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.

Vol. 24, No. 11 **June 1, 2022**

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***George Gordon First Nation v Saskatchewan*, 2022 SKCA 41**

Ottenbreit Whitmore Tholl, 2022-03-29 (CA22041)

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The George Gordon First Nation, its Chief, Council, and members (GGFN) appealed a summary judgment dismissing their claims. GGFN asserted that the Crown breached its duty to consult with GGFN before Saskatchewan disposed of mineral rights within 100 km of GGFN's existing reserve. In 1874, Treaty No. 4 was entered into on behalf of the Government of Canada (GOC) and the First Nations peoples that inhabited the area. When Treaty No. 4 was signed, all land covered by the treaty was administered by Canada. When what would become the provinces of Ontario, Quebec, New Brunswick and Nova Scotia were formed, each province was granted the

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right to exclusively administer Crown lands and natural resources within its borders. Unlike these provinces, when Manitoba, Saskatchewan and Alberta became provinces, the administration of Crown lands and natural resources remained with Canada. These circumstances remained the same until 1930, when various Natural Resource Transfer Agreements (NRTAs) transferred all Crown lands, minerals and other natural resources within the provinces from Canada to Manitoba, Saskatchewan and Alberta. Treaty No. 4 specified lands that would be granted to GGFN based on the band's population. In the 1970s, Court actions commenced that confirmed that various First Nations in Saskatchewan had not received all of the land promised by several treaties, including Treaty No. 4. This commenced a lengthy process, ultimately leading to a settlement agreement in 2006. Under the settlement agreement, GGFN had the option to purchase land to have set apart as reserve lands. The settlement agreement specified a minimum number of acres of both surface rights and mineral rights that GGFN was required to purchase within 12 years of the settlement agreement (shortfall acres). The surface rights to additional acres of land could be purchased with or without the associated mineral rights. The agreement did not permit the purchase of mineral rights as part of reserve lands without also acquiring surface rights. The settlement agreement provided GGFN with monies to fund the purchase of surface and mineral rights. GGFN purchased all its shortfall acres and additional acres of land. By February 2019, GGFN had purchased 17,040.84 acres of land. Saskatchewan transferred 10,122 acres of Crown mineral rights to GGFN that had been moved to reserve status. 6,499 additional acres were ready to be transferred to reserve status and 6,583 other acres of mineral rights frozen, pending GGFN's purchase of surface rights. The issue in this case revolved around Saskatchewan disposing of other mineral rights within a 100 km radius of GGFN's existing reserve lands while it was negotiating the settlement agreement and after the settlement agreement was in effect. Lands within the 100 km radius of GGFN's existing reserve contained potash minerals, and corporations were granted the right of exploration and mining of those minerals. GGFN asserts that it had a right to obtain surface and subsurface rights to that same land to fulfil its outstanding treaty land entitlement (TLE), and that a duty to consult was triggered when Saskatchewan disposed of these rights to third parties. In 2011, GGFN issued a statement of claim alleging that Canada and Saskatchewan failed to consult regarding the disposition of mineral rights in the period when the settlement agreement was negotiated and signed. GGFN asserted that the dispositions and absence of consultation prevented it from obtaining surface and mineral rights to the land subject to the dispositions. In 2018, GGFN applied to the court seeking summary judgment, asserting that Saskatchewan and Canada had an obligation to consult with GGFN before and after the settlement agreement with respect to the disposition of mineral interests within a 100 km radius of Treaty No. 4 territory. The chambers judge dismissed GGFN's claim with costs to Canada and Saskatchewan. On appeal, GGFN argued that the chambers judge erred in the following ways: (1) by misinterpreting the NRTA and failing to determine that the surface and subsurface rights transferred from the GOC to Saskatchewan pursuant to the NRTA was subject to pre-existing Indigenous interests. GGFN asserted that the chambers judge failed to address its argument that Treaty No. 4 is a trust or an

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interest other than that of the Crown, and that Saskatchewan therefore owed a duty to consult with GGFN as a beneficiary; (2) by finding that a duty to consult did not arise in the circumstances when viewed through the lens of s. 35 of the *Constitution Act, 1982*, the unfulfilled obligations under Treaty No. 4, the honour of the Crown, and the resultant Crown fiduciary obligations; (3) in determining that, even if a duty to consult existed, Saskatchewan had not breached that duty; (4) in determining that Canada had fulfilled its duty to consult and that the chambers judge failed to conduct an analysis of the scope required for the consultation; (5) in finding that the release provisions barred GGFN's claim entirely; and finally, (6) by mischaracterizing, disregarding and failing to address its oral arguments. The issues for the court to determine on appeal were as follows: (1) Whether the chambers judge erred in his interpretation of the NRTA; (2) whether the chambers judge erred in finding that Saskatchewan had no duty to consult with GGFN on any other basis before it disposed of mineral rights to third parties; (3) if such a duty to consult existed, did the chambers judge err in determining that Saskatchewan did not breach this duty; (4) whether the chambers judge erred in deciding that the GOC did not have a role to consult with GGFN before Saskatchewan disposed of mineral rights or in deciding that the GOC did not breach its obligations in this regard; and (6) whether the chambers judge erred in finding that GGFN's claim was barred by the provisions of the settlement agreement.
HELD: GGFN's appeal was dismissed. The court carefully reviewed the interplay between Treaty No. 4 and legislation such as the *Constitution Act, 1867* before commencing a review of the NRTA. The court reviewed principles of legislative interpretation and examined the historical and constitutional background of NRTAs. The court also reviewed the text of Treaty No. 4 to decipher the meaning of "trust" and "any interest other than that of the Crown" used in paragraph 1 of the NRTAs. The court found that the chambers judge was correct in his interpretation of the NRTA. The court determined that for GGFN to be the beneficiary of a trust, Saskatchewan would have to have less than a full beneficial interest in mineral rights. A portion of the beneficial interest would be held for the benefit of GGFN and other Bands with unfulfilled treaty land entitlements. The court found that the NRTA did not transfer Crown lands and mineral rights to Saskatchewan subject to a trust or other interest in relation to minerals with GGFN as beneficiary. The court found that when Crown lands and resources were transferred to Saskatchewan pursuant to NRTA, it held the legal and beneficial title to the subsurface rights. Thus, the court determined that a duty to consult with GGFN could not arise on the basis of a trust or other interest as referred to in paragraph 1 of the NRTA. The court then went on to determine whether there were other grounds to find that Saskatchewan had a duty to consult with GGFN before it disposed of mineral rights to third parties within a 100 km radius of GGFN's existing reserve lands. The court adopted the test articulated in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010]2 SCR 650 (*Rio*) to determine whether a duty to consult existed. According to *Rio*, a duty to consult exists when the following elements are present: (1) the Crown must have knowledge of a potential claim or right, (2) there must be a current contemplated Crown conduct or decision that may adversely affect on the claim or right, and (3) the contemplated conduct or decision must have the potential to adversely affect the Indigenous claim or right in an appreciable manner, and

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the claimant must show a causal relationship between the proposed government conduct or decision and the potential for such an effect. The court found that in the circumstances, the chambers judge was correct in determining that there was no conduct or decision made by Saskatchewan engaging a right of claim held by GGFN that would trigger a duty to consult. Although the court had determined that the second stage of the test from *Rio* had not been met, the court nonetheless engaged in a separate assessment of potential adverse effects resulting from Saskatchewan's actions. The court determined that the chambers judge was correct in determining that there was no actual or foreseeable adverse effect on GGFN's existing claim or rights resulting from Saskatchewan's continued disposal of mineral rights in the negotiation period and in the period after the settlement agreement was signed. GGFN asserted that Saskatchewan's actions forced it to choose land and minerals in locations up to 600 km from its existing reserve. The court found that the evidence supported the conclusion that there were other lands and minerals that GGFN could have obtained near its reserve and that it was not forced to make distant acquisitions. The court found that although GGFN had missed the chance for economic gain from those specific lands, this missed opportunity did not translate into an adverse effect on GGFN's rights. The court noted that 96.2% of the Crown mineral reserves in the area remained potentially available for selection by GGFN. Next, the court found that the chambers judge did not err in determining that if a duty to consult did exist, Saskatchewan fulfilled its obligations. The court found that TLE negotiations, the provision of information to GGFN regarding existing dispositions and the availability of mineral rights, and Saskatchewan's practice of engaging a "freeze" on dispositions as soon as GGFN expressed interest in any parcel of available land was reasonable consultation. The court confirmed that the chambers judge was correct in determining that the GOC had no role regarding a duty to consult before Saskatchewan made mineral dispositions. The court found that the GOC did not have the authority to compel action by Saskatchewan nor any obligation to assist with mineral dispositions in the way asserted by GGFN. Further, the court found that the chambers judge interpreted the settlement agreement correctly in finding that GGFN's claim was barred by provisions contained within it. Finally, the court found that the ground of appeal regarding GGFN's allegation that the chambers judge mischaracterized, disregarded and failed to address its oral arguments could not be sustained. It found that there was no evidence of the oral arguments made by counsel at the hearing and as such, no evidence to evaluate the submission.

***R v Santos*, 2022 SKCA 50**

Caldwell Barrington-Foote Kalmakoff, 2022-04-19 (CA22050)

Criminal Law - *Controlled Drugs and Substances Act* - Possession for the Purposes of Trafficking - Cocaine
Constitutional Law - *Charter of Rights*, Section 9 - Unlawful Search and Seizure
Constitutional Law - *Charter of Rights*, Section 24(2) - Exclusion of Evidence

J.S. appealed his conviction for possessing cocaine for the purpose of trafficking to the Court of Appeal (court) following his trial before a judge of the Provincial Court (trial judge) on the ground that the trial judge committed an error in law by ruling that his rights under s. 9 of the *Charter* not to be arbitrarily detained and s. 8 of the *Charter* to be secure against unreasonable search and seizure had not been infringed during a roadside stop by a peace officer (G.), which resulted in the search of the vehicle he was operating and the seizure of a "brick of cocaine." The court was required to determine whether the trial judge made a legal error in concluding that G. had reasonable grounds to believe that cannabis in an amount in excess of 30 grams was present in the vehicle so as to justify the search of the vehicle and the seizure of the cocaine. The court summarized the testimony of G. available to the trial judge in conducting his analysis of the objective reasonableness of G.'s subjective belief that cannabis in this amount would be found in the vehicle. This testimony consisted of what the appellant told G. at roadside, observations he made, and information he obtained, all of which he testified was filtered through his experience and training. In particular, the court recognized that the trial judge heard G. testify that he stopped J.S.'s vehicle under *The Traffic Safety Act*; when at the vehicle, he smelled the odour of raw cannabis; J.S. told him the vehicle was a rental, and he had difficulty finding the rental papers, and appeared flustered and panicked while looking for them; in G.'s experience, drug dealers transport drugs in rental vehicles as plate searches of these provide no incriminating evidence; J.S. volunteered that his own vehicle was being repaired, which G. believed was an attempt by J.S. to justify the use of a rental; J.S. also told him that he was traveling from Calgary to Winnipeg, cities G. knew to be source and destination points for drugs; G. observed a Red Bull energy drink and fast food trash on the floor; G. observed a storage area cover in the vehicle; and made intelligence checks showing that neighbours to J.S. had people mistakenly come to their door wanting to buy drugs.
HELD The court allowed the appeal, deciding that on a standard of correctness, the trial judge had erred in ruling that the evidence before him could objectively lead to the conclusion made by G. that he had reasonable grounds to believe that cannabis in excess of 30 grams might be found in the vehicle. It also chose to conduct the s. 24(2) *Grant* analysis instead of ordering a new trial, concluding that it would have excluded the evidence of the brick of cocaine and other seized items from the trial, without which no conviction could have been entered against J.S. In finding a breach of s. 9 of the *Charter*, the court stated that the trial judge should have recognized that the indicia of the presence of cannabis testified to by G. were entirely "innocuous", whether considered singly or cumulatively. It found that the most cogent observation, the smell of raw cannabis, could not be determinative, since under the *Cannabis Act* and *The Cannabis Control (Saskatchewan) Act*, it was not illegal to transport less than 30 grams of cannabis in a vehicle and G. did not testify to any indicia which could support his belief that more than that amount of cannabis might be present in the vehicle. The court also determined that the trial judge placed too much faith in G.'s reliance on his training and experience in forming his grounds and abdicated his role, which required him to objectively assess the reasonableness of the officer's belief. As to the *Grant* analysis, the court balanced the three factors, being the seriousness of the breach, the effect of the breach on J.S.'s *Charter* rights, and society's interest in seeing the matter adjudicated on its merits, ruling that the long-term interest of maintaining respect for the administration of justice required that the evidence be excluded.

***R.C.S. v R.D.L.*, 2022 SKCA 52**

Schwann Tholl Kalmakoff, 2022-05-03 (CA22052)

Family Law - Interim Parenting Orders - Appeal
Family Law - Custody - Appeals - Standard of Review

R.C.S., the father of a 5-year-old girl, B.D.S., born in September 2016, appealed to the Court of Appeal (court) the decision of a judge of the Queen's Bench Court (chambers judge) denying his request for shared parenting with her mother, R.D.L., among other requests for relief (see: *R.D.L. v R.C.S.* (24 August 2021) Battleford, FLD 52 of 2021 (Sask QB) (Interim Order)). His grounds of appeal were that the chambers judge made material errors of fact, failed to provide adequate reasons, and failed to fully consider the factors bearing on the best interests of B.D.S. as set out in *The Children's Law Act, 2020* (CLA). The court summarized the relevant background facts. R.C.S. and R.D.L. cohabitated from the fall of 2016 until the spring of 2019, at which time they separated. R.D.L. took up residence in a house with B.D.S. and a second child from a previous relationship. R.C.S. claimed the status quo was a shared parenting relationship during the period of cohabitation and for 17 months after the separation, at which time, he alleged, R.D.L. unilaterally reduced his parenting time to each second weekend from Thursday after school to Monday morning. No formal agreement or interim order was in place at the time of the application by R.C.S., which was heard on July 23, 2021. Both parties filed affidavits in support of their respective positions. R.D.L. denied that parenting of B.D.S. was ever shared evenly with R.C.S. or that she had imposed the parenting arrangement in place at the time of R.C.S.'s application. The court reviewed the decision of the chambers judge, noting that he first found the status quo was that B.D.S. lived primarily with R.D.L. and R.C.S. parented her each second weekend from Thursday after school to Monday morning, and went on to decide on the authority of *Gebert v Wilson*, 2015 SKCA 139 and *Seidel v Seidel*, 2021 SKCA 92 that it would not be in the best interests of B.D.S. to change the status quo on an interim basis when the evidence did not suggest the child was at risk or that there were other compelling reasons to change the parenting arrangement.

HELD: The court dismissed the appeal. As to the standard of appeal it was to apply to interim parenting orders, the court stated that it was "narrow in scope and deferential in nature" and as stated in *Bolan v Bolan*, 2013 SKCA 97. it was "fact-based and discretionary in nature and, as such, an appellate court will give considerable deference to a chambers judge's decision." With this standard of appeal in mind, the court found first that the chambers judge did not make any material errors of fact. It agreed that the question of how the status quo arose was immaterial to his decision not to alter it, and so it was unnecessary for him to wrestle with that contested evidence. Secondly, the court was satisfied that the reasons of the chambers judge, when considered along with the court record, were sufficient for their purpose, which was to show why he was satisfied the current parenting arrangement was in the best interests of B.D.S. until a permanent parenting order could be entered into following a pre-trial conference or a trial. As such, his reasons were adequate to allow for appellate review. Thirdly, as to the chambers judge's examination of the non-exhaustive factors enumerated in s. 10(3) of the CLA that a court must consider in determining the best interests of the child, the court saw no error allowing for appellate intervention. It stated that the chambers judge was not required to comment on each of the numerous factors so long as he had them in mind and emphasized those factors relevant to the case before him, as he did.

***K.M.S. v K.B.S.*, 2022 SKQB 57**

Gerecke, 2022-02-24 (QB22070)

Family Law - Interim Order
Evidence - Judicial Notice - COVID-19

The applicant, K.M.S., sought an order authorizing her to have her two children vaccinated against the COVID-19 virus without consent from the children's father, K.B.S. K.M.S. also sought an ancillary order to prohibit K.B.S., from discussing COVID-19 vaccinations with the children. Prior to the court application, the two children had tested positive for COVID-19. The present application was an interim application to vary an existing interim order regarding child custody and decision making. The issues for the court's determination were: (1) whether the court should authorize K.M.S. to have the children vaccinated without K.B.S.'s consent and whether a waiting period should be required; and (2) whether the court should grant orders restricting K.B.S.'s communication with the children regarding COVID-19 and vaccinations.
HELD: The court granted K.M.S.'s application. In reviewing Canadian jurisprudence on similar issues, the court determined that it was appropriate to take judicial notice concerning COVID-19 matters. The court concluded that COVID-19 and the growing understanding of its impacts constituted a material change such that the existing interim order could be varied. The court found that recommendations by health authorities supported K.M.S.'s position regarding COVID-19 vaccinations, and that there was no evidence of health conditions that would place the children's safety at risk by receiving the vaccination. The court found that the father had communicated misinformation about COVID-19 to the children and determined that it was in the children's best interest to restrain him from doing so. The court ordered, on an interim basis, that K.M.S. be authorized to have the children vaccinated against COVID-19 without K.B.S.'s consent and that K.B.S. not discuss or permit to be discussed the issue of COVID-19 or COVID-19 vaccinations.

***R v D.E.*, 2022 SKQB 58**

Elson, 2022-02-25 (QB22059)

Criminal Law – Assault – Sexual Assault – Victim Under 16
Criminal Law – Sexual Interference

The accused, D.E., was charged with two counts which alleged that he committed sexual assault, contrary to s. 271 of the

Criminal Code and sexual interference, contrary to s. 151 of the *Criminal Code*. The victim, K.L., was the accused's biological daughter. K.L. was three or four years old at the time of the alleged offences. K.L.'s mother and the accused had a dysfunctional, intermittent relationship of approximately 4 years. K.L. spontaneously disclosed an incident involving her father when her mother was putting her to sleep. K.L. was interviewed by police and testified at trial, along with her mother, the police officer who had interviewed K.L., and an RCMP officer who took a warned statement from D.E. D.E. testified and denied the allegations. The issue for the court to determine was whether D.E. touched K.L. in a sexual manner.
HELD: The accused was found guilty of sexual interference. A stay of proceedings was entered with respect to the charge of sexual assault. Despite K.L.'s young age, the court found her evidence credible and reliable. The incident K.L. described was explicit and her recollection was corroborated by other events that occurred in the proposed timeline of events. D.L.'s evidence was disbelieved, and his explanations rejected.

***R v A.S.*, 2022 SKQB 60**

Crooks, 2022-03-02 (QB22060)

Criminal Law - Sexual Assault - Sexual Touching of a Minor
Criminal Law - Procedure - Mistrial

The accused filed an application for a mistrial. The accused was charged with sexual assault, contrary to s. 271 of the *Criminal Code*, and invitation to sexual touching, contrary to s. 152 of the *Criminal Code*. The victim, A.S., was eleven years old at the time of trial. The Crown and the accused both consented to A.S. testifying outside the courtroom in a restricted area of the courthouse referred to as the "soft room." A contingent of members of the Bikers Against Child Abuse (BACA) were present in the courtroom as victim support persons for A.S. Two members of the BACA sat outside the soft room while A.S. provided his testimony. The Local Registrar requested that the members outside the soft room leave the area, which they initially refused to do. The BACA members' voices could be heard through the microphone in the soft room and amplified into the courtroom as A.S. testified. After a lunch break, members of BACA attended to the soft room with A.S. The accused sought a mistrial. The sole issue for the court's determination was whether a mistrial ought to be declared.
HELD: The application for a mistrial was granted. The court found that the BACA members' presence outside the soft room and ongoing conversations throughout the complainant's testimony interfered with the complainant's evidence and impacted the accused's trial fairness. The court concluded that a reasonable possibility of prejudice to the accused was present.

***Fairstone Financial Inc. v Stevenson*, 2022 SKQB 93**

Hildebrandt, 2022-03-04 (QB22095)

Mortgages - Foreclosures - Remedies

The mortgagors, T.S. and the estate of T.S., failed to file a defence to a mortgage action against them. The mortgagee, Fairstone Financial Inc. (Fairstone), sought to note the mortgagors for default of defence and to obtain a default judgment for the amount owing under the mortgage pursuant to Rule 17-1 of *The Queen's Bench Rules* on the basis that it was claiming judgment "of a debt or liquidated demand." The local registrar of the Court of Queen's Bench (court) referred the request to a judge, who held the request for default judgment in abeyance pending written submissions on behalf of Fairstone, which filed an affidavit in which it stated it was seeking to realize on the mortgagors' covenant to pay and abandoning its claim to foreclosure or sale of the mortgaged property, and that such a procedure was allowed by *Co-operative Trust Co. of Canada v Target 21 Industries Ltd.* (1988), 63 Sask R 13 (Sask CA) (*Co-operative Trust*). The judge considered the appropriateness of Fairstone proceeding in this manner.
HELD: The judge directed the local registrar's office not to issue the judgment in default, requiring that Fairstone bring an application for such a remedy with notice to the mortgagors. She stated that in proceeding by way of foreclosure, Fairstone had committed to a process with built in protections to the mortgagors and supervision of the process by the court for the purpose of achieving fairness between mortgagors and mortgagees, such as setting timelines for redemption and approving litigation costs, none of which were available to judgment debtors. As to Fairstone's reliance on *Co-operative Trust*, the judge was not convinced it was directly on point, in particular because the rational of the case was that in exercising its remedies under the mortgage, the mortgage may also obtain judgment for the balance owing; it did not speak to obtaining a default judgment outside the foreclosure procedure. Ultimately, the court did not allow the mortgagee to obtain a default judgment, nor was she satisfied that Rule 17-1 opened the default judgment route to the mortgagee. She said cases such as *Moose Jaw Credit Union Ltd. v Goodnough* (1983), 24 Sask R 22 (QB) (*Goodnough*) suggested that a mortgage foreclosure action is not encompassed by the phrase ""debt or liquidated demand" because of the various remedies available to a mortgagee and the protections afforded to a mortgagor."

***T.C. v Y.C.*, 2022 SKQB 65**

Danyliuk, 2022-03-09 (QB22071)

Family Law - Interim Order

The respondent father, D.T., brought an application to vary an interim parenting order. The children's mother, Y.C., was also a respondent in this case. The petitioner, T.C., is Y.C.'s mother and grandmother to D.T. and Y.C.'s two children. T.C. was heavily involved with the children. An interim consent order was granted which included various provisions, including granting D.T. parenting time every weekend. Among other occurrences over the next several months, Y.C. went to the United Kingdom to visit her boyfriend and it was unknown whether she would return to Canada. A subsequent order granted D.T. interim sole custody of the children. D.T.

brought an application seeking to vary the order, requesting primary care and residence of the children, sole decision-making for the children, that T.C. not have specified access upon reasonable request but subject to D.T.'s discretion, and that D.T. be permitted discretion to remove the children from Saskatoon.
HELD: The application was dismissed. The court found that it could not fairly decide on substantive legal issues given that the parties filed conflicting evidence. Accordingly, subject to only minor adjustments, the court declined to grant D.T.'s application to vary the interim parenting order and ordered that the parties proceed to trial.

***Ward, Re (Bankrupt)*, 2022 SKQB 82**

Thompson, 2022-03-24 (QB22069)

Bankruptcy - Consumer Proposal
Bankruptcy - Procedure

G.W. was employed by the applicant, Assiniboine Fire Protection (AFP). G.W. was provided with a credit card in the name of a "sister" company of AFP for the purpose of constructing a garage on his property. In 2016, an AFP representative advised G.W. of interest being charged to A.F.P because of payments made by G.W. In 2015, G.W. filed a consumer proposal. G.W. had not disclosed the debt owed to AFP to his administrator. Regardless, the administrator advised AFP that it had the option of proving its claim through the consumer proposal. AFP alleged that it had a secured claim with the administrator; however, evidence confirmed that the administrator disallowed AFP's secured claim on the basis that the interest was accrued after the date of the consumer proposal. Instead, the administrator found that the $24,000.00 was an unsecured debt. AFP filed a notice of application pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act* (BIA) seeking the following remedy: (1) an appeal from the disallowance of AFP's claim against G.W. and an order declaring that the $24,000 claim against G.W. was a valid and subsisting claim; (2) an order that the consumer proposal be annulled; or (3) a declaration that the interest registered against G.W.'s property be deemed a secured interest.
HELD: The application was denied. The court confirmed the administrator's approach of allowing the AFP debt as an unsecured debt and determined that there were no grounds to annul the consumer approval. The court considered the effect of G.W.'s initial failure to notify the administrator of the AFP debt and concluded that its authority to consider debtor conduct in the context of consumer proposals was limited to circumstances where evidence of injustice is present. The court found no evidence supporting a finding of injustice in this case. The court confirmed the administrator's decision that AFP did not hold a valid secured interest against G.W.

***E.N.M., Re*, 2022 SKQB 81**

Richmond, 2022-03-25 (QB22068)

Family Law - Adoption
Family Law - Paternity

The Ministry of Social Services ("the Ministry") filed an application without notice pursuant to s. 49(1) of the Child and Family Services Act (CFSA) to commit E.N.M., the infant child of E.M., to the custody of the Minister without the father's signature. E.M. and E.H. had been in an eight-month long relationship, during which time E.M. was subjected to verbal and physical abuse by E.H. E.M. ended the relationship after a violent assault resulting in E.H. being convicted. E.M. was not aware at the time that she was pregnant. E.M. gave birth to E.M.H. and advised the Ministry that she was not able to raise E.N.M. E.M. expressed concern regarding her and E.N.M.'s safety if E.H. became aware of E.N.M. The issue for the court to determine was whether the child should be committed to adoption without notice to the father, despite the father being known and his whereabouts ascertainable.
HELD: The Ministry's court application was denied. The court concluded that procedural fairness demanded E.H. be given notice of the proceedings. While acknowledging E.M.'s fear as legitimate, the court found that they could not justify a complete denial of procedural rights. The Ministry was granted leave to reapply after giving notice to E.H.

***B.J.V. v K.T.J.*, 2022 SKQB 95**

Bardai, 2022-04-04 (QB22098)

Family Law - Interim Parenting Orders
Family Law - *Children's Law Act* - Indigenous Upbringing and Heritage

B.J.V., the father of two children, K.B.R.J., aged five, and N.E.S.J., aged three, of Indigenous ancestry through their mother, K.T.J., applied to a judge of the Court of Queen's Bench (chambers judge) for shared parenting and joint decision-making. On the first chambers date in February of 2022, the chambers judge adjourned the matter so K.T.J. could file responding affidavit material and, in the interval, granted B.J.V. some parenting time so he could get reacquainted with the children as he had been away for some time since the separation of the parties on October 29, 2021. The children were in the primary care of K.T.J., who also made all decisions for them since the separation. The court record to which the chambers judge referred, indicated that very early on into his interim parenting order, B.J.V., without K.T.J.'s consent, took K.B.R.J. to have a haircut, at which time his braid was cut off. On the return date of B.J.V.'s interim shared parenting and joint decision-making application, the presiding chambers judge declined to award any further parenting time to B.J.V. He was highly critical of B.J.V.'s actions in having K.B.R.J.'s braid cut off. The matter was back before this chambers judge who was again to consider K.T.J.'s application for shared parenting and joint decision-making. He also had before him the affidavit of K.T.J. and B.J.K.'s affidavit in relation to his actions in cutting off the braid. The chambers judge

was cognizant that his task was to determine what interim parenting and decision-making order was in the best interests of the children following a consideration of the non-exhaustive factors listed in *The Children's Law Act, 2020* (CLA).
HELD: The chambers judge ordered interim parenting of two days per week on a 14-day alternating schedule for B.J.V. and gave K.T.J. sole decision-making authority. Like the previous judge, he too could not underestimate the seriousness of cutting off K.B.R.J.'s braid, quoting from accounts of survivors of residential schools contained in the Truth and Reconciliation Commission of Canada reports in which they expressed the loss of identity they felt when their braid was cut off, and though B.J.V. expressed remorse for his actions in his affidavit and was taking positive steps, the court stated that B.J.V.'s actions in this respect bore directly on his ability to parent the children because they demonstrated he was prepared to put aside what was in his children's best interests to hurt their mother. He said he was required by the CLA to specifically consider as a factor the willingness and ability of a parent to meet the needs of his children which included the child's "cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage." He was of the view that at this stage, B.J.V. was unable to meet his children's needs in this way.

***Behr v Howe*, 2022 SKQB 97**

Tochor, 2022-04-05 (QB22099)

Pensions - Beneficiaries - Definition of Spouse
Evidence - Exceptions to Hearsay Rule
Civil Procedure - Trial of an Issue
Civil Procedure - Order of Presentation at Trial - Burden of Proof

C.E.B., the son of the deceased, B.J.B., who died on February 24, 2021, brought an application to the chambers judge for an order pursuant to s. 21(5) of *The Public Employees Pension Plan Act* (PEPP) to designate his mother's estate as the beneficiary of her pension fund and for an order declaring that L.H., who claimed he was her spouse as defined by s. 2(m)(ii) of the PEPP, and therefore entitled to receive her pension fund, was not her spouse. The chambers judge determined that he was first required to decide the admissibility of numerous text messages attached as exhibits to two affidavits filed in support of C.E.B.'s position; and that he was to decide whether he was able to make a ruling as to L.H.'s claim on the basis of the conflicting affidavit evidence or order a trial of the issue.
HELD: The chambers judge ruled the text messages were admissible as evidence on the application as exceptions to the hearsay rule commonly known as "the state of mind exception" and the "narrative as circumstantial evidence exception" and ordered that a trial of the issue of whether L.H. was B.J.B.'s spouse at her death as defined by the PEPP be conducted with L.H. as plaintiff bearing the burden of proof. With respect to the admissibility of the text messages, he divided these into two groups, one being text messages between B.J.B. and L.H., and the other texts between B.J.B. and the deponent, S.M., in 2020. With the guidance of numerous cases on the point, he examined the text messages between B.J.B. and L.H, observing that these consisted in large measure of "insults, vulgar language and, on occasion, threats of violence." He admitted them not for the truth of their contents but as evidence of the state of mind of B.J.B. and L.H. at the time they were made, relevant to the fact in issue of the nature of their

relationship. As to the “narrative as circumstantial evidence exception”, he ruled that the texts could be used as prior inconsistent statements for the limited purpose of testing the credibility and reliability of the evidence of L.H. in relation to the fact in issue of the nature of his relationship with B.J.B. prior to her death. As to the texts between B.J.B. and the deponent S.M., L.H. challenged texts which referred to L.H.’s “new girlfriend.” The chambers judge admitted these on the basis of the state of mind exception, again, not for their truth, but for the limited purpose of being some evidence of B.J.B.’s state of mind concerning the fact in issue of their relationship. On the question of the need for a trial of an issue, the chambers judge referred to *Mary Anne Savory v R*, 2008 TCC 69 and the seven factors enumerated in it for assisting a court in deciding if parties were “cohabiting in a conjugal relationship.” He was not satisfied the affidavit evidence was sufficient for him to make determinations of such essential issues as the length of time the parties cohabitated, and if and for how long they were separated. Further, a trial would allow for the testing of L.H.’s evidence in support of his belief he and BJ.B. were in a conjugal relationship. Lastly, he exercised his discretion on procedural matters pertaining to “order of presentation” designating L.H. the plaintiff and requiring him to prove he was B.J.B.’s spouse on her death, commenting that his was likely the best evidence related to this primary question.

***R v Yaremko*, 2022 SKQB 100**

Bardai, 2022-04-06 (QB22096)

Correctional Centres and Penitentiaries - Transfer of Remand Prisoner

A remand prisoner, J.Y., applied to a judge of the Court of Queen’s Bench to be transferred from the Regina Provincial Correctional Centre (RPCC) into the federal penitentiary system pending resolution of his charges, which included sexual assault with a weapon and unlawful confinement. On its side, the Crown applied to the judge for an order to have J.Y. assessed by a psychiatrist in contemplation of an application to have him declared a dangerous offender. The Crown’s application was adjourned at its request. In support of his transfer application, J.Y. filed an affidavit. In opposition, the Correctional Service of Canada (CSC) filed affidavits from qualified personnel employed by CSC and RPCC detailing such matters as his history in both the provincial and federal correctional systems and the programming available to a remand prisoner in the CSC system. The judge referred to these and to the submissions of counsel in coming to his decision.
HELD: The judge dismissed the application. He was satisfied he had the power to decide the matter, both by the authority of ss. 516(1) and (2) of the *Criminal Code* and his inherent jurisdiction as a justice of a superior court. He observed that a prisoner is to be remanded to a “prison,” which is defined as including a penitentiary, but agreed with the ruling of the one reported case on the question, *R v Melvin*, 2016 NSSC 130, that such a transfer was to be made “in exceptional circumstances based on the evidence.” He proceeded on the basis that his task involved the exercise of his discretion following an analysis of the pertinent factors revealed by the evidence. J.Y. raised a number of factors that he argued justified his transfer, including that his safety would be better protected in the penitentiary; he was facing a lengthy period of remand if the Crown proceeded with a dangerous offender hearing; he would be better able to access treatment and programming in a penitentiary; and his medical needs would not be neglected. The judge found that the evidence proved: he had exaggerated the number and severity of the assaults he had suffered and that his safety had also been in jeopardy while previously serving time in the penitentiary system, where he had difficulties

integrating; he was responsible for any delay to this point, as he had dismissed his lawyer; programming would not be more available to him at the penitentiary, at least until he received a sentence; and the evidence showed all his medical needs had been met at the RPCC, in spite of his claims to the contrary.

***R v Hoffman*, 2022 SKQB 101**

Dawson, 2022-04-07 (QB22300)

Criminal Law - Aggravated Assault, Robbery and Unlawful Confinement - Sentencing
Criminal Law - Sentencing - Principles of Sentencing
Criminal Law - Sentencing - Joint Submission

The offender, J.H., pled guilty before the sentencing judge to the offences of aggravated assault, robbery, and unlawful confinement arising from one event. She then turned to fashioning a fit and fair sentence for J.H. in accordance with the principles and purpose of sentencing as enshrined in ss. 718 of the *Criminal Code* (Code). Filed at the hearing by counsel for the Crown and defence was a detailed agreed statement of facts. The sentencing judge also had the benefit of thorough submissions of counsel, extensive case law, and had access to the court record. Based on these, she canvassed the facts and circumstances of the offence and the personal circumstances of J.H. On October 4, 2020, J.H. was the operator of a motor vehicle in which the victim, M.B., was being held hostage by her and three males who tied him up and beat him in order to extract his bank card number. They also took his wallet with cash and ID, and an expensive watch. He was choked from behind by a rope or belt, and his head and face were covered. He was struck in the head repeatedly by what he believed was a hammer. At some point, M.B. tried to escape but was recaptured. He gave his captors an incorrect bank number, which angered them. He was again assaulted repeatedly, and his assailants threatened to kill him or cut off his finger. He then acquiesced and gave them the correct number. Nonetheless, his left pinky finger was cut off by a bolt cutter at the knuckle closest to the hand, at which time he passed out. He awoke to being dragged by his feet away from the vehicle. He was in the country in an area he did not know. He was then severely beaten and savagely assaulted. His pants, underwear and shoes were removed, and he was left at the site, shivering, and covered in blood. J.H. had participated in this final assault by kicking and punching M.B. in the face and head. She then went back to the vehicle and put music on to cover M.B.'s screaming. His injuries included the severed finger, 19 lacerations to the rear of his head that required 107 staples to close, an almost entirely severed left ear, complete laceration through the upper lip and left cheek, and eight broken or missing teeth. Of J.H.'s personal history, she noted in particular that she was 25 years of age; she was abused physically and emotionally by domestic partners, including, most recently, one of the offenders; she was addicted to alcohol and drugs; and she had a criminal record which included assault of a peace officer, theft of motor vehicles, and dangerous driving. At the time of the offence, she was experiencing hallucinations due to drug-induced psychosis and following the offence while on remand was admitted to the Saskatchewan Hospital, where she remained for a year. She was diagnosed with PTSD, anxiety disorder, substance use disorder, and substance-induced psychosis. She cooperated with police during the investigation and assisted them in identifying one of the offenders and locating the bolt-cutters. She confessed to her involvement and expressed remorse. One of

the co-accused was sentenced to six years' incarceration by way of a joint submission. The Crown argued for the same sentence for J.H., the defence for a lesser period of incarceration.
HELD: The sentencing judge sentenced her to five years' incarceration, enhanced credit for remand time, and the required ancillary orders. She recognized that the overriding aim of sentencing as pronounced by s. 718.1 of the Code was the goal of achieving "proportionality," the *sine qua non* of the sentencing process, that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender," assisted by its "handmaiden," the principle of parity, s. 718.2(b) of the Code, that a "sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" and aided by s. 718.2(a) of the Code, which required her to account for aggravating and mitigating circumstances pertinent to the offence and the offender's participation in it. She was also aware that she must properly weigh the effect of the joint submission on her analysis of a proportionate sentence for J.H. Following an in-depth review of the meaning of proportionality, she turned to the application of the principle of parity with reference to sentencing cases whose facts resembled those of the case before her in which a victim was subjected to an extended aggravated assault while unlawfully confined for a lengthy period, in particular *R v Gamble*, 2020 SKQB 16; *R v Gamble*, 2021 SKCA 72; *R v Lerat*, 2020 SKPC 30; and *R v Paul*, 2019 SKQB 142. Following this review of the case law, she was satisfied that the range of sentence for this type and severity of offending was between three and 12 years' incarceration. She next reviewed the aggravating and mitigating circumstances relevant to J.H.'s participation in the offences, and the aspects of personal background "directly connected" to her participation in it. As to the weight to be given to the joint sentencing submission of the co-accused, she referred to relevant case law on the issue and concluded that she must not take her cue from that sentence but must keep in mind that proportionality required her to sentence J.H. on the particular facts and circumstances as an individual person.

***Regent v Registrar of Titles*, 2022 SKQB 102**

Layh, 2022-04-08 (QB22097)

Real Property - Land Titles
Statutes - Interpretation - *Land Titles Act*

It was uncontested in this matter that the applicant, T.L., a lawyer, submitted land transfer authorizations signed by e-signature, which were uploaded to the land registry through the Online Submission Tool of the Information Services Corporation (ISC). Contrary to its policy and procedure, the land registry erroneously approved the transfers. Certificates of title were duly issued. T.L. then attempted to again transfer the new titles using e-signatures. These transfers were rejected by the land registry, which "locked" the titles, preventing them from being transferred. T.L. was informed by land registry personnel that e-signatures "were unacceptable respecting the execution of Land Registry documents" and that upon his providing "wet-ink" signatures on the transfer documents, the titles would be unlocked. Upon being informed of this, instead of complying with the direction, he submitted a number of questions to the registrar of the land registry pursuant to The Land Titles Act (LTA) concerning the use of e-signatures on documents

submitted via ISC. The registrar provided a detailed written response to T.L. which concluded with a caution that he "permanently cease employing the use of electronic signatures in submissions to the Land Registry for any documents examined by the Registry," and the titles would remain locked. T.L. then applied to a judge of the Court of Queen's Bench as permitted by s. 107(1) of the LTA for a review of the registrar's decision on the ground that as *The Electronic Information and Documents Act, 2000* (EIDA) permitted e-signatures for other documents submitted to the land registry such as mortgages, the registrar's policy not to accept e-signatures on transfer authorizations was unreasonable and the judge should order that the registrar accept e-signatures.

HELD: The judge dismissed T.L.'s application. At the outset, he considered the scope of his review and order-making powers under ss. 107 and 109 of the LTA. He believed this was necessary because by the plain wording of these provisions, his powers were virtually unlimited, which he recognized could not be what the legislature intended. Through the application of the ejusdem generis rule of statutory construction and the authority of *Olney Estate v Great West Life Assurance Co.*, 2014 SKCA 47, he circumscribed his jurisdiction to orders of a "curative or remedial effect" aimed at directing the registrar to "register, discharge, amend, postpone or assign an interest or transfer title or make changes to a title." He concluded he did not have the power to compel the registrar to accept e-signatures on transfer authorizations as this authority was not given to him by the legislature, which by s. 6(3) of the LTA had invested the registrar with the responsibility for the maintenance and operation of the land titles registry. Similarly, the judge commented, since s.107 of the LTA was curative or remedial, and T.L. had not shown on the evidence that he was a person aggrieved by the decision of the registrar, he did not have standing before him. Nonetheless, he went on to review the registrar's decision in accordance with the test set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and decided that the registrar's decision bore the hallmarks of reasonableness. He observed that she was knowledgeable of her "responsibility for the operation of the land titles registry" and the overriding legislative goal of assuring the public of the reliability of the registry and to thereby maintain trust in the core principle of indefeasibility of title. He went on to hold that the registrar's decision to maintain a policy prohibiting the use of e-signatures with respect to transfer authorizations was reasonable because it was logically consistent with the purpose of maintaining that trust.

***R v Netmaker*, 2022 SKPC 18**

McAuley, 2022-04-14 (PC22016)

Charter of Rights, Section 8 - Search and Seizure
Charter of Rights - Right to Retain and Instruct Counsel

The accused, H.N., was charged with one count of resisting arrest and three counts of uttering threats to cause bodily harm. A 911 call had been made from H.N.'s residence alleging domestic violence against someone other than H.N. When the police attended H.N.'s residence, there was no indication of ongoing fights or disturbances in the home. The 911 caller, B.L., advised the police that she was fine and had no visible injuries. Police remained in the house to continue their investigation. H.N. grew angry and demanded they leave. When they did not leave, H.N. made threats to stab them, and subsequently threatened to have his gun on him the next time they came back. The trial commenced by way of voir dire to first determine whether H.N.'s *Charter* rights under s.

8, 10(a) and 10(b) had been violated by the warrantless search and whether the evidence obtained as a result should be excluded under s.24(2) of the *Charter*.
HELD: H.N. was acquitted of all charges. The court acknowledged that while H.N.'s actions towards the police were inexcusable, the police had infringed H.N.'s *Charter* Rights. The court found that remaining past the initial security check of H.N.'s home constituted a search pursuant to s. 8 without grounds for doing so. Further, H.N. was detained and arrested without police warnings or his *Charter* rights read, which the court found to be significant breaches of his section 10(a) and 10(b) *Charter* rights. The court found that H.N.'s arrest had been unlawful, and as such, his charge for resisting arrest had not been made out. The court found that s. 34 of the Criminal Code provided a defence to the uttering threats charge. The court concluded that the evidence should be excluded, and acquitted H.N. of all four counts.