The Law Society of Saskatchewan Library's online newsletter
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Kot v Kot, 2021 SKCA 4

Schwann Barrington-Foote Tholl, January 15, 2021 (CA21004)

Wills and Estates - Will - Proof in Solemn Form

The appellant appealed the decision of a Queen's Bench judge that dismissed her application for an order revoking the grant of letters probate to her and the respondents and that the will be proved in solemn form (see: 2018 SKQB 338). The appellant alleged that the document presented for probate was not the testator's last will and testament because the testator had intentionally destroyed it. The parties in this dispute were named as beneficiaries under the will. The respondent, Robin Kot, a brother of the testator, was to receive a lease and a right of first refusal. All of the parties were named as executors of the will, dated August 2014. The testator died in September 2015 and letters probate were granted the following December. In her affidavit in support of her application for revocation, the appellant attested that after executing the will in 2014, the testator (her husband) placed it in a drawer and unbeknownst to him, she removed it and kept in her possession

Civil Procedure - Queen's Bench Rules, Rule 7-9(2)(a)

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for safe-keeping and returned a copy she made of it to the drawer. In 2015, the testator told her he intended to make a new will because he had quarreled with one of the respondents, Robin Kot, and later tore up what he thought was the original will in front of her. She took the original will to the lawyer for the estate after the testator's death and prior to a meeting between him and the other executors, describing to him that the testator had torn up what he thought was the original, intending to revoke it. When she later consulted the estate's lawyer about the destruction of the will, she claimed that he advised her that it was best to go with the document in preference to no will. In his affidavit, Robin Kot deposed that the appellant had consulted with the estate lawyer prior to the group meeting with him. There was no affidavit from the lawyer filed in support of the application. The chambers judge admitted into evidence an email from that lawyer to the respondents that stated the estate file did not contain any information from the appellant regarding the intended destruction, and he could not recall such a conversation. The chambers judge stated the law as per Dieno and Olsen and applied it to this case. She reviewed the evidence that supported the will's validity, such as that it had been submitted for probate; there was no evidence supporting the contention that the testator believed he was ripping up the original will; the appellant had acted on the will as if it were genuine for over three years; the testator and his brother Robin had farmed together for years and the former's plan to for his brother to enjoy a right of first refusal was consistent with the testator's actions up until the day he died, and the estate lawyer had not corroborated the appellant's assertion that the will had been torn up. The only evidence supporting validity was the appellant's contention. The judge found that the evidence supporting the contention was very weak and although the delay between probate and the application did not defeat the appellant's position, it suggested that it had little credibility and therefore there was no genuine issue requiring trial on the question whether the testator revoked the will. On appeal, the appellant argued that the chambers judge improperly weighed the evidence and made findings of credibility.
HELD: The appeal was granted. The court ordered that the will must be proven in solemn form at a trial to determine whether the testator revoked his will by the destruction of the photocopy of it. The court noted that judge's decision was discretionary and subject to deference conditional on specific exceptions as set out in Rimmer. It found that although the chambers judge adopted the Dieno test, she erred in law by misapplying the applicable criteria. She went beyond the limited review of the evidence required to determine whether there was a genuine issue for trial by improperly weighing the evidence and making findings of credibility.

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Wenkoff v Wenkoff Estate, 2021 SKCA 5

Richards Schwann Tholl, January 15, 2021 (CA21005)

Contract Law - Formation - Contingent Upon Receipt of Independent Legal Advice

The appellant appealed the decision of a Queen's Bench judge that dismissed his application for summary judgment (see: 2019 SKQB 325). The appellant had sued his deceased father's estate, asking for a declaration that an agreement between them for the transfer of the deceased's farmland was effective and enforceable. The agreement had been drafted by a lawyer in October 2017 but in 2018, the father died intestate, and without having signed the agreement. The lawyer deposed that he had advised the parties that the father should receive independent legal advice before executing the documents in order to avoid a challenge of incapacity or undue influence after his death from his other children. Due to the appellant's delay in providing the lawyer with required information, the final agreement and the father's review of it with another solicitor did not take place before his death. The chambers judge found that the agreement was contingent on the father receiving independent legal advice and dismissed the application. The grounds of appeal were that the chambers judge erred by: 1) deciding that the agreement was contingent on receipt by the father of independent legal advice; 2) failing to find that the contract had been partly performed so as to avoid the impact of the Statute of Frauds; and 3) failing to find that the appellant had not exercised undue influence over the deceased.
HELD: The appeal was dismissed. The court considered only the first ground. The standard of review was palpable and overriding error. It found that the judge had made no reversible error in deciding that the agreement was contingent on the deceased receiving independent legal advice.

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R v Dirksen, 2021 SKCA 6

Jackson Leurer Tholl, January 15, 2021 (CA21006)

Criminal Law - Assault - Sexual Assault - Conviction - Appeal
Criminal Law - Application to Adduce Fresh Evidence - Appeal

The appellant appealed his convictions after trial by a Queen's Bench judge for five sexual offences in relation to two complainants who were 14 at the time. He also appealed from the decision of the same judge to dismiss his application to admit fresh evidence and declare a mistrial (see: 2019 SKQB 140). With respect to the appeal regarding his post-trial application, the grounds of appeal were whether the trial judge erred: 1) by not admitting fresh evidence. It consisted of psychiatric and psychological reports and other evidence regarding his ADHD. He argued that his undiagnosed and unmedicated condition had an effect on his ability to reason and process information during his testimony, and because the judge was unaware of the issue, her assessment

CE Design Ltd. v Saskatchewan Mutual Insurance Company

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of his credibility was compromised. The judge found that the reports did not suggest that he was unable to make full answer and defence, nor would the evidence of ADHD have affected the result at trial. She found him guilty not because he could not express himself, but because she did not believe him, and she made her assessment on the whole of the evidence. Regarding the convictions, the appellant raised numerous grounds of appeal amongst which were whether the trial judge erred: 2) by not intervening in the Crown prosecutor's cross-examination of him. He submitted that it was, among other things, abusive, and contained impermissible questions; 3) by asking him questions at the conclusion of his testimony, and that doing so was improper and impermissibly bolstered the Crown's case; 4) by admitting evidence of one complainant's past sexual activity without complying with s. 276 of the Criminal Code. She improperly permitted the witnesses to testify about one of the complainants flashing her breasts after being asked to do so by the appellant; and 5) by scrutinizing his testimony more strictly than that given by the Crown witnesses. This error in her credibility analysis resulted in an unfair trial, causing a miscarriage of justice.
HELD: The appeal was dismissed. The court found that the trial judge had not erred with respect to each ground, finding that: 1) her decision was discretionary and entitled to deference. She had not admitted the fresh evidence on the basis that it had not met the last requirement of the Palmer test. It could also have been rejected because it did not meet the first branch, either, as the appellant had been diagnosed with ADHD as a child and his evidence could have been adduced at trial. There was no basis to declare a mistrial; 2) it is the duty of a trial judge to prevent abusive cross-examination, but after reviewing the transcript, the court had not found that any of the appellant's complaints regarding the Crown Prosecutor's cross-examination were well-founded; 3) she queried the appellant regarding an inconsistency between his evidence given in examination and cross-examination and gave him the opportunity to explain it, and he provided it. The question was well within the bounds of appropriateness; 4) the witness' evidence related to the appellant's grooming behaviour and was not evidence of her past sexual activity within the meaning of s. 276 of the Code, and thus a voir dire was not required; and 5) the judge reviewed and commented on the inconsistencies in both the testimony of the Crown's witnesses and the appellant's, but found the inconsistencies in the appellant's testimony more significant. Different findings regarding the significance of inconsistences for various witnesses does not, on its own, equate to uneven scrutiny.

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R v Ratt, 2021 SKCA 7

Richards Barrington-Foote Kalmakoff, January 21, 2021 (CA21007)

Zoerb v Saskatoon Regional Health Authority

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Criminal Law - Uttering Threats - Acquittal - Appeal
Criminal Law - Assault - Aggravated Assault - Sentencing - Appeal
Criminal Law - Sentencing - Aboriginal Offender

The respondent was convicted of aggravated assault, obstructing police and two counts of breach of probation after trial in Provincial Court. He was acquitted of one count of threatening to cause bodily harm and a second count of threatening to cause death. The judge sentenced the respondent to 46 months' imprisonment on the aggravated assault charge, which was reduced to 25 months after credit was given for pre-sentence custody. The Crown appealed against the acquittals on the charges of uttering threats and the sentence imposed for aggravated assault. The respondent was on probation at the time of the offences and was in Deschambault Lake, in violation of the conditions of his release. While he was drinking with friends, another man approached them and without apparent provocation, the respondent punched him in the mouth with enough force that his teeth were dislodged. The victim was later taken to Saskatoon for dental surgery. The police officer who arrested the respondent testified that he was very intoxicated and belligerent. The respondent allegedly uttered his first threat when he told the officer he would "punch him out" and then the second when he told the officer: "your family is dead." The respondent testified that he struck the victim pre-emptively because he believed that he was about to be assaulted. He said that he had no recollection of making threatening remarks to the officer and that he had been highly intoxicated. With respect to uttering a threat to cause bodily harm to the officer, the trial judge found that the respondent's statement had not established the actus reus of the offence. A threat to punch someone was not necessarily a threat to cause bodily harm for the purposes of s. 267(b) of the Criminal Code, which the trial judge opined also applied to s. 264.1(1)(a), as defined in R v Dupperon as bodily injury that is more than transient or trifling. Having a reasonable doubt on the count, the judge found the respondent not guilty. Respecting the charge of uttering a threat to cause death to the officer's family, the judge acquitted the respondent. He found the actus reus was established, but the Crown failed to prove the mens rea: he was not satisfied beyond a reasonable doubt that the words were spoken with a genuine intention to instill fear and rather resulted from alcohol and anger. Regarding the sentence for aggravated assault, the judge heard evidence of the respondent's Indigenous heritage and his abusive, violent childhood. He had begun abusing alcohol at the age of nine and progressed to using opiates and methamphetamines. The defence said although the respondent had a lengthy youth and adult criminal record and had spent a lot of time in custody, he had received little in the way of programming. The judge considered the fact that the respondent justified the unprovoked assault as intended to send a message to the victim's brother to warn him and that he had caused a significant injury, but described the assault as being at the lower end of the scale. The Gladue factors present in the respondent's life also reduced the degree of his responsibility. The judge noted that the respondent's record of violent offending was an aggravating factor but concluded that he would sentence him to a shorter sentence than the seven years recommended by the Crown on the basis of his potential rehabilitation, as none of his previous sentences nor probation had accomplished

anything. The grounds of the Crown's appeal were that the trial judge: 1) erred in law respecting the acquittals because he misapprehended the actus reus requirement of the offence with respect to the first count and the mens rea requirement of the second; and 2) erred in sentencing the respondent because he unreasonably emphasized rehabilitation and failed to give proper consideration to the sentencing objective of protecting the public. The defence conceded that the acquittals should be set aside.
HELD: The appeal was allowed. The court ordered that a new trial be held regarding the charges of uttering threats, set aside the respondent's sentence and substituted a term of imprisonment of five years and six months, granting the same reduction for pre-sentence custody. It found with respect to each ground that the trial judge: 1) had erred in law in his finding with respect to the actus reus of threatening bodily harm. In considering only the respondent's words, the judge failed to consider the surrounding circumstances, which included the respondent's aggressiveness and belligerence towards the officer during the course of his dealings with him. The judge also erred in his determination regarding the mens rea required for the second charge. He failed to consider whether the respondent intended his words to be taken seriously, notwithstanding his anger and intoxication. The court would not enter convictions because the judge had not made findings of fact regarding whether the respondent had the requisite mens rea related to either charge; and 2) acted unreasonably by overemphasizing the sentencing objective of rehabilitation and failing to emphasize the objective of protecting the public. There was no indication that the respondent had taken any steps to address his own rehabilitation, despite having a 15-year criminal record involving violence and the consideration he had received in previous sentences for the Gladue factors. To determine a fit sentence, the court reviewed the sentencing principles and concluded that, although the respondent's responsibility was somewhat tempered by his background, in light of the gravity of the offence, the respondent's criminal record, his history of frequent and violent offences and his repeated failure to comply with rehabilitative components of past sentences, the primary focus in sentencing had to be protection of the public and a longer sentence was appropriate.

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Jackson v Jackson, 2021 SKCA 8

Richards Ottenbreit Ryan-Froslie, January 19, 2021 (CA21008)

Civil Procedure - Appeal - Application for Trial Transcript
Civil Procedure - Appeal - Application to Adduce Fresh Evidence

The applicant appellant appealed the decision of a Queen's Bench judge respecting family law matters. Prior to the appeal, the appellant applied to the court for: 1) an order that the transcripts of two hearings of the court in these proceedings be prepared to help him properly argue his appeal on the ground that the judges were biased and that their decision had improperly influenced the trial judge's judgment under appeal; and 2) to accept, as fresh evidence, a Canada Revenue Agency notice of assessment regarding his 2017 and 2018 income tax and his 2019 income tax return.
HELD: The application for the transcript was granted but the application to adduce fresh evidence was dismissed. The court found regarding the first application that an allegation of bias was serious and it was in the interests of justice that the appellant be able to obtain transcripts. With respect to the notices of assessment and income tax return for the years in question, it found that they did not meet the Palmer test.

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Taheri v Buhr, 2021 SKCA 9

Richards Leurer Kalmakoff, January 20, 2021 (CA21009)

Civil Procedure - Pleadings - Statement of Claim - Application to Strike - Appeal
Civil Procedure - Queen's Bench Rules, Rule 7-9(2)(a)

The appellant appealed from the decision of a Queen's Bench chambers judge that granted three applications by different defendants to strike various portions of his statement of claim as disclosing no reasonable cause of action pursuant to Queen's Bench rule 7-9(2)(a). The judge issued three fiats that, taken in aggregate, struck the appellant's entire claim. The appellant was enrolled in a PhD program in microbiology at the University of Saskatchewan (University) in 2009. The defendants Vujanovic and Hamel, an associate and adjunct professor respectively, acted as his co-supervisors. The defendant Gan was also an adjunct professor and a member of the appellant's advisory committee. Hamel and Gan asked the appellant to draft a research proposal and they later used the proposal to gain funding for a research project without giving him any credit. The appellant discovered possible commercial applications of certain fungi and found out in 2012 that Vujanovic and Hamel had published a paper containing his research and conclusions without his knowledge and without crediting him. The appellant pursued his complaint within the University's system, but after a decision was rendered that was unsatisfactory to him, he commenced his action for damages in the Court of Queen's Bench against (1) Vujanovic and Hamel for breach of their fiduciary duty to him and negligence; (2) Vujanovic individually for the tort of detinue, because he had failed to preserve the appellant's fungi collection and had prevented the

appellant from accessing it; (3) Hamel and Gan for breach of fiduciary duty; and (4) the University and Agriculture Canada for vicarious liability. The chambers judge granted three fiats and the appellant ostensibly appealed from all three, but the Court of Appeal noted that he had requested relief only with respect to the latter two: the fiats in response to the application of Hamel, Gan and Agriculture Canada and that of Vujanovic. The chambers judge had struck the claims against these parties on the basis that they concerned academic issues. In the first of the two fiats under appeal, the chambers judge dismissed some of the claims against Vujanovic, Hamel and Gan in negligence on the basis that they concerned academic issues and were not within the purview of the court. The judge further struck the appellant's claim of breach of fiduciary duty by Hamel because it was an academic issue and against Vujanovic because the appellant failed to plead that Vujanovic had agreed to act in a fiduciary role. In the fiat concerning Vujanovic alone, the chambers judge struck the claims against Vujanovic for breach of fiduciary duty and in negligence for the same reasons given in the first fiat. Respecting the appellant's claim against Vujanovic, Hamel and Gan for unlawful interference with economic interests, the judge wrote in both fiats that the principle of deferring to universities did not apply because the University's policy did not provide relief in the form of the damages requested by the appellant. He found as well that there were no factual allegations in the statement of claim that could bring the actions of the three respondents within the scope of the tort.

HELD: The appeal was allowed in part. The appellant's claim was allowed to the extent of reversing the chambers judge's decision to strike the claims in negligence against Hamel, Gan and Vujanovic. The court denied the appellant's application for leave to amend his statement of claim so as to permit the resurrection of the claims that were struck. The appellant had applied very late at the hearing of the appeal, besides which the court was not satisfied that the existing facts would support the necessary amendments and the appellant had not indicated how he might amend his pleadings to cure the defects identified by the chambers judge. With respect to the fiat relating to Hamel and Gan, and also to Vujanovic, the court allowed the appellant's claim in negligence and found, with respect to the appellant's claims related to negligence that were struck on the basis that they concerned academic issues, that it was not plain and obvious pursuant to Queen's Bench rule 7-9(2)(a) that the resolution of an allegation about the appropriation of research and the damages said to flow from that appropriation was something that a student can be deemed to have agreed to leave for determination by the University through its internal proceedings. The chambers judge correctly struck the claim against Hamel and Vujanovic for breach of fiduciary duty. Regarding the second fiat, the chambers judge had correctly struck the claim against Vujanovic but erred again in striking the claim in negligence. Respecting the striking of the claims for unlawful interference with economic interests, the chambers judge's decision was correct.

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Koroluk v KPMG Inc., 2021 SKCA 10

Ottenbreit Caldwell Schwann, January 21, 2021 (CA21010)

Civil Procedure - Appeal - Leave to Appeal
Statutes - Interpretation - Business Corporations Act

The applicant/respondent, KPMG, applied to quash the appeal of the appellant, the representative plaintiff in a proposed class action suit. The appellant filed the class action in 2019 against PrimeWest Mortgage Investment Corporation (PrimeWest) and its current or former directors. Shortly afterwards, PrimeWest brought an application pursuant to ss. 204(8), 210, 215 and 216 of The Business Corporations Act (BCA) seeking approval of its proposed voluntary liquidation and dissolution. The appellant opposed the terms of the proposed application, arguing that the directors should not be permitted to avoid potential liability in the class action via the liquidation proceeding. By consent, a reference to directors was removed, as were others, but a definition of "claim" set out in the Plan of Liquidation and Dissolution was neither altered nor was the reference to the class action removed. In December 2019, KPMG sought an order approving a claims process which was approved but the liquidation order (LO) did not remove all the references to which the appellant had objected. KPMG advised the appellant that as an identified creditor of PrimeWest, he was required to file a proof of claim. The appellant then applied for an order that the class action be excluded from the liquidation proceedings. KMPG concurrently applied for an order declaring that the class action was a claim pursuant to the claims process order. The chambers judge rejected the appellant's submission that the class action was excluded, and interpreted the LO to mean that the class action was not excluded. The appellant appealed from the chambers judge's fiat. KPMG argued in its application to quash the notice of appeal that the fiat was issued pursuant to Queen's Bench rule 10-11 and not pursuant to the BCA. Therefore, there was no statutory right of appeal except as provided by the Court of Appeal Act, 2000 (CAA), in which case, leave to appeal was required under s. 8(1) because the fiat was interlocutory. The issues were whether the fiat: 1) was issued pursuant to the BCA; and 2) was interlocutory.
HELD: The application was denied. The court found with respect to each issue that: 1) the chambers judge addressed the applications of both the appellant and KPMG on the basis that the relief being sought was pursuant to the BCA and relied on the powers conferred on him by ss. 204(8) and 210. As s. 242 of the BCA provides a right of appeal that applies to orders made pursuant to it, leave was not required; and 2) in the context of this case, the fiat was final. The appellant had a right of appeal under s. 7(2) of the CAA and leave was not required. The fiat terminated the class action in its current form and recast it within the very different procedural context of the liquidation proceedings.

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Charles v Saskatchewan Government Insurance, 2021 SKCA 11

Ottenbreit Leurer Tholl, January 21, 2021 (CA21011)

Statutes - Interpretation - Automobile Accident Insurance Act, Section 11.1
Statutes - Interpretation - Limitations Act, Section 5

The appellant appealed from the decision of a Queen's Bench judge to dismiss his action against Saskatchewan Government Insurance (SGI) (see: 2019 SKQB 316). The appellant argued on appeal that the chambers judge erred by finding that The Automobile Accident Insurance Act (AAIA) is not governed or limited by The Limitations Act (LA). The appellant was indebted to the SGI for various amounts incurred in 2008. When the appellant's father died in 2017 as a result of a motor vehicle accident, the appellant was entitled to a death benefit from SGI. Relying on s. 11.1 of the AAIA, SGI deducted the appellant's debt from the benefit. After commencing an action pursuant to s. 191 of the AAIA, the appellant then applied to the Court of Queen's Bench for a determination on a question of law pursuant to Queen's Bench rule 7-1 and asked the chambers judge whether the LA barred SGI from deducting the amounts under s. 11.1. The judge reviewed the pertinent provisions of each Act and decided that the Legislature had not intended s. 11.1 off the AAIA to be bound by the two-year limitation period set out in s. 5 of the LA, because to interpret the provisions otherwise would lead to an absurdity whereby SGI would be forced a pursue a claim for each amount owed to it within two years of a charge or premium arising. The issue on appeal was whether the statutory authority conferred on SGI by s. 11.1 of the AAIA is subject to the limitation period set out in s. 5 of the LA.
HELD: The appeal was dismissed. The appeal under the AAIA was limited to a question of law and, as the appeal involved statutory interpretation, it raised a question of law and the standard of review was correctness. The court found that the chambers judge had not erred in her decision. The court interpreted the two legislative schemes and concluded that SGI's power to deduct funds under s. 11.1 of the AAIA is not limited by a limitation period under s. 5 of the LA. Although SGI cannot commence an action to collect such charges beyond the limitation period in s. 5, it can utilize the method provided by s. 11.1 of the AAIA to collect money owed to it. It also noted that s. 3 of the LA states that the Act applies to "claims pursued in court proceedings" initiated by statement of claim or originating notice, and s. 5 of the LA provides the two-year limit for the commencement of proceedings with respect to a claim. The term "proceedings" is not defined in the LA. The operation of the two sections confines the applicability of s. 5 of the LA to proceedings that are commenced by statement of claim or originating notice. Therefore, SGI's exercise of its powers under s. 11.1 of the AAI is not a "proceeding" within the meaning of s. 5 of the LA.

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R v Paterson, 2021 SKCA 13

Ottenbreit Barrington-Foote Tholl, January 21, 2021 (CA21013)

Constitutional Law - Charter of Rights, Section 8
Constitutional Law - Charter of Rights, s. 24(1) - Remedies - Stay

The appellant appealed the decision of the summary appeal court judge to allow an appeal from the decision of the Provincial Court trial judge (trial judge) to stay her charges of impaired care and control of a motor vehicle. The appellant had been detained by officers of the Regina Police Service (RPS) as a result of the charge, and placed in a police cell which was monitored 24 hours a day by video. The appellant needed to use the toilet located in the cell, in full view of the camera. Due to her intoxication, she fell off the toilet and needed to be assisted in using it by two female officers, who did not take any steps to screen the appellant while she used the toilet. The video had recorded the appellant naked from the navel down to her knees, and she would have been seen by any officers who might have been in the cell monitoring room. The trial judge found that the recording of her use of the bathroom was an unreasonable search and seizure under s. 8 of the Charter, and a serious infringement of her privacy rights. She recognized that her privacy expectations were reduced in police cells, but not to such an extent that she could be openly observed and recorded using the toilet. The trial judge was then required to consider the appropriate remedy for the Charter infringement under s. 24(1), and concluded that the only effective remedy in the circumstances was a stay of proceedings. She reasoned that the law with respect to the imposition of an effective remedy required that it be the only one by which to prevent further breaches of this kind in the future. In what the law understood as the residual category, the remedy of a stay needed to clearly be the only way the court could attempt to prospectively alter abusive state conduct of this kind. She was persuaded that a stay was the only effective remedy to prevent such future conduct, in large measure because the RPS had failed to change its practices following the decision of the Provincial Court in R v Wildfong, 2015 SKPC 55, 471 Sask R 295 and other Ontario cases with similar reasoning, in which s. 8 Charter breaches were found for video monitoring of detained persons in cells using the toilet. The summary appeal court judge allowed the Crown's appeal against the stay, deciding that the trial judge had misdirected herself on the law, in particular because she expanded the factor referred to as "of first instance," meaning that if prior judicial authority has ruled that a police practice and procedure infringes the Charter but the police do not take steps to remedy the infringing policy, the courts have no choice but to step in by signaling through a stay that such practices must stop. The summary appeal court judge found

that the trial judge had expanded the concept by placing too much emphasis on it as a factor that proved the RPS's disregard for the Charter rights of detained persons. The summary appeal court judge also ruled that the trial judge had misdirected herself at law by imposing a punitive and not a remedial sanction against the RPS. HELD: The appeal court allowed the appeal. The appeal raised questions of law, so the standard of appeal was correctness. The appeal court ruled that the summary conviction appeal court erred in finding that the trial judge had misdirected herself on the law with respect to the imposition of a stay of proceedings. The appeal court agreed in her application of the first instance rule and found that she had not imposed a punitive sanction.

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CE Design Ltd. v Saskatchewan Mutual Insurance Company, 2021 SKCA 14

Jackson Schwann Tholl, January 22, 2021 (CA21014)

Insurance Law - Interpretation of Exclusion Clauses
Conflict of Laws - Foreign Judgments
Civil Procedure - Appeal - Standard of Review

This appeal was taken by CE Design (CE), an Illinois company, and the representative plaintiff in a class action lawsuit brought in Illinois against Homegrown, Monty Loree and Lisa Loree (Homegrown), insureds of a Saskatchewan-based insurance company (SMI). CE was a defendant in an action filed in Saskatchewan and brought by SMI. CE appealed to overturn two unreported decisions made in 2015 by a Queen's Bench judge in Saskatchewan in the course of the action. In the first decision (CE Design Ltd. v Saskatchewan Mutual Insurance Company, QB 171/08, JCS, Apr5/19) (stay decision), the chambers judge dismissed CE's application to stay SMI's Saskatchewan action and in the second decision (Saskatchewan Mutual Insurance Company v Homegrown Advertising Inc., QB 171/08, JCS, Apr5/19) (summary judgment) the same judge allowed SMI's summary judgment application for declaratory relief that SMI had no duty to defend Homegrown in the class action and bore no liability to CE. Homegrown was a Saskatchewan business providing unsolicited fax advertising for its customers. It was hired by an Illinois company to provide this service and sent thousands of unsolicited advertisements by fax to businesses in Illinois, contrary to the Telephone Consumer Protection Act of 1991, 47 USC § 227 of that state. CE was certified by Illinois law as the representative plaintiff in a class action against Homegrown for damages resulting from this statutory breach. The class action was eventually settled and approved by the appropriate court in Illinois. By the terms

of the settlement, CE and Homegrown agreed that the amount of the settlement was $5,000,000.00, but Homegrown would not be liable to pay it, and CE would look to SMI for recovery of the amount. SMI had not been given notice of the class action or the settlement. CE obtained default judgment against SMI and applied in 2008 to Queen's Bench in Saskatchewan pursuant to The Enforcement of Foreign Judgments Act to register it, but the application was dismissed by the chambers judge because SMI "did not receive notice of the commencement of proceedings in sufficient time to present a defence" (see: 2008 SKQB 12). Immediately following that ruling, SMI commenced its action against CE and Homegrown. In response, CE brought an application to Queen's Bench arguing that the court had no jurisdiction over the proceedings or the subject matter of the action, and that the action should be dismissed. The chambers judge dismissed the application after reviewing The Court Jurisdiction and Proceedings Transfer Act, finding that the action had a substantial connection with the jurisdiction; both SMI and Homegrown were based in Saskatchewan, and the insurance policy central to the action was made in Saskatchewan and governed by Saskatchewan and Canadian law (see: 2009 SKQB 358). The chambers judge further found that the balance of convenience favoured that the action be continued in Saskatchewan. Also in 2008, CE, now with full knowledge that SMI's Saskatchewan action had been court-endorsed, tried to enforce its default judgment in Illinois. In 2013, SMI tried in five separate applications to have the default judgement set aside. Under Illinois law, SMI was barred from so doing for procedural reasons. SMI was not able to argue the merits of its claim that by the terms of the insurance policy it was not liable to Homegrown for any losses arising from the sending of the unsolicited faxes. It was at this point that SMI sought summary judgment, and CE a stay of the action.

HELD: The Court of Appeal dismissed the appeal, in large measure because it found that CE's grounds of appeal were outside the court's scope of review. With respect to the standards of review, the court stated that the identification of the applicable law and the interpretation of that law is subject to a standard of correctness, and so an error of this kind is an error of law; questions of mixed law and fact, and questions of fact, required deference to the decisions of the lower court and so are subject to a palpable and overriding error standard of review; the standard of review for abuse of process decisions is deferential as these are discretionary, which means that the court will not intervene except where the lower court has made an error in principle, disregarded or misinterpreted a material fact, failed to act judicially, or a result is so plainly wrong that it amounts to an injustice. A decision to proceed by way of summary judgment is a question of mixed law and fact, and absent an error in principle, the decision should not be overturned, except in the case of a palpable and overriding error. As to the standard of review as it pertains to the interpretation of insurance contracts, in this case, it was one of correctness. The appeal court reviewed the stay decision and the summary judgment with these standards in mind. The main ground of appeal advanced by CE with respect to the stay decision was that SMI was given an opportunity in Illinois to fully state its case on the merits during the hearings leading to the Mullen and Ortiz decisions such that it would be abusive and contrary to the law with respect to multiplicity of proceedings in Saskatchewan, particularly in light of The Court Jurisdiction and Proceedings

Transfer Act, for SMI's claim to be allowed to continue. The appeal court ruled that it was open on the evidence for the chambers judge to find that SMI's policy or coverage defences to CE's claims had not been considered fully since no evidence had been called or considered by the courts with respect to these defences. Expert evidence had been presented by affidavit during the stay decision hearing. The chambers judge preferred the opinion evidence of the expert called by SMI who testified that the Illinois court had not as a matter of law considered whether the policy required SMI to defend Homegrown against CE's claims. It was within his discretion to accept that evidence in preference to the evidence of the expert called by CE. As the chambers judge was entitled to find the coverage defences had not had a full hearing, and had applied the relevant law and made the necessary rulings, the appeal court dismissed the appeal of the stay decision. Turning to the summary judgment, the appeal court found that the chambers judge made no error in deciding to proceed in this manner. He had made no error in principle and had judicially exercised his discretion to so do. In his consideration of SMI's claim that Homegrown had no coverage under the policy, the chambers judge found that Homegrown was not covered under the policy because Homegrown had failed to inform SMI of the settlement negotiations as required by the policy, and Homegrown's actions in sending the faxes were not accidental, but were intentional, so were not covered for that reason. The appeal court found no error in principle in this reasoning, but thought the judge should have embarked on a more thorough interpretation of the definitions of "property damage" and "accident," finding that property damage had resulted from the sending of the faxes because of the wasted toner, wear and tear on the fax machines, and waste of staff time. The appeal court also interpreted "accident" to mean an act which was unintended, unlike the intentional sending of faxes.

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R v Anwender, 2021 SKQB 1

Scherman, January 4, 2021 (QB21001)

Criminal Law - Controlled Drugs and Substances Act - Possession for the Purpose of Trafficking - Methamphetamine

The accused was charged with possession of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act (CDSA), trafficking in methamphetamine contrary to s. 5(1) of the CDSA and having possession of property or proceeds of property valued at more than $5,000 knowing that the property was derived from trafficking, thereby committing an offence contrary to ss. 354(1) and 355(a)

of the Criminal Code. During the trial, the court determined in a voir dire that the accused's ss. 8 and 9 Charter rights had not been breached by the police and evidence relating to items located in the accused's vehicle, following a search incidental to his arrest, was admissible at trial (see: 2020 SKQB 67). The police had been surveilling another individual, Bodkin, because they suspected he was involved in trafficking of methamphetamines and had seen him having 20 brief meetings with other individuals in his truck. Three of these meetings involved the accused. Prior to the last meeting, Bodkin was seen purchasing items at a Dollarama and after leaving the store, driving to another location where the accused was parked. He got into the accused's vehicle. The police surrounded the vehicle soon thereafter and arrested both men. A search of the accused's truck ensued and the police found a gym bag on the back seat floor containing two Ziploc bags, each containing more than 400 grams of methamphetamine and two bundles of cash totaling $17,700. Another Ziploc bag containing 5 grams of cannabis as well as two cell phones were located in the centre console. Police further found a Dollarama bag containing $20,400 in cash on the floor of the driver's side and a green notebook. A police expert on drug trafficking testified that the large amount and value of the methamphetamine and the quantities of cash were consistent with high-level distributor to dealer trafficking. He suggested that the notebook was a dealer's scoresheet. No evidence was tendered regarding the contents of the cell phones, and the notebook had a grocery list in it. The Crown's evidence was uncontroverted. It argued that the appropriate inferences to be drawn from the facts were that the accused was in possession of the gym bag and was guilty of possession; his actions of either selling or transporting the drugs to Bodkin constituted trafficking; and the cash in his possession was derived from trafficking so that he was guilty of the third charge. The defence argued that there was a reasonable possibility that the accused was meeting with Bodkin to purchase marijuana and the gym bag and its contents and the plastic bag containing cash were Bodkin's property.
HELD: The accused was found not guilty of all charges. The court reviewed the law pertaining to inferences regarding circumstantial evidence. It noted that Bodkin pled guilty to possession of methamphetamines subsequent to his arrest and after execution of search warrants of his properties had occurred. It found that there was no direct evidence from the police whether Bodkin entered the accused's vehicle with the gym bag. It was possible that the gym bag, the methamphetamine and cash it contained as well as the Dollarama bag were brought into the truck by Bodkin in circumstances where the purpose of the meeting was for the accused to purchase marijuana from Bodkin.

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T.L., Re, 2021 SKQB 2

Richmond, January 5, 2021 (QB21002)

Family Law - Child in Need of Protection - Permanent Order
Statutes - Interpretation - Bill C-92

Yorkton Tribal Council Child and Family Services (YTCCFS) applied for a permanent order, pursuant to The Child and Family Services Act (CFSA), regarding a nine-year-old girl, T.L., with the intent of pursuing an adoption plan with her current caregivers, D.L. and C.Y. Another party, A.D., applied pursuant to s. 23(1)(a) and (b) of the CFSA as well as seeking liberal access pursuant to the Children's Law Act (CLA) and an order granting her custody and primary residency of T.L. pursuant to both the CFSA and CLA. By way of background to these applications, T.L.'s mother and T.L. began living with M.S., T.L.'s father, on the White Bear reserve in 2012, where he tried to support his daughter because of her addictions. He and T.L. became very close. T.L.'s mother moved to Saskatoon in 2015, and T.L. was apprehended there by the Ministry of Social Services, which transferred her file to YTCCFS. After the apprehension, T.L.'s mother suggested that M.S. be contacted as a resource person and T.L. was placed in his care. While T.L. lived with M.S. on the reserve, their relationship became even closer. T.L.'s mother died in March 2017. After that, M.S. felt that it would be too lonely for his granddaughter to live with him and his spouse and recommended that she be placed with his stepdaughter, C.Y., and her spouse D.L., who lived nearby with their three young children with whom T.L. played and attended school. YTCCFS approved the plan and its employee testified that T.L. was happy with the family and called C.Y. and D.L. Mom and Dad. T.L. continued to spend a lot of time with M.S. and he introduced to her Aboriginal culture and spiritual practices. In the summer of 2018, the identity of T.L.'s father was discovered through DNA testing. As a result, his mother and T.L.'s grandmother, A.D., contacted YTCCFS. She was then introduced to T.L. pursuant to a court order providing access and they spent regular time together. There was antagonism between A.D. and T.L.'s caregivers. She was opposed to T.L. remaining with them and in October 2018 successfully applied for an order finding her to be a person of sufficient interest. Many witnesses testified at this hearing of her applications for custody of T.L. in support of A.D., as she had conquered alcoholism and become an elder. She lived on the White Bear reserve and had been active in teaching and other roles at the White Bear Education Complex (WBEC). Some witnesses explained that it was common in Aboriginal culture for grandparents to raise grandchildren. A.D. submitted that she would be better able to help T.L. appreciate her Aboriginal heritage and that living on-reserve, she could attend WBEC where she would gain Nakoda language skills, whereas in her present circumstances, T.L. attended public school in Wawota and it did not offer such a program. A custody and access report was prepared pursuant to a court order and the author recommended that it was in T.L.'s best interests to remain with the family with whom she had lived for three years because to move her to A.D.'s home would be disruptive and set back her familial attachments and development achievements. He recommended that T.L.'s time with both M.S. and A.D. be supported and encouraged by D.L. and C.Y. and that the parties end their

conflict for T.L.'s sake. T.L. expressed her wish to remain with the family and to visit with A.D.
HELD: The court dismissed A.D.'s application for custody pursuant to the CLA. It found that T.L. was a child in need of protection pursuant to s. 11(a)(ii) and (b) of the CFSA and ordered that she be placed in the permanent custody of the Ministry. Although access orders were not permitted under s. 37, it encouraged the YTCCFS to promote T.L.'s relationship with A.D. YTCCFS planned to have T.L. adopted by D.L. and C.Y., a placement which was appropriate pursuant to s. 16(1)(b) of Bill C-92. The court encouraged YTCCFS to promote a relationship with the paternal side of T.L.'s family and also between them and D.L. and C.Y. The court held that the CFSA, the CLA and Bill C-92 had, as their central principle, the consideration of the best interests of the child. It reviewed the best interest factors set out in each piece of legislation and determined that they had a number of items in common and no conflict existed between them. In this case, it was in the best interests of T.L. to remain with the family with whom she had lived and to maintain her close relationship with M.S.

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Wozniak v Wozniak, 2021 SKQB 3

Layh, January 6, 2021 (QB21003)

Civil Procedure - Conflict of Interest

The applicant spouse in a proceeding for division of family property sought to have counsel for the respondent, G.H., removed for conflict of interest. Ten years before her petition was filed, commencing the action for the family property division, the applicant and respondent together purchased farmland from the petitioner's mother. As a result of a dispute between the mother and the applicant and respondent concerning the ownership and removal of personal property and buildings from the farmland, the applicant and respondent jointly retained G.H., a solicitor, to act for them for the limited purpose of resolving the dispute. Through the exchange of letters with the mother's counsel, the matter was soon resolved. G.H. did not meet personally with the applicant and respondent. The applicant claimed that she had communicated intimate and confidential information to G.H. that would have a bearing on the division of family property proceedings, since such information could be unfairly used against her, thus requiring the removal of G.H. and anyone from his firm from acting for the respondent in the action for division of family property.
HELD: The application was dismissed. The chambers judge relied on the primary authority with respect to removal of counsel for conflict of interest, MacDonald Estate v Martin, 1990 CanLII 32 (SCC), [1990] 3 SCR

1235, and the two-branched test enunciated therein "that questions of conflict sufficient to remove a lawyer are twofold: 1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? 2) Is there a risk that it will be used to the prejudice of the client?" The chambers judge ruled that the applicant had failed to satisfy him that the first branch of the test had been established. Firstly, though she deposed in her affidavit that she had communicated intimate and confidential information to G.H., she did not provide any particulars as to what that information was; secondly, it would be highly unlikely that such information would have been imparted to G.H. because it would not be required in a simple property dispute resolved through an exchange of letters, which letters made no reference to information of a confidential nature being provided to G.H.; thirdly, it would not accord with common sense that such information would be passed on without a personal meeting of the applicant and G.H.; fourthly, any exchanges between G.H. and the applicant were also made to the respondent because of the joint retainer, and so were not confidential; and fifthly, the family property proceedings required full disclosure of all material relevant to the division of family property in any case. As to any prejudice which might arise should the information be considered confidential, the passage of ten years since the property dispute would make any such information irrelevant, and so not prejudicial.

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R v Jobb, 2021 SKQB 4

Popescul, January 8, 2020 (QB21006)

Criminal Law - Obstructing a Peace Officer
Constitutional Law - Charter of Rights, Section 9, Section 10(b)

The appellant Crown sought to overturn a not guilty finding by the trial judge with respect to charges of obstructing a peace officer in the execution of his duties by assaulting him and resisting arrest. At trial, the evidence revealed that he charges arose as a result of a roadside stop of a motor vehicle due to a complaint of a possible impaired driver, said to be "Peggy", operating a dirty, white vehicle with an obscured license plate. The peace officer, Cst. Carrier, located the vehicle in a parking lot, engaged his emergency light, and approached the vehicle. When he looked in it, he saw two females, Peggy and Amy, and two males, Brendan and Austin. Brendan and Amy were boyfriend and girlfriend. No one was in the driver's seat. Austin was sitting in the front passenger seat, and Amy, Peggy and Brendan were in the back seat. Cst. Carrier observed Amy, positioned awkwardly, half sitting and half standing, and considered that suspicious. Continuing his

investigation, he thought the females exhibited indicia of alcohol impairment, and asked them to step out of the vehicle. He asked Peggy who the driver was, and she said Amy. Amy denied she was the driver. As he did not suspect Brendan of any possible illegal activity, he told him he was no longer required to remain at the scene and could leave. As he was leaving, Brendan gave Cst. Carrier the keys to the vehicle, and said Amy was the driver. At this point, Austin exited the vehicle and would not follow Cst. Carrier's directions, and so was placed in the police vehicle. Brendan then returned to the police vehicle and escorted Amy away with him. Cst. Carrier said he could not do that as she was detained as a possible impaired driver. He attempted to handcuff her and place her in the police vehicle. She resisted and, during a scuffle, kicked Cst. Carrier in the torso, and they both fell down. The trial judge ruled that there was an unlawful detention of Amy, and her right to be free from arbitrary detention under s. 9 of the Charter had been infringed on the basis that Cst. Carrier did not have reasonable grounds to arrest her. He also found that he had not provided her with rights to counsel forthwith as required by s. 10(b) of the Charter. Having found infringements of Amy's Charter rights, he then conducted a cursory analysis under s. 24(2) of the Charter concerning whether the admission of the evidence obtained would bring the administration of justice into disrepute. He found that it would, and so excluded it, with the result that there was no evidence upon which a conviction could be based, and thus found the accused not guilty.

HELD: The appeal was allowed. The appeal court judge first set out the standard of review applicable to a s. 813(b)(1) Criminal Code summary conviction appeal. Under s. 813(b)(1), the Crown may appeal an acquittal on grounds which raise errors of fact or law and, by the incorporation of s. 686 of the Criminal Code to summary conviction appeals, may, if he finds reviewable error, enter a conviction on appeal. He went on to state that questions of fact are not reviewable if, on the evidence, a trier of fact properly instructed could reasonably reach the verdict he did; and that questions of law are not reviewable if the trial judge correctly applied the law to the facts, and in the case of an appeal from a Charter ruling, if the trial judge correctly applied the proper legal standard to his factual findings. The appeal court judge reversed the Charter findings of the trial judge, ruling that he made an error in law by incorrectly requiring the arresting officer to have a reasonable suspicion that the accused was the driver before detaining her. The appeal court judge concluded that was not the applicable law. The applicable law was that formulated with respect to the duties of a peace officer when detaining drivers to check their sobriety. So long as the detention was for the purposes of checking sobriety, the detention was lawful if it was within the scope of that purpose. The appeal court judge also found that even if he were to assume the trial judge applied the correct reasonable suspicion legal standard, he still committed an error in law by not finding on the facts that the standard had been met. In particular, he was of the view that the facts supported a conclusion that the peace officer was correct in his reasonable suspicion that the accused might be the driver, and he was justified in detaining her to investigate his suspicion further. As to the trial judge's conclusion that the accused's s.10(b) Charter right to be informed of her right to retain and instruct counsel without delay had been infringed, the appeal court judge also found

the trial judge was incorrect at law by not finding on the facts that in the circumstances, the right to be informed had not been delayed as contemplated by the case authorities, and so the right had not been breached. Given the appeal court's reversal of the Charter breaches, the appeal court did not need to address the matter of the s. 24(2) Charter analysis, and in allowing the evidence, found the accused guilty.

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Zoerb v Saskatoon Regional Health Authority, 2021 SKQB 7

Smith, January 11, 2021 (QB21008)

Torts - Medical Malpractice
Limitations - Torts - Statutory Limitation Periods
Torts - Negligence - Standard of Care

The trial judge in a summary judgment application was called upon to decide whether an action against Dr. Block, a pathologist, was time-barred, and if not, whether he had met the standard of care of a general pathologist examining a tissue sample and failing to diagnose a non-malignant tumour of the jaw, known as an ameloblastoma, thereby causing the plaintiff to undergo radical surgery to her jaw. As to the matter of the relevant limitation periods, these were contained in s. 72 of The Medical Profession Act, 1981 (Act) and The Limitation of Actions Act (LAA). Pursuant to s. 72 of the Act, the action against Dr. Block was to be commenced within twelve months of the date of termination of the services complained of. Under the LAA, an action against him was to be commenced within two years from the day the claim was discovered. In this case, Dr. Block provided his diagnosis on April 27, 1990. The plaintiff learned of her true condition, that an ameloblastoma had invaded her jaw, on February 21, 2007. The plaintiff commenced her action against Dr. Block on January 29, 2009. The plaintiff had also added the Saskatoon Health Authority (Health Authority) as a defendant in the action, and the Health Authority had cross-claimed against Dr. Block in contract and pursuant to The Contributory Negligence Act.
HELD: The trial judge dismissed the plaintiff's action against Dr. Block because the limitation period of twelve months from the date of termination of the services to the commencement of the action had expired. Established and extensive case law was clear that the principle of discoverability â€“ that the clock did not begin to run on the twelve-month limitation period until the cause of action was discovered or should have been discovered by the plaintiff â€“ did not apply when the clear wording of the governing legislation excluded such an interpretation, as in this case. This finding, however, did not answer the question of the time

limit on the action by the Plaintiff against the Health Authority, which was governed by LAA and clearly allowed for the two-year limitation period to commence upon discovery of the claim. The trial judge was not prepared to find that the Plaintiff should have been aware of the ameloblastoma before February 21, 2007, the day she was provided with the correct diagnosis by a specialist. Though she had failed to arrange follow-up appointments as suggested by her dentist, oral specialist, and family doctor, she had been told she did not have a tumour and was an unsophisticated person who only knew she had something wrong with her jaw. The trial judge, however, after reviewing the august and extensive case authorities and the opinion of the defendant's expert witness, dismissed the claim of the plaintiff against the Health Authority, finding that Dr. Block had met the standard of care of a general pathologist in that community in the 1990s in the manner in which he conducted his examination of the tissue sample. He dismissed the plaintiff's argument that by not deferring to a pathologist with more experience with ameloblastoma, Dr. Block had failed to meet the legally required standard of care. He found ultimately that the plaintiff's arguments were directed at perceived errors of judgment on the part of Dr. Block, and wrongly held him liable for the results of his error. He reasoned further that the plaintiff was wrongly advancing a standard of excellence for Dr. Block. So long as Dr. Block acted in conformity with standard medical practice at that time in that community in his examination of the tissue sample, he had fulfilled his duty of care to the plaintiff.

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Unifor, Local 892 v Mosaic Potash Esterhazy Limited Partnership, 2021 SKQB 8

Keene, January 12, 2021 (QB21005)

Labour Law - Arbitration - Judicial Review

The union applied for judicial review of the award made by an arbitrator pursuant to a collective agreement between the union and the respondent employer. The respondent operated a mine where it decided it needed to have work done by a private contractor. It was losing money due to the condition of flotation cells, and although employees could perform the work, it would take too long because they would have to fit the project in whenever regular duties permitted. The respondent sent an email to the union advising it of the work on January 7, pursuant to an article in the agreement that required written notice of the reasons for contracting out prior to the work being performed. The notice listed the work to be done. The contractor commenced the work on January 11. The parties held a pre-grievance meeting on January 12 at which the union stated that the reasons that it felt that the work could be done by employees. The respondent said that it did not have the

manpower necessary to complete the work within the necessary timeframe. The union filed a grievance and arbitration followed. A representative of the union deposed in his affidavit that the reasons for contracting out the work were not provided as required by the provision. The arbitrator interpreted the provision and found that proper notice had been provided. At the hearing of the judicial review application, the union took the position that the arbitrator's decision was unreasonable and should be quashed. The respondent did not dispute the evidence provided by the union representative at the arbitration hearing.
HELD: The application was granted. The court found that the decision was unreasonable and should be remitted to the arbitrator for further consideration and to reach a decision according to law. The standard of review was reasonableness. It reviewed the arbitrator's decision and found that his belief that the respondent had met the requirements of the provision did not accord with the facts, which showed that the notice had not supplied reasons but only the scope of work. The arbitrator appeared to have interpreted the requirements of the provision to have been met because the union learned the respondent's reasons on the day after the work commenced and the union somehow bore the onus of making a specific request for disclosure from the employer. It was unreasonable to interpret the notice provisions in this fashion.

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Ingram Estate, Re, 2021 SKQB 10

Robertson, January 13, 2020 (QB21009)

Wills and Estates - Administration de Bonis Non

Counsel for the proposed administrators of the estate of George B. Ingram (George) appeared before the chambers judge in the judicial centre of Moose Jaw on an application to revoke the letters probate initially granted when George died with a will naming as his executor his spouse, Florence Mabel Ingram (Florence), who died before completing the administration of his estate. George and Florence were husband and wife. Each had a will. George had named Florence as his executor. He died before she did, but Florence died before she could complete the administration of his estate. George was to be the sole beneficiary of Florence's estate had he survived her, but as he did not, pursuant to Florence's will, the residue was to be divided equally among Florence's seven named children. Florence failed to name an executor in her will, so two of the residual beneficiaries, Bonnie Hamel and Brenda Mah, applied for and received a grant of administration with will annexed from the court at the judicial centre of Regina. The issues to be determined were how to finalize George's estate, and in which judicial centre that should occur.

HELD: To finalize George's estate, the proposed administrators were to apply for a grant of administration de bonis non, as contemplated by Rule 16-29 of the Queen's Bench Rules. Even though the situation at hand did not quite fit the circumstances in which Rule 16-29 would ordinarily be applicable, the chambers judge was prepared to apply the court's general powers in relation to estate matters, as recognized in The Administration of Estates Act, to allow substance to prevail over form and complete the administration of George's estate. The law with respect to a grant of administration de bonis non is of venerable standing, and is intended to fill the void created when an executor dies before finalizing an estate. Only the court can fill this void. The court's involvement is required; an interested party cannot simply step in to finish the work of the deceased executor without the blessing of the court. The existing administrative grants are rendered null and void, and the documents must be returned to the court. The chambers judge endorsed the appointment of the administrators of Florence's estate, Bonnie Hamel and Brenda Mah, to also act as administrators of George's estate. As Florence's file was in the Regina judicial centre, for convenience's sake, George's file was transferred there.

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R v Langford, 2021 SKPC 2

Kovatch, January 14, 2021 (PC21006)

Criminal Law - Assault - Assault with a Weapon - Motor Vehicle
Criminal Law - Defences - Self-defence

The accused was charged with one count of committing assault with a baseball bat contrary to s. 267(a) of the Criminal Code, three counts of committing assault with a motor vehicle contrary to s. 267(a) and dangerous driving contrary to s. 320.13(1). He admitted that he committed the various acts described in the charges, but argued that his actions were taken in self-defence. The victim whom he had allegedly assaulted with the bat testified that after a party, he, his spouse and their guests had gone to bed but when he heard the front door open, he found the accused and another individual entering his house. The accused said they were there for the party, and the victim told him there was no party and to get out of his house. He argued with the accused and pushed him twice to get him to leave. The accused did leave, but picked up a garden pot as he moved to his vehicle, which provoked the victim to come outside. The accused put down the pot and walked to his vehicle with the victim following him. The accused took a bat from the vehicle and struck the victim five times. Another man came out of the house, tackled the accused and took his bat. The accused retrieved another bat from his vehicle, and the victim testified that he "lost it" and punched the accused in the face a number of

times. A crowd of people gathered. The accused and his friend got into their vehicle, backed up a few feet and then drove forward very quickly into the crowd. Three individuals were struck. A recording of the incident was made by a nearby surveillance camera which was admitted as evidence. It showed that when the accused got into his vehicle, the others approached it and began striking it. The accused testified that he and his friend had been invited to the party by the victim's wife. They both said that they knocked at the door and were admitted by the victim. The victim became very angry and pushed him a number of times and became increasingly aggressive. The accused was scared and believed that he had to do something to protect himself. He denied hitting the victim with the bat, which he had only taken out to protect himself. Once he was back in his vehicle, people began striking the side of it and he was terrified and panicked. All of his actions were taken in self-defence.
HELD: The accused was found guilty of all charges. The charge of dangerous driving was stayed on the basis of Kienapple. Respecting the charge of assault on the victim with the bat, the court found that the accused was not under any reasonably held belief that he was in danger of a further attack from the victim. Because he had been pushed by the victim, the accused had some grounds to believe some force was applied to him, but it was minimal. It found that the accused's action in driving into the crowd was not taken in self-defence. There were no people behind the vehicle and the accused could easily have driven away.

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Labrecque v GGM Developments Ltd., 2021 SKPC 3

Metivier, January 15, 2021 (PC21003)

Statutes - Interpretation - Limitations Act, Section 5
Civil Procedure - Limitation Period - Discoverability Principle

The plaintiffs claimed that on or before October 31, 2017, the defendant committed a trespass by excavating outside their property, causing damage to the sidewalk, fence and gate located on their property. The defendant admitted that a trespass took place but denied that it caused the alleged damage, and raised the issue that the plaintiffs' action, commenced on November 6, 2019, was beyond the two-year limit prescribed by s. 5, and barred by s. 19, of The Limitations Act. The plaintiffs argued that the discoverability rule was inapplicable because they did not know the actual identity of the tortfeasor until sometime after October 31, 2017. Their daughter, who resided at the property at the time, testified that she notified her parents what had happened on October 30 and, within months of the trespass, had contacted the City of Saskatoon to determine who owned

the property. The issue was whether the identity of the owner was discoverable by the exercise of due diligence.
HELD: The plaintiffs' claim was dismissed. The court found that they had not exercised reasonable diligence. It was reasonable for them to assume that they had a cause of action against the property owner on the date the incident occurred and the evidence adduced by them showed that efforts were made to ascertain identity. However, it was discoverable by the exercise of reasonable diligence through a search of a public registry. Accordingly, the discoverability principle had no application to the facts of this case. The plaintiffs were ordered to pay costs of $200 to the defendant under s. 36 of The Small Claims Act, 2016 and s. 6 of The Small Claims Regulations, 2017 in recognition of the time and resources committed by the latter to defend an action that the plaintiffs were statute-barred from commencing.

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R v Merasty, 2021 SKPC 5

Schiefner, January 18, 2021 (PC21004)

Criminal Law - Assault - Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. It was not disputed that physical contact of a sexual nature occurred between the accused and the complainant, but the defence argued that the sexual encounter had been consensual. The complainant testified that she met with the accused and two other women at one of their houses. She admitted that she and the others were drinking and using cocaine. The two other women went to sleep in various locations while she remained in the kitchen with the accused. She decided to leave, but could not obtain a ride home, whereupon the accused suggested that they sleep at the house. They went to a downstairs bedroom in which she went to one bed and the accused took the other. She went to sleep with her clothes on and wrapped in a blanket. The complainant awoke to find the accused on top of her, kissing her and trying to have sex. Her clothes had been pushed down to her ankles. She shoved him off and told him no, put on her clothes and went upstairs, wakened one of the women and said that the accused had tried to rape her. She left the house shortly afterward and her mother convinced her to call the police. The complainant gave her clothes to the police and went to the hospital for a physical examination. In her testimony, the complainant stated that she was definitely intoxicated when she went downstairs but not to the point of blacking out and could still think and speak clearly. She was able to describe each room and what had happened during the time prior to the alleged assault. The complainant asserted she had not consented to

having sexual contact with the accused and that he stopped when she said no. The evidence presented by the Crown's forensic expert was that male DNA had been detected on the clothing but of insufficient quantity to prepare a profile and it was impossible to either exclude or include the accused as a contributor with the sample he had provided. The two women present in the house testified on behalf of the defence. In their versions of events, both said that the complainant was intoxicated. One witness said that she could see the complainant kissing the accused in the kitchen by watching their reflection in the TV screen when she lying on the sofa in the living room and the other witness stated that the complainant told her that she wanted to hook up with the accused and that when she was in the other bedroom downstairs, she could hear signs of foreplay. The complainant was not given the opportunity to address this evidence in cross-examination. The defence argued that the complainant was not being truthful when she denied that she consented and that she did not remember that she communicated her consent because of her intoxication.
HELD: The accused was found guilty. The court preferred the complainant's evidence to that of the defence witnesses. It found that the Crown had proven the actus reus of the offence of sexual assault: that the accused touched the complainant, that the nature of that touching was sexual, and that the complainant had not subjectively consented to that touching. It was satisfied that the Crown had proven the mens rea of the offence: the accused intentionally touched the complainant and he was either aware of or willfully blind to an absence of consent on her part. There was no evidence that the accused took any steps to ascertain whether the complainant was consenting as required under s. 273.2 of the Criminal Code.

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Sir v Prince Albert SPCA, 2021 SKPC 8

Lane, January 21, 2021 (PC21002)

Statutes - Interpretation - Animal Protection Act, 1999, Section 17

The plaintiff successfully appealed the decision of a Provincial Court judge that dismissed her claim. The Queen's Bench judge hearing the appeal ordered a new trial on very limited evidentiary and legal issues (see: 2019 SKQB 96). The plaintiff's claim was that the defendant, the SPCA, had refused to return a dog to her in 2014. She claimed damages in the amount of $30,000. At the second Provincial Court trial, the defendant conceded that the plaintiff was, at all times, ready and able to pay the costs related to the care of the dog as provided by the SPCA. The only issue remaining to be tried was whether the defendant could claim immunity by virtue of s. 17(1) of The Animal Protection Act, 1999 which was in force at the relevant time.

HELD: The plaintiff's claim was dismissed. The court found that she had not proven on a balance of probabilities that the defendant failed to act in good faith when it made the decisions it did regarding the dog. It awarded costs against the plaintiff in the amount of $3,000 pursuant to s. 36(3) of The Small Claims Act, 2016 and s. 6(3) of The Small Claims Regulations, 2017 to deter her and other individuals from pursuing claims under that legislation with the disregard and disrespect for the court and its participants that the plaintiff had demonstrated.

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R v Bear-Maguire, 2021 SKPC 9

Harradence, January 14, 2021 (PC21005)

Statutes - Interpretation - Criminal Code, Section 810.2

A constable delivered a package to the court requesting an information be sworn under s. 810.2 of the Criminal Code and a warrant issue for the defendant's arrest. The material indicated that the defendant would be released on bail pending the s. 810.2 hearing subject to 17 conditions. The court requested a hearing and that Crown counsel submit further information. When the hearing resumed, counsel did not file any further material, but made submissions that conceded that the Crown was not relying on an allegation that the defendant would fail to attend court â€“ the primary ground â€“ as justification for the issuance of a warrant. The Crown declined to amplify the material provided by the constable. It did not include specific reference to an identifiable person or group to whom there was an imminent risk of serious personal injury, and counsel indicated that the concern was with the community of Sandy Lake at large where the defendant intended to live with his mother.
HELD: The court found that the material only indicated a generalized risk and the Crown had failed to satisfy it of an imminent risk posed by the defendant's release as required by R v Penunsi (2019 SCC 39). It stated that it would administer the oath with the constable swearing the information and direct that a summons issue, returnable in six weeks. The court observed that Penunsi allows for an application for an arrest warrant after a summons issues if information comes to light that the defendant poses a risk to the public.

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R v Sweet, 2021 SKPC 12

Martinez, January 26, 2021 (PC21007)

Criminal Law - Motor Vehicles Offences - Impaired Driving - Refusal to Provide Breath Sample

The accused was charged with refusing or failing to provide a breath sample into an ASD contrary to s. 320.15(1) of the Criminal Code. An RCMP officer, patrolling alone early in the morning, observed a vehicle coming from the direction of a local bar and decided to check the driver for licensing, registration and sobriety. After the accused stopped her vehicle, the officer asked her for licence and registration. The accused was flustered and said that she had left them at home. The officer asked her where she was coming from and whether she had anything to drink. The accused replied that she had been at the local bar but she had not had anything to drink there, but had consumed one drink earlier in the evening. The officer formed a reasonable suspicion that the accused had alcohol in her body and decided to detain her to have her provide an ASD sample. She told the accused "stay here and I'll be right back," went to her vehicle and called another officer to ask him to bring an ASD and administer the test, as she was not trained to use the machine. She then returned to the accused's vehicle and informed her then that she was being detained for impaired operation of a vehicle. The officer told the accused that she was going to read a demand a breath demand and get her to blow in the ASD when the other officer arrived. However, the test could not be administered because the ASD had expired, and the officer had to return to the detachment to get another one. Upon his return, the accused was instructed on how to blow and then made seven unsuccessful attempts to provide a sample. In the police vehicle's recording, the accused could be heard saying that she was trying, becoming frustrated and upset and continuing to protest her innocence. The officer then arrested her on the charge. The defence argued that the first officer's demand was not prompt. After the officer formed her reasonable suspicion, she waited about four minutes before making the formal demand and the accused's opportunity to provide a breath sample was delayed unnecessarily when the second officer caused another inexcusable delay of about five minutes by failing to bring a functioning ASD. Consequently, the demand was not lawful as it did not comply with the immediacy requirements of s. 320.27(b) of the Code and the accused was not legally compelled to provide a sample. Alternatively, if the breath demand were lawful, the Crown had not proven that the accused intentionally refused or failed to supply a sample.
HELD: The court found that the ASD demand was not lawful and the accused could not be convicted of refusal or failure to comply with it. It had not been made as soon as the officer formed her reasonable suspicion that the accused had alcohol in her body. Further, it determined on the alternative ground that the accused had not intentionally failed to provide a sample based on its assessment of her credibility in light of her testimony and the recording of her attempts to provide a sample.

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