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

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Subject Index

***T.K. v C.E.*, 2021 SKCA 138**

Jackson Leurer Kalmakoff, 2021-10-27 (CA21138)

Family Law - Custody and Access - Interim - Mobility Rights - Appeal

The Court of Queen's Bench judge in chambers (chambers judge) granted the respondent C.E.'s application to relocate from Saskatchewan to Ontario a child of herself and her spouse, the appellant T.K., conceived by insemination of C.E. by a sperm donor. She concluded that the child's "physical, psychological and emotional safety, security and well-being [were], to the greatest extent possible," protected by relocation with C.E. to Ontario where she would benefit from the support of C.E.'s extended family. (See: *C.E. v T.K.*, 2021 SKQB 108). The chambers judge was satisfied that the child's best interests would not be met if T.K. were the primary caregiver, and if C.E. moved to Ontario without the child, such would be the result. Parenting had been fully shared between C.E. and T.K. through an interim parenting order prior to the application. T.K. appealed on the grounds that: 1) the chambers judge erred in principle by

Constitutional Law - Charter of Rights, Section 8, Section 9 - Arbitrary Detention - Unlawful Search and Seizure

Contract Law - Guarantee - Enforceability - Defences

Criminal Law - Assault - Sexual Assault

Criminal Law - Assault - Sexual Assault - Conviction

Criminal Law - Assault with a Weapon - Sentencing - Crown Appeal

Criminal Law - Evidence - Conduct of the Complainant

Criminal Law - Evidence - Conduct of the Complainant - Application to Cross-Examine - Stage Two

Criminal Law - Murder - Attempted Murder - Sentence Appeal

Criminal Law - Procedure - Appeal - Leave to Appeal

Criminal Law - Sentencing - Application for Remand for Assessment - Dangerous Offender

Criminal Law - Sentencing - Application for Remand for Assessment - Long-Term Offender

Family Law - Child Support - Variation

Family Law - Custody and Access - Interim - Mobility Rights

preferring C.E. in her decision because C.E. was the biological parent of the child; 2) the chambers judge erred by not imposing an evidentiary burden on C.E. to satisfy the chambers judge that it was in the best interests of the child that she be permitted to move with C.E. to Ontario; and 3) the chambers judge erred by overlooking or misinterpreting material evidence to the detriment of T.K. Viva voce evidence was called at the chambers hearing.

HELD: The court, speaking through Leurer J.A., dismissed the appeal. He commenced his analysis by restating that he was loath to interfere with interim parenting orders and would only do so if "the error [was] of such a nature that it compel[led] reversal of the order." (See: *A.M.D. v M.R.M.*, 2021 SKCA 71; *M.H. v H.S.*, 2019 SKCA 122.) The court then turned to the grounds of appeal. With respect to ground 1), the court first referred to ss. 60 and 11 of *The Children's Law Act, 2020* (Act). Subsection 60(2) specifically recognizes that a spouse of a birth parent of a child conceived through insemination by a sperm donor is a parent of the child; and by s. 11, in an application to vary a parenting order, the court shall not prefer one parent over another. As such, T.K. and C.E. came before the chambers judge on an equal footing with no presumption or inference in favour of either. To demonstrate such a preference founded only on the fact of biological parentage would be an error in law. He ruled, however, that the chambers judge committed no such error. Instead, he stated, she considered the evidence of the family connections in Ontario as one of the factors – an important one – that would benefit the child. He said her reasons did not show that the chambers judge favoured C.E.'s claim over that of T.K. solely on the basis that she was the biological mother of the child, but that her reasons clearly showed she remained focused throughout her analysis of the evidence and the applicable law on how best to meet the needs of the child. Next, he turned to ground 2), the matter of the burden of proof on the application, which necessitated a consideration of ss. 16(1) and (4) of the Act. He noted that the chambers judge concluded s. 16(1) applied so that C.E. bore the evidentiary burden of proof because C.E. and T.K. had equal parenting time pursuant to the interim parenting order, and C.E. was the party who wanted it changed. Though viva voce evidence was called on the hearing before her, the chambers judge found the interim parenting order was nonetheless formed from the less complete evidentiary record common to interim orders. As such, pursuant to s. 16(4) of the Act, she had the discretion not to apply s. 16(1) and thereby place no additional evidentiary burden on C.E., which is what she did. The court stated she made no error in doing so since she had recognized that the interim parenting order was a stop-gap measure and had not "been forged in the crucible of litigious dispute," and on that basis did not justify imposing an additional evidentiary burden on C.E.to overturn it. Lastly, in his consideration of ground 3), he understood that the appellant objected particularly to the chambers judge's conclusions on the evidence concerning T.K.'s fitness to be the primary caregiver of the child, and that she failed to consider evidence from T.K. contrary to this proposition. The court stated that the chambers judge did consider T.K.'s evidence and submissions in her analysis. The court dealt fully with the chambers judge's consideration of: an incident in which T.K. disciplined the child for interrupting a conversation between her and C.E. to the point that the child was crying so hard she was gasping for breath; communications

Family Law - Custody and Access - Interim - Mobility Rights - Appeal

Regulatory Offence - Wildlife Act - Unlawful Hunting - Treaty Rights

Statutes - Interpretation - Correctional Services Regulations, 2013, Section 68

Statutes - Interpretation - Criminal Code, Section 752.1, Section 753(1), Section 753.1(1)

Statutes - Interpretation - Criminal Code, Subsection 683(1)

Cases by Name

Atrium Mortgage Investment Corporation v Koh

Folkerts v Folkerts

John Howard Society of Saskatchewan v Saskatchewan (Attorney General)

Kassian, Re (Bankrupt)

R v Envirogun Ltd.

***R v F.I.* (ruling on application)**

***R v F.I.* (decision)**

R v Millie

R v Morin

R v Roberts

R v Rutt

R v Vasile

between C.E. and T.K. which could be interpreted as showing T.K. put her needs before those of the child; evidence which it was reasonable to conclude showed that T.K. would not have promoted the child's relationship with C.E.'s family; and that T.K. was controlling in the relationship to a degree which satisfied the definition of family violence in the Act. On the other hand, the court was satisfied that the chambers judge did consider such matters as the effect of the relocation on T.K.'s ability to continue a relationship with the child; C.E.'s seeming acquiescence with T.K.'s parenting arrangements; and T.K.'s allegations that C.E. also exhibited violent behaviour. The court stated that it was not within its purview to reweigh the evidence but could intervene only if the chambers judge had overlooked or misinterpreted any material evidence in arriving at her decision to an extent which compelled appellate reversal, and this was not the case.

 Back to top

***Saskatchewan Health Authority v Patel*, 2021 SKCA 140**

Kalmakoff, 2021-10-29 (CA21140)

Civil Procedure - Appeal - Vexatious Proceedings

The Saskatchewan Health Authority (SHA) applied to the Court of Appeal (Court) pursuant to Rule 46.2(1) of The Court of Appeal Rules for a declaration that S.P. was a vexatious litigant and for an order that he not bring any further appeals without leave of the court. The Court of Appeal decision in *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 provides the factual background of this matter. Following suspension of his surgical privileges after disciplinary proceedings before the senior medical officer of the Regina Qu'Appelle Regional Health Authority in June 2016, the respondent, S.P., appealed to the Discipline Committee, which upheld his suspension, but provided him with recourse to reapply for reinstatement of his privileges following supervised training. S.P. appealed this decision to the Practitioner Staff Appeals Tribunal (PSAT). A hearing panel was appointed, sitting intermittently for more than two years, and the panel recused itself in December 2020 without reaching a final decision. During this period, S.P. initiated numerous interlocutory applications and other appeals of tangential matters to the Court of Queen's Bench for judicial review of PSAT in-hearing decisions. Most of these appeals wended their way up to the Court of Appeal chambers (court) for leave to appeal or were set down for appeal without leave, though leave was required. All but a few were dismissed or whittled down because S.P., among other dealings: continuously asked the court to review interlocutory decisions knowing the court had no power to do so; brought appeals he knew were without merit; asked the court to exercise first-instance relief or

provide relief which he knew the court simply had no statutory or inherent right to give; "rolled forward" the same arguments and material from one appeal to the next; made unfounded charges of bias, ulterior motive, hidden agendas and racism against judges, lawyers for opposing parties, and court staff; repeatedly filed the same voluminous material of little evidentiary value; and knowingly and repeatedly raised arguments on appeal which he had not made before the Court of Queen's Bench.
HELD: Kalmakoff J.A., writing for the court, declared S.P. to be a vexatious litigant and ordered that he was "prohibited from commencing any proceedings in this Court without leave of the Court or a judge thereof." In his reasons, he explained that the standard to be met by an applicant for such an order was an objective one, and that a pattern of abuse of the court's process was to be demonstrated by the applicant. The court was to weigh a number of "hallmarks of vexatious conduct" which showed a habitual or persistent commencing of meritless proceedings. (See: *Barth v Saskatchewan (Social Services)*, 2021 SKCA 41.) In this case, the court found the following factors were to be weighed in coming to its conclusion that S.P.'s conduct amounted to vexatious proceedings: 1) he repeatedly brought applications for leave to appeal which requested first-instance relief, and for such orders as compelling reasonable behaviour of counsel; 2) he repeatedly initiated proceedings which were "manifestly without merit" because it was "plainly obvious" the relief he requested of the court was not available to the court to give, including compelling Court of Queen's Bench judges to state on the record out-of-court statements they might have made about his matters; 3) he repeated the same arguments from one appeal to the next, though these did not apply to the issues sought to be appealed; he made "spurious allegations about improper conduct of opposing counsel" and made accusations of bias, racism, conspiracy, and a hidden agenda against members of PSAT and Queen's Bench judges without any evidence. The court concluded that on a weighing of these factors, S.P.'s conduct had crossed the line into abuse of the court's process which amounted to vexatiousness.

Back to top

***Sawatsky v Isfield*, 2021 SKCA 141**

Whitmore Schwann Barrington-Foote, 2021-10-29 (CA21141)

Civil Procedure - Interim Order - Judge Seized of Matter - Appeal
Civil Procedure - Collateral Attack

This matter was an appeal by C.S., the spouse of B.R.I., of the decision of a judge of the Court of Queen's Bench in chambers who, among other orders, ordered the sale of the family home (Acton order). There was no dispute that: the matter came before Acton J. as an application by B.R.I. for an interim distribution of property under *The Family Property Act*; B.R.I. wanted the

house sold, but C.S. did not; the application was argued extensively by both parties before Acton J., who adjourned it to allow the parties to attempt to come to terms and file a consent order or failing agreement, file draft orders to assist him in coming to a decision; prior to the return date set by Acton J., the parties appeared before Clackson J., and the question of whether Acton J. was seized such that Clackson J. should stand down was argued; Clackson J. decided that Acton J. was not seized and heard the application anew, ordering that the dispute be set for a pre-trial conference (Clackson order); and that as the parties had not come to an agreement and had filed draft orders as directed, on the adjourned date, Acton J. made the Acton order without reference to the Clackson order; and C.S. argued before the Court of Appeal that the Clackson order was valid unless overturned on appeal by B.R.I., who had not done so for tactical reasons. B.R.I. argued that Acton J. was seized with the matter so that the Clackson order was a nullity, and the Acton order governed.
HELD: The majority allowed the appeal. The decision was written by Barrington-Foote J.A. who ruled that Acton J. was seized with the application, and Clackson J. was wrong in ruling otherwise but nonetheless, the Clackson order was not a nullity and was valid and effective because it had not been appealed. He referred to *R v Wilson*, [1983] 2 SCR 594 and *R v Litchfield*, [1993] 4 SCR 333, which are authority for the proposition that if a court has jurisdiction to make an order in the sense that it is a court of competent jurisdiction to do so, the order is not null and void even if it is wrong or irregular unless it is reversed or nullified on appeal, and not challenged by collateral proceedings. The respondent, B.R.I., did not appeal the Clackson order, but instead challenged its validity, which amounted to a collateral attack. As the Clackson order was valid, the Acton order was set aside. The minority decision was written by Schwann J.A., who dismissed the appeal. She reasoned that the court had the inherent power to set aside the Clackson order because he had no power to make it since Acton J. was seized with it, and as such the rule against collateral attack did not apply. She was of the view that Clackson J. lost jurisdiction by wrongly ruling Acton J. was not seized with the application.

 Back to top

***R v Rutt*, 2021 SKCA 143**

Caldwell Barrington-Foote Kalmakoff, 2021-11-02 (CA21143)

Criminal Law - Murder - Attempted Murder - Sentence Appeal

The appellant applied for leave to extend the time to appeal her conviction of attempted murder, which the Court of Appeal (court) granted, dismissing the conviction appeal but entering a conviction to the offence that conformed to the evidence. The trial had proceeded on the basis that the appellant had committed the offence of attempted murder while using a restricted or prohibited firearm contrary to s. 239(1)(a) of the *Criminal Code*, but no evidence had been presented proving that such was the type of firearm used. The evidence proved it was a .22 calibre rifle which was used, a non-restricted firearm, such that the charge should have been attempted murder contrary to s. 239(1)(a.1) of the *Criminal Code*. The trial judge had sentenced the appellant for attempted murder contrary to s. 239(1)(a) and not s. 239(1)(a.1). The court substituted a conviction to the offence under s. 239(1)(a.1) pursuant to s. 683(3) of the *Criminal Code*. The evidence established that while her husband was sitting on his cabin deck having a beer with her uncle, the appellant came around the corner of the cabin and up onto the deck, pointed the .22 calibre firearm at her husband's head, said "I'm going to kill you" and pulled the trigger. The firearm failed to fire. The trial judge had sentenced her to eight years' incarceration for the attempted murder conviction, and another year consecutive for other offences: *R v Rutt*, 2020 SKQB

200. She appealed only the sentence for attempted murder.
HELD: The court concluded that the trial judge made errors in principle at the sentencing hearing which affected the duration of the sentence and substituted a seven-year sentence of incarceration for the attempted murder conviction. In doing so, the court stated that the range of sentences for attempted murder was between 4 and 16 years, and the circumstances of the offence placed the appellant in the middle of the range. The court then went on to individualize the sentencing process by considering the aggravating and mitigating circumstances applicable to the offence and the personal circumstances of the offender, finding it aggravating that the offence was committed against her spouse, a person whom she had abused with threats and false accusations during the marriage, and while she was bound by a firearms prohibition and on judicial interim release. Concluding that general and specific deterrence were the "paramount objectives of a just sanction in the circumstances," and considering her Gladue factors as mitigating, thus reducing her moral culpability, the court imposed a sentence of seven years' incarceration in relation to the attempted murder conviction effective from the date she was initially sentenced.

 Back to top

***R v Envirogun Ltd.*, 2021 SKCA 144**

Caldwell Whitmore Barrington-Foote, 2021-11-08 (CA21144)

Criminal Law - Procedure - Appeal - Leave to Appeal
Statutes - Interpretation - Criminal Code, Subsection 683(1)

The prospective appellants, Envirogun Ltd. (Envirogun) and C.K., applied to the court pursuant to s. 683(1) of the *Criminal Code* for an order appointing a special commissioner "to inquire and report as to whether the Ministry of Environment [MOE] and the Crown have failed to disclose documentary evidence that would have been relevant to their defences of due diligence or impossibility" (para 4). They sought leave to appeal the decision of a summary conviction appeal judge dismissing their appeal from a conviction for an offence under s. 74 of The Environmental Management and Protection Act, 2002 (Act) for failing to comply with an environmental protection order (EPO) (see: *R v Envirogun Ltd.*, 2019 SKQB 89). The Court canvassed the record of the numerous proceedings taken by Envirogun and C.K. after being charged. First, they appealed pursuant to s. 54 of the Act to have the EPO set aside. That appeal was dismissed by the Court of Queen's Bench (see: *Envirogun Ltd. v Saskatchewan (Environment)*, 2011 SKQB 339). The appeal from that judgment was dismissed*: Envirogun Ltd. v Saskatchewan (Environment)*, 2012 SKCA 73. The trial then proceeded. The Provincial Court judge ruled that he could not allow a challenge to the validity of the EPO during the trial because that would be contrary to the collateral attack rule and not permitted by the Act. The appellants appealed that decision to the summary conviction appeal court, which overturned the decision of the trial judge: *R v Envirogun Ltd.*, 2016 SKQB 258. On appeal by the Crown to the court, the summary conviction appeal court decision was overturned for the reason that the Act did not intend that an EPO should be subject to a collateral attack. The matter was remitted to the trial judge to address the remaining issues arising at trial: *R v Envirogun Ltd.*, 2018 SKCA 8. Once the trial and the first level of appeal were concluded, the appellants sought leave to appeal the conviction to the court on the ground that the trial judge had erred in ruling that they had not made out the defences of due diligence or

impossibility, and in anticipation of advancing a fresh evidence application, they applied for an order for further disclosure pursuant to *R v Stinchcombe*, [1991] 3 SCR 326. The chambers judge who heard the application concluded that the appellants were going on a fishing expedition which amounted once again to the stockpiling of ammunition for a collateral attack on the validity of the EPO on the basis that it allegedly came to be issued as a result of a vendetta and collusion by the MOE and the Rural Municipality of Sherwood. The appellants then brought the application under s. 683(1) before a chambers judge who ruled that jurisdiction to hear the matter rested with the court and not a judge sitting alone, and the matter was heard by a full panel.
HELD: Barrington-Foote J.A., on behalf of the court, first put to the side the question of whether the application could be brought prior to leave to appeal being granted, and then ruled that the application was a "thinly disguised" attempt to once again relitigate the validity of the EPO and was not brought for the legitimate purpose of preparing to adduce fresh evidence on the appeal relevant to the defences of due diligence and impossibility. The application was dismissed.

 Back to top

***R v Roberts*, 2021 SKCA 146**

Jackson Ryan-Froslie Tholl, 2021-11-04 (CA21146)

Criminal Law - Assault with a Weapon - Sentencing - Crown Appeal

The Crown appealed the imposition of a suspended sentence and three-year probation order imposed in the Provincial Court on an 18-year-old person who committed the *Criminal Code* offence of assault with a weapon. The Crown argued that a term of incarceration needed to be imposed to emphasize the primary sentencing objectives of general and specific deterrence and denunciation. The court reviewed the reasons and considerations of the sentencing judge in deciding the sentence, in particular her Gladue factors, such as the prevalence of alcohol in her home community; drug abuse and suicides – she had been part of a suicide pact at the age of 11; her alcohol abuse from the age of 13; that her father was a residential school survivor; her youth; her desire to change; and her not having reoffended for two years since the date of the offence.
HELD: The appeal was dismissed. The court referred to *R v Lacasse*, 2015 SCC 64 as to the standard of appeal on sentencing, that the court cannot interfere with a sentencing judge's weighing and balancing of factors unless "if by overemphasizing one factor or by not giving enough weight to another, the sentencing judge exercises his or her discretion unreasonably." In this case, the court found that the sentencing judge did consider the appropriate factors, especially her diminished moral culpability due to her age and Gladue factors, her desire to change for the better, that she did not reoffend while in the community and the deterrent effect of the lengthy probation order. Thus, the court did not interfere with the trial judge's sentence.

 Back to top

***R v F.I.*, 2021 SKQB 263**

Tochor, 2021-09-14 (QB21254)

Criminal Law - Assault - Sexual Assault
Criminal Law - Evidence - Conduct of the Complainant - Application to Cross-Examine - Stage Two

The accused was charged with sexual assault contrary to s. 271 of the *Criminal Code*. He had met the first stage requirements of an application made pursuant to s. 278.93(4) of the Code (see: 2021 SKQB 262). This hearing related to the second stage of the application, to determine if the proposed evidence is admissible at trial. The accused sought an order permitting him to cross-examine the complainant on whether, at the time of the alleged offence, she was in a committed relationship with another man, intending to argue she had a motive to fabricate the allegation. The time available to conduct and decide the two-stage application inquiry was limited because the trial was scheduled to begin on September 13, 2021. On the date of the hearing, the complainant submitted a considerable amount of material, so the hearing was adjourned and the trial date moved forward one day. The Crown and the complainant's counsel opposed the application. The Crown argued that the proposed cross-examination would offend the prohibition against twin myth reasoning. The complainant's counsel criticized the existing case law, based upon academic articles. They also objected to the accused's attempt to argue that the complainant had a motive to lie.
HELD: The application to cross-examine the complainant on certain limited areas was granted. The court considered the conditions for admissibility of evidence of a complainant's sexual activity set out in s. 276(2) and found that there was no blanket prohibition against permitting the accused to cross-examine the complainant on a possible motivation to lie, and assessed the factors set out in s. 276(3) of the Code, following the guidance provided in *Goldfinch* (2019 SCC 38) and *R.V.* (2019 SCC 41), and determining that the majority of them weighed in favour of permitting the proposed cross-examination. It reviewed the arguments of the Crown and the complainant and found that their positions did not reflect what the defence was arguing. The accused did not submit that, for example, all complainants who have a boyfriend are less worthy of belief or that his application was based upon the idea that women can never be trusted when they make allegations of sexual assault, but rather, to argue that this complainant in these circumstances had a motive to lie. It then found that there is substantial case authority to support the accused's request to consider the motivation of the complainant in a sexual assault case. After reviewing the factors in s. 276(3) of the Code in the context of the aims and objectives of s. 276, it concluded an appropriate balancing of the interests of the accused and the complainant would be achieved by permitting the accused to cross-examine the complainant in the proposed areas.

 Back to top

***Kassian, Re (Bankrupt)*, 2021 SKQB 265**

Thompson, 2021-10-07 (QB21262)

Bankruptcy and Insolvency - Conditional Discharge

The objecting creditor (OC), the former spouse of the bankrupt, opposed his application for automatic discharge without conditions designed to deter financial misconduct. The trustee's report recommended an order of absolute discharge. It advised that the bankrupt could not justly be held responsible for any of the facts referred to in s. 173 of the *Bankruptcy and Insolvency Act* (BIA) and had not committed any financial misconduct related to the bankruptcy. The OC held a proven claim in the bankruptcy that arose from court-ordered equalization for division of family property. The claim made up over 50 percent of the total unsecured proven claims in bankruptcy. The ten years preceding the bankrupt's assignment in bankruptcy in June 2020, commencing with the OC's petition in May 2011, were relevant to her application. The bankrupt had been the shareholder in a business that he operated and for which he received management fees that were paid into his holding company. His typical annual income was over $500,000. He held 51 percent of the shares in that company and the OC held 49 percent. They separated in 2011, and in 2015, legal action commenced between the bankrupt and his business partners, resulting in him relinquishing his shares and losing his employment. In 2015, the bankrupt gave his children $100,000 to help fund the start-up of a new company. He then worked for that company and received $1,500 per month from it in salary. After trial in the family law proceeding in 2018, the judge ordered the bankrupt to pay the OC $859,540 in an equalization payment and $80,000 for arrears in spousal support. In the decision, the judge attributed income of $120,000 to the bankrupt based on his conclusion that he was underemployed and that his gift to his children in 2015 affirmed that he was comfortable without working to the extent to which he was able during the pertinent period. After the judgment was appealed, the Court of Appeal determined that the OC was entitled to an additional $368,981 in equalization (see: 2019 SKCA 101). This decision gave rise to the bankrupt's provable claim in bankruptcy. The OC submitted that the discharge should not be granted because facts existed pursuant to s. 173(1) of the BIA. Amongst her multiple allegations were that: 1) the bankrupt's assets were of a value less than $0.50 on the dollar relative to the value of the proven unsecured liabilities under s. 173(1)(a). He had given his children $100,000 in 2015, within five years of the bankruptcy, while underemployed, when his income was not sufficient to support his annual living expenses. If the bankrupt had been earning income at an appropriate wage, he would have had $6,000 per month rather than the $1,500 per month he claimed for each of the years and months before he assigned into bankruptcy. Further, the asset to liability ratio was not justified because he depleted his assets while he continued to live lavishly, as illustrated by the funds he gave his children; 2) the bankrupt had failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities under s. 173(1)(d). His valuation of the parties' condominium in Palm Springs in the QB proceeding was not supported by the evidence. He undervalued the family home in the bankruptcy proceedings. She also argued that the bankrupt failed to account for the discrepancy between funds and assets formerly held by him and the present state of his financial affairs. She relied upon the bankrupt's declared income between 2013 and 2015, totaling $2,494,735, the cash flow into the bankrupt's holding company before he lost his employment, and the QB judge's conclusion that the bankrupt had the ability to earn $120,000 annually between 2016 and the date of trial in 2018, which ought to have resulted in the bankrupt having savings and investments in capital assets, and no such assets had been disclosed; and 3) the bankrupt had contributed to the bankruptcy under s. 173(1)(e) of the BIA through rash spending.

HELD: The registrar determined that s. 173 facts existed in the bankruptcy, but she did not have sufficient income information to dispose of the application. She ordered the trustee to provide her with a surplus income calculation based on the assumption that the bankrupt was earning a gross annual income of $120,000, in accordance with the surplus income guidelines in effect during the 21-month period that would have applied if surplus income had been required to be paid during the bankruptcy period. Once the calculation has been submitted, the bankrupt would be discharged if he paid the full surplus income amount or, alternatively, reported to the trustee annually for five years and paid the amount of surplus income as calculated by the trustee. The court found that facts existed pursuant to ss. 173(1)(a), (d) and (e) of the BIA. It was particularly concerned that the QB decision had attributed income of $120,000 to the bankrupt and he had undervalued his contribution to his children's business. With respect to the OC's

allegations, it found that: 1) there was a s. 173(1)(a) fact. Based on the findings of the QB judge, it accepted that the bankrupt chose not to work and chose to use estate assets to support a lifestyle that cost his creditors. However, the evidence provided did not meet the onus of establishing that the bankrupt had intended to divert funds from his future bankruptcy creditors when he gave his children the $100,000; 2) there was a s. 173(1)(d) fact as there was evidence that the bankrupt had failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities. Without sufficient evidence concerning the bankrupt's inability to continue working at the potential identified in the QB decision, it concluded that he continued to remain underemployed. From that conclusion, it inferred that the bankrupt had undervalued his contributions to his children's company, and diverted a benefit that ought to have been available to his creditors. However, the bankrupt had not undervalued the family home nor the condominium; and 3); there was a s. 173(1)(e) fact because the bankrupt had contributed to the bankruptcy. The court noted the findings made in the QB decision that the bankrupt admitted to living expenses of $280,000 when he claimed to be earning $1,500 per month. It found on the balance of probabilities that the bankrupt was living beyond his means in the years leading up to his bankruptcy and he contributed to it by unjustifiable extravagance to the ultimate detriment of the bankruptcy creditors.

 Back to top

***R v F.I.*, 2021 SKQB 264**

Tochor, 2021-10-08 (QB21255)

Criminal Law - Assault - Sexual Assault - Conviction
Criminal Law - Evidence - Conduct of the Complainant

The accused was charged with sexual assault contrary to s. 271 of the *Criminal Code*. The complainant testified that the accused came to her house while she slept. Her children's babysitter admitted him into the house and then he entered her bedroom. She was awakened to find him on top of her. Her clothing had been removed and he was having intercourse with her. The complainant pushed him off and forced him to leave. She suffered bruising and a bite mark. The complainant received text messages the next morning that identified the accused as the sender, asking if she was still awake and asking her to come and see him, expressing his wish to engage in sexual activity with her. The complainant responded by asking the owner of the cell phone to stop sending such texts to her. The accused's mother replied, saying that someone had used her phone to send the texts. The complainant informed a friend of what had happened. The friend testified that the complainant was scared, shaken and crying. Later the same day, the complainant met with an RCMP officer. He testified that she was distraught during the interview. Both witnesses confirmed that they had seen the complainant's injuries. The accused denied having sexual intercourse with the complainant. In a written admission of fact, the defence filed as an exhibit a videotaped warned statement given by the accused to the police. The accused agreed his statement was voluntary and therefore admissible. In the video recording, the accused first denied having any contact with the complainant when he went to her house to ask her if she would give him a ride home. The babysitter told him that she could not waken her and he left. After learning that the babysitter had given a statement that he had entered the complainant's bedroom, the accused then denied he went into her bedroom and said he only spoke to her through the door and left when she said she couldn't drive him home. When the police suggested to him that perhaps that the complainant initially agreed to sexual activity with him and then backed out, the accused agreed that that was what had happened and he and the complainant had kissed. At

trial, the accused admitted that he had lied when he provided the first two versions in the warned statement. He testified that he went into the complainant's bedroom and they talked, she kissed him and they touched each other's genitals. He said that they stopped because the complainant was concerned about her former spouse, the accused's brother. When questioned in cross-examination as to the inconsistencies between the versions given in his police statement and his testimony, the accused said that he was scared and had not wanted to tell the officer everything that happened. He admitted sending the text messages on his mother's cell phone but explained they were sent to the complainant by mistake. He intended to send them a person he had known 12 years earlier.
HELD: The accused was found guilty. The court applied the tests set out in *R v D.W.* and found that: 1) it did not believe the accused's testimony because of his untruthfulness during the police interview, and it was not left in doubt by his evidence; 2) it did not believe his testimony at trial and was not left in a state of doubt by it. The reasons were that the accused's testimony differed from any of the other versions he gave the police and the court did not accept the accused's explanation for giving different versions; the testimony was also inconsistent with the reason he provided for his pre-trial applications under s. 276 of the Code to cross-examine the complainant (see: 2021 SKQB 262; 2021 SKQB 263). He had contended in his applications that the complainant had a motive to fabricate the allegations because she was concerned with her boyfriend finding out about her sexual activity with him. At trial, he testified that it was her former husband she was concerned about. He was not credible regarding his explanation as to the text messages received by the complainant. It did not believe that the accused meant to send the text messages to another person. It found that the text messages were admissible for the limited purpose of assessing the credibility of both the complainant and the accused and that the statements of the accused in them constituted an admission against interest which could be admitted into evidence against him; and 3) the Crown had proven beyond a reasonable doubt that the accused had committed the offence. It found the complainant to be credible and that she was not motivated to fabricate her allegations. Her evidence was corroborated by that provided by her friend and the police officer.

 Back to top

***R v Morin*, 2021 SKQB 271**

Smith, 2021-10-15 (QB21258)

Regulatory Offence - Wildlife Act - Unlawful Hunting - Treaty Rights

Two members of a First Nation with hunting rights under Treaty 6 were convicted in the Provincial Court of unlawfully hunting in a manner not prescribed by the regulations, contrary to s. 25(1)(a) of *The Wildlife Act, 1998* (Act). They appealed the conviction to the summary conviction appeal court. The facts were not contested: at issue were the definitions of "hunting" and "visibly incompatible" and their application to those facts. The summary conviction appeal court judge (appeal judge) instructed himself as to the standard of review in cases of statutory interpretation, which he concluded was a correctness standard. The essential facts of the matter were that the appellants shot and killed moose standing on the shore of or in a slough surrounded by a stubble field; that no buildings could be seen in the area; that they did not obtain permission from the landowner to hunt the moose; that they shot the moose from a grid road across the stubble field; and that they drove an ATV across the stubble field to retrieve the dead moose. There was no issue that they were hunting for food as permitted by the Natural Resources Transfer Agreement and were not doing

so on unoccupied Crown land. The appeal judge also quickly dispensed with the notion that the slough was not "visibly incompatible" with such hunting as expounded in *R v Badger*, [1996] 1 SCR 771 and applied in *R v Pierone*. 2018 SKCA 30.
HELD: The appeal judge found that the appellants were "hunting" as that term was interpreted by the relevant case law and dismissed the appeal. He disposed of the appellants' arguments as follows: 1) trying to obtain consent to hunt on land which is visibly incompatible with hunting on unoccupied Crown land is not obtaining consent; 2) retrieving the killed moose and crossing farmed land once it had been shot is part and parcel of "hunting" the moose as defined by the Act; and 3) standing on a roadway and firing across the cultivated land to a slough which conjecturally might not be visibly incompatible with treaty hunting rights is nonetheless hunting from land incompatible with hunting: *R v Baptiste* (1985), 40 Sask R 250 (CA). Lastly, as the appeal judge did not agree with the appellants that the definition of hunting was ambiguous on the facts, he did not need to invoke the doctrine of "honour of the Crown."

 Back to top

***Watts v Laframboise*, 2021 SKQB 279**

Megaw, 2021-10-28 (QB21264)

Family Law - Custody and Access - Interim - Mobility Rights

The respondent mother applied for an interim mobility order regarding the 16-month-old child of the parties that would permit his relocation from his current residence with the respondent in Regina to live with her in Waterloo, Ontario. The respondent had moved to Regina from Waterloo to live with the petitioner in 2019. Their child was born in June 2020 and following that, they lived together and then apart for different periods of time. In October 2020, the petitioner was charged with assaulting the respondent. He pled guilty and received a probationary sentence of 12 months. From the time of the charge until March 2021, the petitioner was under no contact conditions with the respondent, and she was the sole caregiver for the child. The respondent moved with the child to Prince Albert in May 2021. The petitioner followed her there and they remained together until early August 2021, whereupon they returned to Regina and lived at the petitioner's parents' home until early September. In addition to the events giving rise to the assault conviction, the respondent deposed that other incidents of domestic violence occurred during their relationship and she had had to seek emergency assistance services. The respondent had no family, friends, or support in Saskatchewan. She deposed that she and the petitioner discussed her returning to Waterloo with the child. She had been able to regain her previous job and had arranged to live with her grandmother in a home with appropriate accommodations. The parties then agreed that the respondent would drive to Ontario alone and then fly back to Regina to retrieve the child. Once the respondent was in Ontario and intending to return to retrieve the child, the petitioner refused to relinquish custody. In his affidavit, the petitioner stated that he agreed to the plan at a time when he was unaware of his rights. At the time of the application, the child was residing with him in his parents' small home with as many as nine other people. The petitioner was not working and there was no evidence he would be able to provide financial assistance to the respondent for the child's care.
HELD: The application was granted. The court determined that the child was entitled to relocate to live with the respondent in Waterloo, effective immediately. The parties were given joint decision-making and the petitioner was to have reasonable liberal parenting time in person and remotely. The court directed that the matter proceed to an expedited pre-trial conference. It found that

the recent care arrangements did not determine the status quo for the child in this interim mobility application because of the specific facts. The child's life in Regina was not the product either of planning or of longstanding existence. His status quo had been constant change except for the continuing presence of the respondent. The court then reviewed the factors enumerated under s. 10(3) of *The Children's Law Act, 2020* (Act). It determined pursuant to ss. 10(3)(j) and s. 10(4) that it was not in the child's best interest to remain in Regina and thereby compel the respondent to reside there, in light of her fear of violence. The child should be with her in Ontario. The court considered under s. 10(3)(a) of the Act that the child's stability should be maximized, and the respondent's constant presence in his life militated in favour of the child relocating with her. Under s. 10(3)(c), the evidence regarding the history of the care of the child supported relocation as did the difference in the parties' plans for the child's care under s. 10(3)(g). The petitioner's proposed living accommodations for the child were in his best interests. The financial consideration outlined in s. 10(3)(h) also favoured the child's best interests being with the respondent as the petitioner was not working and had not indicated whether he was trying to find employment. With respect to s. 10(3)(f), it found that there was insufficient evidence before it to allow for a determination regarding the impact of the respondent's Indigenous heritage on the best interests of the child.

 Back to top

***Atrium Mortgage Investment Corporation v Koh*, 2021 SKQB 285**

McMurtry, 2021-11-01 (QB21266)

Civil Procedure - Summary Judgment
Contract Law - Guarantee - Enforceability - Defences

The plaintiff, a mortgage investment company, applied for summary judgment of its claim under Queen's Bench rule 7-5 to enforce the guarantee given by the defendants and for dismissal of their counterclaim. The plaintiff loaned $12.8 million to King Edward Apartments Inc. (KEA) for the development of an apartment building (the project) and the loans were guaranteed by the defendants. The plaintiff provided KEA with a letter of interest in March 2014, proposing the loan, a term of which was an unlimited, joint and several guarantee from each defendant. They each signed the letter of intent as guarantors on March 14, 2017. The credit agreement was signed by the plaintiff and KEA on June 19, 2014, and the defendants agreed to guarantee the loan. A joint and several guarantee and postponement of claim was executed by each defendant in July and August 2014. Construction on the project commenced that summer. The agreement was renewed by all parties on October 5, 2015, April 22, 2016 and June 8, 2016. When the plaintiff learned that liens had been registered against the project, it considered it a breach of the agreement and demanded KEA seek discharge of the liens. By August 2016, liens totaling $2.3 million had been registered. The loan matured on September 1, 2016 and on October 6, 2016, the plaintiff made a formal demand on KEA and each defendant to repay. The loan was not repaid. The plaintiff obtained the appointment of a receiver in November 2016 and the receiver completed and marketed the project. During the receivership, the plaintiff advanced $6,662,000 to the receiver to fund completion of the project. In September 2018, the plaintiff's purchase of the project for $7,124,062 was approved by the court (see: 2018 SKQB 296). In August 2018, the plaintiff filed its statement of claim against the defendants, asserting that it was owed the balance on the loan before purchase of $14,266,830 and claimed the deficiency on the loan balance following the sale was $7,102,768. It sought the payment of that amount less a credit of $200,000 from the defendants. In this application, the plaintiff relied on the credit agreement and guarantee in

establishing the liability of the defendants. It asserted that the amount owing by the defendants was the deficiency between the loan to KEA and/or its receiver and the value of the project, as established in the judgment approving its sale to the plaintiff. The defendants opposed the application. They raised two defences: 1) that the claim was barred by *The Limitations Act* (Act). The plaintiff submitted that this defence was waived by the defendants by the terms of the guarantee; and 2) that the receiver mismanaged the receivership process in various ways that resulted in the defendants bearing the cost of a larger deficiency between KEA's debt and the plaintiff's recovery on it. They argued that there was insufficient evidence before the court to justify the debt claim and they should be allowed full disclosure, including discovery and a pre-trial judge's comments, before being forced to pay. The plaintiff stated that the evidence requested by the defendants was in the material before the court. The loss it had suffered was established through the receivership process and the defendants were not permitted to question it now. Seven of the defendants counterclaimed against the plaintiff and another party, BTY Group. They alleged that the plaintiff mismanaged the loan, in breach of the agreement between it and KEA by failing to "inspect, evaluate, advise or represent to KEA" the percentage of completion of the project before advancing funds to KEA. Alternatively, the defendants asked that summary judgment be granted but not enforced until their counterclaim was determined.
HELD: The application for summary judgment was granted. There was no genuine issue requiring trial. The plaintiff was entitled to judgment against the defendants as requested. The defendants' counterclaim was dismissed, as it had no chance of success. The issue raised in the counterclaim regarding the plaintiff had been resolved in this judgment and the court declined to stay enforcement of the plaintiff's judgment against the defendants with respect to the resolution of the proceedings in the BTY claim. The plaintiff had established that the defences raised by the defendants were waived by the terms of the guarantees and/or dealt with through the receivership process. It found that s. 10 of the Act applied, and the terms of the guarantee provided that the obligation arose as at the date of demand. It was made on October 6, 2018 with payment to be made by October 31. The limitation period thus expired on October 6, 2018, and the statement of claim was issued on August 21, 2018, within the limitation period. The defendants' defence regarding the receivership process was an impermissible collateral attack on the 2018 Queen's Bench decision and was an abuse of process.

 Back to top

***R v Millie*, 2021 SKQB 281**

Dawson, 2021-11-02 (QB21265)

Criminal Law - Sentencing - Application for Remand for Assessment - Dangerous Offender
Criminal Law - Sentencing - Application for Remand for Assessment - Long-Term Offender
Statutes - Interpretation - Criminal Code, Section 752.1, Section 753(1), Section 753.1(1)

The Crown applied under s. 752.1 of the *Criminal Code* for an order remanding the respondent to the custody of a psychiatrist for a period not exceeding 60 days to allow an assessment to be performed for use as evidence in an application to have the respondent declared a dangerous offender (DO) under s. 753(1) or a long-term offender (LTO) under s. 753.1(1). The respondent had been convicted of the following offences: possessing child pornography contrary to s. 163.1(4); making available

visual pornographic representations of a person under the age of 18 years contrary to s. 163.1(3); and accessing child pornography contrary to s. 163.1(4.1). The offences are listed under s. 753.1(2)(a) of the Code as offences which allow a court to find an accused to be an LTO. They are not explicitly enumerated under the definition of "serious personal injury offences" (SPIO) in s. 752 of the Code. The Crown argued that whether the offences are SPIOs or not, the court should order the assessor conducting the remand assessment to consider both the DO and the LTO designations, further asserting that it was not necessary at this stage for the court to determine that question and it could be dealt with at the beginning of the Part XXIV hearing. The defence took no position on the issue. An agreed statement of facts disclosed that the respondent had been convicted of offences under s. 163.1 of the Code in 2008 and identified such things as the number of pornographic images, videos and photographs uploaded to a website by the respondent. In at least two of the uploaded images, the faces of the children were visible. The Crown tendered the victim impact statements relating to the impact of sexual assault on three individuals when they were children. The victims did not relate their psychological damage to the respondent specifically. The distress they suffered resulted from the knowledge that the images of them being sexually abused are possessed and viewed by others. In connection with these statements, a lawyer for the Canadian Centre for Child Protection Inc. deposed in her affidavit that at least one image or video of the three victims formed part of the evidence against the respondent. The issues were: 1) whether it was necessary for the court to determine at this stage whether any of the offences committed were SPIOs and 2) whether any one or more of the offences committed by the respondent was an SPIO. HELD: The application for an assessment order was granted on the basis that the respondent might be found to be a DO under s. 753 or an LTO under s. 753.1. The court ordered that the respondent be assessed, and the assessor was to provide a written report. In the circumstances of this case, it found that the respondent's possession of child pornography contrary to s. 163.1(4) satisfied the definition of an SPIO for the purposes of s. 752 of the Code. It reviewed the Supreme Court's decision in *Steele* as well as the judgments of other provincial courts in *Ewing*, *Brouillard* and *Patterson*. In the latter three cases, each court considered and determined that it must be satisfied that an offence articulated in s. 753.2(1)(a) is an SPIO, before it ordered an assessment for DO or LTO. It found with respect to each issue that: 1) it was satisfied that at least one of the offences must be found to be an SPIO before an assessment which considers the criteria for DO is considered by the assessor; 2) the offence committed by the respondent under s. 163.1 of the Code in the circumstances was a SPIO. It accepted the evidence presented in the victim impact statements and accompanying affidavit, and was satisfied that the respondent's conduct inflicted or was likely to inflict psychological damage on the victims of the child pornography, as required by s. 752 of the Code.

 Back to top

***John Howard Society of Saskatchewan v Saskatchewan (Attorney General)*, 2021 SKQB 287**

Layh, 2021-11-02 (QB21267)

Constitutional Law - Charter of Rights, Section 7, Section 11
Statutes - Interpretation - Correctional Services Regulations, 2013, Section 68

The applicant, the John Howard Society, brought an application questioning whether *The Correctional Services Act, 2012* (Act) and *The Correctional Services Regulations, 2013* (Regulations) were compliant with s. 7 Charter freedoms. The applicant has represented inmates in over 30 penitentiary discipline matters. It became aware of inmate discipline issues at Saskatchewan's

correctional institutions because of the 2019 Ombudsman's Report. The report contained nine recommendations regarding disciplinary procedures as a result of complaints it had received from inmates that the process was unfair, and the members of disciplinary members were biased. The disciplining of inmates is governed by provisions within both the Act and the Regulations. Under s. 23 of the Act, the director of a correctional facility in Saskatchewan makes rules regarding the conduct of the inmates. Those rules are not to be inconsistent with the Act and Regulations. Pursuant to s. 25, an inmate who contravenes any rule established pursuant to s. 23 or the Regulations is subject to discipline in accordance with Part VIII and the Regulations. Section 77 provides that in cases where a discipline panel finds the inmate has committed a major disciplinary offence, the panel may impose sanctions on the inmate including: loss of privileges for no more than 30 days; confinement to a cell, room or unit during leisure time for no more than 10 days; segregation to a cell, unit or security area for no more than 10 days; and loss of remission earned for no more than 15 days. Under s. 52 of the Regulations, the director must establish a discipline panel for major offences, identified under ss. 54 and 55 as including fights and physical attacks, escape or conspiracy to escape, resisting authorized search and promoting gang activities. The discipline panel's hearings must provide an inmate charged with a major offence a full and fair hearing under ss. 60 and 61 and under s. 68, the panel cannot find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed the offence. The applicant argued that the burden of proof on a balance of probabilities is contrary to the principles of fundamental justice protected by s. 7 of the Charter. It acknowledged that the presumption of innocence does not attract proof beyond a reasonable doubt so long as the proceeding doesn't involve a determination of guilt. However, because a correctional centre's discipline may result in a finding of guilt to a charge, the presumption of innocence necessarily must simultaneously engage the standard of proof beyond a reasonable doubt. It relied on the Supreme Court's decisions in *Pearson* ([1992] 3 SCR 665) and *Demers* (2004 SCC 46) as holding that where the guilt or innocence of a person is decided in a hearing where a deprivation of life, liberty, or security of the person may result, the accused must be presumed innocent until guilt is proven beyond a reasonable doubt. In the case of inmates found guilty of a breach of prison rules, the consequences can include the loss of earned remission, effectively pushing back their release date. The penalty of segregation that can be imposed in correctional centres is so harsh that only proof beyond a reasonable doubt can justify such disciplinary consequence. It pointed out that s. 43(3) of the *Corrections and Conditional Release Act* provides that an inmate charged with an infraction in a federal penitentiary shall not be found guilty unless the person hearing the matter is satisfied beyond a reasonable doubt. A senior official with the Ministry of Corrections, Policing and Public Safety (Corrections) indicated that in 2019, 6,201 disciplinary charges were laid in the four correctional centres, of which 1,893 were for fights or physical attacks, and a total of 3,367 disciplinary hearings were held. Of the sanctions that can be imposed, the most significant is disciplinary segregation, and it constituted the largest percentage of sanctions at 39 percent. The official described the conditions of segregation as the inmate having a minimum of one hour outside his cell each day where he was permitted to shower, socialize with other inmates, exercise, watch TV or spend time outside. The inmate is not removed to a more secure unit but remains on his unit in disciplinary segregation. She advised that Corrections had implemented seven of the nine recommendations made by the Ombudsman and had developed a Disciplinary Hearing Manual which gives guidance to discipline panel members respecting the burden of proof. The Attorney General for Saskatchewan agreed that, given the penalties that might follow a disciplinary hearing, inmates may be deprived of their "liberty" as that term is used in s. 7 of the Charter. It also accepted that correctional centre discipline is subject to judicial intervention. It took the position that although the principles of fundamental justice under s. 7 of the Charter apply to such proceedings, they do not extend to proof beyond a reasonable doubt as that standard is applied in other aspects of criminal law, citing the recent decision in *Perron* (2020 FC 741). The issue was whether the applicant had established that a fundamental principle of justice necessitates proof beyond a reasonable doubt because a panel establishes the "guilt" of an inmate in a discipline hearing.

HELD: The application failed. Proof of misconduct beyond a reasonable doubt is not a principle of fundamental justice that is part of

Corrections' Charter-required obligations. The court reviewed the Supreme Court's decisions regarding s. 7 of the Charter and the principles of fundamental justice. In applying the three-part test set out in *Malmo-Levine* (2003 SCC 74) to this application, it found that it had to consider only the second criterion: that there must be significant societal consensus that the legal principle is "fundamental to the way in which the legal system ought fairly to operate" (*Malmo-Levine*, para 113). In the context of correctional centre discipline, no province has required the standard of proof of beyond a reasonable doubt in legislation. The Supreme Court's decision in *Shubley* ([1990] 1 SCR 3), which held that s. 11 Charter rights do not apply to prison discipline, is applicable to s. 7 rights in such proceedings. It rejected the applicant's position that a finding of "guilt" in a disciplinary hearing engages proof beyond a reasonable doubt. The use of the word "guilt" in a finding of breach of prison rules cannot establish a Charter infringement. Further, *Shubley* decided that the penalty of revoking earned remission does not constitute the imposition of a sentence of imprisonment. Regarding the penalty of segregation that can be imposed in correctional centres, it found, based on the only evidence before it in this case, that presented by the Corrections official, that the sanction was not a severe consequence.

 Back to top

***Folkerts v Folkerts*, 2021 SKQB 290**

Brown, 2021-11-05 (QB21268)

Family Law - Child Support - Variation

The respondent applied for an order varying the consent judgments rendered in 2011 and 2013 that set his child support payments for the two children of the marriage. In the 2011 order, income of $59,100 per annum was imputed to him, child support was set at $827 per month and spousal support at $833 per month. In 2013, the 2011 order was amended by consent through a pre-trial settlement and it resulted in the parties sharing parenting. Child support payments were not addressed but spousal support was to be terminated and arrears cancelled if certain conditions were met. The parties disputed whether the respondent's financial obligations had been fulfilled regarding either child or spousal support since 2013, and he acknowledged that he owed $23,758 in arrears for the latter. The respondent explained that his income had been reduced since 2015 because of the fall in oil prices, and contended that after recalculation based on a lower income, he had caught up on all child support payments and in fact had a small overpayment to his credit. The child support arrears would also be reduced and should, in his view, be cancelled. The petitioner opposed the application because the respondent had not met the criteria set out in *Colucci* (2021 SCC 24) to have the arrears reduced. She pointed to the respondent's failure to make full disclosure. By the time of the hearing, the respondent had submitted substantially more financial information, but several gaps still existed. It was not clear how diligently he had tried to obtain employment. The facts regarding when the respondent gave notice of his reduced income were also missing. The application had been filed before *Colucci* was decided so the respondent was not sufficiently clear in establishing that he sought recission of his arrears. His income appeared at times to be higher, and other times lower, than what had been imputed to him in 2011. The issue was whether sufficient reliable evidence had been presented to the court to determine when and by how much the respondent's income decreased to ascertain whether that change was significant, long-lasting, and not one of choice, the considerations prescribed in *Collucci*.
HELD: The court declined to calculate any reduction in arrears at the hearing. It ordered the parties to proceed to pre-trial settlement

conference. They were each to exchange all documentation dealing with their access to income, personal or corporate, or the proceeds of the sale of assets, no less than 45 days in advance of the pre-trial. With their agreement, they could exchange the type of records necessary to a *Contino* analysis. If the MEO agreed, the enforcement of the arrears was to be suspended while the respondent paid $750 to the petitioner within two weeks and continued to pay her $400 per month. Should the respondent miss a payment, all the arrears would immediately become enforceable in full. The payments made by the respondent would be interim only and would be reconciled when his and the petitioner's incomes were known. If the MEO did not wish to proceed as recommended, the respondent was to pay child support based upon an income of $40,000 until after pre-trial.

 Back to top

***R v Vasile*, 2021 SKPC 54**

Martinez, 2021-10-29 (PC21042)

Constitutional Law - Charter of Rights, Section 8, Section 9 - Arbitrary Detention - Unlawful Search and Seizure

The trial judge conducted a voir dire under the Charter to determine if the accused had proven on a balance of probabilities that his rights under ss. 8 and 9 of the Charter had been infringed, and if so, whether any evidence obtained as a result of the breach should be excluded under s 24(1) of the Charter. The trial judge made the following findings of fact: a peace officer stopped beside a vehicle at an intersection; the driver was wearing a full black ski mask and was gesticulating and pointing at him; he thought that was strange and so followed the vehicle, locating it parked and locked on a street; he parked his police vehicle behind it and engaged his emergency lights, which caused a number of people on the street to scatter and run away; he noticed a male (the accused) walking across the street alone, and went to him, asking him to stop and give his name; he testified that he was suspicious that the male was connected to the vehicle and that he may have committed a criminal offence or a traffic safety violation; the male would not identify himself, and backed away from the police officer, ignoring directions to stop; he was then taken down, arrested, handcuffed and searched; a magazine with .22 calibre bullets was found on him; the vehicle was then unlocked and searched; and the testimony from the Crown on the voir dire was to the effect that the officer searched the vehicle to determine if any evidence could be found about the identity of the accused or anyone else associated with it. However, the search became more intrusive, resulting in the seizure of a .22 calibre handgun behind a back seat, which the loaded magazine fit.
HELD: The trial judge was satisfied that the accused had proven his rights were infringed and that the inclusion of the handgun, magazine and ammunition at the trial would bring the administration of justice into disrepute. He found that, though he agreed it was strange that the driver was wearing a full black ski mask while driving, and further inquiry was justified, the arresting officer, on an objective standard, did not have reasonable grounds to suspect that the accused was involved in a crime which would justify an investigative detention or had committed a traffic safety violation in relation to the vehicle. What is more, there was no evidence that he was the masked driver, and though registration was found in his name, it was located in the vehicle as a result of what amounted to an unlawful arrest. Furthermore, the vehicle search could not be justified as incidental to the accused's arrest because in the circumstances, a warrant could have been sought to search it. The trial judge went on to find: that the evidence must be excluded because the conduct of the arresting officer and the officers assisting him was very serious, as they knew or should have known they had no grounds to detain or arrest the accused for a non-existent crime; the impact of the infringement was serious for the

accused and society at large because if such conduct were condoned, it would signal to the police that citizens could be arbitrarily detained and searched with impunity and without consequences; and though the possession of illegal handguns for nefarious purposes was of great concern to society and crimes associated with these should be decided on their merits, in this case, the serious conduct of the police and the significant deleterious effect of the infringement on the accused and society tipped the balance in favour of exclusion.

Back to top