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. 17 **September 1, 2021**

Subject Index

Merrifield v Merrifield, 2021 SKCA 85

Ryan-Froslie Leurer Barrington-Foote, May 28, 2021 (CA21085)

Family Law - Spousal Support - Interim - Appeal
Family Law - Child Support - Interim - Appeal

The appellant husband appealed the 2019 decision of a Queen's Bench chambers judge granting the respondent's application, ordering interim child and spousal support and an interim distribution of family property to the respondent, among other things. The respondent was given exclusive possession of the family home. The judge also ordered the appellant to provide broad disclosure of documents relating to his personal finances and the finances of companies in which he was a shareholder, director or officer. The parties were married in 2003 and separated in 2018. Prior to marrying, they entered into an interspousal agreement (ISA) that provided for the division of property upon separation, divorce or death, stipulating that certain property was to be "one party property" rather than divisible family property. The appellant was, directly or indirectly,

Contracts - Interpretation
Statutes - Interpretation - Limitations Act, Section 5, Section 6, Section 18

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - Long-term Offender
Criminal Law - Sentencing - Aboriginal Offender

Criminal Law - Habeas Corpus

Criminal Law - Identification of Accused - Appeal

Criminal Law - First Degree Murder
Criminal Law - Defences - Not Criminally Responsible

Criminal Law - Young Person - Sentencing - Adult - Appeal
Criminal Law - Young Offender - Sentencing - Adult - Appeal
Statutes - Interpretation - Youth Criminal Justice Act, Section 72

Employment Law - Wrongful Dismissal

Family Law - Spousal Support - Interim - Appeal
Family Law - Child Support - Interim - Appeal

Injunction - Interlocutory Injunction - Prohibitory - Requirements

Insurance - Contract - Interpretation - Appeal

Landlord and Tenant - Residential Tenancies Act, 2006 - Appeal

Municipal Law - Tax Assessment - Appeal

the sole, majority or a major shareholder in 15 companies (the Merrifield companies) and the interests were held through a complex structure which included holding companies, family trusts, and payments between the entities for rent, management fees and dividends. The appellant's father had interests in the family trust and in other companies. The respondent's position was that the family property included the Merrifield companies, whereas the appellant relied upon the ISA. In his 2019 affidavit, the appellant listed the 2018 pre-tax corporate income (loss) of the companies and reported his personal income for 2018 as $243,467. The corporate expenses he claimed were disputed by the respondent and she alleged that they had been incurred for his benefit. The ISA further provided that it would constitute full and final satisfaction of all claims for "alimony." After the couple separated in 2018, the appellant acknowledged nonetheless that the respondent was entitled to interim spousal support. Following the separation, their three children, all of whom were under the age of majority, resided primarily with the respondent in the family home and would continue to do so. After the hearing of the application for interim support, the chambers judge dealt first with the issue of the appellant's income, observing the incomplete nature of the information before him and that the appellant had not provided adequate disclosure. He rejected the amount submitted by the appellant as his 2018 income, based upon his lavish lifestyle. For the purposes of calculating interim support, he determined the appellant's gross annual income as $1,023,749. The respondent was found to have no income. The judge attributed $552,598 in pre-tax corporate income to the appellant based upon 65 percent of the pre-tax income of $850,151 of only one of the relevant companies (Holdco) without providing reasons. Also implicit in the judge's decision was the amount of expenses claimed by the appellant he permitted, as he did not review either his or the respondent's evidence regarding same. On the basis of this income, the judge ordered the appellant to pay interim child support of $16,630 per month pursuant to s. 3 of the Federal Child Support Guidelines, 100 percent of s. 7 expenses and $17,700 per month in interim spousal support, an amount below the range provided in the Spousal Support Advisory Guidelines (SSAG). The respondent had submitted that the children's and her annual expenses were $526,160. Although the parties had lived a lavish lifestyle before separation, the judge opined that these expenses could be trimmed and he also took into account the amount of child support awarded. The judge assessed and granted the respondent's application for an interim distribution of family property in the amount of $150,000 pursuant to ss. 21 and 26 of The Family Property Act by reviewing the factors set out in Conley (1985 CanLII 2599) and found that the request was justified. Respecting disclosure, the judge ordered the appellant to provide income tax returns and notices of assessments for companies in which the appellant was not a director or shareholder but in which his father held an interest, and all bank account and credit card statements for any private corporation of which the appellant was a shareholder, director or may have an interest. The issues on appeal were whether the chambers judge: 1) erred by attributing corporate income to the appellant pursuant to s. 18 of the Guidelines. The appellant argued that the judge failed to give sufficient weight to the consideration of the impact of this attribution to him, as it would put the corporations at risk, encroach on their capital and interfere with the rights of third-party shareholders; 2) had erred by attributing

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 66, Section 69

Wills and Estates - Will - Interpretation
Statutes - Interpretation - Administration of Estates Act, Section 50.5

Cases by Name

Abdon v Brandt Industries Canada Ltd.

CP Reit S Real Estate Limited v Saskatoon (City)

Choquette v Viczko

Ewanchuk v Oksana Community Correctional Centre

Gherasim, Re (Bankrupt)

Merrifield v Merrifield

MÃ©tis Nation - Saskatchewan v NexGen Energy Ltd.

Nguyen v Neuls

R v Bear

R v Green

R v Lonechild

R v Schreiner

R v W.M.

Richardson Pioneer Limited v Gherasim

Suncor Energy Products Partnership v J.J. Lamon Inc.

corporate expenses to the appellant as income. The judge had incorrectly "added back" $96,580 In corporate expenses to his income pursuant to s. 18 rather than s. 19 of the Guidelines; 3) erred by not considering s. 4(b) of the Guidelines in awarding child support; 4) erred in ordering an interim distribution of $150,000. Because of the ISA, the appellant had claimed an exemption pursuant to s. 24 of the FPA but the judge incorrectly conducted an analysis, following Conley, as if his assets in the various companies were family property and by concluding that there would be no prejudicial tax consequences; and 5) erred by ordering overbroad disclosure. The appellant asserted that he should not have to disclose records relating to the Merrifield companies, other than those required for income determination purposes as they may be excluded from family property by the ISA, relying on Tolaini (2010 ABCA 223).

HELD: The appeal was allowed in part. The court reassessed the appellant's income as being $927,169 and awarded interim monthly support of $10,000 for the children and of $12,500 for the respondent. The appellant was ordered to pay $150,000 as an interim distribution of family property within 45 days of the judgment date. It was at the appellant's option to secure a loan in that amount by mortgaging the family home. The court held that the order for disclosure was overbroad and varied it so that the appellant was to provide all bank account statements of, and all credit card statements for all credit cards held by, the Merrifield companies in which he was both a majority shareholder, directly or indirectly, and a director. The respondent was ordered to pay the appellant the costs of the appeal. The standard of review applicable to an appeal for child and spousal support is deferential. It found with respect to each issue that the chambers judge had: 1) not erred. The appellant had not provided particulars to support his position that the considerations he relied upon concerning the corporations were current and significant. On the evidence, it was open to the judge to find that the appellant had not met the onus of proving that a substantial amount of Holdco's pre-tax income was not available for child support purposes. His decision, within his discretion, to attribute 65 percent of Holdco's 2018 income to the appellant was also upheld; 2) had erred. The respondent's evidence had failed to prove her claim that corporate expenses should be attributed to the appellant as income. The parties' evidence was conflicting and as the judge did not believe the appellant's evidence and did not fully accept the respondent's evidence, and failed to provide a complete analysis, the issue should have been left to be resolved at pre-trial or at trial; 3) it was unnecessary to decide whether he had erred in this regard. Although the appellant had failed to raise the application of s. 4 before the judge, the court would consider the matter of child support anew on this appeal because it had concluded that the amount of the appellant's income was different than that found by the judge and there was sufficient evidence to allow it to decide the matter pursuant to s. 4 of the Guidelines. It first determined that the appellant's income was $927,169 by deducting the amounts necessary to account for its conclusions as to the inclusion of corporate expenses. The table amount for that amount is $15,084. Although the circumstances here were of a high-income payor and an asset-rich family, it found that the appellant should pay $10,000 per month in interim child support. Based upon its revision of the appellant's income, he should pay interim spousal support of $12,500 per month. The amount took into account the parties' pre-separation

Temple Insurance Company v Aberdeen Specialty Concrete Services

Turcotte, Re (Bankrupt)

Weidner Apartment Homes v Cullum

Ziola v Petrie

lifestyle, the respondent's circumstances and the costs she would incur related to the family home; 4) the chambers judge erred in principle by taking into account the appellant's interests in the companies. After considering the issue anew, it found it was appropriate to order an interim distribution. There were assets available such as the family home that was mortgage-free and not in issue because of the ISA. It was left to the appellant to decide whether to secure a loan of $150,000 by mortgaging the family home; and 5) had erred in ordering overbroad disclosure particularly respecting credit card and bank account statements for companies other than the Merrifield companies, and this was not justified on the evidence relating to the receipt of personal benefits. It was also inappropriate to order disclosure of financial records for the appellant's father's companies in the absence of evidence that the appellant had a direct or indirect interest in them.

 Back to top

Temple Insurance Company v Aberdeen Specialty Concrete Services, 2021 SKCA 94

Jackson Schwann Tholl, June 30, 2021 (CA21094)

Insurance - Contract - Interpretation - Appeal

The appellant, Temple Insurance Company, appealed the decision of a Queen's Bench chambers judge granting the respondents' originating application in which they had requested that the appellant pay their legal fees but dismissing their request for solicitor-client costs and awarding party and party costs (see: 2020 SKQB 14). The respondents cross-appealed from the judge's decision regarding costs. The appellant had issued a "wrap-up" liability insurance policy (WUP) to All Seniors Care Living Centres Ltd., a corporate affiliate of the owner of a construction project (the owner), the project's general contractor, Man-Shield, and its subcontractors. The policy contained a clause, s. 5(a) of Part IX, that required that the appellant be given written notice of an accident or occurrence, containing sufficient particulars to identify the insured, by or for the insured. Another clause in Part IX, s. 5(c), stipulated that an insured was prohibited from making any payment, assuming any obligation or incurring any expense other than for first aid to others at the time of an accident or occurrence. In this case, problems arose with the project and the owner sued the general contractor who in turn sued the respondents for damage alleged to have been caused by their work. When they were sued, the respondents did not notify the appellant. They were unaware of their coverage under the wrap-up policy until April 2018, when they were informed of the same by the appellant through the company it had engaged to manage the policy. Consequently, when the general contractor commenced third-party claims against each of the respondents in March 2015, January 2017 and March 2017 respectively, they contacted their own general liability insurers,

then hired their own lawyers and incurred defence costs. The appellant acknowledged that it would assume the defence of the third-party claims under the WUP in June 2018, but on a go-forward basis only. The respondents sought payment of their prior defence costs and brought their application in Queen's Bench. At the hearing, they argued that the appellant's liability for defence costs arose when the appellant knew about the possibility of claims against them they alleged, on three possible occasions: i) August 28, 2014, when the owner mistakenly attempted to make a direct claim under the WUP for remediation work under the policy before it sued the general contractor; ii) January 14, 2015, when the owner sued the general contractor, which was also the date on which the appellant declined coverage on the owner's mistaken claim; and iii) the various dates between 2015 and 2017 when the general contractor began third-party proceedings against each of the respondents. The chambers judge found, following the decision in Walker (2011 ONCA 597), that the appellant had effective notice as of January 14, 2015 because the owner was in sufficient proximity to the respondents' claim. She held that the appellant was obligated to pay the all of the respondents' legal fees incurred as of the dates on which they were each named as defendants to the third-party claims. However, the respondents were entitled to party and party costs only, as there was no evidence of litigation misconduct by the appellant. The issues on appeal were: 1) what standard of review applied to the interpretation of the WUP; 2) what principles of contract interpretation applied to the WUP; 3) whether the chambers judge erred by finding that the appellant had received notice of the respondents' claims in accordance with Part IX, s. 5(a) of the WUP; 4) whether the chambers judge erred by finding that the appellant was liable for payments made before its June 14, 2018 acknowledgement letter in light of Part IX, s. 5(c) of the WUP; and 5) whether the judge erred by declining to award the respondents costs on a solicitor-client basis.

HELD: The appeal was allowed and the respondents' cross-appeal dismissed. The court found with respect to each issue that: 1) the applicable standard of review was correctness. The WUP was a standard form contract as it met the three criteria set out in Ledcor (2016 SCC 37); 2) ss. 5(a) and (c) of the WUP were unambiguous and should be interpreted to give effect to the clear language, reading the contract as a whole; 3) the chambers judge erred by finding that the appellant had notice as of January 14, 2015 or that it had notice as of the dates the general contractor served them with a third-party claim. She erred in law, incorrectly interpreting s. 5(a) by extending its application to include a claim unknown at the time she found notice had been given. This conclusion was based on the judge's error of fact in finding that the appellant knew as of January 14, 2015 that a lawsuit would be commenced by the general contractor against the respondents. The owner's original letter of August 28, 2014 fell short of telling the appellant the essential facts of who was claiming what and as of when, and nothing had changed in that regard at the time of the January 2015 letter, so that it was impossible to say that that the owner was in sufficient proximity to the respondents to give the appellant effective notice of the respondents' claim as additional insured parties under Part IX, s. 5(a) of the WUP as of January 14, 2015; 4) the judge had erred in law in failing to address the meaning or effect of s. 5(c) of the WUP. The appellant was entitled to rely upon the clause. There were not words in it that limited its application to whether

the insurer had received effective notice; and 5) the foregoing findings resulted in the dismissal of the cross-appeal.

 Back to top

Ziola v Petrie, 2021 SKCA 97

Ottenbreit Caldwell Leurer, July 8, 2021 (CA21097)

Contracts - Interpretation - Appeal

The appellant, D.Z., was the plaintiff in an action to force G.P., the respondent/ defendant in the action, to comply with a contract of sale respecting three quarters of farmland D.Z. alleged had been made following an online bidding process. G.P. denied that a contract for the sale of the farmland had been made between him and D.Z., and characterized the critical telephone exchanges and email with D.Z. as a negotiation which ultimately failed to yield a contract. The trial judge in the lower-court decision (2018 SKQB 209) found there was no contract between the parties and that D.Z. had failed to meet the onus placed on him to prove that he made a clear offer to purchase the farmland which was accepted by G.P. He found as fact that: at the close of the online bidding, D.Z. was the highest bidder on three of the 17 quarters put up for bid (subject quarters); he was not the highest bidder on two other quarters of farmland adjacent to the subject quarters (adjacent quarters) or on another quarter (unsold quarter). The trial judge also found as facts that: D.Z. was notified by email that he was the highest bidder for the subject quarters and that he would be contacted within 48 hours by the seller (D.Z.) as to whether D.Z. wished to accept his bid on these; after discussions with family members, G.P. concluded that selling only the subject quarters to D.Z. would not be feasible due to the problems that would cause for access to the balance of his farmland, and decided to present two alternative package options to D.Z. involving either a purchase and sale of the subject quarters and the adjacent quarters or of the subject quarters and the unsold quarter; he offered both packages a price higher than the total bid made by D.Z. on all the quarters in play; in a telephone conversation with D.Z. within the 48-hour window, G.P. stated that he would not accept his bid on the subject quarters and presented him with the two package options; D.Z. said he would consider the package involving the five quarters, but not the other, and would consult with his son about that package; before ending the telephone conversation, D.Z. stated "Do I have the three if I don't have the five?" (the critical question), to which G.P. answered "yes"; D.Z. and G.P. interpreted this telephone exchange differently, G.P. believing that all that occurred was that he was to wait on a deal until D.Z. had spoken to his son, and D.Z. believing he could still close a deal on the subject quarters alone; G.P. denied he intended that

D.Z. could buy the subject quarters if he rejected the package options; on the same day, D.Z. telephoned G.P. and said he would be buying the subject quarters only as the package option was too highly priced, and he would deliver the deposit immediately, to which G.P. said "hold off"; G.P. meant by these words that he would need to consider D.Z.'s offer to purchase the subject quarters only; and G.P. emailed D.Z. three days later stating that he would not "be accepting his bid" on the subject quarters. The trial judge found that the conversation in the exchange involving the package options and the critical question were agreed to by the parties as being accurate, and formed the basis for all that happened subsequently, but though there was no issue about the words used, how the words were interpreted was the central question to be decided. The meaning of the words was a question of law, not to be decided by what the parties believed was their meaning but, on a consideration of all the circumstances germane to the matter, what an objective observer would conclude. In setting this standard of review, the Queen's Bench judge relied on Tether v Tether, 2008 SKCA 126. He did not expressly make a finding of fact as to the words used which led to the critical question but applied an objective standard to the facts and circumstances of the matter, finding that it could not be reasonable for G.P., immediately after rejecting the bid for the subject quarters and presenting the two package options with a higher aggregate price, to then be prepared to accept the same bid for the subject quarters. He said the conversation leading to the critical question caused each party to mistake what the other believed subsequently until the final email of G.P. expressly rejecting D.Z.'s bid on the three quarters. D.Z. attempted to impute deceit and dishonesty to G.P.'s sending the final email, suggesting that G.P. knew he had accepted the bid, but then reneged on it. The trial judge was not prepared to find such was the case on the evidence presented. In the end, he concluded that an objective consideration of the facts and circumstances, D.Z. had not met the onus on him to prove the negotiations between himself and G.P. had progressed beyond the bid stage; that all D.Z. had at the time he asked the critical question was the highest bid, and so could not claim to "have" the subject quarters. D.Z's grounds of appeal were 1) that the trial judge erred in principle by not making an express finding of fact as to the actual words used in the critical conversation; and 2) that the trial judge made a palpable and overriding error that the evidence could have led him to the conclusion that the parties were mistaken as to whether they had contracted a sale of the subject land.

HELD: The appeal court through Ottenbreit J.A. dismissed the appeal. As to ground 1), the appeal court found that the trial judge made an implicit finding that he preferred the evidence presented by G.P. as to the meaning of the words used in the critical conversation during his analysis of what an objective, reasonable person would conclude from the evidence presented by both sides, and in particular pointed to the fact that D.Z. was still negotiating a deal when he ended the critical conversation by saying he would need to consult with his son. What is more, the appeal court applied the law as elucidated in Harvey v Perry, [1953] 1 SCR 233, that acceptance of an offer must be "clear, unambiguous and absolute," so the trial judge "was not obligated to make an explicit finding of the words spoken." As to ground 2), the court reemphasized the standard of review of the factual findings of a trial judge was the deferential one of palpable and overriding error and one not

easily overcome, concluding that the trial judge considered the very ample evidence that D.Z. and G.P. misunderstood the critical question, and therefore failed to have a meeting of the minds as required to complete a contract. Credibility rulings are an aspect of findings of fact and carry the same standard of review, the appeal court said, and it was open to the trial judge to find the witnesses credible and reliable, and to dismiss any suggestion of dishonesty, embellishment, or unreliability in the testimony of G.P. or the defence witnesses. Finally, the appeal court did not agree that the error of the trial judge in finding only an increase of 5% and not 23% of the price in the package option was significant, but advanced the defence as it tended to show that the package option was a true "counteroffer."

 Back to top

R v Bear, 2021 SKCA 98

Caldwell Tholl Kalmakoff, July 13, 2021 (CA21098)

Criminal Law - Identification of Accused - Appeal

The appellant, B.S.B., was convicted after trial of assault with a weapon, a tire iron. He appealed his conviction on two grounds. The appeal court was required to consider one of those grounds: that the Crown had "failed to establish his identity as the assailant." The complainant was the only witness. He was attacked and assaulted by several people and rendered unconscious. In his testimony, he was initially less than sure that B.S.B. was his assailant, not having actually seen who did assault him, saying his memory was "fuzzy and "foggy" and that "I kind of think it was Brandon," but ultimately he did identify B.S.B. The Crown relied on circumstantial evidence to prove identity including the complainant's testimony that "[B.S.B.] was there, and he tried fighting me at the hospital beforehand and it wasâ€”I don't know, he's got a beef with me. I don't know why." The defence had entered a written statement the complainant gave to the police soon after the assault to cross-examine him on the strength of his identification of B.S.B. as his attacker. The Crown used this statement, without objection from B.S.B.'s counsel, for the truth of its contents, and the trial judge relied on certain portions of it, namely that B.S.B. was one of the "three men around the complainant who hit him" and he "was seen with a tire iron."
HELD: The appeal was allowed and new trial ordered. The appeal court applied R v Bigsky, 2006 SKCA 145, which established the need for the trial judge to embark on an examination of the reliability of the eyewitness evidence. A failure to do so when such evidence is crucial is a reviewable error. In this case, the record of the trial proceedings did not show that the trial judge had embarked on any meaningful testing of the eyewitness

evidence or instructed himself on the dangers of convicting an accused on that evidence alone. His reliance on the written statement of the complainant without any consideration of its reliability demonstrated that failure.

 Back to top

CP Reit S Real Estate Limited v Saskatoon (City), 2021 SKCA 100

Caldwell Ryan-Froslie Barrington-Foote, July 20, 2021 (CA21100)

Municipal Law - Tax Assessment - Appeal

CP Reit Limited (taxpayer), the lead appellant for a group of commercial properties in Saskatoon (subject properties), appealed the decision of the Municipal Board Assessment Appeals Committee (committee) reported in Various (Altus) v Saskatoon (City), 2020 SKMB 2 (Committee Decision) to uphold the decision of the Board of Revision (Board) (See: Altus Group Limited v Saskatoon (City), AAC 2019-0068 (10 July 2019)) (board decision) dismissing the taxpayer's appeal of the assessor's decision to include the Midtown Plaza and the Affinity Head Office with the subject properties in an assessment array of properties (group 2 assessment array). The appellant argued this decision affected the median capitalization rate (CAP rate) of the subject properties to the detriment of the owners of the subject properties by increasing the property tax they would be required to pay without legislative authority. It was uncontested throughout that the CAP rate is a calculation based on the division of a commercial property's net operating income (NOI) and its sale price in a "sales array." The taxpayer argued before the board that the assessor's decision was fundamentally flawed because it failed to demonstrate that the assessor understood and applied the legislated requirements of ss 163 (f.1), (f.2), and (f.3) The Cities Act (Act) and the guiding principles for property assessors contained in the SAMA publication, Market Value Assessment in Saskatchewan Handbook, ver. 3 (Regina: Saskatchewan Assessment Management Agency, 2012) (Handbook). The court considered the appeal on the basis that the board and committee did not analyze the issues raised by the taxpayer in accordance with the following core questions: what is the relation between the terms "market valuation standard" (MVS) and "market value" (MV) as defined by s 163 of the Act, and how would a misapplication of these terms lead to a reviewable inequity for a taxpayer?
HELD: The court, speaking through Caldwell J.A., found that the board decision had in fact placed MV on an equal footing with MVS when MV is only one of the four components of MVS and, as such, had not touched on the essential question, whether inclusion of the Midtown Plaza and the Affinity Head Office in the same tax grouping as the subject properties was an error in principle. In its analysis, the appeal court referred to its own

judicial pronouncements, in particular Saskatoon (City) v Walmart Canada Corp., 2018 SKCA 2, and Harvard Property Management Inc. v Saskatoon (City), 2017 SKCA 34. Though in other language, the appeal court reasoned that to assure taxpayers that the tax system of mass appraisal is fair, s 163 of the Act enshrines a required standard for achieving the assessed value of property in MVS. That standard is met when the value of the property is "prepared using mass appraisal," "is an estimate of the market valueâ€¦ of the property," "reflects typical market conditions for similar properties" and meets SAMA quality assurance standards as outlined in the Handbook. As well, s 165(3) of the Act makes equity "the dominant and controlling factor in the assessment of property," and s 165(5) makes the application of MVS to MV of similar properties necessary to achieve this equity. The appeal court ruled that the board failed to consider any of the requirements of MVS and, in particular, that the value of the property should reflect typical market conditions for similar properties. It did so because it conflated MV with MVS, then decided that as the taxpayer had shown no error on the part of the assessor in arriving at the MV of the group 2 assessment array, he had committed no error. The appeal court ruled that the committee made the same error and failed to "come to grips accurately and adequately with the Board's decision." Having ruled that the committee had failed to properly perform its function, and after a consideration of its powers under s 12 of The Court of Appeal Act, the court embarked on the analysis the committee should have done. With the Handbook and the relevant judicial authority in mind, the appeal court found that the Midtown Plaza and the Affinity Head Office were not similar properties to the subject properties and their inclusion in the group 2 assessment array did not meet MVS. Neither the board nor the committee recognized that the assessor failed to consider how the best use of a commercial property determines its value due to how it generates its income and therefore its market value. Midtown Plaza belonged in the category of a shopping centre, which the Handbook expressly excluded from the category of strip malls, within which the subject properties were grouped. As for the Affinity Head Office, the court also found that it did not belong in the group 2 assessment array because its best use was as an office tower, and not a retail business, and as such both properties were to be excluded from the property array, they were not correctly "stratified." The appeal court then adjusted the CAP rate downward to correct the errors in the tax rolls.

 Back to top

Ewanchuk v Oksana Community Correctional Centre, 2021 SKCA 102

Richards Schwann Tholl, July 28, 2021 (CA21102)

Criminal Law - Habeas Corpus

The appellant, S.B.E., appealed the decision of the chambers judge denying his application by way of habeas corpus for a review of his allegedly unlawful deprivation of liberty. The uncontested facts in the matter were as follows. S.B.E., following an 11-year term of incarceration in a penitentiary for sexual offending against children, commenced a 10-year term of a long-term supervision order (LTSO). The Parole Board of Canada (Parole Board) had placed him on special terms which included the requirement that he reside in a Community Correctional Centre, Community Residential Facility or other residential facility approved by Correctional Services of Canada (CSC), that he wear an electronic monitoring device and that he not be near any playground, park or school. He breached his LTSO as a result of his electronic monitor indicating he was near a playground, park, or school, which resulted in a suspension of the LTSO and his return to the Bowden Institution, a medium security penitentiary. Once his suspension had been completed, he was released to a residential facility, Stan Daniels Healing Centre (Stan Daniels), but because of his continuously breaching the rules of the facility, was no longer welcome there, and as a result his LTSO was again suspended, and he was returned to Bowden Institute to await a further placement. No placement was forthcoming from any institution in Alberta, but the Oskana Community Correctional Centre (Oskana) was prepared to take him; he was released to Oskana, but refused to abide by a curfew or wear an electronic monitor, and so was confined to Oskana 24 hours per day. After hearing from the Parole Board that it would not remove his residency clause, he brought a habeas corpus application to the Court of Queen's Bench. His application for habeas corpus was dismissed on the basis that he had failed to prove the legal requirement of the remedy, being a deprivation of his liberty that was unjustifiable. In the Court of Appeal, he contended that the chambers judge had erred in law by not finding on the facts that he suffered a deprivation of liberty which could not be justified by CSC. HELD: The court through Tholl J.A. dismissed the appeal, finding no error on the part of the chambers judge with respect to his analysis of the two requirements of an application for a writ of habeas corpus ad subjiciendum, finding the chambers judge properly referenced the relevant case law, May v Ferndale Institution, 2005 SCC 82, [2005] 3 SCR 809; Dumas v Leclerc Institute, [1986] 2 SCR 459; and Mapara v Ferndale Institution, 2012 BCCA 127, and applied it correctly. In its review of the chambers judge's decision, the appeal court also considered Khela v Mission Institution, 2014 SCC 24. It found that the chambers judge correctly decided that the first requirement for the obtaining of a writ, that is, proof that S.B.E. was deprived of his liberty, had not been satisfied. He had correctly decided, first, that Oskana was both a penitentiary and a community residential facility in answer to the contention by S.E.B. that as he had served his sentence, he was unlawfully deprived of his liberty by being placed in a penitentiary. The chambers judge was then required to compare "the residual liberty" S.E.B. enjoyed before his relocation to the residual liberty he had at Oskana. The chambers judge used Bowden Institute, a medium security penitentiary, as the baseline for his comparison with Oskana, and found that S.B.E. had in fact gained in residual liberty by the relocation. The appeal court agreed but also asked whether the required comparison should have been made between Oskana and Stan Daniels, since he was housed at Bowden Institute only as a stopgap measure pending a new placement from

Stan Daniels. The court concluded that a comparison with Stan Daniels would not have advanced S.E.B.'s claim since his residual liberty in either location was virtually the same. Like the chambers judge, the appeal court recognized that as the first requirement for the issuing of the writ had not been met, it was not necessary to examine the second requirement, whether the loss of liberty could be justified by CSC, but commented briefly that all decisions made by CSC with respect to S.E.B. were within its power to make, and endorsed by the Parole Board with a view to protecting the public from his criminal activities. It was recognized by the court that the application was a collateral attack on the prior decision of the Parole Board not to remove the residency clause in the LTSO.

 Back to top

R v W.M., 2021 SKCA 103

Richards Ryan-Froslie Barrington-Foote, July 30, 2021 (CA21103)

Criminal Law - Young Person - Sentencing - Adult - Appeal
Criminal Law - Young Offender - Sentencing - Adult - Appeal
Statutes - Interpretation - Youth Criminal Justice Act, Section 72

The appellant appealed from the decision of a Provincial Court judge to grant the Crown's application to sentence him as an adult pursuant to s. 72 of the Youth Criminal Justice Act (YCJA) and to impose a global sentence of nine years' imprisonment (see: 2019 SKPC 50). The appellant pleaded guilty to manslaughter, robbery, and wearing a mask while committing an indictable offence. The pre-sentence report described the difficult childhood of the appellant, who was 17 at the time he committed the offences. He was a member of the Lac La Ronge Indian Band. He did not know his father, had been apprehended from his mother for the final time at the age of five and spent the next seven years in foster homes where he suffered physical, emotional and sexual abuse. At 12, the appellant began drinking alcohol and using marijuana and by 15 was actively trafficking in drugs to support himself and was basically homeless. He was living in a tent in La Ronge when a local business owner became aware of the appellant's circumstances and took him into his own home. Later, the benefactor asked the appellant to leave because he suspected was dealing drugs from it. The appellant then persuaded two other young men to help him to rob his former benefactor. In the course of the robbery, the appellant and the others each participated in beating the victim and he later died of his injuries. The appellant was remanded in custody for 18 months before being sentenced. Prior to these offences, the appellant did not have a criminal record. At the court's request, reports were prepared by: a psychologist who

was working with the appellant in custody. It recommended that he be considered for an Intensive Rehabilitative Custody and Supervision (IRCS) sentence. The psychologist assessed him as being mature and street-wise but immature in other ways, and as suffering from various psychological disorders such as substance abuse disorder; and a psychiatrist who stated that the appellant did not have psychosis and was fit to stand trial. He testified that the appellant was mature for a 17-year-old. On appeal, the appellant argued that the sentencing judge erred in finding that the Crown had rebutted the presumption of diminished moral blameworthiness in its s. 72(1) YCJA application based on the facts established under s. 72(1)(a) that the planning and commission of the offences were sufficiently sophisticated to be "adult-like." The appellant asserted that the judge took an improperly narrow view of the evidence relevant to the question of diminished moral blameworthiness because he was overwhelmed by the seriousness and brutality of the offence itself and erred by failing to consider relevant background matters and Gladue factors. He was required to analyze the issue of moral blameworthiness under s. 72(1)(a) of the YCJA by using the approach to sentencing set out in Gladue and Ipeelee. He had further erred by concluding, under s. 72(1)(b), that the maximum youth sentence of three years would be not be of sufficient length to hold the appellant accountable. The judge had speculated that there was a risk that the appellant could stop taking programming at any time after receiving an IRCS sentence but had overlooked the time that the appellant had already spent in custody. He further erred by rejecting an IRCS sentence on the basis that it could not guarantee his full rehabilitation by the end of the three-year term. Finally, the appellant argued that the judge erred in imposing the sentence he did because he placed an inappropriate reliance on the sentence of seven months given to his co-accused and only briefly mentioned the appellant's personal history and Gladue factors.

HELD: The appeal was allowed in part. The court found that the sentencing judge had not erred in his decision respecting s. 72(1)(a) or (b) of the YCJA that an adult sentence should be imposed on the appellant but found the length of the sentence to be unfit and varied it to seven years' imprisonment. It noted that the judge's decision to sentence a young person as an adult is considered part of the sentence for the purposes of an appeal and the standard of review of a judge's determination under s. 72 is the same as the appeal of a sentence. It found that the Crown had met its obligation under s. 72(1)(a) of the YCJA. It reviewed the evidence given by the psychologist, the psychiatrist and others and determined that the sentencing judge's conclusion that the appellant's offences were committed in an adult-like way was supported, although he had erred in principle by focusing solely on the planning of the robbery and how it was undertaken without taking regard for anything else. However, the circumstances of the offence were nonetheless relevant to the analysis necessary to s. 72(1)(a) in deciding that the presumption had been rebutted. It rejected the defence's argument that the judge should have taken the Gladue approach in making his decision, as the considerations under s. 72(1)(a) of the YCJA and s. 718.2(e) of the Criminal Code are different and enter into play at different points in the sentencing process, but it acknowledged that the Gladue factors are relevant to the consideration of moral blameworthiness. Regarding the judge's determination under s. 72(1)(b), it found that he had erred in

speculating that the appellant might abandon the programming aspect of an IRCS sentence but the error was not enough to upset his overall conclusion about the accountability issue. It was not satisfied that the judge had overlooked the time that the appellant had spent in pre-sentence custody nor that he had regarded an IRCS sentence as being appropriate only if it could somehow guarantee the appellant's rehabilitation or prevent him from reoffending. Neither was the judge obliged to treat rehabilitation as the dominant consideration in his decision-making. Respecting the appellant's sentence, the judge erred in principle in the course of his sentencing analysis. In his reasoning with respect to the appellant's sentence, he failed to treat it as a highly individualized process and focused on the sentence given to the co-accused. That sentence was arrived at by way of a guilty plea and a joint submission and the judge in this case had no knowledge of the co-accused's personal circumstances and how they may have affected the idea of an appropriate sentence. The judge also failed to consider mitigating factors relevant to the appellant's sentencing such as his: guilty plea; repeated expressions of remorse; non-existent criminal record; and positive performance in pre-sentence custody. It varied the sentence to seven years less credit of 38 months for remand time. The court noted that the crime was very grave and the appellant's degree of responsibility was high. It considered his personal circumstances as a case study in Gladue factors. It took into account the mitigating factors that had been overlooked by the sentencing judge in reaching its determination of a fit sentence.

 Back to top

Richardson Pioneer Limited v Gherasim , 2021 SKQB 153

Bardai, May 26, 2021 (QB21158)

Statutes - Interpretation - Saskatchewan Farm Security Act, Section 66, Section 69

The applicant, Richardson Pioneer Ltd., applied pursuant to s. 69 of The Saskatchewan Farm Security Act (SFSA) for a determination whether certain chattels sold by the respondent, a farmer, were exempt. The respondent borrowed $600,000 worth of crop inputs for the 2014 growing season from the applicant. When he fell into default in 2015, the applicant commenced an action against him to recover the amount due. The respondent was deemed bankrupt, effective September 3, 2015, when his proposal to his creditors was not accepted. The registrar's decision regarding his bankruptcy was reserved. The respondent intended to continue farming and the applicant accepted his list of his farm equipment and machinery exempt under s. 66 of the SFSA but argued that the proceeds he obtained from the sale of other equipment after filing for bankruptcy should be available to satisfy creditors and be included as part of the bankrupt's estate. $21,000 from the sale

of a gravel trailer had been applied to a debt owed to a leasing company for grain bins and $87,000 from the sale of a grain cart, trailer and liquid cart was applied to the debt owing for grain bins to the leasing company. The parties agreed that these assets would be exempt under s. 66 of the SFSA as at the date of bankruptcy but differed as to whether a voluntary sale of them meant that they were not reasonably necessary within the meaning of s. 66(d) and therefore no longer exempt. The issues were: 1) whether the gravel trailer was an exempt asset; 2) whether a farmer is allowed to sell an exempt asset and buy or pay down another exempt asset of a different type; and 3) why a vehicle that the respondent had listed as his property, worth $30,000, was now owned by his wife.
HELD: The court ordered that the proceeds from the sale of the gravel trailer were not exempt in the bankruptcy and that the proceeds from the sale of the other assets retained their exempt status as they were put into what was reasonably necessary in the operation of the farm. The respondent was to provide an affidavit setting out the ownership history of the vehicle, explaining why he claimed it as his property and it now belonged to his spouse. It found with respect to each issue that: 1) the respondent had not met the onus of proving a right to the exemption of the gravel trailer as farm machinery; 2) the proceeds from the sale of exempt assets used to pay down other exempt assets reasonably necessary in the farming operation were, in this case and on this evidence, exempt. Grain bins were reasonably necessary to the operation of the farm and therefore the sale of exempt equipment for the purpose of buying grain bins or paying down debt related to them does not result in the loss of the exemption, if the sale of equipment is truly voluntary; and 3) the evidence provided by the respondent to the applicant in 2014 about his ownership of the vehicle was in conflict with his evidence that it was now owned by his wife. The respondent must supply further information.

 Back to top

Turcotte, Re (Bankrupt), 2021 SKQB 162

Thompson, May 28, 2021 (QB21161)

Bankruptcy and Insolvency - Absolute Discharge - Disability Tax Credits

The trustee for the bankrupt applied for directions to determine the treatment of prior, pre- and post-bankruptcy income tax refunds received by it in relation to a disability tax credit that became available to the bankrupt for the 2011 to 2018 income tax years. The application regarding whether the funds were to be treated as property vesting in the trustee pursuant to s. 68 of the Bankruptcy and Insolvency Act (BIA) or as income pursuant to s. 67. It was only after the bankrupt received her automatic discharge in 2019 that she

became aware that she was eligible for the disability tax credit, and successfully applied for it in April 2021. She advised the trustee that she had been approved for it and that had resulted in income tax refunds for the period in question in the amount of $14,929. The Canada Revenue Agency (CRA) advised the trustee that $14,421 was refunded for 2011 to 2017 and $508 was refunded in 2018. The trustee submitted that no surplus income would have been available to the bankrupt while she remained undischarged because her income was well below the Surplus Income Guidelines amount allowed for a family of three.
HELD: The funds held by the trustee were ordered to be paid to the discharged bankrupt with the exception of the $508 received for the 2018 calendar year, which was the year of her bankruptcy. The court found that the authority in Saskatchewan established in Nixon (2001 SKQB 221) had been affected by the decision in Chomistek (2018 ABQB 434) dealing with the law on the treatment of disability tax credits received after bankruptcy discharge so that the bankrupt need only account for the portion that was "earned" during the bankruptcy prior to discharge and the amount received from the CRA on account of the calendar year of the bankruptcy.

 Back to top

Weidner Apartment Homes v Cullum, 2021 SKQB 163

Wilkinson, May 28, 2021 (QB21162)

Landlord and Tenant - Residential Tenancies Act, 2006 - Appeal

The appellant, a landlord represented on the appeal by the manager of the building in question, appealed from a decision of a hearing officer appointed under The Residential Tenancies Act, 2006, to allow the former tenants' (the respondents') claim for return of one month's rent (see 2021 SKORT 998). The rental arrangement between the parties was for a one-year fixed-term lease, ending on April 30, 2021. The tenants gave one month's notice to terminate the lease, effective January 31, 2021. They had two complaints: that their right to quiet enjoyment had been breached during the nine months they resided there and the landlord had not addressed their concerns and that the premises had not been kept in good repair. During their tenancy, the respondents had advised the landlord on six occasions that neighbouring tenants made a lot of noise during the day and night and disrupted their lives and livelihoods. The landlord responded by telling them that a letter had been sent to the offending tenants. When the problems continued, the respondent spoke directly to the building manager and asked if they could leave "without issues." He advised them they would have to pay the lease-breaking fee of one month's rent. When they indeed gave their notice, the building manager made a formal

demand for payment of the fee and they paid $1,116 under protest. When they visited the premises six days after their departure, they found it inhabited by new tenants. They then applied for a hearing and served it by email, using the address supplied by the building manager in his demand letter. At the hearing, the manager said that he had not seen nor read the email until just before the hearing and asked for an adjournment but the officer declined his request. In response to the respondents' complaints, the manager did not provide any explanation as to why they hadn't been resolved and relied upon the lease-breaking provision without providing any evidence as to damages. The hearing officer stated in his decision, without reasons, that the appellant had been properly served. The hearing officer found that the lease-breaking fee was contrary to the provisions of the Act and therefore unenforceable. Further, the tenancy agreement was not a valid fixed-term agreement because the provision allowed the tenants to end the tenancy earlier than the end date if they paid the required fee. He concluded that the s. 21 of the Act applied and as the agreement lacked the required provision, the tenancy defaulted to month-to-month and could be terminated by one-month notice. The appellant's grounds of appeal were that: 1) the hearing officer erred in law by concluding that the fixed-term tenancy was converted to a month-to-month tenancy by operation of s. 21 of the Act; and 2) the hearing officer breached the duty of procedural fairness and thereby erred in law. It was not properly served it and did not have a reasonable opportunity to respond to the notice of hearing.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the hearing officer had not erred in returning the amount paid by the respondents to them. His reasons for doing so, relying upon s. 21 of the Act, were unnecessary to justify his result. The appellant had made no effort to assert a claim for damages in accordance with the statutory remedies and the applicable case law. A lease-breaking fee, expressly prohibited by the Act, is unenforceable; and 2) the hearing officer had not erred in concluding that the notice of hearing was properly served. He was entitled to do so under s. 82.1(1) of the Act and the appellant had not brought forward evidence on appeal to prove otherwise.

 Back to top

Suncor Energy Products Partnership v J.J. Lamon Inc., 2021 SKQB 173

Rothery, June 9, 2021 (QB21174)

Contracts - Interpretation
Statutes - Interpretation - Limitations Act, Section 5, Section 6, Section 18

The plaintiff commenced an action against the defendants in 2017 regarding an amount it alleged was due to it under an agreement between it and the defendants. In the 2002 agreement, the corporate defendant, described in the agreement as a marketer, was to pay an annual licensing fee charged by the plaintiff to sell its fuel products and participate in a profit-sharing arrangement. The personal defendants guaranteed the corporate defendant's obligations to the plaintiff. When the personal defendants wanted to terminate the agreement because of their retirement in 2016, the plaintiff commenced an action against them and the corporate defendant because of a dispute about the profit-sharing. Counsel for the defendants provided the plaintiff with its affidavit of documents in March 2018. The documents disclosed included the unaudited financial statements of the corporate defendant for the 2013, 2014, and 2015 fiscal years, each of which had been prepared by its accountants every June of the year following the fiscal year. In reviewing those financial statements, the plaintiff concluded that the information that the corporate defendant had provided to it through the plaintiff's internal financial accounting system (accounting system) was incorrect, thus reducing the amount calculated by it in the annual profit-sharing between the parties. It then commenced a second action, claiming judgment against the defendants for $210,063. It alleged that it discovered the claim on March 29, 2018 and as it commenced the action on September 4, 2018, it was well within the limitation period under The Limitations Act. The defendants argued that the plaintiff ought to have known of any discrepancy in the unaudited financial statements within the two-year period following their annual preparation and because the statement for the 2015 fiscal year was available in June 2018, the plaintiff's action was statute-barred. At the viva voce hearing, the plaintiff's representative testified that the prior to the 2016 fiscal year, it had not required any of its marketers, including the corporate defendant, to provide any external financial information other than what it received through its accounting system. The issue was when the plaintiff ought to have discovered the discrepancies between the information compiled in its accounting system and the corporate defendant's unaudited financial statements by its own exercise of reasonable diligence. The parties agreed that s. 17 of The Limitations Act did not apply.

HELD: The plaintiff's claim was dismissed as statute-barred. The court found that the two-year limitation prescribed by s. 5 of the Act applied and that the plaintiff had not met the burden of proving that the period had not expired as required by s. 18 of the Act. The plaintiff could not rely on the assertion that it discovered its loss under s. 6 of the Act in March 2018: the material facts upon which the plaintiff relied to assert its cause of action ought to have been discovered by the exercise of reasonable diligence. The latest date of discovery was June 2016, and thus the claim was statute-barred.

Back to top

Choquette v Viczko, 2021 SKQB 167

Currie, June 3, 2021 (QB21170)

Wills and Estates - Will - Interpretation
Statutes - Interpretation - Administration of Estates Act, Section 50.5

The defendant, the executor and trustee of the estate of Joseph Viczko, her late father, applied to the court pursuant to Queen's Bench rule 7-1 to decide a number of issues related to the administration of the estate. One of the beneficiaries of the will had previously commenced an action pursuant to s. 50.5 of The Administration of Estates Act (Act). Under the terms of the deceased's will, the primary beneficiaries were his three children: the executrix, the defendant, David Viczko (D.V.), and Yvonne Choquette, the plaintiff in the action. One clause in the will provided that the trustee was to distribute the estate with respect to certain farm land so that if it had been sold before his death, the proceeds of sale were to be shared equally between the plaintiff and the executrix. If the testator still owned the farm land at the time of his death, it was to be sold by the trustee and the proceeds divided equally between the plaintiff and the executrix. The land in question was owned by the testator when he died. The testator's son, D.V., had farmed the land for years and expressed interest in buying it. After having it appraised, the executrix sold it to D.V. and his wife, Jennifer Viczko (J.V.), in 2012. The plaintiff objected to the sale and commenced the action in which she sought to have the sale set aside and the land returned to the estate, relying on s. 50.5 of the Act. She argued that the combination of that section and the clause in the will meant that the sale of the land had been invalid because it proceeded without her consent, as a person "beneficially entitled" within the meaning of s. 50.5(1). The issues were: 1) whether the plaintiff was a beneficiary whose consent to the sale was required under s. 50.5 of the Act; 2) whether the specific direction in the will to sell the land and distribute the proceeds was paramount to s. 50.5; 3) whether the executrix had the discretion to determine the terms on which the land was sold; and 4) whether the court should approve the sale of the land to D.V. under s. 50.5(4) of the Act. The executrix asked for party and party costs and D.V. and J.V. requested solicitor and client costs against the plaintiff, contending that she commenced and pursued the action because of her ill will towards J.V. and had conducted herself improperly throughout the proceedings. All of the defendants asked that the costs for which the plaintiff was held responsible be paid out of her share of the estate.
HELD: The court determined the questions raised in the application and as a result, the plaintiff's claim was dismissed as the issues identified in the statement of claim had been determined. It found with respect to each issue that: 1) after interpreting the Act as a whole and ss. 21 and 37 of The Wills Act, the Legislature intended to accommodate the final testamentary wishes of testator. The court then examined ss. 50.4 and 50.5(1) of the Act and found that the meaning of the words "the persons beneficially entitled to it" in the latter provision mean the persons beneficially entitled to the real property that is proposed to be sold. In this case, the plaintiff was not. She was beneficially entitled to a portion of the proceeds of the sale of the real property, and thus she was not a beneficiary whose consent to the sale of the land was required under the section. 2) Under the will,

the executrix was given specific direction to sell the land and distribute the proceeds. The will was paramount to s. 50.5 of the Act and the latter did not apply at all to the circumstances. 3) The executrix had the power to sell the land under the will and the discretion to determine the terms on which it was sold; and 4) the court approved the sale retroactively. It was in the interest and to the advantage of the estate and the persons beneficially interested in it. Were it necessary, the court would have approved the sale under s. 50.5(4)(b) of the Act as well. Respecting costs, the court found that this was not an appropriate case for enhanced costs. The plaintiff's motivation was improper but there was a real issue to be tried under the Act. It ordered that the plaintiff bear her own legal expenses in connection with her action and they were not to be paid from the estate. She would have to pay one set of party and party costs under column 2 to the executrix and another such set of the costs of the action to the other defendants. Those costs were to be paid out of her share, or the remainder of her share, of the estate. If her share was insufficient to pay those costs, each of the defendants would have judgments against the plaintiff for the outstanding balance of costs owing to them.

 Back to top

R v Lonechild, 2021 SKQB 174

MacMillan-Brown, June 10, 2021 (QB21217)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - Long-term Offender
Criminal Law - Sentencing - Aboriginal Offender

The accused pleaded guilty in 2016 to committing two sexual assaults on two different victims in 2014, contrary to s. 271 of the Criminal Code. Following an assessment ordered under s. 752.1 of the Code, and after he was found mentally fit to stand trial after another psychological assessment, a dangerous offender hearing took place in 2017. He was subsequently designated a dangerous offender (DO) by the hearing judge and sentenced to two consecutive 10-year terms in custody followed by a 10-year long-term supervision order (LTSO) (see: 2017 SKQB 338). This decision was overturned and the designation and sentence quashed by consent judgment and a new DO hearing ordered in June 2019. Evidence presented at the second hearing included the expert reports from the psychologist who had determined the accused's mental fitness as well as those prepared for the first one and updated by new assessments and reports prepared by the same experts who had participated in the original hearing. The accused, an Indigenous man who born and raised on the White Bear First Nation, was 34 years of age at the time of the hearing. The parents of the accused and his three

siblings were residential school survivors who abused both alcohol and drugs and committed domestic violence. After the father left the home, the accused alleged that his mother's new partner had sexually abused him but she did not believe him and charges were never laid. The accused began drinking alcohol and using marijuana at the age of 12 when he was part of a group of youths engaged in those activities, and they committed various property crimes to fund their use of substances. Eventually alcohol addiction and use of cocaine dominated the accused's life. He left school with only a grade 9 education and tests revealed that his intellectual ability was in the low average range and his literacy was well below average. His peer group remained confined to people who abused drugs. The accused's work history was limited to short-term labour jobs. His criminal record was brief but significant in that he had been convicted of an extremely violent sexual assault in 2006 for which he received a 63-month sentence. Within seven months of his release in 2013, the accused committed the two predicate offences. The accused suffered from anxiety, anti-social personality disorder, substance abuse disorder and auditory hallucinations. He was formally diagnosed with schizophrenia between the original and second DO hearings. While on remand in various institutions including the Regional Psychiatric Centre (RPC), the accused had participated in 13 programs including the Aboriginal Sex Offender Program and Aboriginal Offender Substance Abuse Program. A psychiatric nurse who had worked with the accused at the RPC testified that he was cooperative. His mental health needs were high and those concerning substance abuse, aggression and violence, moderate. An official with Correctional Service of Canada (CSC) deposed that if the accused served his sentence in a federal penitentiary, the Integrated Correctional Program Model (ICPM), a program initiated in 2017, would be available to him both while in custody and afterwards under a LTSO. On behalf of the defence: an older Indigenous man, also a member of the White Bear First Nation, testified that he had been sexually abused as a child and because he understood the problems that it created for him and he had dealt with them, he was mentoring the accused; the accused's brother, 14 years his senior, advised that after the accused was released, he could live at his home. His wife, who was a lawyer, and her mother also resided in the home and together with them, he would provide the accused with a stable, safe residence with supervision. Both of these witnesses said that they would report the accused if he breached any of his release conditions; and the accused testified that he had suffered from auditory hallucinations and it was only when the dosage of the drug prescribed for it was increased that he felt that his mental health had improved and he no longer paid attention to the voices he heard. He expressed remorse to his victims and said that he understood what he had done to them because of the sexual abuse he had suffered and knew that to avoid committing sexual assault, he could never drink or use drugs again and needed new peers. The defence's expert witness, a clinical and forensic psychologist with thirty years' experience and expertise related to DO and long-term offender (LTO) assessments and hearings, testified that the accused's risk to reoffend had been reduced since his first assessment. He noted that the accused's behavourial problems in custody had stopped after his medication became effective. His risk would continue to decline as he aged. He might be in his mid-forties by the time he was released from custody. In his opinion, he found the support offered to the accused in

his post-release plan was of exceptionally high value to him in determining his ability his ability to manage his risk. The expert witness engaged by the court, a specialist in medicolegal psychiatry with over 30 years' experience, to assess the accused, said that after conducting the second assessment, he had changed his risk assessment, resulting from the diagnosis and treatment of the accused's schizophrenia. The accused showed much improved affect and he did not appear to be actively hallucinating. He was clearly remorseful and recognized the gravity of his offence. The accused's empathy with his victims as a result of his own abuse was important. After administering the Risk for Sexual Violence Protocol (RSVP) to the accused, five risk factors were found to be absent or only partially present compared to the 2017 assessment. The accused remained at high risk to commit sexual violence and the harm to a victim might be severe but the diagnosis of schizophrenia indicated that it had an indirect role in his risk for sexual violence. The accused's treatability had improved markedly with the use of medication and abstinence from substance abuse. Risk was reduced since 2017 and would continue to decline if he remained compliant and as he aged.

HELD: The accused was designated a long-term offender. He received a custodial sentence of 4.5 years for the first sexual assault and a custodial sentence of 6.5 years for the second sexual assault. The sentences were to be served consecutively, resulting in a total sentence of 11 years. The court granted eight years' remand credit such that the accused would remain in custody for a further period of three years. It also imposed a LTSO of 10 years, to commence upon completion of his custodial sentence. The court found that the accused was not an intractable offender on the basis of the expert evidence and thus the Crown's case to have him designated a DO failed. Pursuant to s. 753.1 of Part XXIV of the Code, it designated him a LTO. He met the three requirements of: 1) being sentenced for period of two years or more. The predicate offences of major sexual assault required custodial sentences of three years; 2) his risk to reoffend was substantial. The accused had been convicted of three sexual assaults, offences specifically enumerated in s. 753.1(2)(a), and they constituted a pattern of repetitive behaviour and likelihood of causing injury through future sexual offences; and 3) it was satisfied, on the expert evidence and with the support of the accused's mentor and brother, that there was a reasonable prospect that his risk to reoffend could be controlled in the community upon his release from custody. Respecting sentencing, the court noted that protection of the public was the paramount consideration in the context of a LTO designation under Part XXIV. The Gladue factors were relevant, although considered differently in the context of Part XXIV than in conventional sentencing. The accused suffered sexual abuse as a child and witnessed domestic violence. His parents were survivors of the residential school system and abused alcohol and drugs. The mitigating factors included the accused's relative youth, that he had entered a guilty plea immediately and expressed remorse toward his victims. The aggravating factors were that his criminal record, although not lengthy, was extremely serious. The three sexual assaults took place in a short period of time, were violent and were committed against women who were vulnerable. The victim impact statements submitted showed how serious and long-term the effects upon the victims were. The proximity in time of the two offences meant that the sentences would be imposed as consecutive and in light of the

foregoing and the totality principle, a fit sentence was 11 years in custody comprised of four and a half years followed by six and a half years for the respective offences. It reviewed the remand credit to which the accused was entitled on the 1:1.5 basis, and found that it would result in the accused not serving federal time because his net sentence would be under two years. It would be insufficient then to complete the programming he needed. In order to have access to the high intensity programming available in the ICPM model, the court decreased the remand credit to eight years, leaving three years left to serve. A long-term supervision order (LTSO) of the maximum length of 10 years was appropriate based upon the recommendations made by the psychiatrist. It was recommended to the CSC, also based on the psychiatrist's advice, that the accused serve the balance of his custodial sentence at RPC in order to receive mental health assessments and treatment for schizophrenia in conjunction with ICPM programming.

 Back to top

R v Schreiner, 2021 SKQB 175

Mills, June 10, 2021 (QB21183)

Criminal Law - First Degree Murder
Criminal Law - Defences - Not Criminally Responsible

The trial judge was called upon to decide whether the Crown had proven beyond a reasonable doubt the guilt of B.F.S., charged with the first-degree murder of his spouse, T.B., the mother of his two infant children. B.F.S. raised the defence of not criminally responsible pursuant to s 16 of the Criminal Code (NCR). The trial judge used the following decision tree in arriving at his ruling as to B.F.S.'s guilt: 1) Did B.F.S. commit the unlawful act? 2) Did he suffer from a "disease of the mind" at the time of the unlawful act? 3) Did this disease of the mind cause him to be incapable of knowing that the unlawful act was wrong, and was the murder planned and deliberate? On the evidence, there was no doubt B.F.S. had unlawfully killed T.B. He admitted as much. He stabbed her 80 times as he held her down by the neck. In his determination of whether B.F.S. suffered from a disease of the mind, the trial judge followed the approach formulated in R v Lesann, 2014 SKQB 332. Both the psychiatrist for the Crown, Dr. A., and the psychiatrist for the defence, Dr. M.M., agreed that if B.F.S. suffered from a disease of the mind, it could only be a mental illness called schizotypal personality disorder (SPD), one recognized by the DSM-5 and characterized by nine specific traits. Whether "a particular mental condition can be characterized as a "mental disorder" is a question of law to be decided by the trial judge" (see: R v Bouchard-Lebrun, 2011 SCC 58) and excludes "self-induced states caused by alcohol or drugs." (See: R v

Cooper, [1980] 1 SCR 1149.) If the trial judge was satisfied on the evidence that B.F.S. had a mental illness that was a "disease of the mind" at law, then in his capacity as the finder of fact, he needed to decide whether B.F.S. was possessed of this "disease of the mind" at the time of the unlawful act. The role of psychiatrists at trial is to provide their expert opinion as to whether B.F.S. suffered from a condition recognized by the profession as being a mental illness (see: R v Schoenborn, 2010 BCSC 220). If B.F.S. failed to prove on a balance of probabilities that he was suffering from a mental disorder that rendered him incapable of knowing that the unlawful act was wrong, the trial judge was then to move on to decide whether B.F.S. had the mental intent of first-degree murder. The trial judge was aware of these elements in his analysis of B.F.S.'s guilt and was guided by them in making his findings of fact and applying the law.

HELD: The trial judge found that B.F.S. had failed to prove he was possessed by a mental disorder at the time he unlawfully killed T.B., and that the Crown had proven beyond a reasonable doubt both the criminal act and the mental intent element of second-degree murder. Upon a review of the reports of Dr. A., the psychiatrist called by the Crown, and of Dr. M.M., the psychiatrist for the defence, their testimony and the other evidence, including the testimony of family members of B.F.S., of B.F.S. himself, and of journal entries made by B.F.S. before and after he killed T.B., the trial judge preferred the opinion of Dr. A. that B.F.S. was not afflicted by SPD but by anxiety and paranoia exacerbated by a history of drug and alcohol use, and in particular magic mushrooms, which he found B.F.S. had ingested just prior to the murder of T.B. The trial judge disbelieved the testimony of B.F.S., finding that he fabricated evidence after the offence about hearing voices from "Illuminati" which compelled him to kill his wife and daughter, and that he did so for the benefit of Dr. M.M. in their interviews. Dr. M.M. unequivocally accepted B.F.S.'s claims in this regard. The court, on the other hand, found that when B.F.S. was examined by Dr. A. and a team at the Saskatchewan Hospital, before his interviews with Dr. M.M. and over a considerably longer period, B.F.S. expressed or exhibited symptoms consistent with the hallucinogenic effects of magic mushrooms, and not consistent with PDS. Dr. A. also opined that he did not exhibit the specific traits of PDS, with which the trial judge agreed upon a review of all nine of these traits in light of the evidence. The trial judge also found as a fact that, in his interviews with Dr. A., in which other members of the therapeutic team participated, B.F.S. stated: "If I can't have the kids, she can't either." The trial judge also found as a fact that in his accounts to police, his preoccupation was that T.B. would do what she could to have the children taken away from him, and that he knew he had taken a knife into the bedroom and stabbed her. At the Saskatchewan Hospital, he consistently expressed that if he could not be part of the children's lives, T.B. would not be either. When he was interviewed by Dr. Mela, he shared none of these admissions with him. Further as to the features of PDS, Dr. A. opined that the illness would manifest itself early in the sufferer's life, and would be noticeable by the public, no evidence of which was presented by B.F.S. Dr. Mela was of the view that Dr. A's opinion should not be so clear-cut. The trial judge preferred Dr. A's view. Of considerable weight for the trial judge was the evidence that, though B.F.S. said the voices were also pushing him to kill his daughter, he did not do so, and had no explanation as to why. In conclusion, the

trial judge found that B.F.S. had not disproven that he was in a self-induced unstable mental state, not in the grips of a mental illness, because of the prolonged use of magic mushrooms and his ingesting them prior to killing T.B. He also found that he was satisfied, on the evidence of his actions and his admissions, that B.F.S. intended to kill T.B. so she would not take the children away from him. As to whether the Crown had proven he had committed first-degree murder, he found that his anxious and paranoid state prevented him from having the necessary intent for first-degree murder, since, in his mental state, he could not have planned and deliberated to kill T.B.

 Back to top

R v Green, 2021 SKQB 187

Mitchell, June 29, 2021 (QB21185)

Aboriginal Law - Natural Resources Transfer Agreement, Section 12

This summary conviction appeal was brought by the Crown on the ground that the trial judge misinterpreted the word "Indian" as used in s 12 of the Natural Resources Transfer Agreement (Sch. 3 of the Constitution Act, 1930) (NRTA) by giving it an overly broad meaning which would have the effect of permitting treaty Indians bound by a treaty to lands located in Ontario to hunt for food on treaty lands located in Saskatchewan and not to be subject to charges for offences enacted by the Saskatchewan Wildlife Act and its regulations. The respondents were hunting big game for food on private land and in the Moose Mountain Provincial Park without a hunting license and were charged with unlawful hunting and other offences. The Crown argued that the trial judge ignored the historical context within which the NRTA was enacted and failed to apply the correct interpretive principles of purposiveness and generosity to s 12 of the NRTA as required by R v Blais, 2003 SCC 44 (Blais), and in fact failed to consider Blais at all. The Crown contended that the trial judge interpreted the term "Indian" detached from the purpose and historical context of s 12 of the NRTA, and as a result defined the word to mean all "Indians within the Province of Saskatchewan," whether resident in Saskatchewan or not.
HELD: The summary appeal court judge allowed the appeal, ruling that the trial judge had erred in law in his interpretive approach to s 12 of the NRTA, a constitutional document, by not framing his interpretation of the provision as required by Blais and R v Grant, 2009 SCC 32, [2009] with a "generous, purposive, and contextual approach." As such, he reasoned, the trial judge should have read the applicable provisions of the NRTA with an understanding of what the enactment was trying to achieve and, as a result, he should have

concluded that their intent was to preserve hunting rights already in existence for the benefit of "Indians of the Province" upon the transfer of Crown lands to the Province of Saskatchewan. The three NRTAs only applied to each of the western prairie provinces and to the Indian Reserves located in each of them. The purpose of the NRTA relating to Saskatchewan was to preserve the right of Indians attached to the geographical areas in which Saskatchewan treaties were made. The summary appeal court judge implied that to do as the trial judge did, that is, to simply state that the term "Indian" was clear in and of itself and the respondents were clearly "Indians" such that no purposive approach was required to understand its meaning, would result in an interpretation of s 12 of the NRTA unmoored from case authority governing the interpretation of s 12 of the NRTA, and leading to unintended and potentially complicated results.

 Back to top

Gherasim, Re (Bankrupt) , 2021 SKQB 194

Thompson, July 7, 2021 (QB21191)

Bankruptcy and Insolvency - Absolute Discharge
Bankruptcy and Insolvency - Examination of Bankrupt

The bankrupt's automatic discharge was opposed by Richardson International Ltd., a creditor of the bankrupt, alleging: 1) facts pursuant to s. 173(1)(a),(d),(e),(h),(k) and(o) of the Bankruptcy and Insolvency Act (BIA); 2) that the bankrupt failed to deliver all books, records etc. relating to his property and affairs and to aid in the realization of his property and distribution of the proceeds among his creditors contrary to s. 158(b) and (k) of the BIA; and 3) that he committed an offence under s. 173(1)(l) of the BIA by making a fraudulent disposition of his property before the date of the initial bankruptcy, contrary to s. 198(1)(a) of the BIA, and had after or within one year immediately preceding the date of the initial bankruptcy event obtained credit by false representations, contrary to s. 198(1)(e) of the BIA. Richardson made a request at the discharge hearing for it to be permitted to examine the bankrupt. In her report dated March 2021, the trustee stated that the bankrupt could not be held responsible for any of the facts referred to in s. 173 of the BIA. The bankruptcy began in 2015. Over the course of the next six years, the first trustee had retired and been replaced by a new one who submitted the report at the discharge hearing and the bankrupt was represented by different counsel. The bankrupt had been deemed to have assigned in bankruptcy by operation of s. 57 of the BIA in July 2015 after his creditors voted against a proposal to deal with his debts. The former trustee's report estimated the anticipated rate of dividends of 0 percent for the unsecured creditors and identified the cause of bankruptcy as

weather conditions producing poor crops. He concluded that the bankrupt could not be justly held responsible for any of the facts pursuant to s. 173 of the BIA. In March 2016, under the administration of the former trustee, the bankrupt's discharge was adjourned on the grounds that he was examined under oath by the trustee and one of the creditors (Richardson), and until all of the bankrupt's undertakings were complete, the trustee was unable to make a recommendation on his discharge. At the 2021 hearing, counsel for Richardson tendered a transcript of an examination of the bankrupt for the court's consideration in the matter of his discharge. Counsel for the bankrupt then raised preliminary concerns about the propriety of some of Richardson's arguments in that the unanswered undertakings given by the bankrupt under the guidance of his previous counsel might have been founded on an improperly constituted examination conducted in 2016 by Richardson's counsel. The bankrupt's lawyer asserted that the examination occurred without the court order required pursuant to s. 163(2) of the BIA and, without it, the evidence tendered by way of the examination must be excluded from the court's consideration. The court requested that the parties provide submissions on the issue of whether there is authority for a trustee or a bankrupt to consent to an examination by a creditor. Richardson's counsel responded by submitting that he was acting for the trustee when he examined the bankrupt in 2016. At the 2021 hearing, the same counsel did not cross-examine the bankrupt regarding his unanswered undertakings, nor did he seek an order approving the examination nunc pro tunc. The evidence indicated that the bankrupt's previous counsel apparently consented to the examination of him without the required order and that although it had begun under the trustee's authority, it continued for two days under Richardson's counsel, ending with the bankrupt making over 50 undertakings. The issues were whether: 1) the examination was properly constituted; and 2) the bankrupt was an honest but unfortunate bankrupt.
HELD: The court denied Richardson's request to examine the bankrupt and granted the bankrupt an absolute discharge. It found with respect to each issue that: 1) the 2016 examination of the bankrupt was not properly constituted as it was conducted without the legal authority of a court order. It reviewed the purposes of the BIA and the intent of s. 163 regarding examinations and distinguished them from those conducted in civil litigation proceedings. It held that the consent of the bankrupt's previous counsel cannot be construed to waive the statutory requirements for a court order in this case. The evidence submitted by Richardson supported the finding that their counsel was not examining the bankrupt as a representative of the former trustee but was acting on his client's behalf. After six years, it was too late in the bankruptcy to allow an examination of the bankrupt and delay his discharge. Counsel for Richardson failed to seek an examination order at any time between the bankruptcy assignment in 2015 and the discharge hearing in 2021 or apply for an order nunc pro tunc or cross-examine the bankrupt on his affidavit at the discharge hearing; and 2) Richardson had not established a fact to rebut the trustee's finding that the bankrupt could not be held responsible for a fact under s. 173 of the BIA. The onus to rebut had shifted from the bankrupt to Richardson because the trustee's report was taken as evidence of the statements it contained under s. 170(5) of the BIA, and she attributed the bankruptcy to weather conditions producing poor crops. Further, the trustee decided not to oppose the

discharge with the knowledge that bankrupt's undertakings had not been met. There was no evidence before the court to rebut the trustee's conclusion that the bankrupt had complied with s. 158 of the BIA or to support a finding of fraud.

 Back to top

Métis Nation - Saskatchewan v NexGen Energy Ltd., 2021 SKQB 195

Clackson, July 12, 2021 (QB21192)

Injunction - Interlocutory Injunction - Prohibitory - Requirements

The plaintiff, Métis Nation - Saskatchewan (MNS), the government of the Saskatchewan Métis, representing seven Métis communities in the north of the province, applied for an interlocutory injunction (II) and simultaneously commenced an action against the defendant, NexGen, a corporation involved in uranium exploration and development, alleging a breach of an agreement to negotiate a second agreement in good faith. In addition to damages for the alleged breach, the plaintiff's II application was to prohibit the defendant from moving forward with an environmental assessment of a potential green-field uranium mine unless it had complied with its contractual obligation to negotiate in good faith. In 1994, the MNS filed an Aboriginal title claim to lands in northern Saskatchewan including those that the defendant had identified in 2013 for its uranium mine, known as the Rook I project (the project). After obtaining provincial regulatory approval of the project description in 2019, the defendant sought and obtained the assistance of the plaintiff in moving the process forward when the parties entered into a written "Study Agreement" (SA) that provided a description of the position of the parties, including that the plaintiff had not consented to the project and would be able to participate in environmental reviews of it and the defendant had not decided to proceed with it, and they would collaborate to advance the environmental assessment process (EAP). Further, if the plaintiff consented to the project, consent would be granted through a formal Impact Benefit Agreement (IBA) related to the economic/employment benefits that would accrue to it. The SA committed the parties to negotiate an IBA in good faith and formalize it by June 30, 2020. These negotiations commenced in November 2019 and continued regularly after the onset of the pandemic. A number of items were contentious and were not resolved by August 2020, when the plaintiff threatened legal action against the defendant and disclosed its draft statement of claim, alleging the defendant's breach of the good faith term of the SA. In November 2020, it informed the defendant that it would return to the negotiating table only if certain terms were agreed to beforehand, including that it would not oppose the injunction application that it then initiated. The plaintiff

filed multiple affidavits in support of its application relating to the communications history between the parties upon which it relied to demonstrate the defendant's lack of good faith. The defendant objected to much of the content of the affidavit evidence.
HELD: The application was denied. In its preliminary remarks, the court commented on the plaintiff's failure to come to it with clean hands in seeking equitable relief in that it had not made full disclosure of all the facts relevant to the negotiations between the parties. It further remonstrated the plaintiff for violating the requirements of Queen's Bench rule 13-30 in response to the defendant's objections to the affidavits filed by the plaintiff. The court attached an extensive and detailed schedule of the offensive portions struck from the affidavits in question. Respecting the application for an II, it applied the three-stage test set out in RJR-MacDonald ([1994] 1 SCR 311) and PSC v Mosaic (2011 SKCA 120). It first found that the strength of case threshold to be met by the plaintiff was to demonstrate that its underlying claim presented a serious issue to be tried, as the injunction was prohibitory; would not dispose of the underlying action regardless of outcome; and the plaintiff's case was not a simple question of law based upon undisputed facts. The plaintiff demonstrated that a serious issue was to be tried: whether the defendant's contractual obligation to use its best efforts to negotiate an IBA within the SA's timelines was legally enforceable. Regarding the third stage of the test, the plaintiff had not shown it would suffer irreparable harm if the injunction were not granted. The underlying claim was a garden variety contract dispute between private parties and the plaintiff had not established a meaningful doubt as to the adequacy of damages should the injunction not be granted. On the balance of convenience, the defendant was likely to suffer greater harm if the injunction were granted.

 Back to top

Nguyen v Neuls, 2021 SKQB 202

Brown, July 15, 2021 (QB21198)

Barristers and Solicitors - Confidentiality - Conflict of Interest - Application for Removal

The petitioner's counsel applied to have T.S., the lawyer for the respondent, removed as his counsel on the basis of an alleged conflict of interest. Another lawyer, A.S., who worked in the same firm as T.S., had met with the petitioner in 2018 and provided legal advice related to the same matters currently being litigated between the parties. The petitioner came to Canada in 2014 from Vietnam at the time of her marriage to the respondent. Her capacity to speak and understand English was quite limited. In 2018, she sought help from the Regina Immigrant Women's Centre (RWIC) because the respondent was abusing her. Through the RWIC's

services, she met with A.S. for a pro bono legal consultation session lasting 50 minutes and gave him the respondent's name and date of birth as well as telling him about the respondent's abusive treatment of her and her concerns about his parenting of her daughter. She gave the same information to A.S.'s assistant. A.S. provided legal advice to her, saying that she and her daughter should find safe accommodation and he would represent her without payment until after the family property was divided. He stated that the respondent was wealthy and he could start an application on her behalf. The petitioner took no further action until after the parties separated in 2021 and she then retained K.K. as her counsel. T.S. undertook to represent the respondent, who had been a client of his firm regarding various matters since 2007. K.K. noted in her communication with T.S. in early April 2021 that the petitioner had met with A.S. in 2018 and saw a conflict of interest with his firm representing the respondent. She advised him shortly thereafter what her client wanted in terms of a collaboratively-based outcome and that she was looking into the conflict of interest. T.S. responded by saying that A.S. had provided pro bono service to RWIC, that he had no recollection of meeting the petitioner, and that they could not find a file in relation to her within their firm. He advised that the respondent had been a client of the firm since 2007. A few days later, K.K. withdrew as counsel and the petitioner began representing herself. On behalf of the respondent, T.S. made a without prejudice proposal to the petitioner but nothing was resolved. In late May, she retained her present counsel, J.M. J.M. advised T.S. that she believed there was a conflict of interest due to the consultation with A.S. on the same matters now being litigated. His response was that K.K. had told him that the petitioner did not object to him representing the respondent. This application was then brought. A.S. filed an affidavit deposing that he had held dozens of meetings with various clients of RWIC since he began doing pro bono work for it in 2015 and he could not recollect the petitioner. He could not find any notes from the meeting and no payment was made by anyone relating to the meeting. The petitioner averred that she had not waived any conflict with T.S. when K.K. was still representing her. He argued that he was not imputed with A.S.'s knowledge because it was a short-term summary legal service provided in a pro bono interaction to which Commentary 3 to s. 3.4-2 of the Code of Professional Conduct applied, allowing him to continue to represent the respondent. He submitted that an impermeable wall would be placed between him and A.S. in the future respecting the parties. Further, he contended that the petitioner was estopped because she had sought a collaborative meeting with him and the respondent before K.K. withdrew and then she continued to deal with him after that had occurred, and these actions confirmed her waiver of conflict.

HELD: The application was granted. The court removed T.S. as counsel for the respondent. It reviewed the authorities and applied the tests set out in MacDonald Estate ([1990] 3 SCR 1235), finding that T.S.'s law firm was in a conflict of interest resulting from the petitioner's consultation with A.S. in 2018 regarding the concerns she had with her marriage to the respondent. That information was directly related to the current litigation. The firm was imbued with the information. There was a risk that the information would be used to prejudice the plaintiff. It noted that family law cases raise additional considerations respecting confidential

information, that family violence was alleged to have occurred and that the petitioner, a new Canadian, was not fluent in English. In its review of the evidence, the court accepted that A.S. received considerable confidential information from the petitioner, no advance systems were created in the law firm to try to avoid conflicts and the timing of T.S.'s assurance of future impermeability between him and A.S. was unsatisfactory: policies regarding conflicts should have been put in place early on. Although A.S. had not spoken to T.S. about the meeting, it was possible the petitioner's file was still in the office's system and she should not have to be concerned that information she gave A.S. could be used during any cross-examination of her that might occur in the litigation. There was no evidence that the petitioner was seeking to use the conflict rules tactically to prevent the respondent from retaining legal counsel and there are many family lawyers available to represent him. It rejected T.S.'s submissions. For example, respecting s. 3.4-2 the Code, it found that A.S.'s legal consultation with the petitioner did not fit within the exception relied upon by T.S. because A.S. actively sought her business. Thus, his firm could be imbued with the information.

 Back to top

Abdon v Brandt Industries Canada Ltd., 2021 SKPC 37

Demong, July 15, 2021 (PC21028)

Employment Law - Wrongful Dismissal

The plaintiff brought an action for wrongful dismissal against the defendant and sought damages of $30,000, the limit of the monetary jurisdiction of the court under The Small Claims Act, 2016. He argued that after working for the defendant for eight years as a welder, a reasonable period of notice would be eight months. The defendant asserted that it had just cause because the plaintiff abandoned his employment when he failed to show up for six ten-hour shifts on January 15, 16 and 17 and February 3, 4, and 5, 2020. It also questioned the quantum of damages as it claimed that the plaintiff failed to take reasonable steps to mitigate them by refusing to take other welding positions offered to him. The plaintiff said that his failure to attend was due to a back injury. He went to work on January 14 but left a note for his supervisor explaining that he had back pain and attached a medical certificate from a physician dated as of that date indicating that the plaintiff was not fit for work from January 15 to 21. The supervisor was suspicious because the plaintiff had been in a meeting immediately prior to his shift commencing and had not mentioned his infirmity. The defendant sent an email to the plaintiff on January 16, advising him to complete and submit its short-term disability forms, not to return to work until January 22, and to present a physician's statement. The plaintiff did not reply nor did he ever submit

the forms. On February 4, the plaintiff sent an email to the supervisor that supplied a doctor's report saying that he had been diagnosed with sciatica in the Philippines on February 3. On February 6, the plaintiff attended at work for his regularly-scheduled shift but he was advised by supervisory staff that they felt that they had been duped and they were terminating him. The evidence showed that the plaintiff had planned and paid for a vacation in March 2019 that he intended to take in the Philippines from January 15 to February 6, 2020. In October 2019, the plaintiff asked his foreman if he could borrow 2020 vacation time to supplement the required 22 days he would need for his vacation. That request was denied, as were six others made by the plaintiff thereafter to more senior individuals. The manufacturing work that was performed by the defendant required full attendance in order for Brandt to meet its production quotas and it scheduled all employee requests for vacations at the end of each year. It had advised employees in a 2015 memo that prior approval of any leave was required and if it was not obtained, it could be deemed an unapproved absence resulting in discipline and termination. The plaintiff had received a written warning regarding his unapproved absence that year but had not, since that time, failed to attend work. The plaintiff's counsel argued the plaintiff's absence was medically justified and could not be seen to be unauthorized. Further, the defendant was obliged to follow its own progressive disciplinary measures rather than immediately terminate the plaintiff.
HELD: The plaintiff's action was dismissed. The defendant was awarded costs set at five percent of the damages claimed by the plaintiff. The court was satisfied that the plaintiff's dismissal was for just cause. His conduct had been insubordinate and deceitful. He feigned two injuries in the hope that it would excuse his absence from work. The evidence of his unsuccessful attempts to obtain borrowed vacation time to allow him to travel to the Philippines and that he had been warned in the past of the consequences of unauthorized absence indicated that he knew that he was taking unauthorized leave. The defendant would not be able deter other employees from similar behaviour unless it dismissed him in these circumstances. In the event the court had erred in its findings, it reviewed the age of the plaintiff, his length of service and the availability of similar employment to him and found that six months would be reasonable notice. It noted the employment offers he had received, the salaries proposed and the plaintiff's reasons for not accepting them and concluded that his damage award would have been reduced because of his failure to mitigate.

Back to top