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

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Subject Index

***S.B. v T.B.*, 2022 SKCA 65**

Whitmore Schwann Barrington-Foote, 2022-06-01 (CA22065)

Family Law - Costs - Offer to Settle
Family Law - Division of Matrimonial Property - Inheritances
Family Law - Division of Family Property - Appeal
Family Law - Division of Matrimonial Property - Trusts
Family Law - Family Property - Property Held in Trust - Contingent Interests - Unequal Division

The appellant appealed to the Court of Appeal regarding spousal support and division of family property. The parties were married 22 years and had three children together. Shortly after their marriage, the parties moved to the appellant's family farm and worked together on a mixed farming operation. The farmland and family home were owned by the appellant's father throughout the marriage. Shortly after separation, the appellant's father died and the appellant alone inherited the farmland and family home. Mineral rights were subject to a trust. The

Civil Procedure - Service

Civil Procedure - Summary Judgment

Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure

Criminal Law - Appeal - Conviction

Criminal Law - Evidence - Onus

Criminal Law - Negligence Causing Death

Criminal Law - Sentencing - Aboriginal Offender

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence - Appeal

Criminal Law - Sentencing - Dangerous Offender Application

Criminal Law - Sexual Touching of a Minor

Family Law - Child and Spousal Support

Family Law - Child Apprehension - Child Protection

Family Law - Costs - Offer to Settle

Family Law - Division of Family Property - Appeal

Family Law - Division of Family Property - Unequal Distribution

appellant and his sister were the trustees. The appellant, respondent and other individuals were potential beneficiaries. The Court of Appeal considered whether the trial judge erred by: (1) using the date of adjudication to value the real property; (2) including the inherited property in the family property; (3) dividing all the mineral rights as family property; (4) using the date of application to value the livestock; (5) not accounting for potential tax consequences; (6) determining the ongoing spousal and child support obligations; and (7) awarding double costs.
HELD: Most of the appeal was dismissed, and the issues of the valuation of the mineral rights trust and the characterization of pre-trial payments were remitted to the Court of Queen's Bench. (1) Valuing property at the date of application or of adjudication is a discretionary decision. Expert evidence supported the trial judge's valuation of real property as at the date of adjudication because the change in value was a result of market forces. There was no specific evidence to support the appellant's argument for date of application valuation. (2) The parties did not own the family home while they lived together. The appellant inherited it shortly after the application was made. Inherited property is presumptively shared equally. The party seeking an unequal distribution has the onus to establish that equal sharing would be unfair. Because the family home was used and improved by both parties during the marriage, it would be inequitable for the appellant alone to benefit from the property. There was no error in dividing the inherited house and home quarter equally. The other inherited farmland was part of the parties' lives and livelihoods during the marriage. The trial judge's discretionary decision that 75 percent of the inherited farmland be divided equally was made after the judge instructed herself on the law and in consideration of all the evidence. No error permitted appellate intervention. (3) The mineral rights were subject to a trust. After the appellant's father died, the appellant and his sister were the trustees. The contingent beneficiaries included the appellant, the respondent and others. The trial judge failed to take into account the value of the interest in the trust held by the appellant and respondent as beneficiaries. The issue of the effect of the interests of other beneficiaries on the value of the family property for division was remitted to the Court of Queen's Bench, because it required additional findings of fact. (4) The trial judge valued the livestock at an amount between the two expert witness valuations as at the date of application. The trial judge's discretionary choice to value the livestock as at the date of application was not in error, even though real property was valued at the date of adjudication. Expert evidence regarding the value of the livestock was inadequate, contradictory and incomplete. Livestock has been valued at the date of application in other cases. The trial judge would be better placed to make the decision regarding date of valuation, and although her reasons were sparse, she did not make a reviewable error. (5) The Act permits a trial judge to order unequal division of property if it would be unfair because of tax liability. The trial judge did not believe the appellant's evidence that he would sell the farm and considered that there was a significant capital gains discount for sale of farmland. Evidence regarding tax liabilities was imprecise. It is not the function of an appellate court to reweigh evidence. The trial judge's decision was upheld, despite problematic comments in the trial judge's reasons. (6) The respondent was the primary caregiver and had given up off-farm employment to work on the farm. The appellant's income was much higher than the respondent's. Ongoing

Family Law - Division of Matrimonial Property - Inheritances

Family Law - Division of Matrimonial Property - Trusts

Family Law - *Divorce Act* - Parenting - Family Violence

Family Law - Evidence - Credibility

Family Law - Family Property - Property Held in Trust - Contingent Interests - Unequal Division

Family Law - Interim Parenting Orders

Family Law - Support - Child Support - Extraordinary Expenses

Family Law - Support - Child Support - Interim Order

Forfeiture of Property - Unlawful Activity - *Seizure of Criminal Property Act, 2009*

Municipal Law - Appeal - Assessment Appeals Committee - Leave to Appeal

Organized Pseudolegal Commercial Argument Litigant

Practice - Production of Documents - Solicitor-Client Privilege - Litigation Privilege - Wigmore Criteria

Statutes - Interpretation - *The Court Jurisdiction and Proceedings Transfer Act*, Section 9

Statutes - Interpretation - *The Municipal Board Act*, Section 33.1, Section 33.2

spousal and child support were upheld. The Court of Appeal rejected the argument that spousal support ought to be reduced to take into account the likely impact on income because of the division of family property. There was no evidence to establish the property equalization payment could be used to generate income, and thus, it was not appropriate to impute income to the respondent. (7) Several days before trial, the respondent had offered to settle in a manner more advantageous to the respondent. There were no special circumstances that justified a departure from an award of double costs.

 Back to top

***Chenjelani v Institute of Chartered Professional Accountants of Saskatchewan*, 2022 SKCA 66**

Caldwell Whitmore Leurer, 2022-06-02 (CA22066)

Administrative Law - Professional Bodies - Procedural Fairness

P.C., an accountant candidate with the Institute of Chartered Professional Accountants of Saskatchewan (CPA SK), appealed to the Court of Appeal (court) pursuant to s.7(2) of The Court of Appeal Act the decision of a judge of the Court of Queen's Bench (chambers judge) upholding the decision of the CPA SK to cancel his registration as an accountancy candidate (see: *Chenjelani v Institute of Chartered Professional Accountants of Saskatchewan*, 2021 SKQB 251 [decision]). His grounds of appeal were that the decision was unreasonable as that concept is explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 and also that the chambers judge erred on a standard of correctness by not ruling that the process which led to the cancellation of P.C.'s registration as a candidate was unfair as that concept had been developed by judicial precedent, including such cases as *Akpan v The University of Saskatchewan Council*, 2021 SKCA 129. The court was not required to make any factual findings, basing its analysis on the record of proceedings before the administrative bodies of the CPA SK and the uncontested affidavit evidence of its registrar. The facts which interested the court in particular were that: as a condition of his registration as a candidate with CPA SK, P.C. enrolled with the CPA Western School of Business (CPAWSB) and was to complete the CPA Professional Education Program (CPA PEP); enrollment fees were required to be paid annually on May 31; P.C. did not pay his fees for the 2019 school year, which led to a series of written communications from the registrar reminding him of the unpaid fees, and providing him with notice that if the fees were not paid, he would be suspended from the CPA PEP; payment was not made, and P.C. was suspended from the course; in addition, the admissions services of the CPAWSB also purported to suspend his candidacy with the CPA SK for non-payment of fees; following further communications between the registrar and P.C., P.C. agreed to her suggestion

Cases by Name

855 Park Street Properties GP Ltd. c/o Hungerford Properties (SK) v Regina (City)

A.W. v N.P.

Chenjelani v Institute of Chartered Professional Accountants of Saskatchewan

D.W., Re

Director under The Seizure of Criminal Property Act, 2009 v Kheder

Ernst & Young Inc. v Koroluk

Mardanisamani v Farshad

Penner v Saskatchewan Health Authority

R v A.W.C.

R v L.P.

R v Laprise

R v Major

S.B. v T.B.

Saskatchewan Power Corporation v Mitsubishi Power Canada Ltd.

Schneider v Colhoun

Webfam Farms Ltd. v SaskPower Corporation

that he seek "reinstatement" with CPA SK, as allowed by Regulatory Bylaw 37.1 of the CPA SK bylaws, and that he do so through the registration committee; P.C. failed to complete the reapplication process or pay the outstanding fees by an extended deadline he requested; the extended deadline had been granted on a further condition that P.C. obtain an "updated transcript assessment"; P.C. objected to this condition but the registration committee declined to waive it; as was his right, P.C. appealed this decision to the CPA SK Board with the assistance of the registrar and was advised of the hearing date. He did not attend the hearing, relying instead on written submissions which he asked the registrar to file for him, which she did; a hearing was held before the CPA Board at which the registration committee set out its reasons for requiring an updated transcript assessment; the CPA Board agreed with and upheld that decision, then cancelled his candidacy registration; and following this decision, P.C. applied to the Court of Queen's Bench for judicial review. The court reviewed the decision of the chambers judge, who found that the CPA SK Board made a reasonable decision, in accordance with its processes and procedures, and one that provided P.C. with all the procedural fairness required in the circumstances. In particular, the court noted that the chambers judge emphasized the efforts made by the registrar on P.C.'s behalf throughout his dealings with the CPAWSB and the CPA SK.

HELD: The court allowed the appeal. It concluded that the chambers judge made an error in law by failing to turn his mind to whether the process resulting in P.C.'s initial suspension by admissions services from his candidacy in CPA SK was the correct process, which the court stated then led to all other steps in the process and the cancelation of his candidacy altogether. Pointing to the specific bylaws and rules of the CPAWSB and of the CPA SK, the court found that the CPAWSB rules and bylaws did not give it the authority to suspend P.C.'s candidacy, finding further that the regulatory structure of the CPA SK governed such suspensions. In particular, the court observed that none of the rules and bylaws governing the CPA SK's power to suspend candidates for registration from the CPA SK for non-payment of fees were delegated to the CPAWSB. In addition, the court stated that using an invalid process to suspend P.C.'s candidature was a serious deprivation of procedural fairness because the failure by CPA SK to follow its own processes prevented P.C. from availing himself of procedural safeguards such as the right to personally make submissions to the Registration Committee explaining his reasons for not paying his registration fees and any other submissions he might choose to make in response to the registrar's recommendation of suspension. The court also expressed that though P.C. was not a sympathetic individual in this case, he was nonetheless entitled to have serious decisions adversely affecting his future made in accordance with the procedures put in place to safeguard his right to be treated fairly.

 Back to top

***R v Laprise*, 2022 SKCA 77**

Caldwell Schwann Kalmakoff, 2022-06-30 (CA22077)

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence - Appeal

M.B.L. appealed the decision of a Court of Queen's Bench judge (sentencing judge) that found him to be a dangerous offender and sentenced him to an indeterminate prison sentence. M.B.L. was convicted of seven offences from three separate incidents. In one incident, he used bear spray against a bartender. He was not permitted to be in possession of bear spray because of two existing orders. In a further incident, M.B.L. participated in a bank robbery in which he struck a bank employee in the head with what appeared to be a handgun. Lastly, M.B.L. joined other individuals in robbing a restaurant and a patron, again by brandishing bear spray. After M.B.L.'s convictions, the Crown sought an assessment order under s.752.1 of the *Criminal Code* in anticipation of making a dangerous offender application (an application under Part XXIV of the *Criminal Code*). A forensic psychiatrist assessed M.B.L. and concluded that he had severe antisocial personality disorder and substance abuse disorder. The psychiatric report further stated that M.B.L. was a high risk to commit violent offences in the future and based on his history and clinical presentation, M.B.L. met the criteria for designation as a dangerous offender under either ss.753(a)(i) or 753(1)(a)(ii) of the *Criminal Code*. Before the sentencing judge, the Crown introduced M.B.L.'s lengthy criminal history which included offences for which he was sentenced after the three incidents that brought him before the court. Three correctional staff and M.B.L. testified before the sentencing judge. M.B.L. testified to his Indigenous heritage and his present life circumstances. The sentencing judge issued a written decision, designated M.B.L. to be a dangerous offender and sentenced him to an indeterminate sentence. Within the decision, there was no reference to the testimony received from the correctional staff or the testimony M.B.L. provided. The sentencing judge, after hearing additional submissions, imposed the indefinite sentence on the robbery convictions. M.B.L.'s appeal raised two issues before the court: did the sentencing judge err in failing to consider his testimony and did the sentencing judge err in not considering s.718.2(e) factors of the *Criminal Code*?

HELD: The court accepted M.B.L.'s arguments and allowed his appeal, directing the matter to a new hearing. The court set out the standard of review to be applied: s. 759(1) of the *Criminal Code* permits an individual found to be a dangerous offender to appeal their sentence on any ground of law or mixed law and fact. The robust standard of sentence review contemplates that a designated offender does not receive a hearing de novo before the court, and absent an error in law, the court will not intervene unless the sentencing judge's findings were unreasonable. In M.B.L.'s matter, the sentencing judge erred by not considering his evidence and then further failed by failing to assess s. 718.2(e). The sentencing judge's decision gave no consideration to the testimony M.B.L. provided and whether it corroborated or contradicted the opinion of the forensic psychiatrist. The court further held that the sentencing judge did not consider s. 718.2(e), which requires a reviewing court to assess an individual's Indigenous heritage. The sentencing judge failed to give any consideration to M.B.L.'s background and unique experiences as an Indigenous person. The failure to consider M.B.L.'s circumstances and analyze them in context of the evidence received was an error in law. Given the sentencing judge's failures, a new hearing under Part XXIV of the *Criminal Code* was ordered.

Back to top

***R v Major*, 2022 SKCA 80**

Schwann Leurer Tholl, 2022-07-20 (CA22080)

Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure
Criminal Law - Appeal - Conviction
Criminal Law - Evidence - Onus
Criminal Law - Negligence Causing Death

After a trial before a judge and jury, R.M. was convicted of twelve counts of dangerous driving and criminal negligence. Applying the principles from *R. v. Kienapple*, 1974 CanLII 14 (SCC), [1975] 1 SCR 729, the Court of Queen's Bench justice (trial judge) entered a judicial stay on six dangerous driving charges. R.M. was sentenced to seven years of incarceration for each charge of criminally negligent operation of a motor vehicle causing death (three convictions in total), and three years of incarceration for each charge of criminally negligent operation of a motor vehicle causing bodily harm (three convictions in total). The sentences were to be served concurrently. R.M. appealed the underlying convictions and sought a new trial. R.M. drove his pickup truck through a highway intersection and struck a semi-truck. There were seven occupants in his vehicle. Three passengers – two of his children and his girlfriend – were killed in the collision, and the three other passengers were seriously injured. The accident happened in February on a dark morning. R.M. testified that while he knew that he was to stop at the intersection he crossed, he was too late, and his vehicle crossed into the intersection. At the scene of the accident, without a warrant, the police seized the factory-installed airbag control module (ACM) from R.M.'s vehicle and accessed data from the event data recorder (EDR), a component within the ACM. The data was processed through specialized software – Bosch CDR software – at the accident scene. The data revealed information including that the vehicle reduced its speed from 137 km/h to 118 km/h mere seconds before the accident. R.M. sought to have the EDR evidence excluded at trial, but the trial judge rejected his s. 8 *Charter* application. She found that R.M. did not have a reasonable expectation of privacy in the data collected by the EDR. The admissibility of the EDR data was contentious at trial. R.M. objected to a police officer being qualified as an expert to provide testimony on EDR data. The trial judge limited the police officer's expert qualifications; he was not qualified to be an expert on EDR data, but he was permitted to tell the jury how he retrieved the data from R.M.'s vehicle and the information he recovered. The police officer's accident reconstruction report, which relied on information he had obtained from the EDR data, was made a full exhibit at trial. R.M. raised further objections before the trial judge concerning the testimony of another officer who had interactions with R.M. after the accident and the charge that was made to the jury. The issues before the court were: Did the trial judge err (a) in determining the seizure of the ACM and EDR data did not violate R.M.'s rights under s. 8 of the *Charter*; (b) in admitting the evidence generated from the EDR data without there being a proper evidentiary basis; (c) by permitting impermissible evidence to be tendered through the testimony of the constable that R.M. had objected to; (d) in admitting some of R.M.'s statements, which were made to the police officer, without holding a voir dire; (e) in providing flawed instructions to the jury regarding the elements of dangerous driving and criminal negligence?
HELD: The court allowed R.M.'s appeal and ordered a new trial. The court only considered the first two issues of R.M.'s appeal and issue (b) was conclusive in granting R.M.'s appeal. The court established that in finding a s. 8 infringement, the accused must demonstrate that his privacy has been infringed. Three categories of privacy have been established in jurisprudence: personal, territorial, and informational. Personal privacy relates to bodily integrity. Territorial privacy is considered in intrusions of personal spaces, including one's home and vehicle. Informational privacy considers the right of individuals to control when, how, and to what extent information is made available to other persons. There is divergent jurisprudence across Canada respecting the treatment of

EDR data. The court explored cases where s. 8 infringements have been found and other cases where no infringement was determined. The court concluded that R.M. could not reasonably have intended that information related to the last five seconds of his vehicle's various mechanical and electronic components immediately before a catastrophic collision would be private. The EDR did not contain any personal information about R.M. that would attract an objectively reasonable expectation of privacy. The court held that the trial judge did not err when she determined there had been no s. 8 infringement as no private right had been established by R.M. However, the court had significant concerns about the admission of evidence generated from the EDR data and allowed R.M.'s appeal on this basis. The court found that there was not a proper evidentiary foundation for the admission of EDR data at trial. At a minimum, an expert was required to testify about the data if it was to be admitted. The Crown's arguments that it is permissible to admit EDR data under s. 31.1 of the *Canada Evidence Act*, RSC 1985, c C-5, as authentic electronic documents, was rejected. The issue to focus on was whether the EDR data met threshold reliability to be admitted; it did not. The data being accessed in a component of a motor vehicle's safety system is not understandable to the average person. The court distinguished the data being recovered from the ACM as distinct from data retrieved from common devices and programs such as a mobile phone or spreadsheet software, that are commonly understood by lay people. The data being recovered was on specialized software (Bosch CDR software) about which no expert had testified to establish a foundation. The court held that if a foundation could not be established about how the software operated, particularly on how to account for anomalies in EDR data recovered, then the evidence could not be tendered before the jury. Given the importance placed on the EDR data, with its lack of threshold reliability, the court held that R.M.'s convictions could not stand. A new trial was ordered.

 Back to top

***Ernst & Young Inc. v Koroluk*, 2022 SKCA 81**

Barrington-Foote, 2022-07-26 (CA22081)

Appeal - Leave to Appeal
Civil Procedure - Queen's Bench Rules, Rule 12-1
Civil Procedure - Service

The applicant and prospective appellant, Ernst & Young Inc., sought leave to appeal a decision validating service of a statement of claim on the applicant. The respondent had the statement of claim issued and served on some, but not all, defendants. Within the six-month window for service, the applicant was added as a defendant to the claim. The respondent's claim alleged that the applicant acted as an auditor and was negligent. The respondent obtained two six-month extensions of time for service of the claim. The respondent made no attempt to serve the applicant. The applicant became aware of the claim during a voluntary liquidation process. The applicant wrote counsel for the respondent and stated that the applicant had not been served, a different entity with a similar name was the auditor, and the applicant would assume the claim was abandoned if there were no further contact. The respondent did not respond for 16 months. Then, the respondent applied to validate service on the applicant and others. Service was validated on the basis that the applicant had notice of the claim. The appellate judge considered whether to grant leave to appeal.
HELD: Leave to appeal was granted on the question whether the Queen's Bench chambers judge failed to correctly identify or apply

the legal criteria governing validation of service. The prospective appeal raised the issue whether notice alone required validation of service, regardless of attempts at service, how the defendant knew about the claim, and what the defendant did in response. The applicant would argue Rule 12-1 does not authorize validation of service where there was no attempt at service, but only where there was irregular or unauthorized service. Leave is granted when there is sufficient merit and importance. The prospective appeal had sufficient merit because there was little authority on the governing principles and because the prospective appellant's arguments were not destined to fail even though the prospective appeal is a review of a discretionary decision and discretionary decisions are reviewed on a deferential standard. The prospective appeal was sufficiently important because it could be determinative of the statement of claim and because the issue transcended this particular case.

Back to top

***855 Park Street Properties GP Ltd. c/o Hungerford Properties (SK) v Regina (City)*, 2022 SKCA 86**

Jackson, 2022-07-28 (CA22086)

Appeal - Leave to Appeal
Municipal Law - Appeal - Assessment Appeals Committee - Leave to Appeal
Statutes - Interpretation - *The Municipal Board Act,* Section 33.1, Section 33.2

The applicant sought leave to appeal a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board. The proposed appeal related to the assessment of a large vacant property zoned as medium industrial and classified as non-regulated. The property was assessed according to the sales comparison approach to value. The committee had upheld the assessment. The applicant sought leave to appeal on the following grounds: (1) the committee identified the incorrect standard of review; (2) the committee erred in law or principle by affirming the assessor's use of sales from outside the assessment cycle; (3) the committee failed to follow past decisions regarding the determination of the base land rate, standard parcel size and land size multiplier curve.
HELD: The Court of Appeal chambers judge granted leave to appeal on one issue: whether the committee erred in its interpretation and application of the cost guide and jurisprudence regarding the base land rate, standard parcel size and land size multiplier curve. (1) Misstatement of the appropriate standard of review, in the absence of an error in the application of the appropriate standard of review, is not a stand-alone basis upon which to grant leave. (2) *The Municipal Board Act* contemplated an appeal on an error in law or jurisdiction, and not an error in principle. Agreeing with the decision below is a form of correctness review. The court did not have meaningful doubt over the correctness of the committee decision regarding the use of sales from outside the assessment cycle, and thus the appeal on that issue was bound to fail. There were also concerns that the applicant had conceded this issue and the analysis regarding which leave to appeal was now sought was moot. (3) The court will grant leave to settle a recurring question that appears to have created difficulty. One such recurring question was the issue of whether the committee failed to follow past decisions regarding base land rate, standard parcel size and land size multiplier curve. This was a companion appeal to another appeal also before the Court of Appeal.

Back to top

***Penner v Saskatchewan Health Authority*, 2022 SKQB 142**

Meschishnick, 2022-06-06 (QB22337)

Practice - Production of Documents - Solicitor-Client Privilege - Litigation Privilege - Wigmore Criteria

The plaintiff sought disclosure of documents from the defendant in the context of a wrongful dismissal action. The documents sought were notes of discussions between managers, labour relations professionals and a lawyer in the role of executive director of labour relations, created during the defendant's investigation of the plaintiff's conduct and the defendant's deliberations leading to the plaintiff's dismissal. The documents were relevant. The judge considered whether the documents were exempt from disclosure because of (1) solicitor-client; (2) litigation; or (3) Wigmore criteria privilege.
HELD: (1) Solicitor-client privilege applied to five documents. Solicitor-client applies to a confidential communication between solicitor and client which entails the seeking or giving of legal advice. In-house lawyers often have legal and non-legal responsibilities. Five of the documents documented discussions seeking or receiving legal advice from an in-house lawyer in the role of executive director of labour relations. The timing, subject-matter and individuals involved supported the conclusion that the discussions documented involved legal advice. (2) The litigation privilege did not apply to the remaining seven documents. At the time the documents were created, dismissal and litigation were not certain to follow the allegations being substantiated by the investigation. The dominant purpose of the remaining documents was not to prepare for litigation. (3) The remaining seven documents recorded discussions of the facts discovered during the investigation, discussions about what inferences should be drawn from those facts, and advice and views about what discipline should follow. Privilege cannot be used to conceal relevant facts from the opposite party. The court considered the four Wigmore factors. There was an expectation that the documented discussions would be confidential. Confidentiality of those discussions was necessary to preserve the relationship between the managers and labour relations personnel. The community would want to foster the relationship between managers and labour relations personnel because dismissal decisions ought to be made based on the best information and advice available. Injury from disclosure outweighed the benefits. If this type of discussion was not reliably confidential, dismissal decisions would not be made collaboratively. The benefit of disclosure to the litigation would be small because the views of managers or labour relations professionals are not relevant to a court's determination of whether there was just cause for dismissal. Those portions of the remaining documents that record the facts found during the investigation were ordered disclosed, and the contents protected by Wigmore privilege were ordered redacted before the documents were produced.

 Back to top

***Director under The Seizure of Criminal Property Act, 2009 v Kheder*, 2022 SKQB 144**

Mitchell, 2022-06-09 (QB22341)

Forfeiture of Property - Unlawful Activity - *Seizure of Criminal Property Act, 2009*

This matter was an application by the director under *The Seizure of Criminal Property Act, 2009* (SCPA) to a judge of the

Court of Queen's Bench (judge) for an order for the forfeiture to Her Majesty the Queen in Right of Saskatchewan (Crown) of $15,365.15 (cash) seized from the respondent, K.K. The evidence upon which the judge made his factual findings was contained in numerous affidavits filed by the Crown and on behalf of K.K., including one from J.D.H., who was accepted by the judge as an expert witness qualified to provide opinion evidence about drug trafficking activity. The judge found that, following a lawful arrest of K.K. at roadside for suspected consumption of cannabis in a motor vehicle contrary to the Cannabis Control Act (Canada), and a lawful search of his person and the vehicle, a number of items were seized by the arresting officers including a SIM card, cell phones, numerous air fresheners, and bundles of $20.00 bills totalling the cash seized, and 66 grams of cannabis. The judge also found as fact that the vehicle was a rental, K.K. and one female passenger were traveling from Winnipeg to Alberta, ostensibly for a short holiday; Alberta "is a source province for drug trafficking;" K.K. gave two contrary explanations for being in possession of the cash; and he claimed he had receipts to prove his story but produced none of any evidentiary value.
HELD: The judge allowed the application and directed that the cash be forfeited to the Crown in Right of Saskatchewan. He first referenced the SCPA, highlighting the following provisions: the director has the burden to prove on a balance of probabilities that the property sought to be forfeited is "proceeds of unlawful activity"; "unlawful activity" includes activity which amounts to offences pursuant to "an Act, an Act of any provision or territory of Canada or an Act of the Parliament of Canada"; the director is not required to prove "the property was acquired in connection with a specific unlawful action"; as stated in *Director under The Seizure of Criminal Property Act, 2009 v Kotyk*, 2013 SKCA 140, "the standard is whether the allegation is more likely than not, and that whether a proposition is inherently probable or improbable is a matter of common sense"; upon a finding that the property is proceeds of unlawful activity, the respondent may invoke an "interests of justice" exception pursuant to s. 7 of the SCPA, and as stated in *Director under The Seizure of Criminal Property Act, 2009 v Mihalyko*, 2012 SKCA 44, the respondent must demonstrate that forfeiture of the property would be "draconian and unjust or manifestly harsh." With the found facts and governing principles in mind, the judge determined, first, that he was satisfied on the totality of the evidence that the director had proven on a balance of probabilities, including in particular the seized SIM card, the air fresheners which K.K. said were supplied by the car rental company, but which they denied supplying, and most persuasively, he stated, the amount of seized cannabis, the amount of cash and how it was bundled and stored, that the cash was proceeds of criminal activity. As to s. 7 of the SCPA, K.K. claimed that the seizure of the cash would prevent him from earning a living by selling cars. The court did not accept that the cash was used for such a purpose and ruled that he had not provided any evidence that the forfeiture was draconian and unjust or manifestly harsh.

 Back to top

***Saskatchewan Power Corporation v Mitsubishi Power Canada Ltd.*, 2022 SKQB 147**

Kilback, 2022-06-17 (QB22342)

Statutes - Interpretation - *The Court Jurisdiction and Proceedings Transfer Act*, Section 9

Flenco Fluid System S.r.l. (Flenco) and Pompe Garbarino S.p.A. (Garbarino), defendants in a multi-defendant action brought by Saskatchewan Power Corporation (SaskPower), applied under rule 3-14 of The Queen's Bench Rules to a chambers judge of the Court of Queen's Bench for an order dismissing or staying SaskPower's action against them. They claimed the court lacked "territorial competence" in the proceeding or, alternatively, that the more convenient forum to try the action as it pertained to them was Italy, where they were incorporated and their operations were exclusively based. They also argued that SaskPower's pleadings,

if proven, could not satisfy the strictures of The Court Jurisdiction and Proceedings Transfer Act (CJPTA). The chambers judge considered the pleadings, the affidavits of the parties with attached exhibits, and the submissions of counsel in light of the judicial precedents central to the interpretation of the CJPTA, in particular, *SSAB Alabama Inc. v Canadian National Railway Company*, 2020 SKCA 74 (*SSAB CA*) and *Club Resorts Ltd. v Van Breda*, 2012 SCC 17. He canvassed the evidence and was satisfied on the facts that SaskPower sued Flenco and Garbarino in negligence, alleging that a thunderstorm at the Boundary Dam Power Station (BDPS) caused the failure of a faulty lube oil system which was designed, engineered, procured, manufactured, assembled and tested by Flenco, and two main pumps and an emergency pump manufactured and supplied by Garbarino for the lube oil system, causing damage to and the shutdown of a turbine. SaskPower claimed damages in the amount of $14.6 million for costs and losses resulting from the alleged failure of the lube oil system and the pumps.

HELD: The chambers judge dismissed the application, stating that "this court has territorial competence and Italy is not a more appropriate forum in which to try SaskPower's claims against Flenco and Garbarino." He considered the provisions of the CJPTA, in particular, s. 2, "territorial competence," ss. 4(e), 9 and 10, and governing case law with respect to each. He then proceeded to his analysis of the term "territorial competence" and its application to the pleadings in the action, along the following lines of inquiry: first, whether the facts the court was to consider in determining a "real and substantial connection between Saskatchewan and the facts on which the proceeding against the person is based" were those specific to Flenco and Garbarino or were those in the action as a whole; and second, whether any of the presumptions listed in s. 9 of the CJPTA applied so that a *prima facie* real and substantial connection was presumed unless rebutted by Flenco and Garbarino. As to which set of facts he was to examine in determining a real and substantial connection between Saskatchewan, Flenco and Garbarino, he concluded that the case law and s. 9 indicated that he was to look at "the facts of the action as a whole" and was not restricted to the "defendant's circumstances or status". The chambers judge then turned to an analysis of the s. 9 presumptions, and in particular, ss. 9(e)(i) and 9(g). In his s. 9(e)(i) analysis, he asked himself whether "the proceeding concern[ed] contractual obligations which were to be performed to a substantial extent in Saskatchewan," finding that they were. He was aware that Flenco was not in a contractual relationship with SaskPower, as it had subcontracted to build the lube oil system and that Garbarino was subcontracted to Flenco to provide the pumps for the lube oil system. Nonetheless, he reasoned, the phrase "concerns contractual obligations" in s. 9(e) was broad enough to encompass the case before him. He pointed in particular to a manual prepared by Flenco which showed it was aware that the lube oil system was to be installed in the "Boundary Dam Project, Saskatchewan, Canada" and that the "chain of events" flowing from the agreement between SaskPower and the contractor of a BDPS upgrade, Mitsubishi Power Canada Ltd. (SRS agreement), led inexorably to the alleged failure of the lube oil system in Saskatchewan. As to the claim of Flenco and Garbarino that the s. 9(e)(i) presumption did not apply to them, he stated they had failed to show that no "real relationship or a… [weak relationship] existed between the subject matter of the litigation and the forum." The chambers judge then focused his analysis on the application of the presumption created by s. 9(g) of the CJPTA, whether "the proceeding [was] brought for a tort committed in Saskatchewan," being satisfied that it was. He was not persuaded, as advanced by Flenco and Garbarino, that any alleged negligent conduct on their part occurred in Italy, where the system and the pumps were designed and built, and not Saskatchewan, pointing out the law is clear that the tort of negligence is not proven unless damages result, and that in this case no damages were incurred by SaskPower until the lube oil system failed in Saskatchewan. As with s. 9(e)(i), the chambers judge found that the presumption had not been rebutted because Flenco and Garbarino had not shown that "in the case of a multi-jurisdictional tort, a presumption of jurisdiction may be rebutted where only a relatively minor element of the tort has occurred in the province: *SSAB CA*." Having satisfied himself that the action as a whole had a real and substantial connection with Saskatchewan and that the court had territorial competence to hear it, he focused his attention on the concept of *forum conveniens*, as codified in s.10(b) of the CJPTA, concluding that the appropriate forum for the action to proceed was Saskatchewan, because other than Flenco and Garbarino, all other defendants had a substantial connection with Saskatchewan. He was not prepared to compromise efficiency and fairness by bifurcating the proceedings when

Flenco and Garbarino held themselves as servicing “worldwide markets”, and therefore should be prepared to defend their products on a worldwide basis. As well, he reasoned it would be more efficient for them to bring their witnesses to Saskatchewan than to have the much more numerous witnesses of SaskPower and the other defendants brought to Italy.

Back to top

***Webfam Farms Ltd. v SaskPower Corporation*, 2022 SKQB 148**

Layh, 2022-06-21 (QB22343)

Civil Procedure - Summary Judgment
Actions - Utility Easement - Damages
Actions - Utility Company - Statutory Right of Entry

The defendant, SaskPower, applied to a judge of the Court of Queen’s Bench for summary judgment dismissing the action of Webfam Farms Ltd. against it for damages caused by SaskPower as a result of its removal and mulching of “approximately 800 yards of 30-year-old ash trees” which were located near power pole and lines constructed on farmland subject to an easement (1977 easement). The facts relative to the summary judgment application were not in dispute. The 1977 easement allowed for the construction and maintenance of a power line, and also created a duty of care owed by SaskPower to Webfam to avoid “unnecessary damage to the land or to trees, crops, buildings or other property situated thereon” and contained a requirement to pay reasonable compensation to the owner of the easement land “for damage done to any buildings, fences, crops, timber or livestock on the land arising out of or attributable to the exercise of its rights under the easement”. Of relevance to the application for summary judgment was s. 33 of *The Power Corporation Act* (PCA), which SaskPower claimed was a complete defence to the action, notwithstanding the terms of the 1977 easement. SaskPower argued that its actions in causing the trees to be removed and mulched were completely permitted by s. 33 of the PCA, which allowed it to enter onto the plaintiff’s land to “trim or remove any trees or shrubs or removing other obstructions to the extent that, in the opinion of the corporation, is necessary to protect its power lines and any cross arms, wire or other attachments to power poles” and provided further that no owner of land was entitled to compensation for the removal of trees.
HELD: The court denied the application for summary judgment, ruling that “the scant evidence before the court does not permit a careful and thoughtful analysis of the application of s. 33 of the Act in light of the pre-existing 1977 Easement”. He listed a number of “inquiries and questions” left unresolved by the evidence which could only be answered by a trial, including the relevance of SaskPower’s failure to notify WebFarms of its intention to remove and mulch the trees; whether it was necessary for SaskPower to remove the trees and whether s. 33 of the PCA required the use of the least intrusive operation; and the interplay between the 1977 easement and s. 33 of the PCA.

Back to top

***A.W. v N.P.*, 2022 SKQB 150**

McCreary (*ex officio*), 2022-06-22 (QB22353)

Family Law - *Divorce Act* - Parenting - Family Violence
Family Law - Child and Spousal Support
Family Law - Division of Family Property - Unequal Distribution
Family Law - Evidence - Credibility

Following a trial before a judge of the Court of Queen's Bench, the trial judge rendered her decision on a number of contested issues. She first canvassed the uncontested background facts of the issue of parenting: A.W. and N.P. were married in January 2006 and separated in April 2019 and three children were born to them, R.P. in 2010, H.P. in 2013, and T.P. in 2015 (children). A.W., their mother, was the primary caregiver of the children during the marriage, and since the separation; an interim parenting order was put in place in July 2019 that reflected this arrangement; at trial, A.W., requested that the existing parenting regime continue, as it was in the best interests of the children; N.P., the father, urged the court to grant equal parenting time; and the children were thriving in the care of A.W. The testimony of A.W. and N.P. was diametrically opposed, which the trial judge recognized required her to make credibility and reliability findings to arrive at the facts she was to apply to the issues at play. She was of the view that the main question to decide was the extent of the family violence perpetrated by N.P. during the marriage and the separation, and how it should be considered in deciding the parenting order. She also dealt with the issue of a family loan made by N.P.'s parents to A.W. and N.P. during the marriage in some detail and resolved the other issues with respect to the family property division and with respect to support less exhaustively.
HELD: The trial judge first made the necessary credibility and reliability findings as these pertained to the question of family violence allegedly perpetrated by N.P. She found that N.P. gave "deliberate dishonest testimony at trial;" that he "lied to the court;" that he doctored documents presented to the court to his advantage and thereby "tried to mislead the court by introducing a document that he created for the trial;" and that "[N.B.] is willing to perjure himself to improve his position." The court found that N.B.'s testimony and other evidence he adduced could not be believed, and that where his evidence and that of A.W. conflicted, she preferred A.W.'s evidence. Nonetheless, she was aware that she was still required to assess A.W.'s testimony against the evidence as a whole to decide whether her testimony met "the real test of the truth of the story of the witness… its harmony with the preponderance of the probabilities." (See: *Faryna v Chorny*, [1952] 2 DLR 354 (BC CA). The court ruled it was in the best interests of the children that the status quo be maintained and ordered accordingly. As to the family loan, after a review of the treatment of debt owed by the parties to other persons in *The Family Property Act*, the court found it unnecessary to consider in the family property division as it was not an enforceable debt. With respect to the primary question of family violence, she first referenced ss. 16(1), 16(3), and 16(4) of the Divorce Act and case law explaining the relationship between family violence and parenting arrangements in the best interests of the children, including *Barendregt v Grebliunas*, 2022 SCC 22. She found first that N.P. had committed family violence by physically assaulting A.W., two incidents of which resulted in convictions. She also found that the family violence demonstrated a pattern of "Coercive, controlling and intimidating conduct after… separation and at trial," with a view to gaining an advantage in the proceedings and involving the children or to which they were exposed. She noted in particular that when N.P. moved out of the family home he removed household goods which he did not need, including the children's bikes, toys, coin collection, swimming gear, winter clothes, baseball uniforms and household electronics, among other numerous items; he removed the Apple calendar, passwords for the home thermostat, security system, and the children's iPads, making it difficult for A.W. and the children to live in the home; he placed a form disparaging A.W. in the children's backpacks for their teacher to read; and at a baseball game he

claimed he did not have H.P's uniform, which caused H.P. to be upset, at which point N.P. produced the uniform from the trunk of his vehicle. As well, the trial judge was satisfied that the evidence showed that N.P. was unable to act in the best interests of the children, but only in his own interests, and that his behaviour prevented A.W. from communicating with him concerning the children's needs. The trial judge concluded that the "family violence and its impact" caused her to doubt N.P. could "care for and meet the needs of the children" if he were granted shared parenting, and she was of the view that N.P. would not be able to cooperate with A.W. "on issues affecting the [children]" (see: s.16(3)(j) of the *Divorce Act*). As a result, the court declined to order shared parenting, granting A.W. primary care of the children and N.P. scheduled parenting time.

 Back to top

***Mardanisamani v Farshad*, 2022 SKQB 160**

Goebel, 2022-07-06 (QB22356)

Family Law - Interim Parenting Orders
Family Law - Support - Child Support - Interim Order
Family Law - Support - Child Support - Extraordinary Expenses

S.M., the mother of R.F. born in 2014 (son), brought an interim application before a judge of the Court of Queen's Bench (chambers judge) for an order granting her primary care of the children and generous parenting time to the son's father, A.F.; an order for interim child support, and for ss.7(1)(d) and (e) expenses pursuant to the Federal Child Support Guidelines (Guidelines). The chambers judge appreciated that the parties were amicable and the only contested issue to be decided was whether certain "extraordinary expenses for primary or secondary school education or for any other educational programs that [met] the[son's] particular needs" and "extraordinary expenses for extracurricular activities" were "reasonable" and if so, given his limited means, how much A.F. should pay towards these.
HELD: The chambers judge, among the other necessary orders with regard to parenting and non-specific child support, also ordered that ss.7(1)(d) Guidelines school expenses and 7(1)(e) Guidelines extracurricular expenses, namely piano, tutorial fees for reading and math class, Persian language class, skate class, soccer class, swim class, and art class met the judicially sanctioned test for the making of such an award, that being whether these "extraordinary" expenses were necessary "in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation" as the test was interpreted by judicial authority including M.D.L. v C.R., 2020 SKCA 44 (M.D.L.). She recognized that the necessity requirement in the test included the ability of the payor spouse to contribute to the expense. She found that A.F. did not dispute the expenses "were being incurred" and his son benefited from them. The chambers judge resolved the question of A.F.'s ability to pay these extraordinary expenses by relying on judicial precedent to the effect that "proportional sharing" of extraordinary expenses was not a "fixed or absolute rule" but a "guiding principle," and that it was in her power to cap A.F.'s contribution at $150.00 per month. She was mindful that as the order was an interim one, it was "fully reviewable at trial."

 Back to top

***D.W., Re*, 2022 SKQB 154**

Richmond, 2022-06-30 (QB22354)

Family Law - Child Apprehension - Child Protection

A judge of the Court of Queen's Bench presiding at a hearing pursuant to *The Child and Family Services Act* (CFSA) (hearing judge) was required to determine whether the Ministry of Social Services (MSS) had satisfied her on the evidence presented that the child D.W., born 2022, was a child in need of protection. She set out the background facts of the matter, which were uncontested with respect to the facts in issue: at the time of the apprehension, D.W. was residing with her mother E.W., who was 26 years of age at the time of the hearing, with B.R., D.W.'s father, and with her son, S.W. born in 2018; S.W.'s father was one C.S.; though E.W. was a loving and caring mother to D.W. and S.W., and B.R. was of assistance to her in caring for the children, the two regularly engaged in physical and verbal altercations with each other in front of the children. MSS child protection workers became involved with the family in December 2021; on March 21, 2021, C.S. reported that E.W. and B.R. were fighting in front of S.W.; MSS workers visited the home and told E.W. she needed to find a "safe place" for S.W.; she moved in with C.S., and then with C.S.'s mother, then back in with B.R. in November 2021; D.W. was born during this period of time; S.W. was being assisted for cognitive delays at the First Nations University daycare; E.W. and B.R. continued to use force against each other in the home; the MSS became involved again and eventually an MSS worker required "monitors" be present in the home and a safety plan put in place on short notice; E.W. was unable to arrange these; no assistance in making these arrangements was provided by the MSS; First Nations University was prepared to assist in separating E.W. and B.R. by giving him a place to stay and a ticket to Edmonton; the MSS apprehended D.W. and S.W. on May 5, 2022; the police broke down a door to get in; at the time, B.R. was not present, S.W. was in daycare and E.W. was feeding D.W.; S.W. was immediately placed in the custody of his father, C.S., D.W. was eventually placed with M.H., E.W.'s aunt; E.W. moved in with her to care for D.W.; and the relationship between E.W. and B.R. was over at the time of the hearing.
HELD: The hearing judge ruled that she was not satisfied that D.W. was a child in need of protection, and ordered her to be returned to E.W. As to S.W., because he was in the custody of his father, she ruled she had no authority to deal with his situation under the CFSA. Though she understood the MSS workers were concerned with the welfare of the children and believed apprehending D.W. was necessary for her safety, she found that s. 17 of the CFSA required that MSS look first at taking "all reasonable steps …to provide for the safety or welfare of [D.W.] including "the offer of family services where practicable before apprehending [her]", and that the MSS had failed to do so. She stated that when apprehended, D.W. was not at immediate risk of serious harm because B.R. was not in the home, and if MSS workers had made inquiries, it would have become evident to them that B.R. was prepared to move to Edmonton and should have been assisted in doing so. In addition, she expressed that with B.R. out of the picture, appropriate services could have been put in place to support E.W. in caring for D.W. "and thereby satisfy the goals of s. 3 of the CFSA to promote the well-being of children in need of protection by offering… services… designed to maintain, support and preserve the family in the least disruptive manner." In short, she concluded that the MSS apprehension of D.W. was premature and unjustified.

Back to top

***Schneider v Colhoun*, 2022 SKQB 163**

Danyliuk, 2022-07-13 (QB22358)

Civil Procedure - Summary Judgment
Organized Pseudolegal Commercial Argument Litigant

G.S brought an application for summary judgment to a judge of the Court of Queen's Bench which the chambers judge characterized as "some arcane quasi-litigation process of his own apparent devising." He noted that G.S. had filed a proper statement of claim against the defendants (respondents on the application), N.M. and L.C., his former residential landlords, for the sum of $1,024,743.00. The chambers judge noted further that G.S. claimed he was entitled to this amount because N.M. and L.C. failed to respond to a document, he called a "Notice and Demand," one of several documents he filed with the court, which the chambers judge said contained no grounds he was able to decipher. The chambers judge was aware that G.S. was the type of litigant who, since *Meads v Meads*, 2012 ABQB 571 (*Meads*), has been referred to as "Organized Pseudolegal Commercial Argument (OPCA) Litigants." He chose to review the characteristics of OPCA litigants described in *Meads* to determine how G.S. matched the prototype of such a litigant, doing so to show that G.S.'s application was not a sincere one, but was simply intended to interfere with the course of justice, and as such was of no merit, and was frivolous and vexatious.
HELD: The chambers judge dismissed the application with costs. He pointed in particular to the "Notice and Demand" as being an example of the type of unmeritorious ploy which the court in *Meads* found was common to OPCA litigants and which purported to "unilaterally foist obligations on the litigants, peace officers, state actors or the court and court personnel." As to costs, the chambers judge considered awarding solicitor-client costs as permitted under Part 11 of *The Queen's Bench Rules*, for a number of reasons including that "the plaintiff would not admit that his alternate legal process was entirely illegitimate" and that "this application was not necessary and was a waste of time and money for the defendants" but declined to do so, recognizing, as did the Court of Appeal in *Siemens v Bawolin*, 2002 SKCA 84, that solicitor-client costs "are awarded in rare and exceptional cases" and "though close," this case was not such a case. He also was aware that these costs would need to be assessed and to do so would once again drag N.M. and L.C. into G.S.'s alternate universe.

 Back to top

***R v L.P.*, 2022 SKPC 27**

Scott, 2022-06-17 (PC22026)

Criminal Law - Sentencing - Dangerous Offender Application

The offender, L.P., was found guilty of assault causing bodily harm on his intimate partner after a trial before a judge of the Provincial Court (trial judge) (see: 2018 SKPC 54). Prior to sentencing, the Crown gave notice that it intended to apply to have L.P. declared a dangerous offender under Part XXIV of the *Criminal Code* (Code). A hearing for that purpose was held and the trial judge rendered her decision. She first itemized the evidence adduced at the hearing, including that of institutional witnesses and records from the correctional centres and penitentiaries in which L.P. had been an inmate; the reports and expert opinion testimony of Dr.

Shabehram Lohrasbe, the psychiatrist appointed by the court to assess L.P. for purposes of the application; the forensic psychiatric reports and expert opinion testimony of Dr. Terry Nicholaichuk, who provided evidence for the defence; court binders related to L.P.'s criminal history, a pre-sentence report; a Gladue report (see: *R v Gladue*, [1991] 1 SCR 688); the evidence of Dr. Michelle Stewart (M.S.) of the Integrated Justice Program (IJP), who prepared the Gladue report; statistical information from Correctional Service Canada about dangerous offenders and long term offenders; and testimony from A.S., L.P.'s mother, and L.P. himself. She next reviewed this evidence finding that: L.P. was a 42-year-old Indigenous person whose background included residential school survivors in his immediate family, a dysfunctional home life, alcohol abuse by his mother, and foster home placements; he witnessed spousal abuse; suffered physical abuse at the hands of his parents, and sexual and physical abuse of himself and his siblings by his step-father; he was sexually abused by a teacher over a lengthy period of time; his formal education as a child ended in grade 10; a number of close family members died tragically while he was a child, including three cousins in a house fire; as a child he participated in Indigenous culture; he was diagnosed with schizotypal personality disorder, alcohol dependence and schizophrenia; he likely suffered from FASD and other cognitive deficits; his criminal history began in 1998, and included 50 convictions, 11 violent offences, including four sexual assaults and numerous offences for breaching court orders, including by reoffending while in the community on conditions of release, with 13 of them being for failing to comply with conditions of recognizances made pursuant to s. 810.2 of the *Criminal Code*; the sexual assault convictions were for touching sleeping victims for a sexual purpose, though on one occasion he broke into the victim's home to do so; he committed assaults of various kinds while intoxicated by alcohol, including striking a victim with a bottle of alcohol; the predicate offence was a prolonged serious assault on an intimate partner while consuming alcohol which caused her injuries, and L.P. was committed while he was bound by a s.810.2 recognizance; he had a history of institutional offences while incarcerated; he was known to make sexually suggestive comments and gestures towards female staff; his access to programing and his participation in it was mostly unsatisfactory due to his "cognitive, behavioural and mental health deficits;" if he took his medications, stayed off alcohol, and attended counselling, his behaviour and thinking were "dramatically improved;" while under intense supervision in the community, when he was taking his medication, not consuming alcohol, and attending counselling, he showed a desire to live a normal life and shed his criminal lifestyle; A.S., his mother, was now sober, and wanted to help L.P.; the Gladue report and the witness M.S. described an "integrated program" developed by the IJP, of which she was the director, which was designed to assist people like L.P. surmount the "multiple forms of trauma including developmental, historic, intergenerational, cultural and systemic" which he "carrie[d]" with him; the expert witnesses both agreed that as of their most recent interviews with L.P., he was genuinely aware of his many limitations and problems and expressed what they believed was a genuine desire to reduce his "high risk for future acts of violence", which they opined did not include sexual assaults, because these were the result of poor self-control and were not a pathology; they both agreed that with the proper level and length of intensive supervision with treatment interventions including antipsychotic medications and relapse prevention programs, and with his cooperation and motivation to "participate in multiple treatment interventions" there was reason to be optimistic of reducing his risk of reoffending to a manageable level; further, they were in accord that at the age of 42, his risk of violence was on the decline; and they agreed that the shortest possible jail term and the longest possible intensive supervision in the community would be required to reduce his risk to the public to a manageable level.

HELD: The trial judge ruled the Crown had not proven beyond a reasonable doubt that J.P. met the criteria for designation as a dangerous offender as set out in ss. 752 and 753 of the Code but that she was satisfied he met the criteria for designation as a long-term offender under s. 753.1 of the Code. Following this finding, she then focused her attention on the imposition of a fit sentence for J.P. under s. 718 of the Code. In doing so, as required, she kept the overarching principle and goal of Part XXIV in mind, that being the safety and protection of the public. Following her analysis, which included an in-depth review and application of the pertinent and binding case law with respect to each step of her analysis, she sentenced J.P. to five years in custody followed by a 10-year long-term supervision order for the predicate offence of assault, and three years' consecutive time for the s. 810.2 breach

of recognizance. She then credited J.P. with remand time of five and a half years for a total remaining sentence of 30 months' incarceration to be served in a federal institution. Lastly, she made orders concerning various ancillary matters. She recognized that her step-by-step analysis began with determining whether the predicate offence was a serious personal violence offence under s. 752(a) of the Code, which she found it was. She then considered on the evidence before her whether the predicate offence established that J.P. "constitute[d] a threat to the life, safety, or physical or mental well-being of other persons" and whether the predicate offence established, along with the offences in his criminal history, a pattern of failure by J.P.to restrain his behaviour and a likelihood of "causing death or injury to other persons, or inflicting severe psychological damage on other persons" in the future as she was required to do pursuant to s.753(1)(a)(i) of the Code. She was aware that at the stage of determining if J.P. was a dangerous offender, she was to decide, in accordance with the pronouncements in *R v Boutilier*, 2017 SCC 64, whether the Crown had proven beyond a reasonable doubt that his pattern of violent behaviour, which she found the Crown had proven under s. 753(1)(a)(i), was highly likely to be a "real and present danger to life or limb," that the pattern of conduct [was] substantially or pathologically intractable" and that such a determination required a "prospective assessment of risk and the viability of future treatment." She then applied her factual findings to this legal requirement, in particular, that of the expert witnesses, the witnesses from IJP, and the community parole officers, which she said led her to conclude that the Crown had not shown that J.P. was an "intractable" offender, that his risk to the safety and security of the community could not be reduced to manageable levels through the methods testified to, and his honest resolve to commit to them. Nonetheless, she was not prepared to say that J.P. did not present a substantial risk to reoffend, that the predicate offence required a sentence of at least two years, and as a result, J.P. met the criteria of a long-term offender under s. 753.1(1). Having ruled on J.P.'s designation under Part XXIV, she then turned to the imposition of penalty on J.P., and the application of the general principles and goals of sentencing in s. 718, which in the context of a Part XXIV proceeding were to be governed by the primary goal of safety and protection of the public. She examined principles of proportionality, that the sentence should reflect "the gravity of the offence and the degree of responsibility of the offender," which led her to consider J.P.'s Gladue factors. She surveyed the case law to determine where this particular offender and this offence fitted within similar sentences previously imposed; she weighed the mitigating and aggravating factors; and she reviewed other principles, all this with a view of establishing J.P.'s moral culpability in relation to the offences, in the context of the primary principle of protection of the public, and accordingly arrived at the penalty she imposed.

 Back to top

***R v A.W.C.*, 2022 SKPC 34**

Daunt, 2022-07-21 (PC22029)

Criminal Law - Sexual Touching of a Minor
Criminal Law - Sentencing - Aboriginal Offender

A.W.C. pled guilty to sexually touching his step-granddaughter, contrary to section 151 of the *Criminal Code*. He came before the court for sentencing. In addition to the crime he pled guilty to, A.W.C. was also to be sentenced for two breaches of his release conditions. The Crown sought a sentence of five years with an appropriate reduction for remand time. A.W.C. sought a custodial sentence of two years in addition to remand time, followed by two years of probation. A.W.C.'s step-granddaughter told her mother when she was eight years old that A.W.C. had licked her and pursued her when she was five or six years old. The victim

disclosed that the assaults had happened in the bathroom at A.W.C.'s residence. The victim's mother reported the crimes and A.W.C. was arrested. When A.W.C. was arrested, he was intoxicated. The next day, he gave a warned statement in which he ultimately admitted to touching the victim in private places at least "once or twice" and that he would plead guilty. A.W.C., who was 65 years old at the time of sentencing, had lived at the Little Red River reserve most of his life. He began drinking when he was twelve or thirteen years old. He had a limited education but had worked steadily throughout his life. He had been sexually abused as a child and had spent a limited amount of time in foster care. A.W.C. had numerous convictions for offences against girls and women in his life. Notably, in 2007, he had been sentenced to 36 months in a federal penitentiary for sexually assaulting his adult daughter. A.W.C. enjoyed support from his local bishop and a friend who provided a residence and surety to him while he was on judicial interim release. The issue for the court to determine was the fit sentence to impose on A.W.C. for his crimes.
HELD: A.W.C. was sentenced to four years in prison with deductions to be made for remand time. A.W.C. was also subject to a lifetime weapon ban and a SOIRA order. The court stated that a sentence must be proportionate to the gravity of the offence and the moral responsibility of the offender. The court directed itself to consider the factors found in *R v Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688 as A.W.C. is an Indigenous offender. In considering parity, the court cited *R v Friesen*, 2020 SCC 9, 391 CCC (3d) 309 (*Friesen*) that notes that in 2015 Parliament increased the maximum sentence for sexual offences against children from 10 to 14 years. *Friesen* directs sentencing judges to acknowledge the wrongfulness of sexual offences against children and the profound long-term harm that they cause. Intentionally applying force of a sexual nature to a child is highly morally blameworthy. The court considered mitigating and aggravating factors. The vulnerability of the victim was seen as a highly aggravating factor. A.W.C.'s early confession and his behaviour in the community, including the support he received from his friend and bishop, were seen as mitigating. The court considered Gladue factors and noted the abuse that A.W.C. had suffered but cautioned that A.W.C. could have reflected on his problematic behaviours earlier, given his prior convictions. The court's analysis concluded with imposing a sentence of four years of incarceration, and the court noted that nothing short of a lengthy penitentiary sentence would be proportionate to the gravity of the offence and the degree of responsibility of A.W.C., even considering the mitigating effect of Gladue factors.

Back to top