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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***R v Arno*, 2022 SKCA 55**

Richards Caldwell Whitmore, 2022-05-04 (CA22055)

Criminal Law - Appeal - Conviction - Sexual Assault
Criminal Law - Appeal - Credibility of Witness
Criminal Law - Appeal - Unreasonable Verdict

S.B.A. appealed his conviction for sexually assaulting the complainant to the Court of Appeal (court) on the basis that the judge hearing his trial in the Court of Queen's Bench (trial judge) erred in law by making findings of credibility contrary to *R v D.W.*, [1991] 1 SCR 742 (*D.W.*), which resulted in an unreasonable verdict. In particular, S.B.A. argued that the complainant fabricated the allegations against him and the trial judge failed to have a reasonable doubt that the allegation was fabricated because she "incorrectly

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assessed the complainant's credibility" by reviewing the complainant's testimony before she reviewed [S.B.A.'s] testimony;" proceeding to assess S.B.A.'s credibility after finding the testimony of the complainant was not consistent with being fabricated; failing to resolve inconsistencies in the complainant's evidence in her reasons; misunderstanding the import of a recording of a telephone call between S.B.A. and the complainant; and using prior consistent statements of the complainant in assessing her credibility.

HELD: The court dismissed all the grounds of appeal. It first considered the applicable standard of review for appeals taken following a guilty verdict after a judge-alone trial where the appellant challenges that verdict as unreasonable under s. 686(1)(a)(ii) of the *Criminal Code*, stating that a verdict of guilty will not be set aside except where it cannot be supported by the evidence, is "vitiated by illogical or irrational reasoning" or in cases where a credibility assessment is being reviewed, an error in assessing credibility becomes a reviewable question of law because it "cannot be supported on any reasonable view of the evidence" (*R v Burke*, [1996] 1 SCR 474). The court found that on each ground raised by S.B.A., the trial judge had been correctly guided by the framework established by *D.W.*: that she was to acquit "if [she] either accepted the exculpatory evidence of the accused or if [she] did not believe that evidence but [was] left in reasonable doubt by it" and "even if [she was not] left in reasonable doubt by the evidence of the accused, [she] must consider whether [she was] convinced beyond a reasonable doubt of the guilt of the accused based on all the evidence that [she did accept]." S.B.A. claimed the trial judge was required to assess his credibility before that of the complainant, since if she believed his evidence or was left in doubt by it, she would have been required to acquit. The court did not agree, commenting that the order of assessment of the evidence was of no consequence because the trial judge was required to examine the evidence in its totality to determine whether she believed the accused or was left in doubt by his evidence. In rejecting the argument that the trial judge fell into error by first finding the complainant did not fabricate her evidence and, with this conclusion in mind, then assessing S.B.A.'s credibility, the court again concluded that the trial judge had considered the evidence as a whole in coming to her credibility findings. As to S.B.A.'s credibility, the court pointed out in particular that the trial judge expressed having problems squaring S.B.A.'s testimony that the complainant left home for several days because of "a little bit" of an argument, and not because she had been sexually assaulted. The court commented on the trial judge's assessment of the credibility of the complainant's evidence, observing that she had fully sifted her evidence, finding the complainant's account to be detailed and contextually sensible, and having a "level of nuance, detail and complexity." In rejecting the suggestion of the appellant that the trial judge did not correctly address a significant inconsistency in the complainant's evidence as to the type of sexual activity she was subjected to, the court held that the complainant's accounts were not mutually exclusive. As to the other inconsistencies, the court thought these were peripheral and did not require the trial judge's comments. With respect to the recorded telephone conversation, the court appreciated that the trial judge did not accept S.B.A.'s logic that if the complainant was fabricating the sexual assault, she would be more likely to threaten blackmail than if she had actually been sexually assaulted, and also appreciated that she viewed the recording as evidence that bolstered the complainant's credibility that she had been sexually assaulted, though it was tendered in evidence by the defence. The court could not find that the trial judge's

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assessment of the meaning of the telephone exchange "reveal[ed] a readily observable error." Lastly, the court considered the use made by the trial judge of a handwritten statement of the complainant upon which she was cross-examined but which was not entered into evidence. S.B.A. posited that the trial judge improperly used the statement as further proof that the complainant had not fabricated the sexual assault. The court was not convinced that the statement was used for this improper purpose by the trial judge, but for the permissible purpose of assisting her to "understand the sequence of events and the narrative of the Crown's case."

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***Koroluk v KPMG Inc.*, 2022 SKCA 57**

Richards Ottenbreit Leurer, 2022-05-11 (CA22057)

Corporations - Interpretation of Liquidation Plan - Appeal
Corporations - Liquidation - Claims Against Directors - Appeal
Appeal - Practice on Appeal - Mootness

R.K., an investor in a publicly traded corporation called PrimeWest Mortgage Investment Corporation (PrimeWest) commenced an action under *The Class Actions Act* (CAA) (proposed class action) against the directors and auditor of PrimeWest, alleging breaches of various duties on their part that caused financial loss to R.K. and the proposed plaintiffs in the class action. The proposed class action was not taken against the corporation, PrimeWest. It was not disputed that PrimeWest's board of directors moved to proceed with a voluntary liquidation and dissolution of the corporation "under the supervision of KPMG Inc. as liquidator" (liquidation plan) pursuant to the liquidation and dissolution provisions for solvent corporations contained in The Business Corporations Act (BCA), which the shareholders approved. Pursuant to the BCA, PrimeWest was to cease all business activities except to the extent required to give effect to the liquidation plan. Also, the liquidator chose to conduct the liquidation plan under the supervision of the Court of Queen's Bench as allowed by s. 204(8) of the BCA. By the terms of the liquidation plan, which had been "affirmed and approved" by a chambers judge of that court (chambers judge), all claims against PrimeWest were to be proven through a claims process "for identification and resolution of claims." The definition of "claim" in the liquidation plan on its face encompassed all manner of "indebtedness, liability or obligation" against the corporation. It also included all potential claims against the directors of PrimeWest, which could include the proposed class action. Following several chambers applications with the aim of clarifying the powers and duties of the liquidator in relation to the proposed class action, the chambers judge ruled that the proposed class action was to be subsumed into the claims process: *KPMG Inc. v Koroluk* (7 July 2020), Saskatoon, QBG 1455 of 2019 (chambers decision). The

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chambers judge reasoned that under the supervisory powers of the Queen's Bench, the proposed plaintiffs in the class action would not be prejudiced by proceeding in this manner since it was within the purview of a judge in the liquidation process to make orders to manage the proposed class action. He also stated in justification of his ruling that the "liquidation order would be meaningless as far as determining the issues necessary for the winding up of PrimeWest if it could be held up until final adjudication of the class action." R.K. appealed the decision of the chambers judge to the Court of Appeal (court). The liquidator applied to strike R.K.'s appeal. In dismissing the application, the court commented that the chambers decision "terminated the Class Action in its current form and recasts it within the very different procedural context of the liquidation proceedings." The application to strike his appeal having been dismissed, R.K. proceeded with it on the ground that the proposed class action was not being taken against PrimeWest but against its directors and auditor so that the liquidation plan and its claims process could have no application to it. HELD: The court allowed the appeal, ruling the proposed class action was not a claim in the liquidation and could proceed in the regular way in accordance with the CAA. It was of the view that the chambers judge erred on a standard of correctness by interpreting the claim process as including the proposed class action, stating that on a modern approach to the construction of court orders made pursuant to the auspices of the liquidation and dissolution provisions of the BCA codified in s. 2-10 of *The Legislation Act*, the chambers judge failed to have in mind the function of the liquidation and dissolution provisions within the broader statutory scheme of the BCA, which required him to limit the effect of his orders to creditors of PrimeWest and to its liabilities and obligations. As to the matter of claims against the directors, the court continued, these could not have been intended under the terms of the BCA to require that the proposed class action be managed through the liquidation and dissolution process since the liquidator was ill-equipped to deal with claims that involved causes of action unrelated to the types normally dealt with in the claims process. As to the mootness argument raised by the liquidator, the court responded by stating, among other reasons, that the evidence did not support its position that by putting in a claim pursuant to the liquidation plan, R.K. had abandoned his objection to being required to do so.

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***R v Napope*, 2022 SKCA 61**

Ottenbreit Barrington-Foote Tholl, 2022-05-18 (CA22061)

Criminal Law - Inconsistent Verdict - Appeal
Criminal Law - Jury Trial - Instructions to Jury - Appeal

This case was remanded from the Supreme Court of Canada, based on the case of *R. v. R.V.*, 2021 SCC 10 (*R.V.*) that dealt with inconsistent verdicts. K.C.N. appealed his conviction, applied for leave to appeal

Cases by Name

Abbey Resources Corp. v Saskatchewan Assessment Management Agency

Chartier Estate v Saskatoon (City)

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his sentence, and appealed the four-year jail sentence that had been imposed for robbery. In 2017, K.C.N. had been found guilty of robbery but not guilty of manslaughter by a jury hearing the trial of his matter. The charges emanated from a home invasion in which the victim was killed. K.C.N. appealed his conviction. His argument that the verdict of guilty of robbery was inconsistent with the acquittal for manslaughter was accepted by the court: *R v Napope*, 2020 SKCA 71, 389 CCC (3d) 148 (2020 decision). The 2020 decision was appealed to the Supreme Court of Canada by the Crown. The Supreme Court remanded the matter back to the court for disposition following the principles of *R.V.* The issue for the court to answer was: can K.C.N.'s verdicts be explained by the errors in the jury charge, with the degree of certainty required by analytical framework required in R.V.? Importantly, the court had determined in the 2020 decision that there were errors in the jury charge.

HELD: The conviction appeal was dismissed. Leave to appeal the sentencing decision was granted, but the appeal of the sentencing decision was dismissed. The court concluded that the inconsistent verdicts were the result of the legal errors in the jury instructions as to the meaning of principal offender and the *mens rea* required for the unlawful act of manslaughter. The court reviewed the jury instructions in detail. The court concluded in part that the trial judge had erred in his use of the term "principal offender" as this would have excluded the jury from making determinations if K.C.N. had aided and abetted in the manslaughter. K.C.N.'s appeal of the four-year sentence imposed was dismissed. K.C.N. argued that the sentence was demonstrably unfit and was impacted by an error in principle. K.C.N.'s arguments were centered on there being inconsistent verdicts; as the court had reconciled the verdicts, K.C.N.'s appeal on sentence lacked merit. In reaching its conclusions on the conviction and sentence appeal, the court laid out the background of the 2020 decision before considering the issue on appeal that required an analysis of whether the verdicts were inconsistent. The general rule for inconsistent verdicts was described in *R v J.F.*, 2008 SCC 60, [2008] 3 SCR 215: "a conceptually distinct rule that precludes a conviction on one charge which cannot be reasonably reconciled with an acquittal on the other." Before the 2020 decision was determined, the Crown had advanced several arguments: the essential elements of robbery and manslaughter are different and that the jury instructions on the manslaughter charge were deficient, inevitably leading to an acquittal on the manslaughter charge. The Crown argued that the only real issue in the case was identity. The court's conclusion on the 2020 decision differed from the Crown's arguments on inconsistent verdicts. It found that "the fact that offences have different elements does not mean that the conviction on one and an acquittal on the other cannot constitute inconsistent verdicts." The court further confirmed that the test has been found in Supreme Court cases for unreasonable verdicts is the following: "When an appellate court decides whether the verdict of a jury or the decision of a trial judge is unreasonable, the test is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered." The court further outlined the authority of the Supreme Court to remand a case and then outlined the decision in *R.V.* Like the 2020 decision, the Ontario Court of Appeal had allowed Mr. R.V.'s appeal on the grounds that there were inconsistent verdicts: an acquittal on sexual assault but a conviction for sexual interference and invitation for sexual touching. The Supreme Court in *R.V.* restated the test for inconsistent verdicts: "Are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence? ([*R v] Pittiman* [2006 SCC

9] at para. 10"). Put another way, a conviction is unreasonable and must be set aside where the verdicts cannot be reconciled on any rational or logical basis and no properly instructed jury, acting reasonably, could have rendered the verdicts it did based on the evidence." The court summarized the approach outlined in *R.V.* as requiring a reviewing court to reconcile apparent inconsistent verdicts to determine how the jury had arrived at the result. Guidance on this was provided by the Supreme Court, which outlined a framework for this process, but established it is the Crown's heavy burden to reconcile the verdicts. The test was stated as: "The Crown must satisfy the court to a high degree of certainty that there was a legal error in the jury instructions and that the error: (1) had a material bearing on the acquittal; (2) was immaterial to the conviction; and (3) reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct." Considering the remand, the parties were invited to submit written arguments, which they did. K.C.N.'s position was that the court could only speculate on the reasoning of the jury that led to inconsistent verdicts, and that as a result an acquittal should be entered on the robbery charge. The Crown reiterated that if the essential elements of an offence are different, the conduct of which the accused has been found guilty and not guilty is necessarily different and the verdicts cannot be inconsistent. The Crown now asserted that identity was not the only real issue in K.C.N.'s matter. Lastly, the Crown argued and the court accepted that it was an error in the 2020 decision for the court not to consider whether legal errors in a jury charge can reconcile verdicts. The court applied the analytical framework from *R.V.* and found that the Crown had discharged its burden that there had been a legal error in the charge to the jury.

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***R v Boyer*, 2022 SKCA 62**

Jackson Whitmore Kalmakoff, 2022-05-31 (CA22062)

Aboriginal Law - Métis - Fishing Offences - Right to Fish for Food
Wildlife Offences - Métis - Subsistence Fishing - Historic Rights-bearing Community - Definition

The court at the outset of its decision outlined the significance of this case, which considered the extent to which Métis individuals can claim a right to hunt and fish for food under s. 35(1) of the *Constitution Act, 1982*. The Métis National Council and Manitoba Métis Federation Inc. intervened in this appeal. Three accused – B.M., W.B., and O.P.– all Métis, were charged with unlawfully fishing for food, i.e., harvesting, contrary to wildlife and fisheries regulations. They had been harvesting land that has previously been described as constituting the historic "Métis community of Northwest Saskatchewan" (HMCONWS). The three men were tried together. They mounted a defence by serving notices of constitutional question on the Crown. The notices stated that they had the right to hunt and fish for food that is protected by s. 35(1) of the *Constitution Act, 1982*. They further asserted in their notices that HMCONWS encompasses a vast amount of land, possibly the whole province. The trial judge granted the Crown's application, brought midway through trial, that s. 35 could only be claimed under site-specific locations. The crown relied on *R v Powley*, 2003

SCC 43, [2003] 2 SCR 207 (*Powley*) for this application. The trial decision found that W.B. and O.P. (collectively, the accused) had hunted and fished on land beyond HMCONWS and they were convicted; B.M. was acquitted, as he was found to have been on HMCONWS land. The accused originally appealed to the Court of Queen's Bench (summary conviction appeal judge) where their appeal was dismissed. The court described HMCONWS as it had been defined in the case of *R v Laviolette*, 2005 SKPC 70 (*Laviolette*). Importantly, the area where the accused had been hunting and fishing was where the accused in *Laviolette* had been hunting and fishing. Mr. Laviolette had been acquitted. For context, the court provided the trial reasoning in *Laviolette* before beginning its analysis of the appeal brought by the accused. The court in *Laviolette* had found that HMCONWS included "the triangle of the fixed communities of Green Lake, Île à la Crosse and Lac La Biche and includes all of the settlements within and around the triangle including Meadow Lake." The trial included extensive expert evidence. The entirety of the *Laviolette* evidence, including historical evidence, was accepted at the trial of the accused. The accused agreed at trial they were harvesting just outside the boundaries of what had previously been declared in *Laviolette* to be the HMCONWS. In the *Laviolette* decision, a finding of fact was the time when "effect control" of land was made by the Government of Canada, as this limited the claim that could be made to territorial hunting; this followed the analysis that had been outlined by the Supreme Court in *Powley*. It was important to establish "effect control" as this provides the context for the land that can be hunted and fished by Métis individuals prior to control being established by the Government of Canada. At trial, the essence of the constitutional question put forward by the accused was that they had standing to hunt and fish throughout the province as they had ancestral links to the Métis community that had been mobile throughout Saskatchewan. The Crown's notice to strike the constitutional notices came after 41 witnesses were called to testify at trial. The Crown's argument was that the accused were abusing the trial process by trying to relitigate the findings made in *Powley*. The trial judge agreed that a site-specific analysis is to occur; the accused were making arguments regarding their territorial immunity that were too broad in their constitutional questions. The trial judge also considered the question of whether the Métis are included in the term 'Indians' as defined in the schedule to the *Constitution Act*. He found that "Canada had no express constitutional obligation to the Métis in Saskatchewan from which a fiduciary or any related legal obligation could arise and no power to include the Métis in the NRTA, a negotiated agreement, without Saskatchewan's agreement." Effective control was set to the period 1876 to 1881. Ultimately, the accused were convicted because they had been hunting and fishing outside territory defined under the HMCONWS. Before the summary conviction appeal judge, the accused argued that their notices had been inappropriately struck. Their appeals were dismissed as the summary conviction appeal judge could find no error in the trial decision. The accused brought their application for leave to appeal to the court and their corresponding appeal. The Crown conceded that leave ought to be granted. The issues raised on appeal were: Did the summary conviction appeal judge err by not finding that the trial judge erred (a) in his approach to determining whether the appellants can assert as a defence the constitutional right to harvest in the north, central and southern parts of the province; (b) by interpreting *Powley* as preventing a claim to a right to harvest in the north, central and southern parts of the province; (c) by denying the appellants their right to make full answer and defence or by concluding he did not have the jurisdiction to make findings beyond the Province of Saskatchewan; or (d) by fixing the date of effective European control at 1876 to 1881; and (e) if error is found, what is the appropriate remedy?

HELD: The accused's appeals were allowed, and a new trial ordered. The accused had a right to have their constitutional questions considered; the trial judge had erred in accepting the Crown's application midway through trial. The court considered the issues in turn. The court concluded that the summary conviction appeal judge erred, as had the trial judge, in narrowly interpreting jurisprudence respecting Métis rights. The court canvassed jurisprudence from the Supreme Court that had discussed Métis rights to

hunt and fish. The court confirmed that *Powley* should be interpreted as a starting, rather than ending, point for the consideration of Métis rights. The court outlined that the Supreme Court has followed a consistent approach to the resolution of Indigenous rights. Two categories of cases are generally found in Supreme Court jurisprudence: those that describe and provide content to the meaning of the phrase "the honour of the Crown" and those that emphasize the need to consider the Indigenous perspective. The summary conviction appeal judge erred by not considering the approaches outlined by the Supreme Court. This limited the interpretation of Métis rights. The court specifically found the interpretation of *Powley* by the summary conviction appeal judge to be an error. In the context of defences raised in previous cases that were "site-specific", the summary conviction appeal judge failed to note that it was the offenders in those cases that were seeking site-specific defences; the accused were not, as they claim to be a migratory or nomadic people whose traditional territory may potentially cover the entire province. Succinctly, the court summarized: "a reading of *Powley* that requires the assertion of a Métis harvesting right over what must always be a smaller site size is not justified." The trial judge erred by narrowing the appellant's constitutional question to whether they had the right to site-specific hunting and fishing and not considering the possibility that the right extended into a larger area than the HMCONWS. This prevented the accused from making a full answer and defence, which was an error in law. The trial judge went beyond trial management in agreeing to the application brought by the Crown. The court declined to decide the issue of "effective control". The only appropriate remedy, given the errors of the summary conviction appeal judge, was setting aside the convictions of the accused and directing a new trial.

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***Abbey Resources Corp. v Saskatchewan Assessment Management Agency*, 2022 SKCA 63**

Richards Whitmore Barrington-Foote, 2022-05-30 (CA22063)

Municipal Law – Appeal – Property Taxes – Assessments – Non-regulated Property

Abbey Resources Corp. (Abbey), the owner of 2,200 gas wells (wells) in Saskatchewan, appealed to the Court of Appeal (court) the decision of a judge of the Court of Queen's Bench (chambers judge) denying its application for a declaration that the Saskatchewan Assessment Manual (manual) used by the Saskatchewan Assessment Management Agency (SAMA) in assessing its wells could not achieve "equity" as required by s. 195(6) of *The Municipalities Act* (MA) and as such rendered that assessment *ultra vires*: *Abbey Resources Corp. v Saskatchewan Assessment Management Agency*, 2021 SKQB 100. Abbey argued that in using the manual to assess the wells, SAMA treated Abbey unfairly in comparison with other taxpayers whose properties were taxed on a market value model. In canvassing the chambers judge's decision, the court noted that he explained the difference between "market value standards" which were based on "the market value of properties" used in assessing residential and non-regulated property, and "regulated property assessment standards" which applied to properties like Abbey's wells, classified by SAMA as "resource production equipment", a subset of regulated property. It was uncontested that SAMA did not use a market value model in appraising the wells; that the chambers judge agreed with SAMA that by law it was not required to do so given the classification of the wells for assessment purposes as regulated property; and that the manual, which is revised every four years by SAMA using industry standards and input from "stakeholders" has the force of law when approved by the government minister in charge. HELD: The court dismissed the appeal. In doing so, it referred extensively to *Double Diamond Ranch Ltd. v Saskatchewan*

Assessment Management Agency, 2002 SKCA 62, from which it derived its standard of review as one of correctness, finding that the chambers judge was correct in deciding that Abbey's application for a declaration that it was treated inequitably and unfairly as compared to taxpayers assessed on a market valuation model could not succeed. It stated that the concept of equity as expressed in s. 195(6) of the MA, "that equity in regulated property assessments is achieved by applying the regulated property assessment valuation standard uniformly and fairly," required Abbey to adduce evidence, not that the manual was applied unevenly and unfairly to properties valued using a fair market value process, but that it was so applied to properties using a regulated property assessment valuation process. As it failed to adduce such evidence, the court expressed, the chambers judge would have erred in law in ruling that equity had not been achieved and the manual should be set aside as it applied to Abbey's wells.

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***R v W.D.M.*, 2022 SKCA 64**

Ryan-Froslie Schwann Leurer, 2022-05-31 (CA22064)

Criminal Law - Assessment of Credibility - Sufficiency of Reasons - Appeal
Criminal Law - Misapprehension of Evidence - Appeal

The accused, W.D.M., appealed his conviction for the offences of sexual assault and exposing himself to a minor for a sexual purpose to the Court of Appeal (court) after a trial before a judge of the Court of Queen's Bench (trial judge). His grounds of appeal were that the trial judge made errors of law by failing to address in his reasons crucial portions of the complainant's testimony which bore directly on her credibility or alternatively, the trial judge misapprehended the significance of this evidence as it pertained to her credibility. The court summarized the salient evidence available to the trial judge and his reasons. The evidence of the *actus reus* of the alleged offences was supplied by the testimony of the complainant and W.D.M. alone. The complainant, who "came forward with the allegation" when she was 18 or 19, testified that in 2006 or 2007, when she was six or seven, W.D.M. came into her room when she was in bed for the night and laying on her back, lifted her nightgown above her chest, pulled down his pants to his ankles so he was naked from the waist down, and masturbated over her until he ejaculated on her. She testified the room lights were on and she saw the ejaculate "come from his penis and felt it land on her bare chest". During this time, she pretended she was sleeping, and her eyes were slightly opened, enough so she could see what was happening, but not enough for him to know she was awake. She stated this was the only incident of a sexual nature on her by W.D.M. The complainant also testified she hated W.D.M. because he favoured his daughter from a previous relationship to her and thought about that every day. The complainant's mother confirmed the "anger and resentment" the complainant felt towards the accused. W.D.M. testified that he "had been stricter with the complainant than with the sister, that at times he had been verbally abusive towards the complainant and that he had spanked the complainant harder than he spanked the sister. He acknowledged that he had made the complainant cry. He denied the incident described by the complainant happened. In reviewing the reasons of the trial judge, the court commented that these were delivered orally, were very brief, and did not provide reasons why he discounted the risk that the complainant fabricated the incident, given her well-documented anger towards W.D.M. The court commented further that the trial judge did not reconcile inconsistencies in the

complainant's account of the discharge of semen; and did not touch on the plausibility of what the complainant testified she saw. HELD: The court allowed the appeal and ordered a new trial, agreeing with W.D.M. that the trial judge's reasons failed to survive the test for adequacy of reasons clearly elucidated in the seminal decision *R v Sheppard*, 2002 SCC 26, and reaffirmed in *R v R.E.M.*, 2008 SCC 51, and by doing so committed an error in principle. Related to the failure to provide adequate reasons, the court stated, was the error of law the trial judge committed "[by] fail[ing] to consider all material evidence or to proceed on the basis of a misapprehension of the evidence." Though the court dealt in a summary fashion with the two other areas with which it was concerned, namely, the inconsistent account of the ejaculation and the plausibility of the complaint's account of what she saw, it considered in depth the evidence concerning motive to fabricate and did so with reference to case law dealing with this aspect of witness credibility. The court concluded that the direct evidence from the complainant, the complainant's mother and W.D.M. as to the complainant's anger towards W.D.M. made it incumbent on the trial judge in assessing her credibility to show in his reasons that he had not failed to take into account the evidence of motive on her part to fabricate evidence, and why her motive to fabricate did not raise a reasonable doubt in his mind as to W.D.M.'s guilt.

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***Chartier Estate v Saskatoon (City)*, 2022 SKQB 104**

Danyliuk, 2022-04-11 (QB22310)

Administrative Law - Judicial Review - Natural Justice/Procedural Fairness

The estate of G.C. appealed decisions made by the City of Saskatoon and Property Maintenance Appeal Board (board). The appeal initiated on two Orders to Remedy Contravention (ORC) made regarding certain property in Saskatoon. The dispute regarding one of the ORCs was resolved before the court hearing. On appeal, the appellant focused on an ORC regarding a greenhouse. A Fire Inspector had issued an ORC to G.C. before she passed away respecting numerous bylaw infractions related to the structural integrity of a greenhouse located on her residential property. After G.C. died, her son continued her appeal to the court. While the focus was on the greenhouse, the appellant also raised issues respecting the second ORC that had been issued regarding his mother's yard. The board considered this issue to be moot as the contraventions had been remedied. The court considered the following issues on appeal: 1) What is the court's jurisdiction to hear this matter, and what is the standard of review? 2) Was the issue regarding the order pertaining to the yard moot, or should the board have rescinded that order? 3) Are the issues raised by the appellant legal issues, or issues of mixed fact? 4) Is the bylaw in question valid? 5) Did the board make any errors as to law or jurisdiction? 6) What is the appropriate disposition as to costs?
HELD: The appeal was dismissed in its entirety. The appellant was also ordered to pay $1,000.00 in costs. The court considered the issues in turn in arriving at its conclusion to dismiss the appeal. On the first issue, the board is granted its authority based on *The Cities Act*, SS 2002, c C-11.1 (Act). Given the narrow parameters of statutory review grounded in the Act, the court concluded that only issues of law can be determined on a standard of correctness. On the second issue, the court canvassed authority on mootness and concluded that while the appellant wanted to "rescind" the ORC issued by the board, for all practical purposes, the issue was moot. On the third issue, the court accepted the arguments of the respondent that the appellant was attempting to establish new

facts or review facts that had previously been determined. As such a review is not permitted before the court, the court determined that it did not have standing to consider the appellant's grounds of appeal which attempted to relitigate facts. On the fourth issue, the court was not persuaded that there was any merit to the appellant's suggestion that the bylaw in question for the ORC was not valid. The court considered the interpretation of the bylaw and found that it was compliant at law. On the fifth issue, the board made no errors as to law or jurisdiction. The appellant's arguments were disjointed. The court indulged the appellant's arguments but found that the appellant "misapprehended the nature of this appeal". There were no true arguments presented challenging an error in law or jurisdiction. As the appeal was dismissed in its entirety, the court acceded to the request of costs made by the respondent and ordered costs of $1,000.00 payable by the appellant.

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***Synergy Credit Union Ltd. v Weisbrod Farms Ltd.*, 2022 SKQB 105**

Zuk, 2022-04-12 (QB22311)

Civil Procedure - Foreclosure of Farmland
Mortgages - Foreclosure - Farmland - *Saskatchewan Farm Security Act*

The plaintiff, Synergy Credit Union Ltd. (Synergy), applied for an order nisi for the sale of farmland owned by the defendants, Weisbrod Farms Ltd. and K.M.W. The defendants own farmland with an appraised value of $7,751,000 and have five separate mortgages with Synergy. The cumulative amount owning to Synergy, not including interest, as of September 14, 2021, was $2,560,415. In addition to the amount owed to Synergy, approximately $4,978,494.72 was owed to four enforcement charges on the farmland. The enforcement creditors suggested a redemption period of 30 days. The matter had been in chambers several times and had resulted in a previous order for sale of the property. In seeking adjournments, the defendants had advised on two separate occasions in chambers that refinancing was imminent. The court was concerned with directing an appropriate order for the disposition of the farmland. Synergy's position was to sell the farmland at an optimum time to recover the most funds possible. Synergy presented evidence from a realty company that outlined various options to dispose of the property. If a tender process could not be completed, the realtor suggested individually selling the parcels of land. The length of time for the sale process was variable and Synergy presented either a short redemption period or a redemption period extending into 2023. The defendants' position continued to be that they would secure financing. The defendants sought a lengthy redemption period to secure financing. The sole issue for the court's determination is the length of the redemption period to be granted. Synergy proposed either a short 30-day redemption period or a lengthy six-month redemption period. The enforcement creditors suggested 30 days. The defendants sought a lengthy redemption period.
HELD: The court directed a five-month redemption period. The court began its analysis by stating the law on redemption periods, which was recently addressed in *Scotia Mortgage Corporation v McNaughton*, 2021 SKQB 159 (*McNaughton*). *McNaughton* referenced previous cases where general principles have been listed to guide the court in determining redemption periods. In *McNaughton*, it was further found that a 90-day redemption period is commonly assessed at chambers. The court went through the

non-exhaustive factors that had been incorporated into *McNaughton* from an earlier case. It determined that a few factors favored a lengthy redemption period. The court noted that Synergy's mortgage debt is sufficiently secured. Based on the lack of evidence from the defendants, the court was not convinced that they would be successful in refinancing the farmland to retire Synergy's mortgages and the enforcement charges against the farmland. The defendants had failed to make any payments to Synergy since September 14, 2021 or enter into any plan to make payments, which militated against a lengthy redemption period being granted. The court considered the request of a shortened redemption period suggested by the enforcement creditors but viewed those interests as secondary to the mortgage interests of Synergy. The court carefully considered the uncontroverted evidence presented by Synergy that the best selling period for the farmland would be in the spring, or later in the year. The court also stated that the overarching spirit and intent of *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, is to protect farmers against the loss of their farmland. Accordingly, taking various factors into account, the court determined that a five-month redemption period was appropriate. There was a slight amendment to the previous order for sale of the property: the previous order did not contain a provision requiring a deposit from a buyer; the court amended the order to include this provision.

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***R v Morrison*, 2022 SKQB 111**

Popescul, 2022-04-18 (QB22330)

Criminal Law - Evidence - Admissibility

T.D.M. and S.V. (collectively the accused) will face a trial with judge and jury on three counts, including first degree murder and offering an indignity to human remains. The Crown brought a preliminary application to seek an advance ruling on evidence it intended to enter that can be categorized as "bad character" evidence. With respect to T.D.M., the Crown sought to have entered 10 items of evidence, including that T.D.M. had been involved in a relationship with a woman who would also date the victim; that the victim's tires and vehicle had been vandalized and destroyed in prior incidents involving T.D.M.; and possible gang and drug affiliation involving T.D.M. and an organized crime entity. T.D.M.'s counsel accepted nine of the 10 items as being properly admissible but objected to the Crown's attempt to include evidence that T.D.M. wanted to practice shooting close in time to the murder. With respect to S.V., the Crown intended to present evidence that spoke to motivation behind the killing. The Crown sought to include five items of evidence, with counsel for S.V. objecting to two items of evidence that were sought for introduction: "that S.V. was involved with the Terror Squad and had a dislike for people that posed as gangsters", and that his client had attempted to retrieve gang affiliated paraphernalia from the victim. The issues for the court to determine were whether to permit the Crown to introduce the items of bad character evidence that were being objected to by the accused.
HELD: Despite the objections of the accused, the evidence sought to be introduced into trial by the Crown were permitted. The court concluded that any prejudicial effect of introducing the evidence can be tempered by instructing the jury appropriately. The court was guided in its analysis by prior cases such as *R v Handy*, 2022 SCC 56, [2002] 2 SCR 908 (*Handy*) which held that it is the role of the

court to exclude extraneous misconduct of offenders facing criminal charges. *Handy* established, however, that sometimes an offender's prior discreditable conduct may be relevant in something other than for the purpose of blackening an individual's character. The test in *Handy* for admissibility is stated as: to gain admission of prior discreditable conduct evidence, the Crown must show on a balance of probabilities that the probative value of the evidence outweighs its prejudicial effect. The court applied the test from *Handy* to the three items being objected to by the accused. T.D.M. objected to evidence being introduced that he was practicing shooting close to the time of the murder. The court considered the circumstances and determined that firing a gun is not discreditable conduct: an ordinary person would not find the discharge of a weapon to be objectionable. Further, who owned the firearm that T.D.M. was handling and how it came to be used in shooting the victim is evidence that is highly probative. S.V.'s objections to two items of evidence being introduced centered on potential gang affiliations. The court concluded that gang affiliation is discreditable conduct and its probative value as evidence must be weighed against prejudicial effects. The court held that the evidence objected to by S.V. shall be admitted into trial. It was evident to the court that much of the material submitted by the Crown in the context of the proceeding consisted of conversations between the accused and the victim related to gangs, drugs, retribution, retaliation, and criminal activities. To deprive the jury of hearing this information would destroy context and preclude highly relevant information they need to perform their duty. While accepting the Crown's application, the court confirmed that the jury must be properly cautioned.

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***Suffern Lake Regional Park Authority v Danilak*, 2022 SKQB 118**

Zuk, 2022-04-20 (QB22315)

Landlord and Tenant - Residential Tenancies - Writ of Possession
Contract - Duty to Act Honestly
Civil Procedure - Costs - Summary Judgment

The Suffern Lake Regional Park Authority (Park) applied to a judge of the Court of Queen's Bench (chambers judge) under s. 50 of *The Landlord and Tenant Act* (LTA) for a writ of possession against two overholding tenants (tenants) who had refused to give up possession of their recreational properties following the expiration of their leases. The chambers judge made the following findings of fact germane to his analysis of the relevant law with respect to the matter: the tenants were longstanding residents of the park; the leases in question had expired and did not contain a renewal clause; the Park was relying solely on the expiration of the leases to justify the writ of possession; the Park authority, constituted pursuant to *The Regional Parks Act*, passed a motion to the effect that "due to the all the trouble [sic] cabin owners 27, 56… have caused the park and all the lawyer fees and for not paying any invoices for the past three to four years, the Park Authority do not renew their leases that have expired on Dec 31 20. Seconded by Alex, Carried unanimous;" the tenants had not paid their rent for three years, though demands were made in writing to them by the Park, as a form of protest against what they perceived as wrongdoing and bad faith in the administration of the Park by the Authority and

board members who used their positions for personal gain; the Park denied any wrongdoing by itself or by board members; the tenants made these unproven allegations of wrongdoing by the Park and board members repeatedly to various levels of government, including the Premier, none of whom chose to intervene on their behalf; the tenants had made extensive improvements to their properties; the Park wrote letters to the tenants prior to applying for the writ of possession giving them sufficient time to either sell the cabins and improvements on the leased land or move these off the leased land; one of the tenants suggested to the Park that the "lease issue" be resolved by mediation; and the tenants offered to pay some lease arrears into trust pending resolution of the dispute.

HELD: The chambers judge granted the writ of possession with costs against the tenants. He reviewed the evidence and arguments of the tenants, and applied extensive case law to the issues at play with particular emphasis on the allegations of malfeasance of the Park and board members in seeking a writ of possession; the duty of the Park to act honestly in exercising its rights under the lease, and what obligations the Park had to advise the tenants of the "impending expiration of the lease" and "that failure to pay outstanding lease arrears could lead to the non-renewal of the Tenants' leases." First, the chambers judge ruled that the provisions of the LTA dealing with the application before him were designed for summary disposition unless the complexity of the matter at law, the testing of witness credibility on material evidence and suchlike considerations required a trial. He was of the view that any contradictory evidence in this case was irrelevant since the Park was relying on the expiration of the lease and not on any disputed breaches of the lease, and so denied the tenants' request for a trial. He found the various accusations of wrongdoing by the Park and board members could have no relevance to the granting of the writ of possession. As to the submission of the tenants that the Park was a public body and bound to act in good faith with them, and to proceed fairly in determining whether to renew their leases, the chambers judge ruled that the law with respect to the fiduciary duty of a public body to act in good faith vis-à-vis those its decisions affected did not apply when it "was acting in a private capacity," commenting that the leases created a contractual relationship between the Park and the tenants that was to be governed by contract law. Having so found, he then turned to consider whether the Park owed the tenants a common law duty to act honestly in its contractual dealings with them under the lease, concluding that, as the lease had expired, no such duty existed; and in any event, the evidence did not show any dishonest dealings or misleading behaviour by the Park towards the tenants. Lastly, the chambers judge ruled that the Park was not required to advise the tenants of the expiry of the leases or that the failure to pay lease arrears would lead to non-renewal of the leases. The common law duty of contractual honesty did not extend as far as to require a party to the contract to have a "positive obligation" to do something not required to be done by the terms of the contract.

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***R v McCaig*, 2022 SKQB 121**

Dawson, 2022-05-02 (QB22326)

Criminal Law - Second-Degree Murder - Defence of Not Criminally Responsible
Criminal Law - Second-Degree Murder - Specific Intent

At his trial in the Court of Queen's Bench for the offence of second-degree murder of K.H., the accused J.M. placed his mental state at the time of the alleged offence in issue. The trial judge was required to decide, first, whether J.M. should be found not criminally responsible due to mental disorder (NCRMD), and second, if J.M. was not found to be NCRMD, whether the Crown had proven beyond a reasonable doubt the specific intent element of the charge. It was not contested that the actus reus of the offence was proven, that J.M. had stabbed K.H. multiple times with a buck knife in the torso, causing his death. It was also not seriously contested that J.M. suffered from a constellation of mental conditions identified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) from childhood to the time of the offence when he was 30 years of age, for which he had been continuously treated with medications and hospitalizations. The trial judge stated the most relevant of these diagnoses for her purposes was paranoid schizophrenia, with its accompanying symptoms, including auditory and visual hallucinations, persecutory delusions, and "delusions of reference." Neither was it contested that J.M. was inconsistent in taking his prescribed medications but was a "rampant" user of illicit drugs, including marijuana, crystal meth and alcohol, from the age of 11. She was persuaded from the expert opinion evidence of the forensic psychiatrist (Dr. M.) that J.M.'s psychotic symptoms were worsened by the use of these illicit drugs and alcohol. The trial judge recognized that it was her task to decide on the evidence whether J.M. had proven on a balance of probabilities as required by s. 16 of the *Criminal Code* that the paranoid schizophrenia diagnosis amounted as a matter of law to a mental disorder ("branch 1") and that, as a matter of law, the mental disorder made J.M. incapable of "appreciating the nature and quality of the act or that it was wrong (branch 2(i), (ii))". She also appreciated that if J.M. did not prove that he should be found NCRMD, she was then to decide whether, on all the evidence, the Crown had proven beyond a reasonable doubt that J.M. had the specific intent to commit second degree murder. To do so, she embarked on credibility determinations, especially from the evidence of the forensic psychiatrist and of J.M. himself.
HELD: The trial judge ruled that J.M. had not proven on a balance of probabilities branch 2 of s. 16 of the Code and, as such, was not found to be NCRMD. She then found that the Crown had not proven beyond a reasonable doubt that J.M. had the specific intent to cause bodily harm to K.H., nor that he had "the subjective knowledge the bodily harm was of such a nature it was likely to result in death and was reckless as to whether death ensued" as set out in s. 229(a)(ii) of the *Criminal Code*. In the result, she found J.M. guilty of unlawful act manslaughter, the unlawful act being assault *simpliciter*. In coming to these rulings, the trial judge was guided in her analysis of the evidence by extensive binding or persuasive judicial authority. As to branch 1 of the test in s. 16 of the Code, whether J.M. was suffering from a mental disorder at the moment of the offence, the trial judge was satisfied that the evidence of Dr. M., who thoroughly reviewed the police reports about the case, J.M.'s medical history and conducted a thorough interview with him, was reliable and persuaded her that his long-standing psychotic symptoms, including visual and auditory hallucinations, and persecutory delusions were floridly active at the time of the offence, and were exacerbated by his not taking his medication and by a period of heavy drug use days before and on the day of the incident. Since this evidence was consistent with that of J.M.'s mother who testified that in such a state, J.M. would hallucinate and hear voices, and that a few days before the stabbing was in a "frantic

mess" about the whereabouts of his girlfriend, C.M., the trial judge was satisfied that J.M. was suffering from a mental disorder at the time of the offence. As to branch 2(i) of the s. 16 test, whether J.M. "appreciated the nature and quality of the act," she accepted the interpretation of this concept as cited in *R v Cooper*, [1980] 1 SCR 1149, that the presumption a person does not suffer from a mental disorder at the time of the offence is only set aside if the person does not have an "appreciation of the factors involved in his act and the mental capacity to measure and foresee the consequences of it." The trial judge accepted the evidence of Dr. M. that J.M. told him at the time of the offence that he understood he was stabbing K.H., a human being, to "remove his resistance so he could get to the garage where he believed, due to his auditory hallucinations, his girlfriend was being tortured" and so showed he appreciated what he was doing and why he was doing it. As such, the trial judge concluded she was not satisfied that J.M. "meets the criteria for this branch of the s. 16 defence". She then turned to branch 2(ii) of the tests, whether J.M. had proven that because of his mental disorder he did not know stabbing K.H. was wrong. Relying on *R v Chaulk*, [1990] 3 SCR 1303 and cases flowing from it, she determined that the term "wrong" meant morally wrong, and not the more restrictive meaning of legally wrong. She then again focused on the statements of J.M. from his interview with Dr. M., and in particular that he said, "he knew at the time stabbing someone was wrong" but he "rationalized he had to do it because he had to rescue his girlfriend." She also pointed to Dr. M's evidence, which she accepted, that at the time of the attack "his efforts were not specifically driven by the psychotic symptoms sufficient to remove his ability to know the stabbing was wrong." Having decided that J.M. was not NCRMD, the trial judge turned to the question of the effect of J.M.'s mental disorder on his capacity to form the subjective intent required to prove the offence of second-degree murder as codified in s. 229(a)(ii) of the *Criminal Code*: whether J.M. meant to cause K.H. bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not. In order to decide the issue, she first delved into the testimony of the eyewitnesses to the events prior to the stabbing and to the stabbing itself, focussing on the witness testimony about J.M.'s behaviour. She found the accounts of the various witnesses to be reliable. No one testified that C.M. was at the subject property or in the garage at the time of the stabbing. Their testimony described J.M. as having ingested substances with them, and gradually becoming very agitated, asking if they had seen C.M. and going into the garage on the property; he was mumbling about seeing "devil dogs"; and after the stabbing was walking slowly like a "Radio Shack Robot" and going in and out of the garage. As to the testimony of J.M., the trial judge self-instructed on the *D.W.* requirements and concluded that she believed his testimony, and that his time on the stand confirmed his life-long struggles with mental illness She summarized his evidence. He had ingested large amounts of weed and meth four days prior to and including the day of the fatal attack on K.H.; he went to the subject house for more drugs; he did not know K.H.; at the time of the stabbing, he was hearing voices, including that of C.M. which made him believe "demons were torturing [C.M]'s soul, like they had her soul in the garage"; the voices said he was "such a bitch" for not rescuing her; when K.H. came out of the garage he was sure C.M. was being tortured in it; he did not want to kill K.H., but he was wielding a wooden block to prevent him from rescuing C.M.; he believed everyone in and around the house was conspiring against him. She went on to refer to other instances of paranoid and delusional thinking on the part of J.M. soon after the attack. With all the evidence she accepted, including that of Dr. M., and J.M., she concluded that J.M., due to his being in the throes of an overwhelming delusion to rescue C.M. even to the point of using violence to do so, had no ability to appreciate that he was causing bodily harm to K.H. which he knew was likely to cause his death and was reckless as to whether death ensued. In the result, the trial judge convicted him of unlawful act manslaughter because assault *simpliciter* is not an offence of specific intent, but one of general intent and J.M. admitted he knew he was stabbing K.H.

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***Malhotra v Joint Medical Professional Review Committee*, 2022 SKQB 124**

Crooks, 2022-05-06 (QB22317)

Occupations and Professions - Physicians - Billings - Documentation
Administrative Law - Standard of Review

Dr. L.M. appealed a decision of the Joint Medical Professional Review Committee (JMPRC) that ordered her to repay $271,698.78 to the Ministry of Health (Ministry) from billings made between June 1, 2014, and September 24, 2015. Dr. L.M. further appealed the discretionary amount of $50,000.00 she had been ordered to pay by the JMPRC. The JMPRC advised Dr. L.M. that they were reviewing her pattern of billing based on a referral from the Ministry. Dr. L.M. and the JMPRC had various exchanges where JMPRC would seek records and Dr. L.M. would provide them. These exchanges continued over three years. On November 20, 2018, the JMPRC sent correspondence outlining their list of findings and invited Dr. L.M. to respond. Dr. L.M. responded on January 23, 2019 in writing to the request made by the JMPRC. Additional records were provided and the JMPRC was advised that some surgical assists were mistakenly billed as unscheduled and emergent and that several complications of pregnancy may have been billed under another code. It was further advised that there were a "handful" of instances where the health services provided had not been documented but that such a practice does not constitute an unacceptable billing pattern. After receipt of this correspondence and an additional letter from Dr. L.M., the JMPRC provided a Proposed Decision and Report, updating information that had been provided in November 2018. Again, Dr. L.M. was invited to provide comments. Dr. L.M. responded on three separate occasions in July 2019 with 468 pages of additional records. The JMPRC advised on October 4, 2019, that they were not accepting the records that had been submitted by Dr. L.M. The court noted in the correspondence provided by the JMPRC that it was highlighted that in the three and a half years the review had been ongoing, ample opportunity had been provided to Dr. L.M. to provide "all relevant medical records." They were not accepting the records submitted in July 2019. On October 4, 2019, the JMPRC issued their final decision, the decision under appeal before the court. The JMPRC made twenty findings in their final decision. Dr. L.M. appealed eleven findings made by the JMPRC. The court considered three issues in determining the appeal before it: 1) Did the JMPRC impose documentation requirements beyond those contemplated in the payment schedule? 2) Was the JMPRC's process contrary to the principles of natural justice? 3) Was the additional amount inappropriate?
HELD: There was mixed success on appeal. The court dismissed Dr. L.M.'s appeal regarding several categories of overbilling she sought to recover but redirected other billings back to the JMPRC for review. No costs were ordered as there had been divided success. The court commenced its analysis by discussing the role of the JMPRC, then defined the standard of review. The court then considered the billings under dispute in the appeal. Referencing previous cases, the court reiterated that the role of the JMPRC is to review physician billings according to the payment schedule in place in the province. Medical services may only be billed where the service is necessary or required based ultimately on the judgment of the Ministry. The role of the JMPRC is to determine whether a physician should be required to repay the Ministry because of overbilling, erroneous billing or because the services provided were unnecessary or excessive. The JMPRC does not assess physician competence. The court confirmed that the JMPRC does not need to accept billings simply because they have been billed for. The JMPRC is to determine whether treatment is medically necessary, the qualification of the physician rendering the service, provision of the treatment billed for, billing under the appropriate code, and

satisfying criteria as listed in the payment schedule. The court noted that deference is owed to the JMPRC on appeal. The standard of review, given that Dr. L.M.'s appeal was statutory in nature, follows the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 in that the appellate standard of review applied. Depending on the issues raised by Dr. L.M., the court concluded the JMPRC's application of the payment schedule to the documentation submitted by Dr. L.M. to be a question of mixed fact and law and subject to a standard of palpable and overriding error. The correctness standard applied, however, to the documentation requirements imposed and principles of natural justice, as these were questions of law. In considering the first issue, the court considered the argument of Dr. L.M. that the JMPRC was factoring her competence into their decision which would result in an error in law. The court was not persuaded by this argument. The court confirmed instances where Dr. L.M. erred by inappropriately utilizing certain billing codes or misapplying the same. The court then applied the palpable and overriding error standard of review to consider each of the disputed billing items specified by Dr. L.M. in her appeal. The court found that the JMPRC had provided appropriate reasons for rejecting some of Dr. L.M.'s billings that had not been documented and that appeared to be medically unnecessary or not documented. In other instances, however, the JMPRC had failed to provide adequate reasons behind their conclusions resulting in the court ordering those items to be re-evaluated by the JMPRC. In considering the second issue, the court rejected Dr. L.M.'s arguments that the JMPRC's process of review contravened her rights to natural justice. Dr. L.M. had been afforded appropriate opportunities to respond before the JMPRC issued their final decision. Lastly, in considering the third issue, the court held that the JMPRC did not err in their discretion to order an additional $50,000.00 be paid by Dr. L.M. The JMPRC provided adequate reasons for their decision and there was no error in law. Accordingly, there was mixed success on appeal and some items of billing were directed back to the JMPRC for consideration.

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***T.Z. v P.V.R.*, 2022 SKQB 129**

Robertson, 2022-05-17 (QB22322)

Practice - Privacy - Sealing of Court Documents

T.Z., the proposed plaintiff, made a preliminary application seeking to seal the court file and anonymize the names of the parties. T.Z. proposed to file a statement of claim against P.V.R., the respondent of preliminary application, alleging sexual assault. P.V.R. denied that any form of sexual assault had occurred, taking the position that the parties had a consensual affair. T.Z. had initially filed her application without notice to P.V.R. but was directed by the court to file the application with notice, as P.V.R. had counsel. While no application with notice was ever filed, the parties did consent to the application being heard in chambers. Prior to the matter being heard in chambers, the court directed that General Application Practice Directive #3, which is titled Discretionary Orders Restricting Media Reporting or Public Access, be followed. No member of the media attended chambers on the day the application was heard. T.Z. argued that her privacy rights entitled her to both a sealing order and anonymization of names to prevent identification. Relying on s. 486.4 of the *Criminal Code*, T.Z. argued that legislative policy seeking to anonymize victims of sexual assault applies in both criminal and civil contexts. P.V.R. argued that T.Z. overemphasized the risk she faced of future harm that

could result from potential gossip and further that the parties' relationship was consensual. The court was to answer two issues: 1) Should the court file be sealed? 2) Should the names of the parties be anonymized by initials?
HELD: T.Z.'s application was dismissed without any award of costs. The court first identified, citing *Sherman Estate v Donovan*, 2021 SCC 25 (*Sherman*), that "as a general rule, the public can attend hearings and consult court files". The court then evaluated the parties' positions using the three-step analysis found in Sherman which considers whether a court file should be sealed. Applicants such as T.Z. have the onus to demonstrate that their matter should not be dealt with in open court if: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative aspects. The court considered but distinguished cases that had been cited by T.Z. The court recognized that the privacy interest of an alleged victim of sexual harassment or sexual assault is an important public interest and found that the first prong of the Sherman test was satisfied. The court did not find T.Z.'s arguments compelling to satisfy the second and third parts of the Sherman test. Accordingly, on the first issue to be determined by the court, T.Z.'s application was dismissed. In its analysis, the court was not satisfied that sealing the court file would prevent the use of private information from circulating. Further, as T.Z. did not seek to have court proceedings closed, the hearing would be in public, and private information would be revealed. With the final part of the test, the court was not satisfied that sealing the court file would be proportional to its negative effects on the open court principle. In dismissing T.Z.'s application on the second issue of anonymizing the parties' names, the court determined that it was not reasonable to anonymize all pleadings. As the court has residual power to anonymize published decisions to protect privacy interests, the court ruled that other judges may exercise their discretionary authority as they see fit and as circumstances warrant.

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***R v Morrison*, 2022 SKQB 132**

Popescul, 2022-05-19 (QB22333)

Criminal Law - Jury Trial - Directed Verdict
Criminal Law - Elements of Offence - Indignity to Human Remains

At the close of the Crown's case during a jury trial in the Court of Queen's Bench for charges including first degree murder and "offer[ing] an indignity to the human remains of [the victim] by leaving his remains in a wooded area, contrary to section 182(b) of the *Criminal Code*," the defence requested a directed verdict with respect to the latter charge. The Crown evidence relevant to this charge was that the accused and an accomplice drove the deceased to a bluff of trees in the vicinity of a grid road where he was shot dead and left where he fell. Nothing was done with his body after he was killed. The Crown argued that the offence was complete when the accused left the body in the bluff of trees knowing it could be "ravished by wildlife" and pointed to evidence that the accused said the deceased would become "coyote meat."
HELD: The trial judge allowed the application for a directed verdict. He first set out the test he was to apply in determining whether the charge should be left with the jury, that test being the same as for an application for a non-suit as set out in *United States of*

America v Shephard, [1977] 2 SCR 1067 and restated for circumstantial evidence in *R v Arcuri*, 2001 SCC 54: that the applicant must show that there is admissible evidence, whether direct or indirect, on each of the essential elements of the offence upon which a reasonable jury properly charged could convict. The trial judge referred specifically to *R v Franks*, 2003 SKCA 70, to assist him in the four-stage process he was to apply in order to determine whether the charge should remain with the jury and then went on to review a number of cases considering the elements of the offence of offering an indignity to a human body, concluding that upon his survey of these cases, common to them was some involvement with the body after the person was killed, such as moving it to another place. The trial judge pointed out that the Crown had not adduced any evidence of the essential element of intention, that the accused intended "to improperly or indecently interfere with a dead body or human remains." In particular, there was no evidence, he said, that the accused intended to take the deceased to the bluff of trees so his remains would become coyote meat. He went on to say that if the Crown's proposition were accepted, the offence of offering an indignity to a human body would be a "companion charge" to homicide, which Parliament could not have intended.

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***R v Nayneecassum*, 2022 SKPC 10**

Rybchuk, 2022-06-02 (PC22020)

Criminal Law - Sexual Interference - Sentencing
Criminal Law - Sentencing - Mandatory Minimum Sentences
Criminal Law - Sentencing - Sentencing Principles - Fundamental Principle - Proportionality
Constitutional Law - *Charter of Rights*, Section 12

A judge of the Provincial Court (sentencing judge) was tasked with sentencing S.J.N., who was in jeopardy of being sentenced to a 12-month mandatory minimum jail term. It was uncontested that S.J.N. was an Indigenous offender with extreme cognitive limitations due to FASD, and other conditions, who had pled guilty to sexual interference of an Indigenous 14-year-old girl by having sexual intercourse with her on one occasion. At the time of the offence, S.J.N. was 30 years of age, with no criminal record. As an infant, he was removed from his Indigenous mother due to her alcohol abuse and was in and out of foster homes until he was returned to her care after she rehabilitated herself. He was raised without a father in his life. He continued to reside with his mother except for a brief period when he lived on his own, during which time he committed the offence. He was assessed at various times with respect to his cognitive abilities, most recently and for sentencing purposes by a psychologist qualified to give expert opinion evidence as to the extent of S.J.N.'s intellectual disabilities, intellectual limitations, ability to function in society and therapeutic options. S.J.N. was well below average in such skills as verbal comprehension, perceptual reasoning, and ability to adapt to life in society. In particular, he could not process verbal and visual cues, and was unable to understand and appreciate such concepts as emotional or psychological harm. His Gladue factors included alcohol abuse in his family, exposure to criminal behaviour, a broken home, and exposure to the adverse effects of residential schools in his family background. Defence counsel made application under s. 12 of the *Charter*, asking that the sentencing judge not apply the mandatory minimum sentence of 12 months' incarceration because it would

subject S.J.N.to cruel and unusual punishment. The Crown advanced a sentence of three years' incarceration.
HELD: The sentencing judge recognized that in his analysis of whether the mandatory minimum sentence was cruel and unusual punishment if imposed on S.J.N., he was required to first determine what a fair and proportional sentence would be in this case and was to do so in accordance with the goals and principles of sentencing as codified in s.718 of the *Criminal Code*. He recognized that the fundamental principle of sentencing was proportionality, that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1). He appreciated that other principles of sentencing such as aggravating and mitigating factors (718.2(a)), parity- "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (s. 718.2(b)), and s. 718.2(e), commonly known as the Gladue factors, were specific manifestations of that fundamental principle. Following a thorough review of the evidence available to him in applying these sentencing principles to S.J.N. as an individual, he determined that because of his severely reduced ability to fully appreciate that he had harmed the victim due to factors beyond his control, and which emanated from the adverse effects of colonialism and the historical mistreatment of Indigenous persons, his moral culpability for the offence was considerably reduced. He stated that if not for the mandatory minimum sentence, he would levy a sentence of 90 days' interim custody and probation for two years. Turning to the analysis of whether the mandatory minimum sentence was cruel and unusual punishment if applied to S.J.N., he concluded that "the mandatory minimum sentence was designed to capture the average ordinary or typical offender committing this crime, not someone like Mr. Nayneecassum whose circumstances fall well outside the range of ordinary or typical" and a "reasonable Canadian would be shocked and would find that punishment cruel." Lastly, he turned to s. 1 of the *Constitution Act*, and whether the mandatory minimum could be sustainable as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society," and after a review of judicial authority applicable to the factors he was to consider in making this determination, ruled that he could not imagine how a law which amounted to cruel and unusual punishment could be "sheltered" by s. 1 of the *Constitution Act*: *R v Nur*, 2013 ONCA 677.

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