Case Mail

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Turtle v Valvoline Canadian Franchising Corp., 2021 SKCA 76

Richards Jackson Kalmakoff, May 17, 2021 (CA21076)

Appeal - Interlocutory injunction

The appellants, Kara Turtle (K.T.), and two corporations, Sneer Enterprises Ltd. (Sneer) and Dad's Oil Change Ltd. (Dad's), appealed the decision of the chambers judge granting a mandatory injunction against them in favour of the respondent, Valvoline Canadian Franchising Agreement (Valvoline), the successor corporation to The Great Canadian Oil Change Franchising Ltd. (Great Canadian), which enjoined them from operating their business before trial. The appellants operated an automotive oil change business on Nelson Road in Saskatoon, and Valvoline claimed their business was being conducted in breach of a restrictive trade covenant made between Sneer and Valvoline (the Nelson Road Agreement) (See: QBG 476/20, Saskatoon). The sole shareholder, director and officer of both Sneer and Dad's was K.T. Great Canadian and Sneer had executed a franchise agreement pertaining to the Nelson Road business which expired on October 2, 2017, though the

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Arcand v Atsu

business continued to be carried on under the Great Canadian banner. Dad's was incorporated in September 2019. In February 2017, Sneer entered into a franchise agreement with Valvoline to operate a Great Canadian Oil Change business on Warman Road in Warman (the Warman Agreement), which contained the same restrictive trade covenant as the Nelson Road Agreement. Soon after Dad's was incorporated, Sneer transferred its assets to it, and Dad's continued to operate under the Great Canadian banner without the consent of Valvoline. K.T. executed the Warman Road Agreement on behalf of Sneer and did not sign as a guarantor of Sneer for performance of its obligations under the Warman Road Agreement. Sneer was named the franchisee in it. The chambers judge ruled that the respondent had demonstrated a strong prima facie case that K.T. was personally bound by the terms of the Warman Road Agreement, accepting the arguments of the respondent that, by the terms of article 15.21 and Schedule "A" contained in the Warman Road Agreement, it appeared that she had agreed to be bound by the restrictive trade covenants in it. The article and schedule relied upon by the respondent before the chambers judge pertained to a representation by Sneer that K.T. was an owner-operator of the business on Warman Road who "shall participate actively on a full-time basis in the management and operation of the business" and that K.T. was "bound by the covenants contained in this Agreement."
HELD: The appeal court, speaking through Richards C.J.S., allowed the appeal, deciding that the chambers judge had erred in principle by exercising her discretion in favour of the respondent by finding it had made out a strong prima facie case that K.T. had personally bound herself to the restrictive trade covenant. Essentially, the court reasoned that the chambers judge had ignored the fundamental and largely inviolable principle that a corporation has a separate existence, is a legal person, and that the fact that K.T. was the sole shareholder, director, officer, and operating mind of Sneer could not displace this bedrock doctrine. She did not guarantee Sneer's compliance with the Warman Road Agreement. Article 15.21 and Schedule "A" bound Sneer, not K.T. Though Sneer was clearly bound by the restrictive trade covenant, its actions might not amount to breaches of that covenant at trial and did not amount to a strong prima facie case, which is one "of such merit that it is very likely to succeed at trial." (See: R v Canadian Broadcasting Corp., 2018 SCC 5.)

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Arcand v Atsu, 2021 SKCA 81

Caldwell Leurer Tholl, May 21, 2021 (CA21081)

Family Law - Access and Custody - Interim - Appeal
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Carter v Canada (Attorney General)

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Turtle v Valvoline Canadian Franchising Corp.

The appellant mother appealed the decision of a Queen's Bench judge to grant the respondent's application pursuant to The Children's Law Act, 1997 for joint custody, primary residency and an order requiring the appellant to return the parties' eight-year-old daughter to Regina from Swift Current. Amongst other terms, the order specified that the child would reside primarily with the appellant if she relocated to Regina by February 1, 2021 and otherwise, her primary residence would be with the respondent. The issues of the child's primary residence and its location were set down for resolution in an expedited pre-trial conference. The orders had been stayed when the appeal was filed. The parties separated before their child was born in 2012. The appellant had been her sole caregiver until July 2016 when she moved with her from Alberta to Regina to enable the respondent to have greater access. The appellant deposed that during the next four years, she continued to have primary responsibility for the child and that the respondent's parenting time was sporadic, a claim that the respondent rejected, saying he was a very involved parent. When the appellant and her new partner learned that she was expecting a baby, she began planning a move to Swift Current where her partner resided. She averred that she advised the respondent in May 2020 that she and their daughter would be relocating there in the fall, that he accepted this change and she understood it constituted his consent to the move. In September 2020, the respondent revoked his consent. The respondent disputed this version and said that he told the appellant in mid-July 2020 that he did not agree to the move. The appellant appealed on the grounds that the chambers judge: 1) misapprehended the affidavit evidence when he found that the respondent had not consented to the child's relocation to Swift Current; and 2) failed to address whether it would be in the child's best interests to place her in the respondent's primary care if the appellant declined to return to Regina with her.

HELD: The appeal was dismissed. The chamber judge's fiat was amended so that the reference in the order to July 5, 2021 was changed to February 21, 2021. The matter should proceed to pre-trial settlement conference as ordered by the judge or to trial on the issue of the child's relocation. The court stated that the standard of review respecting the judge's finding and inferences of facts was that of deference, absent palpable and overriding error. It reiterated its reluctance to interfere in interim orders of this sort and that interim relocations by a custodial parent are allowed only in compelling circumstances. It found with respect to each issue that the chambers judge had: 1) not made a palpable or overriding error that would permit the court to interfere. The judge inferred from the evidence that the appellant made a unilateral decision to relocate. There was no evidence of express consent and he was not persuaded that the respondent had tacitly consented. Even if it found that the judge made a palpable error in drawing the inference, it would not have overridden the result in this case as the respondent had clearly withdrawn his consent by the time of the hearing; and 2) not erred. He canvassed the relevant factors before concluding there were insufficient grounds to uproot the child from her life in Regina. He did not assess the evidence of the child's relationship with the respondent but there was no evidence that he could not meet the child's needs or that she would be harmed in his care. The judge also observed that moving the child would impede her contact with the respondent. Although the evidence

established that the appellant was the child's primary parent, that finding was not dispositive of whether she should be permitted to relocate with the child.

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R v John, 2021 SKCA 83

Schwann Barrington-Foote Kalmakoff, May 28, 2021 (CA21083)

Criminal Law - Evidence - Identity of the Accused - Appeal

The appellant, W.F.J., was convicted after trial of two counts of break and enter to commit an indictable offence and one count of possession of stolen property. The trial judge made an identification of W.F.J. by comparing W.F.J. as he sat in court to purported images of him in video tape and photographic evidence from two crime scenes and a third location. Circumstantial evidence such as the make of a stolen truck at both crime locations, distinctive clothing worn by W.F.J., the presence of a female accomplice in the video evidence, the GPS tracking data of an SUV stolen from one of the crime scenes, and the tight timelines and route of travel of the person identified as W.F.J., was also adduced in support of his identification. The appellant appealed on several grounds which were all dismissed in turn, but the issue of whether the trial judge made a reviewable error with respect to the essential element of identity was the primary focus of the appeal.
HELD: The appeal was dismissed. The appeal court, under the pen of Schwann J.A., started its analysis by reviewing the law with respect to identification evidence, and for that purpose referred to the governing authority concerning videotape evidence, R v Nikolovski, [1996] 3 SCR 1197 (Nikolovski), as well as the helpful analysis of the types of identification evidence, and in particular recognition evidence, contained in R v Field, 2018 BCCA 253, 362 CCC (3d) 401 and R v Murtaza, 2020 ABCA 158. The court confirmed that there are three types of identification evidence: 1) eyewitness evidence by a stranger, 2) identification by the trier of fact, and 3) recognition evidence. In this case, identity was established by the trier of fact in court, though problematically, he also erroneously relied in part on the evidence of a police officer who, during the narrative about his investigative steps, and after being asked by Crown counsel to do so, compared a photo of W.F.J. pulled from police files with W.F.J. sitting in the dock. The officer did not know W.F.J. and had had no dealings with him. The court noted that the trial judge was satisfied the video tape evidence was of sufficient quality and clarity, providing him with a full, frontal facial view, and permitting him to make the in-court comparisons, and that he very attentively looked back and forth from the video clips to W.F.J. while they were playing. Nikolovski is authority for the proposition that videotape evidence may provide the sole basis for the

identification of the accused. Recognition evidence on the other hand is only valid and probative where the witness has had interactions and dealings with the accused to an extent which permits him or her to offer an opinion as to the accused's identity, and for such evidence to be admissible, a voir dire must be held to establish that the witness has sufficient personal knowledge to allow the evidence to be admitted. In the case under appeal, no voir dire had been held by the trial judge. The appeal court ruled that the trial judge put insufficient weight on the police file photo for it to have displaced his in-court identification based on the videotape evidence and remarked that the trial judge himself had said, even without seeing the photograph of W.F.J., that he was satisfied W.F.J. was the person in the video.

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R v K.D.S., 2021 SKCA 84

Jackson Barrington-Foote Tholl, May 28, 2020 (CA21084)

Appeal - Constitutional Law - Charter of Rights, Section 7 - Full Answer and Defence - Lost Evidence
Charter of Rights, Section 24(1) - Stay of Proceedings - Appeal

The Crown appealed a stay of K.D.S.'s jury trial ordered by the trial judge following an extensive voir dire in which all important Crown witnesses and K.D.S. testified. The voir dire was held primarily to determine, among other evidentiary issues, whether the failure of police to preserve videotape evidence of the respondent K.D.S. at the police station over the course of several hours, from numerous angles and places in the police station, constituted a breach of his section 7 Charter rights to a fair trial due to his inability to make full answer and defence to the charges as a result of the failure of the police to preserve the videotape evidence. K.D.S. was facing a jury trial for manslaughter and unlawfully causing the death by suffocation of his infant daughter in her crib at his residence. Throughout the proceedings, the Crown's theory was that K.D.S., who was 6' 4" tall, in an extreme state of intoxication by alcohol, entered the child's crib and laid on the child, causing her death by suffocation. There was no evidence that the crib was damaged from K.D.S being in it. Police relied on their observations of K.D.S. at the scene and later at the detachment to conclude he was heavily intoxicated at the time of the child's death, and also relied on the presence of an amount of urine on the plastic sheet in the crib too voluminous to be the child's, concluding it must have been that of K.D.S. Police did not take any steps to sequester the videotape evidence before it had been automatically overwritten despite being asked by defence counsel to provide any videotape evidence "connected with this matter." In his testimony at the voir

dire, K.D.S. denied being heavily intoxicated or entering the crib, and argued that the videotape evidence would have been highly relevant to his defence before a jury as it would have been capable of raising a reasonable doubt about the Crown theory if it failed to show that he was "hammered," that urine was on his clothes, or that he smelled of urine. The trial judge found the videotape evidence was highly relevant to K.D.S.'s potential defences; that the police failed to provide any explanation to rebut the presumption that their actions in losing the evidence constituted unacceptable negligence, and concluded K.D.S.'s s. 7 right to a fair trial was infringed. The trial judge then turned to the matter of the appropriate remedy for the breach as required by s 24(1) of the Charter, and concluded that, though he recognized that a stay of proceedings is an extraordinary remedy, he had no choice in this case but to order it. The breach of K.D.S.'s right to have a fair trial by being unable to make full answer and defence could not be remedied. There was no alternate way to correct the prejudice arising from the loss of the highly relevant evidence. The police did not suggest that there were any summaries of the contents of the video or whether it could be reproduced in some alternate way. As to whether he should reserve his decision on the stay until after the trial had been conducted, he determined that "that deficiency will stand as clearly and significantly at the conclusion of trial evidence as it does today." On appeal, the Crown argued that the trial judge erred in finding a breach of the respondent's s. 7 Charter right to a fair trial, and that if a breach was found, he committed an error of law by not considering possible alternate remedies other than a stay. The Crown also argued that the trial judge erred by not reserving his decision on both the breach of s. 7 of the Charter and the s 24(1) remedy until after the trial had been conducted.

HELD: The appeal was dismissed. The appeal court, speaking through Jackson J.A., reviewed the voir dire decision of the trial judge on a standard of correctness as it pertained to the breach of the Charter under s. 7, and reviewed the decision to grant a stay ahead of the trial on the standard applicable to the discretionary decisions of trial judges, quoting Moldaver J. in R v Babos (2014 SCC 16): "Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (Bellusci, [2012 SCC 44] at para. 19; Regan [2002 SCC 12], at para. 117; Tobiass, [1997 CanLII 322 (SCC), [1997] 3 SCR 391] at para. 87; R. v. Bjelland, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51)." In reviewing the arguments of the Crown related to the breach, the court gave primary consideration to R v Cathcart, 2019 SKCA 90, and found that the trial judge had properly instructed himself with respect to the correct process by which to determine the relevance of the lost evidence and also whether the loss of that evidence constituted unacceptable negligence, agreeing that the Crown theory of guilt made the videotape evidence highly relevant, and that the Crown had failed to put forward any explanation as to why the videotape was not preserved. It also found that the judge was correct in concluding that he was able to determine relevance on the voir dire evidence given its fulsome nature. As to the ruling that the only possible remedy to rectify this loss of evidence was to abort the trial, the

appeal court was not prepared to disturb his decision, ruling that, though a rare and extraordinary step, it was one that it was open for the trial judge to make on the evidence in this case.

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Cupola Investments Inc. v Zakreski, 2021 SKCA 86

Richards Leurer Kalmakoff, May 31, 2021 (CA21086)

Civil Procedure - Queen's Bench Rules, Rule 3-72(1), Rule 3-78, Rule 3-79, Rule 3-80, Rule 3-84(2)

The appellants, three general partners for and on behalf of three limited partnerships, appealed the decision of Queen's Bench chambers judge to dismiss their application to amend their statement of claim. The application, brought pursuant to Queen's Bench Rules 3-72(1)(c)(ii), 3-78(2) and 3-84(2), sought to add the appellants' former lawyer, Zakreski, as a defendant to a lawsuit they commenced in 2016 against the defendants/respondents that included former general partners, associated corporations and individuals, regarding the management of their investments. The original statement of claim included an allegation that a particular transaction, a "securities flip," constituted wrongful conduct. During the securities flip, Zakreski represented the plaintiffs, the prior general partnerships, and the remaining defendant corporations controlled by the individual defendants. The appellants deposed in their application that although they had obtained Zakreski's legal files in 2016 and 2017, they only learned of his involvement and potential conflict of interest in the securities flip during questioning in 2019 and from third-party document disclosure in 2020. The chambers judge reviewed the application as one made under Queen's Bench rule 3-78(2) that required him to exercise his discretion to add the party based on his assessment of the balance of convenience. He found that the plaintiffs had satisfied a number of the criteria in Queen's Bench subrules 3-78-2(a) to (d). He then selected and applied the two-step process set out in MFI Ag Services (2013 SKQB 161) regarding Queen's Bench subrule 3-78(2)(e) and found that adding Zakreski would not promote the convenient administration of justice. At the hearing of the appeal, the parties agreed that Zakreski was not a necessary party for the existing action. He conceded that if he had been named as a defendant originally, there would have been no basis on which the claim against him might be struck or severed from the claims made against the other defendants. The issues on appeal were: 1) what was the source of the court's discretion to authorize an amendment to a statement of claim to add a party; 2) what principles apply when a court considers whether to authorize such an amendment; and 3) whether the chambers judge should have made the order naming Zakreski as a defendant.

HELD: The appeal was allowed. The application was granted to add the proposed defendant. The court found with respect to each issue that: 1) the source of the court's discretion to amend pleadings and add a party is pursuant to Queen's Bench rules 3-72 and 3-84. The chambers judge erred by focusing on Queen's Bench rule 3-78; 2) a court must consider the principles behind the purpose of the amendment, whether the proposed amendment is a proper pleading, and whether it will cause prejudice to the other party that cannot be ameliorated. In order to reconcile Queen's Bench rule 3-72, which pertains to the determination of proper parties, and rule 3-84, which pertains to determination of necessary parties, the latter rule should be limited to situations involving misjoinder or non-joinder of a necessary party. Even where joinder is necessary under rule 3-84(2), the court must order it on any terms it considers just. The plaintiff's request for a proposed joinder should be permitted unless the court is satisfied that it would unduly complicate or delay the action or cause undue prejudice to a party. In this case, the chambers judge did not approach the proposed joinder of Zakreski in this way and applied the wrong test; and 3) the chambers judge should have ordered that Zakreski be added as a defendant. In light of the chambers judge's error, the court would make its own determination. It noted that since Zakreski conceded he could have been named when the statement of claim had first issued, then it could not be said that the joinder would unduly complicate or delay the action or unduly prejudice him so as to compel the making of an order under Queen's Bench rule 3-80. He had not suggested that there was any reason to deny the amendment except for the prejudice caused by missing mandatory mediation and the opportunity to watch questioning of other parties, and these matters could be remedied.

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R v Karuranga, 2021 SKCA 90

Jackson Whitmore Kalmakoff, June 11, 2021 (CA21090)

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

The appellant appealed his conviction on a charge of trafficking in cocaine contrary to s. 5(1) of the Controlled Drugs and Substances Act. The appellant brought a Charter application before trial, alleging breaches of his ss. 8 and 9 Charter rights. The appellant had been a passenger in a vehicle that was stopped by a City of Estevan police officer on January 10, 2018 and he was detained for 20 minutes without being advised of the reason while the officer called other officers for information. During an ensuing vehicle search, a small bag of marijuana was found on the passenger side. The appellant was arrested for possession. He was taken to the

police station where he was strip-searched and his mobile phone searched without a warrant. Before this incident occurred, the Estevan police had begun surveilling the appellant beginning in November 2017 and ending in March 2018 as part of an investigation into suspected drug trafficking. The police executed a search warrant for a residence because they had seen the appellant coming and going from it in a fashion they believed to be consistent with drug transactions. The appellant was found in the residence at the time of the search, sitting near a box containing marijuana. The officers located both clean and used plastic sandwich bags, a knife and a digital scale, all with white residue on them, which later reacted to the presumptive test for cocaine. They also found a tablet and a mobile phone. The day following the search, the officer answered a call on the phone and heard the caller ask for "five." That officer was the Crown's main witness on the cocaine trafficking charge and he testified as to general observations he made while conducting surveillance and during the search. He provided his opinion that certain behaviours exhibited by the appellant, items found during the search, and "five" meaning five packages of cocaine in the conversation intercepted on the appellant's phone were all consistent with drug trafficking. The Crown also called a witness who testified that he had purchased a small bag of cocaine from the appellant sometime in November 2017. With respect to the Charter breach allegations, the trial judge found that the appellant's s. 9 Charter rights had been violated by the roadside detention and his s. 8 rights were violated by the warrantless search of his phone. The judge concluded that although the breaches were serious, they had resulted from the officer's inexperience and were not intentional and the appropriate remedy would be to exclude only the evidence from the unlawful phone search conducted in January 2018. Regarding the charge of trafficking, the judge reviewed the testimony given by the police officer regarding the surveillance of the appellant and the search of the residence in which he was found, the interception of the call to the appellant's mobile phone on the day after the search and officer's opinion that the evidence was consistent with drug transactions and trafficking. Regarding the testimony of the witness who had purchased cocaine from the appellant, the judge was not satisfied that this transaction had occurred during the time frame specified in the indictment. He concluded, based on the cumulative evidence, that the appellant had trafficked and intended to traffic in cocaine. The appellant's grounds of appeal were that the trial judge made a number of errors in his treatment of the evidence and failed to grant a proper remedy for breaches of his rights under ss. 8 and 9 of the Charter.

HELD: The appeal was allowed and the conviction on the charge of trafficking in cocaine was quashed. The court found that the proper remedy under s. 686(2) of the Criminal Code was acquittal because to order a new trial would permit the Crown to correct the oversight it made in the first trial and because the appellant had already served his full sentence of 18 months less time on remand. It found that the trial judge had erred in by relying on evidence that was not properly admitted at trial. The Crown had not sought to qualify the police officer as an expert witness nor obtained a ruling from the judge permitting him to provide opinion evidence. The judge also erred by admitting and relying upon the officer's testimony regarding the incoming call because it was unqualified opinion evidence and inadmissible hearsay. Although the judge accepted the testimony of

the other Crown witness who purchased cocaine from the appellant, that evidence alone was not sufficient to sustain the verdict. The judge stated in his reasons that he treated that testimony as being one piece of circumstantial evidence he could consider in determining whether the Crown had proven its case. Because of its conclusion regarding the trial judge's errors, the court did not address the appellant's arguments regarding the appropriate remedy for the violations of his Charter rights.

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Carter v Canada (Attorney General), 2020 SKCA 91

Richards Schwann Kalmakoff, June 14, 2021 (CA21091)

Administrative Law - Application for Judicial Review
Statutes - Interpretation - Extradition Act, Section 44
Constitutional Law - Charter of Rights, Section 7

The applicant applied pursuant to s. 57(1) of the Extradition Act (Act) for judicial review of the decision by the Minister of Justice of Canada to order her surrender to the United States (U.S.). The U.S. formally requested her extradition to stand trial with two other individuals and one corporate entity in the state of Georgia. The alleged offences consisted of wire fraud conspiracy, wire fraud, aiding and abetting wire fraud and conspiracy to commit money laundering, all contrary to various provisions of Title 18 of the United States Code. The U.S. provided a record of the case, certifying the summary of evidence therein available for trial and a description of how the alleged offences were committed between 2014 and 2017 and, in particular, how the applicant had participated in the scheme that defrauded American citizens of more than $633,000. The applicant was arrested under the Act and consented to her committal for extradition, which order the Court of Queen's Bench issued in August 2019. The Court of Appeal directed the preparation of a Gladue Report that was provided to the Minister. It described the family background of the applicant, a 24-year-old Cree woman currently residing on the Pelican Lake First Nation reserve. Both of her parents had attended day school on the reserve. She had been raised by her mother and they had lived in both Edmonton and Pelican Lake. Because her father abused alcohol, the applicant's mother left him when the applicant was nine years old. The applicant did not finish high school and had never had full- or part-time employment. She was described as naïve and her family reported that she was raised in a sheltered environment as they adhered to the strict rules of the church to which they belonged. The applicant had never participated in traditional First Nation ceremonies. In her submissions to the Minister, the applicant argued that her surrender would violate her rights under ss. 6 and

7 of the Charter and would be unjust and oppressive within the meaning of s. 44(1)(a) of the Act. The Minister found that her surrender would not be unjust or oppressive under s. 44(1)(a) of the Act or otherwise violate her s. 7 Charter rights. In his decision, he reviewed the applicant's Gladue factors. He noted: the evidence of her involvement in the fraud scheme and that she could not be prosecuted in Canada for her conduct; that the likely sentences in the U.S. and Canada did not differ; the applicant would be able to inform the U.S. court of her youth, her Indigenous heritage and the historical mistreatment of Indigenous communities in Canada; and that U.S. authorities would accommodate the applicant's Indigenous heritage, cultural and spiritual needs in pre-trial and post-conviction custody. The applicant sought to overturn the Minister's decision on the general basis that he failed to properly account for Gladue-type considerations in his analysis of her situation. She contended that the Minister erred in his assessment of her rights under s. 7 of the Charter and thereby failed to properly apply s. 44(1)(a) of the Act.
HELD: The judicial review application was dismissed. The court noted that s. 57(1) of the Act does not give it an appellate function and the appellate standards of review were not involved. The standard of review was reasonableness. It concluded that the applicant had not established that the Minister's decision was unreasonable. In a review of the Minister's decision, the court must consider whether the Minister took into account the relevant factors and reached a defensible decision based on them. In this case, the Minister took into account the applicant's Indigenous background and the Gladue principles in determining whether her surrender would "shock the conscience" and violate s. 7 of the Charter. He found, based on the information received from the U.S. Department of Justice, that it would be within the sentencing judge's discretion to consider the applicant's Indigenous background as well as mitigating factors present in the applicant's circumstances.

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R v Mills, 2021 SKQB 134

Danyliuk, May 6, 2021 (QB21137)

Criminal Law - Bail - Estreatment

This matter was an application to the chambers judge by W.J.M. for the release of $12,500.00 paid to him to secure his release from jail pending his trial. He had initially been arrested for drug trafficking offences and then released with conditions on a recognizance upon payment of $2,500.00 cash bail. He reoffended while bound by these release terms and was arrested again and rereleased after depositing a further $10,000.00 cash

bail. He was arrested for breaching his conditions a second time and again released, and then arrested a third time, finally being held on remand after a bail hearing, at which time he pled guilty to some offences and was sentenced to 3 years' imprisonment in the penitentiary. The Crown applied for estreatment of the bail monies pursuant to ss 770 and 771 of the Criminal Code four years after the bail monies were deposited, and followed all procedures required by these provisions to estreat the bail money, including the filing of an evidentiary certificate from the sentencing court stating that W.J.M. was in default of his recognizance and setting out that "the ends of justice have been defeated or delayed by reason of the default." On the hearing, the applicant had a right to show cause why the presumption in the certificate that his default defeated or delayed the ends of justice was rebutted and the judge should exercise his discretion in favour of W.J.M. and release the bail money to him. W.J.M. put forward the argument that the Crown had simply taken too long to apply for estreatment, though he presented no legal basis for this proposition, and neither did he present any evidence to rebut the evidentiary presumptions contained in the certificate.
HELD: The chambers judge allowed the application and ordered that the bail monies on deposit with the court be forfeited. In doing so, he had reference to R v Cote, 2014 SKQB 269 and its analysis of the applicable principles that should guide a judge on such an application, and in particular the overarching principle that bail money is meant to assist in upholding the judicial release system by creating an incentive through the "pull of bail" for the released accused to attend court. The chambers judge indicated that he had no basis at law to find that the four-year delay was an impediment to the granting of the application. He also found that W.J.M. had failed to show cause why his repeated defaults did not defeat or delay the ends of justice. He found it was clear that W.J.M. had flouted the bail system and his actions could not but threaten it if no meaningful measure, such as estreatment, were taken.

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Hildebrand v Hattum, 2021 SKQB 136

Brown, May 7, 2021 (QB21129)

Wills and Estates - Gift - Donative Capacity - Undue Influence

This matter came before the chambers judge as an originating application under Rules 3-49(1)(i) to 3-55 of The Queen's Bench Rules. Among other claims, the applicants sought relief under s. 109 of The Land Titles Act to have six quarters of land (the land) transferred from T.M.H. to the estate of A.H. or, alternatively, a declaration that the land was subject to a resulting trust in favour of the estate. The last will and testament of

A.H., made in 2014, divided his estate equally among his four children, one of whom was T.M.H. The will included the land. In 2017, A.H. and T.M.H. attended the credit union where A.H. had his accounts and executed a transfer of the land in favour of T.M.H. for no payment. Later, T.M.H. consulted a lawyer about the transfer of the land, and as a result a document entitled "Declaration of Intention" (DOI) was prepared and signed by A.H. as "Parent" and T.M.H. as "Child." The stated intention was to explain to the remaining children that A.H. transferred the land to T.M.H "of his own volition and free from any undue influence or coercion." The other children gave evidence that they were not informed of any of these dealings with the land and stated in evidence that they knew nothing of them until A.H.'s death. The lawyers from whom A.H. obtained independent legal advice averred that A.H. did not agree with the DOI and felt intimidated by T.M.H. They believed T.M.H. was putting pressure on A.H. and told her the transfer was improper, though they also stated that they believed A.H. was of sound mind and had testamentary capacity. In 2018, at a meeting with his accountant, as deposed by the accountant, A.H. said he did not know he had transferred the land to T.M.H. S.D.H., one of the applicant children of A.H., deposed in affidavit evidence that A.H.'s health deteriorated after an injury due to a fall in 2016, which resulted in T.M.H. having increasing involvement in A.H.'s life, including management of his financial affairs. S.D.H. stated that A.H. told her T.M.H pushed him around. Under the terms of the DOI, A.H. was to continue to receive the income from the land, which S.D.H. swore was diverted to T.M.H. T.M.H. denied that the other children were not told of the transfer of the land or that A.H. was not of sound mind at the time of the transfer.
HELD: The chambers judge ruled that, given the conflicting affidavit evidence on the paramount issues revealed on the application, being whether A.H. had donative capacity to give the land to T.M.H. because of his deteriorating health or the undue influence of T.M.H., and the necessity to test the credibility of the evidence by cross-examination of the witnesses, he declined to make a decision in a summary fashion, finding that he could not properly weigh the evidence without hearing from witnesses. He was satisfied that the new approach to judicial conflict resolution (see: Hryniak v Mauldin, 2014 SCC 7) as reflected in new rules of court, allowed for increased flexibility in court procedure so as to resolve disputes more expeditiously and less expensively in appropriate cases, though for the reasons stated, he was satisfied that a trial of the central issues was necessary to the interests of justice in this case, and in coming to that decision relied extensively on the reasoning of the Court of Appeal in McStay v Berta Estate, 2021 SKCA 51.

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R v K.L.F., 2021 SKQB 143 (*Editor's note: this decision has yet to be published by CanLII, but given its significance, I do not wish to delay publishing the digest.*)

Dovell, May 13, 2021 (QB21143)

Statutes - Interpretation - Criminal Code, Section 493, Section 525
Statutes - Interpretation - Youth Criminal Justice Act, Section 13, Section 14, Section 28

A 16-year-old youth faced multiple summary and indictable non-s. 469 Criminal Code offences, or deemed ss. 13(2) or 13(3) offences pursuant to the Youth Criminal Justice Act (YCJA). He had been held on remand since October 2020. When a review of detention application regarding him was sent to the Court of Queen's Bench, he confirmed with the court that he contested his continued detention and wanted a detention review pursuant to s. 525 of the Criminal Code. The Crown advised that it took the position that the Court was not the appropriate jurisdiction to conduct a 90-day detention review for a youth. It submitted that the Provincial Court of Saskatchewan, sitting as a designated "Youth Justice Court," was the appropriate forum. The Ministry of Corrections argued that the Court of Queen's Bench did have jurisdiction to conduct the youth's s. 525 detention review in spite of its judges not being deemed Youth Justice Court judges pursuant to either ss. 13(2) or 13(3) of the YCJA in these circumstances. What was important to the Ministry was the need by the youth facilities within Saskatchewan for specific instructions as to where they should be sending their 30-day notices pursuant to s. 30.1 of the YCJA or the 90-day notices pursuant to s. 525 of the Code. Before the hearing regarding jurisdiction was heard, the Queen's Bench judge, sitting as an ex officio Provincial Court/Youth Court judge, released the youth pursuant to granting a consent release order.
HELD: The court ruled, although the decision was moot, that the Saskatchewan Court of Queen's Bench has jurisdiction to conduct a detention review under s. 525 of the Code in respect of a youth with charges being dealt with by a Youth Court pursuant to s. 13(1) of the YCJA as opposed to offences in which a youth has an election pursuant to offence as dealt with in ss. 13(2) or 13(3) of the YCJA wherein the Court of Queen's Bench is deemed a Youth Justice Court upon the youth electing to be tried by a Queen's Bench judge alone or with and jury. Furthermore, if that conclusion were wrong, it would still not oust the jurisdiction of the Saskatchewan Court of Queen's Bench to hear a s. 525 detention review of a youth when s. 8 of The Queen's Bench Act, 1998 was applied. All youth facilities in Saskatchewan shall henceforth send their s. 525 notices to the Court of Queen's Bench.

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Cummings v Tarrickfic Aerial Ltd., 2021 SKQB 147

Bardai, May 17, 2021 (QB21156)

Torts - Negligence - Nuisance

Following a trial, the court was required to determine whether liability should be found against a farmer, S.H., who hired an aerial crop sprayer to spray his field adjacent to the acreage of the plaintiff, K.L., and against the aerial crop sprayer he hired (TA Ltd.). K.L. alleged that the herbicide drifted onto his mature and newly planted poplar trees (poplars). The trial judge found the following facts on the evidence presented by both sides in the action: in August, 2015, the trees were damaged by herbicide sprayed by R.D.H., the pilot for TA Ltd., that drifted onto the poplars during the spraying operation when R.D.H. flew over K.L.'s yard and failed to adequately take account of relevant conditions and requirements; the mature poplars had been previously damaged by herbicide and as a result were not healthy; and K.L. did not replace the damaged mature trees or replant the dead seedlings until 2019 and 2020.
HELD: Based on these facts, the trial judge ruled that S.H., TA Ltd. and R.D.H. were liable to K.L. on a balance of probabilities in both negligence and nuisance. As to the tort of negligence, he was satisfied on the required standard that the defendants collectively owed a duty of care to K.L. which they breached, and which caused a foreseeable loss to him. As to the tort of nuisance, the court relied on Rylands v Fletcher, which established nuisance as a strict liability tort, concluding that all defendants had allowed the herbicide to "escape" from the land being sprayed, which caused damage to K.L.'s property. With respect to the quantification of damages, the trial judge found that the cost of remedying the loss and not the decrease in market value of the acreage was the most reasonable approach to quantifying the damages. In accordance with this approach, and keeping in mind the principle of mitigation, damages were calculated by adding together the cost to clear the dead and damaged poplars, the cost of supplying and planting the new trees, and the cost of maintaining the poplars until they had grown into the size they would have been but for the loss.

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First National Financial GP Corporations v Churko, 2021 SKQB 164

Layh, May 31, 2021 (QB21163)

Mortgages - Foreclosure - Pre-Leave Costs

The applicant, First National Financial GP Corporations, had applied for leave to commence under The Land Contracts (Actions) Act, 2018. By the time of the hearing, the respondent had paid the outstanding amount on the mortgage account and there were no other breaches of outstanding insurance or property taxes. The applicant continued with its claim for pre-leave costs of $5,000. When it submitted its original Form 10-39B of

The Queen's Bench Rules, its affidavit stated that it did not seek pre-leave costs but it had added to the form that it reserved its right to amend this position prior to adjudication. The applicant did not provide an itemized account supporting its claim for pre-leave costs. The applicant described the respondent as a "chronic offender." Its officer provided affidavit evidence and attached as exhibits two demand letters sent to the respondent in January 2019 and November 2020 to justify the claim. Both demanded the arrears to be paid together with legal costs. The exhibited statement of mortgage account showed NSF, property maintenance and occupancy check fees were added to the account. In his affidavit evidence, the respondent described his efforts to arrange to pay his arrears with different employees of the applicant over a period of six months and their failure to answer his queries.
HELD: The application was dismissed. The court found that the applicant had failed to provide an itemized account for pre-leave costs and had improperly claimed legal costs and fees in its demand, contrary to s. 8 of The Limitation of Civil Rights Act. It found that the respondent was not a chronic offender and that he had attempted to make appropriate arrangements with the applicant. He was entitled to rely upon the applicant's notice that it would not seek costs. It had added its reservation of the right to do so in the Form when its claim that the respondent was a chronic offender could not be justified.

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Saskatoon (City) v Hill, 2021 SKQB 177

Danyliuk, June 10, 2021 (QB21169)

Statutes - Interpretation - Cities Act, Section 121

The city of Saskatoon applied pursuant to s. 121(2)(b) of The Cities Act for a determination by the court of whether the respondent, a city councillor, should be disqualified from sitting as a councillor for his ward. The respondent had filed the forms disclosing contributions and expenditures made during the campaign sixteen days past the filing deadline required by the City's bylaw, The Campaign Disclosure and Spending Limits Bylaw, 2006. The respondent had first been elected in 2006 and had never before failed to comply with his legal obligation to make timely campaign financial disclosure in 2006, 2009, 2012 and 2016. He admitted that he breached the bylaw and filed an affidavit in response to the application. In it, he explained his failure to file the forms in a timely fashion as being due to multiple and successive physical health problems that began in 2016 after he suffered a concussion in a vehicle accident. He deposed that his ability to think, organize, and complete tasks was affected. From 2019 through to the election, he suffered a number of personal misfortunes.

In January 2021, the respondent contracted COVID-19 and experienced many debilitating effects. He checked into the hospital in March 2021 because he was having mental health problems. The issues were: 1) whether the respondent breached the bylaw and was therefore prima facie disqualified to remain as a city councillor; 2) whether this was a proper case in which to exercise judicial discretion pursuant to s. 121(6)(b) of the Act and allow the respondent to remain as a city councillor; and 3) in the alternative, had the respondent's breach occurred as a result of inadvertence or an honest mistake, and should the application therefore be dismissed pursuant to s. 122 of the Act?
HELD: The application was dismissed. The court declared the respondent able to remain a member of city council. Pursuant to its discretion under Queen's Bench rule 11-1, the court did not award costs to either party. It reviewed and interpreted ss. 121 and 122 in light of the purpose of the Act and the bylaw, and held that it is incorrect to take a harsh approach to the issue of a candidate in breach of the campaign financial disclosure provisions. A judge should exercise his or her discretion to remove a democratically elected person from office sparingly. It conducted a review of relevant cases and derived from them a set of non-exhaustive factors to consider in the exercise of its discretion. It found with respect to each issue that: 1) the respondent breached the bylaw and was prima facie disqualified from holding his office; 2) it concluded that respondent should not be ousted from his seat. Among the factors it considered as militating in favour of the respondent retaining his position were: i) that a reasonable person who was aware of the respondent's previous unblemished record and knowing his circumstances in 2019 and 2020 would understand how he could miss the filing deadline. The respondent's physical and mental health problems should be considered as mitigating; ii) the applicant did not suffer a financial loss and the respondent did not gain financially from the breach; iii) the respondent had not acted in bad faith nor deliberately; and iv) there had been a serious impact on the respondent because of the breach and his public disclosure of his personal situation; and 3) the respondent's breach was inadvertent within the meaning of s. 122 of the Act and the application must be dismissed. He would remain a member of city council under the test pursuant to s. 121(6)(b). No costs were awarded for reasons that included that the applicant had asked the court to make a determination, there had been no misconduct, and the decision was important to Saskatchewan municipalities.

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R v Russell, 2021 SKPC 31

Bazin, May 28, 2021 (PC21024)

Criminal Law - Assault - Sentencing

The accused pled guilty to assault causing bodily harm contrary to s. 267(b) of the Criminal Code, uttering a threat to cause bodily harm contrary to s. 264.1(1)(a) of the Code and simple assault on three victims. The charges were laid after the accused was asked by an employee to wear a mask upon entering the store. He responded by screaming at the employee and when the manager came, the accused punched him in the face. Three more employees tried to assist but the accused either punched, shoved or threatened each of them. Another employee, 62 years of age, followed the accused into the parking lot so that he could take his licence plate number, and the accused punched him more than 20 times in the face. The Crown submitted that the accused should receive a four-month jail term based on the principle of general deterrence. It indicated that the sentence took into account that the accused pled guilty the day following the offences, had a supportive family and did not have a criminal record. The defence argued that this was a one-off event because the accused was suffering from "COVID fatigue" and that a rehabilitative sentence was in order. Although acknowledging the severity of the assaults and the circumstances, the defence submitted that a 12 to 18 month jail term to be served in the community under a conditional sentence order would be appropriate.
HELD: The accused was sentenced to 120 days in jail for assault causing bodily harm, 30 days in jail concurrent for uttering threats and 90 days in jail concurrent for the assault on the three named victims. The accused would be subject to a 12-month probation served concurrently and including the requirement of counselling for anger management, mental health and personal issues. The court found that a conditional sentence would not achieve the general deterrence of sending the message that society would not tolerate attacks on frontline workers who are responsible for enforcing public health orders.

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Pederson v Brandt Developments Ltd., 2021 SKPC 35

Demong, June 15, 2021 (PC21025)

Employment Law - Employment Contract - Interpretation - Damages

The plaintiff sought damages arising from his termination of his employment with the defendant. The parties entered into an employment contract in 2016. It provided that upon termination without cause, the plaintiff would be given 60 days' notice or payment in lieu based on his annual base salary, not to include any discretionary bonus to which he might otherwise be entitled. The defendant gave the written contract to the plaintiff to review and he had it for seven to ten days before he executed it. He testified that he didn't think that it was necessary to obtain legal advice and negotiated with the defendant regarding bonus provisions. Under

the contract, the plaintiff's base salary was $110,000 per annum and he was entitled to a discretionary bonus of up to $30,000 subject to meeting company objectives. If earned, the bonus was to be paid following the defendant's annual audited financial statements and if the employee had active status, meaning that he was an employee who was working, whose employment had not been terminated and who was employed at the end of the defendant's fiscal year. In 2018, the plaintiff's new manager decided that the plaintiff was not meeting his goals for that year and since an organizational restructuring would make his position redundant, the plaintiff was terminated on August 22, 2019. The defendant paid the plaintiff $19,000, representing 60 days' notice after statutory deductions, and no payment was given as bonus. The plaintiff obtained legal advice that he was entitled to three months' notice resulting in additional payment of $9,500 and that the defendant should have decided in favour of awarding a bonus of $20,000. The defendant's counsel advised that it would not negotiate further. The plaintiff then commenced this action. The issues were whether: 1) written employment agreements are enforceable, and if so, under what conditions; and 2) was the employment agreement in this case: a) unconscionable; b) ambiguous; or c) illegal?

HELD: The action was dismissed. The court found with respect to each issue that: 1) written employment contracts are enforceable. The presumption of common law notice and damages may be rebutted through an express contrary agreement unless it is found to be unconscionable, ambiguous or illegal; 2) the employment here was not: a) unconscionable. There was no inequality of bargaining power. The plaintiff was an educated and sophisticated businessperson who had dealt with employment contracts throughout his career. He had time to review the contract beforehand; b) ambiguous. The termination and right to bonus upon termination provisions were clear. The plaintiff had not met the defendant's discretionary standard and he was not actively employed at the end of October 2018 when bonuses were to be considered; and c) illegal. It rejected the plaintiff's argument that because the agreement stated that he had to give 30 days' notice if he chose to terminate it, this was in violation of s. 2-63(1) of The Saskatchewan Employment Act which dictates employees only have to give two weeks' notice. The section states that employee must give notice of at least two weeks and nothing in the Act precludes the parties contracting for a longer period of notice.

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