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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***Patel v Saskatchewan Health Authority*, 2022 SKCA 84**

Jackson Schwann Barrington-Foote, 2022-07-28 (CA22084)

Appeal - Interlocutory Order
Civil Procedure - Costs - Taxation
Civil Procedure - Court of Appeal Rule 54
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This matter arose as a result of a costs award made by a judge of the Court of Queen's Bench for $10,000.00 against S.P. and his counsel personally, apportioned equally between them. The court summarized the history of the proceedings: the costs award was appealed to the court as one of a number of appeals which were finally dealt with in *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 (appeal proper); prior to the appeal proper being heard, S.P. and S.P.'s counsel, E.M., brought an application to the court to amend their joint notice of appeal and factum as concerned the costs award; the amendment application was dismissed, and costs were ordered to be paid by S.P. and his counsel (2021 fiat); the SHA, the successful appellant on the appeal proper, prepared a bill of costs in relation to

the 2021 fiat and submitted it to the registrar of the court, who referred the matter to a judge of the court under Rule 54(7)(e) of *The Court of Appeal Rules*, who approved the bill of costs (2022 taxation order); S.P. applied pursuant to s. 20(3) of *The Court of Appeal Act* (CAA) to vary the 2021 fiat so that the costs of the application would be awarded against E.M. only; though he had been served, E.M. did not attend the hearing of the application to vary; and S.P. claimed E.M. was acting for himself when he brought the application to amend the notice of appeal and factum, though the 2021 fiat stated that E.M. was acting both on his own behalf and on that of S.P.
HELD: The court dismissed the application. In determining the scope of s. 20(3) of the CAA, the court reasoned that, though the plain wording of the provision did not specifically place a time limit on when an order might be varied, "the essential tenor" of s. 20(3) led to the conclusion that applications to vary chambers rulings incidental to the appeal proper, such as the 2021 fiat, were to be brought to the court while the appeal was still pending. Be that as it may, the court went on to "assume without deciding" that s. 20(3) allowed the court to hear the application to vary the 2021 fiat, though it declined to do so for two reasons: first, that S.P. did not challenge "what the Chambers judge decided in substance" but only the costs order itself, which courts have been reluctant to disturb; and second, that S.P. did not provide the court with sufficient evidence to allow it to give effect to S.P.'s main argument, that E.M. had been acting on his own behalf only.

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***QHR Technologies Inc. v Niebergal*, 2022 SKCA 85**

Caldwell Whitmore Kalmakoff, 2022-07-28 (CA22085)

Contract - Interpretation
Torts - Abuse of Process

The appellants, QHR Technologies Inc. and Clinicare Corporation, appealed the trial decision allowing an action by the respondents against the appellants for payment of amounts owing under promissory notes. The respondents were former shareholders of Clinicare. QHR had acquired Clinicare through a share purchase agreement. The agreement listed a purchase price subject to adjustment as described in a schedule. The schedule only provided for adjusting the purchase price for underestimated liabilities greater than $75,000 discovered before February 1, 2010. QHR provided a promissory note in part payment of the purchase price. QHR stopped paying on the promissory note, claiming Clinicare's cashflow was insufficient to make the payments. On May 24, 2010, QHR asserted $600,000 in adjustments to the purchase price were required. The trial judge decided that no adjustments were required and the respondents were entitled to the full amounts owing under the promissory notes plus accrued interest. The appellants had counter-claimed that the respondents had tortiously issued and served 53 pre-garnishee summonses on physicians and medical clinics that were customers of a

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subsidiary owned by QHR. The appellants said that the issuance of the summonses was abusive because the subsidiary had never been indebted to the respondents and it was not party to the litigation. The trial judge dismissed the appellants' counterclaims of the tort of abuse of process and breach of representations and warranties under the agreement. The Court of Appeal considered whether the trial judge erred: 1) in his interpretation of the adjustment clause; and 2) by concluding that the respondents had not committed the tort of abuse of process.

HELD: The appeal was dismissed with costs to the respondents. 1) The trial judge did not err by deciding the entire agreement between the parties included the share purchase agreement, promissory notes and disclosure letter. The trial judge's interpretation reflected the ordinary and grammatical meaning of the words used by the parties in the agreement. The share purchase agreement defined the agreement as including documents referred to in the agreement and the agreement referred to the disclosure letter. The trial judge did not err in deciding that only liabilities and not assets were subject to purchase price adjustment. The appellants argued many circumstances surrounding the deal, including the haste to conclude the deal, supported post-closing adjustments to the purchase price in relation to assets. Courts interpret the words of the contract in light of the purpose of the agreement, its commercial context, and the circumstances known or reasonably capable of being known by the parties at the time of its formation. Simply because other inferences were also legally available to the trial judge did not render the inferences drawn a palpable and overriding error. Statements made early in negotiations and a media release did not form part of the agreement, were not binding and did not supersede the written agreement. The trial judge did not err by refusing to use these extrinsic documents to import a new concept into the adjustment clause. Surrounding circumstances do not overrule the text of the written agreement. The trial judge interpreted the term "discovered" as requiring the appellants to have communicated adjustments by the date specified. The interpretation made commercial sense and was not a palpable and overriding error. 2) The trial judge correctly identified the four elements of the tort of abuse of process: the use of a legal process; a collateral or illicit purpose; a definite act or threat in pursuit of the illicit purpose; and a resulting special damage. The trial judge decided the evidence neither established that the garnishee process was used for an illicit purpose nor that the appellants suffered special damages from the garnishee process. The appeal court found no legal error in the trial judge's reasoning. The respondents were cavalier and ill-considered in the garnishee process, but there was no direct evidence of an improper purpose. There was no basis for the appellate court to interfere with the trial judge's inferences of fact.

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***Solgi v College of Physicians and Surgeons of Saskatchewan*, 2022 SKCA 96**

Leurer Barrington-Foote Kalmakoff, 2022-09-01 (CA22096)

Civil Procedure - Application to Strike Statement of Claim - Abuse of Process - No Reasonable Cause of Action - Scandalous and Vexatious
Torts - Abuse of Public Office

The appellant, an internationally trained medical doctor, appealed an order of a Queen's Bench chambers judge dismissing his claim against the defendant College of Physicians and Surgeons of Saskatchewan (College) as frivolous and vexatious or otherwise an abuse of process. In 2016, the appellant started practicing medicine under a provisional licence through a program allowing internationally trained doctors to practice under supervision while working towards a regular licence. The appellant's path to a regular licence required achieving certification by the College of Family Physicians of Canada (CFPC) and a summative assessment. In 2018, the College amended its bylaws and eliminated the summative assessment path to regular licensure, although another path to regular licensure through an exam remained. The appellant achieved CFPC certification in 2019, after the change to the bylaws. The appellant was practicing in another province under supervision. In 2020, the appellant inquired about practicing telemedicine in Saskatchewan, and the College informed him that his provisional licence was cancelled as he was no longer practicing under supervision in the province. The appellant appealed the cancellation of his provisional licence to the College council. The council dismissed the appeal. The appellant then started a court action against the College. The allegations in the statement of claim were not clearly expressed. The Court of Appeal interpretated the statement of claim as alleging that the College improperly, and in bad faith, used their regulatory powers to secure compulsory and unpaid services by family physicians; that the College was wrong in the process and outcome of changing the bylaws to eliminate the summative assessment path to licensure; that the appellant's provisional licence was removed improperly; and that the College's registrar improperly benefited from decisions. The statement of claim sought reinstatement of the licence to practice, damages, and costs. The defendant College had applied to strike the statement of claim. The chambers judge decided the claim disclosed a reasonable cause of action for misfeasance in public office but struck the statement of claim pursuant to rule 7-9(2)(b) and (e) as scandalous, frivolous and vexatious and an abuse of process. The Court of Appeal considered whether the chambers judge erred in concluding: 1) that the allegations against the defendants were "scandalous, frivolous and/or vexatious"; and 2) that the statement of claim was a collateral attack on the statutory appeal and judicial review process.

HELD: The appeal was allowed. 1) Assessing whether a claim is scandalous, frivolous or vexatious involves an assessment of the merits of the claim and the motives of the plaintiff. Evidence other than the pleadings is admissible. Success on such an application normally results in dismissal of the action and the rule of *res judicata* will likely apply. An action is scandalous when it makes immaterial degrading charges. The allegations the chambers judge found to be scandalous were necessary to make out the cause

of action based on abuse of public office. Because the allegations were not immaterial, the statement of claim could not be struck as being scandalous. An action is frivolous if it is groundless and lacks substance. The chambers judge erred in law in the finding that the action was frivolous. The defendants had argued the action was a collateral attack on administrative decisions and not that the allegations were false and without basis. Therefore, the evidence did not allow for the evaluation of whether the allegations made in the statement of claim were groundless or lacked substance. An action is vexatious if it is malicious or has goals other than to enforce a true legal claim. The chambers judge concluded that the appellant believed his claim was legitimate. Therefore, there was no basis to find the claim was vexatious. The order striking the statement of claim on these bases was set aside. 2) The chambers judge found the appellant's action to be a collateral attack on the statutory appeals procedure or judicial review and therefore an abuse of the court's process. Abuse of process is a flexible doctrine aimed to prevent misuse of court procedure in a manner manifestly unfair to a party or bringing disrepute to the administration of justice. A collateral attack is an attempt to impeach a judicial finding by the impermissible route of re-litigation in a different forum. The appellant's claim was not an attempt to relitigate the licensing decision, but rather an attempt to obtain a judgment for the damages alleged to have been caused by that licensing decision. Although the relief requested included a plea for reinstatement of his licence and that relief could be pursued through judicial review, the essential character of the claim was for damages alleged to flow from the licensing decision. The appellant was not required to pursue all administrative avenues before pursuing his abuse of public office claim. The appellate court made no comment on whether the claim was likely to succeed. The court overturned the chambers judge's order striking the claim, and substituted an order striking only the relief to reinstate the licence to practice and remove practice restrictions, with costs in the ultimate cause.

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***R v Ibanez*, 2022 SKQB 155**

Crooks, 2022-06-29 (QB22150)

Criminal Law - Refusal to Provide Breath Sample - Elements of Offence

Criminal Law - Motor Vehicle Offences - Refusal to Provide Breath Sample - Reasonable Excuse

This matter was a summary conviction appeal to a judge of the Court of Queen's Bench (appeal judge) by the appellant, R.I., from his conviction before a Provincial Court judge (trial judge) of failing or refusing to provide a breath sample in an approved screening device following a serious motor vehicle accident caused by his driving through an intersection on a red light. The material facts summarized by the trial judge were that: immediately after the collision, R.I. was examined by an EMT who was of the view R.I. was not suffering from the effects of a head injury at the time of the collision; video evidence taken of R.I. at the police detachment showed the "entire transaction" between R.I. and the arresting officer (A.); R.I. did not dispute that the requisite grounds existed for the arresting officer to make the demand that he provide a sample of breath; R.I. was very rude and belligerent to A., and to each of the numerous times he was asked to provide a sample of breath, he replied "fuck off" or "shut the fucking door"; R.I. said he had no recollection of the collision or his interaction with the police and that the next day he went to the hospital; medical records showed he was "dazed and confused…not himself and that he had amnesia"; while in police custody, he showed no gross signs of brain injury, and did not ask for medical attention. On appeal, R.I. advanced two grounds, first, that the trial judge erred in law by finding the Crown had proven beyond a reasonable doubt that R.I. had refused to provide a breath sample (*actus reus*) and that his refusal was wilful (*mens rea*). R.I. argued that the trial judge made this error because he had wrongly focused his attention on whether R.I.'s

amnesia amounted to a reasonable excuse, and not on whether it negatived the elements of the offence; and second, the trial judge erred by failing to consider the video evidence in assessing the credibility and reliability of A.'s testimony.
HELD: The appeal judge dismissed both grounds of appeal. She first set out the controlling standard of appeal applicable to summary conviction appeals under Part XXVII of the *Criminal Code* (Code) as interpreted by the case law: findings of fact are judged on a deferential standard and will not be overturned except in the case of a palpable and overriding error; the assessment of the credibility and reliability of witness testimony is a question of fact; questions of law are reviewable on a correctness standard; and matters of mixed law and fact, such as the application of a legal standard to a set of facts, is subject to a standard of correctness. With these standards in mind, the appeal judge reviewed the reasons of the trial judge in light of the evidence presented at trial and with the reasoning in *R v Lewko*, 2002 SKCA 121 and *R v Goleski*, 2014 BCCA 80, aff'd 2015 SCC 6 in mind. First, she determined the trial judge was correct in treating R.I.'s evidence concerning the head injury and the resulting amnesia as a lawful excuse under s. 794(2) of the Code. The appeal court disagreed with R.I.'s argument that as a result the trial judge embarked on the wrong inquiry, which R.I. argued was whether the Crown had proven beyond a reasonable doubt that R.I. had refused to provide a sample of breath and that he had intended to refuse to do so. The appeal judge was convinced that the trial judge was correct in finding that the evidence of R.I.'s behaviour following the breath demand by the arresting officer as shown in the video evidence could lead to no other conclusion but that R.I. had refused to provide a sample of breath and that such was his intention. She referenced the trial judge's summary of the video evidence in which R.I. responded with "fuck off" or "shut the fucking door" in clear reply to the officer informing him of his right to counsel, breath demands or explanations concerning obstruction charges. With respect to his response about an obstruction charge, the appeal court observed that the trial judge referred specifically to R.I.'s response which was "Yeah, yeah, just obstruct me, fuck off." The appeal judge agreed with the trial judge's conclusion that it was objectively reasonable for A. to believe that given R.I.'s behaviour, he was refusing to provide a breath sample and was doing so wilfully. She also disagreed with R.I. that the trial judge erred by not giving sufficient weight to the video evidence in assessing the credibility and reliability of the arresting officer's evidence. The appeal court stated that the record of the trial showed the trial judge was aware he needed to rely on the video evidence in assessing the arresting officer's evidence, and that he found it essential for that purpose.

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***R v Saulteaux*, 2022 SKQB 156**

Elson, 2022-06-30 (QB22151)

Criminal Law - Penitentiaries - Provincial Correctional Facilities - Transfer of Remand Prisoners

The Correctional Service of Canada (CSC) applied to the trial judge who presided at R.S.'s trial to amend a warrant remanding R.S. into the penitentiary system. R.S. was found guilty on October 23, 2015 of a number of serious personal injury offences for which the Crown sought a dangerous offender designation. The dangerous offender hearing was still pending as of the date of the fiat, June 30, 2022, during which time R.S. had remained a remand prisoner. Since January 10, 2019, had been detained at the Saskatchewan Penitentiary pursuant to a remand warrant made by the trial judge specifying his remand was to the "…Federal Penitentiary, Saskatchewan." CSC took the position that the trial judge did not have the statutory authority to remand R.S. to a specific institution, and by doing so restricted its ability to manage his security risk by transferring him to other facilities

outside of Saskatchewan more suited to managing him. In reply to CSC's application, R.S. made an application for an order that he be remanded to the Saskatchewan Hospital North Battleford (SHNB), a provincial psychiatric hospital performing remand functions for individuals with mental health diagnoses or issues within an Integrated Correctional Facility (ICF) located there. The trial judge summarized the relevant facts with respect to the applications: R.S. was given a maximum security classification when he was remanded to the Saskatchewan Penitentiary; he was not able to successfully integrate into the maximum security unit used to hold remand prisoners and as a result was placed in the newly-created structured intervention unit (SIU), which was intended to replace administrative segregation, and was the only option available to CSC given the remand warrant. Section 33 of the Corrections and Conditional Release Act (CCRA) required that R.S.'s confinement in the SIU "end as soon as possible" and he had been confined there well beyond this limit; while on remand in provincial correctional centres, R.S. accumulated 85 disciplinary charges which included "threatening to harm or kill correctional staff, threatening to start a riot, throwing feces and urine at correctional staff and damaging facility property"; the minister in charge of overseeing provincial correctional centres took the position that as a result of this behaviour, R.S. was no longer suitable for remand to a provincial correctional facility, and that the trial judge did not have the statutory authority to remand him to a specific provincial correctional institution.
HELD: The trial judge dismissed R.S.'s application and allowed that of CSC. Though satisfied the term "prison" in s. 515 of the *Criminal Code* (Code) was sufficiently broad to include remand to a penitentiary, he conceded that the clear wording of s. 11 of the CCRA, which states that a person transferred to a penitentiary "may be received into any penitentiary, and any designation of a particular penitentiary in the warrant of committal is of no force or effect," rendered the warrant null and void. He also concluded that by the provisions of s. 18 of The Correctional Services Act (CSA) of Saskatchewan, which states that a person who is "transferred to a correctional facility may be received into any correctional facility, as directed by the minister, and any designation of a particular correctional facility in a warrant of committal is of no force or effect" did not empower him to remand R.S. specifically to the SHNB and, in any event, he would not do so because R.S. was unlikely to meet the criteria of the ICF's Admissions Committee. He was also satisfied that the term "warrant of committal" in both the provincial and federal Acts was intended to include remand warrants.

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***R v Byblow*, 2022 SKQB 157**

Layh, 2022-06-30 (QB22152)

Criminal Law - Impaired Driving Causing Bodily Harm - Sentencing

The offender, C.M.B, was found guilty after trial before a judge of the Court of Queen's Bench (trial judge) of three counts of operating a motor vehicle while impaired by alcohol and causing bodily harm and three counts of dangerous operation of a motor vehicle and causing bodily harm and was to be sentenced. The trial judge made detailed findings of fact at trial (2021 SKQB 300), the gist of which for sentencing purposes were that C.M.B. was operating a motor vehicle at a high rate of speed while intoxicated by alcohol, and while doing so was taking drinks from s 26-ounce bottle of whiskey, using her cell phone, and playing loud music; she was swerving on a gravel road, then turned onto a highway, where the vehicle she was driving entered the ditch, struck an embankment, and rolled; the three passengers in the vehicle suffered various degrees of serious injuries; S.P. was permanently paralyzed from her mid-chest; C.B. injured his left shoulder and ribs, and developed severe headaches, depression, and sensitivity

to light and sound; K.B. had his collarbone broken, injuries to his right eye, scratches and bruising. The trial judge was cognizant that as these were personal injury offences, a conditional sentence order could not be imposed by law. The Crown sought a sentence of three and one-half years, a three-year driving prohibition and ancillary orders; the defence, a global sentence of 24 to 30 months.
HELD: The trial judge imposed a global sentence of 33 months and made the required ancillary orders. He first reviewed the purpose and principles of sentencing in s. 718 of the *Criminal Code* (Code), recognizing that the paramount principle is proportionality, that the sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender" and that other sentencing principles such as parity, mitigating and aggravating factors, totality and restraint are intended to guide the sentencing judge in individualizing the offender in order to achieve a fair and just sentence for this particular offence, committed by this offender in this community. He then determined that in the case of offences involving impaired driving causing bodily harm, denunciation and deterrence were the primary means by which to prevent further offending of this kind, since typically these offenders, including C.M.B., were otherwise of good character such that denunciation and deterrence were particularly effective forms of punishment in those cases (see: *R v Lacasse*, 2015 SCC 64 [*Lacasse*]). In applying the principle of parity, the trial judge reviewed the numerous cases provided by Crown and defence, placing more weight on those cases decided after Lacasse, having concluded that since *Lacasse*, sentences for drinking and driving causing death or bodily harm were increasing. Turning to the aggravated and mitigating circumstances relevant to the offences, he found mitigating that C.M.B. was of good character; she had no criminal record, was a dedicated teacher, and was remorseful; as to the aggravating factors, he found the pattern of driving and the seriousness of the injuries and their effect on the lives of the victims as they expressed at trial and in their victim impact statements to be particularly egregious, and s.718.2(a) (iii.1) of the Code required him to take into account as an aggravating factor any "significant impact on the victim."

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***Pasap v Saskatchewan Indian Gaming Authority*, 2022 SKQB 200**

McMurtry, 2022-07-05 (QB22190)

Employment Law - Wrongful Dismissal
Employment Law - Mitigation - Notice - Damages
Employment Law - Wrongful Dismissal - Damages
Employment Law - Wrongful Dismissal - Damages - Loss of Disability Benefits
Damages - Punitive Damages

The plaintiff, a former facilities manager for a casino, claimed he was wrongfully dismissed by the defendant casino operator and sought damages for failure to provide reasonable notice, loss of long-term disability benefits, and moral and punitive damages. The defendant claimed the plaintiff resigned and alleged he had lied about not resigning and committed fraud during his employment. The court considered: 1) did the plaintiff resign or was his employment terminated; 2) if the employment was terminated, what was the appropriate notice period; 3) what were the damages for loss of salary and benefits; 4) would the plaintiff have been entitled to a disability allowance because of a medical incident; 5) what were the damages for loss of disability benefits

and the defendant's manner of termination?
HELD: The defendant terminated the plaintiff's employment without cause. Shortly after a return from a medical leave of absence, the casino general manager asked the plaintiff to "step up his game." The manager testified the plaintiff responded by resigning. The judge decided the manager's testimony was not credible. The plaintiff testified he was given an ultimatum of resigning or being let go. Text messages from the date of termination were consistent with the plaintiff having been given an ultimatum. The plaintiff confirmed by email days later that he had not resigned. The first record of employment (ROE) issued by the employer indicated dismissal. A second ROE issued a week later indicated he had quit. The termination of employment was inconsistent with the employer's policy manuals. Telling an employee to resign or be fired is a termination. The defendant acknowledged the absence of cause for termination. 2) The appropriate notice period was eight months. The plaintiff was 38 years old at termination, had almost five years of continuous employment service, and was a junior manager overseeing 15 employees. Management positions were difficult to find in the area. 3) Damages were $43,246 for loss of salary and $10,084 for loss of benefits from August 17, 2012 to April 16, 2013. The defendant argued the plaintiff had failed to mitigate but led no evidence of the availability of reasonable employment. The plaintiff looked for employment online and at his band office and hunted and trapped to feed his family and earn money. He applied for employment insurance and had medical issues that affected his ability to search for work. The plaintiff made reasonable efforts to find other employment during the notice period. 4) Four months into the notice period, the plaintiff had a catastrophic medical event. He was hospitalized for several weeks. The parties agreed he was totally disabled during hospitalization. The plaintiff argued he was totally disabled following the medical event and the defendant disputed the ongoing disability. The plaintiff had no employment for two years, then limited employment as a general labourer and destroying beaver dams, and then sporadic employment as a light duty labourer, truck driver or equipment operator. The plaintiff earned considerably less than before the medical event. Medical evidence from several assessments was presented. The plaintiff's former spouse and a community member testified to the deterioration of the plaintiff's functional capacity. The judge preferred the opinion of the medical expert called by the plaintiff, indicating the plaintiff had a major neurocognitive disorder. The judge determined the plaintiff was not malingering and decided the plaintiff was totally disabled within the definition found in the defendant's disability plan. The plaintiff was entitled to disability benefits from April 13, 2013 to age 65.5. The court awarded damages for loss of disability benefits from 2013 to 2039, when the plaintiff would reach age 65, discounted from the date of trial to age 65, in the total amount of $1,283,313.25. The defendant's conduct at termination was bad faith conduct. The defendant ignored its own employee policy manual and accused the plaintiff of lying, made unsubstantiated allegations of fraud, and maintained the position at trial. The judge awarded the plaintiff moral damages of $25,000 for stress caused by the defendant's allegations and additional punitive damages of $25,000 for the defendant's fabrication of the reason the plaintiff's employment ended. The plaintiff was entitled to costs under Column 3.

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***Leonard v Leonard*, 2022 SKQB 164**

Smith, 2022-07-13 (QB22159)

Family Law - Parenting Orders
Family Law - Mobility
Family Law - Relocation of Children

During a trial in May 2019 before a judge of the Court of Queen's Bench (trial judge) the petitioner J.M.L. and the respondent, G.M.L., were able to agree to "joint custody" of their son A.J., born August 28, 2016, on a two-week rotational parenting plan. The trial judge did not designate a primary parent at that time, hoping the parties would come to an agreement on that issue, but they could not. Having heard the evidence at trial, the trial judge made the necessary findings of fact: in November, 2017, G.M.L. absconded with A.J. to Cape Breton, where he was born and raised, and which he considered home; he was ordered to return A.J. to Saskatchewan by a judge of the Court of Queen's Bench in 2018; he complied, returning A.J. to Strathmore, Alberta, at which time an interim week-on/week-off parenting plan was put in place; in order to accommodate J.M.L's parenting time, G.M.L. was required to transport A.J. back and forth between Strathmore and Dodsland, Saskatchewan, where the family had been residing before G.M.L. "fled" to Nova Scotia. At the trial continuation to determine which parent should be the primary one, G.M.L. sought an order to relocate A.J. to his home in Nova Scotia. The trial judge was provided with further testimony which enabled him to make findings of fact about the period between May, 2019 and the date of the application, July, 2022; to determine who should be the primary parent, including that: J.M.L. relocated to Kindersley, about 45 minutes from Dodsland; she found work in Kindersley, and had opportunities to be a personal care aide; she had the support of her parents, who were available to provide day care for A.J. and also had extended family in the area; J.M.L. no longer suffered the post-partum depression she had experienced after A.J.'s birth; since October, 2020, she and A.J. lived in a condominium in a "good neighbourhood" made available by an aunt, in which A.J. had his own bedroom; G.M.L. also had extended family at his home in Nova Scotia; his father had given him a house where he would reside with A.J. free of charge; A.J. had visited the area at Christmas, 2019, and he was treated with affection by G.M.L.'s family; G.M.L. was a plumber, he made inquiries of G.M.L. about work and he was confident finding work would not be difficult; and family would be available to care for A.J. in lieu of daycare; A.J. was a "happy, affable, and a cooperative young boy"; and as to the income of the parties, J.M.L. could not hope to match G.M.L.'s buying power.
HELD: The trial judge denied G.M.L.'s request to relocate A.J. and ordered that J.M.L. be A.J.'s primary parent. With the assistance of case law on point, he first reviewed the provisions of the *Divorce Act* (DA) relevant to the question he was to decide, being which parenting regime was in the best's interests of A.J. He turned his attention to the factors enumerated in s. 16(3) of the DA he was required to consider to determine the best interests of A.J. generally and also the factors listed in s.16.92 specifically directed to the bests interests of A.J. as far as his relocation was concerned. In so doing, he was satisfied that, but for the move, he would have no hesitation in ordering joint parenting responsibility since A.J.'s best interests could be met by either parent. However, he stated, the proposed relocation made such an arrangement impossible, and so he had no choice but to designate one primary custodial parent, and in making this determination emphasized the reasons for the relocation, the impact of the relocation, and the reasonableness of G.M.L.'s plan to buffer the adverse effect of the relocation on J.M.L.'s parenting time. The trial judge stated that G.M.L's reason for relocating was his desire to go back home, and not what was in the best interests of A.J.; the impact of the relocation would be "profound" for A.J. as he would in effect be taken away from his mother; and given the much reduced financial means of J.M.L., she would be unable to fly to Nova Scotia to exercise regular access. Weighing all in the balance, the trial judge concluded he could not order that A.J. be taken away from a life which was "known, tried, and tested" to a distant place, the effect of which on his well-being was unknown

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***Nemetchek v Nemetchek*, 2022 SKQB 165**

Goebel, 2022-07-13 (QB22160)

Civil Procedure - Binding Pre-trial Conference
Judgments and Orders - Power of Court to Amend

The parties, L.N. and N.M., agreed to resolve the issues between them in a family law dispute by participating in a binding pre-trial conference as permitted by Rules 4-21.1 to 4-21.92 of *The Queen's Bench Rules* (Rules). The Rules set out a two-part process, the first being a settlement portion, and the second portion aimed at deciding any issues not settled during the pre-trial conference following consideration by the judge of the court record, written briefs, draft judgments, and submissions of counsel. A judgment was rendered by the presiding judge (judge) covering all matters in issue, including spousal support and family property division. A formal order was not taken out and prior to that being done, counsel for N.M. wrote directly to the court asking for clarification about the distribution of gold and silver, occupation rent, and the calculation of the lump sum spousal award, which prompted the judge to request briefs be filed by counsel and a hearing convened.
HELD: The judge first remarked that writing directly to the court for clarification of a judgment "is neither common nor acceptable." She next considered her authority to revisit her judgment, stating that Rule 10-10 did not give her that power since it was intended to allow a judge to correct clerical errors after a formal judgment had issued and not to revisit an issue on the merits. She cited a number of cases to that effect. As a formal judgment had not been taken out in this case, she was of the view from her reading of *C.H. v S.F.*, 2021 SKCA 24 that her authority to vary the judgment was not so restrictive, since she was not *functus officio*, and as such had the "inherent jurisdiction to vary, reconsider or even withdraw the order so as to carry out what was intended." She then looked at the three issues for which N.M. sought "clarification," ruling that, upon a review of the court record, contrary to N.M.'s position, no agreement had been reached to the effect that the gold and silver were to be distributed in specie, nor that occupation rent had been overlooked since it was clearly referenced in the judgment and was not raised as a live issue in N.M.'s submissions. As to applying a discount to the lump sum spousal support award, the judge again pointed out that in his closing arguments N.M. had not raised the issue, and in any event, discounts were applied using DivorceMate. Lastly, the judge imposed a higher award of costs because the "application was unnecessary and without merit," remarking it was the duty of counsel and not the court to explain and clarify its judgment to a confused litigant.

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***Baran v Dundurn (Rural Municipality No. 314)*, 2022 SKQB 182**

Currie, 2022-08-03 (QB22180)

Administrative Law - Judicial Review - Jurisdiction - Appeal
Administrative Law - Judicial Review - Adequate Alternative Remedy
Administrative Law - Statutory Appeals
Practice - Costs
Statutes - Interpretation - *Municipalities Act*, Section 148

In December 2021, the Rural Municipality (RM) declared three council seats vacant. The applicants had held those three council seats. In February 2022, the applicants applied for judicial review of the RM's decision declaring the applicants' council seats vacant. The court considered whether the application should be dismissed because the applicants had an adequate alternative remedy.
HELD: The application was dismissed. The right of appeal pursuant to s. 148 provided an adequate alternative to judicial review and to proceed with judicial review was not appropriate. Section 148(2.1) of *The Municipalities Act*, SS 2005, c M-36.1 provided the applicants a right of appeal within 10 days of the resolution declaring a council seat vacant. The appeal was to the same court, on the same evidence and with the same powers as the judicial review. The purpose of the short appeal period was to ensure uncertainty that might be created by a resolution declaring a council seat vacant would not last long. If the court were to conduct a judicial review commenced after the 10-day appeal period, the statutory right of appeal would be rendered ineffective. Similarly, if the court were to conduct a judicial review under s. 358 of the Act, then s. 148(2.1) would be rendered ineffective. Section 358 provided a mechanism to apply for a court review of other resolutions within six months. If a s. 358 review remained available to an ousted councillor for six months, there would be no point to s. 148(2.1). The applicants argued that if the judicial review were not heard, any wrong that occurred would never be righted. They argued that exceptional circumstances existed, and the judicial review ought to be heard. They further argued that they did not receive official notification of the resolution and the 10-day appeal period, and that the resolution occurred shortly before Christmas holidays. The applicants consulted with a lawyer the day after the resolution was passed, and thus were aware of the resolution. Each of the applicants was aware of the existence of the Act as the statute that governed their rights and responsibilities as councillors. The judge was not convinced that the timing of the resolution prevented the applicants from dealing with it. The evidence did not establish that the applicants' failure to appeal occurred as a consequence of statements from the lawyer consulted the day after the resolution was passed. There was no exceptional circumstance that justified continuing with a judicial review. The application was dismissed with one set of costs to the RM. The RM's request for enhanced costs because the application alleged bad faith on the part of the RM was not granted because the allegations were made in passing and there was no evidence of damage caused by the allegations.

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***Patel v Saskatchewan Health Authority*, 2022 SKQB 183**

Brown, 2022-08-04 (QB22174)

Administrative Law - Judicial Review - Application for Stay of Proceedings
Civil Procedure – Mootness

In its decision cited as 2021 SKCA 115, the Court of Appeal (court) dismissed appeals by S.P. from motions and appeals decided against him by judges of the Court of Queen's Bench during his ongoing campaign to bypass the statutory appeal mechanism mandated by s. 15 of The Practitioner Staff Appeals Regulations (PSA Regulations). The Practitioner Staff Appeal Tribunal then constituted (PSAT 2018) thought it best to recuse itself and did so before the appeals were heard by the court. The court decided that due to the recusal of the PSAT 2018 panel, all its decisions were null and void, and the appeals were moot. A new appeal panel was constituted (PSAT 2022). On the eve of the commencement of the hearing before PSAT 2022, S.P. brought an

action in the Court of Queen's Bench (QGB 827 of 2021) for a determination that the PSAT "is not an adequate alternative remedy to hear or render a decision regarding the Applicant's appeals of his suspension of privileges to practice as a surgeon." S.P. applied before a chambers judge of the Queen's Bench for a stay of the proceedings of the PSAT 2022 pending resolution of QBG 827 of 2021.
HELD: The chambers judge denied the stay application and awarded costs against S.P. in the amount of $4,000.00. After a thorough review of the case law governing the granting of stays, including the leading case, *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR-MacDonald*), the chambers judge chose to concentrate his analysis on "the merits of the case" requirement of the tripartite test set out in *RJR-MacDonald*. He was satisfied that S.P.'s action had little chance of success since it raised questions of law which would not, in all likelihood, be answered in his favour. Upon a review of the case law on point, including 2021 SKCA 115, he found first that the court's decision on the mootness of the appeal following the recusal of the PSAT 2018 was binding on him because the relief sought by S.P. in QBG 827 of 2021 was "essentially a recitation of the previous judicial reviews already dealt with by our Court of Appeal," and so figured strongly against success in the action as it pertained to a review of the individual rulings of the PSAT 2018. The chambers judge next considered as a matter of law whether the recusal decision itself, as posited by S.P., was reviewable, concluding that the case authorities consistently held that the decision to recuse was not capable of being reviewed since a court would have no factual basis on which to review its correctness, being based on the person's "internal considerations of whether they can no longer offer unbiased decision-making to the process". Having found that S.P. did not satisfy the merit branch of the test, the chambers judge chose not to analyze the other two branches of the test, namely, whether S.P. would suffer irreparable harm if the stay were not granted, and, finally, which party would suffer greater harm from "the granting or refusal" of the stay.

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***Solo v Institute of Electrical and Electronics Engineers, Incorporated*, 2022 SKQB 185**

Elson, 2022-08-11 (QB22182)

Civil Procedure - Dismissal for Lack of Jurisdiction
Statutes - Interpretation - *Court Jurisdiction and Proceedings Transfer Act*, Section 3, Section 4, Section 6, Section 9

The defendants applied to have the plaintiff's statement of claim dismissed because the court lacked jurisdiction to hear and decide this claim. The defendants argued pursuant to *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [CJPTA] the court did not have territorial competence over the plaintiff's action. The plaintiff, an electrical engineer located in Saskatchewan, had sued the Institute of Electrical and Electronics Engineers, Incorporated and several individuals, alleging breach of contract and torts including fraudulent misrepresentation, injurious falsehood, intentional infliction of mental harm, conspiracy and other complaints and seeking damages. The plaintiff was a member of the Institute. He alleged that he was denied benefits associated with his membership in the Institute, including membership in various committees and on the editorial board of a Canadian publication. The Institute was a volunteer-led not-for-profit corporation incorporated in the United States. It had no paid employees. Membership in the Institute was not a prerequisite to the practice of any profession. The Institute generated publications and held conferences

worldwide. The individual defendants were volunteers for the Institute, and lived variously in France, India, Spain and Australia. The Institute and individual defendants did not have assets in Saskatchewan. The court considered whether the court had territorial competence over the claim.

HELD: The court did not have territorial competence over the claim. The plaintiff's claim was a claim in personam, meaning it related to personal rights of litigants rather than the rights or status relative to a person or thing in the judicial control of the court. Pursuant to s. 3 of the CJPTA, territorial competence is determined solely by reference to the Act's provisions. Section 4 defines five circumstances in which a Saskatchewan court has territorial competence over a claim against a person: the person is a plaintiff in a proceeding in the court and the claim is a counterclaim in that proceeding; the person submits to the court's jurisdiction; the plaintiff and the person agreed to the court's jurisdiction; the person is ordinarily resident in Saskatchewan; or there is a real and substantial connection between Saskatchewan and the facts grounding the proceeding. The judge looked at the evidence to determine whether the claim met at least one of the criteria set out in s. 4 of the CJPTA. The first three circumstances did not apply and were not considered in detail. The Institute and the individual defendants were not ordinarily resident in Saskatchewan. The individuals had never been to the province. The Institute had no registered address, nominated agent or central management in Saskatchewan, and no place of business in Saskatchewan. McNaughton Centres located on two University campuses in Saskatchewan received occasional, indirect, discretionary grants from the Institute, but this was insufficient to make the McNaughton Centres places of business for the Institute. There was no meaningful connection between the core of the corporation's operations and Saskatchewan. There was no real and substantial connection between Saskatchewan and the facts. Section 9 of the CJPTA lists factors creating a presumption of a real and substantial connection. A presumptive factor does not apply if the facts pleaded do not disclose a reasonable cause of action. The judge questioned whether the presumptive factor created by s. 9(e)(ii), the location of contract formation, actually informed whether there was a real and substantial connection. Regardless, the factor was considered as required under the Saskatchewan legislation. No specific facts as to the location of contract formation were pleaded. Affidavit evidence established Institute membership was open globally to anyone who applied online and paid a fee. The Institute had no discretion to refuse membership. The membership "contract" was formed when the Institute accepted the fees in New Jersey or New York. The contract was not formed in Saskatchewan. Furthermore, the circumstances of an international non-profit scientific and educational organization would have rebutted the presumption of place of contract formation indicating a real and substantive connection between the subject matter of the litigation and Saskatchewan. No specific facts or inadequate facts were pleaded to support the bald assertion of various torts, including intentional infliction of mental suffering, conspiracy and injurious falsehood. There was no reasonable cause of action in tort. Therefore, the court could not consider any presumptive factor in s. 9(g) of the CJPTA in relation to the location of the tort. Even if the factor of location of tort allegations could be considered, none of the actions occurred in Saskatchewan and any alleged harm from being rebuffed by an international organization was not confined to Saskatchewan. No facts in the claim or evidence established that the plaintiff carried on a business in Saskatchewan. Therefore, a presumption under s. 9(h) did not arise. The defendants' application to dismiss the claim for want of jurisdiction was granted, with fixed costs.

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***Arnot v Banff Constructors Ltd.*, 2022 SKQB 188**

Dovell, 2022-08-12 (QB22183)

Human Rights - Discrimination
Human Rights - Process - Evidence
Employment Law - Discrimination
Evidence - Witness - Credibility
Statutes - Interpretation - *Saskatchewan Human Rights Code, 2018*, Section 16

The complainant, an Indigenous person, alleged that the defendant, a construction company, discriminated against the complainant in his employment as a heavy equipment operator. The complainant alleged that in 2018 his supervisor called him "stupid Indian", asked if "you Aboriginals" sleep on abandoned mattresses, and made other derogatory comments. The company terminated his employment after the complainant complained of racism to the internal human resources department. The company took the position that, despite requests, the complainant had not provided the company with details regarding the racial comments he alleged the supervisor to have made. The complainant said he was waiting for a meeting to provide the details, as the issue was too personal for a text or email. After a heated exchange in which the supervisor yelled at the complainant and instructed the complainant to work in a manner the complainant considered unsafe, the complainant was told to go home. Three days later, the company told the complainant he was laid off for shortage of work. At trial, the supervisor and construction company denied the racist comments and conduct had happened. The court considered: did the evidence establish discrimination in employment under the Code?
HELD: The discrimination complaint was dismissed. To establish a claim of employment discrimination under the Code, the complainant must show on a balance of probabilities three elements: a protected ground under the Code; an adverse impact regarding employment; the protected characteristic was a factor in the adverse impact. The complainant was an Aboriginal person living on reserve. This satisfied the first element of a protected ground or ancestry and race or perceived race as defined in ss. 2(1)(j) and (m) of the Code. The judge considered whether the alleged racist comments were made. All witnesses were described as competent professionals in their field of work. The judge characterized the complainant as not hesitating to voice his opinion. The supervisor was characterized as having admitted to being blunt, set in his ways, overbearing and having gone "too far" on one occasion. The supervisor was also characterized as having a genuine respect for "Aboriginal people." The judge observed that it was not surprising that the complainant and his supervisor had a huge personality conflict and a toxic employment relationship. The judge accepted the company's labour advisor's evidence that the labour advisor had asked the complainant twice if the supervisor had made racist comments and the complainant had said no. No texts or emails during the complainant's employment corroborated the alleged racial comments. The complainant's counsellor testified that, during the time the complainant was employed, the complainant had told her about the supervisor's racist comments. The judge accepted the supervisor's evidence that he never made any racial discriminatory comments to the complainant. The judge was critical of the presentation and completeness of the documentary evidence tendered and questioned whether the original complaint had been altered after it was provided to the respondent. The judge was critical of the employer's lack of investigation into allegations of harassment.

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***R v Baraniski*, 2022 SKPC 33**

Schiefner, 2022-08-31 (PC22033)

Criminal Law - Trial - Stay of Proceedings
Criminal Law - Abuse of Prosecutorial Discretion
Public Welfare Offences - Failure to Wear Face Mask - COVID-19

The accused was charged with failing to wear a face mask as required by a public health order during the COVID-19 health emergency. The accused argued the proceeding against him was an abuse of process and contrary to s. 7 of the *Charter* and should be stayed. The court received video evidence filmed by a police officer of three employees of a bar, including the accused, not wearing face masks in a busy bar. The accused was the son of one of the bar owners and had some supervisory responsibilities. The police officer issued a ticket to the accused and told him if he was willing to comply with the public health rules in the future, the prosecution team would look at having the ticket withdrawn. The accused acknowledged he was not wearing a face mask as required on the date he was ticketed. The accused testified that from the time after receiving the ticket until the first appearance date, he wore a face mask while working at the bar, but staff he supervised did not wear face masks. The bar had multiple issues with public health order compliance before and after the ticket. The accused was ticketed again for not wearing a face mask as required several months after the first appearance. The accused argued that he had done what the officer asked him to do and had complied with applicable public health orders during the "mediation period" from the date of the ticket to the first appearance. The accused argued continuing with the prosecution would undermine the integrity of the justice system and trust in police officers. The court considered: 1) did the police officer make a resolution proposal to the accused; 2) did the accused comply with the proposal; 3) was it an abuse of process for the Crown to continue prosecution; and 4) what was the appropriate remedy?

HELD: The Crown's decision not to withdraw the charges was a matter of prosecutorial discretion. There was no basis for the court to intervene. 1) The police officer did make a resolution proposal to the accused and had the authority to do so. 2) The accused did not comply with the police officer's proposal, because the staff he was supervising did not comply with public health orders. The accused's belief that the police officer was only concerned with the accused's personal compliance rather than the compliance of the bar more generally was illogical and self-serving. The bar had recently been closed because of a COVID-19 outbreak. Public health officials had repeatedly told the bar to comply with all public health rules and while the accused was the acting manager, he said that the bar would comply. 3) Continuing to prosecute the accused was not an abuse of process under the circumstances. The accused did not fulfil his obligation under the proposal. Even if that proposal only applied to the accused personally and not as the acting manager of the bar, intervention by the court would not be appropriate. Courts should not routinely second-guess Crown decisions about the nature and extent of a prosecution. The decision to take this prosecution to trial did not bring the integrity of the justice system into disrepute, especially in light of ongoing non-compliance at the bar contrary to the accused's personal assurances the bar would comply. 4) Because there was no abuse of prosecutorial discretion no remedy was appropriate. Even if judicial intervention had been appropriate, a stay would not have been warranted and the appropriate remedy would have been adjusting the amount of the fine.

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