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

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Subject Index

***R v Thalheimer*, 2022 SKCA 25**

Ottenbreit Barrington-Foote Tholl, 2022-02-25 (CA22025)

Criminal Law - Dangerous Driving Causing Death - Conviction - Appeal
Criminal Law - Credibility and Reliability
Criminal Law - Misapprehension of Evidence - Appeal

C.T., the accused at a trial before a judge of the Court of Queen's Bench (trial judge), appealed his conviction for the offence of dangerous driving causing death (see: *R v Thalheimer*, 2019 SKQB 168). He appealed on a number of grounds, including that the trial judge erred in law in her application of the test for determining reasonable doubt when credibility of witness testimony was a key aspect of the trial: *R v D.W.*, [1991] 1 SCR 742 (*D.W.*), and did so in two ways: first, by framing the question of reasonable doubt as a credibility contest between the evidence of the accused and

Civil Procedure - Appeal - Application for Leave to Appeal

Civil Procedure - Class Action - Certification - Summary Judgment

Civil Procedure - Pleadings - Striking Out

Civil Procedure - Production of Documents

Civil Procedure - Service

Constitutional Law - *Charter of Rights*, Section 24 - Stay of Proceedings

Constitutional Law - *Charter of Rights*, Section 7

Constitutional Law - *Charter of Rights*, Section 7 - Late Disclosure

Criminal Law - Break and Enter and Discharge Firearm - Sentencing

Criminal Law - Credibility and Reliability

Criminal Law - Dangerous Driving Causing Death - Conviction - Appeal

Criminal Law - Defences - *Charte*r - Abuse of Process

Criminal Law - Disclosure - Lost Evidence

Criminal Law - Misapprehension of Evidence - Appeal

Criminal Law - Motor Vehicle Offences - Impaired Driving

that of the Crown, and secondly, by failing to take into account "key evidence from… [the appellant] or explain the basis on which she concluded he was not a reliable witness." The court summarized the evidence available to the trial judge in conducting the W.D. analysis: C.T. was the operator of a vacuum truck which he was driving on Melfort Street at a point where it crossed a railway track; his spouse was the only passenger in the truck; the truck operated by the appellant collided with a moving train and was dragged down the track for two-thirds of a kilometre, at which point it dislodged from the train, coming to rest near a slough; the appellant's spouse was killed and the accused seriously injured; the truck was extensively damaged; C.T. testified that Melfort Street was in poor condition from the graveyard, a point 1/8th of a mile before the railway crossing, with washboard, broken pavement, and potholes; the truck was not located until 15 hours after the collision; during that time, other traffic had passed over the area of the collision, which resulted in physical evidence being lost; no tire marks were present to allow for a speed analysis; two warning signs marked the railway crossing; a large area of "fuel debris" was found in the left lane at the point of the collision; the speed limit on the section of road before the crossing was 50 km/h; Sgt. E., the accident reconstruction expert witness, testified that in his opinion, the truck operated by C.T. was traveling at "127 km/h" just before the collision and that no brakes were applied until 2 seconds before the collision, which occurred at "93 km/h"; Sgt. E. testified that he based his determination of speed of travel primarily through the physical evidence, and looked to the data from the vehicle's event data recorder (EDR) to confirm his conclusions; the EDR collected data from sensors located in a number of systems of the vehicle, including the engine, throttle, seat belts and air bags; the air bag had not deployed; Sgt. E. testified that that was due to the angle of the collision, not speed; he also said he did not check the calibration of the sensors, which were not recalibrated following a transmission repair of the truck; C.T. testified that he travelled Melfort Street "30 times a year for 30 years" and was well aware of its poor condition, that it was his habit to cross the tracks in the left lane to avoid the washboard in the right lane, and that he drove at between 50 km/h and 70 km/h on the portion of the road from the graveyard; he swore he recalled "driving down the road like normal, going home, at normal speed;" that he did not see the train, or react to the train, but did recall that he did not apply his brakes, and that he knew he did not do so since that memory was "embedded in… [his] mind;" and C.T. was adamant he would not have traveled at 127 km/h as he had never done so in the past, and the condition of the road did not allow it. The court considered the trial judge's reasons, remarking that she first decided the vital question to be determined was the speed at which the appellant was driving at the time of the collision, concluding that to make that finding she must pay particular attention to the evidence of C.T. and Sgt. E. In reviewing her reasons, the court noted that the trial judge examined Sgt. E's evidence in detail, but did not refer to C.T.'s evidence about how he was driving before the collision, and that he always drove on that road in the same way, having done so 30 times a year for 30 years; that she found Sgt. E.'s evidence to be "objective and impartial;" that

Criminal Law - Procedure - Stay of Proceedings

Criminal Law - Saskatchewan Review Board - Unfit to Stand Trial - Appeal

Criminal Law - Sentencing - Reckless Discharge of a Firearm

Family Law - Custody and Access - Mobility Rights - Interim Application - Best Interests of the Child

Family Law - Family Violence - Effect on Parenting Orders

Family Law - Interim Order

Family Law - Joint Decision-Making Orders

Family Law - Parenting Orders

Family Law - Parenting Orders - *Children's Law Act, 2020*

Labour Law - Arbitrator's Decision

Labour Law - Collective Agreement - Interpretation

Medical Malpractice - Non-suit - Appeal

Professions and Occupations – Lawyers – Fees – Taxation

Small Claims - Collision - Deductible

Small Claims - Fraudulent Concealment

Torts - Negligence - Motor Vehicle Collision - *Highway Traffic Act*

she found that though C.T. honestly believed he was not driving at the speed testified to by Sgt. E., though his credibility was not at issue, the reliability of his evidence was; that in the face of the EDR data and physical evidence presented by Sgt. E., which she accepted without question, C.T.'s evidence did not raise a reasonable doubt; and that the 127 km/h speed of travel amounted, in the circumstances, to dangerous driving.
HELD: The appeal was allowed, and a new trial ordered. First, the court ruled that the trial judge did not substantively apply the test set out in *D.W.* as considered in *R v Dinardo*, 2008 SCC 24 and turned the trial into a credibility contest between the evidence of C.D. and Sgt. E. The court ruled that credibility encompassed reliability, so that the reliability of C.T.'s evidence in relation to the evidence as a whole was to be subjected to the D.W. analysis, which the trial judge failed to do because her reasons did not show she turned her mind to whether the evidence as a whole was sufficiently reliable to prove beyond a reasonable doubt that the speed at which C.T. was operating the truck was "far in excess of the speed limit". She did not deal with the reliability of the EDR or of the physical evidence in any meaningful way. In that, the court said, the trial judge made a fundamental error which amounted to a miscarriage of justice. Further, the court concluded that the trial judge misapprehended or failed to appreciate C.T.'s evidence in a number of respects: she made no mention of the significance of his habit of driving in the left lane when crossing the railway tracks, and the fuel debris found at the point of collision; she assumed that C.T. was merely speculating about how fast he was driving, ignoring that C.T. had said he had "a pretty conscious mind of what was going on the whole evening" and ignoring his evidence about his course of conduct over 30 years when driving Melfort Street, which the court was prepared to find was admissible and reliable, and so should have figured in the trial judge's D.W. analysis.

 Back to top

***Saskatchewan Hospital North Battleford v Isaac*, 2022 SKCA 26**

Richards Caldwell Whitmore, 2022-02-25 (CA22026)

Criminal Law - Saskatchewan Review Board - Unfit to Stand Trial - Appeal
Administrative Law - Standard of Review - Reasonableness - Appeal

Pursuant to s. 672.78(1)(a) of the *Criminal Code* (Code), the Saskatchewan Hospital North Battleford (SHNB) appealed the decision of the Saskatchewan Review Board (review board) dated November 18, 2021, ordering the transfer of S.I., who was under the jurisdiction of the review board since 2008, from the Regional Psychiatric Centre in Saskatoon (RPC) to the SHNB. Section 672.78(1)(a) of the Code provides that the court may set aside a "placement decision" of the review board where the court is of the opinion that the decision was "unreasonable or [could] not be supported by the

Cases by Name

Biletski, Re (Bankrupt)

Black Lake Denesuline First Nation Treaty #8 Benefits Board of Trustees v Robillard

Federated Co-operatives Limited v Ajit Transport Inc.

Hander v Kumar

Heimlick v Longley

Hoedel v WestJet Airline Ltd.

Irwin v Paul

Koroluk v Anderson

R v Cathcart

R v Jobb

R v Olynik

R v Thalheimer

R.H. v R.S.

R.R. v M.K.

Rahimi v Banyi

Saskatchewan Hospital North Battleford v Isaac

Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic

Vo v Phillips Legal Professional Corporation

evidence." SHNB appealed on the grounds that the review board acted unreasonably: by not paying adequate attention to S.I.'s record of violence; by misinterpreting evidence from RPC that S.I. had "not engaged in assaultive behaviour in five months;" by not explaining how S.I.'s detention would be less restrictive at SHNB; and by not obtaining further information about when SHNB would "have the capacity to deal with [S.I.]" in fulfillment of its "inquisitorial function." The court reviewed the evidence tendered at the hearing. S.I. was born in 1991. He was charged with violent offences, including an attack on his mother with a saw and an axe in 2008, and declared unfit to stand trial, at which time he became a charge of the government under the jurisdiction of the review board. He was assessed by medical professionals as having the cognitive ability of a child, though an adult; brain abnormalities; frontal epilepsy; antisocial personality disorder; intermittent explosive disorder; and morbid obesity. His history revealed persistent assaultive behaviour towards staff and other persons which consisted of many forms of aggression including punching, kicking, biting, spitting, damaging property, charging at people, and threats to do harm. His behaviour was described as being unpredictable and dangerous. Numerous review board hearings were held to determine placements for him when he became too difficult to deal with in one or another of the facilities where he was housed, which included group homes, SHNB and RPC, which the review board determined to be the only two options for him in June 2019. The review board ordered him to be moved from SHNB to RPC "until his behaviour stabilized" because the RPC was a more secure facility. There he remained, during which time he became more "predatory and calculated in his actions," until approximately 5 months before the review board hearing, which was the subject of the appeal, when, due to "basic therapeutic interventions" geared to his intellectual level, only two incidents were reported: climbing on a table and then charging staff, and laying on the ground in the courtyard, then running at staff. The psychiatrist, psychologist and clinical staff at the RPC were of the view that this therapeutic system was easily transferrable to other facilities, including the SHNB, and if put in place would significantly reduce the need for security staff. The evidence also included a written submission and testimony from a community intervention worker who stated that, though Community Living Service Delivery (CLSD) did not have the resources to assist S.I. in the community "due to the intensity and severity of… [his] aggressive behaviours," its workers could assist him in the less restricted environment of SHNB. The review board agreed with RPC that moving S.I. to SHNB was the most effective way for it to fulfill its mandate as required by s. 672.54 of the Code to make a disposition "taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." The court observed that the reasons of the review board demonstrated that it had carefully reviewed all the "opinions, information and representations provided by the various staff and representatives of RPC and SHNB" and in making its decision gave effect to the principles it was to apply, namely that S.I. should be placed in the least restrictive environment consistent with

maintaining the safety of the public, S.I.'s reintegration into society and fulfilling his needs.
HELD: The appeal was dismissed because the court was of the view that SHNB had failed to satisfy it that the decision of the review board was "unreasonable" as that term was explicated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), finding that "a reasonableness review is concerned both with the internal coherence of the reasoning for a decision and with whether the decision is justified in light of the legal and factual constraints that bear on it." The court then went on to review the decision of the review board in accordance with the four allegations of unreasonableness made by the SHNB. First, it did not agree that the review board did not consider S.I.'s record of violence, commenting that it had dealt with S.I. since 2008, and that it had expressly referred to the reports of the medical experts concerning his violent behaviour. Secondly, the court held that in accepting RPC's evidence that S.I. "has not engaged in any assaultive behavior in the previous five months" the review board had not ignored the assaultive nature of the two incidents, but had used the phrase "no assaultive behaviour" in the sense that no physical force had been applied to anyone by S.I. Thirdly, the court dismissed SHNB's argument that the review board failed to provide any explanation for its view that the move to SHNB would result in fewer restrictions to S.I.'s liberty. It answered this ground of complaint on the basis that it was common ground at the hearing that RPC was a penitentiary facility and SHNB a mental hospital, each performing different functions with different levels of security. Lastly, the court stated that the review board could have adjourned to obtain information about when SHNB would have the resources in place to effectively continue the therapeutic plan put in place at the RPC, but not having done so did not render the decision unreasonable since, on the whole, the decision of the review board "bears the hallmarks of reasonableness: justification, transparency and intelligibility."

 Back to top

***Hoedel v WestJet Airline Ltd.*, 2022 SKCA 27**

Barrington-Foote, 2022-02-28 (CA22027)

Civil Procedure - Appeal - Application for Leave to Appeal
Civil Procedure - Class Action - Certification - Summary Judgment

The applicant, L.H., a plaintiff in an action against WestJet Airline Ltd. and associated companies (WestJet) and against Air Canada and associated companies (Air Canada) applied for leave to appeal to a judge of the Court of Appeal (chambers judge) the preliminary decision of a judge of the Court of Queen's Bench (case management judge) on a number of grounds, including that she erred in ordering the action proceed to a summary judgment hearing at the request of WestJet and Air Canada to dismiss the claim in advance of the application to have the action proceed as a class action pursuant to The Class Actions Act (CAA). The cause of action advanced by the plaintiff was that in 2014 WestJet and Air Canada colluded when they introduced fees of $25.00 per first checked bag at approximately the same time. The chambers judge reviewed the decision of the case management judge in

accordance with the test specified in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 for determining whether leave to appeal was to be "granted or withheld," recognizing that the test had two branches: first, whether the proposed appeal had "sufficient merit to warrant the attention of the Court of Appeal," and secondly, should the applicant satisfy this first branch, whether the proposed appeal was of "sufficient importance" for the Court of Appeal to hear it.
HELD: The application for leave to appeal was allowed. In determining the question of merit, the chambers judge considered the standard of review of a discretionary decision, and whether the deference owed to the case management judge in ordering the summary judgment application be heard ahead of the class action certification hearing was supportable given that "[d]iscretionary decisions must be based on the evidence and fall within the boundaries established by the law:" *Rimmer v Adshead*, 2002 SKCA 12 and *Kot v Kot*, 2021 SKCA 4. The chambers judge reviewed the case law cited by WestJet and Air Canada in support of their position that the proposed appeal lacked merit because the case management judge provided adequate reasons for exercising her discretion to have the summary judgment application heard before the certification hearing, including that she was satisfied "she had a sufficient understanding of the nature and particulars of the proposed class action" and "sufficient evidence … to determine the issues raised by the applications" to fully consider the summary judgment application, and that to hear it before the certification application was in the best interests of the efficiency of the administration of justice. The chambers judge asked how the case management judge could know she had sufficient evidence before conducting the hearing unless she had already decided the matter. He also disagreed with WestJet and Air Canada that because the case law did not create a "bright line rule" against hearing the summary judgment application before the certification hearing, the case management judge's discretion in ordering it could not amount to a reviewable error. He stated that it was open to the applicant to argue on appeal that the case management judge erred in principle by not fully considering the unique nature of a proposed class action certification hearing, which proceeds on the significantly less onerous proof requirement of "some basis in fact" whereas a summary judgment hearing proceeds on "factual and evidentiary grounds," and further, to force the applicant to proceed to a summary judgment hearing without cross-examinations and document disclosure would place him, and the potential plaintiffs in the class action, at an unfair disadvantage at the summary judgment hearing. Having considered the test of the merit of the proposed appeal, the chambers judge then turned to the sufficient importance requirement to obtain leave to appeal, concluding that the question of the relation between summary judgments and class action certification hearings in a "sequencing application" before a case management judge raised a question of law of sufficient importance to the practice of class actions to be allowed to be heard before the Court of Appeal.

 Back to top

***Black Lake Denesuline First Nation Treaty #8 Benefits Board of Trustees v Robillard*, 2022 SKCA 29**

Schwann Leurer Kalmakoff, 2022-03-09 (CA22029)

Aboriginal Peoples - Jurisdiction of the Courts

The appellants, the Treaty #8 Benefits Board of Trustees and individual members of the same (trustees), appealed a lower court decision that directed the matters underlying the dispute would be determined by the Court of Queen's Bench and not the Federal Court. A trust was established pursuant to a settlement between the Black Lake Denesuline First Nation (BLDFN) and the Government of Canada. The trustees manage the trust. The respondents, residents of the BLDFN, disputed how the trustees were

operating the trust. The trustees brought an application at the Court of Queen's Bench seeking to dismiss the respondents' application for being out of jurisdiction. The chambers judge found in favour of the respondents that the dispute should be litigated in the Court of Queen's Bench. The issue for determination before the court was whether the chambers judge erred and whether the underlying application should be heard in Federal Court as opposed to the Court of Queen's Bench. A secondary issue was whether the chambers judged erred in granting costs to Respondents on behalf of the BLDFN.
HELD: The appeal was dismissed, except for the award of costs to the BLDFN, which was set aside. The court considered whether the trustees were a federal board as defined by s. 2 of the *Federal Court Act*. The chambers judge correctly applied a two-step test from *Oceanex Inc. v Canada (Transport)*, 2019 FCA 250 to determine whether the trustees were a federal board. The two-step analysis required the chambers judge to first "identify the jurisdiction or power at issue" and then "identify the source or the origin" of the power in issue. The court agreed with the chambers judge that the trustees are not a federal board because neither its jurisdiction nor its power is conferred by or under an Act of Parliament. The chambers judge did err when he granted the respondents costs, as they were not acting on behalf of BLDFN but were simply residents of the same.

 Back to top

***Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2022 SKCA 30**

Richards Caldwell Barrington-Foote, 2022-03-09 (CA22030)

Administrative Law - Appeal - Arbitration
Labour Law - Arbitrator's Decision
Labour Law - Collective Agreement - Interpretation

The Saskatchewan Polytechnic Faculty Association (SPFA), the appellant, filed an appeal of a lower court decision which had dismissed a grievance filed by it on behalf of two employees against the respondent, Saskatchewan Polytechnic (SP). SPFA had sought a finding on judicial review before the lower court that an arbitrator's decision was unreasonable when he ruled in favour of SP that two employees who had been reassigned, pursuant to the terms of a collective bargaining agreement, did not have the right to seek severance pay upon resignation. The issue before the court was whether the arbitrator's decision had been reasonable considering the collective bargaining agreement existing between the appellant and respondent. The collective bargaining agreement had contemplated specifically at article 7.6.1.(c) that a reassigned employee was entitled to resign and receive severance pay.
HELD: The appeal was allowed and the chambers judge's decision set aside. The chambers judge erred in his assessment of the arbitrator's decision. The arbitrator's mistake was that he accepted SP's position that any new assignment of an employee obviated the options laid out in article 7.6.1(c). Following the logic of the arbitrator, if SP found adequate positions for employees represented by SPFA, those new assignments removed the employees from consideration of receiving severance pay if they resigned. This logic was flawed as it would mean any new assignment would replace a reassignment as contemplated by article 7.6.1(c).

 Back to top

***Hander v Kumar*, 2022 SKCA 33**

Kalmakoff Barrington-Foote Tholl, 2022-03-10 (CA22033)

Medical Malpractice - Non-suit - Appeal

The litigation guardian of a deceased plaintiff, S.H., appealed the decision of a judge of the Court of Queen's Bench (trial judge) on two grounds, one of which was that the trial judge made an error in law in allowing a non-suit application brought by the defendant neurosurgeon, A.K. *(Hander v Kuma*r (11 March 2021) Regina, QBG 1724 of 2017 (Sask QB)). The court dealt solely with this ground of appeal. The court reviewed the evidence heard at trial relevant to the non-suit. The deceased plaintiff, H.D., an elderly man who suffered from ankylosing spondylitis, a form of arthritis in the joints of the spine, fell and struck his neck on the edge of his bathtub. He first attended on his family physician, who ordered x-rays of his cervical spine and chest. The x-rays did not show any fractures. Eight days later, he again saw his family physician at the hospital, complaining of neck pain, weakness in his upper extremities, and numbness in his fingers. A CT scan was conducted the same day. A.K. was the on-call neurosurgeon. He reviewed the images of the CT scan, observing no fractures of the cervical spine. He learned H.D.'s presenting history and that he suffered from ankylosing spondylitis. He had no further dealings with H.D. Later the same day, H.D.'s symptoms had worsened, and he returned to the hospital, where another neurosurgeon attended on H.D. and examined the CT scan. He identified a fracture of H.D.'s cervical spine and suspected an epidural hematoma of the spine at the injury site. He ordered an MRI, which confirmed a "large dorsal hematoma" at the fracture sight that had damaged his spinal cord. In spite of surgical intervention, H.D. was rendered a quadriplegic, in which state he remained until his death. Expert opinion testimony was called "regarding the clinical significance of various aspects of the presentation of spinal injuries, and proper treatment of same." A.K. applied for a non-suit under Rule 9-26 of *The Queen's Bench Rules* after the close of the plaintiff's case. The court reviewed the trial judge's decision to grant the non-suit, noting that he "[was] required…[to] draw reasonable inferences from the facts to determine whether, if a jury were present, the jury would be in a position to make a decision based on the evidence before them" and "the test for a non-suit is whether there is sufficient evidence to satisfy the Court" on each element of one of the causes of action: negligence or breach of contract.
HELD: The appeal was allowed, and a new trial was ordered. The court stated that the trial judge failed to apply the correct test for determining whether to grant the non-suit, a fundamental error, and should not have granted it. He stated the trial judge's reasoning process was faulty, that he allowed the non-suit because he was not satisfied that the plaintiff had presented sufficient evidence from which he could draw reasonable inferences from the facts with respect to each of the elements of negligence or breach of contract, instead of asking himself whether the plaintiff had "led sufficient evidence, which if left uncontradicted, could satisfy a properly instructed and reasonable trier of fact that the case has been made out on a balance of probabilities." The court commented that the trial judge had wrongly embarked on a weighing of the plaintiff's evidence and ruled "upon the ultimate weight or believability of the evidence" instead of determining whether there was sufficient evidence on each of the elements of one of the causes of action that "could" allow a properly instructed and reasonable trier of fact to find that the case had been made out, and that the believability of the evidence, or an alternate interpretation of the evidence, should not have entered into his reasoning. The court conducted the correct analysis of each of the elements of negligence at issue in the trial, finding that there was sufficient evidence on each to allow a trier of fact to find the plaintiff had proved her case, if the evidence were not contradicted. With respect to the element of standard of care, the court pointed to the evidence of the expert witness, who testified that a neurosurgeon in the position of A.K., knowing the presentation history of H.D., his age, the nature of the fall, the increasing severity of his symptoms in a short time, and his ankylosing spondylitis, should have taken steps such as an MRI to rule out an epidural hematoma as the cause of his ailment, and his not having done so could be sufficient evidence of a breach of his standard of care towards H.D.

Back to top

***R.R. v M.K.*, 2022 SKQB 33**

Megaw, 2022-02-02 (QB22039)

Family Law - Parenting Orders
Family Law - Joint Decision-Making Orders
Family Law - Family Violence - Effect on Parenting Orders

This matter was a full trial before a judge of the Court of Queen's Bench (trial judge) resulting in a determination, among others, that "now is not the time to impose a shared parenting regime." Though the trial judge was required to make credibility findings with respect to material facts concerning the petitioner father's family violence, he was able to extract from the evidence adduced by both parties the background narrative of the dispute at issue. The respondent mother and the father met in March 2019 and had a "whirlwind romance." Within a few months, the mother became pregnant. The child of the relationship was two years of age at the time of the trial. The mother and father never cohabitated. The child lived with the mother while the father was cohabitating with his first wife from whom he had divorced. The father was convicted after trial of an assault on the mother on April 6, 2020 which caused her to be "significantly traumatized and injured." As a result, the father participated in court-ordered and voluntary counselling to help him deal with his violent and controlling tendencies. The court also imposed on him a no-contact clause with the mother which was to expire in March 2022. The father admitted to this one act of violence towards the mother, denying any others, whereas the mother alleged several other violent incidents at his hands including "a particularly disconcerting sexual incident." He also denied being controlling of the mother, though it was uncontested that on one occasion he attended at the mother's residence and took photographs of her personal journal. The father also claimed the mother was restricting his parenting time. He had brought two previous court applications to increase his parenting time, which contemplated his parenting for a few hours a week and no overnight parenting. The child suffered from serious allergies which were controlled by medication and a strict routine. The mother made all health care decisions for the child, and alleged the father was second-guessing these decisions to the point that he was not following the instructions given her by the pediatrician. It was uncontested that the father brought the child to another doctor while parenting her and without informing the mother.
HELD: The trial judge reviewed the evidence presented at trial and found as fact that the father had committed other acts of violence toward the mother, including the incident of violence of a sexual nature. He also found that he had also engaged in controlling behaviour towards her and did not follow the medical regime put in place by the pediatrician to manage the child's allergies. In making the credibility findings, the trial judge was guided in part by *H.L. v Z.L.*, 2018 NSFC 5 (*H.L.*) and the cases to which it referred. Of the factors listed in *H.L.*, the trial judge relied in particular on those which emphasized an examination of the internal and external inconsistencies in the testimony of the witnesses. He also looked for evidence corroborative of a witness's testimony, and emphasized that the mother's testimony was confirmed by "the totality of the evidence presented at trial." Of concern to the trial judge with respect to the credibility question was that before the mother testified in chief, the father was not cross-examined with respect to what she was to testify to, thus denying him an opportunity to address her evidence. He recognized that to proceed in this manner was contrary to the rule in *Browne v Dunn* (1893), 6 R 67 (QL) (UK HL) and that he must come to terms with its effect on her credibility, which he did by finding that her evidence in these areas was either corroborated, or was not central to his fundamental concern, being how the family violence against the mother figured into what parenting arrangement was in the best

interests of the child as he was directed to do by ss. 10(3)(j)(i)(ii), and 10(4)(a) to (h) of *The Children's Law Act* (CLA, 2020) . In dealing with the meaning of "best interests of the child", he turned to *A.O. v T.E.*, 2016 SKCA 148, and *Prime v Prime*, 2020 SKQB 326 which referenced the seminal case of *Young v Young*, [1993] 4 SCR 3 at 84. He recognized that he must determine "the impact of that violence on the best interests of the child which guides the crafting of such a parenting order" (see: *Juraville v Armstrong*, 2021 SKQB 73). He concluded that the family violence perpetrated by the father significantly and legitimately affected the mother's belief that she was unable to co-parent with the father, or to communicate with him in any constructive way to advance the child's best interests. The trial judge found further that the evidence did not raise a concern that the father was a risk to be violent towards the child. Nonetheless, the continuing trauma suffered by the mother and its effect on her ability to communicate with the father, he concluded, dictated that parenting could not be shared between the parties at this time and that it was in the child's best interests that the child should continue to live with the mother. Having made this baseline decision, he went on to consider the other factors listed in ss.10(3) of the CLA, 2020 to determine what type of parenting role the father should have in the child's life, and concluded his parenting should be increased and should include overnight parenting. He ordered further that the mother and father should communicate by electronic means about childcare. Lastly, with respect to parenting, the trial judge dealt with the question of joint decision-making as provided for by s. 3 of the CLA, 2020, and agreed that it would be in the child's best interests that the father be truly involved in her life by being a decision-maker with the mother on all matters except those concerning the child's healthcare and medical treatment.

 Back to top

***R v Cathcart*, 2022 SKQB 37 (not yet on CanLII)**

Currie, 2022-02-08 (QB22036)

Constitutional Law - Charter of Rights, Section 7
Criminal Law - Disclosure - Lost Evidence
Criminal Law - Defences - Charter - Abuse of Process
Criminal Law - Procedure - Stay of Proceedings

The trial judge conducted a Charter voir dire on the application of the accused, C.D.C. (applicant) and in doing so heard the full case for the Crown. C.D.C. stood charged with unlawful confinement of two persons (complainants) and attempting to rob them. He summarized the evidence: the complainants testified that C.D.C. was the operator of a motor vehicle (suspect vehicle) before it was stopped by police; two other accused forced the two female complainants into the back seat of the car, and sat on either side of them, blocking them in; they demanded money from them, threatened to kill them and struck them; they searched their persons; the applicant drove at high speed and was noticed doing so by an officer of the Saskatoon Police Service (SPS) operating a police vehicle who attempted a traffic stop, but C.D.C. attempted to evade the officer and a chase ensued; C.D.C. was able to momentarily hide from the officer by turning on a gravel road outside the city with his lights off; the officer called for backup; he soon relocated the vehicle; other police vehicles arrived; the complainants were able to exit the suspect vehicle; a high-risk takedown was conducted due to the attempt to flee, the allegation of kidnapping, and the risk that the occupants of the vehicle were violent or had weapons; each occupant was commanded to exit the vehicle in turn, during which the officers had their pistols drawn; C.D.C. exited

from the back seat; the police vehicles were equipped with in-car recording systems for both audio and video, though no audio was able to be recorded from outside the vehicle without body mics (ICCS mic), which were to be worn by the members on their person; of the several officers present when C.D.C. was taken down and arrested, only one was wearing an ICCS mic; C.D.C. claimed he was too intoxicated to be able to drive the suspect vehicle, and did not operate it; he claimed that audio from ICCS mics would have assisted him in proving his level of intoxication; he pointed to police policy which required officers on duty to "wear the ICCS microphone when on patrol"; the complainants were taken to SPS headquarters and placed in a room called a "service centre" in order to provide written statements of what happened; the service centre was equipped with security cameras which recorded video, but not audio; the video recording was destroyed after twelve days, as per policy; a number of officers were assigned to supervise the complainants while they were writing their statements and waiting in the service centre; the testimony of the officers was to the effect that the complainants were told not to discuss with each other what to write in their statements; the complainants were separated on opposite walls and 20 meters apart when writing their statements and did not talk to each other across the room; when they were together, they did not talk about what to put on their statements but about their emotional distress; the service centre cameras had no audio recording capability; C.D.C. claimed the deleted video recordings would have assisted him in his defence by allowing him to see whether the evidence of the officers guarding the complainants was credible on the question of whether their statements were fabricated.

HELD: The application was dismissed. The trial judge first considered the general law with respect to the loss or destruction of evidence, agreeing with the reasoning in *R v Anderson*, 2013 SKCA 92 (*Anderson*) and the cases cited therein, including *R v La*, [1997] 2 SCR 680, which stated that though the Crown, which includes police, has a duty to preserve evidence in its possession or control, evidence will be lost or destroyed on occasion for non-malicious reasons. Where evidence has been lost or destroyed, the Crown will be called upon to demonstrate that it took reasonable steps to preserve the evidence commensurate with the importance of the evidence to the case the accused is to meet. If the explanation leaves the reviewing judge unsatisfied that the Crown took the care it should have to preserve the evidence, a breach of the Crown's duty to disclose will result, though a breach of the disclosure obligation is not the same as a breach of the right to make full answer and defence under s. 11(d) of the Charter, nor is it an abuse of process under s. 7 of the Charter without more. For the breach of the duty to disclose to amount to a Charter breach, the applicant must demonstrate "actual prejudice to his or her right to make full answer and defence result[ing] from the infringement" (see: *R v Spackman*, 2012 ONCA 905, as cited in Anderson). The trial judge then applied these authorities to the evidence put before him. As to the proposition advanced by C.D.C. that the Crown's duty to ensure that SPS officers present at the takedown were equipped with ICCS mics, he accepted that the circumstances leading up to and including C.D.C.'s arrest were highly charged and "high-risk," and as such it was impractical for the officers to comply with the policy requiring them to wear the ICCS mics "when on patrol," and in any event, police policy does not amount to a statutory requirement. He reasoned further that the effect of C.D.C.'s argument that not wearing the microphones was an infringement of the Crown's disclosure obligations would amount to an expansion of an accused's right to disclosure of evidence in the possession or control of the Crown to include the requirement that the Crown create evidence which might suit the accused at trial. He remarked that the law did not recognize such a right. On this aspect of the application, he also ruled that no abuse of process was made out by the accused, because not wearing the microphones was not an extraordinary event, and other evidence existed which was relevant to the question of C.D.C.'s level of intoxication. Turning to the erasure of the service centre video recording, the trial judge remarked that it would not have been obvious to the officers that the service centre recordings would be relevant to assist the accused in his defence. He agreed that it was reasonable it would not have occurred to them to preserve this evidence. The recording was of limited use: it could not tell the court what the complainants said to each other. He said he was not persuaded that the recordings would have assisted C.D.C in his defence of collusion between the complainants, especially since the Crown would present many police witnesses to the effect

that no collusion had taken place between them, and the destroyed recordings would not be capable of countering this evidence.

 Back to top

***Vo v Phillips Legal Professional Corporation*, 2022 SKQB 41**

Tochor, 2022-02-08 (QB22052)

Civil Procedure - Production of Documents
Professions and Occupations - Lawyers - Fees - Taxation

M.P., a lawyer facing disciplinary proceedings, applied for a discretionary order releasing an audio recording from a legal costs assessment hearing. T.V., M.P.'s client, applied for an order to assess accounts rendered. M.P. was ordered to return money to T.V. by the local registrar, a decision upheld by both the Court of Queen's Bench and the Court of Appeal. One of M.P.'s disciplinary charges was that he had been untruthful at the assessment. In this context, M.P. sought the recording. The sole issue for the court's consideration was whether to grant an order releasing the audio recording.
HELD: The court dismissed M.P.'s application. M.P.'s application was unique in that he sought a recording that was not from a traditional court proceeding and he argued that the recording was vital to his defence in the disciplinary proceedings. The court dismissed these arguments: pursuant to Rule 9-34(2), there is no obligation to automatically provide a copy of a recording from any proceeding, and a hearing before the local registrar was found to be a proceeding. The court concluded that although findings made in the Court of Queen's Bench may be relied upon in disciplinary proceedings, they may not be determinative of professional misconduct. Further, M.P. did not suggest the certificate issued by the local registrar to be inaccurate or untruthful, and M.P. failed to demonstrate on an evidentiary basis why a transcript was necessary for his defence.

 Back to top

***R v Jobb*, 2022 SKQB 47**

Crooks, 2022-02-16 (QB22053)

Criminal Law - Motor Vehicle Offences - Impaired Driving
Constitutional Law - *Charter of Rights*, Section 7 - Late Disclosure
Constitutional Law - *Charter of Rights*, Section 24 - Stay of Proceedings

The Crown appealed the decision of a judge of the Provincial Court (trial judge) who entered a stay of proceedings for late disclosure by the Crown of cell block and in-car video. The appeal was taken before a summary offence appeal judge in the Court of Queen's Bench (appeal judge) as allowed by s. 813(b)(i) of the Criminal Code on the ground that in entering a stay of proceedings

on the information, the “trial judge erred at law.” The appeal judge fleshed out the ground of appeal by reference to the standard of review to be applied to a stay of proceedings as pronounced in R v Babos, 2014 SCC 16 (Babos), and applied in R v K.D.S., 2021 SKCA 84, recognizing that she was not to interfere in the discretionary decision of the trial judge to grant the stay unless the trial judge “… misdirect[ed] him[self] … in law, committ[ed] a reviewable error of fact, or render[ered] a decision that [was] "so clearly wrong as to amount to an injustice."” The appeal judge adopted the factual findings made by the trial judge. The material facts with respect to the stay application were: on December 21, 2019, the respondent, S.C.J., was charged with impaired driving and driving with a blood alcohol level over the legal limit; the charges resulted in a provincial driving suspension on that day; defence counsel requested full disclosure, including video evidence, of the case against his client in writing on December 24, 2019; a disclosure package was received by the Crown which did not include cell or in-car video; S.C.J. entered not guilty pleas on January 6, 2020; the trial was scheduled for March 6, 2020; Cst. L. was informed of the trial date on February 19, 2020; on February 20, 2020, defence counsel wrote to the Crown stating that he had not received any video disclosure; on February 27, 2020, the Crown emailed Cst. L. requesting for the first time that he provide “cell block video, in [car] camera video or interview room video (observation period)”; Cst. L. delivered the videos to the Crown on March 2, 2020; on the same day defence counsel filed a Charter notice claiming S.C.J.’s rights under s. 7 were violated due to the non-disclosure of the videos and seeking a stay of proceedings as a remedy; on March 3, 2020, the Crown mailed the videos to defence counsel; the videos did not arrive at his office until the morning of the trial, at which time he was en route to the court house to conduct the trial; he did not receive the videos; instead of proceeding to hear evidence in the trial, the trial judge held a Charter voir dire at which Cst. L. and S.C.J. testified; S.C.J. described the adverse effect of the driving suspension on his life, including “his inability to travel to Regina when his 13-year-old son had a serious health emergency;” Cst. L. testified as to his frustration about the inefficient system for obtaining video evidence from the “IT department” and for getting it into the Crown’s hands; he did however, take proactive steps in this case to obtain the videos, which remained on the police file from February 20, 2020; he stated he did not send them to the Crown on that day because “he was busy”; he said the Crown requested them for the first time on February 27, 2020 by email; Cst. L. also testified that he was off duty until March 1, 2020 and was not aware of the request from the Crown until that day; prior to this case, the trial judge had presided on a case, *R v Mattice* (15 March 2017) (Sask Prov Ct) (*Mattice*), where “unacceptably late” video evidence was provided to defence, and at which Cst. L. swore to similar problems as testified to in the voir dire; in *Mattice*, in *obiter*, the trial judge stated that “because of the late disclosure and its effect on trial fairness as I have found it, if it were necessary… I would be inclined to conclude that this was one of those rare cases where exclusion would be warranted based on the late disclosure.” The appeal judge then reviewed the trial judge’s decision, commenting that he had the leading authorities in mind when arriving at his decision, especially *Babos*, and was aware of the test set out in it and of the “main category” and “residual category” of offending conduct of the state which could result in a stay of proceedings. The appeal court noted that the trial judge was aware that the remedy of a stay of proceedings was an extraordinary remedy available only in the clearest of cases, and that he considered both categories in the context of late disclosure of documentary evidence central to *R v La*, [1997] 2 SCR 680. The appeal judge was also aware that the videos were not viewed as part of the voir dire to determine their importance to the defence in meeting the case.

HELD: The appeal was dismissed. The appeal judge ruled in effect that the trial judge used language which might suggest his decision was based on the “main category” of offending state conduct, which is concerned with the irredeemable effect of that conduct on S.C.J.’s right to a fair trial. The appeal court was cognizant that the trial judge considered, but rejected, adjourning the trial as a remedy, though the evidence was that the trial had been expedited and a second trial date was available within two weeks, and that he did not turn his mind to whether he should view the video evidence during the voir dire so as to ascertain its relevance to S.C.J.’s right to a fair trial. In effect, the appeal judge dismissed the appeal for the reason that the trial judge’s discretionary decision could be supported by his reasoning on the applicable evidence with respect to the “residual category;” that the offending state

conduct, illustrated by the "cavalier" and lackadaisical attitude of the Crown and police towards disclosure of the video evidence which was continuous and remained unresolved even in spite of the obiter comments of the trial judge in *Mattice*, left the trial judge with no other option but to enter a stay of proceedings in order to denounce the state misconduct and "preserv[e] the integrity of the justice system."

 Back to top

***R.H. v R.S.*, 2022 SKQB 52**

Zuk, 2022-02-22 (QB22050)

Family Law - Parenting Orders - *Children's Law Act, 2020*
Family Law - Custody and Access - Mobility Rights - Interim Application - Best Interests of the Child

This matter was an application to a judge of the Court of Queen's Bench (chambers judge) by the petitioner father, R.H., to order the return of a child (child) of his relationship with her mother, R.S., who had relocated her six hours away from her permanent home in Prince Albert to "ABC," Alberta without any notice to the petitioner. The chambers judge commented on the sparsity of the evidence from R.S. explaining the reasons for and the particulars of the relocation. He reviewed the available uncontroverted evidence and the court record and determined that: the child was born in 2009 and was 13 years of age at the time of the relocation; since the separation of R.H. and R.S. in 2015, pursuant to an interim order made June 2, 2015, R.S. had primary care of the child in a home in Prince Albert, and R.H. exercised weekend access totalling approximately 20% of the time; R.S. relocated the child on October 18, 2021, unilaterally and without notice to R.H.; she deposed that she relocated the child to Alberta because the child was being abused verbally and emotionally by R.S.'s "current spouse"; the child had grandparents and extended family in Prince Albert and Spiritwood, where the father lived, and she attended school in Prince Albert; R.S. did not work in Prince Albert before the relocation; she was taking courses online; she had a friend in ABC, Alberta, with whom she said she was living, and who she said would help her find work there; R.S. had no connection with ABC except that her friend lived there; she provided no evidence concerning the nature of the living accommodations in ABC; and though R.S. had at no time prior to the relocation indicated that the child had reservations about being with R.S., she now claimed such was the case, though the access time continued unchanged for six years.
HELD: The chambers judge allowed the application, ordering that R.S. return the child to Prince Albert within ten days of service of the order, and if she complied, she would continue to have primary care of the child; if, however, she chose not to return to Prince Albert, the child would be placed in R.H.'s "primary care and [R.S. would] have parenting time at all reasonable times upon reasonable notice or as may be jointly agreed between the parties." The chambers judge first oriented himself with respect to the statutory and judicial landscape he was required to have in mind in exercising his discretion to make the necessary rulings. He recognized that he was to be governed in the exercise of his discretion by the provisions of *The Children's Law Act, 2020* (CLA, 2020), in particular, s. 6(2) (Jurisdiction); s. 10 (Best interests of child); s. 13 (Notice of Intended Relocation); s. 15 (Best interests of child - additional factors to be considered); and s. 16 (Burden of proof for relocation). As to the case law, he referred to numerous authorities, and in particular to *Gordon v Goertz*, [1996] 2 SCR 27, concerning changing existing custody and access orders; *Mantyka v Dueck*, 2012 SKCA 109, concerning the policy objective of discouraging "a family law culture of "move first and ask

questions later"; and *K.F.L. v B.K.*, 2021 SKQB 229, which endorsed the reasoning in *Guenther v Guenther* (1999), 181 Sask R 83. The chambers judge noted that following the passing of CLA, 2020, courts should not vary the status quo on an interim basis except in compelling circumstances. After deciding that he would proceed on the basis that both parties bore the same burden of proof for or against the relocation as provided by s. 16(4) of the CLA, 2020, the chambers judge then went on to review the available evidence in light of the statutory and judicial framework with respect to relocation of the child. He concluded, first, that R.S. had failed to provide evidence sufficient to overcome the first threshold of the inquiry to allow the relocation, that is, evidence of a change in circumstances of the child since 2015. He went on nonetheless to analyze the remaining factors relevant to his inquiry. As to whether the move was in the child's best interests, he referred to the "non-exhaustive factors" enumerated in s. 10 of the CLA, and concluded that little evidence was available to make a determination on a number of the best interest factors, but he was in a position to decide that the child's "best interests were being met by the existing parenting order" and the available evidence showed that R.S.'s reasons for the relocation could not be justified. As to the abuse of the child by the "current spouse," R.S. failed to establish that the problem could not be solved by a move within Prince Albert. R.S. had not shown that the child's needs would be better met by the move, given the paucity of evidence about how the friend might assist R.S. with living arrangements and finding work. What is more, R.H. had shown during the previous six years that he was a capable parent, the distant relocation would seriously limit R.H.'s parenting time, and the long drives on Fridays would mean the child would miss school. Lastly, the chambers judge mentioned that due to previous court proceedings, R.S. was aware of the legal requirement to notify R.H. before the relocation.

Back to top

***Federated Co-operatives Limited v Ajit Transport Inc.*, 2022 SKQB 53**

Gerecke, 2022-02-22 (QB22054)

Civil Procedure - Pleadings - Striking Out

The plaintiff, Federated Co-Operatives Limited (FCL), applied to strike the statement of defence of the defendant, Ajit Transport Inc. (AT), by filing an appearance day notice pursuant to Rule 6-24. The parties had agreed to a consent court order for AT to file its affidavit of documents by a specified date. AT was 15 days late in providing the affidavit of documents. AT applied pursuant to Rule 13-7 to extend the time for service of its affidavit of documents. Both applications came before the court by agreement. The issues for the court to decide were whether it was fatal to FCL's application that it was brought under Rule 6-24 rather than regular chambers and whether the statement of defence should be struck.
HELD: The court held that while it was improper for FCL to file an appearance day notice, it was not fatal given how the proceedings had progressed. The court dismissed the application to strike the statement of defence. The court first determined the issue of whether the matter being filed as an appearance day notice precluded it from being determined. As the parties had agreed to adjourn the matter to the court in the manner they did, this was a non-issue. The consent order the parties had entered into did not explicitly list a consequence for the late provision of the affidavit of documents. This distinguished the matter from previous cases and the court declined to strike the statement of defence.

 Back to top

***Heimlick v Longley*, 2022 SKQB 55**

Turcotte, 2022-02-22 (QB22055)

Civil Procedure - Pleadings - Striking Out
Family Law - Interim Order

The petitioner, B.H., filed an application seeking several forms of relief in a family matter, including the variation of an interim order. She filed numerous affidavits of friends, family, and her own. The respondent, M.L., objected to the content of affidavits filed by B.H. and sought to have the application to vary the interim order struck. The issues for the court to consider were whether the contents of the affidavits filed by B.H. and whether the application to vary the interim order should be struck.
HELD: The court struck portions of the affidavit evidence but declined to strike the application to vary the interim order. The court determined that while it is not encouraged, it is possible to have an interim parenting order varied. The court ruled that portions of the affidavits filed by B.H. were inappropriate and struck the same pursuant to Rule 15-46. Portions struck included hearsay statements; where speculation, argument or opinion existed; those statements which were scandalous, and where statements were irrelevant.

 Back to top

***Koroluk v Anderson*, 2022 SKQB 61**

McMurtry, 2022-03-04 (QB22056)

Civil Procedure - Service

The plaintiff, R.K., sought an order to extend time for service of a statement of claim on four individual defendants and on the corporate defendant, Ernst & Young (EY). In the alternative, R.K. sought to validate service on the defendants because they obtained knowledge of his claim through other proceedings. In the further alternative, he sought an order permitting service by electronic means. The issue for the court to consider was whether to validate service since the individual defendants and EY had knowledge of the proceedings through another action.
HELD: Service was validated against the defendants. While service was clearly effected later than within the six months contemplated by Rule 3-10, the Court considered *Jahnke v Thomas*, 2017 SKQB 161, which set out several factors to assist in the Court in the consideration of whether it should exercise its discretion to validate service beyond six months. Included among those factors was whether the plaintiffs' claim has merit; whether refusing to set aside the order extending the time for service would

deprive the defendants of a limitation period defence; whether the delay would prejudice the defence due to factors such as fading memories or disappearance of witnesses, and importantly, whether the defendants should have been aware of the possibility that the plaintiffs had started an action and were seeking to serve them with a claim. The factors favoured the plaintiff's application.

 Back to top

***Biletski, Re (Bankrupt)*, 2022 SKQB 62**

Thompson, 2022-03-08 (QB22057)

Bankruptcy and Insolvency - Death of Bankrupt - Provincial Exemption Legislation

The Registrar in Bankruptcy (registrar) was called upon to determine the legal effect on the divisibility in bankruptcy of a quarter of farmland (land) on the death of an undischarged bankrupt (C.J.B.). One of the creditors of the bankrupt (R.M.D.) had opposed the claim of the bankrupt that the land was exempt from execution in favour of the bankruptcy creditors because of provincial exemption legislation. The application by C.J.B. claiming the exemption of the farmland from seizure as a home or a homestead had not been heard by the registrar before the death of C.J.B. The trustee of the estate of C.J.B. (trustee) argued that any protection from divisibility of the farmland which might have accrued to C.J.B. under provincial exemption legislation continued upon his death and therefore could be asserted by the trustee on behalf of his estate, and so the farmland should be returned to the estate. R.M.D. argued that any exemption protection which C.J.B. might have had against execution of the farmland on behalf of the bankruptcy creditors did not survive his death, because the exemption was a personal right of C.J.B. which "cease[d] to continue without a living claimant."
HELD: The registrar found in favour of R.M.D., ruling that the farmland did "not retain its exempt status" and was "divisible among the bankruptcy creditors". The registrar reviewed the cases on both sides of the issue, including, on the trustee's side, *Royal Bank of Canada v North American Life Assurance Co.*, [1996] 1 SCR 325, which the trustee argued adopted *Pearson, Re* (1977), 73 DLR (3d) 704 (Ont SC) (Pearson), and *Richardson Pioneer v Gherasim*, 2021 SKQB 153, and on the creditor's side, *Re Perry*, 2021 ABQB 609, and *Hinton Estate (Trustee of) v Royal Bank of Canada*, 2014 MBQB 162. She also referred to the applicable provisions of the *Bankruptcy Act* (BIA), being ss. 72(1), 71, 70(1), and in particular 67(1)(b), *The Enforcement of Money Judgments Act* (EMJA) and *The Saskatchewan Farm Security Act* (SFSA). The registrar noted that s. 67(1) (b) of the BIA "excludes property that is exempt under provincial or federal law from divisibility," and then embarked on an interpretation of the character of the exemptions carved out by the EMJA and the SFSA which would be excluded from divisibility, concluding that the intention of the SFSA was to permit a debtor and his or her dependents to keep the farmland out of the hands ofa creditor if it met the definition of a homestead because "the broader policy behind exemptions… is to ensure that living people, namely the debtor and his or her family, can afford the necessities of life." In this case, the registrar observed that no evidence had been brought forward that C.J.B. had any dependents who survived him. The registrar did not agree with the trustee that the bankruptcy somehow altered the character of the provincial exemption, clothing the deceased and therefore his estate in the homestead exemption. She referred to the distinction between the intent of the BIA vis-à-vis an individual bankrupt and a corporate bankrupt: the intent of the BIA with respect to an individual bankrupt was as much as possible to rehabilitate him and to allow him to get back on his feet financially, which goal was no longer operative upon his death.

 Back to top

***Irwin v Paul*, 2022 SKPC 6**

Henning, 2022-02-11 (PC22012)

Small Claims - Fraudulent Concealment

The plaintiff, M.R.I., and the defendant, K.P., proceeded to trial in the Civil Division of Provincial Court pursuant to *The Small Claims Act, 2016* before a judge of that court (trial judge) with respect to a dispute concerning the fraudulent concealment by K.P. of a serious problem with the entry of rainwater through the cement foundation of a residential property (house) purchased by M.R.I. from K.P. on October 17, 2017. M.R.I. sought to recover by way of damages the sum of $27,765.00 from K.P., her costs to remedy the damage caused by the defect in the foundation of the house, and to prevent any future damage of that kind. She claimed that she would not have purchased the house had she been aware of the water leakage problem. The trial judge reviewed the uncontested evidence and the testimony of the witnesses to make credibility rulings and arrive at the facts upon which to apply the relevant law, which he determined emanated from *Smith v Hawryliw*, 2020 SKQB 169 and *Hawryliw v Smith*, 2020 SKCA 92 (*Hawryliw*). It was uncontested that K.P. purchased and occupied the house from a point in time in 2012, until he sold it to M.R.I., a period of five years. Also not in issue was that the real estate contract for the purchase and sale of the house included an applicable exclusion clause which overrode any other documents associated with the purchase and sale, including a property condition disclosure statement. The witnesses for the plaintiff were M.R.I., who testified about the problems with odour which led her to seek advice about potential problems and itemize the costs associated with fixing the water leak, and who testified she would not have bought the house if she had known about the foundation leakage; her plumber, who first identified a possible water leak problem in the basement; an engineer, E.C., who provided expert opinion evidence about the cause of the leakage of rainwater into the basement, its duration, and how best to fix it; an architectural technologist from the City of Saskatoon; and a second plumber who testified the water problem was not from sewage, but from an outside source. The defence called K.P. and other witnesses whose evidence the trial judge did not find helpful. K.P. said during the five years he lived in the house, he had never had water leakage problems, and that the basement was finished when he bought the house and he had never renovated it. He testified further that he noticed the horizontal cracks in the foundation in the laundry and furnace room but had not experienced any water or sewage problems in the basement. Also in evidence, the trial judge noted, were several photographs, including photos of the basement at the time M.R.I. took possession of the house, which the trial judge observed showed a pristine, clean, and unspotted carpet, and no water staining on the walls, scuffing or other signs that people had lived in it for five years.

HELD: The trial judge found in favour of the plaintiff and allowed her claim for remedial damages except the amount representing the cost of installing weeping tile. The trial judge put great weight in the testimony of E.C., and the evidence of the photographs showing the pristine state of the basement at the time of purchase of the house by M.R.I. He observed that E.C. was knowledgeable about building practices in 1966, when the house was built. He noted that E.C.'s evidence was to the effect that at that time, foundations were not poured in one continuous pour, but in batches, and rebar was not used to reinforce them. The trial judge accepted his evidence that all houses poured in this way would eventually develop leakage from outside sources including rain, that the problem

would be noticeable and long-lasting, and was present when the house was purchased by M.R.I. from K.P. The trial judge therefore accepted the evidence of M.R.I. over that of K.P. ruling that he was satisfied on a balance of probabilities that K.P. had experienced leakage problems from rain in the five years he occupied the house, and fraudulently concealed this defect by denying he knew anything about it, and by being untruthful about not remodelling the basement during the time he occupied the house. As he believed M.R.I., he accepted that she relied on the fraudulent concealment, as was required according to *Hawryliw*, to maintain the cause of action.

 Back to top

***R v Olynik*, 2022 SKPC 12**

Jackson, 2022-02-25 (PC22010)

Criminal Law - Break and Enter and Discharge Firearm - Sentencing
Criminal Law - Sentencing - Reckless Discharge of a Firearm

Following the trial of two co-accused (2021 SKPC 49), R.L.O. and B.J.L., the trial judge imposed sentence. He reviewed the facts he had found at trial. The two offenders attempted to break into a basement apartment armed with a 22-calibre rifle and a metal bar. There were two persons present in the apartment. One of them was able to reclose and lock the apartment door when the co-accused attempted to shoot and batter their way in, sustaining injury from a blow to the head by the metal bar wielded by one of them. Having failed to gain entry by way of the door, they then went to a basement window and fired multiple shots through it, grazing the second person in the arm and shoulder as he threw objects through the window which successfully repelled the attack. The co-accused then fled in a vehicle and were located by police. A chase ensued with several police vehicles engaged, following which the co-accused were arrested. They remained in custody on remand pending trial.
HELD: The trial judge first listed the purposes and principles of sentencing contained in Part XXIII of the Criminal Code (Code), in particular ss. 718, 718.1 and 718.2. He then reviewed the personal circumstances of the accused as detailed in pre-sentence reports (PSR) prepared for each. R.L.O. was a 31-year-old Caucasian male, with a troubled home life due to domestic and physical violence. He failed to graduate high school, got into trouble with the law at an early age and developed substance addiction problems. He had a youth record involving violence and weapons and accompanying “compliance-related convictions” which offending continued in a similar pattern into adulthood, which included a 44-month penitentiary sentence for attempted kidnapping. He was assessed in the PSR as being a high risk to reoffend generally. As to B.J.L., the trial judge noted that he was a 27-year-old Caucasian male, who also suffered abuse from his parents and older brother; that there was “drinking and partying a lot” in the home; that he reported being sexually abused by a neighbour and left home at 15 when he began to abuse illicit drugs which progressed into an addiction to fentanyl. B.J.L. received a penitentiary sentence in 2016 following his only set of offences, which included possession of a prohibited substance for the purposes of trafficking, several weapons offences, and breaches of release terms. As required, the trial judge then considered the aggravating and mitigating factors relevant to the offences and the offender, followed by a review of the case law in relation to the offences of break and enter and discharge a firearm, and intentionally discharging a firearm. He noted that the range of sentence intentionally discharging a firearm was between five and eight years depending on the aggravating and mitigating factors, and between 4 and 12 years for break and enter and discharge firearm. He

then imposed a sentence of 6 years incarceration for both offenders on each offence. As to the other offences arising from the same delict, he imposed concurrent time except for possessing the firearm while prohibited, which resulted in jail time of six months consecutive, and evade police, three months consecutive. The global sentence for R.L.O. before credit for remand was six years, nine months' incarceration in a penitentiary; and for B.J.L., six years, six months. R.L.O was given enhanced remand credit of 399 days; and B.J.L., enhanced remand credit of 1,012.5 days. Various ancillary orders were also made by the trial judge.

 Back to top

***Rahimi v Banyi*, 2022 SKPC 13**

Demong, 2022-03-08 (PC22011)

Torts - Negligence - Motor Vehicle Collision
Small Claims - Collision - Deductible

The plaintiff, M.R., brought an action in small claims court to recover his automobile insurance deductible following a collision between a vehicle operated by him and one being operated by the defendant, H.W.B. The action proceeded to trial before a judge of that court (trial judge). The judge reviewed the testimony of three witnesses, the plaintiff, the defendant, and a witness called by the defendant, Ms G., and made credibility findings and drew inferences from this testimony. He first described the intersection where the vehicle collision occurred from his personal knowledge of Regina streets. Victoria Avenue and Broad Street each have four lanes, the two centre lanes of both are "through lanes," whereas the left and right of each are turning lanes. M.R. testified that he was operating his vehicle westbound on Victoria Avenue in the through lane closest to the right turn lane onto Broadway Street. The traffic light towards which he was driving had been green for some time and remained green when he entered the intersection, at a speed of 40 to 45 kilometers per hour. He was struck in the side rear quarter panel by the vehicle being operated by H.W.B. and was spun around 180 degrees. He did not see H.W.B.'s vehicle before the collision and surmised it must have been exceeding the speed limit because the force of the collision spun his vehicle 180 degrees, and that she must have driven through the intersection on a red light because he "was presented" with a green light when he was crossing through the intersection. H.W.B. testified that she was operating her vehicle on Broad Street southbound in the through lane closest to the left turn lane onto Victoria Avenue at about 50 kilometers per hour, and that approximately two or three car lengths before the intersection, the traffic light turned green. She had not slowed down when the light was red and stated that she did not see M.R.'s vehicle before the collision, and that she did not check for any vehicles in the intersection before she entered it. Ms. G.'s evidence conformed more to H.W.B.'s evidence. She testified that because she sits high in her truck, she had a clear view of the intersection at the time of the collision; that she was travelling southbound at 50 kilometres per hour and moved into the left-hand turn lane; that as she was doing so, the light turned green and she noticed H.W.B.'s vehicle a car length or two ahead of her; that she also saw M.R.'s vehicle about to enter the intersection at what she believed was a high speed, at least 60 to 65 kilometers per hour; that at the time the vehicles entered the intersection and collided, no other traffic was in the intersection and her view of the collision was unobstructed by any other traffic. The trial judge took note that M.R. chose not to cross-examine Ms. G. on her evidence.
HELD: The trial judge ruled that both the plaintiff and the defendant were at fault for the accident and did so primarily from inferences

drawn from the evidence of Ms.G., whose evidence he said was both reliable and credible, that “she gave her evidence in a forthright manner… did not overstate any of her evidence, nor did she give me any indication that she was preferring one party over the other.” Based on that evidence and inferences drawn from it with the aid of mathematical formulas concerning speed and placement of the vehicles, he found as fact that M.R. sped through the intersection on a “stale yellow light” which turned red before he exited the intersection, and that H.W.B. was crossing on a green light at the time of collision. He then applied the law to the facts and pointed to the operation of ss. 213(1) and (2) and 235(3) of *The Traffic Safety Act* which required drivers travelling through intersections to do so with care and attention in all circumstances and when facing a yellow light to proceed cautiously. He also considered *Genoway v D’Sena*, 2017 SKPC 65. He concluded that the driving of M.R. was negligent because he attempted to race through a yellow light; and that of H.W.B. was also negligent, because, though she was not exceeding the speed limit, she did not slow down through the intersection or notice her surroundings when the light had just turned green. He found that M.R. was considerably more reckless than H.W.B. and apportioned fault 75% to M.R. and 25% to H.W.B. pursuant to *The Contributory Negligence Act*.

Back to top