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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***Rankin v Rankin*, 2022 SKCA 32**

Ottenbreit Whitmore Tholl, 2022-03-10 (CA22032)

Family Law - Division of Property - Valuation
Trusts - Constructive/Resulting Trust
Family Law - Inherent Jurisdiction

The appellant, A.M.R., appealed to the Court of Appeal (court) from the decision of a judge of the Court of Queen's Bench (judge) following a summary judgment procedure in which A.M.R. requested that four "discrete issues" be determined to assist her and H.I.R., the respondent, to divide their family property: *Rankin v Rankin*, 2020 SKQB 317. Of these four issues, the court said only three were germane to the appeal: how to value Rankin Farms Ltd. (Rankin Farms) and "assets retained and transferred by it to the parties;" how to account for income and expenses from the farming operation; and how to deal with expenses to farmland and buildings since the date of the application to divide family property filed in 2010. The court acknowledged the facts relevant to this appeal were not contested before the judge and for the most part were contained in an agreed statement of facts filed by the parties, and

Civil Procedure - Limitation Period

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understood that the issues which the judge had to decide concerned the application of the facts to the law interpreting the scope and meaning of *The Family Property Act* (FPA). The court summarized the facts available to the judge on the application: A.M.R. and H.I.R. separated in 2008 after 29 years of marriage; on January 29, 2010, A.M.R. commenced a proceeding under the FPA to divide family property; at that time, A.M.R. and H.I.R. farmed through Rankin Farms, which held all the farming assets including the land; A.M.R. and H.I.R. were the sole and equal shareholders of Rankin Farms; on September 30, 2010, pursuant to two agreements, an assumption of liabilities and transfer of assets agreement (transfer of assets agreement), and a share sales agreement, four quarters of land, farm equipment and other assets were transferred from Rankin Farms to A.M.R. and H.I.R. equally, and the shares of Rankin Farms were sold to an arm's length third party for $1.3 million dollars, which sum was divided equally between them; though not contemplated by the transfer of assets agreement, at a later date, legal title to three quarters of the land, which included the homestead, was transferred to A.M.R. and one quarter of land was transferred to H.I.R. (transferred assets); the parties continued to farm together and split income and expenses equally until A.M.R. unilaterally terminated the farming relationship; and the parties had not formally divided the family property prior to this application. The court then reviewed the judge's decision. As to the main issue of the valuation of the transferred assets, the court noted in applying the provisions of the FPA, the judge ruled that the transferred assets were family property as defined by the FPA even though on January 29, 2010, the date of the application to divide, they had not been transferred to the parties, who on that day owned only their shares in Rankin Farms. The court observed that the judge conducted an analysis based on the principles of tracing and trusts to conclude that the transferred assets were to be included as family property for purposes of division. Before the court, A.M.R. advanced that the judge had not been asked to divide the family property but only to provided rulings on the discrete issues, and so did not have the jurisdiction to make an order.

HELD: The appeal was dismissed. The court first stated that both Rule 1-4 of The Queen's Bench Rules and the inherent jurisdiction of the Queen's Bench Court gave the judge the power to make a division of property though not asked to do so, and correctly exercised that power by directing the parties to consider "the various components of s. 21(3) of the FPA dealing with unequal division" and asking for supplemental briefs addressing this question. As to the main issue, how to value the family property, the court disagreed with the judge that the transferred assets should be included as family property because it was settled law that, by the FPA, only property in which the parties had an interest on the day of the application was to be considered family property (see: s. 2(1), "family property"). In the matter before the judge, that property consisted for the most part in the shares of Rankin Farms, and the transferred assets were acquired by the parties from Rankin Farms after the application for division. The court stated that the judge erred in deciding that the FPA allowed for the application of general principles of property tracing, and concepts such as exchange of property did not apply. As well, the court pointed out that the definition of family property could not "bridge the gap between family property of a certain kind and nature owned at the date of application and property of a completely different kind and nature acquired thereafter." Though the court concluded that the judge had erred in this way, it nonetheless went on to find that the result he came to was correct, doing so by considering the scope

of the meaning of "value" in s. 2(1) of the FPA, which allowed the court to determine the fair market value of the shares in Rankin Farms either at the time of the application or at the time of adjudication. The court went on to examine the dealings of the parties in the 11 years since the application was made for division considering the stated aim of the FPA to achieve a "fair and equitable distribution of family property." In the result, the court valued the shares in Rankin Farms as of the date of the application, added to this value the proceeds of the share sale and then divided this sum unequally in favour of H.I.R. to take into account the increased value of the transferred farmland since the application date.

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***D.T.D. v T.A.J.*, 2022 SKCA 34**

Ottenbreit Caldwell Schwann, 2022-03-16 (CA22034)

Divorce Act - Corollary Relief - Relocation

The father, D.T.D., appealed the interim decision of a judge of the Queen's Bench Court (chambers judge) to the Court of Appeal (court) denying his application to return two children of the marriage, aged three years and five months respectively at the time of the separation in March 2021. (See: *D.T.D. v T.A.J.*, (January 21, 2022), Saskatoon, DIV 203 of 2021 (Sask Q.B.).) The children were moved unilaterally by the mother, T.A.J, from their family home on an acreage "outside of a central Saskatchewan town" to Martensville on May 15, 2021. D.T.D. objected to the decision on a number of grounds, including that the chambers judge erred in principle in finding on the facts that the move was only a "change of residence" and not a "relocation" as defined by s. 2(1) of the *Divorce Act* (Act). Pursuant to the Act, the move was to be characterized as a relocation if it was likely to have a significant impact on the child's relationship with D.T.D., in which case T.A.J. needed to lead evidence that the relocation was in the best interests of the children generally, and specifically with respect to the move, according to the factors set out in s. 16.92(1) of the Act. D.T.D. also appealed the decision on the basis that the chambers judge erred in principle by endorsing the unilateral move although he had filed a formal objection in answer to T.A.J.'s notice of her intention to relocate which by law required the matter of the move to be determined in the Court of Queen's Bench. While the decision was pending, T.A.J. moved the children. The court was able to consider the appeal on the evidence before the chambers judge on the application: during the four years of the marriage, the parties resided on the acreage; upon separation, D.T.D. remained in the family home, and T.A.J. relocated with the children on a temporary basis to a basement in a friend's home in close proximity to the acreage; the notice of the move was given by T.A.J.'s lawyer to D.T.D. on March 24, 2021 pursuant to s. 16.9(1) of the Act; D.T.D. filed his objection with the Queen's Bench Court and also applied for shared parenting and an order prohibiting

Cases by Name

D.T.D. v T.A.J.

GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.

Kashuba v Wilton (Rural Municipality)

Kelln v Scheurer

Leis v Miccar Aerial Ltd.

Lenee v Parvez

Lisitza v Herle

Lyons v Lyons

Mandziak v Animal Protection Services of Saskatchewan

R v Cathcart

R v Langenburg Redi-Mix Ltd.

R v Loutitt

R v Morin

R v T.S.

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the move; T.A.J. countered with an application to approve the move, and opposed the shared parenting request; both applications came before a chambers judge on May 5, 2021, who rendered a decision on May 28, 2021 in *D.T.D. v T.A.J.* (28 May 2021) Saskatoon, DIV 203 of 2021 (Sask Q.B.) concerning parenting matters, and recognizing that the status quo was that T.A.J. was the primary caregiver of the children, and D.T.D. as "active and involved [with the children] as his employment and farming commitments allow;" the chambers judge who heard the applications on May 5, 2021, adjourned the question of "relocation" sine die; three weeks after her ruling, her written decision issued, which stated "for greater clarification, absent agreement or further Court order, [the mother] may not move to Martensville;" between the decision from the bench and the written decision, T.A.J. moved with the children; D.T.D. then applied for an order that T.A.J. return the children to the acreage, and T.A.J. asked that her move be endorsed; pending her decision, the chambers judge made an interim order that T.A.J. and the children remain in Martensville. D.T.D. argued on appeal that the chambers judge reduced the inquiry into whether the move was a relocation or a simple change of residence to a question of "whether the mother's move would have an impact on his parenting time" as opposed to whether the move would have a detrimental effect on the nature and quality of the children's relationship with him as a parent, even though the additional commute would not be long, only an additional 15 minutes either way.

HELD: The court dismissed the appeal. It first directed itself with reference to *K.G.K. v L.T.K.*, 2021 SKCA 12 to the standard of appeal it was to apply, which was one of deference to the fact-finding process of the chambers judge and the discretionary decisions she was to make. It instructed itself further that it could only interfere with the decision of the chambers judge if the reasons or lack of reasons demonstrated "material error," that is, showed "an indication that the [chambers] judge did not consider relevant factors or evidence," and so misdirected herself on the question of whether the evidence failed to satisfy the test for proving the move was a relocation. In reviewing her reasons, the court concluded that the chambers judge did in fact weigh all relevant factors which might significantly affect the children's relationship with D.T.D. if the move were allowed and did not restrict herself to the negligible effect of the commute. As to T.A.J.'s failure to delay her move until the chambers judge on the May 5, 2020 application had made her decision on the relocation, the court stated that it could not disturb the chambers judge's approach to T.A.J.'s playing "fast and loose" with the notice requirements because her decision was supportable on the evidence that T.A.J. was not attempting "to stymie the parenting arrangement or to curtail [the father's] relationship with [the daughter] and [the son]."

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***Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37**

Leurer, 2022-03-18 (CA22037)

Civil Procedure - Pleadings - Statement of Claim - Application to Amend
Civil Procedure - Application to Extend Time for Leave to Appeal
Appeal - Leave to Appeal - Interlocutory Order

The applicants, Terence K. and Tracy K., sought leave from a judge of the Court of Appeal (appeal court judge) to extend the time to apply for leave to appeal and to extend the time to file a notice of appeal against a decision of a judge of the Queen's Bench Court (chambers judge) on their application seeking to amend a statement of claim. The chambers judge disallowed sizable portions of the draft claim and the affidavit in support for non-compliance with Rules of the Queen's Bench Court (Rules) governing proper pleading. (See: Kashuba v Rural Municipality of Wilton #472 (October 7, 2021) Battleford, QBG 33 of 2021 (Sask Q.B.).) It was uncontested that the action was brought by the appellants against the Rural Municipality of Wilton #472 (RM) as a result of water and sewer services being cut off by the RM to houses in the organized hamlet of Lone Rock, and that the issues giving rise to the appellants' action were also the subject of an appeal board referral pursuant to *The Municipalities Act* "to address a range of disputes relating to water and sewer services and land purchases by the RM." The proposed grounds of appeal were that the chambers judge erred: in striking portions of Terence K.'s affidavit for being "full of speculation evidence concerning the intentions of others, and argument;" in not allowing amendments to the claim for violating Rules 1-3 and 13-8; in not allowing a plea of breach of procedural fairness; in not allowing allegations against non-parties; in not allowing Terence K.'s breach of contract claim; and in ordering a temporary stay pending the outcome of the appeal board referral.
HELD: The appeal court judge dismissed the applications. On each of the grounds, he determined whether the order sought to be overturned on appeal was a final or interlocutory one, since leave to appeal was required when an order was interlocutory. The appeal court judge defined an interlocutory order as one made during a proceeding including an action which did not "finally dispose of a substantive issue," and a final order as one that "finally disposes of the rights of the parties:" Saskatchewan Medical Association v Anstead, 2016 SKCA 143. He also reviewed the factors he was to consider in deciding whether to extend the time for applying for leave to appeal, and for filing a notice of appeal, stating that the main factor he needed to consider was merit, which was also one of the criteria for determining whether leave to appeal should be allowed, along with the importance of the proposed issue to be appealed. (See: *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119.) For the most part, he found that the decisions made by the chambers judge were interlocutory and the proposed grounds of appeal in relation to each were without merit or were not of sufficient importance because the appeal was destined to fail. The applicants had not advanced grounds showing an arguable case that the chambers judge had wrongly exercised his discretion in disallowing the proposed amendments, or the proposed grounds of appeal were not of sufficient importance because the disallowed amendments did not gut the claim, which had "continued vitality" without them.

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***GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38**

Caldwell Ryan-Froslie Kalmakoff, 2022-03-24 (CA22038)

Civil Procedure - Limitation Period
Civil Procedure - Pleadings - Striking Out

The appellant, GHC Swift Current Realty Inc. (GHC) appealed a decision of a chambers judge to strike its statement of claim as filed against three corporate defendants. The three corporate defendants, BACZ Engineering (2004) Ltd. (BACZ), Lesmeister Construction '97 Ltd. (LCL) and Starks Plumbing and Heating Ltd. (Starks), argued before the chambers judge that claims against them be struck pursuant to Rule 7-9 as they were statute-barred by s. 5 of *The Limitations Act*. GHC had engaged the defendants in the construction of a care home. After the care home was completed, deficiencies were first noted in 2015. GHC demanded that the defendants complete remedial work. BACZ did not engage, despite the request by GHC. LCL and Starks both worked with GHC to try to improve the deficiencies noted. Further deficiencies were discovered in 2017. GHC brought claims in 2018. The chambers judge found on application by the defendants that GHC ought to have known of the deficiencies as contemplated by *The Limitations Act* in 2015 and was out of time in pursuing its claims. The issues for the court to determine were whether the chambers judge had erred in her interpretation of the principles of Rule 7-9 in striking the claims entirely considering the discovery of deficiencies in 2017. HELD: The appeal was allowed in part as the chambers judge had erred by striking the claims against LCL and Starks. Those claims were restored and directed back for determination by the lower court on outstanding applications for summary judgment. GHC successfully argued that the start date for the running of the limitation period ought to have been delayed because LCL and Starks had participated in efforts to remedy the deficiencies and, if those efforts had been successful, litigation would not have been necessary. The court found that the parties were not simply negotiating, which would have barred the claims, but were working on solutions which delayed the application of s. 5 of *The Limitations Act* until those efforts had been completed. Accordingly, the claims against LCL and Starks were within time.

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***Saskatchewan Association of Rehabilitation Centres v Saskatoon (City)*, 2022 SKCA 44**

Ryan-Froslie, 2022-04-06 (CA22044)

Municipal Law - Property Assessment - Leave to Appeal

The applicant, Saskatchewan Association of Rehabilitation Centres (SARC), sought leave to appeal the decision of the Saskatchewan Municipal Board Assessment Appeals Committee (committee), which had upheld the decision of the Saskatoon Board of Revision (board) dismissing SARC's argument that "site coverage [be eliminated] as an adjustment factor" in property assessments involving warehouse properties larger than 24,000 square feet. (See: *Various (Altus Group Limited) v Saskatoon (City)*, 2021 SKMB 50 (committee decision) and *Various (Altus Group Limited) v City of Saskatoon* (17 December 2020) BOR 077-2020 (Board Decision).) Leave to appeal was sought by SARC pursuant to s. 33.1 of The Municipal Board Act, which permits

an appeal to the Court of Appeal from a decision of the committee on a question of law or jurisdiction with leave of the court. The facts and circumstances at the root of the leave application were not contested, though SARC took issue with how the committee characterized and interpreted the evidence presented to the board. The judge of the Court of Appeal (leave judge) reviewed the record and the evidence before the board that the committee was required to consider. In 2019, the board upheld assessments in which site coverage of 17% for warehouse properties over 24,000 square feet was determined to be a valid adjustment factor such that all properties of this kind were grouped together for mass appraisal purposes. In 2020, SARC appealed its warehouse assessment, which was again based on a 17% site coverage, on the same grounds as in the 2019 appeals. The board ruled that as there was no new evidence presented by SARC, the appeal must fail. SARC's appeal to the committee was also dismissed, with the committee ruling that it was reasonable for the board to rule against SARC on the basis that previous rulings of the board, including in 2019, had upheld the validity of a 17% site coverage adjustment factor and SARC had not presented any evidence to show these rulings were erroneous at law.

HELD: The leave judge dismissed the application, citing *SBLP Town N Country Mall Inc. v Moose Jaw (City)*, 2022 SKCA 10 for the proposition that leave to appeal a committee decision will only be granted if there is a "meaningful doubt" about the correctness of its decision as it pertains to "the point or points in issue" and if the proposed grounds of appeal are of "sufficient importance" to warrant the attention of the court in the sense that the issues raised on the application have significant consequences for the proposed appellant and respondent, transcend the particular in their implications, are significant to the law of property assessment, or involve a "new or uncertain or unsettled point of law or jurisdiction." The leave judge was not satisfied that any of the proposed grounds of appeal raised a meaningful doubt that the committee's decision to uphold the board's rulings was incorrect at law. As to its argument that the board "mischaracteriz[ed] or misinterpret[ed] evidence in its evaluation of the [b]oard's decision," the leave judge said the appeal was "destined to fail" because SARC had not provided evidence to "prove error in the use of site coverage as an adjustment factor." She went on to find that the other proposed grounds of appeal had no chance of success and raised no meaningful doubt about the correctness of the committee's decision, stating that the committee placed no weight on SARC's failure to appeal the 2019 decisions of the board; that SARC could not maintain the committee had wrongly sat in review of its own decision, when it specifically wrote that it had not done so, even though SARC had in fact asked it to do so by saying, "Mr. Chairman, its not our intention to reargue the 2019 case, but to ask the Board to reconsider its 2019 decision;" that SARC specifically referenced previous board decisions before the board from 2019 and could not now complain that the committee referred to them in its decision; and that SARC could not succeed in its argument that the committee placed an onus on it to disprove the correctness of the 2019 board decision since the record proved that the onus was placed on SARC to "establish error in the 2020 assessment." The leave judge then went on to examine the "sufficient importance" requirement for the granting of leave to appeal, expressing that the case was one specific to the parties which did not "raise legal issues of significance to the property assessment regime generally or, the administration of justice."

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***R v Morin*, 2022 SKCA 46**

Richards Caldwell Whitmore, 2022-04-08 (CA22046)

Charter of Rights, Section 8, Section 9 - Search and Seizure - Search Incidental to Arrest

Criminal Law - Appeal - Conviction
Criminal Law - *Controlled Drugs and Substances Act*
Criminal Law - Defences - *Charter of Rights*, Section 11(b)

The appellant, T.M., appealed his convictions for drug trafficking. T.M. had been a passenger in a vehicle that was subject to a traffic stop. T.M. exited the vehicle and identified himself to the police. A police officer observed what he believed to be methamphetamine in a clear plastic bag in the open centre console, which led to T.M.'s arrest. T.M. argued that the trial judge failed to find his rights under sections 8 and section 9 of the *Charter* had been breached. He further argued that the trial judge had erred in law by declining to hear his application under s. 11(b) of the *Charter* that he had not been tried within a reasonable time. The issues before the court were whether the trial judge had failed to consider potential breaches of T.M.'s ss. 8 and 9 *Charter* rights, whether there had been an error in not considering the s. 11 application, and whether it was reasonable for T.M. to be found guilty when there was circumstantial evidence adduced which supported inferences other than guilt.
HELD: The appeal was dismissed. T.M.'s section 8 *Charter* rights had not been violated as the narcotics were in plain view of the arresting officer. The determination of whether narcotics are in plain view of an arresting officer is a question of fact and the trial judge is afforded deference to his finding. The determination of the narcotics being in plain view also eliminated any breach of section 9, as T.M. was subject to detention. The court further dismissed the argument from T.M. that his case had been subject to unreasonable delay: he had not provided an adequate *Charter* notice within the 14-day period required to be given to the Crown, and further, the record did not support a finding of unreasonable delay. T.M. also sought a stay of proceedings only before sentence was imposed. On the issue of whether the trial judge improperly rejected reasonable inferences of fact that were inconsistent with guilt leading to an unreasonable verdict, the court found that the trial judge's reasons, the evidence, and the arguments at trial all established guilt. There was no unreasonable verdict as the facts supported the trial judge's conclusions.

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***Regina (City) v Loucks*, 2022 SKCA 47**

Schwann Leurer Tholl, 2022-04-13 (CA22047)

Civil Procedure - Pleadings - Application to Strike - Appeal
Municipal Law - Bylaw - Nuisance - Appeal

The City of Regina (city), the respondent in the cause, brought an application against G.L. to quash the appeal he filed against a lower court decision that struck his statement of claim for being an abuse of process. G.L. maintained pigeons on his property. He maintained that some pigeons were show or racing pigeons and he should be allowed to maintain them despite being subject to an enforcement action from the city that sought his cooperation in removing the birds. G.L. appealed the enforcement action and was partially successful in that he was given time to remove the show and racing pigeons from his property and transfer them to a properly sanctioned and maintained property or an enclosed bird sanctuary. Despite the ruling from the city's appeal board to the original enforcement action, the city proceeded to remove and destroy all his birds before the stipulated date that was provided to G.L. G.L. then appealed the appeal board decision. The court found G.L. to be out of time in filing his appeal and

dismissed it. G.L. later filed a lawsuit against the city and two private individuals. The city was successful in having the claim struck on the basis of an abuse of process, given the prior court decision. G.L. appealed the striking of his statement of claim. The issue for the court to determine was whether it was appropriate to quash G.L.'s appeal for lacking merit.
HELD: The city's application to quash G.L.'s appeal was refused. The court evaluated *The Court of Appeal Rules*, rule 46.1(1), which prohibits vexatious proceedings, with the aid of the case of *Jardine v Hyggen*, 2018 SKCA 38, [2018] 7 WWR 713 (Jardine). Jardine established that the burden for an appeal to be quashed for being manifestly without merit requires a high threshold and that it must be clear that there is no possibility for any ground of appeal to succeed. In the present application, the court refused to parse G.L.'s grounds of appeal. While stating that most of G.L.'s grounds of appeal appeared to be quite weak, the court could not conclude that there was no possibility that any ground of appeal might succeed. Accordingly, the city's application to quash was dismissed.

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***R v Langenburg Redi-Mix Ltd.*, 2022 SKQB 40**

McCreary, 2022-02-08 (QB22042)

Public Welfare Offences - Occupational Health and Safety - Death of a Worker - Conviction - Appeal

The appellant, Langenburg Redi-Mix Ltd., brought a summary conviction appeal of the decision of a Provincial Court judge to convict it of a number of offences under *The Occupational Health and Safety Act* and to sentence it to a fine of $200,00 plus 40 percent victim surcharge on each count for a global fine of $560,000. The charges were laid and the trial held as a result of the death of one of the appellant's employees at one of its worksites, an aggregate stockpile. The employee was a young man who had worked for the appellant for approximately eight months. At the time of the accident, the worksite was unsupervised. The employee drove a loader up the stockpile to tow a truck. He exited his loader and while standing between the loader and the truck, the former rolled back and crushed him between the two vehicles, killing him. The trial judge found that the Crown had established that the appellant had failed: to provide an adequate safe work procedure for towing a truck on an aggregate stockpile; to communicate adequate training to ensure that the employee should not have exited his loader when it was being hooked up to tow another vehicle up a slope; to supervise the worksite and that contributed or substantially caused the incident that result in the employee's death; and failed to prove, under the onus it bore, that it was duly diligent. The issues on appeal were whether the trial judge erred: 1) in concluding beyond a reasonable doubt that the safe work procedure provided by the appellant for towing in the circumstances was not adequate to ensure the health, safety and welfare of its workers, resulting in the employee's death. The appellant argued that the Crown had failed to prove the *actus reus* of the offence beyond a reasonable doubt; 2) in finding that the appellant failed to reasonably ensure that workers followed a safe work procedure for towing a truck on an aggregate stockpile and that this failure resulted in the employee's death; 3) in finding that the appellant's supervision of the worksite was inadequate, resulting in the employee's death; 4) by making improper use of the post-incident evidence in relying upon the appellant having written and implemented a safe work procedure for towing after the accident; 5) in finding that on a balance of probabilities that the appellant had not taken reasonably practicable steps to prevent the employee from being harmed or by finding that the harm which resulted in his death was reasonably foreseeable; and 6) by imposing a demonstrably unfit sentence.
HELD: The appeals as to convictions and sentence were both confirmed. The court determined that an appeal under s. 813(1)(a) of the *Criminal Code* is subject to s. 686(1) of the Code and permits an appellate judge to set aside a verdict that is unreasonable,

cannot be supported by the evidence or is wrong on a question of law. Therefore, the standard of review on factual grounds is reasonableness and on questions of law, correctness. It found with respect to each issue that the trial judge had: 1) not erred in concluding that the appellant failed to provide an adequate safe work procedure and the evidence reasonably supported it that the Crown had proven the *actus reus* of the offences in question and then in accordance with *Sault Ste. Marie* ([1978] 2 SCR 1299), that the appellant had not met the onus of proving that it had taken all reasonable care to prevent the accident. He reasonably determined that the appellant did not have a written procedure outlining precautions that would have addressed the type of risk that the employee took in these circumstances. He relied on evidence that the appellant had not included any safe work procedures that included the procedure of setting-off the loader from the vehicle so that a pinch point could not be created. Neither did it have a written safe work procedure that expressly addressed the task of a loader pulling a vehicle up a slope; 2) not erred by finding that the appellant had never adequately communicated a procedure for safely towing a truck with a loader. There was no direct evidence from any witness that anyone had communicated to the employee that he must remain in his loader while a truck was being hooked up to be towed up a slope; 3) not erred. There was evidence from witnesses that the worksite had been supervised in the past but was unattended at the time of the employee's death and that demonstrated that the appellant had previously recognized the need for it at that worksite; 4) not erred. He weighed the evidence of the appellant's post-incident development and implementation of a written safe work procedure for towing a vehicle and noted that by doing so, the appellant was not making an admission of liability; 5) not erred in finding that the appellant was responsible for the employee's failure to adhere to safe work practices and that the harm was reasonably foreseeable. There was no evidence that the employee had ever been informed that he should not get out of the towing vehicle. The appellant had no safe work procedures for towing a truck up a stockpile. The witnesses' evidence identified the known risks associated with backing down or being towed up a stockpile when the aggregate is soft; and 6) not erred. The fine was high but it had been determined after he had analyzed the sentencing principles set out in s. 3-79 of *The Saskatchewan Employment Act* and reviewed the sentencing case law.

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***Kelln v Scheurer*, 2022 SKQB 63**

Brown, 2022-03-09 (QB22058)

Wills and Estates - Executors - Application for Removal

Beneficiaries of an estate brought an application to partially remove the executor of the estate so that they could directly defend litigation brought by a dependant of the estate. The beneficiaries had commenced their own litigation under *The Dependants' Relief Act*. The executor was the brother of the deceased. The dependant of the estate was the widow of the deceased, who had been married to him for 40 years. The beneficiaries of the estate were three adult children of the deceased who sought to directly defend against the dependant's claim. The sole issue for the court to determine on this application was whether the executor of the estate should be removed in the limited respect of conducting and managing *The Dependants' Relief Act* litigation brought by the dependant. Other matters, such as the matter continuing to pre-trial conference, had been agreed to by the parties.
HELD: The application to partially remove the executor was dismissed. While the executor was accused of showing bias towards the dependant's claim, no such proof of the same existed. The court found that mere conflict or bad personal relations between a

beneficiary and an executor is not sufficient for the removal of a duly appointed executor. There is a high standard for the removal of an executor from an estate; the beneficiaries did not meet this high threshold. Further, the act of removal of the executor would effectively remove someone with no self-interest and replace him with those with self-interest in the distribution of the estate. The executor had not acted in any way that gives reason to suggest that he would act arbitrarily to the estate's interests, and accordingly, the application to have him partially removed from administrating the estate was dismissed. The consolidated actions would continue to pre-trial conference.

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***Leis v Miccar Aerial Ltd.*, 2022 SKQB 67**

Haaf, 2022-03-14 (QB22061)

Courts - Jurisdiction - Inherent Jurisdiction

The plaintiffs applied for an order to validate proceedings to date, notwithstanding their failure to comply with s. 14 of *The Agricultural Operations Act* (Act). The plaintiffs sued their neighbours and the aerial company that sprayed their neighbours' land with herbicide under the allegation that such spraying damaged their property. Pursuant to s. 14 of the Act, anyone who commences an action for nuisance related to agricultural operations must apply to the Agricultural Operations Review Board and wait 90 days before commencing that action. The plaintiffs realized that they had failed to comply with the Act. The issue before the court was whether it had jurisdiction and whether it should declare the plaintiffs had complied with s. 14 of the Act.
HELD: The plaintiffs' application was granted. The court has the right to make declaratory orders under its inherent jurisdiction. This includes orders *nunc pro tunc*, which give an action retroactive legal effect as though it had been performed in the past. Whether such discretion should be exercised by the court was to be determined considering the factors in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, [2015] 3 SCR 801 (*Green*). The *Green* factors include consideration of whether: the opposing party will be prejudiced; the order would have been granted if sought at the appropriate time; the irregularity is intentional; the order will effectively achieve the relief sought or cure the irregularity; the delay has been caused by an act of the court and the order would facilitate the access to justice. The *Green* factors weighed in favour of the plaintiffs.

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***Lyons v Lyons*, 2022 SKQB 70**

Richmond, 2022-03-16 (QB22062)

Family Law - Divorce Act - Corollary Relief - Spousal Support

Family Law - Spousal Support - Imputing Income to Payee Spouse

This matter was an interim application before a judge of the Court of Queen's Bench (chambers judge) by the respondent, J.M.L., for the petitioner, D.T.L., to pay spousal support pursuant to s. 15.2 of the *Divorce Act*. The chambers judge set out the facts relevant to her determination concerning the entitlement of J.M.L. to spousal support and the quantum of such support. The parties cohabitated from 1985 to 1990, at which time they married and lived together until they separated in September 2017. Theirs was a traditional marriage. J.M.L. was the childcare provider and homemaker, and D.T.L. the breadwinner. They had three children, one who died at 18 years of age, and two others who grew to adulthood but were not able to live independent lives (the girls), requiring financial and other assistance from D.T.L. and J.M.L. D.T.L. voluntarily paid J.M.L. for her support from 2017 to 2021 totalling $116,000.00. J.M.L. paid most of it to the girls. D.T.L. also paid money to them. J.M.L. refused to enter into an agreement with D.T.L. that would allow him to claim the payments he made to her as deductions for income tax purposes. J.M.L. had been working at Canada Post but since November 2021 was on leave without pay because she refused to be vaccinated for COVID and refused to consent to the release of her medical records. Before being placed on unpaid leave, J.M.L. had an income of $53,399.00. D.T.L. earned $101,848.00 in wages and disability for the relevant period. J.M.L. had no income at the time of the application.
HELD: The chambers judge first dealt with the question of J.M.L.'s entitlement to spousal support, recognizing that on an interim basis, emphasis was to be placed on "needs and ability to pay" of the parties: *Wendt v Wendt*, 2016 SKQB 227. She recognized that J.M.L. had a need for spousal support as a result of her role in this traditional marriage and that D.T.L. had the means to pay, though he was under some financial pressure due to a drop in income, payment of a capital gain on investments he was required to redeem to make payments to J.M.L. and the girls while away from work on disability, and J.M.L.'s refusal to assist him with claiming his payments to her as income tax deductions. The main issue she was to decide, the chambers judge stated, was whether income should be imputed to J.M.L. by reason of her choosing not to be vaccinated. The chambers judge stated that she was free to make her own decisions in this regard, but she must also deal with the consequences of her decisions, which in this case was a reduction of the quantum of spousal support D.T.L. was to pay her by the amount of the income she could be making. She found authority for this ruling in *D.B.B. v D.M.B.*, 2017 SKCA 59 and *L.S. v M.A.F.*, 2021 ONCJ 554.

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***Lisitza v Herle*, 2022 SKQB 71**

Brown, 2022-03-16 (QB22063)

Family Law - Child Support
Family Law - Domestic Contracts - Interspousal Agreements
Family Law - Mandatory Mediation - Exemptions

The parties in this matter, L.D.L., the petitioner in a family law proceeding, and C.L.H, the respondent, each brought an application before a judge of the Court of Queen's Bench Family Division (chambers judge). L.D.L. sought an order requiring C.L.H. to engage in resolution/mediation mandated by s. 44.01 of *The Queen's Bench Act, 1998* (Act) or an order that she engage in the

resolution/mediation mechanism incorporated into their Interspousal Agreement (ISA). C.L.H. sought an order that L.D.L. resume the child support payments he unilaterally discontinued in April 2021 and pay a lump sum to make up the accumulated arrears of child support before the issues between them proceed to mediation/resolution either through the ISA or directly to mandatory mediation pursuant to s. 44.01 of the Act. The chambers judge made the following findings of fact from the evidence before him: following their separation, in December, 2016, the parties negotiated the ISA through a collaborative law process, with the assistance of their own lawyers, who provided each of them with independent legal advice as they proceeded through the negotiation; the ISA was intended to resolve all issues between them, including payment of child support and expenses for the two children of the marriage, aged 14 and 12 at the time of the application; the ISA contained a process for adjusting child support and expenses each year; child support payments were considered "advances" to be retroactively adjusted up or down on May 1 of each year, or at any other time if one of the parties had a significant change in income during the year based on each party's income declared in the previous year's income tax return; child support would then be adjusted in accordance with the *Federal Child Support Guidelines*; L.D.L. was given a severance package from his employer in December, 2020 totalling $515,467.00; he took the position that this amount was not income to him; immediately after leaving that employment, L.D.L. started working for two companies he controlled from which he derived "benefits" in 2021; L.D.L. did not disclose receiving the severance package to C.L.H.; and the ISA contained a dispute resolution clause, s. 20.1, which required L.D.L. and C.L.H. to "first attempt to resolve such disagreement outside of the Court process by consulting with a professional in the area in dispute," and in the event resolution failed to then take up the matter "to the Courts."
HELD: The chambers judge found that on the evidence before him the severance package was a form of income to L.D.L., that he was not justified in unilaterally discontinuing child support and child expense payments, that his application to force L.D.L. into mandatory mediation under s. 44.01 of the Act was an attempt to delay making the support payments as long as possible, and that his actions bordered on the disingenuous. He ruled that a "partial exemption" to mandatory mediation under s.44.01(6)(e) of the Act was made out by C.L.H., allowing for an interim order to be made prior to mediation. He then ordered that L.D.L. was to continue making his 2021 child support payments in accordance with his 2020 income, and to pay all arrears forthwith. Though he was satisfied on an interim basis that the sum of $515,467.00 was a form of income for support purposes, the chambers judge was not prepared to declare the full amount as income to L.D.L. in 2020 until the issue of how this amount was to be characterized and how it was to be accounted for was more fully explored, and so ordered the parties to proceed forthwith to resolution/mediation.

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***Lenee v Parvez*, 2022 SKQB 73**

McMurtry, 2022-03-17 (QB22064)

Residential Tenancies - Tenant Abandoning Rental Unit - Appeal
Residential Tenancies - Landlord Seizure of Tenant Property - Appeal

This matter was an appeal by the tenant, P.L., from a decision of the hearing officer appointed pursuant to *The Residential Tenancies Act, 2006* (RTA) awarding the respondent landlord arrears of rent, amounts to clean and repair the basement suite

(suite), and fees to store the personal property of the tenant. The hearing officer also dismissed the claim of the tenant for damages as against the landlord for personal property she alleged went missing from the suite due to his fault. The appeal was taken under s. 72 of the RTA which allowed the tenant to appeal the decision of the hearing officer to the Court of Queen's Bench on a question of law or jurisdiction. The judge on the appeal (judge) accepted the factual findings of the hearing judge, the crux of which was as follows: the tenant was out of country for an extended period of time, from December, 2020 to February, 2021, leaving the suite unsecured; neighbours complained to the landlord that the door to the unit had been left open, people were coming and going, and a window was broken; the landlord attended at the suite and found belongings strewn throughout, and property damage, including a broken toilet, vanity, door and window; the landlord also paid to have the suite cleaned; the appellant failed to pay rent for January and February, 2021; the tenant made no effort to retrieve her property from storage; and none of the items she claimed to be missing from the suite "were recovered by the landlord from the suite." The judge observed that the hearing officer did not make reference to ss. 12 and 85 of the RTA in making his ruling concerning the obligations of the landlord when property is seized from a tenant.

HELD: The hearing judge allowed the appeal, finding that the hearing officer made an error in law by ruling against the tenant on the question of the seizure of the tenant's personal property without giving any consideration to the application of ss. 12 and 85 of the RTA to his factual findings. The hearing judge determined that without an order from a hearing officer under s. 85 of the RTA as required by s. 12, the landlord was not authorized to seize and store the property. In making this determination, she relied on *Rozon v Re/Max Guardian Commercial Real Estate Services Inc.*, 2011 SKQB 57. In the result, she ordered the matter returned to the hearing officer for a new trial.

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***R v Loutitt*, 2022 SKQB 74**

Chow, 2022-03-21 (QB22065)

Criminal Law - Impaired Driving - Summary Appeal
Constitutional Law - Charter of Rights, Section 7, Section 24(1)
Criminal Law - Stay of Proceedings - Crown Appeal

The Crown appealed the decision of a judge of the Provincial Court (trial judge) staying charges against the respondent, B.L., of operating a conveyance while impaired and being over the blood alcohol legal limit after ceasing to operate a motor vehicle, to the Court of Queen's Bench pursuant to s. 813(b)(i) of the *Criminal Code* (Code), which allows the Crown to appeal from an order that "stays proceedings on an information." The Crown conceded that it had failed to provide disclosure of video and other evidence in a timely manner in breach of the respondent's right to make full answer and defence to the charges contrary to s. 7 of the *Charter*. It appealed on the sole ground that the trial judge erred in law in ruling on the facts before her that the only remedy available to her in the circumstances which would satisfy society's interests in ensuring that accused persons received a fair trial was a stay of proceedings under s. 24(1) of the Charter. The summary conviction appeal court judge (appeal judge) canvassed the salient facts available to the trial judge in arriving at her decision: the information in question was sworn on March 23, 2020; on March 26, defence counsel formally requested disclosure of the case against his client; on April 23, 2020, the Crown provided some

disclosure, but no video or audio recordings were disclosed at that time; the next day, defence counsel requested that the Crown determine that the police investigators had provided all disclosure in their possession or control of relevance to the case; no response was received to this correspondence from the Crown by May 8, 2020, at which time defence counsel again corresponded with the Crown requesting that the matter be brought forward to enter a not guilty plea and set a trial date; the Crown again did not respond, and defence counsel arranged with the Provincial Court to have the information brought forward to June 8, 2020, at which time the trial was set for August 20, 2020; on August 17, 2020, the Crown became aware of the existence of some in-car video in the hands of the investigators which had not been disclosed to defence counsel, and the next day advised defence counsel of its existence, and that the video in question would be available for review by the accused the morning of the trial; on the morning of the trial, defence counsel was provided with the in-car video and "a video and a photograph of [B.L.] at the detachment after her arrest, a prisoner's report prepared by investigators, and an audio recording of the initial civilian complaint that precipitated the investigation;" the accused's license was suspended on the date of the alleged offence and continued to be suspended until the charges were concluded; B.L. was a property manager whose work required her to visit numerous properties each day; B.L. resided in Prince Albert and defence counsel in Saskatoon; and defence counsel was not available for an early trial date of September 24, 2020. The appeal judge reviewed the trial judge's decision, taking note that with respect to the crux of the matter, being the appropriate remedy for the late disclosure of the evidence by the Crown, she turned her mind to whether an adjournment of the trial, and throw away costs of the adjournment would satisfy society's need to ensure a fair trial, and whether she should hear the trial evidence before determination of a remedy, concluding that such measures would not be a satisfactory response to the Charter breach because such corrective measures would not alleviate the prejudice to the accused's right to a fair trial and to the integrity of the justice system (see: *R v Babos*, 2014 SCC 16).
HELD: The appeal judge dismissed the appeal following extensive citations from cases with respect to the standard of appeal he was to apply and with respect to the history of the development of the Crown's disclosure obligations, and remedies for failures to satisfy these obligations, including the granting of stays. The appeal judge stated that he was to respect the trial judge's decision unless "it has been shown that the trial judge misdirected herself in law, committed a reviewable error of fact, or rendered a decision that is so clearly wrong as to amount to an injustice:" *R v K.D.S.*, 2021 SKCA 84. He concluded he could not find any fault of this kind in the trial judge's ruling. He pointed to her reference to all the relevant authorities, her awareness that a stay was a remedy of last resort not to be used except in extraordinary cases, and that she had correctly taken into account all other possible remedies and avenues of redress, and as such, deference to her findings could not be disturbed.

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***Mandziak v Animal Protection Services of Saskatchewan*, 2022 SKQB 75**

Klatt, 2022-03-22 (QB22066)

Administrative Law - Judicial Review
Administrative Law - Judicial Review - Animal Protection Services of Saskatchewan

The applicant sought judicial review of the Corrective Action Order (CAO) made by the respondent, Animal Protection Services of Saskatchewan, not to return cattle to him that had been seized from his farm. The applicant appealed the CAO through

the right provided to him at s. 21 of *The Animal Protection Act* (Act). The respondent received information on or about June 8, 2020 that the Applicant's cattle were in distress. Officers of the respondent met with the applicant on June 23. The CAO was issued upon observation of several animals in distress. On June 26, a search warrant was obtained and executed to further enter the applicant's premises. Members of the respondent, the RCMP and a veterinarian attended the applicant's farm. The veterinarian estimated that 25% of the herd were in poor body condition. The respondent's representative issued a notice of seizure for 135 of approximately 400 cattle. In July, the respondent decided not to return the cattle to the applicant and auctioned them off. The issues for the court's determination were: (1) did the respondent owe the applicant a duty of fairness during the investigation that required them to disclose to him the identity of the informant and confidential information they received from June 8 to June 26, 2020; (2) did the respondent owe him a duty of fairness to make submissions to them before they decided in July 2020 to not return cattle to him; (3) was the search of June 26, 2020 unreasonable, thereby violating s. 8 of the Charter, and (4) are sections 12 and 14(3) of the Act unconstitutional?
HELD: The appeal of the CAO was dismissed. (1) The respondent was not obligated to disclose the identity of the confidential informant. (2) The court determined that while the respondent owed a general duty of procedural fairness to the applicant, the Act requires swift corrective action. Accordingly, a person affected by a decision of the respondent cannot legitimately expect expansive procedural fairness give the policy objectives underlying the Act. As for the last two issues, the applicant's arguments on Charter breaches and unconstitutionality of the Act were without merit and were dismissed.

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***R v Cathcart*, 2022 SKQB 84**

Currie, 2022-03-28 (QB22074)

Criminal Law - Application to Adduce Fresh Evidence
Criminal Law - Procedure - Mistrial

The self-represented accused, C.D.C., was convicted on five counts covering unlawful confinement, attempted robbery, and breach of an undertaking. He had been driving a vehicle in which victims had been unlawfully confined and attempts had been made to remove valuables from them. After conviction but before sentencing, C.D.C. applied for orders of reopening the trial to call more evidence; directing the transcription of a police interview; and permitting substitutional service of a subpoena on a detective or, alternatively, a mistrial. The issue for the court to determine was whether to reopen the trial or to declare a mistrial.
HELD: C.D.C.'s applications were dismissed in their entirety. The Court applied the *Palmer* test for fresh evidence (*R v Palmer*, [1980] 1 SCR 759) and the additional "tactical decision test," which is to consider whether an accused is attempting to reverse a tactical decision made at trial. The four elements of the *Palmer* test for fresh evidence – whether due diligence would have adduced the evidence before trial; whether the evidence is relevant; whether the evidence is credible, and whether the evidence taken would have affected the result – were applied and C.D.C. did not meet three of the four *Palmer* criteria. Further, the court determined that C.D.C. had made certain tactical decisions that he was now inappropriately seeking to review on application. The court did not reopen the trial and did not declare a mistrial.

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***R v T.S.*, 2022 SKPC 17**

Anand, 2022-04-12 (PC22015)

Criminal Law - *Youth Criminal Justice Act*
Criminal Law - Evidence - Statement - *Res Gestae* - Spontaneous Utterance Exception

The accused, a 13-year-old boy, brought an application to exclude statements made by him in the presence of police which would trigger the procedural protections contained in s. 146 of the *Youth Criminal Justice Act* (Act). The accused was charged with stabbing another young person in the neck. While being arrested, the accused made statements to his mother in the presence of the police. The issue for the Court to resolve was whether the accused made such inculpatory statements spontaneously to persons in authority.
HELD: The accused's application was granted. The accused had not made the statements spontaneously, they had been made because of his mother's questioning. The Court determined that the accused's statements were made to persons in authority, given the police presence. As such, the Crown was to establish beyond a reasonable doubt, that the accused's statements were both spontaneously made, and that the statements made were done so without a reasonable opportunity to be cautioned by the police pursuant to the Act. The statements had not been spontaneously made and the accused had not been cautioned and accordingly, the statements would not be admissible at trial.

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