, in some cases, though not in this one, support a lesser sentence (see: Boutilier).

© The Law Society of Saskatchewan Libraries Back to top

McStay v Berta Estate, 2021 SKCA 51

Jackson Barrington-Foote Tholl, April 1, 2021 (CA21051)

Appeal - Wills and Estates - Proof of Will in Solemn Form
Civil Procedure - Queen's Bench Rules, Rule 16-46

The appellant, the daughter of the testator and a beneficiary of his estate, appealed from the decision of a Queen's Bench chambers judge to dismiss her application for an order that the will be proven in solemn form. The testator made the will in question on May 24, 2018 just before he died. In it, the testator left various

bequests, classified by percentages. One bequest of 22.5 percent of his estate was made to the appellant and her two children but the largest one was to the executor for the benefit of his children. This will replaced a will made in 2013 naming the appellant as executor and sole beneficiary. The appellant's application to have the 2018 will proved in solemn form made pursuant to Queen's Bench rule 16-46 sought a trial on the issues of whether at the time of the execution, the testator had testamentary capacity or was subject to undue influence. She filed three affidavits sworn by herself and her mother. The executor filed affidavits from himself, the testator's lawyer and legal assistant, and a friend of the testator's. Much of the evidence was controverted concerning such factors as the testator's mental state at the time he executed the will, his relationships with the appellant and her children and with the executor and his children, the role of the executor in the making of the will and the circumstances surrounding it. The chambers judge identified the test set out in Dieno (1996 CanLII 6762) for proving a will in solemn form. After reviewing the appellant's and executor's evidence that negated and affirmed testamentary capacity respectively, she examined the evidence regarding suspicious circumstances to consider whether undue influence had occurred. She found that the evidence overwhelmingly showed that the testator knew of the contents of the will and approved them and that the executor's evidence affirmed testamentary capacity, and further found no suspicious circumstances. The major issue on appeal was whether the chambers judge erred in her application of the first part of the Dieno test by weighing conflicting evidence and making findings of credibility.
HELD: The appeal was allowed and the court directed that a trial be held to prove the 2018 will. It awarded the appellant the cost of the appeal, payable by the estate, on a solicitor-client basis. Costs of the chambers application would be costs in the cause with the determination of whether they should be on a solicitor-client basis left to the trial judge. The standard of review for findings of fact made on the basis of affidavit evidence is that of palpable and overriding error, as established in Yorkton v Mi-Sask (2021 SKCA 43). It found with respect to the issue that although the chambers judge identified and applied the correct test from Dieno, Ritchie (2007 SKCA 64) and Kapacila (2010 SKCA 85), she erred in the application of the test by weighing the evidence and making findings of credibility on conflicting affidavit evidence. She erred by treating the application as akin to a summary judgment application wherein she would have been permitted to weigh the conflicting evidence and make findings of credibility. An application under Rule 16-46 did not permit her to engage in such an exercise.

© The Law Society of Saskatchewan Libraries Back to top

Carruthers v Carruthers, 2021 SKCA 52

Ryan-Froslie Schwann Leurer, April 6, 2021 (CA21052)

Family Law - Division of Family Property - Appeal

The appellant appealed from the judgment of a Queen's Bench judge rendered after trial regarding the division of family property (see: 2019 SKQB 7). The appellant and the respondent separated in 2011 after 28 years of marriage. They moved to the family farm after their marriage at the insistence of the respondent's parents. The respondent's father created a farming corporation (Whiteshore) in 1980 as an estate planning tool for the intergenerational transfer of the farm. A house was built for the parties to reside in on the farm owned by Whiteshore. During the course of the marriage, the parties both worked on the farm with little monetary compensation and held jobs off-farm to help make the farm viable. It survived a number of financial crises over the next 20 years and eventually a lender required the parties to sell their assets of cattle and equipment into Whiteshore in exchange for common shares and shareholder loans. This resulted in the respondent's father transferring 30 percent of Whiteshore's shares to the respondent and 25 percent to the appellant. The parties began negotiating with the respondent's parents in 2009 to permit them to retire. Four years after the parties had separated, in March 2015, the appellant commenced family law proceedings. To forestall the respondent's parents from selling some of the farmland to a relative, the appellant arranged financing to enable her to purchase the shares and entered into a written agreement with the respondent's parents on June 1, 2015 to effect the purchase of their shares and shareholder loan at $500,000, whereupon she held 70 percent of Whiteshore's shares. The trial judge found that everyone agreed that the proposed sale price of $500,000 would be below market value. She determined, among other things, that the parties' residence on the farm was the family home for division purposes and that the each of the parties had an interest at the date of application in the Whiteshore shares owned by the respondent's parents. The grounds of appeal where whether the trial judge: 1) erred by determining the residence was a family home. The appellant relied upon the decision in Weixl (2006 SKQB 319) that held a house owned by a corporation does not qualify as a family home. The judge had found uncontroverted evidence that the home was built for the parties and they had lived there for approximately 30 years, and distinguished it from Weixl based on the length of the marriage in this case; 2) in determining that the parties had an interest, as of the application date, in the Whiteshore shares owned by the respondent's parents because there was no evidence of an oral agreement regarding them and there was no evidence to support the judge's finding of unjust enrichment (UE). Further, the appellant argued that The Family Property Act (FPA) is a complete code and the court does not have jurisdiction to consider the principle of unjust enrichment in dividing the family property; and 3) erred in her valuation of the parties' shareholder loans because she valued them as at the end of July 2015, the corporate year-end for Whiteshore, rather than at the date of application. The appellant objected to her bank account's balance of $14,737 being valued at that amount because she had deposited $12,400 into it from the sale of cattle owned by Whiteshore; 5) erred in failing to find dissipation with respect to the respondent's alcohol use or his use of the corporate account; 6) erred in her obiter comments with respect to an unequal division of family property pursuant to s. 21(3) of the FPA based on UE; and 7) erred by refusing to award the appellant costs.

HELD: The appeal was dismissed. The court held that pursuant to the emphasis given in the FPA to the fair and equitable distribution of property, considerable deference was owed to a trial judge's overall decision as to entitlement and valuation subject to the exceptions outlined in Rimmer. It found with respect to the grounds of appeal that the trial judge had: 1) not erred in determining there was a family home. The residence clearly met the definition of same under s. 2.(1)(a)(ii) of the FPA, as it does not depend upon ownership, and Weixl was in error regarding that point. Further the judge did not value the family home separately from the corporation because the parties' interest in it was as shareholders of Whiteshore; 2) did not err in finding that the parties had an interest in the parents' shares. She found that was so by virtue an oral agreement or because of UE but failed to provide an analysis of how the facts supported the existence of either. The court reviewed the judge's factual findings and found that she had erred as there was no evidence of an oral agreement between the parents and the parties at the date of application. They had not agreed upon a price. However, the facts established that the judge had not erred in finding that the parties' interest in the shares was based on UE because the respondent's parents and the farm had been enriched by the parties' contributions to the farm operation and its finances, they in turn had suffered deprivation, and there was no juristic reason for the enrichment. As well, s. 52 of the FPA does permit consideration of equity; 3) not erred in valuing the shareholder loans. The expert witnesses, business evaluators who testified on behalf of each party, valued Whiteshore as at its corporate year-end and as close as possible to the date of application. Their valuations involved the deduction of the parties' shareholder loans as debts owing by the corporation. In Ackerman (2014 SKCA 137), the court stated that judges have considerable discretion in determining whether to use the date of application or adjudication in valuing property and it should be valued consistently. A different date may be used if an explanation is provided. The judge had not made any palpable or overriding error in including the $12,400 in the appellant's bank account. The money had not been accounted for in the corporate records; 4) not erred in failing to find dissipation regarding the respondent's alcohol use because he used income earned from employment after the relationship had ended and had not jeopardized the financial security of the household. The judge also accepted the respondent's explanation of his withdrawal of $23,000 from the corporate account to pay a debt owed by Whiteshore; 5) had not erred in finding that the parties had an interest in the parents' shares based upon UE. It was not necessary to address whether she had erred in comments regarding s. 21(3) of the FPA; and 6) had not erred in determining costs. The decision is discretionary and attracts a deferential standard of review. The appellant had not met the significant burden of establishing that the judge erred in exercising her discretion.

© The Law Society of Saskatchewan Libraries

Back to top

Hawryliw v Smith, 2021 SKCA 53

Jackson Tholl Kalmakoff, April 7, 2021 (CA21053)

Civil Procedure - Summary Judgment - Genuine Issue Requiring Trial
Real Property - Sale of House - Failure to Disclose Defect - Patent or Latent Defect
Torts - Fraudulent Misrepresentation

The appellant appealed the decision of a Queen's Bench chambers judge that granted his application for summary judgment against the respondent plaintiff with the exception of her claim against him in fraudulent misrepresentation (see: 2020 SKQB 169). The judge did dismiss the respondent's claims against him in breach of contract, negligence and misrepresentation based on the affidavit evidence but found that she could not resolve the dispute regarding the claim of fraudulent misrepresentation by concealment because of the contentious nature of the facts, and a trial with viva voce testimony would be required in order to assess credibility and make the necessary findings of fact. The respondent had purchased a 100-year-old house from the appellant in 2013 and, later that year, discovered that it had sustained fire damage in the ceiling joists that had been concealed by drywall. The judge found that the respondent's evidence contained contradictions as to whether it was a patent or latent defect. Although the respondent deposed that she discovered the damage to the structure caused by the fire after removing the drywall, she also averred that there was evidence of a fire near the electrical panel, implying that the damage should have been identified during the home inspection. The judge noted that the respondent was placing responsibility on the inspector for not observing the fire damage as a patent defect and on the appellant for not disclosing it as a latent defect but despite the contradiction, she found it was highly unlikely that during the course of a reasonable inspection, an ordinary purchaser could have uncovered the extent of the damage as it was behind a finished ceiling. Thus, she would proceed with her analysis on the basis that the fire was a latent defect. She examined the verbal representations made by the appellant and decided that the respondent had not relied on any of them insofar as negligent misrepresentation was concerned, but was unable to make the same determination regarding fraudulent misrepresentation. The grounds of appeal were whether the chambers judge erred: 1) by failing to find that the fire damage was a patent defect; and 2) by failing to dismiss the claim in fraudulent misrepresentation after determining that the respondent had not relied on any of the appellant's representations.
HELD: The appeal was dismissed. The court found with respect to each ground that the chambers judge had not erred because: 1) she did not reach a finding of fact regarding the character of the defect. The appellant failed to convince her that the defect was patent and she could not summarily dismiss the claim. She noted the contradiction in the respondent's evidence but concluded that she was not satisfied she could determine whether there was a patent or latent defect and simply proceeded on that basis that it was the latter; and 2) she did not make any finding of fact with regard to the reliance by the respondent on the alleged misrepresentation of the concealment.

© The Law Society of Saskatchewan Libraries

Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality), 2021 SKCA 55

Ottenbreit Caldwell Schwann, April 9, 2021 (CA21055)

Real Property - Lease - Sand and Gravel Lease - Profit à Prendre - Appeal
Contract Law - Interpretation - Appeal

The appellant, Ter Keurs Bros. Inc. (TK), appealed the decision of a Queen's Bench chambers judge declaring the respondent, the Rural Municipality of Last Mountain Valley, to be the owner of certain sand and gravel (product) stockpiled on land owned by TK and granting other related relief (see: 2020 SKQB 37). In terms of judicial history, the respondent originally succeeded in obtaining summary judgment against the appellant regarding ownership of the product (see: 2018 SKQB 58) but on appeal, the chambers judge's decision was set aside on the basis she had not applied Sattva in interpreting the agreement and considering surrounding circumstances. The Court of Appeal remitted the matter for a rehearing (see: 2019 SKCA 10). The facts underlying the dispute were that the previous owner of TK's lands entered into a 10-year gravel agreement with the respondent that permitted it to enter upon them and excavate, process, stockpile and remove the product. The appellants purchased the lands in 2014 and the sale included an assignment of the agreement. During 2014, the respondent increased the extraction by a substantial amount because it wanted to ensure a sufficient stockpile to permit it to repair road damage caused by flooding. In 2016, TK expressed concern to the respondent's council about the volume of extraction and advised it to remove all of the stockpiled product before the contract expired as TK was not in the business of storage. The parties attempted to negotiate a renewal of the agreement but on the day that it expired, TK informed the respondent that it was not renewing and that it was claiming ownership of the product remaining on the land. It then prohibited the respondent from entry to the land. At that time, the respondent had paid $884,450 for the stockpile still on the land. In response to the rehearing of the respondent's application, the chambers judge reviewed the terms of the agreement and its factual matrix in accordance with Sattva. After considering the affidavit evidence, she found ownership of the product depended on whether the contractual relationship was for a profit à prendre. Relying upon the law relating to that type of contract as set out in Saskatoon Sand & Gravel, she found that the nature of the respondent's interest was a profit à prendre. The issues on appeal were whether the chambers judge erred: 1) by applying the wrong law. The appellant argued she erred by interpreting the agreement in accordance with Sattva and by considering the parties' subsequent dealings. It took the position that the agreement was a standard form contract and must therefore be interpreted by the principles established in

Ledcor; 2) in her conclusion on ownership; and 3) in her conclusion on rights of storage and removal of the stockpile after the agreement ended.
HELD: The appeal was dismissed. The court remitted to the Court of Queen's Bench the issues regarding the amount of notice that the appellant should provide for removal of the product and should receive in compensation for storage of it. It found with respect to each issue that the chambers judge had: 1) not made any palpable or overriding error in interpreting the agreement. She had erred insofar as she considered the subsequent dealings of the parties as part of the factual matrix surrounding the formation of the contract because there was no evidence at all as to what the original parties intended on the issues of ownership, storage and removal of the product after the lease terminated. It noted that the agreement was not a standard form contract as described in Ledcor but rather, similar to a template; 2) had not erred. She appropriately applied Saskatoon Sand & Gravel in determining the agreement revealed that the parties intended the respondent would have the same rights as those associated with profit à prendre, including that title to the product passed on severance from the land, regardless of whether or when it was removed from the land. She properly interpreted the agreement and found that the termination of the agreement could not operate to transfer ownership of the severed stockpiled product back to the appellant; and 3) had not erred. She correctly implied a term into the agreement that allowed storage of the product after termination and in finding that the respondent's right to continued storage was subject to termination on reasonable notice. On the facts, she had not erred in determining that the respondent had not received reasonable notice to remove the stockpile. Those matters were remitted to the Court of Queen's Bench for determination.

© The Law Society of Saskatchewan Libraries

Back to top

R v Getz, 2021 SKQB 67

Allbright, March 10, 2021 (QB21066)

Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(b), Section 24(2)
Criminal Code - Motor Vehicle Offences - Failure to Provide Breath Sample
Summary Conviction Appeal - Providing Identification During Traffic Stop
Summary Conviction Appeal - Amending Information

The appellant appealed his sentence for and convictions of the Criminal Code offences of failing or refusing to provide a breath sample in an approved instrument upon demand of a peace officer and obstructing a peace officer by refusing to identify himself. His grounds for appeal included that the trial judge erred in law by: 1)

allowing an amendment to the Information after having entered a conviction and 2) failing to exclude the evidence of the refusal under s 24(2), or to stay the charge, in view of the alleged breaches of his rights under ss 8, 9 and 10(b) of the Charter. He further argued that as he was not required by law to identify himself to police when stopped for a traffic violation, he could not be found guilty of obstructing a peace officer. The trial judge accepted evidence that the appellant was stopped for speeding, not using his signal lights, and failing to stop at a stop sign for a peace officer in full working uniform of the RCMP, who was driving a marked police vehicle with flashing emergency lights engaged. When stopped, the appellant pulled over to the wrong side of the road and walked away from his vehicle. When approached by the officer, he refused numerous times to give his name, and said he wanted to talk to his lawyer. The officer asked him for his driver's license, which he claimed was not on him. He did not mention it was in his vehicle, a few feet away. The peace officer arrested him for obstruction and escorted him to the police vehicle. The appellant remained mute until some time later when, at the police detachment, he demanded a telephone book to call a lawyer. At roadside, the arresting officer noted indicia of impairment including heavy-lidded and bloodshot eyes, speeding and other road infractions, parking on the wrong side of the road, and his unusual behaviour at roadside. The officer formed the belief he was operating a motor vehicle while impaired by alcohol, and rearrested him for that offence. He was provided with rights to counsel upon arrest. Once at the police detachment, he was placed in an interview room equipped with a video camera and recording equipment, which recorded what transpired there. The appellant was asked by two officers at the detachment three times whether he wanted to call a lawyer, but he said nothing until stating "Go get me a phone book." He was provided with a phone book. He continued to be "confrontational, aggressive, uncooperative and argumentative." Without looking at the phone book, he then demanded his cell phone and provided a telephone number for Mike Owens, a private lawyer, to the peace officers. One of the peace officers present dialed the number for him, but there was no answer. The appellant left a message using the lawyer's first name and asking him to call back. He left no return phone number, where he was or the reason for the message. These omissions were pointed out to him by the peace officers. The message was left at approximately 10:30 PM. About 10 minutes later, the arresting officer made a demand for a breath sample three times, each time telling the appellant that he would be charged with refusal. The appellant repeated each time that he would do nothing until he spoke to his lawyer. He was charged as warned, and placed in police cells from12:40 am until around 8 am. No one checked on him during that time, and the only reason given by the arresting officer for detaining him in cells was that he always detained persons who refused to provide breath samples. No call was made to the detachment by Mike Owens concerning this matter.
HELD: The appeal was dismissed. First, the appeal judge found no reviewable errors in any of the trial judge's findings. He agreed that a wait of only 10 minutes from the time of leaving a message for Mike Owens to call him to his arrest for refusing to provide a breath sample was a breach of the implementational component of the appellant's right to counsel, but on the s 24(2) analysis, and the weighing of the three branches of that

analysis, which are: 1) the seriousness of the breach, 2) the impact of the breach on the person, and 3) society's interest in adjudication of the matter, he could not say the trial judge was wrong in finding 1) a breach of rights to counsel is always serious, 2) the impact of the breach was nothing, since a call was never received from Mike Owens at any time, and 3) the need to adjudicate the matter was not decisive one way or the other, and on balance, the evidence of the refusal should not be excluded. As well, the appeal judge could find no error in principle in the conclusions of the trial judge that the appellant was arbitrarily detained when left in cells for an entirely arbitrary reason, that the officer always placed persons who refuse to provide a sample in jail. The appeal judge also took no issue with the trial judge as to the remedy for this breach, which was a reduction of the fines on the provincial offences to which the appellant had pled guilty and to which he had been found guilty. Next, the appeal court agreed with the trial judge that the appellant was compelled by law under applicable traffic legislation to identify himself to peace officers when detained, and that R v Moore ((1978), [1979] 1 SCR 195) was a complete answer to any argument to the contrary. The appellant's argument that the trial judge erred in law by allowing the Crown to amend the refusal count in the Information by substituting s 254(3) for s 254(3.3) was also rejected. The appellant took the position that because the Crown had not proven a s 254(3.3) screening device demand refusal, the charge should have been dismissed. However, he could not point to any prejudice to him caused by the amendment, since he could not say he had been taken by surprise by the Crown's evidence. The appeal court agreed with the trial judge that pursuant to s 601 of the Criminal Code, he could allow the amendment as it did not mislead or prejudice the appellant. Lastly, the appeal judge agreed that there was no arbitrary search and seizure as a result of the roadside detention since the arresting officer was able to articulate reasonable grounds for his belief that the appellant was impaired in his ability to operate a motor vehicle, and that these grounds were objectively sustainable (see: R v Gunn, 2012 SKCA 80).

© The Law Society of Saskatchewan Libraries Back to top

Belmonte Home Ltd. v Temple Insurance Company, 2021 SKQB 68

Mills, March 12, 2021 (QB21092)

Insurance - Contract - Interpretation

The applicant, a construction company, brought an originating application under Queen's Bench rule 3-49(1)(d)(i) and (f) for a declaration that that respondent, Temple Insurance Co., was responsible to pay all of the applicant's past legal costs associated with actions taken against it arising from its participation as a subcontractor in a construction project. The owner of property in Saskatoon hired Manshield Construction to

act as a general contractor for the project and the latter required the owner to provide a wrap-up liability policy having as the insureds, the contractors and subcontractors working on the project. A wrap-up policy was issued by the respondent in August 2010, specific to the construction project, to cover the requested parties. It provided protection for the applicant and others from liability assessed against them under the contract and to defend on behalf the insured at the cost of the respondent in any civil action brought against the insured on account of property damage. The applicant had its own commercial general liability insurance policy issued by Wawanesa Insurance. The policy provided that it was insurance in excess of any other primary insurance. After the owner informed the respondent of potential claims, it acknowledged by letter to Manshield dated December 18, 2014 that the policy provided coverage related to it. However, it reversed its position in January and said that coverage was not available. On January 20, 2015, the owner issued a claim against Manshield in negligence in the construction of the project. The applicant was added as a third party to this litigation in March 2015. In July of 2017, another subcontractor commenced a cross-claim against the applicant. The applicant was not aware of the wrap-up policy. It gave notice of its claim to Wawanesa and, with its consent, obtained independent legal counsel to defend the claim. It was only on April 18, 2018 that counsel for Manshield informed the applicant and other subcontractors of the wrap-up liability coverage policy and requested from them a copy of any other insurance policies that might be relevant. When the applicant's counsel requested a copy of the respondent's policy, Manshield's counsel responded that it would not provide same until there was confirmation of coverage by the respondent. It confirmed coverage by letter to the applicant dated June 27, 2018. It also advised it was only prepared to extend defence coverage from that date and any legal fees incurred prior to it were not covered. The applicant did not receive a copy of the wrap-up policy from the respondent until December 20, 2018. By the time of the filing of this application, the claims against the applicant had been discontinued and it claimed only for its legal fees incurred throughout the course of the action. Wawanesa had paid all of its legal costs and the applicant was taking this subrogation action on behalf of Wawanesa. It argued that the respondent had become responsible for the defence costs from the date upon which the third-party claim by Manshield was filed and continued until the claims against it were discontinued. It requested costs of the application on a full indemnity basis. The respondent submitted that the duty to defend only arose with notice and that its letter of June 27, 2018 acknowledging a potential coverage was subject to a reservation of rights and as the applicant did not accept its offer in the letter, the duty never arose. It also argued that the action commenced by the applicant here was not a subrogated action but rather an action for contribution by one insurer against another, relying upon Cameco (2010 SKCA 95). Finally, it argued that the claim for legal costs was statute-barred because the two-year period under the Limitations Act commenced on June 27, 2018 and had ended before the applicant filed the application on July 14, 2020.

HELD: The court ordered the issuance of a declaration requiring the respondent to pay the applicant's past legal costs associated in the underlying action from the date of the third-party claim against the applicant until

the filing of the notice of discontinuance of the third-party claim and cross-claim against the applicant. The applicant was entitled to its costs on a party/party basis to be taxed under column 2. It noted that the issue of notice in identical circumstances involving the same construction project but different parties had been decided in Aberdeen Speciality Concrete Services v Temple (see: 2020 SKQB 14). The judge found in that case that Temple had effective notice on January 14, 2015 of claims under the wrap-up policy. In this application, the court adopted the reasoning of the judge in Aberdeen and found that the respondent had effective notice of the claim involving the applicant was in existence under the policy by January 14, 2015 when it came to its attention through the court action and the involvement of their counsel. It was clear from the provisions of the wrap-up policy that upon notice, the respondent would be responsible for the costs of defending the action. It rejected the respondent's contention that the payments made out of necessity in defending the action could not be reimbursed because the applicant made them voluntarily as it had done so because it was unaware of the policy until April 2018 and was not notified that it was insured under it until June 2018. There was nothing in the June letter to suggest that the applicant needed to do anything to acquiesce to the respondent in order to have insurance coverage. The applicant's action was one for subrogation. The two policies here did not cover the same risk, and consequently, Cameco could be distinguished and did not apply. Regarding the defence that the action was statute-barred, the court found that the applicant had not "discovered" its claim under s. 6(1)(d) of the Act until it received a copy of the policy in December 2018 when it learned that it had a claim against the respondent to the exclusion of Wawanesa. The applicant was awarded party/party costs because the respondent's conduct did not approach the requirements set out in Siemens for solicitor-client costs.

© The Law Society of Saskatchewan Libraries

Back to top

Juraville v Armstrong, 2021 SKQB 73

Megaw, March 17, 2021 (QB21070)

Family Law - Custody and Access - Interim
Statutes - Interpretation - Children's Law Act, 2020, Section 10

The parties separated in November 2019 after a tumultuous seven-year relationship with two children, aged eight and four. They each brought applications regarding the respondent father's access to the children and each filed affidavit evidence that conflicted with the other party's version of their relationship before and after separation. The petitioner mother described that the respondent had been verbally, emotionally and physically abusive to her throughout the relationship, that the pattern continued during attempts to reconcile during the

separation, and that the respondent never had anything to do with the care of the children. She alleged the abuses were related to alcohol abuse. The respondent's evidence was that he was a loving and involved parent and that the petitioner verbally and physically abused him. Each party denied the other's allegations. There were no allegations that the children had been abused by either parent. The children resided with the petitioner. She originally made an ex parte application in February 2020 that sought an order preventing the respondent from having any in-person contact with the children and from attending at the eldest child's school. The petitioner also requested that the respondent's parenting time for the future be supervised. The application was dismissed with the exception of the restriction on the respondent's ability to pick up the child from her school. The parties engaged in negotiations respecting parenting issues and agreed on unsupervised parenting times for the respondent that included overnight visits. The petitioner unilaterally changed the arrangement in November 2020 by restricting the respondent's parenting time and terminating overnight parenting. The evidence was unclear as to why this occurred. In her application, the petitioner sought to continue the ex parte order and requested a prohibition on overnight visits. She wanted to hold sole decision-making authority for the children. In his application, the respondent sought to have the ex parte order vacated because of the effect it had on the school's regard for him. He did not seek equal parenting time at this stage but requested overnight parenting time every second weekend, parenting time during the alternating weeks, and to have input into decisions about the children.

HELD: The respondent's application was granted in part. The court vacated the ex parte order and ordered that the respondent would have weekend parenting time with the children every other week from 5:30 pm on Thursdays to 8 pm Sunday, and Tuesday and on Thursday evenings during the second week. He was entitled to have electronic communication with the children once each week. He would have input into decisions regarding the children. Restrictions were placed on the respondent regarding possession and use of alcohol before and during his parenting time. The court determined what was in the best interests of the children by reviewing the factors set out in s. 10(3) of The Children's Law Act, 2020 with particular consideration given to family violence, its impact on parenting ability and the appropriateness of mandating cooperation of the parents under ss. 10(2)(j) and 10(4) of the Act. The available evidence suggested that both parties should be involved in parenting their children and both had the ability and willingness to care for them and meet their needs. The respondent's evidence regarding his conduct over the past year supported his application for parenting time. The allegations of violence were taken seriously, but there was no evidence that the children had been put at direct risk by the alleged actions of the respondent or that the children or any family member had expressed concerns for their safety. The allegations pre-dated the commencement of these proceedings by a year. The order would take into account the conflict between the parties by limiting their contact with each other: the petitioner was to arrange for a third party to meet the respondent for the purposes of transferring the children and their communications were to be confined to parenting issues. For that purpose, they would be

restricted to using the Our Family Wizard program so that a complete record of their communications would be kept.

© The Law Society of Saskatchewan Libraries Back to top

Phillips v Phillips, 2021 SKQB 79

Bardai, March 19, 2021 (QB21075)

Family Law - Custody and Access - Mobility Rights - Primary Residence

The parties were married in 2008 and separated in 2014. The four sons of the marriage, now aged 14, 12, 10 and 6 years old, lived with the petitioner mother in Kerrobert where they had resided their entire lives. In the current parenting arrangement, the children's primary residence was with the petitioner and they spent two evenings each week and weekends with the respondent on an alternating basis. In her application, the petitioner sought permission to relocate with the children to the town of Plenty, 50 kilometres from Kerrobert, where they would reside with her on her new partner's family farm. It had many amenities for children and the house had six bedrooms. The boys would then attend the K-12 school in Plenty and take part in sport activities in that town. She proposed that to effect the change, she and the respondent would share driving responsibilities and that the respondent's parenting time would be unaffected by the move. She offered to increase it so that he would have the boys three weekends per month. In the respondent's application, he sought a week-on/week-off parenting order because he wanted to be more than a weekend father. During the course of the marriage, the parties had worked together at a store they owned but the petitioner performed the majority of the child care and domestic duties. The respondent's parents resided in Kerrobert and had assisted with child care during this period. The respondent developed problems with alcohol and drug use and gambling. The store was closed in 2014. The respondent left the family home around that time and failed to make agreed-upon support payments. The petitioner had to support the family with help from both sets of grandparents. The respondent disappeared until the summer of 2018 and, during his absence, his parents helped to care for the boys. Upon his return, his parents assisted the respondent by putting him into rehab. After his treatment, he was reintroduced into the boys' lives and permitted to visit with them and eventually, the current parenting arrangement was established. The evidence showed that the parties had had communication problems and the respondent in particular had sent disrespectful messages to the petitioner. HELD: The petitioner's application was granted. The trial concluded days before the amendments to the Divorce Act came into force. Under s. 35.3 of the amendments, the court applied the new provisions of s. 16 of

the Act regarding the assessment of the best interests of a child to the facts of this case. Consequently, it would not consider the respondent's drug use because it amounted to past conduct under s. 16(5) of the Act and that abuse no longer affected his ability to parent. However, the respondent's absence from the lives of the children was a relevant consideration. After assessing all of the factors enumerated in s. 16, it found that the appropriate parenting order in the absence of the petitioner's request to move would have been for the respondent to have the boys on alternating weekends and from after school on Wednesdays to Friday morning during the other weeks. However, in assessing the petitioner's request to move, the court considered ss. 16.92(1), 16.93 and 16.95 of the Act. It determined that it would be in the best interests of the boys to move with the petitioner to Plenty but remain in their schools and activities in Kerrobert. Through this arrangement, their lives would not be as disrupted and it would not interfere with the respondent's parenting time with them or their connection with his parents. The parties were directed to consult with each other on decisions regarding the boys and to communicate with each other in a courteous manner.

© The Law Society of Saskatchewan Libraries Back to top

Ly v Regina (City), 2021 SKQB 80

Robertson, March 22, 2021 (QB21076)

Statutes - Interpretation - Cities Act, Section 307, Section 329, Section 367
Municipal Law - Bylaw - Community Standards - Order to Comply

The self-represented plaintiff filed a statement of claim in November 2018 against the respondent, the City of Regina, for trespass to his residential property and removal of personal property from it, damages of $55 million and $250,000 for lost parts and cancellation of the costs of clean-up. The plaintiff believed that the items removed included inventions of great potential value. The respondent had cleaned up the property on June 1, 2017 in enforcement of an order it had originally issued in 2015. The respondent submitted that the claim was statute-barred under s. 307(1) of The Cities Act. It had initially inspected the plaintiff's backyard in August 2015 in response to three complaints it had received from nearby residents. In October, the bylaw standards officer advised the plaintiff in person and then by notice in the form of a letter that the presence of many items in the yard were in violation of the respondent's property maintenance bylaw and they would have to be removed. The letter also listed specific items for removal. The plaintiff had emigrated from Cambodia to Canada. Although he initially appeared cooperative, the plaintiff's resistance to the idea of interference with his property was related to his past experience with the Khmer Rouge's regime in his country. In January, 2018

the plaintiff appealed to the Regina Appeal Board from the order to comply he had received that month from the officer. The board confirmed the order to comply in March 2016. The respondent decided to delay enforcement while awaiting the result of a complaint by the plaintiff to the Provincial Ombudsman. In January 2017, an officer inspected the property again and found continued non-compliance. In March 2017, the Ombudsman advised the respondent that its investigation had found no substance to the plaintiff's complaint and it was closing its file. Another inspection took place in May 2017 and the officer posted a notice of pending clean-up to occur within five days. The clean-up took place on June 1, 2017 and its cost was added to the plaintiff's property taxes. The plaintiff wrote to the respondent's legal department the next day, giving notice of his claim and seeking compensation. In response, the respondent's official denied the claim. It sent a tax statement of account to the plaintiff at the end of June 2017.The plaintiff commenced his action on November 16, 2018. At trial, he made numerous arguments, including questioning: the validity of the bylaw, because the respondent had repealed and passed a new bylaw during the period following the issuance of its order; whether the bylaw applied when the yard was not visible; the delay between the decision of the board and the actual enforcement of the order to comply; and trespass by the respondent.
HELD: The action was dismissed. The court found that it was statute-barred as the one-year limitation period pursuant to s. 307(1) of The Cities Act had expired. The plaintiff discovered his claim on the date that the clean-up occurred or at the latest, in July 2017, when he received the tax statement of account. Although the respondent should have drawn the one-year limitation period to the plaintiff's attention when it denied the plaintiff's claim, it the limitation period could not be extended on the basis of the plaintiff's ignorance of the law. If the respondent had been found liable, it would have awarded nominal damages because the plaintiff's valuation was speculative and unsubstantiated. In dealing with the plaintiff's issues, it found that the proceeding commenced under a former enactment may be continued under the new enactment under The Legislation Act and by ss. 31 and 367(7)(d) of The Cities Act where the new bylaw incorporates the provisions which supported the ongoing proceeding, as it did here. The lack of visibility of the backyard was not a defence as visibility was not required under the bylaw. Section 329 of The Cities Act provides for appeals to the board and a further appeal to the Court of Queen's Bench. The court, therefore, did not have jurisdiction to hear an appeal by the plaintiff from the board's decision as he had not appealed it when it was made. To do so would offend the rule against collateral attack. The delay in enforcement by the respondent was appropriate under s. 14(2) of The Ombudsman Act, 2012. The delay caused by the Ombudsman might have created a problem for the respondent if a material change in the property's condition had occurred during that period that might have required a new order to be made. However, the order to comply contained both general and specific instructions to remove, the respondent continued to carry out periodic inspections as it waited, and the photographs taken showed the overall condition remained the same. Regarding the issue of trespass, the respondent had the defence of lawful authority for entering the property since it was pursuant to a lawful order under s. 330 of the Act and necessary to remedy the nuisance.

© The Law Society of Saskatchewan Libraries

R v T.S.1, 2021 SKQB 82

Klatt, March 23, 2021 (QB21077)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - Indigenous Offender

The sentencing judge, having found the accused guilty of sexual assault after trial, embarked on the task of imposing a just and fair sentence on him. At the conclusion of her analysis, she sentenced him to a two-year term of incarceration, followed by a period of probation of 2 years. To assist her in doing so, she had the benefit of a victim impact statement and a pre-sentence report (PSR). The offender, T.S.1, who was 20 at the time of the offence, had been an intimate partner of T.S.2 for 4 or 5 years. She was in her late teens at the time of the offence. T.S.2 had a child from T.S.1, at which point in time, they both agreed that their relationship should no longer be romantic or sexual, but one centred on the child. Nonetheless, on the day of the offence, while T.S.1 was staying overnight at T.S.2's home, he had sexual intercourse with her against her will. In the victim impact statement, T.S.2 described being "very heavily" impacted by the offence. The PSR described T.S.1's background. Both his parents struggled with substance abuse and his father left the family around the time T.S.1 was four. His father was a victim of the residential school system. The effect on him was undeniable and was recognized when he received a residential school monetary settlement later in life. As a child, T.S.1 was placed in a foster home for a time, and then settled into a relatively normal family life with his father and his stepmother, who was Caucasian. T.S.1 said he had suffered from racism because "of the colour of his skin" and that a loving relationship with his father was hindered by the unresolved trauma he suffered in residential school. T.S.1 did not have a prior criminal record, though his attitude to women suggested he saw them as sexual objects, available unless they said no. He did not believe he had done anything wrong.
HELD: The sentencing judge first considered the principles of sentencing codified in the Criminal Code applicable to the case and determined that the most relevant provisions were ss 718.1 and 718.2(a), in particular (ii) and (iii.1); 718.2(b) and 718.2(e). She recognized that, as set out in s 718.1, proportionality is the governing principle in sentencing, such that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender", as enunciated in R v Ipeelee, 2012 SCC 13, and other cases; that by s 718.2(a), a sentence is to be increased or decreased to account for aggravating or mitigating factors, specifically that evidence that the offence was committed against an intimate partner is aggravating and evidence that the offence had a significant impact on the victim is aggravating; that by s 718.2(b) as

interpreted by such cases as R v Friesen, 2020 SCC 9, the principle of parity works hand in hand with the principle of proportionality; and that by s 718.2(e), particular consideration should be given to all available sanctions other than imprisonment for Aboriginal offenders which are "reasonable in the circumstances and consistent with the harm done to victims or to the community." With these principles in mind, the sentencing judge found aggravating that T.S.1 and T.S.2 were intimate partners and that T.S.1 had, without any consideration for the victim, abused that bond, and found that the offending behaviour had a profoundly adverse effect on her. She found the following mitigating factors: that T.S.1 was a youthful offender, had no prior criminal record, was relatively productive, had not breached any release conditions, and led a pro-social life. With respect to parity, she mentioned authorities relied on by the Crown which consistently called for a starting point sentence for a major sexual assault of three years, to be increased or decreased as required by the aggravating or mitigating circumstances. (See: R v Bear (10 October 2018) Regina, CRM 196/16 (Sask QB); R v Cappo (1993), 116 Sask R 15 (Sask CA); and R v Revet, 2010 SKCA 71.) Next, she reviewed the case authorities relied on by defence counsel for a 3-year jail sentence or one below that benchmark, and struck a balance between a remedial sentence which recognized Gladue factors and a sentence which took into account the increased need for specific and general deterrence and denunciation, imposing a sentence below the benchmark custodial sentence of three years. The sentencing judge ordered a two-year custodial sentence because T.S.1 wished to access the superior programing in the penitentiary, and a probation order of two years' duration to address T.S.1's objectification of women and other concerns.

© The Law Society of Saskatchewan Libraries Back to top

R v Hansen, 2021 SKQB 81

Elson, March 23, 2021 (QB21093)

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08
Constitutional Law - Charter of Rights, Section 8, Section 9, Section 10(a) - Appeal

The Crown appealed the decision of a Provincial Court judge to grant the respondent's Charter application after a blended voir dire. In October 2018, the respondent had been charged with impaired driving contrary to s. 253(1)(a) of the Criminal Code and driving while her blood alcohol content exceeded the limit contrary to s. 253(1)(b). After she had been drinking in a bar, the bar's security officer noted the respondent exhibiting signs of inebriation and when he saw her drive away from the bar, he called the Prince Albert Police Service dispatcher and described the vehicle and its licence number. An officer on patrol responded to the dispatcher's

call and was able to find and stop the respondent's vehicle. He testified that, after he asked her identity and where she had been, she gave her name and said that she picked up her friend from the bar. It was not clear whether he advised the respondent of the reason for the traffic stop. When the respondent lit a cigarette and tried to cover her mouth with her jacket, saying it was because she was cold, the officer doubted her explanation but was unsure whether she was impaired because he could not smell alcohol emanating from her. Because he had only one year of experience, the officer sought advice from a colleague and confirmed the information from the security officer. He then decided to detain the respondent for further investigation as to her possible impairment. He returned to her vehicle and informed her that she was being detained for the purpose of an investigation into whether she was driving while impaired. He placed her in the police vehicle and then smelled alcohol coming from her. Satisfied that he had sufficient reason, he read the ASD demand to the respondent. After she failed the screening test, the respondent provided Breathyalyzer samples that resulted in the charges. The first count was stayed. The trial judge found that the officer had unlawfully detained the respondent. Although the traffic stop was valid, there was no basis in law for him to detain her beyond the stop and thereby he had breached s. 9 of the Charter. She found that the officer did not have authority to detain in the circumstances under either the common law as set out in Mann or under s. 254(2). When the officer could not confirm the information given by the security officer's report of impairment in the initial stop, he should have let the respondent go. Further, the judge found as a fact that the officer had not informed the respondent of the reason for her initial detention. He used it as an opportunity to gather further grounds for his action and thereby breached s. 10(a) of the Charter. The officer had also violated s. 8 of the Charter because the case was analogous to a warrantless search based upon an anonymous tip, since there was no evidence as to why the officer believed the information from the security officer was reliable. Performing the Grant analysis, the judge determined that the Certificate of Analysis should be excluded under s. 24(2) of the Charter, primarily because of the arbitrary detention. The Crown's case in the appeal was that judge's treatment of the common law concept of investigative detention was flawed.
HELD: The appeal was allowed. The court found that ss. 8, 9 and 10(a) of the Charter had not been breached. The acquittal was set aside, a guilty verdict entered under s. 686(4)(b)(ii) of the Code and the matter remitted to Provincial Court for sentencing. It found that the trial judge had erred by misapplying the concept of investigative detention, disregarding the guidance provided in Chehil. Although she correctly identified the essential question whether the detention was lawful, as prescribed in by the two-part test set out in Mann, she apparently accepted the officer had a reasonable suspicion, but erred in applying the test's second part by understating the extent to which the officer's reasonable suspicion could permit him to detain the respondent and to pursue only a minimally intrusive investigation that would likely resolve the question. This error then impacted on the judge's findings of breach of ss. 8 and 9 of the Charter. The respondent's detention in the police vehicle was authorized by law as were the investigative actions that followed. Respecting the finding of

the s. 10(a) breach, the court found there was no evidence on which to base it. However, the burden of proof rested on the respondent to prove an alleged Charter breach, and she failed to meet it.

© The Law Society of Saskatchewan Libraries Back to top

N.M. v T.M., 2021 SKQB 83

Richmond, March 23, 2021 (QB21078)

Family Law - Child Support - Federal Child Support Guidelines

The applicant, T.M., the respondent in a petition for divorce brought by N.M., applied for child support for their child, P.P.-M. The amount of child support to be paid was to be determined by reference to the Federal Child Support Guidelines (Guidelines) with particular emphasis in this case to ss 10 and 19(1)(a). T.M. claimed that income should be imputed to N.M. because he intentionally became unemployed at a time when he had an obligation to pay child support for P.P.-M. N.M. resisted the imputation of income to him, and also claimed he should pay support in an amount less than the Guidelines indicated because of undue hardship. Though the evidence was lacking in support of some of N.M.'s claims, the court found that N.M. met a new partner prior to the summer of 2019, at which time he was employed by a power line construction company (HPLC) in Regina. He earned $ 90,000.00 in 2018 and $77,667.00 in 2019 from his employment there. In the summer of 2019, N.M., and his new partner, C.K., moved to Avonlea, which required N.M. to commute to work. In August 2020 he quit HPLC, claiming he was tired of the commute and its cost, and could no longer do the job, though he filed no evidence to establish that. N.M. took a job with a tow truck company in Avonlea, which lasted for three months. He then filed for EI. A child was born to N.M. and C.K. on August 23, 2020, suffering from a genetic condition which required much medical treatment and hands-on care, though N.M. filed no evidence concerning the child's specific medical condition and needs. Initially N.M. and C.K. had not planned for N.M. to remain at home with the child, but when the application for child support for P.P.-M. was brought, the new plans were put into place, and C.K. would not provide childcare, but instead would go to school.
HELD: The judge ruled that income be imputed to N.M. pursuant to s 19(1)(a) Guidelines on a three-year average of $75,531.00. She found that his decision to quit a high-paying job was unreasonable in the circumstances, considering he chose to move to Avonlea, forcing him to commute, and in any event, his financial obligations to his children were paramount and superseded all else. She relied on Pontius v Murray, 2011 SKCA 121 and Peterson v Merk, 2013 SKQB 156 in her determination of the relevant factors to be

considered under s 19(1)(a) in finding that N.M.'s decision to quit his job with HPLC could not be justified based on the needs of the child. As to the undue hardship argument permitted by s 10 of the Guidelines, the judge found first that N.M., on the financial evidence available, had not met the onus placed on him to satisfy the threshold requirement that his imputed income was not sufficient for him to manage his financial obligations as they presently existed. In making this ruling, she relied on the reasoning in Lonsdale v Evans, 2020 SKCA 30. She set the Guideline child support award at $639.00 per month commencing September 1, 2020.

© The Law Society of Saskatchewan Libraries Back to top

Van de Voord v Van de Voord, 2021 SKQB 86

Elson, March 25, 2021 (QB21094)

Family Law - Child Support - Interim - Variation
Family Law - Spousal Support - Interim - Variation
Statutes - Interpretation - The Family Maintenance Regulations, 1998, Section 21.33

The petitioner applied for orders to: 1) rescind a recalculation decision issued in December 2020 by the Saskatchewan Child Support Recalculation Service (SCSRS); 2) vary the support provisions of the 2019 consent order with respect to the amount of support payable by the respondent; and 3) impute annual income of $77,000 to the respondent for the purpose of making the varied support order. After the parties' separation in 2017, the petitioner issued her divorce petition in February 2019 and then applied in late 2019 for a parenting order regarding the one child of the marriage, who had his primary residence with her, and for spousal support. The petitioner's affidavit in support of the application projected her annual income for 2019 to be $25,950. The respondent's income for the two years previous to 2019 showed his income to be $62,375 and then $69,525. The application was never argued, as on the return date the petitioner's counsel presented a draft consent order and the judge directed it to issue that day. The order: (i) did not state it was an interim order; (ii) established the respondent's income as $69,525 and did not identify it as imputed income; (iii) directed the respondent to pay child support of $584/month and spousal support of $123.50/month; and (iv) provided for recalculation pursuant to The Family Maintenance Act, 1997 and The Family Maintenance Regulations, 1998. In late 2020, the respondent availed himself of the recalculation option that resulted in the SCRS's decision to reduce child support to $435/month based upon the respondent's updated income information that indicated a Guideline income of $53,365 based upon his 2020 earnings. In support of this application, the petitioner's information

concerning her 2020 income indicated that it would be $34,990. The respondent's 2019 income tax return showed employment income of $57,110. In response, the respondent supplied the information that he had earlier provided in his request to the SCSRS for recalculation. He projected his 2019 income at $55,171 and explained the drop was due to being on stress leave for six months and receiving 60 percent of his salary under short-term disability insurance. He also advised that he had been laid off temporarily for seven months in 2020 due to the pandemic and during this period had received either a supplementary employment benefit from his employer or Employment Insurance benefits. The petitioner did not accept the SCSRS decision. She argued that the 2019 consent order was based on imputed income, and that that was so because the respondent consented to the imputation; thus, the order was not eligible for recalculation. In requesting a variation in support payments, the petitioner submitted that there had been a material change in circumstances since the order because the respondent had: remained intentionally underemployed without providing an explanation or justification; failed to meet his support obligations; and applied for recalculation knowing that the order was ineligible. Her need for spousal support had increased due to such events as the loss of Employment Insurance top-ups and higher living costs.
HELD: The application was dismissed in its entirety. The court determined that the order was interim in nature and found with respect to each aspect of the application that: 1) the SCSRS decision could not be rescinded. After reviewing the Regulations, it found that s. 21.16(2)(b) did not apply here because the consent order, prepared by the petitioner's counsel, contained no express wording that the respondent's income was imputed and consequently, recalculation was available. The evidence presented in the 2019 application did not support that the order was determined on imputed income; 2) the application to vary could not succeed under ss. 17(1) and 17(4.1) of the Divorce Act. The petitioner's allegations against the respondent, suggesting blameworthy conduct, did not demonstrate the type of change that would warrant variation of a support order, particularly respecting spousal support. The evidence adduced by the respondent did not justify an imputation of income to him. Different considerations might apply at trial. Although costs of $5,000 were requested by both parties, the amount was unnecessarily punitive given their limited means. The petitioner's application was ill-founded on both aspects and costs of $1,500 were justified and awarded to the respondent.

© The Law Society of Saskatchewan Libraries Back to top

R v Jackson, 2021 SKQB 87

Currie, March 26, 2021 (QB21095)

Statutes - Interpretation - Traffic Safety Act, Section 2, Section 137, Section 241.1(2)

The appellant appealed his conviction of driving a vehicle while holding, viewing, using or manipulating an electronic device contrary to s. 241.1(2) of The Traffic Safety Act. The appellant had stopped and parked his vehicle at the roadside in compliance with directions from the police. While he awaited an officer coming to the vehicle, the appellant picked up his cell phone from the console and looked at it and then placed it between his legs. The trial justice of the peace found that the appellant had held and viewed the phone while the vehicle was not in motion. In the context of s. 241.1(2) of the Act, the justice concluded that the sense of "driving" included being in control of a vehicle while stopped and parked at the roadside. The appellant argued that in those circumstances, it cannot be said that the driver of the vehicle is "driving a motor vehicle on a highway" based on the common usage of the word "driving" or as defined by Black's Law Dictionary. The Crown submitted that under s. 137(b) of the Act, the definition of driving includes having care or control of a vehicle whether it is in motion or not.
HELD: The appeal was allowed and the conviction and sentence were set aside. The court found that the trial justice of the peace erred in law in his interpretation of s. 241.1(2) of the Act. Under s. 2(1)(y)(ii) of the Act, the definition of "parking" applied in the circumstances of this case: the appellant's vehicle was standing on a highway in obedience to the directions of a police officer. A vehicle cannot be parked and at the same time, be being driven. The definition of driving given in s. 137(b) only applies to Part XIII of the Act and as s. 241.1(2) is in Part XVI, the definition did not apply.

© The Law Society of Saskatchewan Libraries

Back to top

Restaurant Sahib Jee Inc. v Prairie Oasis Travel Plaza Inc., 2021 SKQB 88

Layh, March 26, 2021 (QB21096)

Landlord and Tenant - Commercial Lease - Breach - Termination - Application for Relief from Forfeiture

The plaintiff applied for relief from forfeiture under a commercial lease with his landlord, the respondent, under s. 10(3) and (4) of The Landlord and Tenant Act. The parties signed a five-year lease in August 2019 respecting restaurant premises where the respondent operated a gas bar and gift shop in a portion of the same building. They also agreed orally that the plaintiff and his family would rent a residential unit on the property monthly. The lease payments would be based on 15 percent of the plaintiff's gross sales. If rent was not paid, the lease allowed re-entry 30 days afterward. The method of recording was through the plaintiff's register for restaurant sales and payments and the gross sales amount was integrated with the respondent's computer

system that could generate an invoice. The only sales that the plaintiff did not account for were the meals purchased by the respondent's principal and his family, which were paid for by cheque each month. The plaintiff paid the rent until the rise of COVID-19 caused the restaurant to close from mid-March to mid-June 2020. In June and July, rent was reduced due to the federal rent relief program, but when it ended and sales were slow in the fall, the plaintiff deposed that the respondent was unhappy with the amount of rent being paid. After the respondent failed to provide an invoice for November, the plaintiff's lawyer wrote to inquire why and indicated the appropriate rent payment. He suggested that the respondent's threat to terminate the lease was groundless. The defendant's lawyer responded that termination would be justified because the plaintiff had been deleting food sales and owed the respondent for them. As well, the amount of the defendant's principal's family meals should have been entered into the till and the rent for that was $588 which was in arrears. The plaintiff explained that sales receipts were only deleted when errors had been made and that it would pay the $588, although it had been the parties' previous practice to bill the sales separately. The defendant's lawyer stated in late December that the plaintiff owed $1,407 in non-accounted-for sales. The conflict between the parties was not resolved and the defendant pressured the plaintiff to sign a new lease. The plaintiff's lawyer indicated that if the defendant terminated the lease, it would apply for relief from forfeiture. The defendant indicated on December 24 that the lease had been breached because of the non-payment of unaccounted sales and the amount owed for the defendant's meals and it was giving 11 days' notice. It locked out the plaintiff, shut off the power and changed the access code to the residential unit on January 21, 2021. It reopened the restaurant on January 30, apparently operated by the respondent. The plaintiff averred that it would pay the $588 and alleged non-paid rent of $1,407 and the reason for the termination was the defendant's dissatisfaction with the lowered gross sales' effect on the amount of rent. The issues were: 1) whether the defendant properly terminated the lease and re-entered the premises; and 2) whether relief from forfeiture should be granted.
HELD: The plaintiff was granted relief from forfeiture. It was granted immediate possession of the restaurant premises on the condition that it pay the sum of $588 to the defendant and $1,407 into court, to be paid out as the parties might agree or as the court might order. The parties were encouraged to consider how to record gross sales accurately to their mutual satisfaction. The court found on the evidence that the plaintiff paid its monthly rent punctually and tried to pay the November rent in the absence of an invoice. However, it could not determine whether the amount of gross sales had been misdescribed by the plaintiff on the evidence provided. The plaintiff's affidavit stated that the defendant had repeatedly asked that a new lease be signed on a fixed rent amount but the defendant had not sworn an affidavit to disavow this. However, because the ambiguity respecting the amount of gross sales was apparently only raised in the December 24 letter, and neither the 30 days of breach under the lease nor the two months of breach under the Act had expired before the defendant terminated the lease, it was an improper termination. Therefore, granting the application for relief was a foregone conclusion. If the lease had been breached, the breach was minimal and the plaintiff had dealt with

the matter of rent expeditiously. There was no intervening tenant and the defendant had not provided any evidence that a new third-party tenant would be caught unawares by this application, so there was no impediment to allowing the plaintiff back into possession. As well, the relocation of the plaintiff's principal and his family and their reliance on the income from the operation of the restaurant when other employment opportunities during COVID were so limited were considered in equity as lying in favour of the request from forfeiture.

© The Law Society of Saskatchewan Libraries Back to top

Cao v Saskatchewan (Economy), 2021 SKQB 91

Scherman, March 30, 2021 (QB21097)

Administrative Law - Judicial Review - Procedural Fairness - Breach of Duty

Eight separate applicants, all Chinese nationals, sought judicial review of decisions made by administrative officials of the Saskatchewan Immigrant Nominee Program (SINP) dismissing their respective applications for nomination by Saskatchewan to Canada for permanent resident status in Canada under Canada's economic immigrant legislation. The applications were heard simultaneously. Two of the applicants had their applications rejected by a reviewing officer at the Expression of Interest (EOI) phase of the SINP application process on the grounds that they had not met the requirement to have made an "exploratory visit" (EV) prior to submitting their EOIs, and thus did not have sufficient qualifying points on a criteria grid to be selected for participation in the program. After the applicants' challenge of it, the initial decision was reviewed by the SINP and upheld because the reviewing officer had completed the assessment with due diligence and against published program policy, guidelines and requirement. The applicants were informed they could submit a new EOI for consideration at any time. The applicants argued that an email they received from an SINP official showed that the program had changed its requirement to add the EV after they applied. The other six applicants' applications had progressed to the point in the process where they were interviewed by SINP officials regarding their knowledge of the contents of their proposed Business Establishment Plan (BEP). After their respective interviews, their applications for nomination were dismissed on the grounds that they had failed to demonstrate sufficient knowledge regarding their BEP. These applicants also obtained a review of the initial decision of ineligibility. After review of the original application materials and the reviewing officer's assessment of the information, the initial decision was upheld. The applicants were informed they could submit a new EOI for consideration in a future invitation. These applicants argued that their interviews had

been cursory and contained incoherent questions. All of the applicants argued that they were denied procedural fairness by reason of SINP's failure to follow its own mandate procedures or requirements and regardless, the decisions made were unreasonable.
HELD: All of the applications were dismissed. The court found no denial of procedural fairness had occurred and that all of the decisions in question were reasonable. In its preliminary consideration of the applications, it determined that all of the affidavit evidence submitted by each of the applicants and the respondent were inadmissible as their contents did not fall within a permissible exception to the rule that affidavit evidence is not admissible on a judicial review application. It identified the standard of review applicable to judicial review as recently clarified by the decision in Vavilov, reviewed the background to the SINP as described in Feng (2020 SKCA 6), and then considered the SINP and the applications pursuant to the five factors set out in Baker ([1999] 2 SCR 817). It then found that the process and decisions made in this case fell at the lowest end of the spectrum for procedural fairness and required the minimal procedural safeguards. In the case of all of the applications, it concluded that there had been no breach of an obligation to provide an appropriate level of procedural fairness. It rejected the interpretation of the email from the SINP official submitted by the two applicants regarding EVs. The decision made following the review of the initial decision respecting the EOIs respectively was both reasonable and correct. The decisions made following the review of initial decisions respecting the BEP and interview were justified, transparent and intelligible.

© The Law Society of Saskatchewan Libraries Back to top

Abbey Resources Corp. v Saskatchewan Assessment Management Agency, 2021 SKQB 100

Brown, April 7, 2021 (QB21090)

Statutes - Interpretation - Municipalities Act, Section 195(5)
Municipal Law - Assessment Appeal - Saskatchewan Assessment Manual

The plaintiff, an owner and operator of gas wells in Saskatchewan, challenged the Saskatchewan Assessment Manual prepared by the defendant, the Saskatchewan Assessment Management Agency, as it related to the assessment of certain of the plaintiff's assets. Pursuant to s. 16.1 of the Municipal Board Act, it applied by originating application for judicial review, seeking: a declaration that the manual is inconsistent with s. 195(5) of The Municipalities Act (MA); an order quashing or setting aside relevant parts of the manual limiting depreciation of gas wells by 40 percent plus 10 percent production downtime allowance; and the incorporation of "end of life obligations" in the assessment of gas wells in the manual. The parties agreed that the manual

was applied to the plaintiff's assets in accordance with its terms but the plaintiff took issue with the terms of, and approach to, the assets dictated by the manual. It had purchased 2,200 wells from two companies for $10. Although the wells were operating at a loss when the plaintiff purchased them in 2016, the plaintiff believed it could make a profit through the use of new technologies and after its first year, it had operated them at a break-even basis, aside from municipal taxation. It submitted that it might not be able to continue to operate the wells if the municipal taxes assessed via application of the manual continued at the very high current rates. It maintained that the defendant's assessment vastly exceeded the actual value of the wells and did not include any end of life costs. The manual did not treat its non-renewable and depleting assets any differently than assets which do not deplete and are renewable. The defendant acknowledged that the manual does not apply a fair or market value to the type of assets owned by the plaintiff because it uses two valuation standards for property appraisals in the province. Gas wells are classified as regulated property, and thus it applies Regulated Property Assessment Standards to them. Gas wells are referred to as resource production equipment (RPE) and the defendant uses and must use mass appraisal techniques for such assessments. The primary issue was whether the manual was inconsistent with s. 195(5) of the MA. The plaintiff argued that the tax levy to which it was subject was much higher than it believed was fair, just or reasonable, and therefore not equitable as required by s. 195(5). The parties agreed that the issue would be decided with reference to "equity."
HELD: The application was dismissed. The court found that standard of review applicable to the determination whether the respondent had created a manual inconsistent with provincial legislation was correctness, following Double Diamond Ranch (2002 SKCA 62). It determined that the manual was not inconsistent with s. 195(5) of the MA. The statutory provisions require that "equity" must be achieved in the assessment process specify that "equity," when considered in the context of regulated property assessments such as this, is achieved by applying the regulated property assessment valuation standard uniformly and fairly. This has been consistently interpreted as being the same vis-à-vis one property when compared to another similar or like property. The plaintiff had not provided any authorities that could permit considering such features as end of life obligations in the assessment process, including creation of the manual. The plaintiff had not shown any inconsistency in the application of the manual's provisions to its properties, nor that they had been treated differently from any other properties of the same type owned by others.

© The Law Society of Saskatchewan Libraries

Back to top

A.G. v J.G., 2021 SKQB 101

Robertson, April 7, 2021 (QB21091)

Family Law - Child Support
Family Law - Spousal Support

The petitioner wife sought orders for divorce, child and spousal support, both current and retroactive, and division of family property. The parties began living together in 2006, married in 2007 and their son was born in 2009. During the marriage, the respondent was employed as an RCMP officer and the family moved a number of times to accommodate his career. The petitioner was also employed throughout the marriage, with the exception of maternity leave. The parties separated in 2016. The respondent moved to Regina to take up a new post at the RCMP Depot. The petitioner remained in the family home in Assiniboia with their son, where they continued to reside. Various interim applications had been made since the separation, notably by the petitioner in 2018. The petitioner applied for interim support at that time because the respondent was not paying support regularly and failed to pay the mortgage or taxes. The judge ordered that the parties would have joint custody with the petitioner having primary care of their son and, based upon the incomes of the respondent of $107,190 and the petitioner of $24,695, the respondent was ordered to pay child support of $919 per month and 81.28 percent of s. 7 expenses. The petitioner was given exclusive possession of the family home. As the home and the mortgage were registered in the sole name of the respondent, the judge ordered him to pay spousal support of $1,400 per month to enable the petitioner to pay the mortgage and home expenses out of it. At trial, the issues were how much money the parties earned to determine the amount of child and spousal support and how much the family property was worth. The respondent did not provide net family property value in his property statement but showed debts of $367,900 that he argued should be deducted from the property division and sought an unequal division of his pension because of his debts. The petitioner's statement supplied the net family property as $106,316 and her debts as $286,388. After the trial, the respondent applied to re-open it to allow him to cross-examine the petitioner about her relationship with her boyfriend. The only material filed in support was a recent Facebook post made by petitioner's employer, one of her witnesses at trial, that included a photograph of the couple that showed that the petitioner was pregnant. She had not divulged her pregnancy during the trial, although she and her boyfriend had testified about their relationship and it was established that she was not in a spousal relationship so as to affect her entitlement to spousal support. The respondent also suggested that the petitioner's failure to reveal her pregnancy brought her credibility into question and she should be further cross-examined.
HELD: The court granted a divorce to the parties and ordered the respondent to pay child and spousal support to the petitioner. The respondent was to keep the family home and the petitioner was to vacate it within 90 days of the order. It dismissed the respondent's application as it had not met the test for re-opening a trial. The petitioner was not obliged to volunteer the information that she was pregnant, and regardless, it would not have changed the result. Although the evidence might not have been obtained before trial through reasonable diligence, it was a possibility to consider since the respondent knew of the petitioner's current relationship. It assessed the petitioner as being more credible than the respondent and thus the latter's testimony was not

believed: for example, that the petitioner was equally liable for funds he had borrowed from his family, the values he ascribed to property and the accuracy of his financial summaries regarding support and expense payments. Regarding the income of each party, the respondent's salary for 2020 was $100,751 and it would increase with retroactive effect when the RCMP's new collective agreement was reached. Therefore, support payment amounts would then be adjusted. The petitioner's employment with a small radio station yielded income for 2020 of $41,000. She did not receive any benefits. Based upon the Guidelines, the respondent was ordered to pay $864 per month in child support. Because the petitioner had brought her application for interim relief as soon as she realized the respondent would not provide voluntary regular support for her and their son, the court awarded $3,000 to the petitioner in retroactive child support and $2,411 for past s. 7 expenses. The petitioner was entitled to spousal support in the mid-range of $782 per month for six years, granted on a compensatory and non-compensatory basis. They parties had cohabited for 10 years and the traditional roles they adopted in the marriage caused an economic disadvantage to the petitioner. She was in financial need and the respondent had the ability to pay. Her claim for retroactive spousal support was allowed in the amount of $12,000. She had had to pay the mortgage costs and property taxes from the $1,400 in interim support awarded to her in 2018 and that amount was much less than what would be payable under the Guidelines. Respecting the division of family property, it noted that the only significant assets to be divided were the respondent's pension and the house. Debt was not divisible as family property and because the parties had kept their finances separate during marriage, each would be responsible for their own debts. The petitioner was entitled to an equal division of the respondent's pension for the 10 years of cohabitation. For various reasons, it found that there were extraordinary circumstances under s. 22 of The Family Property Act and determined that the family home should not be divided equally. As there was little equity, selling the house might result in a loss. By retaining the house, the respondent would have an asset that might increase in value, and if not, he would be eligible for subsidization through the RCMP relocation policy at the time of his next transfer if the house was still owned by him and claimed as his principal residence.

© The Law Society of Saskatchewan Libraries Back to top

R v Kelln, 2021 SKPC 29

Rybchuk, April 19, 2021 (PC21019)

Criminal Law - Motor Vehicle Offences - Driving While Impaired
Constitutional Law - Charter of Rights, Section 9

The accused was charged with impaired driving and refusal to provide a breath sample in April 2020. The defence brought a Charter application, alleging that the accused's s. 9 Charter rights had been breached by the police, and requested the remedy of exclusion of evidence pursuant to s. 24(2) of the Charter. At the voir dire, two Crown witnesses testified. The first was a woman who had observed the accused while they were both stopped in the parking lot at a liquor store. She testified that he stumbled and swayed while walking and mumbled when he spoke. Believing he was inebriated, she called 911 and continued to watch the accused when he emerged from the store and then struggled to get into his vehicle. She stated that police cruisier began following him as soon as the accused left the parking lot and noticed that he turned right and drove the wrong way down a one-way street, although the dash camera footage from the police cruiser indicated that the accused turned in the correct direction of traffic. The officer who was following the accused testified that the accused's driving was erratic but this view was not supported by the police cruiser's video footage. After the accused stopped his vehicle, the officer's description that he had trouble getting his attention at the driver's window was at odds with the video as well. During their conversation, the accused told the officer he had not had anything to drink that night. He said that the accused asked him many times if he could smoke but officer refused his request saying that he could not have anything in his mouth if a breath sample were needed. The officer noted the accused's speech was slurred and his pupils were dilated but noted no odour of alcohol. He said he asked the accused to walk to the police cruiser to gauge his ability to walk but did not inform him that he was participating in a sobriety test. The officer explained that was his usual practice during impaired investigations. He observed the accused as unsteady, taking wide steps and bumping into the cruiser. The video did not confirm this description. The constable admitted that during the sobriety test, he had still not formed the reasonable suspicion to make an ASD demand. At the police cruiser, while very close to each other, the officer's evidence was that he still could not detect an odour of alcohol. He performed a brief pat down search of the accused, directed him to sit in the back of the cruiser. He testified that he did so to try to detect the smell of alcohol, this too was his standard practice, and he still had not formed a reasonable suspicion to make an ASD demand. The accused sat down with one leg outside the vehicle and the officer told him to get in and began to shut the door. The accused stood up and out of the vehicle and asked if he was being arrested. While the officer was saying that he hadn't decided yet, the accused stepped further away from the cruiser and within seconds, the officer announced that he was now under arrest. The officer could smell alcohol for the first time when he handcuffed the accused. Following this, the officer said that he refused the accused's request for a cigarette six times but in cross-examination, he admitted that the accused had only asked twice before and once in the police cruiser. Another officer arrived on the scene and testified that he did not note the accused exhibiting any indicia of impairment there or during the time at the station. After he had spoken to legal counsel at the station, the accused was placed in the Breathalyzer room and instructed to blow by the arresting officer. He made four unsuccessful attempts and was warned of the penalty. The officer explained why each of the previous attempts failed and the accused expressed willingness to provide a sample. He was about to do so

when the instrument timed out. After being formally charged with refusal, the accused asked about being released. None of the people that the officer called to pick up the accused answered their phones, so the accused was booked into the cells where he remained for the next six hours. The officer testified that the police need to ensure that when they release someone, they can look after themselves. He could not watch the accused to see if he could be released sooner during the hours remaining in his shift as he had to complete his report. The parties agreed that the initial traffic stop and detention was a lawful execution of the officer's police duties in responding to a complaint of an impaired driver. The Crown argued that the officer was exercising his investigative powers of detention at common law regarding his subsequent conduct. The issues were: 1) whether the accused's s. 9 Charter rights were violated at the roadside; 2) whether the officer had sufficient grounds to place the accused under arrest and demand a breath sample; 3) if the accused's s. 9 rights were breached, what was the appropriate remedy; 4) whether any of the roadside evidence was compelled and not admissible at trial; and 5) whether the accused's s. 9 Charter rights were violated when he was held overnight. HELD: The Charter application was granted on the ground that the accused's s. 9 Charter rights were violated and certain evidence was excluded under s. 24(2). The court questioned the overall accuracy and reliability of the observations of the witness who reported the accused to 911 as well as the evidence of the arresting officer. The court found with respect to each issue that: 1) the accused's s. 9 Charter rights had been breached. He had been arbitrarily detained by the officer outside his vehicle and again when the officer told him to sit in the police cruiser. The officer was permitted at common law, under the ancillary powers doctrine set out in Fleming, to detain the accused outside of his vehicle to further his impairment investigation and had met the three-part test set out in MacDonald (2014 SCC 3). Although it rarely occurs, the officer in this case failed to articulate his subjective suspicion but provided sufficient evidence establishing grounds for a reasonable suspicion, and therefore the absence of subjective suspicion made the detention of the accused outside of his vehicle arbitrary. The officer's next detention of the accused in the police cruiser was also arbitrary as it was not reasonably necessary as established in Aucoin (2012 SCC 66). His reason for placing the accused in the vehicle was to enable him to detect the smell of alcohol. This could have been achieved by less intrusive means by asking the accused to blow into his face. Moreover, the odour of alcohol is not a requirement for establishing the reasonable grounds to make an ASD demand; 2) the officer did not have grounds to arrest the accused under s. 495 of the Criminal Code or demand a breath sample under s. 320.28 of the Code. It found that the officer repeatedly stated that he did not have the reasonable suspicion necessary to make an ASD demand. If he did not subjectively believe that he had met the lower standard of reasonable suspicion needed for the ASD demand, he could not have believed that he had met the higher standard of reasonable grounds to believe his ability to operate a vehicle was impaired by alcohol necessary to make an arrest and Breathalyzer demand. The evidence showed the decision to arrest was made in a few seconds when the accused stepped out of the police cruiser; 3) it would exclude all of the evidence from the trial proper following the direction to the accused to exit his vehicle. To do otherwise would bring the administration of justice into disrepute in light of

the police conduct. After applying the Grant analysis, the court assessed the breach of putting the accused in the police cruiser as serious, following Aucoin, and in this case, it was aggravated by the fact that the officer did not have reasonable grounds to do so and was following his standard practice that showed a pattern of disregard for Charter values. The breaches in this case were deliberate and continuing and had a serious impact on the accused's liberty. Society's interests in prosecuting impaired drivers weighed only slightly in favour of excluding the evidence; 4) the evidence that could be excluded from the evidence in the trial proper consisted of all indicia of impairment gathered after the accused was directed to leave his vehicle because of the breach. All of the evidence gained from that point met the "obtained in a manner" requirement of s. 24(2) of the Charter. Respecting the issue of compelled evidence, it found that the evidence gathered by the officer after directing the accused to leave his vehicle was for the purposes of an informal sobriety test. Had this conscripted evidence been accepted, it would have constituted compelled evidence admissible for the purposes of establishing grounds for arrest and the breath demand in the voir dire, but not admissible for proof of guilt of the offence of impaired driving at trial; and 5) the accused failed to demonstrate that the detention at the police station was arbitrary. The officer took reasonable steps to attempt to find a person to take responsibility for him.

© The Law Society of Saskatchewan Libraries

Back to top