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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***Barth v Barth*, 2022 SKCA 9**

Kalmakoff, 2022-01-20 (CA22009)

Civil Procedure - Appeal - Stay of Execution Pending Appeal to Supreme Court

The applicant, T.B., whose numerous appeals from Queen's Bench chambers decisions had been dismissed by the Court of Appeal (court), sought an order that proceedings be stayed with respect to these decisions pursuant to s. 65.1(2) of the *Supreme Court Act* (Act). The Court of Appeal chambers judge (judge) surveyed the various appeals and decisions of the chambers judges as revealed by the court records on appeal and from the Queen's Bench: the applications in chambers were taken by T.B. in the context of a child support dispute between T.B. and his spouse and his child's mother, L.B.; T.B.'s accusations of child abuse against L.B. caused the Ministry of Social Services (MSS) to become involved with the family; though the allegations against L.B. were determined by MSS to be unfounded, these

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rebounded onto T.B., resulting in an interim order that the shared parenting arrangement be varied such that L.B. was granted sole custody of the child and T.B. was reduced to supervised access (*Barth v Barth* (9 March 2020) Saskatoon, FLD 307 of 2018 (Sask QB) (Wilkinson Fiat)); T.B. appealed the Wilkinson Fiat to the court, asking the court to "remake" the chambers judge's decision, which it ruled it could not do; there followed a series of applications tangential to the custody dispute in which T.B. sought, because of alleged conflicts of interest, to remove lawyers as counsel for L.B. and counsel for MSS whose firms had acted either for him or L.B. in the past; in each case, the chambers judge dismissed the application since there was no possibility that L.B.'s lawyer or counsel for the MSS could have obtained confidential information about T.B. either because internal conflict of interest measures were in place at the firm, or because there was no reasonable possibility that L.B.'s counsel could have obtained confidential information against T.B. in the circumstances presented to the chambers judge; the court agreed with the chambers judges; and lastly, T.B. had brought an application to set aside the divorce judgment because he alleged L.B. had lied in her evidence pertaining to the grounds for divorce, in particular that she had not abused the child. The court agreed with the chambers judge that, having admitted separation for one year as one his grounds, the alleged falsity of L.B.'s evidence pertaining to the other grounds was neither here nor there. As to all the chambers and appeal court decisions, see: *Barth v Barth* (21 August 2020) Saskatoon, FLD 307 of 2018 (Sask QB); *Barth v Barth* (3 January 2020) Saskatoon, FLD 307 of 2018; *Barth v Barth* (21 February 2021) Regina, CACV3556 (Sask CA); *Barth v Ritter* (14 November 2019) Saskatoon, QBG 102 of 2019 (Sask QB); *Barth v Ritter*, 2021 SKCA 95, and *Barth v Barth* (18 December 2020) Saskatoon, DIV 565 of 2020 (Sask QB). T.B. then brought this application, though he had not yet filed his application for leave to appeal and notice of appeal.

HELD: The court dismissed the application following a review of ss. 65.1(1), 65.1(2) and 40(1) of the Act, in combination with *Blass v University of Regina Faculty Association*, 2011 SKCA 48, which incorporated the principles governing injunctions as set out *RJR-MacDonald Inc. v Canada (A.G.)*, [1994] 1 SCR 311, to applications to stay proceedings pending an application for leave to appeal to the Supreme Court. The factors which the court agreed it was required to consider were: 1) the merits of the case; 2) whether the applicant would suffer irreparable harm; 3) whether the balance of convenience favoured the application; 4) whether the applicant intended to apply for leave; and 5) whether a stay was necessary to avoid a miscarriage of justice which would arise between the application for a stay and the filing of the leave application. As to factor 1), the court reasoned that on the question of merit, it was less concerned with whether there was a serious question to be tried than whether by s. 40(1) of the Act the appeal raised matters of "public or national importance" such that there was a prospect that leave to appeal might be granted. With respect to each proceeding, the court concluded that in each case, its factual nature and the resultant deferential standard of review

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could not elevate the prospective appeals to matters of public or national importance. In considering (2), the factor of irreparable harm, the court stated that considerable time had passed, and nothing has arisen to cause concern for the child's safety, and T.B. had not shown how he would suffer irreparable harm if the effect of the divorce judgment was not stayed. As the applicant did not show merit or irreparable harm, the court did not consider the other factors.

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***SBLP Town N Country Mall Inc. v Moose Jaw (City)*, 2022 SKCA 10**

Richards Caldwell Schwann, 2022-01-24 (CA22010)

Municipal Law – Appeal – Property Taxes – Assessment – Leave to Appeal
Appeal Procedure - Leave to Appeal - Test

The taxpayer applicant, SBLP Town N Country Mall Inc. (TNC Mall), sought leave to appeal the decision of the Assessment Appeals Committee (committee) overturning the decision of the Board of Revision (board), which had set aside the property assessment of its mall by the Saskatchewan Assessment Management Agency (SAMA). TNC Mall advanced that the appeal raised questions of law which should be heard by the Court of Appeal (court). More particularly, TNC Mall alleged that the committee erred in law in a number of ways, including by: 1) applying "the incorrect standard of review to the [board's] findings and substituting its own view of the evidence;" 2) wrongly applying and relying on the court's decision in *T N C Mall Property Holdings Inc. v Moose Jaw (City)*, 2020 SKCA 99 (*TNC 2020*); and 3) wrongly applying the court's decision in *Saskatoon (City) v Walmart Canada Corp.*, 2018 SKCA 2 (*Walmart 2018*). At issue was the calculation of the capitalization rate of the TNC Mall and the suitability of the properties used as comparators to determine that rate. A full panel of the court heard the leave application and, in doing so, indicated it would address the issue of the "nature of the test that should be applied by the [court] in determining whether to grant leave to appeal from a decision of the Committee."
HELD: The court concluded that the test for determining when leave to appeal to the court with respect to property assessment questions as elucidated in *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13 (*North Ridge*) was "fundamentally sound" but could be "usefully clarified." Following its analysis of this issue, the court went on to apply the test to the leave application brought by TNC Mall in this case and allowed the application on the three questions of law stated above (three questions). First, the court embarked on a

Dembrowski v Bayer Inc.

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historical survey of the legislated right of appeal culminating with s. 33.1 of *The Municipal Board Act*, which, it stated, expanded the right of appeal but required prospective appellants from decisions of the committee to obtain leave to appeal. In its review, the court then considered the case law that developed as a result of this requirement, culminating in *North Ridge* and other cases that applied it. The court stated that the factors to be considered by a chambers judge in exercising his or her discretion to allow leave to appeal continued to be grouped within the two rubrics of merit and importance (the *North Ridge* approach). As to merit, the court restated the test as a series of narrowing queries culminating in a consideration of whether the proposed question of law raised "a meaningful doubt as to the correctness of the Committee's decision;" and as to the importance of the question of law, the court set out four queries, any one of which, if answered positively, might lead a chambers judge to find the question of law of sufficient importance to grant leave to appeal. The court included such considerations as whether the proposed question "raise[d] a point of significance to the law of property assessment, to the larger assessment regime or to the administration of justice more generally." Having restated the *North Ridge* approach, the court went on to find that the three questions raised a meaningful doubt: 1) that the committee failed to apply the proper standard of review to the board's decision by, for instance, failing to show how the board's reliance on a witness' calculation of the CAP rate could not be sustained; 2) that the committee wrongly applied *TNC 2020* by finding it was wholly determinative of the case before it when the factual foundations were not the same; and 3) that the committee wrongly interpreted *Walmart 2018* by finding that it stood for the proposition that the board erred by considering comparators not within the prescribed valuation period, when the case did not stand for that notion, but for the principle that a taxpayer could not use comparators from outside the valuation period to show that SAMA erred in its assessment, which was not the case here. As to the importance of the three questions, the court stated: 1) the application of the proper standard of review had "genuine significance" for the proper functioning of the assessment appeal system; 2) how the committee understood *TNC 2020* and Court of Appeal precedents dealing with property assessments was of general importance; and 3) it was important to the law of property assessment to clarify how comparators not within the valuation period were to be used in the assessment process.

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***R v Potter*, 2022 SKCA 14**

Caldwell Schwann Kalmakoff, 2022-01-27 (CA22014)

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

The offender, M.A.P., appealed the decision of a judge of the Provincial Court (sentencing judge) designating him a dangerous offender pursuant to s. 753(1)(a)(ii) of the *Criminal Code* and then imposing a sentence of indeterminate detention under ss. 753(1)(4) and (4.1). Before the Court of Appeal (court), his grounds were boiled down to one by his counsel, that being whether the dangerous offender designation and the sentence of indeterminate detention were "unreasonable," and in particular that the sentencing judge erred in a number of areas, such as being swayed by the seriousness of the predicate offence; underemphasizing his treatability; finding him to be a homosexual pedophile, which led her to discount the reduction of his risk to reoffend because of aging; and not conducting a "thorough inquiry" pursuant to ss. 753(1)(4) and (4.1) as to whether a lesser sentence would adequately "protect the public against the commission by the offender of murder or a serious personal injury offence." The court first stated the standard of review it was to apply pursuant to the right of appeal created by s. 759(1) of the *Criminal Code*: absent an error of law, the court would not intervene and disturb the sentencing judge's decision unless her findings were unreasonable. The court extensively reviewed the sentencing judge's findings in light of the evidence admitted at the hearing and the proceedings generally, from which review it extracted the following relevant considerations: M.A.P. likely suffered from FSAD and neurological deficits; as early as 12 years old, he offended sexually against children, by age 13 had sexually assaulted approximately ten victims and continued to do so, except from 1999 to 2006, until the commission of the predicate offences; he estimated he had offended sexually against many more children than indicated on his criminal record; his longest sentence of two years' detention in the penitentiary was imposed for continual breaches of probation orders which required him to abstain from attending places where children under the age of 14 years were likely to frequent, accessing child pornography, or failing to participate in treatment and counselling; in official reports and psychological assessments, his risk to reoffend sexually against children was always graded as high; sex offender treatment offered to him both inside and outside of prison, including the Phoenix Program on two occasions, the High Risk Offender Program and Wellspring Treatment Program, did not reduce this risk of sexual offending against children; on his first enrollment in the Phoenix Program, he had a sexual relationship with a 14-year-old boy, and he failed to complete the second Phoenix Program due to low motivation; he had been prescribed libido-reducing medication in the past but though the medication reduced his sexual urges, it did not reduce his "preoccupation with sex;" up to the time of sentencing for the predicate offence, he refused to consider taking libido-reducing medications, but testified at the hearing he was now ready to take them; as to the predicate offence, M.A.P. admitted that in the spring and summer of 2014, when he was approximately 27 years old, he befriended a 7-year-old male child at a library and during that time touched the boy's genitals numerous times, took naked photos of him for self-gratification, showed him how to masturbate, and offered to perform oral sex on him; M.A.P. believed his offending was not harmful to his victims because they enjoyed it; he volunteered for a penitentiary sentence to access programming, and recognized he needed help to fight his urges; the court-appointed assessor concluded in his report that M.A.P's risk of sexual offending in the future was high and "chronic," that past programming had failed to reduce his risk, and without sex-drive reducing medication, the likelihood of managing his recidivism in the community on his release would be next to nil; the psychiatrist for M.A.P. in his psychological report agreed that sex-drive reducing medications offered the best method of reducing his risk, that management of his risk in the community was no more than a possibility due to his "lack of cooperation," that if there was any likelihood of control of his urges in the community, intensive supervision with "no end in sight" and well beyond the length of any court-ordered terms would be required; that M.A.P.'s behavioural problems were "neurodevelopmental in their origin' and "largely irreversible;" that by *R v*

Boutilier, 2017 SCC 64, and cases referred to in it, though the general goals and principles of sentencing were not to be ignored, the paramount purpose of the dangerous offender provisions was the safety of the public "through the prevention of further offences;" that the sentencing judge concluded the evidence satisfied her that M.A.P was unable to "surmount" his offending; the predicate offence was one which, along with his past offending, formed a pattern of persistent aggressive behaviour showing a substantial degree of indifference to the consequences of that behaviour on his victims; and finally, the evidence also satisfied her that he would not consent to the use of libido-reducing drugs while bound by court orders given his poor history of compliance, and since he would need to take them for a period beyond any court order, a term of incarceration and a long-term supervision order of maximum length would not be reasonably expected to adequately protect the public, and for similar reasons general community supervision "with no end in sight" was not an option.
HELD: The court dismissed the appeal of both the dangerous offender designation and the imposition of an indefinite sentence, concluding that the sentencing judge made no error in law and that her findings were reasonable and accorded with the evidence. It stated that the sentencing judge was alive to the evidence of treatability, and that on the evidence before her concerning M.A.P.'s intractability and his irreversible neurological behavioural problems, it was not incumbent on her to review all of M.A.P.'s programming and its suitability to his particular make-up. The court also dismissed the notion that the sentencing judge did not take into account the positive comments of the experts about treatability but expressed that M.A.P. had not fully appreciated the nuance of this evidence. As well, the court did not glean anything from her reasons which would suggest that the sentencing judge was overawed into error by the circumstances of the predicate offence, or that otherwise she failed to fully consider the suitability of sentencing options short of an indefinite sentence.

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***R v MaIsi*, 2022 SKQB 2** (not yet on CanLII)

Smith, 2022-01-06 (QB22002)

Criminal Law - Child Pornography
Constitutional Law - *Charter of Rights*, Section 1, Section 8, Section 9, Section 10(b)

The accused was charged with various *Criminal Code* offences related to child pornography: two counts of possession under s. 163.1(4), accessing contrary to 163.1(4.1), and four counts of distributing contrary to s. 163.1(3). The accused brought a *Charter* application, alleging that his ss. 7, 8, 10(a) and 10(b) rights had been violated during the execution of a search warrant by members of the Saskatoon Police Service (SPS) and asked that the evidence obtained from his cell phones be excluded. A voir dire was held. An officer with the SPS, a member of its Internet Child Exploitation Unit (ICE), had received information from a Canadian law enforcement clearing house that it had identified a Facebook message containing child pornography as having come from an internet provider in Saskatchewan. The officer determined the address of a residence in Saskatoon from which the Facebook message was sent. She then obtained a search warrant for the property and led a team of six officers to execute the warrant at 7:00 am in June of 2020 with the intention of seizing and examining any device in the house that had access to the internet. The ICE

officer kept detailed notes of the search. She testified that a police officer knocked at the door and the accused's mother opened it. The ICE officer advised her that they had a warrant to search the property and they entered it and asked that the residents all assemble in the living room. They were the accused, his parents and his brother. The ICE officer remained in the living room with them and explained that they were not under arrest but were detained and therefore she would read them their right to counsel and their right to remain silent. While she was doing so, the other officers, two of whom were tech officers given responsibility for searching devices, conducted the search. The family had come from the Philippines but only the accused's father appeared to have trouble understanding English. The ICE officer said that she read the accused his rights and then rephrased it in plain English, and he appeared to understand. The accused initially said that he would like to talk to a lawyer and the officer said that they would arrange a phone call as soon as they could but the accused then changed his mind, saying that he did not wish to speak to counsel at that time. The officer then gave him the *Prosper* warning and said that he could speak to a lawyer at any time if he changed his mind. After completion of the warnings process, the ICE officer asked for and received, from each family member, their passwords to various phones and devices. Two cell phones belonging to the accused were seized. As she did not handle the electronic devices, it was the tech officers who searched two cell phones belonging to the accused. One of these officers testified that even without the password, it was inevitable that the data from the phones could have been extracted. The search of the cell phones located seven images and 11 videos that met the definition of child pornography. The accused alleged that the ICE officer had not advised him nor the others that they were being detained and did not provide their rights to counsel at the time of the search or prior to obtaining passwords to their phones. He testified that he felt compelled to give up his passwords before receiving the *Charter* or police warning. The accused's mother's testimony was generally corroborative of the ICE officer's but she repeated that the accused had not been given the warning by the officer before he gave her his password. The defence argued that the accused had not been given an opportunity to instruct counsel until he had been taken to the police station, and such delay constituted a violation of s. 10(b) of the *Charter*. It also argued the recorded statement given by the accused at the station was not voluntary and should be excluded. The Crown's brief of law explained that in the circumstances of this search for and of electronic devices, it was not possible to allow the accused to call a lawyer as no device was available and such a call could not have been made privately. The accused had not asserted his right to counsel until he was at the police station, where his request was facilitated and prior to his call, none of the officers had asked him any questions.
HELD: The *Charter* application was dismissed. The court found that the police conduct was proper and appropriate throughout. It did not accept the accused's testimony and did accept that of the ICE officer that he had been informed of his right to counsel. Respecting the recorded statement, it was found to be voluntary as it met the requirements set out in *Oickle* (2000 SCC 38).

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***Can-Seed Equipment Ltd. v Young*, 2022 SKQB 12**

Currie, 2022-01-12 (QB22009)

Contracts - Restrictive Trade Covenants

Contract Law - Interlocutory Injunction

The Applicant, Can-Seed Equipment Ltd. (Can-Seed), commenced an action against two of its former employees, C.B. and J.Y., for breaching articles of an employment agreement made between them and Can-Seed known as "Article 9.01 Confidential Information" (Art. 9.01) and "Article 9.02 Non-Solicitation" (Art. 9.02). The employment agreement was filed with the court as part of the affidavit evidence upon which the presiding judge of the Court of Queen's Bench (chambers judge) relied to make his findings. The chambers judge found that C.B. and J.Y. had been territorial managers for Can-Seed and resigned from their employment in April, 2021; thereafter, they formed their own corporation, BEHST Machinery Corp., which became involved in the same type of business as Can-Seed, that being the sale of grain and grain equipment; Can-Seed alleged that C.B. and J.Y. were in breach of Art. 9.01 by disclosing confidential information of Can-Seed to other persons to their economic detriment and, that contrary to Art. 9.02, "entice[d] away …persons who have customarily dealt with" Can-Seed, causing it economic loss. He also found on the evidence that the "confidential information" Can-Seed alleged C.B. and J.Y. had wrongly taken consisted of such things as public documents, commission policy, a general description of Can-Seed, a Can-Seed pay stub, and other similar items. As to the allegation that C.B. and J.Y. had enticed away persons who dealt with them, he found that Can-Seed did not claim customers had been enticed away but suppliers of product. The chambers judge framed his fact-finding and decision-making process within the law relevant to injunctions generally as elucidated in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR-MacDonald*), and *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120 (*Mosaic Potash*), and specifically with respect to injunctions in the context of restrictive covenants within the law set out in *Culligan Canada Ltd. v Fettes*, 2009 SKCA 144 (*Culligan*).

HELD: The application was dismissed. The chambers judge acknowledged that *RJR-MacDonald* and *Mosaic Potash* required him to apply a tripartite test to determine whether to grant the injunction, these tests being that: 1) Can-Seed has a strong *prima facie* case; 2) Can-Seed would suffer irreparable harm if the injunction were not granted; and 3) the balance of convenience favoured Can-Seed. He understood from *Culligan* that in restrictive covenant cases, the onus of proof was raised from the serious issue test to the strong prima facie case test. As to the strength of the case, after summarily dismissing three minor arguments made by Can-Seed, the chambers judge concluded that the applicant had not shown on the evidence that C.B. and J.Y. were in possession of any confidential information as defined by Art. 9.01. He concluded the information pointed to by Can-Seed as being confidential was public and readily accessible, or was personal to C.B. or J.Y.; and further, no evidence was produced by Can-Seed proving that if confidential information were in the hands of C.B. and J.Y. it had been used in a way which caused Can-Seed any economic harm. With respect to Can-Seed's claim that C.B. and J.Y. had solicited or enticed away "persons" who had dealt with Can-Seed, the chambers judge embarked on a more complex analysis of Art. 9.02 because, he said, if Can-Seed's argument was correct, the injunction would have the effect of preventing C.B. and C.Y. from doing business at all. The chambers judge understood Can-Seed to say that the only person enticed away from doing business with it to that point was one supplier, which it alleged resulted in a loss of profit of $140,000.00. Upon a close reading of Art. 9.02, and a consideration of the logical effect of this argument on C.B. and J.Y.'s ability to conduct business and earn a livelihood, he concluded that there was little likelihood Can-Seed's argument would be successful at trial. He said no court could interpret the clause to include suppliers due to the ambiguity of the phrase "any customers or persons who have customarily dealt with the Employer." By the application of the operation of *contra proferentum*, this ambiguity would be interpreted in favour of C.B. and J.Y. since Can-Seed was the drafter of the employment agreement. He added further that if interpreted as Can-Seed argued, Art. 9.02 would have the effect of cutting off C.B. and J.Y. from the 80 or so suppliers with whom

Can-Seed had done business, thus barring them from doing business at all. As a result, he reasoned, the court at trial would read down Art. 9.02 by excluding suppliers from the definition of persons. As to the second test, the chambers judge was of the view he did not have a "meaningful doubt" that Can-Seed could not be compensated by the payment of damages for any loss proven at trial by Can-Seed. He reasoned that just as Can-Seed had been able to calculate $140,000.00 in alleged loss of profits, it would be capable of calculating any other alleged losses at trial. Further, the chambers judge commented, though loss of good will is difficult to quantify, no evidence had been put forward by Can-Seed as to how it lost good will. Similarly, with respect to Can-Seed's claim it had lost unquantifiable market share to C.B. and J.Y., any loss of market share was mere speculation and had not been demonstrated by evidence. Lastly, the chambers judge ruled against Can-Seed on the balance of convenience test, reasoning that the granting of an injunction would have much more serious consequences for C.B. and J.Y. than not granting it would have on Can-Seed. He reiterated that the first two tests led him to conclude Can-Seed was unlikely to succeed at trial, so that the likely effect on C.B. and J.Y. would be an unjust and inequitable exclusion from the market for two years, and economic hardship for no good reason.

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***Prairie Heights Condominium Corporation v Southshore Group of Properties Inc.*, 2022 SKQB 15**

Crooks, 2022-01-18 (QB22023)

Statutes - Interpretation - *Land Contracts (Actions) Act, 2018*, Section 3

The plaintiff, Prairie Heights Condominium Corporation, through its Administrator, commenced a foreclosure proceeding against the defendant, Southshore Group of Properties, the owner of 13 units in the Prairie Heights Condominium building. The plaintiff alleged that the defendant had not paid condominium fees, special assessment fees, lien costs and interest calculated on the unpaid fees as required. In its statement of claim, the plaintiff stated that leave to commence the action was not required under *The Land Contracts (Actions) Act, 2018* (LCAA) because, pursuant to s. 3, the units were used for commercial purposes. The defendant brought this application alleging that leave was required under ss. 5 and 8 of the LCAA and, as the plaintiff had failed to obtain it, it requested the court declare the action a nullity. The defendant's president averred that the units were generally rented out. It argued that the units were used or intended to be used as residences by their tenants and therefore the land was not used solely for a commercial purpose but also for a residential purpose. The units were rented through tenancy agreements under *The Residential Tenancies Act* (RTA). It suggested the provisions of the LCAA and the RTA be considered concurrently and the court should look to the RTA for context surrounding the use of the units. The issue was whether the units owned by the defendant were used solely for commercial purposes.

HELD: The application was dismissed. The court found that the defendant used the units for commercial purposes and thus s. 3 of the LCAA did not apply and the plaintiff was not required to seek leave to commence. It considered the LCAA and the Law Reform Commission's 2014 report on reforming it. In particular, it reviewed the report's comments with respect to "commercial purposes" as that phrase is not defined in the legislation. In the report, the Commission described that the purpose of the LCAA was to allow

"borrowers time to sort out their lives before having an action started against them." Thus, the court held then that the LCAA's purpose is directed to protect the owners of the property, not the tenants. It did not accept that the definitions in the RTA reflect or incorporate a residential purpose under the LCAA where the property is solely used by the owner to generate corporate income. In this case, the evidence confirmed that the 13 units were intended to be an investment vehicle and revenue stream for the defendant and were used by it solely for commercial purposes.

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***Saskatchewan Indian Gaming Authority Inc. v Liberty Mutual Insurance Corporation*, 2022 SKQB 16**

Smith, 2022-01-19 (QB22024)

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

The defendants, five insurance companies, applied pursuant to Queen's Bench Rule 7-9(1)(a) to strike portions of the plaintiff's statement of claim pursuant to Queen's Bench Rules 7-9(2)(b), 7-9(2)(c) and/or 7-9(2)(d). The plaintiff, the Saskatchewan Indian Gaming Authority, objected to the portions of their pleadings being struck. The plaintiff had arranged with the defendants for an "all risk" property insurance policy that pertained to the seven casinos it operates in the province. As a result of the COVID-19 pandemic, the Government of Saskatchewan twice ordered the closure of all casinos and then allowed them to open with restrictions. The plaintiff suffered significant revenue losses during the closures and incurred expenses to take mitigating steps to comply with restrictions. It filed a claim with the defendants in March 2020 but they replied that the plaintiff was not insured for the closures so it commenced this claim against the defendants to recover the losses. The defendants impugned the pleadings or portions of the plaintiff's claim as being unfocused, irrelevant and/or immaterial.
HELD: The application was allowed in part. The court reviewed each of the pleadings the defendants sought to have struck. It declined to strike the portions that described: the character of the defendants' business; the policy coverage; the amount paid in premiums; the description of COVID-19 as a strain of coronavirus; theories of how it spread; the World Health Organization's declaration; and the number of cases and deaths that occurred due to the pandemic throughout the world and in Saskatchewan. It found these pleadings to provide useful and relevant facts. The facts given in paragraphs describing the case counts and deaths that led to the government closures constituted the *causa causans* of the loss suffered by the plaintiff. It did strike paragraphs that contained a review of the history of the discovery of coronaviruses in the 1960s as irrelevant and immaterial.

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***Dembrowski v Bayer Inc.*, 2022 SKQB 22**

Gabrielson, 2022-01-26 (QB22025)

Civil Procedure - Class Action - Application to Amend Certification Order

The applicant made an application for orders to amend the certification order granted to the respondents, the representative plaintiffs in a class action that had been certified under *The Class Actions Act* (see: 2016 SKQB 286). In 2018, the judge ordered the respondents' action (the Dembrowski action) be certified as a multi-jurisdictional class comprised of Canadian women, except for residents of Ontario and Quebec, who had experienced adverse reaction to drugs manufactured by the defendant, Bayer Inc. and others, and naming Dembrowski as a representative plaintiff and the Merchant Law Group (MLG) as class counsel. At the hearing, the applicant disclosed that her purpose in bringing the application was to replace Dembrowski as representative plaintiff and remove and replace MLG so as to appoint her counsel, Napoli Shkolnik Canada (NSC), and in particular the counsel representing her, to represent the class. She alleged that Dembrowski and MLG had done nothing on the file since October 2018, the date of the certification order. They had "parked" the action to await settlement of a parallel action in Ontario that was contrary to the litigation plans they had filed and had done so without the approval of the applicant or the other class members. MLG had not closed pleadings, conducted discovery, retained experts nor held any of the four conferences per year as was set out in the second and third proposed workable methods filed by MLG. Dembrowski failed to file reports as required by the workable methods concerning these conferences to inform the members of the class. The applicant alleged that MLG should be replaced as class counsel because the senior counsel, Tony Merchant, faced suspension by the Law Society. MLG could not adequately represent the class because it had "neither the manpower nor the funding" required for the trial. The applicant's suggested replacement, the law firm of NSC, and she filed an affidavit stating that it has access to an over $100 million line of credit and has a minimum of 24 junior lawyers available to assist on the file. In response, Dembrowski filed and stated in her affidavit that she had no desire to be replaced as the representative plaintiff nor to request a change in her legal representation or to have the applicant's counsel be involved with the litigation, because such changes would not be of material benefit to the class. MLG filed an affidavit describing that it had successfully certified 30 class actions. It had over $6 million in trust available to it to support the trial and 12 lawyers who devote most of their time to the firm's class action practice. The respondents requested that solicitor-client costs be awarded against the applicant.

HELD: The application was dismissed. Costs were not awarded to either party, but the court declined to order solicitor-client costs against the applicant. The application did not represent an unwarranted interference with the progress of the action, and it would not likely have been made if MLG and Dembrowski had adhered to the terms of the workable plans or had sought approval of their intention to delay the action while awaiting the possible settlement in the Ontario action. It determined that it had the jurisdiction pursuant to ss. 10(3), 14 and 17 of the Act to amend the certification order but it declined to do so. With respect to the applicant's request to replace Dembrowski as the representative plaintiff, the court found that it was satisfied that Dembrowksi, unlike the representative plaintiff replaced in the *Piett* decision (2021 SKQB 232), had the necessary interest, independence and incentive to fulfil her duties to the class members and had demonstrated that there is a workable plan for the action and that the litigation is ongoing. The evidence before it had consisted of conflicting affidavits from the applicant and Dembrowski and neither had been cross-examined on them. It found that the applicant had not met the onus of establishing that Dembrowski was not fit to serve as representative plaintiff, nor had she attempted to demonstrate that Dembrowski did not have a reasonable possibility of success, nor that it was plain and obvious that the claim could not succeed. It did not grant the applicant's request to replace Dembrowski's counsel by NSC because the applicant had not established that MLG should be removed as class counsel or replaced. She had not

met the onus of proof and shown that the MLG does not have the personnel or funding necessary to complete this action. It noted that Mr. Merchant had successfully appealed his suspension.

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***Métis Nation – Saskatchewan v Saskatchewan (Environment)*, 2022 SKQB 23**

Robertson, 2022-01-26 (QB22032)

Civil Procedure - Abuse of Process - Multiplicity of Proceedings
Civil Procedure - Judicial Review
Aboriginal Law - Métis Aboriginal Title and Harvesting Rights
Aboriginal Law - Duty to Consult

The Métis Nation-Saskatchewan Secretariat Inc.(MNS) brought an action before a judge of the Court of Queen's Bench (judge) by way of an originating application for judicial review requesting various judicial declarations, including that the Government of Saskatchewan (Minister of Environment) (ME) failed or refused to engage in good faith consultation with respect to permits for uranium exploration activities having "potential impacts to asserted Aboriginal title and commercial harvesting rights." ME took issue with the claim by MNS that Aboriginal title and commercial harvesting rights continued to exist "for land or resources in Saskatchewan" and relied on the First Nation and Métis Consultation Policy Framework (2010 Policy) to that effect. In ME's view, no duty to consult existed with respect to MNS relative to land or resources, though it embarked on a process of consultation in accordance with the 2010 Policy prior to the issuance of the contested permit to conduct uranium exploration on the disputed lands. Long before bringing the originating application, MNS had issued a statement of claim which sought various forms of relief including a declaration that "the province's duty to consult Saskatchewan Métis includes, where relevant, consulting on Métis claims to lands and resources." This statement of claim was alive at the time of the bringing of the originating application but had not been pursued for several years. In the course of the originating application proceedings, ME brought a notice of application on two grounds: 1) that portions of the originating application and the statement of claim were in substance advancing the same cause of action, being that Métis Aboriginal title in land and resources continued to exist and the government's duty to consult was engaged when Métis title to land and resources might be adversely affected by government decisions, and as such, the pursuit of both actions, without excising the duplicated portions from the originating application, was an abuse of the court's process; and 2) judicial review was not the appropriate proceeding to resolve the question of the continued existence of Aboriginal title to land and resources because it was in the nature of a summary proceeding, and the complex issues raised in the action required the in-depth treatment mandated by *The Queen's Bench Rules* (Rules) governing statements of claim, which were designed to ready an action for trial, wherein the legal issues could be fully examined through the calling of evidence.
HELD: The judge allowed the application on both grounds and ordered that the duplicated portions of the originating application be struck out, and that the statement of claim proceed to trial. After a review of the court records, the affidavit and documentary evidence filed by both sides, and case law relevant to the issues at hand, which included how to interpret the relevant Rules, he

decided that Rule 7-9(2)(e) allowed for the striking out of a pleading that "is otherwise an abuse of the process of the Court" and that an abuse of process included the prosecution of two actions which advanced substantially the same cause. In this case, the statement of claim and the originating notice were duplicative. He went on to state that the Rules were an embodiment of the court's inherent jurisdiction to control its own processes, and duplicative proceedings were anathema to the overall integrity of the administration of justice. As to the ground that the originating application was not the appropriate vehicle for the action, the judge agreed with ME that the action required numerous "legal and factual determinations that are better suited to an action commenced by statement of claim, which allows for trial with full evidence, rather than by originating application for judicial review, which generally considers only a limited record of the challenged decision" and as such, though the Rules promoted summary proceedings in certain cases, a full civil action was required where "there will be any material facts in dispute" (Rule 3-49(1)(i)) and complex legal issues to decide, as in this case.

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***A.C.G. v W.L.G.*, 2022 SKQB 27**

Richmond, 2022-01-31 (QB22018)

Civil Procedure - Family Law Proceedings - Costs

Following a trial in family court in which issues of child support, spousal support, and division of family property were contested, the respondent appealed and the Court of Appeal returned this matter to the trial judge to determine whether costs, including expert witness fees and disbursements, were payable by either party and, if payable, the amount of such costs. The issues to be decided were: who was the successful party; how complex was the trial; and what fee should be allowed for an expert witness? The trial judge recognized that she was to be guided in her determination by Rules 15-96 and 11-1 of *The Queen's Bench Rules* (Rules), that Rule 15-96 concerned costs in family law proceedings and Rule 11-1 set out the parameters of her discretion in awarding costs. She referred to case law to assist her in applying the Rules, in particular *Ackerman v Ackerman*, 2015 SKQB 113; *1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200; and *Biletski v University of Regina*, 2017 SKQB 386.

HELD: The judge first considered the question of entitlement to costs, being aware that "a successful party will be entitled to costs." The respondent, W.L.G., argued that the parties "enjoyed mixed success" and so no costs should be ordered; the petitioner, A.C.G., argued that she was successful at trial and ought to be awarded costs. The trial judge referred to offers to settle made during the course of the proceedings and filed at court by both parties. She found that, though these did not comply with Rule 4-26 of the Rules and so did not entitle either party to double costs, they were relevant evidence on this question. She concluded that the W.L.G.'s offer to settle with respect to spousal support was much lower than the order made in A.C.G.'s favour at trial, and so she was the more successful party and entitled to costs. The trial judge then turned to the amount of costs which should be paid to A.C.G., stating that the trial had some complexity, made more complex by W.L.G. failing to call his accountant and bookkeeper to testify when their evidence was plainly necessary to the issues at trial. She concluded that she did not want to "overstate" the complexity of the trial, so awarded costs to A.C.G. according to column 2 and not column 3 of the tariff of costs. Lastly, she agreed with the case

law that expert witnesses' fees were to be paid in an amount that was fair and reasonable, depending on such factors as how useful the evidence was at trial. She also was cognizant of the policy against indemnification of expert fees and allowed these at 50%.

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***Canadian Pacific Railway Company v Saskatchewan*, 2022 SKQB 28**

Kilback, 2022-01-31 (QB22019)

Civil Procedure - Evidence - Admissibility of Documents
Civil Procedure - Evidence - Hearsay - Principled Exception

The plaintiff, the Canadian Pacific Railway Company, brought an action against the defendant, the Government of Saskatchewan, regarding whether it was exempt from payment of certain taxes. The plaintiff relied upon the exemption provided for in clause 16 of a contract made in 1880 between it and the Government of Canada. The plaintiff sought to tender two sets of documents into evidence during the trial: 1) 39 historic documents (HD), dated between 1916 and 1984, contained in its book of documents, without having a witness speak to them for the truth of their contents under the principled exception to the hearsay rule. They would be received as evidence that the authors did the things and held the views described in the documents; 2) 48 documents contained in a joint book of documents (JBD), that also included historic documents, were initially entered into evidence by consent. The defendant objected on the assumption that the plaintiff sought to admit these documents for the truth of their contents. The plaintiff clarified its intentions and asked for the documents to be admitted as evidence of the conduct and acts described in them and as evidence that the authors held a particular understanding or took a particular position at the relevant time. It stated its proposed purposes for admission of both the HD and JBD were not: a) as proof of the validity of any opinions expressed in them; b) to rely on any statements in the documents as determinative of the legal issues in the action; and c) to argue that any of the statements in the documents, in themselves, constituted conclusive proof of a fact or point of law in issue. The defendant continued to object to the admissibility of 33 of the HD. With respect to documents it contended were inadmissible because of parliamentary privilege, the matter was decided separately (see: 2022 SKQB 29); and with respect to 48 documents in the JBD, although it was not resiling from its consent, it argued that these HD and JBD documents were inadmissible if they were tendered for the purpose of providing evidence: a) of the existence or interpretation of the 1880 contract; b) of the legal status, effect, description, characterization or scope of the tax exemption in the contract; or c) that the parties held a particular understanding or took a particular position at a point in time. Any statements related to these points would be opinions which could only be given by a properly qualified expert. The defendant itemized documents in both the HD and JBD that should not be admitted because they contained opinions. Other types of documents that the defendant argued were inadmissible included: documents in HD because they contained legal advice that was not admissible in the absence of a properly qualified expert, as well as documents containing legal summaries because they constituted double hearsay; documents in HD because they were correspondence between the plaintiff and the government of Manitoba. These were not probative of any issue in this action and opinions of officials in the Manitoba government regarding the

contract were not binding on the Government of Saskatchewan or the court; and excerpts from the memoirs of a federal cabinet minister.
HELD: The documents submitted by the plaintiffs were all admissible as evidence of the truth of their contents for the proposed purposes. The court found with respect to the documents that: 1) the HD were *prima facie* admissible, subject to the defendant's objections. They met the test of necessity and reliability because the requirements for the admission of ancient documents had been subsumed into the principled exception to the hearsay rule. Regarding necessity, there was no other convenient way of presenting the evidence contained in the documents. Except for one record, the excerpt from the memoir published in 1994 by a former federal cabinet minister, it could infer from the age of the documents that no one with knowledge of them could testify as to their authenticity and truth of the contents. The reliability of the documents had been established because they were disclosed and produced in litigation pursuant to Queen's Bench Rule 5-2, supporting the conclusion they were produced from proper custody and under Queen's Bench Rule 5-16, they were presumed to be authentic. As well, correspondence and memoranda in the HD made by senior officials of both parties possess inherent reliability. It determined the HD and JBD documents, to which the defendant had objected on the ground that they contained opinions, should be admitted for the proposed purposes because the opinions were admissible as evidence where the fact that the opinion was held was relevant to the issues. It also admitted into evidence the documents that contained legal advice for the same reason. Documents containing legal summaries were admissible in the specific historical circumstances of this case and because the plaintiff was not seeking to admit them as proof of the validity of the legal opinions expressed in them. The Manitoba documents in HD were admissible because of the proposed purposes. They were relevant to the issue raised by the plaintiff that it continued to apply the clause in the contract after 1966, which the defendant denied in its statement of defence. An excerpt from the cabinet minister's memoir mentioned above was admissible. Its reliability had been established because a previous consistent statement made by the same minister in an excerpt from Hansard had already been tendered into evidence.

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***Canadian Pacific Railway Company v Saskatchewan*, 2022 SKQB 29**

Kilback, 2022-01-31 (QB22020)

Civil Procedure - Evidence - Admissibility - Documents - Parliamentary Privilege

The plaintiff, the Canadian Pacific Railway Company, brought an action against the defendant, the Government of Saskatchewan, regarding payment of taxes by it since 1905 and whether it was exempt from such payment. The exemption relied upon the plaintiff was provided for in clause 16 of a contract made in 1880 (1880 contract) between the plaintiff and the Government of Canada. During the trial, the plaintiff tendered into evidence two records from the Saskatchewan Legislative Assembly's record of Debates and Proceedings (Hansard) and the journal of Votes and Proceedings for November 29, 2021. Their contents referred to the passage of a resolution to amend the Constitution of Canada to repeal s. 24 of The Saskatchewan Act retroactive to August 29, 1966. The defendant objected to the admissibility of these records on the basis that they are subject to parliamentary privilege (privilege). The background to the resolution and to the dispute regarding the 1880 contract relates to the creation of the Province of

Saskatchewan by the *Saskatchewan Act* in 1905. Under s. 24 of that Act, the powers granted to the province were to be exercised pursuant to clause 16 of the 1880 contract. Section 52(2) of the *Constitution Act, 1982* states that the Constitution of Canada includes the Acts referred to in the Schedule, and the *Saskatchewan Act* is listed in the Schedule. In its amended statement of defence, the defendant denied the 1880 contract is part of the Constitution and in the alternative, pleaded that clause 16 was rescinded in 1966. The Legislative Assembly's resolution of November 29, 2021 to amend the Constitution of Canada to repeal s. 24 of the *Saskatchewan Act* is retroactive to August 29, 1966. This date was significant because the then President of the plaintiff advised the then federal Minister of Transport that the plaintiff's board had no objection to constitutional amendments to eliminate the tax exemption. The plaintiff argued that it sought to introduce into evidence these records regarding the resolution because they contradicted the defendant's defences regarding the existence and constitutionality of clause 16 of the 1880 contract. Further, they could be entered as exhibits without having a witness speak to them on the basis of their admissibility under *The Evidence Act*. The defendant asserted that proceedings in the Assembly cannot be used for evidentiary purposes in civil court. Admitting the two documents into evidence would infringe the freedom of speech of the Assembly's members, a category of the parliamentary privilege enjoyed by members and the Assembly as a whole. The defendant asserted that this privilege of freedom of speech was codified by Article 9 of the U.K. *Bill of Rights, 1689* and it is in force as part of the law of Canada. The defendant relied on the Judicial Committee of the Privy Council's decision in *Prebble v Television New Zealand Ltd.*, [1995] 1 AC 321 (*Prebble*) as establishing an absolute bar on the use of members' speeches in civil actions.

HELD: The record of Hansard and the journal of Votes and Proceedings of November 29, 2021 were admissible, and would be marked as full exhibits in the trial. The court first determined three preliminary matters: 1) that the two documents were prima facie admissible under s. 41 of *The Evidence Act*. The purpose for which they were admitted here was their relevance to the issue of whether clause 16 of the 1880 contract forms part of the Constitution, and they may be considered to ascertain the facts and circumstances related to the passage of a particular amendment to a statute, and in this case, to the circumstances of the amendment request, even though not yet enacted; 2) that it had jurisdiction to determine whether the privilege applies to preclude the admission of the documents; and 3) that the defendant, representing the executive branch, does not hold and is unable to exercise parliamentary privilege. Such privilege is held against the executive branch, not by it and is held by the Legislative Assembly and its members. Even if it was possible for the defendant to assert the privilege as if it were being claimed by the Assembly, the privilege would not preclude admission of the documents into evidence. The court held that Article 9 of the *Bill of Rights, 1689* was not an absolute bar on the use of members' speeches in civil actions that would preclude the admission of documents into evidence in this case. The purpose of admitting the records was an interpretive one, respecting the issue of whether clause 16 of the 1880 contract forms part of the Constitution and was intended to provide a perpetual tax exemption. Such interpretive purposes would not impeach or question the freedom of speech in legislative proceedings, subject to what inferences the court may be asked to draw at trial. The plaintiff sought to adduce the records into evidence to prove what was said and done by the Assembly, which was in accord with *Prebble*, and this purpose too permitted their admission. Finally, freedom of speech extends only as far as is necessary to protect legislators in the discharge of their legislative and deliberative functions and it was not necessary to prevent the records from being admitted into evidence in this case to protect the legislature's constitutional functions.

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***Collingridge v Wyatt*, 2022 SKQB 32**

Robertson, 2022-02-01 (QB22022)

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

The self-represented plaintiff commenced an action against multiple defendants that included: two Crown prosecutors; the Ministry of Social Services (Ministry); and his spouse, from whom he was separated. He also made a *Charter* application in which he sought an order pursuant to s. 24 that would revoke his spouse's decision-making authority respecting their four children and for them to have their primary residence with him and to give him sole decision-making authority over them. Each of these defendants described above applied pursuant to Queen's Bench Rule 7-9 for an order setting aside the plaintiff's statement of claim as disclosing no reasonable cause of action or as an abuse of process. The plaintiff had apparently named the Crown Prosecutors as defendants because they had been involved in prosecuting the plaintiff on charges of assault on one of his children. The Ministry had been named as a defendant because it had been investigating and continued to investigate allegations against the plaintiff and his spouse of inappropriate discipline and care of the children, and it had apprehended the plaintiff's children several times. The plaintiff and his spouse had separated in 2020 and he had then petitioned for divorce, custody, and child support. In March 2020, a Queen's Bench judge issued a fiat ordering the parents to have interim joint custody and the plaintiff's spouse to have primary care and residence of the children. Other orders had since varied the fiat, but it remained in existence and at the same time, the Ministry was involved in another apprehension. The plaintiff filed his statement of claim and his *Charter* application in December 2021.
HELD: The plaintiff's application was struck and each defendant's applications to set aside the statement of claim was granted. The court struck the claim in its entirety without giving leave to amend or refile it. Costs were awarded to each of the defendants: $1,000 to each of the Crown Prosecutors; $1,000 to the Ministry; and $500 to the plaintiff's spouse. The court dismissed the plaintiff's application because it found that it could not grant the relief sought by the plaintiff: to do so would contradict the order made in the family law proceeding. The plaintiff's remedy against the order had been undertaken as the matter was proceeding to trial. Further, the plaintiff had not given the required notice under The Constitutional Questions Act, 2012. It granted the defendants' applications pursuant to Queen's Bench Rules 1-3 and 7-9. Respecting the prosecutors' application, it was granted under Queen's Bench Rule 7-9(2)(a) because the plaintiff's statement of claim had not identified any cause of action nor sought any relief. It was also plain and obvious that the claim should be struck under Queen's Bench Rule 7-9(2)(e) as an abuse of process. The Ministry's application was granted under Queen's Bench Rule 7-9(2)(a) for the same reasons as given regarding the prosecutors'. It granted the plaintiff's spouse's application pursuant to Queen's Bench Rule 7-9(2)(e) on the basis that it offended the rule against a multiplicity of actions because of the existing family law action.

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***Danychuk v University of Regina*, 2022 SKQB 35**

Megaw, 2022-02-03 (QB22028)

Administrative Law - Judicial Review - Academic Institution

The applicant, S.D. applied for judicial review to set aside the decision of the University Senate Appeals Committee of the University of Regina (SAC), which upheld the decisions of both the Professional Suitability Review Panel of the Faculty of Social Work (review panel), and the Counsel Committee on Student Appeals (CCSA), recommending to the University of Regina that S.D. "be required to discontinue from the BSW program, and the University, for a specified period of time, or indefinitely in accordance with the regulations of the University of Regina." S.D. was discontinued from the BSW program for two years, after which time he would be eligible to reapply. The judge of the Court of Queen's Bench (reviewing judge) stated that the factual and evidentiary underpinnings of the matter were not in issue and were discernible from the university record of proceedings. He provided a summary of the relevant facts. S.D.'s actions proved to be disruptive to the Faculty of Social Work (faculty) soon after his enrollment in 2016. He began making claims of unfairness against an instructor to the dean of the faculty and other officials as a result of a failing grade. As part of his program, he was to complete a practicum, but was discharged from the practicum before completing it because of his "performance and interpersonal interaction" with those involved in it. The faculty became aware of concerns involving S.D., namely, that he was missing seminar sessions, refusing to participate in work assignments, and making "untoward comments regarding fellow students." He posted entries on Facebook accusing faculty and administrative staff of "abusive behaviour or serious misconduct." There were complaints of S.D.'s inappropriate and harassing behaviour towards other students. S.D.'s grade point average was not at a level which allowed him to re-enrol in the practicum, and so his request to do so was denied by the faculty. A number of these officials complained to the faculty about what they characterized as S.D.'s harassment of them. They expressed that they feared encounters with him because of this harassment. As a result of these concerns, the faculty's associate dean wrote to S.D. inviting him to take a medical withdrawal and to "seek re-enrolment" at a later time. S.D. declined this offer. S.D.'s campaign of complaints continued, resulting in a written request by the faculty that the review panel engage a hearing to determine whether S.D.'s behaviour was contrary to the applicable codes of conduct. The faculty alleged S.D.'s actions showed he had contravened the CASW code of ethics "for acceptable professional behaviour," contravened the practice standards of registered social workers of Saskatchewan (SASW Standards), and had shown "impaired judgment or functioning in any client contact pursuant to a requirement of a class or practicum." At the hearing, which proceeded before a three-person panel, S.D. argued that his actions were not unprofessional, and that he was rightfully pursuing just treatment from the faculty. In his representations, he at no time advanced that his alleged mistreatment by the faculty was related to mental disabilities which affected him. The decision of the review panel was to the effect that his performance as a student in the BSW program was unsatisfactory and in contravention of the professionalism required of him under the CASW code of conduct and guidelines, and he also failed to adhere to the requirements of the SASW Standards "to maintain a reasonable level of self-awareness necessary to appropriately manage personal needs and limitations in the context of a professional relationship" among other contraventions. S.D.'s complaints about the faculty dean, associate dean and others resulted in a referral to the dean of the faculty of nursing which generated a report from the dean in which he agreed with the recommendations of the review panel. S.D. appealed the report of the dean of the faculty of nursing to the CCSA, which dismissed his appeal. S.D. did not present any additional information at the CCSA appeal hearing. Following the dismissal of his appeal, he appealed to the SAC, making the same submissions on the same information as he had before the review panel and the CCSA appeal panel. The SAC dismissed S.D.'s appeal, following which he brought this application for judicial review.

HELD: The application was dismissed. The reviewing judge first considered the standard of review he was to apply to his analysis

of the merits of S.D.'s application, and directed himself to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, concluding that he was not to interfere with the decision of the SAC to uphold that of the review panel unless he was of the view that the SAC's decision was unreasonable following his review of the proceedings before the administrative bodies below and the record created as a result of those proceedings. He recognized that he must show deference to the decisions of these specialized administrative entities, in this case administrative bodies with knowledge of student competency questions, as long as the decisions were made within "their proper spheres" and did not demonstrate "manifest unfairness, where there has been a flagrant violation of the rules of natural justice" (see: *Sardar v University of Ottawa*, 2014 ONSC 3562). Upon a review of the record of the proceedings below and the submissions of the university and of S.D., he ruled that the decision of the SAC to uphold the decision of the review panel was reasonable and fair. The reviewing judge observed that S.D. argued for the first time before him that the decision of the SAC was unreasonable because the faculty had failed to accommodate his disabilities, describing himself in a letter to a professor in 2019 as "an abnormally sensitive boy who grew up in rural Saskatchewan" who had social anxiety which caused other students to abuse him, from which the faculty failed to protect him. He noted that during the discipline hearings, S.D. brought forward no evidence about the nature and symptoms of his disability or how he was to be accommodated because of it, but maintained throughout that he was fighting a just fight against his treatment by the faculty. The reviewing judge ruled that the SAC and review panel decisions were a result of thorough analysis of the evidence and submissions before them, and their decisions were reasonable and fair.

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***R v Hansen*, 2022 SKQB 34**

Robertson, 2022-02-04 (QB22027)

Criminal Law - Procedure - Direct Indictment
Constitutional Law - *Charter of Rights*, Section 7
Criminal Law - Trial Procedure - Witness Testimony - Videoconference

The accused was charged under two Informations with six offences. The charges arose after the accused and two other individuals had allegedly committed robberies in two different locations, and where the accused was masked. The self-represented accused elected trial by judge alone in the Court of Queen's Bench and requested a preliminary inquiry regarding identity. Before the preliminary inquiry was held, the acting Deputy Attorney General for Saskatchewan signed a direct indictment preferring the six charges under s. 577(a) of the Code. The accused brought this pre-trial application, challenging the direct indictment on the ground that there was no new evidence to justify it and alleging that it violated his s. 7 *Charter* rights. The Crown applied under s. 714.1 of the Code for four police witnesses to be allowed to testify by videoconferencing technology and under s. 714.2 of the Code for one civilian witness to testify from outside Canada by videoconferencing technology. The witness had been the victim of one of the robberies and was currently in Pakistan. The accused objected, saying that the witness should appear in person in the interests of justice and arguing that the pandemic should have no effect since the province's health restrictions provided sufficient safeguard to persons attending court.

HELD: The accused's application was dismissed, and the Crown's applications were granted. The court found that the right of the Attorney General to prefer an indictment under s. 577 of the Code was unfettered. There are no limitations on the right, and no requirement for new evidence. The effect the preferring of the indictment had in removing the right to a preliminary inquiry did not breach the accused's legal rights under s. 7 of the *Charter* nor constitute an abuse of process. It allowed the application for the police witnesses to give remote testimony after it assessed the factors set out in *Burns* (2020 SKQB 228) and found that, in the main, they weighed in favour of the application. It found that under s. 714.2 of the Code, the accused had not met the burden of proving that the reception of the testimony of the witness, a victim of one of the robberies, would be contrary to the principles of fundamental justice.

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***R v Brandt Industries Canada Ltd.*, 2022 SKPC 4**

Wiegers, 2022-01-31 (PC22003)

Regulatory Offence - Occupational Health and Safety - Elements of Offence

This matter was a trial before a judge of the Provincial Court (trial judge) for offences allegedly committed by Brandt Industries Canada Ltd. (Brandt) under The Saskatchewan Employment Act and The Occupational Health and Safety Regulations (regulations), more particularly, that Brandt failed to ensure that: 1) E.K., a worker employed by Brandt, was a competent crane operator, which failure resulted in serious injury to her; and 2) failed to provide E.K. with "approved industrial protective headwear and require [her] to use it where there [was] a risk of injury to the head", resulting in serious injury to her. Following the testimony of witnesses at trial and the filing of various records from Brandt and the Crown, the trial judge made the following findings: E.K. was injured by falling off a trailer while assembling a load of beams and pipes onto it; she was adjusting a heavy metal pipe while operating an overhead crane; she was standing on an even stack of four-inch wide rectangular metal beams while lifting the round pipe with the crane; the pipe shifted more than expected and swung towards her knees, which caused her to move and fall eight feet to the hard floor where she struck her head and shoulder, resulting in traumatic brain injury, including skull fractures, and a broken shoulder; at the time of the incident, E.K. had been an assembler with Brandt for seven months; the regulations specify that a crane operator will be deemed to be a competent operator if she successfully completes a prescribed training program or "is completing" prescribed practical training "under the direct supervision of a competent operator or qualified operator"; the training must total 40 hours; E.K. participated in six and a half hours of classroom instruction based on course material provided by the Safety Association of Saskatchewan Manufacturers (SASM), an injury prevention organization funded through workers' compensation premiums, which she successfully completed; the day following her training program, E.K. executed a lift on the crane like the one she would operate, which took thirty minutes; in addition to the SASM course and the training lift, E.K. operated the crane as part of her duties while working with competent crane operators and authorized supervisors; though it was concerning that Brandt did not keep separate records with respect to E.K.'s training hours, the trial judge was able to infer from the records and the testimony that E.K. had exceeded the prescribed 40 hours of training before the incident and was a good crane operator; the crane operators were not

required by Brandt to wear “approved industrial protective headwear” or any headgear at all while assembling loads because these were intended to prevent head injuries and Brandt trained its crane operators not to lift above their heads.

HELD: The trial judge first dismissed count 1, which alleged that Brandt failed to ensure that E.K. was a competent crane operator at the time of the incident and that caused her injuries. He found on the evidence that, though he was disturbed that Brandt had not kept separate records, the evidence allowed him to make reasonable inferences that E.K. had been provided with the required 40 hours of training in accordance with the regulations and, as such, a reasonable doubt was raised that Brandt had failed to ensure E.K. was a competent crane operator. He pointed to the classroom training using the SASM course and the supervised practical training with seasoned and competent crane operators and the evidence that she was a good crane operator. As to count 2, which alleged Brandt failed to provide the required headgear, the trial judge ruled that the Crown had failed to prove factual causation beyond a reasonable doubt. The Crown was required to prove that if E.K. had been wearing approved headgear, she would not have suffered serious injury to her head in the fall. The trial judge referred to evidence showing that approved industrial protective headgear did not cover the area of E.K.’s head which came into contact with the floor, and so concluded that the wearing of the headgear would not have diminished the injury to E.K.’s head. In the result, the Crown could not seek a greater penalty in the event of a finding of guilt for the offence simpliciter, which required the Crown to prove a realistic risk of injury to the head of E.K. which the wearing of approved headgear would have mitigated. The trial judge concluded that on the evidence there was a realistic risk that the pipe might shift more than expected when lifted by E.K. with the crane and that E.K. would fall from the flatbed and injure her head in a way which proper headgear might have mitigated. As the Crown had proven this offence to the required standard of proof, the trial judge looked to Brandt to present a defence of due diligence on a balance of probabilities to avoid a conviction (see: *R v Sault Ste. Marie,* [1978] 2 SCR 1299). Brandt’s defence was that it could not have foreseen that approved head gear would be required in the circumstances at the time of the fall. The trial judge disagreed, stating that it was reasonably foreseeable that a supervisor should have been aware that the load could have shifted more than expected, and in the circumstances would have caused E.K. to fall and injure herself, such that “it was incumbent on Brandt to take specific steps to mitigate that risk.”

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