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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Ottenbreit Schwann Leurer, 2022-02-17 (CA22022)

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The appellant appealed the decision of a Queen's Bench judge that granted judgment in favour of the respondent and awarded damages in the amount of $8,809,872 (see: 2021 SKQB 250). The appellant and the respondent entered into a streaming canola purchase contract in 2014 under which the latter advanced $2 million to the appellant in exchange for him delivering canola during each of the 2014 to 2019 crop seasons (contract 1). As a condition, contract 1 specified that the appellant give a collateral mortgage to the respondent as security, and he concurrently granted a mortgage over certain farmland (mortgage 1). It contained a clause that secured the appellant's present and future obligations under contract 1 and "any related or ancillary documents," and

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further provided that the appellant agreed to repay the obligations secured in accordance with the terms of contract 1 at the rate of five percent per annum. The amount the appellant was to secure was to be the aggregate of the principal sum of $2 million and sums equivalent to any interest on the principal as may remain unpaid. Later in 2014, the parties entered into contract 2, under which the respondent advanced the appellant a further $1 million in exchange for his delivery of canola in addition to the amounts promised under contract 1. In fulfillment of a condition of contract 2, the appellant delivered a collateral mortgage as security for his performance of his obligations under contract 2. At the same time, the parties signed a mortgage amending agreement (mortgage 2) that provided that the principal amount of mortgage 1 was increased to $3 million and that mortgage 2 would be treated as part of it. The respondent paid the $1 million contemplated by contract 2 after mortgage 2 had been registered. When the appellant failed to meet his obligation under contracts 1 and 2, the respondent commenced an action against him, but the court found that the contracts were unconscionable and set them aside (liability judgment) (see: 2018 SKQB 154). However, it awarded judgment to the respondent based on unjust enrichment. Its appeal of that decision was successful (see 2019 SKCA 78). The appellant appealed to the Supreme Court, which remanded the matter back to the Court of Appeal for reconsideration. The court confirmed its earlier decision and ordered that the matter be returned to Queen's Bench for determination of damages and enforcement of the security interests (see: 2021 SKCA 56). The Queen's Bench judge allowed the respondent's claim for damages and interest (damages judgment). With respect to interest, the judge found that the claim was based on the appellant's agreement to pay interest in mortgage 1. He found that contract 2 and mortgage 2 were "related or ancillary documents" as referred to in the clause in mortgage 1, and thus interest was payable on all amounts owing under the two contracts and mortgage 2 at the rate of five percent per annum, which equaled $1,568.569. The appellant argued that the judge erred in finding that contract 2 and mortgage 2 qualified as related or ancillary documents and the interest was only applicable to his obligations under contract 1. The issues were: 1) whether the judge erred in his interpretation of mortgage 1. The appellant argued that the court must interpret the contract by determining the parties' objective intent and when the words of mortgage 1 are examined, even as amended in mortgage 2, they objectively refer only to contract 1, as evidenced by words in mortgage 1 that define the "obligations secured" only with reference to contract 1. He erred in finding that contract 2 was "related and ancillary" to contract 1 because it was not an amendment to, nor did it refer to, contract 1. Further, the judge erred by assuming that

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since contract 2 was entered into on the same date as mortgage 2, that mortgage 1 secured the terms of contract 2. He then assumed that since mortgage 2 amended mortgage 1 to increase the principal amount owing by $1 million, it must be securing contract 2; and 2) whether it was open to the appellant to argue that mortgage 1 does not secure contract 2. The issue had not been before the judge as he was asked to quantify the respondent's damages and the actual enforcement of the mortgage was to be dealt with separately. However, the appellant argued on appeal that the answer to the question of whether mortgage 1 required him to pay interest at five percent also determined the question as to whether mortgage 1 secured contract 2. The respondent objected that as the argument was not raised by the appellant before the judge, it should not be entertained on appeal. Further, the appellant should not be permitted to raise the argument that mortgage 1 did not secure contract 2 because it was inconsistent with position taken by the appellant earlier in the litigation. It asserted that issue estoppel applied to prevent it from being considered.

HELD: The appeal was dismissed. The court found that the judge who awarded damages had not erred in his interpretation of themortgage and its application to contract 2. In addition, it would be an abuse of process to allow the appellant to advance an argument that mortgage 1 did not secure contract 2. It found with respect to each issue that: 1) as the interpretation of a contract involves a question of mixed fact and law, the palpable and overriding error standard of review was applicable. In this case, the judge had not made an error in his interpretation of mortgage 1, let alone one of a palpable and overriding nature. The appellant's argument that the proper interpretation of mortgage 1 involved looking only at the words in the contract was rejected. The judge correctly began first by interpreting the words in contract 1 and then considering the context of the surrounding circumstances and the commercial purpose of the parties to find that mortgage 1 applied mortgage 2 to fulfil both parties' commercial interests; and 2) it was appropriate to address the argument here, because the judge was asked only to determine whether contract 2 was a related or ancillary document to contract 1 within the meaning of that phrase in contract 1, and therefore the appellant could ask the court to review the judge's consideration of it. The court would also consider the issue because of possible problems between the parties in the context of future efforts to enforce mortgage 1. Regarding the respondent's second objection to the appellant raising this issue on appeal, it was unnecessary to decide whether issue estoppel applied because the appellant's actions engaged the doctrine of abuse of process. He was attempting to resile from a position he had taken earlier in these proceedings that had strongly influenced the course of the litigation. Relying upon its inherent jurisdiction, the court found that allowing the argument would constitute abuse of process as it would be manifestly unfair and would bring the administration of justice into disrepute. The liability judgment was based on that judge's acceptance of the appellant's original

position that mortgage 1 secured contract 2. At the appeal of the liability judgment, the appellant relied again on the same idea and the court proceeded on the same understanding on which the liability judgment was based.

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***Abbott v Saskatchewan Power Corporation*, 2022 SKCA 23**

Ottenbreit Caldwell Schwann, 2022-02-18 (CA22023)

Statutes - Interpretation - *Snowmobile Act*, Section 32, Section 34(1)(b)
Civil Procedure - Appeal - Application to Adduce Fresh Evidence
Civil Procedure - Queen's Bench Rules, Part 7 - Evidence

The appellants, the estate of T.G. Abbott and the wife of the deceased, appealed from the decision of a Queen's Bench judge to dismiss their claim against the defendant, Saskatchewan Power Corporation, in a summary judgment (see: 2021 SKQB 49). They also applied to adduce fresh evidence on the appeal. They brought an action in negligence and public nuisance against the defendant as a result of the death of T.G. Abbott, who was killed while riding a snowmobile. He had collided with a guy wire used to stabilize a power pole. They applied for summary judgment and the parties agreed to litigate the issue of liability on the application. The chambers judge determined that the matter could be decided summarily and reviewed the evidence surrounding the construction and maintenance of the power pole and guy wire, including that of expert witnesses proffered by each side. He ultimately decided that the affidavit of one expert submitted by the appellants was inadmissible and only portions of the affidavit evidence of another of their expert witnesses was admissible. The judge applied the two-part *Anns*/*Kamloops* test ([1978] AC 728/[1984] 2 SCR 2) and found that the respondent owed a duty of care to the deceased, a duty it had acknowledged, but that duty of care was limited by s. 34(1)(b) of *The Snowmobile Act*. He assessed the appellants' arguments that the respondent had breached its standard of care because of its failure to inspect and maintain guy wires and markers. Although such failure could, in other circumstances, form the basis for a breach of the standard, the judge found that in this case the respondent's duty of care was constrained by the phrase "wilful act" in s. 34(1)(b) of the Act, as a failure to act or an omission is not an act. Thus, the appellant had not proven that the respondent failed to fulfill its duty of care to the deceased. The

appellants sought to adduce fresh evidence on appeal, including police and coroner's reports and pictures of the scene of the accident. The central ground of the appeal waswhether the chambers judge erred in his interpretation of, and the effect to be given to, the term "wilful act" found in s. 34 of the Act.
HELD: The application to adduce fresh evidence and the appeal were both dismissed. With respect to the former, the court concluded that the proposed fresh evidence did not meet the criteria set out in *Palmer* ([1980] 1 SCR 759). It did not bear on a decisive issue, nor could it reasonably be expected to have affected the result of the case when taken with the other evidence adduced at the hearing. It noted that the appellants attempted to tender some of the same evidence in the summary judgment proceeding which the judge declined to admit because it had not been authenticated, as well as attempting to tender substantially more documentation. It dismissed the appellants' argument that they were surprised by the respondent's objections to the admission of the documents at the chambers hearing because they had received notice of the objections in the respondent's brief. Instead of requesting an adjournment, they attempted to have the material admitted as presented and thus were the authors of their own misfortune. Under Part 7 of *The Queen's Bench Rules*, the parties must properly adduce the evidence they intend to rely on and in this case, the appellants had not put their best foot forward respecting the presentation of their evidence. Regarding the appellant's ground of appeal, the court agreed with the chambers judge's findings and conclusions and dismissed the appeal for the reasons given by him in his decision.

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***R v Power*, 2022 SKCA 24**

Richards Barrington-Foote Kalmakoff, 2022-02-24 (CA22024)

Criminal Law - Robbery - Conviction - Appeal
Criminal Law - Application to Adduce Fresh Evidence - Appeal

The self-represented appellant appealed his convictions for robbery, possession of stolen property, fraud and breach of probation. He had been convicted after trial by judge alone in Provincial Court (see: 2020 SKPC 47). In his appeal, he contended that his trial counsel failed to provide adequate representation, resulting in a miscarriage of justice, and he applied to adduce fresh evidence to support his argument. The Crown's case against the appellant had been largely circumstantial. The employees of the bank that was robbed could not identify the appellant as the robber but described the latter's height and build, and a tattoo that was visible on his neck below the scarf with which he masked his face. The employee who handed cash to the robber included a "hold up bundle" with recorded serial numbers. Surveillance video from the bank showed the type and colour of clothing worn by the robber. Other video surveillance footage taken at a nearby mall showed someone who appeared to be the robber entering shortly after the robbery and going into a bathroom. There was no film that showed the appellant entering the bathroom but a few minutes after the robber entered it, the appellant left it, wearing a sweater or jacket, clothing that differed from the robber's. The video showed the appellant then purchased a cell phone with cash, and later, a Rogers pay-as-you-go service plan from two different outlets in the mall. A police officer testified that he retrieved the robber's clothing from the garbage can in the bathroom and obtained the marked bills from the

Rogers outlet. The appellant denied having been in the bank and testified that he had walked to the mall wearing the clothes shown in the video-recording and at the time of the robbery, had been in the mall's bathroom for an hour due to a severe attack of colitis. After recovering, he followed his plan to purchase a cell phone and service plan. He acknowledged that he had a tattoo on his neck but argued that if he had been the robber wearing a scarf, it would not have been visible. The trial judge rejected the appellant's evidence. Recognizing that the case against the appellant was circumstantial, the judge self-instructed, citing *Villaroman* (2016 SCC 33), and relied in part on drawing inferences from what could be observed in the video surveillance recordings. Based on that and the other evidence presented by the Crown, he concluded that the robber and the appellant were the same person. The appellant's proposed fresh evidence was that his counsel had refused to follow several of his instructions and one of the failures was that the appellant wanted to re-elect to be tried by judge and jury. At the hearing of the appeal, the appellant was allowed to cross-examine counsel under s. 683(1)(b) of the Code and the lawyer stated that he never put his mind to the question of whether a jury trial would have been better for the appellant because it was never raised. By the time he came to represent the appellant, the election had already been made and he simply followed the appellant's instructions. The appellant submitted four pages of notes and instructions that he said he had sent to his counsel just before the trial. Amongst them were his desire to subpoena his doctor and a video technician. The issues on appeal were whether: 1) a miscarriage of justice resulted from ineffective assistance of trial counsel? This issue required consideration of whether the proposed fresh evidence be admitted; and 2) the trial judge erred by: a) misapprehending the evidence? The appellant argued that amongst the errors was the evidence of identity in that the bank employees' descriptions of the robber's appearance and tattoo did not match his appearance nor his tattoo; and b) drawing unreasonable inferences from the evidence?

HELD: The appeal and the application were both dismissed. The court found with respect to each issue that: 1) this ground could not succeed, as it decided it would not admit any of the fresh evidence. The appellant failed to establish that he was prejudiced by the alleged ineffectiveness of trial counsel and thus did not lead to a conclusion that his conviction should be set aside and a new trial ordered. Consequently, the appellant had not established the necessary factual basis to assert that he was prejudiced by a failure of trial counsel to follow his instructions regarding re-election. His proposed fresh evidence regarding re-election was not credible. It would not admit the rest of the proposed evidence either because he had not established that any prejudice resulted from any of the allegations regarding his counsel; and 2) this ground also failed. The trial judge had not erred in any of the ways suggested by the appellant.

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***Odelein v Odelein Farms Ltd.*, 2022 SKCA 28**

Ottenbreit Caldwell Schwann, 2022-03-08 (CA22028)

Property Law - *Inter vivos* gifts - Appeal
Contracts - Promissory Estoppel
Corporate Law - Shareholder Loans

The Appellant, L.T.O., brought an action in the Court of Queen's Bench for payment of shareholder loans credited to him on the books of a family farming corporation, Odelein Farms Ltd. (OF). The Queen's Bench judge (judge) dismissed the claim following a summary judgment hearing. L.T.O. appealed that decision on the ground that the judge "misconstrued or ignored material evidence and misapplied the governing law" in finding that the contributions made by L.T.O. to OF were a gift subject to the principle of promissory estoppel, or that L.T.O. waived or forgave repayment of the sums owed to him. The court briefly reviewed the relevant facts and background. The sons of E.O. and H.O. aspired to play hockey in the NHL. At a point when L.T.O. and his brother S.O. were having success in working towards this goal, they agreed that if one should play in the NHL, he would reinvest his earnings in the farm. L.T.O. did have a career in the NHL. The family incorporated OF and the family members were issued shares. The family members transferred their individual assets including farmland, machinery, and equipment to OF and were given shareholder loans in an amount equal to the value of the assets each contributed to the family farm. The incorporation and rollover of assets into OF were done with the assistance of lawyers and accountants, and duly set down in rollover and sale of assets agreements. Shareholder loan accounts were set up and were credited or debited as required. L.T.O periodically made contributions to OF from his hockey earnings, and also took withdrawals from his shareholder loan account. OF alleged that L.T.O. repeatedly said his contributions were gifts and he would not be demanding repayment. Through the years, all of his contributions were recorded as shareholders loans, and were so declared in OF's income tax returns. OF claimed that it would not have made the types of equipment and land purchases it did without L.T.O.'s representations that his contributions were intended as a gift to OF. The court went on to canvass the judge's decision and made the following observations: his twenty-three page judgment was made up in large part of quotations from OF's brief and affidavits of S.O. and E.O.; during his review of the evidence, he made some of his own observations, but in large measure quoted from OF's brief as to OF's view of the evidence; he did not quote from L.T.O.'s material; he made findings of fact from OF's brief; the judge accepted OF's explanation that land and expensive machinery were purchased because of L.T.O.'s assurances that he did not want to be paid back; he found the other shareholders did not know how the accountants were treating L.T.O.'s contributions for tax purposes; the judge cited case law concerning waiver, promissory estoppel, demand loans, and inter vivos gifts; he did not make any specific finding that L.T.O waived any of OF's debt to him, nor that promissory estoppel applied to the facts; treated the matter of L.T.O.'s credibility cursorily; and ordered solicitor-client costs against him without explanation in his reasons.

HELD: The court allowed the appeal, set aside the decision in its entirety, and remitted it to the court below for redetermination. It stated that the errors made by the judge were of such a fundamental nature that the decision could not be salvaged; that he did not in any meaningful way engage with the material filed, or apply the case law he quoted in any coherent way; that he did not address and resolve credibility issues arising from the evidence; that he "abdicate[d] his fact-finding role and… ignore[d] or misapprehended much of the actual evidence that touched on the issues put before him;" and that the legal determinations he made were not discernible. The court could not see that the judge resolved inconsistencies in the evidence or applied factual findings to the law with respect to the elements of gifting, promissory estoppel, waiver, or enforcement of debts. The court concluded that the judge's reasoning was a "mishmash" and "murky", and that the elements of the various defences raised by OF were so confused one with the other that it could not be known how he came to decide L.T.O. had intended to gift his contributions to the farm.

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***CIC Asset Management v Townsgate Development Corporation*, 2022 SKCA 31**

Ryan-Froslie, 2022-03-09 (CA22031)

Court of Appeal - Leave to Appeal - Sufficient Merit and Sufficient Importance
Mortgages - Foreclosure - Application for Judicial Sale - Order Nisi - Amendment

The mortgagee, CIC Asset Management Inc. (CIC), applied to a judge of the Court of Appeal (judge) for leave to appeal the decision of a judge of the Court of Queen's Bench (chambers judge) denying his application to replace an order nisi for sale that had resulted in the sale of some of the mortgaged properties. (See: *CIC Asset Management Inc. v Townsgate Development Corporation*, 2021 SKQB 327 (chambers decision)). CIC advanced $5,990,000.00 to Townsgate on September 8, 2015 and took a mortgage as security for the loan. The mortgaged property consisted of four condominiums and 19 vacant condominium lots. Townsgate defaulted on the loan and CIC obtained a consent order nisi including a term for judicial sale of the mortgaged properties and judgment in the sum of $960,541.46, which was the full outstanding amount owing at that time. The order nisi was granted on May 8, 2019. The sale of the properties proceeded. The four condominium units were sold, realizing $827,975.15, but none of the vacant lots sold. At the time the order nisi was granted, the vacant lots were appraised at $25,000.00 each. In November 2020, the appraised value of each vacant lot was $9,800.00. On November 27, 2021, the appraiser wrote to CIC attaching current "lot price information" and stated, "there does not appear to be any indication that the Weyburn market will improve anytime soon." CIC applied to "substitute" the first order nisi for one pertaining only to the unsold vacant lots, changing the outstanding amount to $530,822.00 as of September 30, 2021, judgment for that amount, a redemption period of one day, postponing the listing of the land to such time as CIC determined, and reducing the upset price to $165,000.00. CIC had a right to purchase the mortgaged lands but did not exercise that right. No one appeared for Townsgate in chambers. Although it had consented to previous amendments to the order nisi, CIC did not show that Townsgate had consented to what CIC referred to as an amendment to the order. The judge than reviewed the decision of the chambers judge dismissing CIC's application to "substitute" the order nisi with a new order, noting that the chambers judge's overarching reason, among a number of others, was that the proposed new order was a second attempt at judicial sale, which was not allowed by law as it was fundamentally unfair to the mortgagee, especially since the property had been listed for two years in a declining market, the upset price was significantly lower, CIC had not exercised its right to purchase the properties, and it sought an indefinite listing period.
HELD: The judge did not allow the application for leave to appeal. In doing so, she relied on the leading case concerning when leave to appeal might be granted, *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119. She stated that the test to determine when a judge might exercise her discretion to grant leave to appeal is bipartite: one, does the proposed appeal have sufficient merit and two, is it sufficiently important "to warrant determination by this Court." The judge ruled that she would not exercise her discretion to allow the appeal since she was not satisfied that the applicant, CIC, had satisfied either branch of the test. As to merit, she concluded that the appeal, though not frivolous or vexatious, had little chance of success since none of CIC's arguments showed any evidentiary basis to conclude the chambers judge had disregarded any material facts. CIC argued that some of the delay was the fault of Townsgate, but the judge was of the view that nothing in the record showed how that was so. She was unable to agree that because Townsgate had consented to amendments to the existing order nisi in the past, it was now consenting

by implication to a complete replacement of the existing order with a new order, which consent, in any event, could not supplant the principle "that there is no right to a second attempt at judicial sale." As to the second branch of the test, that CIC must satisfy her that the proposed appeal had sufficient merit, she rejected the argument that the appeal had merit because it raised a question concerning whether the chambers judge's decision "effectively fetters the discretion of the Court." She responded that on her review of the proceedings below, the chambers judge's discretion was not fettered in any way, and otherwise the proposed appeal did not raise a matter of great concern for the court.

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***Saskatchewan (Highways) v West-Can Seal Coating Inc.*, 2022 SKQB 43**

Currie, 2022-02-09 (QB22043)

Commercial Arbitration - Judicial Review
Commercial Arbitration - Bid Protest Mechanism

The Ministry of Highways (Ministry) applied to a Court of Queen's Bench chambers judge for judicial review by way of certiorari of the decision of an arbiter who conducted an arbitration pursuant to the Bid Protest Mechanism (BPM) of the New West Partnership Trade Agreement (NWPTA), ruling in favour of a "supplier," West-Can Seal Coating (West-Can), to the effect that the Ministry conducted the bidding process for a procurement contract known as H20126 in breach of articles contained in Chapter 5 of the Canadian Free Trade Agreement (CFTA), which is intended to ensure that all bids are dealt with fairly, openly, and impartially. In accordance with the BPM, the arbitration was a "paper arbitration", commenced by a request in writing of the bidder, West-Can. As required, the written request of West-Can provided "detailed information" about the factual grounds of the dispute, "alleged inconsistency with the trade agreement," and appended copies of relevant correspondence and documentation. The Ministry responded by way of a written reply, to which West-Can, as permitted by the BPM, delivered a written counter-reply. The chambers judge reviewed the written request, reply, counter-reply, documentation, and relevant provisions of the trade agreements, all in light of the arbiter's reasons, and made the following findings: West-Can was an out of province supplier; all bidders for H20126 knew in advance that the successful bidder would be the one with the lowest bid and the highest cumulative score derived from the total of a Work Zone Traffic Audit Process (WZTA) score, a Contractor Performance Evaluation (CPE) score, and a "community benefit provision;" the WZTA score was a safety evaluation tool arrived at through audits of the safety record of the bidder performed by the Saskatchewan Heavy Construction Association, the CPE score reflected the bidder's history in successfully completing contracts, and the community benefit provision was a "sliding scale with the maximum 25 points awarded for those contractors using 100% local labour and 0 points for those using 60% or less"; a bidder called Morsky won the contract and West-Can was a close second; West-Can had a slightly lower bid at $2,059,622.00 versus Morsky's bid of $2,092,932.00; Morsky scored higher on the WZTA and the CPE, and the two were tied on the community benefits score; the arbiter ruled with respect to the WZTA scores that West-Can's score was skewed against it, agreeing that the Ministry should not have used it because a past audit had been included in the score that did not meet the criteria in place at the time of the bid, and West-Can had not been given an opportunity to correct the score; with respect to Morsky's CPE score, the arbiter concluded that it too was distorted to the prejudice of West-Can because Morsky and the Ministry were involved in litigation with respect to a past contract known as H18005, so Morsky's performance on H18005

had not generated a score; as to the community benefits score, though West-Can's score was higher than Morsky's, the arbiter concluded that such a score was inherently contrary to the CFTA as it favoured in-province bidders; the arbiter found that the Ministry had breached a number of articles of the CFTA having to do with fairness, openness, impartiality, and bid evaluation "based on the conditions specified in advance i[n] its tender notices or tender documentation;" the Ministry argued before the chambers judge that the arbiter had not treated it fairly and equally because it was not given an opportunity to respond to a number of West-Can's arguments, including that an adverse inference should be drawn because the Ministry had not produced documents in its possession which had previously been ruled to be confidential and therefore without prejudice; and the Ministry argued before the chambers judge that the arbiter had failed to consider relevant evidence and considered irrelevant evidence, and exceeded the scope of his arbitration.

HELD: The chambers judge dismissed the application. He first directed himself to the governing standard of review, recognizing that the arbitration in question arose from a contractual relationship between the Ministry and West-Can created by a combination of the NWPTA and the BPM. He stated he was bound to interpret and apply the terms of this agreement which, by article 9, paragraph 1 of the BPM, specifically allowed for judicial review of the arbiter's decision in accordance with clauses 46(1)(c) and (f) through (i) and subsection 46(8) of The Arbitration Act (Act). In referring to these provisions, he noted that his powers were limited to setting aside the arbiter's award if any of the Ministry's grounds satisfied him that the arbiter was incorrect in his application of the relevant provisions of s. 46(1) of the Act, and he decided he was not so satisfied. With respect to the Ministry's charge that the arbiter exceeded the scope of the arbitration, he said he could consider this ground under s. 46(1)(c) of the Act, concluding that the arbiter did as he was required to do by specifically indicating how the procurement was inconsistent with the CFTA. As to the ground put forth by the Ministry that the arbiter unfairly did not allow it to properly respond to claims made by West-Can, the chambers judge determined that s. 46(1)(f) of the Act gave him authority to review the arbiter's compliance with this requirement and found that the Ministry had shown no basis to complain it had been treated unfairly in this regard. The Ministry had opportunities to respond but chose not to, had not been taken off guard by any of the evidence, and the arbiter's decision did not hinge on those portions of West-Can's written submissions that the Ministry claimed had surprised it or to which it had no opportunity to respond. As well, the chambers judge disagreed with the Ministry that the arbiter had considered irrelevant evidence or failed to consider relevant evidence. In particular, he said that he could not assume the arbiter "did not consider the bid documents, the submissions of the parties and the Ministry's evaluation of the bids" because his reasons showed that he had reviewed all the evidence. Lastly, the chambers judge dismissed the Ministry's ground that the arbiter's decision was "wholly unreasonable" because s. 46(1) of the Act did not give him the authority to consider such a ground.

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***R v Patron*, 2022 SKQB 48** (not yet on CanLII)

Robertson, 2022-02-10 (QB22045)

Constitutional Law - Application of the *Magna Carta*
Charter of Rights - Hate Speech - Freedom of Speech - Freedom of Belief

An unrepresented accused, who was charged with wilfully promoting hatred against an identifiable group contrary to s. 319 of the

Criminal Code, brought pretrial motions before a judge of the Court of Queen's Bench assigned to conduct his trial (trial judge) to declare the charge unconstitutional for being contrary to the *Magna Carta* and ss. 2(a) and 2(b) of the *Charter*. The judge observed that the intent of the *Magna Carta* application was difficult to discern, especially since the accused chose not to make oral submissions to explain what relief he was seeking and its basis. The trial judge recognized that the accused belonged to an amorphous group of persons appearing before courts with some regularity who do not believe the laws of the nation apply to them. He observed further that such persons called themselves by various names, including "de-taxers," "Freemen of the Land," "sovereign citizens" and "*Magna Carta* Lawful Rebellion" and their arguments were best characterized as "Organized Pseudolegal Commercial Arguments."
HELD: The trial judge dismissed the applications. As to the *Magna Carta* argument, he referred to a number of cases including *Meads v Meads*, 2012 ABQB 571, and *Harper v Atchison*, 2011 SKQB 38, which confirmed that, though an important historical document, the *Magna Carta* "has no independent legal significance or legislative weight in the scheme of current Canadian legislation." As to the *Charter* motion, the trial judge reviewed the case law including *R v Keegstra*, [1996] 1 SCR 458, noting that s. 319 had already survived constitutional challenge and was found to be valid law.

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***R v K.R.S.*, 2022 SKQB 42**

Layh, 2022-02-10 (QB22037)

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Criminal Law - Evidence - Witness - Credibility
Criminal Law - Credibility - Reasonable Doubt

A trial judge of the Court of Queen's Bench (trial judge) was tasked with determining whether the Crown had proven beyond a reasonable doubt the essential element of lack of consent on the part of the complainant who alleged she was sexually assaulted by the accused, K.R.S. The trial judge summarized the evidence adduced at the trial. The complainant, M.S., testified that L.D., the spouse of K.R.S., whom she knew since they lived on the same reserve and were neighbours, invited her to come over to their house to sit by a fire and drink. M.S. said to her that she might come over. When she got home, she decided she would not go over to the fire. She changed into a top and shorts and settled on a mattress in the living room. She heard knocking at the door, and opened it to K.R.S., who came in, insisting that she come back with him to the fire. She agreed to go after some persuasion and said she would drive her own car. K.R.S. went to leave, but then came back and sat in a rocking chair near the mattress. M.S. went to grab her phone on the mattress and K.R.S. pushed her down on it, "slapping" her feet and legs, and trying to tickle her. He said, "lets wrestle," which he tried to do as he continued to tickle her. She said "Don't," but he continued. She tried to get up, but he pushed her down onto the mattress. She kept telling him to stop, but he turned her over and pushed her head into the pillow with his hand on the back of her neck. She heard him remove his pants. He pulled her shorts down and put his fingers in her vagina, then raised her hips up and inserted his penis. She felt paralyzed but kept telling him to stop by saying "No" or "Stop" over and over. He said she was

"tight" and then "announced" he had ejaculated. He then got up, was leaving, and asked her if she was coming over to his house, as if nothing had happened. M.S. testified that she went to the hospital because her vagina was sore. The doctor told her she had tearing. The outpatient report did not indicate tearing but did report bleeding in the area of her vagina. M.S. said she was embarrassed by what happened and did not want to tell her parents about it, but she did tell an aunt. K.R.S. testified in his own defence. His account was consistent with that of M.S. up to the point where he was sitting in the rocking chair. He testified that he got up to leave but M.S. grabbed his arm and pulled him back in the chair. He said he played with her feet and then went higher up and reached her shorts. He said she said "stop" in a "flirty" way and was giggling. He said he touched her over her clothes, then under her panties, then touched her vagina. He recalled M.S. removed her panties, and he removed his pants. He said they had intercourse in the missionary position, then with her on all fours because it helped him achieve a full erection, which he was unable to do because of the alcohol. He said she agreed to the change of position. He testified she said she wanted intercourse with him. He felt weird about what happened, as she did, but he asked her again to come to the fire to try to make the situation more normal, but she declined. He stated that when he returned home, L.D. was angry at him, and wanted to know where he was and what he was doing when he was gone. She was yelling at him "wanting to know what [he] was doing at M.S.'s house." When confronted with an affidavit on cross-examination sworn during a pre-trial application in which he had attested to M.S. threatening him that if he did not have sex with her, "she would say [he] raped her," and that he did not mention anything about this threat when he testified in chief, he claimed he was confused, and that the threat happened "another time," not this time. L.D. testified that she was at the fire, but when K.R.S. left, she went to bed. She suspected he had gone to see "another woman who lived with her grandmother," and when he returned "teased" him about it, which made him angry, resulting in some kicking between them, and her calling the police to restore peace. She said further that she drove to M.S.'s a few days after learning about the alleged sexual assault, and M.S. told her while crying and screaming that "K.R.S. pushed his way in and threw her on the bed and raped her."

HELD: The trial judge convicted K.R.S. of the offence as charged. He first instructed himself that his fundamental task in this case was to examine the evidence with the judicial tools developed by the courts to test the credibility of witnesses, and that in this case, these centred on consistency of witness testimony such as inconsistency with other evidence when one would not expect inconsistency without a reasonable explanation; inconsistency between a witness' evidence and other reliable evidence; and inconsistency between separate accounts of what happened, including police statements, statements to other persons, preliminary inquiries, affidavits and the testimony of the witness at trial, given in chief and in cross-examination. The trial judge also recognized that he was to be attentive to the demeanour of a witness in responding to questions: was the witness "straightforward in their answers, or evasive, argumentative, and hesitant?" Did the witness' answers have "a ring of authenticity and truth?" The trial judge then considered the case law by which he was to guide himself in determining whether the Crown had proven beyond a reasonable doubt that M.S. did not consent to sexual activity, as she testified in a case like this, one which hinged on credibility of diametrically opposed testimony of the complainant and the accused. In particular, he relied on *R v D.W.*, [1991] 1 SCR 742, which he understood was intended to steer courts away from turning the trial into a credibility contest between the complaint and the accused by directing him to examine all of the evidence before making his final ruling that "he was convinced beyond a reasonable doubt by that evidence of the guilt of the accused." In convicting K.R.S., he ruled that he did not believe his testimony for a number of reasons including: K.R.S's own evidence was consistent with the evidence of M.S. that from the time of the invitation to go to the fire earlier in the evening; she made it clear she was tired, wanted to go to bed, and was not interested in going out to the fire, so that it was not plausible for him to claim she feigned all of this in order to have him come to her house for sex; he had no believable explanation as to why he attested in his affidavit that M.S. had threatened to accuse him of rape if he did not have sex with her, but failed to testify

to this threat at trial; K.R.S.'s testimony about where he went when he left from the fire was contradicted by that of his spouse L.D. in that K.R.S. testified he told L.D. he was going to M.S.'s to pick her up but L.D. testified he did not tell her where he was going; K.R.S. contradicted himself when he testified as well that L.D. was angry because she did not know where he had gone though he had earlier testified he had said he had gone to M.S.'s to pick her up. In contrast, the trial judge found M.S. to be a credible witness: her demeanour was consistent with someone "who was relating an experience she found extraordinarily difficult;" she did not hesitate to challenge suggestions defence counsel made to her when she thought these were nonsensical; and any inconsistencies in her evidence were of minor significance and of the kind one would expect honest people to make. In the result, he found he did not believe K.R.S., and the other evidence he did accept, including that of M.S. and L.D., did not raise a reasonable doubt in his mind.

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***D.M. v M.M.*, 2022 SKQB 44**

Brown, 2022-02-10 (QB22038)

Family Law - Parenting Time - Primary Residence
Family Law - *Divorce Act* - Decision-Making
Family Law - *Divorce Act* - Child Support

This matter was a decision by a judge of the Court of Queen's Bench (trial judge) following a full trial to determine what parenting time and decision-making arrangements would be in the best interests of two children of the marriage following their parents' separation in 2018. Prior to making his rulings, the trial judge summarized the evidence of the witnesses he heard at trial. An expert who prepared a report concerning A.M., the thirteen-year-old daughter of the parties (the mother, D.M., and the father, M.M.) testified that A.M. expressed to him that her personal needs were primarily met by D.M., and she much preferred being with D.M. than M.M. because she believed M.M. used her private disclosures to him against her, and he was overly critical of her twelve-year-old sister, I.M. The expert also related that A.M. did not observe any drug or alcohol use by either of her parents. A counsellor for I.M. from 2016 to 2020 testified that I.M. told her that her family thought she was dumb, and that M.M. did not like her; that D.M. was present at seventy-nine of I.M.'s appointments, and M.M. at four; and that she was satisfied that D.M. was not on drugs when she came to I.M.'s appointments. D.M.'s boss related that D.M. was the manager of occupational health and safety, and she trusted her fully, that she attended at her home, finding it clean and organized, that her parenting was patient and appropriate, and that she never suspected D.M. was on illicit drugs. A school counselor for both A.M. and I.M. had counseled the girls for three years since 2018. A.M. was referred to her because she "identified as male" in June 2021 and was "now in the process of transitioning from female to male." She said both D.M. and M.M. expressed support for A.M. As to I.M., she was having difficulties in school, which was alleviated by medication for ADD. She saw much more of D.M. than M.M. D.M. was "was easy to work with and was very involved in her children's lives." M.M. was not as involved with the girls at school but was clearly caring and wanted what was best for them. D.M. took the stand and described the history of the marriage. She acknowledged that she and M.M. began their relationship in an

environment of partying, drugs, and alcohol, which culminated in British Columbia Social Services becoming involved with the children. In 2013, she attended in-patient treatment, and though she relapsed a few times, remained clean and sober from 2014 to the time of trial. D.M. said she was the primary caregiver, and M.M. worked very hard to provide for the family and was not hands-on at home. She continued to be the primary caregiver after the separation in 2018, attending "to school, to dental and medical appointments, to extracurricular activities." She said M.M. was more the "fun parent," and was not so disciplined about sleep times, routines, and extracurricular activities. D.M. kept a record of the amount of time M.M. spent with the children, which was in the range of 30% to 36%. D.D.M., M.M.'s father, interacted with the family daily. He acknowledged M.M. had been a drug dealer in British Columbia, but he was clean and sober. He thought D.M. was a "good mother to the children." M.M.'s co-worker lived in the family home for seven months. He thought M.M. was active with the children when he was home and that D.M. was angry "a lot at the children." He said further that he did not observe either D.M. or M.M. do drugs or drink, and that D.M. was "the instigator of arguments," that M.M.'s home was clean and well-stocked with food. M.M.'s mother testified that A.M. and I.M. enjoyed the family holidays in Fort St. John and their extended family. Her unsubstantiated evidence was that D.M. had tried to commit suicide twice and was in mental institutions twice. She said she had seen D.M. drinking every day prior to 2018 and using a lot of pills and that M.M. never yelled at the children or called I.M. "crazy," but D.M. hurt the children by brushing their hair too hard. M.M. took the stand on his own behalf and repeated his unfounded accusations that D.M. continued to use illicit drugs since the separation. The trial judge than reviewed the pertinent portions of the *Divorce Act*, including ss. 16.1(1) to (3) "defining decision-making responsibility" and "parenting time," s. 17(1); "variation order;" s. 17(3); "conditions of order" on variation, s. 17(5); "change of circumstances," ss. 16.1 to 16.4; parenting orders, s.16(3); "factors to be considered" in "determining the bests interests of the child," and referred to case authorities such as *Young v Young*, [1993] 4 SCR 3; *Gordon v Goertz*, [1996] 2 SCR 27 and *A.O. v T.E.*, 2016 SKCA 148, to help guide him in his determination of what parenting and related arrangements were in the best interests of A.M. and I.M.

HELD: The trial judge declined to order shared parenting, and rearranged M.M.'s parenting time. A.M. and I.M. were to reside with D.M., who was granted primary parenting rights. He ordered joint decision-making with respect to education and health, but gave D.M. the veto in the event of a dispute in these areas. He commented that child support was not in dispute and calculated such in accordance with the *Federal Child Support Guidelines*. He reasoned that as A.M. and I.M. were considerably younger when the previous orders were made, and though age is not generally a material change in "the condition, means, needs or other circumstances of the child and/or the ability of the parties to meet those needs" (see: *Willford v Schaffer*, 2007 SKCA 9), in this case, the children grew from being of tender years to a pre-teen and a teenager and with A.M.'s gender transition, and D.M.'s and M.M.'s household and partner changes, he was satisfied that parenting and decision-making should be adjusted. He found as fact that both D.M. and M.M. were now clean and sober; that D.M. had always been the primary caregiver, and one whose parenting style was more suited to the needs of the children, being structured and organized; that M.M. was more of a friend to the girls than a responsible parent; that M.M.'s continued unsupported attacks on D.M. about drug use were not in the best interests of A.M. and I.M.; and that A.M. did not want to be in M.M.'s home for six days in a row. In the result, the trial judge did not disturb D.M.'s parental primacy, but gave M.M. decision-making rights, and set up a parenting schedule for him that would accommodate A.M. by shortening the six-day parenting span and ensuring holiday time in the summers for visits to M.M.'s extended family.

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***Director of Maintenance Enforcement v Roesler*, 2022 SKQB 45**

Turcotte, 2022-02-11 (QB22044)

Statutes - Interpretation - *Enforcement of Maintenance Orders Act, 1997*
Statutes - Interpretation - *Indian Act*, Section 89

The applicant, the Director of Maintenance Enforcement, applied under s. 26 of *The Enforcement of Maintenance Orders Act, 1997* for judgment in default against the account debtor, Fond Du Lac Denesuline Nation. The applicant alleged that in accordance with ss. 17, 18 and 25 of the Act, the respondent was purportedly served by fax with a notice of seizure of account under s. 60(5)(d)(ii) specifying that the seizure included any funds payable by the account debtor to the respondent, J.R., who was obligated to pay child support for two children pursuant to a maintenance order. No payments were received from the account debtor, and it did not file a notice of dispute within 10 days as required by s. 25 of the Act. Accordingly, the applicant was entitled to judgment in default.
HELD: The application was dismissed. The court found that service of the seizure by fax was not valid. The account debtor was not a corporation within the meaning of s. 60(5)(d)(ii) of the Act, following *R v Big River First Nation*, 2019 SKCA 117. Even if it had been served properly, the notice would be ineffective in attaching the real or personal property of the account debtor or of J.R. unless the latter or his former spouse were “Indian” within the meaning of the *Indian Act*, following the interpretation given to s. 89(1) of that Act in *Bellegarde v Walker*, 1987 CanLII 4770.

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***University of Saskatchewan v Canadian Union of Public Employees, Local 1975*, 2022 SKQB 49**

Scherman, 2022-02-18 (QB22047)

Labour Law - Arbitration - Judicial Review

The applicant, the University of Saskatchewan, applied for judicial review of the decision of an arbitrator to allow a grievance brought by the respondent union, CUPE, on behalf of one of its members, an employee of the applicant (see: 2020 CanLII 108773). The grievance involved the theft of 10 cleaning rags owned by the applicant by the employee, a cleaner. The rags were worth $5.00. The applicant terminated the employee. After the matter was grieved by the respondent, it was heard by an arbitrator. In his decision, the arbitrator found that there was justifiable cause for discipline of the employee but the penalty of dismissal was inappropriate in the circumstances. He substituted a six-month suspension and ordered that it would remain on the employee’s record indefinitely. The applicant sought to have the decision quashed on the grounds that the arbitrator’s decision was unreasonable because it was internally inconsistent. The applicant had described the employee as being evasive and unremorseful when confronted with the theft. The arbitrator’s finding of fact was that employee had not been either evasive or unremorseful and was able to be a trustworthy employee in the future. The decision was not justifiable in relation to the applicable legal and factual context, in that the arbitrator

failed to consider relevant and probative evidence and apply relevant jurisprudence relating to the importance of trust in employment relationships. He placed unwarranted emphasis on the value of the stolen property, failed to consider the gravity of the misconduct and unreasonably interfered with the discipline imposed. The applicant requested that as part of the judicial review, the court should consider the notes taken by a member of its team during the grievance hearing. It asserted that the notes of what evidence was heard at the hearing was necessary for the court to assess its argument that the arbitrator's decision was unreasonable. The arbitrator filed the record of the proceedings that included all the exhibits, his notes taken at the hearing, and a summary of the evidence he wrote following the hearing and while he prepared his decision.

HELD: The application was dismissed. The arbitrator's decision was upheld as transparent, intelligible, and justifiable, and it fell within a range of possible acceptable outcomes. The court determined preliminarily that it would not consider the applicant's team member's affidavit and notes taken at the hearing. Materials or evidence extraneous to the record should not be permitted except where it is necessary, and the proposed materials did not qualify for that exception. It was not necessary to know what evidence was or was not heard by the arbitrator. It added nothing to the actual record. The standard of review was reasonableness. The court went on to find that arbitrator's decision was reasonable because he made no palpable and overriding errors in respect of his findings of fact regarding the employee's conduct, nor was his decision unreasonable because of his finding that the conduct did not justify termination. Under s. 6-49(4) of *The Saskatchewan Employment Act*, the arbitrator was entitled to substitute the penalty he did. The decision was justifiable as well. It rejected the applicant's submission that the arbitrator failed to properly consider and apply relevant jurisprudence relating to the issue of trust in employment relationships. The arbitrator's decision indicated that he had done so and then canvassed factors such as types of disciplinary measures, the value of the property, and the employee's length of service and clear discipline records.

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***BTA Real Estate Group Inc. v Kaiss*, 2022 SKQB 50**

Mitchell, 2022-02-18 (QB22048)

Civil Procedure - *Queen's Bench Rules*, Rule 4-10, Rule 7-9, Rule 10-4(2)
Statutes - Interpretation - *Queen's Bench Act*, Section 42(1.2)(a)

The defendant brought an application pursuant to Queen's Bench rule 3-72 for leave to file an amended statement of defence and amended counterclaim. The plaintiff brought its own applications for orders: that its application be heard in advance of mediation pursuant to s. 42(1.2)(a) of *The Queen's Bench Act, 1998*; and striking out specified paragraphs in the defendant's amended statement of defence as well as the entirety of the defendant's amended counterclaim, both pursuant to Queen's Bench rule 7-9. It also sought an order waiving Queen's Bench rule 10-4(2) and that the defendant pay it costs on a solicitor-client basis. The plaintiff had instituted receivership proceedings against a business, Family Fitness Inc. (FFI), pursuant to contractual remedies available to it under a lease between the parties. The court approved the sale and vesting order of FFI in February 2021. At that time, the plaintiff

commenced an action against the defendant seeking to enforce an indemnity agreement between it and him, executed in 2013. The defendant was a shareholder in FFI. The plaintiff claimed for the balance of FFI's indebtedness remaining after the sale of FFI from the receiver. The defendant countered the claim by asserting that because the plaintiff pursued its contractual remedies in the receivership proceedings in a commercially unreasonable manner and breached its duty of good faith, it implicitly repudiated the indemnity proceedings. In his counterclaim, the defendant alleged that the plaintiff had defamed him in a letter it distributed to the membership of FFI in March 2021, and by making false, derogatory and demeaning statements about him to FFI's former clients. The issues were whether: 1) the plaintiff's application to strike the defendant's amended statement of defence and amended counterclaim under Queen's bench rule 7-9(2)(b) and (e) could be heard prior to mandatory mediation; 2) paragraphs in the statement of defence should be struck. The plaintiff said that the impugned portions amounted to a collateral attack upon the receivership proceedings that led to the court's order that had not been appealed; 3) the defendant's amended counterclaim should be struck. The plaintiff submitted that the statements it made in the letter were true, thus providing a complete defence. The defendant's allegation that he had been slandered was devoid of particulars and should be struck on that basis alone; 3) Queen's Bench rule 10-4(2) should be waived. Such an order would permit the plaintiff to prepare the order granted by the court; and 4) the defendant should pay solicitor client-costs. The plaintiff argued that the defendant's lawyer filed the amended statement of claim and amended counterclaim knowing that such pleadings amounted to an abuse of process.
HELD: The plaintiff's applications were allowed in part. The court struck the specified portions of the defendant's amended statement of defence and his amended counterclaim. The application to order solicitor-client costs was dismissed, but enhanced costs were awarded to the plaintiff. Its application for the requirements of Queen's Bench rule 10-4(2) to be waived was dismissed. The plaintiff was granted leave to file an amended counterclaim. The court found with respect to each issue that: 1) the application could be heard prior to mandatory mediation as it was not a "further step in the proceeding." Such an application raises a threshold question respecting the propriety of the action itself. Consequently, s. 42(1.2) of the Act was not relevant in the circumstances and the plaintiff was not required to apply for an exemption from the mediation process; 2) the paragraphs were struck. It was not open to the defendant to claim that the plaintiff's actions were unreasonable and in bad faith after the proceedings were endorsed by court order and the defendant had not appealed the decision; 3) the amended counterclaim should be struck because of the deficiencies in the pleadings, but it was not clear that these amounted to abuse of process. The defendant was given leave to amend the counterclaim so that the pleadings conformed to the requirements set out in *Hope v Gourlay*, 2015 SKCA 27 and *Catalyst Capital Group Inc. v Veritas Investment Research Corp.*, 2017 ONCA 85; 3) it would not grant the order. The plaintiff had not provided any reason to support this request; and 4) it was not an appropriate case in which to order solicitor-client costs. It was not clear that the defendant's allegations in his amended statement of defence amounted to allegations of fraud by the plaintiff. However, the plaintiff was awarded enhanced costs of $1,500, as its motion was argued by two lawyers and they had filed extensive and comprehensive materials.

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***Burton v Kingsley Conservation and Development Area Authority*, 2022 SKQB 51**

Kilback, 2022-02-22 (QB22049)

Statutes - Interpretation - *Conservation and Development Act*, Section 73
Administrative Law - Conservation and Development Area Authority - Judicial Review

The applicant, an owner of lands located within the jurisdiction of the Kingsley Conservation and Development Area Authority (authority) and the Rural Municipality of Kingsley (RM), brought an application in which he applied to the court for various kinds of judicial relief against the authority (as represented by its appointed trustee), the RM, and an individual who was employed as the authority's secretary treasurer. The applicant had earlier objected to the authority's 2013 resolution to impose a new levy and its subsequent amendment of the assessment roll on landowners within its jurisdictional area that was used each year from 2014 to 2017. The applicant's appeals regarding the levy to the authority and then to the Saskatchewan Municipal Board (SMB) in 2016 were unsuccessful, leading him and other landowners to ask the SMB to present a stated case to the Court of Appeal pursuant to s. 77 of *The Conservation and Development Act*. The court's decision (*Trithardt*) on the stated case was that the authority's assessment roll was not determined in accordance with the Act. It directed the SMB to direct the authority to amend the assessment roll for 2016 in accordance with the opinion of the court (see: 2019 SKCA 42). A number of developments prevented the implementation of the court's 2019 decision and the direction of the SMB. The Minister responsible for the authority appointed the Moose Mountain Pipestone Creek Watershed Association as official Trustee (trustee) for it under s. 89 of the Act. The trustee then implemented the SMB direction in relation to the 2016 assessments to reflect the court's decision. In 2020, the applicant asked the trustee to reassess 2013, 2014 and 2015 (appeal period years) on the same basis. The trustee then passed resolutions: "that levy rebates be made to landowners for 2013, 2014 and 2015 on the same basis as was ordered by the Saskatchewan Court of Appeal and the Saskatchewan Municipal Board for 2016; and, that these rebates be paid out 50% in May, 2020 and 50% by the end of October, 2020" and "we settle the outstanding assessment appeals from 2017 and the 2017 levy adjustment required in light of the Court of Appeal and the Saskatchewan Municipal Board decisions for 2016, by having a zero levy on all lands in 2019 and 2020." The trustee passed another resolution shortly thereafter in which it deferred a final decision on possible adjustments to the assessment and tax rolls for the appeal period years to a later date out of concern for its financial ability to pay the rebates. It decided later to pay out the rebates over time, starting in 2020, and passed another resolution that stated: "that levy rebates be made to landowners for 2013, 2014, 2015 and 2017 assessment and levy errors, which amount to $99,812 in total, be corrected by rebating taxes to the affected land owners on the same basis as the Court of Appeal and SMB ordered rebates for 2016, beginning with a payment in 2020 of $39,000." The applicant sought judicial review of the last resolution and applied for an order in the nature of *mandamus* compelling it to amend the assessment rolls and to issue the rebates in full immediately. He also claimed different ancillary orders that included awarding him damages for the costs he incurred as an appellant in *Trithardt*. Because the applicant had disagreed with the levies imposed by the authority during the appeal period years, he did not pay taxes imposed by the RM in connection with those levies, and as a result, penalties and interest accrued on the unpaid taxes. He applied for an order of mandamus compelling the RM to provide new tax notices and to reimburse any penalties to landowners who refused to pay their taxes.
HELD: The applications for judicial review and for orders of *mandamus* were dismissed. The court determined that the standard of review applicable to the trustee's decision was reasonableness. It concluded that the resolution was reasonable and justifiable, and fell within the range of possible acceptable outcomes. The trustee was empowered by s. 73 of the Act to alter or cancel tax in its discretion as well as cancel or refund only part of the tax paid. Although it was unnecessary to deal with the application for

mandamus, the court reviewed the issue regardless, and found that the applicant had not met the requirements. It found that the trustee did not owe a legal duty to him to amend assessment rolls and to issue rebates in full immediately: i) pursuant to the Act. The trustee's decision to correct the assessment was discretionary under s. 73 and *mandamus* in not available in such a case; ii) pursuant to *Trithardt*. The Court of Appeal decision in the stated case related only to the 2016 assessment roll pursuant to s. 77 of the Act, and it did not order the authority to do anything; and iii) pursuant to the SMB direction, as it pertained only to the 2016 assessment roll. With respect to the other application for an order for mandamus against the RM, it found that the applicant had not met the requirements. As he had been unsuccessful against the trustee to have the assessment rolls amended, the RM was not required under s. 82 of the Act to enter the new information on its tax roll. There was no duty on the RM to reimburse penalties in connection with the levies either because the applicant had not established that the assessments made by the authority for the appeal period years were unlawful, and penalties on unpaid taxes accrue automatically under ss. 279 to 282 of *The Municipalities Act*. The court also found that the applicant should not have sought damages to compensate him for the appeal, as the Court of Appeal had expressly declined to make an award of costs.

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Mihalyko v Tanos Holdings Ltd., **2022 SKQB 54**

McMurtry, 2022-02-22 (QB22051)

Civil Procedure - *Queen's Bench Rules*, Rule 7-5

The defendant brought an application pursuant to Queen's Bench rule 7-5 to dismiss the plaintiff's action according to the terms of a settlement agreement reached with him through email communication. The self-represented plaintiff denied that a binding agreement had been made. He had commenced an action against the defendant for damages suffered after he slipped and fell on the defendant's premises. After mediation and oral questioning had occurred, the defendant's counsel wrote an email proposing a settlement to the lawyer then representing the plaintiff. The defendant offered $7,500 on the execution of settlement documentation. In his email response, counsel for the plaintiff said that following a telephone call in which all parties had participated, his client, the plaintiff, had accepted the offer, conditional upon receipt of minutes of settlement. The defendant's lawyer provided the executed settlement documents with a cheque. The plaintiff's lawyer then advised the defendant that his client claimed that due to his hearing problems, he had misheard the settlement amount on the telephone and refused the settlement. The lawyer then withdrew as counsel for the plaintiff.
HELD: The application was granted. The plaintiff's claim was dismissed pursuant to the terms of the settlement agreement. The court found that a settlement had been reached. The plaintiff's claim that he had misheard, whether true or not, did not make the agreement unenforceable. The plaintiff violated the agreement when he did not discontinue his claim.

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***R v McCallum*, 2022 SKPC 3**

Tomka, 2022-03-08 (PC22009)

Criminal Law - Impaired Driving - Refusal - Breath Demand
Charter of Rights - Section 7, Section 9, Section 12, Subsection 24(2)

The accused was charged that, being in care and control of a motor vehicle on a public highway, he did fail or refuse to provide a breath sample in an approved screening device (ASD). He mounted a *Charter* challenge before a judge of the Provincial Court (trial judge) to the admissibility of the evidence of the offence on the basis that the detaining peace officer who stopped him at roadside did not have articulable cause to do so, it resulted in an arbitrary detention contrary to s. 9 of the *Charter*, and following his arrest, he was overheld in police cells for no lawful reason in breach of his rights under ss. 7 and 9 of the *Charter*. The accused did not admit the facts which constituted the offence. The trial judge first reviewed the evidence to determine if the Crown had proven the offence beyond a reasonable doubt, then reviewed the evidence on the *Charter* voir dire. The evidence was called in a blended voir dire/trial. The detaining peace officer, Cst. Wallace, a member of the RCMP, was the only witness for the Crown, and the accused, M.C.M., took the stand on his own behalf in the *Charter* voir dire. The trial judge reviewed the evidence, which consisted of the testimony of Cst. Wallace and M.C.M. and a "WatchGuard" video, making the following findings of fact: Cst. Wallace was alerted to a "suspicious vehicle" travelling toward Cold River; he and a second officer in another police vehicle went in search of the vehicle and located it in a small campground parked "on a pathway used by vehicles in the campsite as a turnaround as there was only one entrance and exit to the campground;" Cst. Wallace engaged his emergency lights and parked behind the subject vehicle and walked to it, locating M.C.M. in the driver's seat with a female passenger in the front seat; Cst. Wallace initially detained M.C.M. to investigate the suspicious vehicle report, and to check his licence, registration and sobriety; Cst.Wallace smelled a strong odour of alcohol and cannabis coming from the vehicle; a box of beer was located within arm's reach of M.C.M; Cst. Wallace made a lawful demand on M.C.M. for a breath sample in the ASD; he had the ASD with him; M.C.M. was "asked" by Cst.Wallace to accompany him to the police vehicle to provide the breath sample; M.C.M. first shook his head, then when asked again to accompany him said "No;" Cst. Wallace explained to him that a refusal to provide an ASD sample "is the same charge as impaired driving" and then asked him, "Are you refusing to provide a sample?" Mr. McCallum responded, "Yes;" by these words M.C.M. "clearly and unequivocally refused to provide a sample" and was arrested, given his rights and warnings and booked into the detachment at 22:09 and released the next day at 10:40; no evidence was provided to explain why he was held in cells for this period of time; M.C.M. exercised his right to counsel, and was cooperative; he was unable to get to work after his release and was reprimanded by his employer.
HELD: The trial judge held that the Crown had proven all essential elements of the offence and found that M.C.M. had not proven on a balance of probabilities that the detention at roadside was arbitrary and amounted to a breach of his rights under s. 9 of the *Charter*. He did find that the overholding in police cells was arbitrary and was also an infringement of his right under s. 7 of the *Charter* not to be arbitrarily detained and to not be deprived of his right to life, liberty, and security of the person "except in accordance with the principles of fundamental justice." First, he reviewed the elements of the offence of refusing to provide a breath sample in light of the facts, listing these as being the making of a lawful breath demand, the refusal by the detainee to provide a

sample of breath pursuant to the demand, and the subjective intention to refuse to provide the sample. The trial judge recognized that the facts did not show a failure to provide a sample, which, had that been the case, would have given rise to a different analysis on the element of intention. Being satisfied that the Crown had proven the offence to the required standard, he turned to M.C.M.'s *Charter* motions, which he knew were to be proven on a balance of probabilities. As to the detention at roadside, M.C.M. had argued that the true motivation of Cst. Wallace in stopping his vehicle was to investigate nothing more than a "suspicion or hunch" that he might be doing something unlawful, and that a detention in such circumstances was arbitrary. The trial judge disagreed that the detention was made without lawful authority because the stop was made in an area defined by *The Traffic Safety Act* (TSA) as a "highway" and by s. 209.1(1) he had the statutory authority to detain the "suspicious vehicle" for the purpose he had testified to, namely, to check his driver's licence, and to "request information" about the consumption of alcohol or a drug. He referred to *R v Suteau*, 2019 SKCA 115 as authority for the principle that no reasonable suspicion of a crime or traffic safety infraction is required for a peace officer to detain a driver under s. 209.1 of the TSA. With respect to the overholding in cells, he said that without any explanation from the Crown as to the purpose for what appeared to be a long and unjustified detention contrary to the arrest provisions of s. 498(1.1) of the *Criminal Code*, the detention was arbitrary and in breach of M.C.M.'s right to life, liberty and security of the person. M.C.M. argued that overholding in cells could result in exclusion of evidence of the offence, in this case the refusal, whereas set out in s.24(2) it could be shown that the evidence was "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*." The trial judge was aware and referred to case law to the effect that the "in a manner" requirement could be satisfied "if the breach and the impugned [evidence] can be said to be part of the same transaction or course of conduct," and the "required connection between the breach and the [evidence] may be "temporal, contextual, causal or a combination of the three" (see: *R v Lichtenwald*, 2020 SKCA 70). In the case before him however, he declined to find such a connection between the evidence of the refusal and the overholding, such that the evidence was not excluded, though he did go on to conduct the analysis prescribed by *R v Grant*, [2009] 2 SCR 353 in the event he was wrong in his reasoning about his interpretation of the "in the manner" requirement of s. 24(2) of the *Charter*, concluding that to exclude the evidence of the refusal would be contrary to the administration of justice.

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***R v J.M.S.*, 2022 SKPC 11**

Schiefner, 2022-03-04 (PC22008)

Criminal Law - Sexual Assault - Young Person
Criminal Law - Evidence - Witness - Credibility

J.M.S., the accused, being 17 years of age at the time he was alleged to have committed the offence of sexual assault against the complainant, A.D., was a young person as defined by the Youth Criminal Justice Act. A.D. was also 17 at the time of the alleged offence. A trial was conducted before a judge of the Provincial Court (trial judge) who was required to make credibility findings from the conflicting evidence of J.M.S. and A.D. as to the nature of the sexual activity which occurred between them which formed the basis of the charge. The evidence also consisted of the testimony of "Logan" and "Isabella", who, though they were not present in

the bedroom where the sexual activity between J.M.S. and A.D. occurred, were able to observe tangential events of relevance to the trial judge's credibility analysis.

HELD: The trial judge convicted the young person of the offence as charged. J.M.S. defended the charge on the basis that the evidence raised a reasonable doubt that A.M. consented to the sexual activity or that it raised a reasonable doubt that J.M.S. knew or was wilfully blind as to whether A.M. was consenting. In his credibility analysis, the trial judge was guided by *R v Ewanchuk*, 1999 SCC 711 and *R v Barton*, 2019 SCC 33. He recognized that the element of consent in sexual assault cases has two aspects. It is an element of the *actus reus* of the offence, and it is also an element of the *mens rea*, the intention of the offender. He was aware that as part of the *actus reus*, in determining whether the Crown had proven the absence of consent on the part of the complainant, his analysis was to focus on whether A.M., in her own mind, was not consenting to the sexual activity. He was also cognizant that as an aspect of the mental element of the offence he was to focus on what was in the mind of J.M.S. and whether he was satisfied to the required criminal standard that J.M.S. knew A.M. was not consenting or was wilfully blind as to whether she was consenting. He also directed himself to the defence of "honest but mistaken belief in the consent," whether the evidence proved that circumstances were such that J.M.S. could have been honestly mistaken that A.M. was consenting, and how ss. 273.1(1) and (2) and 273.2 of the *Criminal Code* bar an accused from raising the defence where there is no evidence "that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct" or evidence that "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." In conducting his credibility analysis the trial judge found: that he had a doubt A.D. said "no" to J.M.S., though she testified she repeatedly said "no" in a loud voice, and he had this doubt because Logan and Isabella, who were in a separate bedroom in the same general area as the bedroom J.M.S. and A.D. were in were able to hear sounds coming from the room but did not hear A.D. yelling "no;" that both J.M.S. and A.D. gave compelling evidence about kissing in the bedroom, J.M.S. saying it happened and A.D. just as vehemently saying it did not; that A.D.'s testimony that she did not help J.M.S. remove her pants was "clear, cogent and compelling" and "consistent with someone whose personal integrity had been violated", but he could not find that A.D. resisted the removal of her pants by J.M.S.; that in giving her evidence A.D. was generally "open and transparent", not evasive, as suggested by defence counsel, and was able to explain any perceived omissions in her evidence which might appear evasive; that the trial judge had not doubt that A.D. in her own mind did not consent to the sexual activity; that because A.D. consented to kissing J.M.S. it did not follow that she was therefore consenting to sexual intercourse; as to the *mens rea* element of consent, the trial judge concluded that he did not have a reasonable doubt that A.D. was not consenting because no evidence had been presented showing that J.M.S. had taken reasonable steps to ascertain whether A.D. was consenting as he was required to do by s.273.2(b) of the *Criminal Code* and neither was any evidence presented that A.D. "affirmatively expressed by words or actively expressed by conduct" was consenting, but on the contrary he had taken no steps at all to find out if she wanted to have sexual intercourse, and the conduct he relied as an active expression of consent to sexual intercourse such as previous kissing, his perception she was not resisting the removal of her pants, her moaning, and placing his hand on her side could not be evidence that she was consenting to sexual intercourse, since "there [was] a world of difference between kissing and sexual intercourse."

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