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.

Volume 24, No. 20 **October 15, 2022**

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***Suderman v Yakubowski- Suderman*, 2022 SKCA 87**

Richards Ottenbreit Leurer, 2022-08-03 (CA22087)

Family Law - Appeal - Division of Family Property
Civil Procedure - Costs - Appeal
Statutes - Interpretation - *Family Property Act*, Section 2- dissipation, Subsection 21(2), Clause 21(3)(q)

Having been unable to agree on the division of family property under the *Family Property Act* (FPA), the petitioner wife, C.Y.-S., and the responding estate of K.S., her late husband, proceeded to trial before a judge of the Court of Queen's Bench (trial judge) to resolve the outstanding issues between them (see: decisions rendered February 26, 2020 and September 3, 2020, Saskatoon, DIV 15 of 2009 (Sask QB)). The record showed that C.Y.-S. issued a petition for divorce on January 13, 2009, and the trial was not conducted until November 2019. It was common ground that both C.Y.-S. and K.S. were indifferent to their financial affairs, and failed to file tax returns, pay income tax, or keep proper records,

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thus complicating the fact-finding process at trial. Both parties were unhappy with the judgment of the trial judge and appealed to the Court of Appeal (court). The grounds of appeal concerned the rulings of the trial judge with respect to: an interim distribution of family property to C.Y.-S.; payments made to N.S., the estate administrator, by the estate; the sharing of "post-petition" farm income; the valuation of grain on hand as of the date of the petition; the allotment of rental from the "Hanley property;" the valuation of a business property, the Crazy Cactus, owned by C.Y.-S.; whether the parties had dissipated family property; whether capital gains tax had been paid when the farmland was sold; the treatment of K.S.'s unpaid taxes for 2008; the valuation of some farm equipment; and the award of costs.

HELD: The court allowed a number of the grounds of appeal and dismissed others, following which it recalibrated the value of the property available for distribution and recalculated the equalization payment due to C.Y.-S. It allowed the estate's appeal concerning the trial judge's treatment of interim payments made to C.Y.-S. by the estate, finding the trial judge made a palpable and overriding error by subtracting the interim payments made to C.Y.-S. from her side of the ledger, which had the erroneous effect of increasing the equalization payment due to her by the estate when the equalization payment due to her should have been reduced by the amount of the interim payments. Similarly, the court allowed the estate's appeal from the trial judge's ruling that payments to N.S. by the estate were interim distributions of family property. The court stated that the trial judge made a palpable and overriding error by failing to consider that not all property held in the estate was family property, and that the payments made to N.S. were in fact from funds which were not family property. Next the court examined the trial judge's reasons with respect to C.Y.-S.'s entitlement to income produced from the farmland since the petition was issued, noting that the trial judge made a palpable and overriding error by misinterpreting evidence which led him to erroneously find, along with other errors, that K.S.'s income from the farmland was "rather modest" with the result that he exercised his discretion not to make an unequal property division in K.S.'s favour in accordance with ss. 21(2) and 21(3)(q) of the FPA to compensate her for K.S.'s use of the "family property asset", i.e.., the farmland. The court recognized that the trial judge fell into error on this question by deducting tax arrears from after-tax farming income earned by K.S. twice, thus reducing the post-petition income available for distribution by half of what it was. As such, the court affirmed, the available post-petition income available for distribution was significant and not modest, and 25 percent of it should be awarded to C.Y.-S. As to the matter of the value of grain on hand at the date of the petition, the court did not find any reviewable error on the part of the trial judge by relying on the entries in the posthumous 2009 income tax return to arrive at a figure. As to the issue of the attribution of rental income from the "Hanley property," the court intervened to correct a calculation error made by the trial judge by allotting the full adjusted amount of rent to C.Y.-S.; the trial judge had allotted half. As to the remaining grounds of appeal, the court ruled: the trial judge was correct in finding on the available evidence that the proceeds from the sale of the assets of the Crazy Cactus were used to pay indebtedness of the corporation, and that on

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Evidence - Expert Evidence - Basis for Opinion

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Family Law - Child Support

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Family Law - Custody and Access - Previous Agreement

Family Law - Divorce - Division of Family Property - Retroactive Child Support

Indigenous Law - Treaties - Hunting and Fishing Rights - Appeal

Labour Law - Appeal

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any valuation method available under the FPA, C.Y.-S.'s shares in Crazy Cactus had no value; that though both C.Y.-S. and K.S. were irresponsible operators, poor managers, and were irresponsible in their use of alcohol and in the case of K.S., his gambling, the trial judge was correct in finding that none of this rose to the level of "dissipation" defined by s. 2 of the FPA as "to jeopardize the financial security of a household by the squandering of property;" the trial judge made a palpable and overriding error in finding as a fact that the testimony of the estate accountant did not establish the estate had paid capital gains tax when she clearly testified with reference to the income tax return entries that capital gains tax was paid; the trial judge made a reversible error in not taking pre-petition 2008 income tax owing by K.S. into consideration as a "shared debt and the responsibility of both parties;" the trial judge did the best he could with the evidence he had in valuing a truck and a trailer, and could not be said to have erred in doing so; and as to the cost award in favour of C.S, the trial judge did not err in the manner in which he exercised his broad discretion to order costs as he did because the evidence was capable of supporting his finding that C.Y.-S. was largely successful at trial in that she was presented with an unpalatable offer for settlement made by the estate, and at trial obtained a much higher award than was made in the offer.

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***Granquist v Lemond*, 2022 SKCA 90**

Richards Barrington-Foote Kalmakoff, 2022-08-10 (CA22090)

Family Law - Child Support
Family Law - Child Support - Variation - Change in Circumstances
Family Law - Custody and Access - Previous Agreement
Family Law - Divorce - Division of Family Property - Retroactive Child Support
Statutes - Interpretation - *Divorce Act*, Section 15.1, Section 17

The appellant and respondent were divorced. They had agreed that the appellant would have sole custody of their child and that she had sufficient income to support herself and the child. They had agreed that the respondent gave up custody of the child, would not pay child support and waived his right to a property division equalization payment. Four years later, the appellant applied for child support. The parties continued to earn incomes similar to their incomes at time the agreement was made. The chambers judge dismissed the application because there had been no material change in circumstances. The Court of Appeal considered: 1) what were the governing standards of review; 2) how should the parties' agreement be interpreted; and 3) did the chambers judge err in not ordering

Real Property - Sale - Specific Performance

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Sale of Land - Agreement for Sale

Sale of Land - Farm Land - Specific Performance

Statutes - Interpretation - *Bankruptcy and Insolvency Act*

Statutes - Interpretation - *Class Actions Act*

Statutes - Interpretation - *Criminal Code*, Section 152

Statutes - Interpretation - *Divorce Act*, Section 15.1, Section 17

Statutes - Interpretation - *Family Property Act*, Section 2- dissipation, Subsection 21(2), Clause 21(3)(q)

Statutes - Interpretation - *Natural Resources Transfer Agreement* - Paragraph 12 - Appeal

Statutes - Interpretation - Ontario's *Construction Act*, RSO 1990, c C.30

Statutes - Interpretation - *Recovery of Possession of Land Act*

Statutes - Interpretation - *Trespass to Property Act*, Section 12

Statutes - Interpretation - *Wildlife Act* - Section 2, "hunting," Subsection 25(1)

child support?
HELD: The appeal was dismissed. Although the decision contained some flawed reasoning, the conclusion was upheld. 1) The chambers judge's decision was discretionary. The Court of Appeal applied a deferential standard of review. The appellant needed to demonstrate an error in principle, a significant misapprehension of the evidence, or that the decision was clearly wrong. The interpretation of the parties' agreement involved a mixed question of fact and law, reviewable on a standard of palpable and overriding error. 2) The chambers judge did not fully explain his understanding of the parties' agreement. The court interpreted the agreement as providing the appellant sole custody of the child with no child support payable by the respondent. The court also interpreted the agreement as waiving the respondent's right to any property equalization payment, and if the appellant sought child support at any time, the amount of the respondent's waived equalization payment would be set off against the child support owed on a go-forward basis. The waived equalization payment was not a prepayment of child support. 3) Section 17(4) of the *Divorce Act* requires an inquiry into a change of circumstances for a change to a pre-existing child support order. Because there was no pre-existing child support order, the requirement for a change in circumstances did not apply. Section 15.1 of the Act provided for the possibility of awarding child support different from the Guideline amount if a special provision in the parties' agreement benefitted the child and the Guideline amount was inequitable in the circumstances. The respondent's agreement to forgo an equalization payment benefitted the child. The respondent earned $128,776 in 2020 and the appellant earned $198,000 in 2020. The appellant did not claim she was unable to provide for the child's needs. Parents cannot contract out of child support obligations. Changing only one element of the agreement was unfair. The appellant did not argue in the alternative that the respondent ought to pay less than the full Guideline amount, and the court declined to consider that possibility. Although the chambers judge did not engage in the correct line of analysis, the Court of Appeal upheld the conclusion not to order child support. The Court of Appeal confirmed that appellant was not permanently precluded from receiving child support.

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***R v Green*, 2022 SKCA 92**

Richards Whitmore Barrington-Foote, 2022-08-11 (CA22092)

Indigenous Law - Treaties - Hunting and Fishing Rights - Appeal
Statutes - Interpretation - *Natural Resources Transfer Agreement* - Paragraph 12 - Appeal

The Court of Appeal (court) was asked by the appellants, A.G. and B.H., members of an Indian band

located in Ontario who were charged with unlawful hunting under *The Wildlife Act* (WA), to overturn the decision of a judge of the Court of Queen's Bench acting as a summary conviction appeal court judge (appeal judge), who allowed the Crown's appeal from the decision of a judge of the Provincial Court acquitting them of the charges. (See: 2021 SKQB 187 and 2019 SKPC 44.) The court was asked by the appellants to decide that the appeal judge erred in law by not endorsing the trial judge's interpretation of paragraph 12 of the *Natural Resources Transfer Agreement* (NRTA). They claimed the trial judge's interpretation of paragraph 12 of the NCRA was correct as it was in accordance with *R v Frank,* [1978] 1 SCR 95 (*Frank)*. The Crown, in response, argued that the appeal judge was correct in ruling that the trial judge had "interpreted paragraph 12 of the NRTA too broadly" and did so by failing to follow the rules of construction applicable to the NRTA as mandated by *R v Blais*, 2003 SCC 44 (*Blais*). The evidence consisted wholly of a brief agreed statement of fact and attached map showing the historic treaty boundaries of Canada.

HELD: The appeal was allowed, and a new trial ordered with "the appellants and the Crown… expected to develop an evidentiary record that will allow the trial judge to come at the interpretation of paragraph 12 of the NRTA in the manner mandated by *Blais*." The court decided that *Frank* was not the panacea the appellants believed it to be, finding that its *ratio decidendi* did not encompass the situation at hand, that being whether the expressions "Indians of the Province" and "Indians within the boundaries thereof " in the context of paragraphs 10-12 of the NRTA were to be interpreted to mean that all Indians wherever resident had the right to hunt game for sustenance in Saskatchewan. The court presented six reasons why *Frank* was not authority for the appellants' position, in particular that the question to be decided in *Frank* was different from the one at issue in the appeal. The court stated that the issue in *Frank* was whether a Treaty 6 "Indian" from Saskatchewan in possession of a moose on Treaty 6 land in Alberta was guilty of unlawfully having moose meat in his possession contrary to the Alberta *Wildlife Act* because, as argued by the Alberta Crown, paragraph 12 of the NRTA should be read to equate "Indians of the Province" and "Indians within the boundaries thereof" as being the same group, namely, Indians residing in Alberta. The Supreme Court in *Frank* ruled that the two phrases referred to two separate groups of Indians: those residing in Alberta and those who are within its boundaries, which meant "all Indians within the boundaries of Alberta, and not just some of the Indians within such boundaries." The court recognized that, on the surface, *Frank* appeared to decide that all Indians situated within the boundaries of a province, even those not having hunting rights pursuant to treaty territory within the province, had a right to hunt for food on unoccupied Crown land, but found that on closer inspection *Frank* was really concerned with whether "Mr. Frank's right to hunt in Treaty 6 territory in Alberta had been, in effect, extinguished by the Alberta NRTA." The court noted as well that the Supreme Court in *Frank* was cognizant that paragraph 12 of the NRTA was intended to reassure treaty Indians that their existing hunting rights would be protected upon transfer of Crown lands to the provinces, so that the Supreme Court's concern in *Frank* was not with respect to the hunting rights of all Indians but only those of Treaty 6 Indians being prosecuted for exercising their hunting rights on Treaty 6 territory lying across a provincial boundary. The court added that such was the Supreme Court's *ratio*, and all else was *obiter dicta*. Next, the court commented that the appeal judge did not err

in ruling that by failing to follow *Blais*, the trial judge "gave [paragraph 12] too generous, if not extravagant, an interpretation because it expand[ed] the entitlement considerably beyond its intended purposes, and by doing so over-sh[ot] those purposes." The court stated that in this case, the trial judge did not apply the principles of interpretation of "constitutional agreements" like the NRTA as prescribed by *Blais*, which required him not to try the matter without evidence that places paragraph 12 "in its proper linguistic, philosophic and historical contexts". The court then referred to case authority such as *R v Grumbo* (1998), 125 CCC (3d) 142 (Sask CA) and ruled that because of the sparsity of such evidence, it was necessary that a new trial be ordered and the relevant evidence be adduced.

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***R v Morin*, 2022 SKCA 98**

Richards Caldwell Whitmore, 2022-09-13 (CA22098)

Indigenous Law - Treaties - Hunting and Fishing Rights - Appeal
Statutes - Interpretation - Wildlife Act - Section 2, "hunting," Subsection 25(1)
Statutes - Interpretation - *Natural Resources Transfer Agreement* - Paragraph 12 - Appeal

Three Treaty 6 "Indians" (appellants) obtained leave to appeal on a question of law to the Court of Appeal (court) the decision of a summary conviction appeal court judge of the Court of Queen's Bench (appeal judge) dismissing their appeal from a verdict of guilty for the offence of unlawful hunting under s. 25(1) of The Wildlife Act (WA) following a trial before a Provincial Court Judge (trial judge). The court reviewed the material facts found by the trial judge on the uncontested evidence adduced before her which raised the following question of law: were the appellants exercising their constitutional right as embedded in paragraph 12 of the *Natural Resources Transfer Agreement* (NRTA) to hunt for food on "all unoccupied Crown lands and other lands to which the said Indians may have a right of access"? The court appreciated that the facts central to the appeal were that on October 7, 2018, the appellants were actively hunting for moose; they came upon a moose and two calves in a slough surrounded by a strip of uncultivated land situated on a quarter section of farmland, which they knew was being actively farmed and which at that time of year was in stubble; they fired their rifles from a grid road across the slough, killing the moose, and then traveled on the cultivated farmland to the slough to retrieve and field dress the moose, which they then hauled out of the slough; they once again traveled over the cultivated farmland to the road and drove away. The appellants conceded that the farmland they travelled on to retrieve the kill was not unoccupied. The appellants made several arguments. The court concentrated its analysis on the appellants' argument that on these facts they were not hunting according to the definition of "hunting" in s. 2 of the WA, claiming that they fired over unoccupied farmland – that is, the slough – and that the retrieval of the kill was an act incidental to the exercise of their constitutional right to hunt for food on unoccupied Crown land.
HELD: The court dismissed the appeal. First, as the Crown had not taken a position for or against the proposition that the slough and surrounding uncultivated strip were unoccupied Crown land which was not incompatible with the appellants' right to hunt for food, the

court proceeded on that assumption. It then reviewed a number of case authorities dealing "with the question of whether land has been put to a visible use which is incompatible with hunting" to focus its analysis. It then turned to the definition of hunting in s. 2 of the WA and dismissed the appellants' argument that the definition of hunting was restricted to actions related to live animals and not dead ones, so that the retrieval of killed game is not hunting for purposes of the WA. In rejecting this argument, the court turned to accepted rules of statutory interpretation, pointing out that the definition of hunting in the WA was not exhaustive but inclusive: the definition does not exclude the ordinary meaning of "hunting" found in dictionaries and applied in the case law. The court went on to state that the ordinary meaning of hunting includes much more than the killing of the animal and inherent in the process of hunting is the retrieval of the kill, so that crossing the occupied cultivated land surrounding the slough was outside the scope of the appellants' constitutional right to hunt game for food, with the result that the guilty verdicts for unlawful hunting were properly entered.

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***AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2022 SKCA 99**

Schwann Tholl Kalmakoff, 2022-09-14 (CA22099)

Labour Law - Appeal
Labour Law - Labour Relations Board - Judicial Review
Labour Law - Unfair Labour Practices - Good Faith Bargaining
Administrative Law - Saskatchewan Labour Relations Board - Judicial Review - Appeal
Contract Law - Estoppel
Contract Law - Formation

The appellant employer, AlumaSafway, appealed against the chambers judge's decision dismissing its application for judicial review of a decision of the Saskatchewan Labour Relations Board. In 2018, the employer and respondent union had exchanged emails about employment terms for work on an oil upgrader in 2019, 2020 and 2021. The union forwarded a draft document that contained a term stating the agreement would be effective on the date of signing. The employer did not tell the union it had accepted the union's document and did not sign the document. The employer bid on the oil upgrader work for the three years. The oil upgrader accepted the employer's bid for 2020. In early 2020, the employer asked the union to sign the document proposed in 2018. The union said the document was an unsigned draft for discussion purposes and no agreement had been reached. The employer applied to the Saskatchewan Labour Relations Board (board) for a determination that, by failing to sign the agreement, the union had failed to bargain in good faith and had committed an unfair labour practice. The board decided the union had not made an offer capable of being accepted and the employer had not done what was necessary to accept it, even if it was an offer. The board dismissed the employer's application. The chambers judge determined the board's conclusions were reasonable and reasonably explained. The Court of Appeal considered whether the chambers judge correctly applied the reasonableness standard of review to two issues: 1) the board's decision that the employer had not established the formation of a binding agreement; and 2) the board's decision that the

union's representations did not create an estoppel.
HELD: The appeal was dismissed. The chambers judge was correct to not interfere with the board's decision. A reasonableness review required the court to consider whether there were serious flaws in the internal rationality of the decision or whether the decision fell outside relevant factual or legal constraints. 1) The common law elements of contract formation and the statutory definition of "collective agreement" in *The Saskatchewan Employment Act* were the legal framework for the board's decision. The board did not base its decision on the union's subjective intentions. Instead, the board relied on an objective reading of emails between the parties. Multiple readings of the emails were possible. The board determined that the employer had not established it was more likely than not that the emails communicated an offer capable of acceptance. Even if the emails had contained an offer, the employer did not accept the offer for over a year. The board's conclusion that the employer did not accept within a reasonable timeframe was reasonable. The purported agreement was not a unilateral contract in which the side who communicated the offer would be bound by certain promises if the other side performed a stipulated act. The proposed agreement involved an exchange of promises: the union agreeing to provide workers subject to certain conditions of employment and the employer bidding on the work and employing members of the union to do the work on those conditions. The proposed agreement would have been a bilateral rather than unilateral contract. The board's approach to the question of offer and acceptance did not misapply the law. 2) The board's rejection of the employer's estoppel argument was reasonable. Estoppel requires a clear representation intended to affect a legal relationship. Promissory estoppel applies when there is a statement of intention. Estoppel by representation applies when the statement is a statement of fact or of mixed fact and law. Estoppel operates as a defence, rather than to found a cause of action. In the labour relations context, estoppel may provide a party with a defence to an unfair labour practice allegation but estoppel cannot form an independent basis of an unfair labour practice claim. Estoppel is limited to the administration of contracts and does not apply to the formation of contracts. The board's estoppel decision was brief but clear and well-explained. The board viewed the evidence as not establishing a representation intended to affect the parties' legal relationship. A finding of estoppel would have improperly used estoppel as a sword, not a shield. The board's decision was reasonable.

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***Dubois v Saskatchewan*, 2022 SKCA 100**

Richards Whitmore Schwann, 2022-09-15 (CA22100)

Constitutional Law - *Charter of Rights*, Section 2(b), Section 9
Criminal Law - Arrest - Reasonable and Probable Grounds
Criminal Law - Constitutional Challenge
Municipal Law - Bylaws - Validity - Constitutionality
Statutes - Interpretation - *Recovery of Possession of Land Act*
Statutes - Interpretation - *Trespass to Property Act*, Section 12

The appellants were a group of individual protesters who were arrested, held in custody and released without charge in connection with a protest camp near the Legislative Building in a Regina park. The protest camp involved teepees, tents, a firepit and other related items. It was established to highlight the failings of judicial, political and societal systems in the treatment of

Indigenous youth and children. The protests did not comply with applicable bylaws, *The Trespass to Property Act* and *The Recovery of Possession of Land Act*. The protesters did not dismantle the site as they had previously agreed to do. They were arrested and held in custody until the protest camp was dismantled. Protesters subsequently re-established a protest camp near the Legislative Building. The appellants appealed a decision dismissing their application for a declaration that they had been denied their freedom of expression and right to be free from arbitrary detention and imprisonment as guaranteed by ss. 2(b) and 9 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal considered whether the chambers judge erred by: 1) reversing the onus of proof regarding s.1 of the *Charter*; 2) failing to factor reconciliation into the s. 1 *Charter* analysis; and 3) making improper findings of fact regarding the reason for the appellants' arrest and detention.

HELD: The appeal was dismissed. 1) The chambers judge did not reverse the onus of proof in the s. 1 *Charter* analysis. The burden of establishing the reasonableness of any limitation of *Charter* rights was on the respondents. The chambers judge had commented that she was unable to see a less restrictive alternative to the permit application process. The chambers judge did not require the appellants to prove a less restrictive way of achieving the objective. 2) The appellants argued the chambers judge failed to consider reconciliation in the s. 1 analysis. Reconciliation is a broad concept relating to creating and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples. Reconciliation can play a role in the s. 1 analysis. Reconciliation does not displace or trump other considerations. The chambers judge did not fail to consider reconciliation. The chambers judge had commented how the appellants had not explained how reconciliation could be given legal effect in the circumstances of the case. The comment was reasonable considering the arguments presented. 3) The chambers judge decided the appellants were arrested under s. 129 of the *Criminal Code of Canada* (obstructing a peace officer) and not s. 139 (obstructing a judicial proceeding). The record supported the judge's decision. The arrest of the protesters was lawful because the peace officer reasonably believed the protesters were committing a criminal offence. Under common law and under *The Trespass to Property Act*, the Provincial Capital Commission had a lawful right to remove the teepee encampment from the park. The protesters refused to leave the encampment. This created a confrontation situation. The police had a duty to keep the peace. The protesters' refusal to leave obstructed the police in their duty to keep the peace. Additionally, s. 12 of *The Trespass to Property Act* provided legal authority for a warrantless arrest. There was no order regarding costs.

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***Herold v Wassermann*, 2022 SKCA 103**

Caldwell Whitmore Leurer, 2022-09-20 (CA22103)

Civil Procedure - Stay of Proceedings
Class Action - Management
Civil Procedure - Class Action
Practice - Stay of Proceedings
Statutes - Interpretation - *Class Actions Act*

The appellants (the Herold plaintiffs) were family members of five individuals who died when a transport truck collided with a bus carrying the Humboldt Broncos hockey team. The Herold plaintiffs sued in negligence the trucker, the trucking company, the

bus manufacturer and the Saskatchewan government. Another group (the Brons plaintiffs) started a broader action to sue the trucker, the trucking company, the bus manufacturer, Saskatchewan and other defendants, and expressed the intention to represent everyone on the bus, their families and those who responded at the collision scene. The Brons plaintiffs had applied to stay the Herold action until the decision regarding certification of their proposed class action. The chambers judge temporarily stayed the Herold action either until the proposed class action was certified and the Herold plaintiffs opted out of the class, or until the application for certification of the proposed class action was dismissed. The Herold plaintiffs appealed. The Court of Appeal considered: 1) did the chambers judge apply the correct legal principles in granting a temporary stay; and 2) should the action have been temporarily stayed?

HELD: The appeal was granted. The chambers judge erred by staying the Herold action. 1) A superior court's inherent jurisdiction to control its own processes provided the chambers judge the authority to stay the Herold action. The chambers judge may have misidentified the source of his authority. An appellate court may intervene in a lower court's discretionary decision where the judge failed to identify the correct legal criteria or misapplied those criteria, and thus committed an error of law. The chambers decision did not identify the Herold plaintiffs' extant right to prosecute their action and did not identify and weigh the prejudice to the Brons plaintiffs if the Herold action were allowed to proceed. The chambers judge correctly identified the important policy objectives served by The Class Actions Act as a mechanism to resolve many claims with common issues in a comprehensive proceeding, yielding consistent results and promoting efficiency for the parties and court, while allowing individual plaintiffs choice between participating in the action or maintaining separate litigation. The chambers judge erred in conceptualizing the Herold plaintiffs' right to pursue their separate action as arising upon the decision regarding the certification of the Brons action. The Herold plaintiffs had an existing right to prosecute their action. The chambers judge failed to account for the Herold plaintiffs' extant right and the preservation of claimants' right to pursue their claims in a regular action along with the goal of avoidance of unnecessary multiple proceedings. The *RJR-MacDonald* framework has been applied in most stay applications, but it is not a universal mandatory test. The *RJR-MacDonald* framework is a three-stage test involving: a preliminary assessment of whether there is a serious question to be tried; whether the applicant for the stay would suffer irreparable harm if the stay were not granted; and whether the harm of not granting the stay would outweigh the harm of granting the stay. A court must consider whether the applicant's interest in the stay justified granting the stay. The chambers judge considered whether there was substantial overlap of issues in the proceedings, whether the cases shared the same factual background, whether a temporary stay would prevent duplication, and whether the stay would result in injustice to the Herold plaintiffs. The chambers judge did not directly consider whether the applicants for the stay, the Brons plaintiffs, would suffer prejudice if the Herold action were not stayed and did not balance the competing interests. 2) The Herold action was more focused on family members of those who died, and liability issues related to limited defendants. The scope of the Brons action was much wider in terms of plaintiffs, defendants and theories of liability. The Brons action had the procedural requirements of a class action. The Herold action and the Brons action had differences. The Herold plaintiffs said they wished to prosecute their action as a regular action and had taken steps to advance the litigation including obtaining an expert report. They cited potential prejudice from delay because one party faced deportation and another witness was in ill health. The Brons plaintiffs claimed they could be prejudiced by findings made in the context of the Herold action. The Herold plaintiffs claimed they could be prejudiced by the stay impairing their procedural autonomy over their own action, and by financial and emotional impacts of not moving forward with their own action. The types of prejudice cited by the Brons plaintiffs would continue post-certification and continue after the lifting of the temporary stay. The stay completely barred the Herold plaintiffs' right to access the court for an indefinite and possibly lengthy period. When the Herold action was ready for trial, the court and litigants could re-evaluate how any issues overlapping with the Brons action were to be dealt with. As much as the Brons plaintiffs argued a court might make unwelcome findings in the Herold action, the same point could be raised by the Herold plaintiffs to stay the Brons action. There was

no explanation why the Brons action ought to proceed before the Herold action. The effects of duplicative proceedings could be ameliorated by mechanisms other than a stay, including intervening, hearing by the same judge, or hearing actions at the same time. Other concerns where actions have been stayed to prevent multiple proceedings did not apply. The desire to avoid duplicative proceedings did not outweigh the Herold plaintiffs' litigation autonomy to determine how to pursue their claims. The Herold plaintiffs were entitled to costs against the Brons plaintiffs, payable forthwith because there was not ongoing legal action between those parties.

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***R v Neil*, 2022 SKQB 174**

Elson, 2022-07-26 (QB22169)

Criminal Law - Reasonable Doubt
Criminal Law - Identification - Recognition Evidence
Criminal Law - Defences - Alibi

The accused, C.N., was charged with a number of serious personal injury and firearms offences arising from an unlawful confinement of the complainant in a house where he was twice struck in the face with the butt of a firearm, had letters carved with a knife in his back, was forced to strip to his underwear, and forced into a car driven and occupied by his assailants, from which he escaped, running through snow in freezing temperatures to eventual safety. He was hospitalized as a result of his injuries, including serious frostbite. The circumstances of the offence were not at issue at the trial before a judge of the Court of Queen's Bench (trial judge), who determined that the issues he was to resolve were whether the Crown had proven beyond a reasonable doubt that C.N. was a participant in the offending behaviour and second, whether C.N. had made out the defence of alibi.
HELD: The trial judge acquitted the accused. He first reviewed the Crown evidence with respect to identity, which he determined consisted of the testimony of the complainant that he knew the accused participated in the assault on him because of previous contact with him to purchase drugs; the evidence with respect to a contact number for the accused on the complainant's cell phone; and a positive identification of the accused by the complainant in a photographic lineup. Following his analysis of the identity evidence, he commented that it exhibited frailties that substantially reduced the weight he could assign to it. As to what he referred to as the "recognition evidence," he found that the complainant's opportunities to observe the accused prior to the offences were brief, "very occasional and not very substantive," and that though he did identify the accused from a photograph in the lineup array, that photograph had been cropped and stood out from the rest. He agreed with Crown counsel that the presence of the accused's cell phone number on the complainant's cell phone did establish a connection between them, but the failure of the police to obtain an authorization to search the number to learn to whom it was registered diminished its evidentiary value. The trial judge next turned to an analysis of the defence evidence, which consisted of C.N.'s testimony to the effect that he was not at the house during the assault on the complainant but had come to the house later that same morning by cab after having been at his girlfriend's house; and the evidence of the girlfriend confirming that the accused was in her company at the relevant time. Of significance to the trial judge as well was a record from Correctional Services showing that the accused was in custody during periods when the

complainant testified he had had personal contact with him, and evidence that a cab had come to the house at around the time the accused had testified to arriving there by cab. As to the alibi evidence, he referred to a line of cases starting with *R v Cleghorn*, [1995] 3 SCR 175 for guidance as to how he was to treat it. He concluded, as did the Court of Appeal for Ontario in *R v Tomlinson*, 2014 ONCA 158, that the accused needed only to show the alibi had an "air of reality," that there was some evidence capable of belief by the trier of fact to establish the alibi. As to the requirement that the person seeking to rely on alibi evidence give notice to the Crown, he agreed that was the case, and that no particular form of notice was required so long as the Crown was aware of the possible alibi within a reasonable time before the trial. In this case, the police had information on their files early on, before C.N. was charged, that he was asserting an alibi, but they did not follow up on this information. The judge affirmed that the accused had no obligation to remind the police of his alibi defence.

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***R v Stark*, 2022 SKQB 176**

Danyliuk, 2022-07-28 (QB22170)

Appeal - Criminal Law - Driving Over .08
Constitutional Law - *Charter of Rights*, Section 8, Section 10(b), Section 24(2)

Following his conviction after a trial before a judge of the Provincial Court (trial judge) for operating a conveyance with a blood alcohol level equal to or exceeding the legal limit within two hours of ceasing to operate it, the appellant appealed to a judge of the Court of Queen's Bench in his capacity as a summary conviction appeal court judge (appeal judge) pursuant to s. 813 of the Criminal Code on the ground that the trial judge erred in ruling that the evidence leading to the appellant's conviction was not obtained in a manner that infringed his rights under the *Charter*. Following his review of the evidence adduced at trial, the appeal judge found particularly relevant that the detaining officer (B.) administered an ASD test on reasonable suspicion, which the appellant failed, and concurrently, a second officer (S.), without telling B. he was doing so, performed a warrantless search of the interior of the appellant's vehicle in circumstances that did not justify such a search; B. testified, and the trial judge believed, that the results of the search played no part in the formation of his grounds to make the breath test demand, which B. said was made solely on the strength of the ASD fail result; while the appellant was being transported to the detachment to provide breath samples, he answered questions B. asked him about his drinking pattern prior to the roadside stop; the Crown did not tender the evidence of these admissions at trial, and the trial judge made an order that any evidence about these admissions be excluded from the trial. The Crown conceded at trial that the vehicle search was a breach of the appellant's right to be free from unreasonable search and seizure, and that the admissions he made in the police vehicle were obtained in breach of his right to retain and instruct counsel. HELD: The appeal judge dismissed the appeal, ruling that the trial judge made no error in law in finding that the evidence of the breath test results ought not be excluded from the trial under s. 24(2). He found the trial judge made reasonable factual findings and applied these facts correctly and in accordance with the prevailing case law to his analysis of the meaning of the words "obtained in a manner" in s. 24(2) of the *Charter*. He went on to say that the trial judge did not overstate matters when he expressed that the connection between the search and seizure, the obtaining of the admissions in the police vehicle, and the *Charter* infringements

were “tenuous at best” and did not satisfy the requirement that evidence be obtained in a manner that infringed or denied the appellant’s *Charter* rights. In doing so, the appeal judge reviewed *R v Mack*, 2014 SCC 58, which he agreed encapsulated the settled approach to determining whether evidence is obtained in a manner that justifies its exclusion: evidence will be excluded if the connection between the obtaining of the evidence and the *Charter* breach, be it temporal, contextual or causal or a combination of these, is “remote” or “tenuous.” He concluded that in this case, he saw no error in the trial judge’s reasoning, finding that he did not erroneously look for a “strict causal relationship” between the breaches and the obtaining of the evidence, but correctly found that he could not see how the search of the appellant’s vehicle was linked in any cogent way with the administration of the ASD test, which formed the reasonable grounds for the breath demand; nor how the admissions in the police vehicle, which were not tendered in evidence by the Crown, could even enter the debate.

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***Bell v Bell*, 2022 SKQB 198**

Popescul, 2022-08-26 (QB22194)

Wills and Estates - Application to Prove Will in Solemn Form
Rules of Court - Queen’s Bench Rule 16-46

The applicant, W.B., was one of the children of the deceased, L.B., who died leaving a will in which she provided that W.B. was “not to receive anything from [her] estate nor any of his issue.” In an attempt to render L.B. intestate, W.B. challenged her testamentary capacity and charged that his brothers, two of whom were the executors of L.B.’s estate, had unduly influenced her to exclude him from the will, and applied to a judge of the Court of Queen’s Bench (chambers judge) pursuant to Rule 16-46 of The Queen’s Bench Rules to have the will proven in solemn form at a trial of the issues. The bases of his allegation of lack of testamentary capacity were that L.B. was 87 years of age when she executed the will, was forgetful, forgot names, demonstrated confusion by erroneously insisting a loan to W.B.’s daughter, D.B., had not been paid, and that she “got lost in a mall on one occasion;” and as to undue influence, he argued that the executors and another brother were making “disparaging and false statements” about him and his daughter, D.B., to L.B., which caused her to cut him and D.B., as his issue, out of the will.
HELD: The chambers judge ruled that W.B. had failed to prove at the first threshold stage of the application that there was a “genuine issue to be tried”, and so dismissed it. He first laid out the test he was to apply to decide this question, relying on a line of cases culminating in *Kot v Kot*, 2021 SKCA 4, which he understood required him to determine if the applicant had adduced “some evidence which if accepted at trial would tend to negative testamentary capacity” or undue influence, and that he was not as a matter of law to weigh “conflicting evidence… both for and against an applicant.” Having oriented himself on the test, he then turned to the evidentiary requirements for proving a lack of testamentary capacity, appreciating that once the formalities of execution of the will had been proven, a presumption arose to the effect that the testator had testamentary capacity, which the person challenging that capacity must surmount with evidence to the contrary. The chambers judge then listed the “essential elements of [testamentary] capacity” enumerated in the case law, including that at the time of the making of the will, the testator appreciated “the persons who may ordinarily be expected to benefit from her estate.” He then focused on the test required to establish undue influence, which he explained by reference to *Vout v Hay*, [1995] 2 SCR 876 quoted in *Karpinski v Zookewich Estate*, 2018 SKCA

56, which cited the well-known excerpt from *Craig v Lamoureux* (1919), 50 DLR 10 (UK JCPC) that "… [U]ndue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean…" He then applied the evidence in the affidavits filed in the application, including that of the drafter of the will, L.B.'s experienced lawyer, who presented cogent evidence of the instructions she had given him, to the case law to which he had referred, finding that W.B. had failed to adduce any uncontradicted evidence to rebut the presumption that L.B. did not have testamentary capacity when she made the will. In particular, the chambers judge stated that W.B. had not presented any uncontroverted evidence that L.B. did not appreciate that, though W.B. was her son, and should ordinarily have been expected to benefit from her estate, she had excluded him from the will for nonsensical reasons. On the contrary, he said, her reasons were cogent; she believed, though perhaps erroneously, that W.B. had personally benefitted from the family corporation to the disadvantage of his brothers, and so had already received his share of the estate, and also believed that D.B. had not repaid a loan she had made to her, which she chose to correct by excluding her from the will through her father. With respect to the allegation of undue influence, W.B. had not shown on the evidence that L.B.'s "falling out" with him and his daughter was due to any machinations on the part of his brothers, or that this otherwise capable woman could not make her own decisions.

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***101034761 Saskatchewan Ltd. v Mossing*, 2022 SKQB 193**

Mitchell, 2022-08-24 (QB22187)

Contract - Agreement for Sale - Breach - Specific Performance
Contracts - Land - Specific Performance
Contracts - Uncertainty - Unenforceability
Evidence - Expert Evidence - Basis for Opinion
Evidence - Witness - Credibility
Real Property - Offer to Purchase - Damages
Real Property - Sale - Specific Performance
Sale of Land - Farm Land - Specific Performance
Sale of Land - Agreement for Sale
Torts - Negligent Misrepresentation

The plaintiff was a corporation operating an asphalt and construction business. The defendants owned and had advertised for sale about 22 quarters of land suitable for agriculture and gravel purposes. The plaintiff sued the defendants, seeking specific performance of the contract for sale and purchase of the defendants' land or, alternatively, damages for breach of contract. Through a realtor representing both sides of the transaction, the plaintiff presented a written offer to purchase, subject to due diligence and financing conditions. The defendants signed the plaintiff's offer. Another potential purchaser later told the defendants he had made an unconditional offer of the full purchase price to the realtor before the defendants signed the plaintiff's offer. Prior to closing, the defendants told the plaintiff that they would not complete the transaction. At trial, the defendants argued the sale contract was

uncertain and the plaintiff did not fulfill conditions of the offer. The defendants argued in the alternative that if the defendants were liable in damages, the realtor, who was added as a third party to the action, was negligent and responsible for any damages. The court considered: 1) was there a valid contract for the purchase and sale of land; 2) was the contract unenforceable because of the realtor's actions; and 3) was the appropriate remedy specific performance or damages?
HELD: The defendants breached the sale contract and were ordered to pay $1.5 million in damages and return the plaintiff's deposit of $100,000. The defendants' third party claim against the realtor was dismissed. 1) The trial judge reviewed and applied principles applicable to assessing the credibility and reliability of witness evidence. He decided there was a valid contract for the sale and purchase of land. There was no uncertainty regarding the essential elements of a land transaction: parties, property and price. Minor typos in dates did not invalidate the contract. The disposition of the 2010 harvested crop was not uncertain. The written condition that the defendants could store grains until a specific date meant the defendants retained the 2010 harvested crop. The payment date and possession date were sufficiently clear and were non-essential contractual terms. The failure of the agreement to address the issue of apportionment of property taxes did not invalidate the contract. It was reasonable to infer taxes would be apportioned in the usual manner for real estate transactions. The agreement contained a residence clause allowing the seller to remain in the residence for a "specified time" to allow for a reasonable transition. The parties had not specified a date for the defendants to vacate their home. A contract to contract is not a contract. The residence clause, however, was not a fundamental term of the sale, even though it was significant to the defendants. A defendant witness testified he had not intended to continue to live on or farm the property and the defendants had not indicated at any point that the timing of vacating the residence was a condition precedent to the sale. Uncertainty in the residence clause did not render the entire contract unenforceable. The sale agreement contained a handwritten and uninitialed paragraph indicating the seller would not process or sell rock aggregate other than what was agreed to with the buyer during the time for due diligence. There was no evidence the defendants intended to sell rock aggregate during this time. The defendants argued the handwritten paragraph was added after they signed the agreement, without their consent, and invalidated the contract. The realtor said the handwriting was added before the defendants signed. The trial judge was not persuaded that the handwritten paragraph was a material alteration and further was not persuaded that it altered the fundamental nature of the contract for sale of real property. Regardless of when the handwriting was added, it did not void the contract. The use of a slightly larger bucket than the agreement specified for testing aggregate was not a fundamental breach. The notice to remove conditions was signed by all parties. Any deficiencies in the contract were not sufficient to render the contract invalid and unenforceable. 2) The trial judge did not believe the evidence of a witness who claimed to be a competing purchaser. The competing purchaser testified he had told the realtor he would make an unconditional cash offer the full purchase price. The trial judge decided this testimony was not credible because the competing purchaser made only one 45-minute visit to the land, and it was not likely an experienced business person would make a $2.5 million purchase without conducting any due diligence. Furthermore, if the realtor had refused to meet with him and told him he was presenting someone else's offer, the judge did not believe the witness would have waited until after that other offer was presented before contacting the defendants. Realtors have a fiduciary obligation to communicate serious verbal offers to purchase land to a client. The judge concluded the evidence did not support the existence of a competing serious verbal offer to purchase the property that the realtor had failed to communicate to the defendants. The defendants' claim of negligent misrepresentation against the realtor was dismissed. The realtor acting as a dual agent in a real estate transaction did owe a duty of care because of the special relationship between the realtor and his client. The judge accepted the defendants' evidence that the realtor made an inaccurate representation when he told the defendants that the competing purchaser was not interested in purchasing the property. The defendants reasonably relied on this inaccurate information. There was, however, no proof the defendants relied on the misrepresentation to their detriment. The defendants accepted the only offer to purchase the land for full asking price after the land had been on the market for many years. Although the

defendants hoped for a bidding war yielding a larger purchase price, there was no evidence a bidding war was possible, let alone probable. The competing purchaser was not asked if he was prepared to pay more than full asking price. 3) The plaintiff argued specific performance was the appropriate remedy because the contract was for the purchase of land and because the defendants still owned and resided on the property. Specific performance was not an appropriate remedy. The plaintiff wanted the property primarily for commercial purposes. Substitute properties were readily available and were purchased by the plaintiff. The plaintiff's delay bringing the matter to trial prejudiced the defendants. In the alternative, the plaintiff argued damages over $47 million. The plaintiff's quantum of damages was based on an expert report estimating the value of usable aggregate and gravel on the property. The trial judge decided the expert report did not contain a reliable estimate of the quantity or value of usable aggregate because the expert had never visited the property and because the report was based on unrealistic assumptions not proven at trial. The judge accepted the evidence of a witness who said one of the defendants had told him the land was still for sale and the asking price was $4 million. The judge used $4 million as the current value of the property. Damages were assessed based on the difference between the purchase price in the contract and the current valuation of the property.

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***Tron Construction & Mining Limited Partnership, Re (Bankruptcy)*, 2022 SKKB 203**

Gerecke, 2022-09-08 (KB22197)

Bankruptcy - Procedure
Statutes - Interpretation - Ontario's *Construction Act*, RSO 1990, c C.30
Statutes - Interpretation - *Bankruptcy and Insolvency Act*

The applicants (general contractors) were a corporation and limited partnership involved in general contracting in multi-trade industrial construction in Saskatchewan and Ontario. The general contractors filed notices of intention to make proposals under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. A power company had two construction contracts with the general contractors for construction projects on land the power company leased. The leases required the power company to keep the leased lands free of construction liens under the Ontario *Construction Ac*t, RSO 1990, c C.30. The power company said the general contractors failed to meet construction milestones and complete required work. Subcontractors had filed liens against the projects. The power company had kept a ten percent holdback funds of over $1.6 million from the general contractor invoices. The general contractors had disclaimed the contracts with the power company. The power company applied to court seeking orders that the general contractors pay the holdback funds into the court in Saskatchewan, and that all liens against the projects be discharged, actions against the site owner be dismissed or vacated and a claims procedure established under the bankruptcy proposal proceedings in Saskatchewan. Some but not all lien claimants supported the power company's application. The general contractors opposed the application. The court considered whether it should make the orders sought by the power company.
HELD: Section 108(1) of the *Bankruptcy and Insolvency Act* (BIA) conferred on the court jurisdiction over this matter. A single proceeding model brings together all claims against a debtor into a single process to bring efficiency and maximize returns for creditors. The power company sought the order because it was seeking a faster and more efficient process than would be available under the Ontario *Construction Act*. The court noted the general contractors were able to disclaim the construction contracts with

the power company only because the general contractors had invoked the BIA. A single proceeding model applies unless an exception is established. The power company and the lien claimants are not strangers to the general contractors' BIA proposal. They are at least contingent creditors and their claims must be valued by the proposal trustee pursuant to s. 136(1.1) of the BIA. The power company's application was not a collateral attack on the stay of proceedings under the BIA, but rather was consistent with the BIA. The general contractors argued the process proposed by the power company was prohibitively expensive but filed no evidence of potential cost. There were six known lien claimants and seven lien claims. It was unlikely the costs of these claims would seriously hinder the general contractors' debt restructuring process. The court's goal was to balance the interests of the debtor and its creditors while maintaining the integrity of the process and the confidence of the public. The power company would save costs and had the most to benefit from the order sought. If the process the power company sought was to be ordered, the power company would need to agree to contribute to the cost of administering the claims process to reflect its cost savings. The judge ordered the power company agree to be responsible for the first $35,000 of the administration costs plus half of all additional costs in the claims process it sought. If the power company did not agree to the cost allocation, its application would be dismissed. Lien claimants were allowed to present evidence and argument regarding the holdback amount in a future hearing.

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***R v Nippi*, 2022 SKPC 36**

Agnew, 2022-07-22 (PC22032)

Criminal Law - Sexual Touching - Victim under 16
Criminal Law - Evidence - Children as Witnesses
Criminal Law - Conduct of Trial - *Browne v Dunn*
Statutes - Interpretation - *Criminal Code*, Section 152

The trial of T.N. proceeded before a judge of the Provincial Court (trial judge) on two sets of sexual offences alleged to have been committed on two complainants aged 14 years. In assessing the credibility and reliability of the evidence of the complainants, the trial judge directed himself that he was to be attentive to the "specific concerns regarding child witnesses," and in particular in this case "their ability to communicate the evidence." He was also required to apply the rule in *Browne v Dunn* (1893), 6 R 67 (UK HL), which was recently considered in *R v Wilde,* 2022 SKCA 74, in his assessment of the accused's credibility, and given that he accepted that complainant A. had testified T.N. had asked if he could perform oral sex on her, was required to determine whether this evidence amounted to an invitation "to touch" his body for a sexual purpose, one of the essential elements of s. 152 of the *Criminal Code* (Code).
HELD: The trial judge dismissed all four counts for different reasons. With respect to the charges involving complainant A., he first dealt with the s. 152 count, that T.N. had touched her "directly or indirectly" with a part of his body for a sexual purpose and then with the count that he exposed his genital organs to her for a sexual purpose contrary to s. 173(2) of the Code. He accepted A.'s evidence that T.N. asked if he could perform oral sex on her, even though she had twice testified that he had asked her "if he wanted to perform oral sex on her" and also accepted her evidence that T.N. was "butt naked." He did not believe T.N.'s denial that he had asked A. if he could perform oral sex on her or that he was not "butt naked" because, though his denial was plausible, contrary to the

rule in *Browne v Dunn*, without notice to the Crown, and without cross-examining A. about it, the accused testified in his own defence to the effect that he had found methamphetamine belonging to A., had gone into her room to confront her about it, and threatened to tell her mother. This development at trial prompted the trial judge to "hold [the breach of the rule] against [his] credibility" and reject this evidence. Where the evidence of A. and T.N. conflicted, he preferred the evidence of A. The trial judge next grappled with a matter of interpretation: did the evidence of A. that T.N. had asked her if he could have oral sex with her satisfy the essential element of s. 152 that T.N. had invited A. to touch a part of his body directly or indirectly? Following a review of the cases on point and pertinent scholarly commentary about construction of penal statutes, he was led to conclude that the verb "to touch" was not ambiguous, and as such he was not required to delve into the "legislative intent" behind the words. In the result, though he did not believe the accused's denial and accepted A.'s testimony, he stated he must acquit T.N. because the charge had not been made out by the Crown. As to the s. 173 offence, he again concluded that he believed A. that T.N. was "butt naked" but nonetheless was left in a reasonable doubt that these words satisfied the essential element of the offence that T.N. had exposed his genitals to A. As to the offences pertaining to complainant B., the trial judge had a reasonable doubt that the Crown had proven that T.N. was the person who had "attack[ed]" her because the identification evidence was frail: B. had not seen her assailant as the room was dark, she had not looked at him, and he did not speak; she believed it was T.N. because of the smell of marijuana and alcohol on him, and because she believed T.N. was the only person in the house at the time, though there was evidence to the effect that her grandfather was known to attend at the house frequently without letting anyone know he was coming.

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***Amadi v Amissih*, 2022 SKPC 35**

Demong, 2022-08-31 (PC22034)

Torts - Fraudulent Misrepresentation
Courts - Provincial Court - Small Claims

Three plaintiffs (plaintiffs) brought an action before a judge of the civil division of the Provincial Court under The Small Claims Act (trial judge) against a pastor of a church he had founded (defendant), claiming he was liable in damages for fraudulently misrepresenting to them "the nature of [an] investment" and the return they could expect from it. Though the trial judge was required to make credibility and reliability rulings at trial, the background facts were not in dispute. The defendant incorporated a non-profit called HOTO community which he described as a "community help group that would help each other by "gifting" investors." The investment vehicle was what the defendant called a "money circle." Six money circles with six investment levels, from $100.00 to $2,500.00, and varying numbers of investors in each circle were set up by the defendant, who took 10% of each investment as what he referred to as an administration fee. In theory, once a money circle was filled up, the first person who paid in would be "gifted" all the money paid in the money circle, and the money circle would be filled up again. The trial judge described the money circle as a pyramid scheme by another name and the administrative fee a "kickback." The money circles could only produce a return if investors continued to fill them. If new investors were not added to the circle and as quickly as possible, the "gifts" would be delayed or not paid at all, leading to a downward spiral and failure of the circles – which is what happened. The plaintiffs claimed as

damages the amounts they invested less what they received before the circles collapsed. The plaintiffs asserted that the defendant had told them that they "were guaranteed to receive a significant return on their contributions in one or two weeks, depending on the amount of money contributed." They trusted the pastor of their church. The defendant testified he did not guarantee a return on investments, and that anyone who said that was a liar.
HELD: The trial judge allowed the plaintiffs' claims and ordered the defendant to pay damages, judgment interest and the cost of issuing the summons. He first made findings of fact following an assessment of the credibility of the testimony and evidence of the parties, concluding that he believed the testimony of the plaintiffs and did not believe "very much" of the evidence of the defendant. He found the plaintiffs were consistent and fair in their testimony as to the promises made by the defendant in their conversations with them. He found on the other hand that the defendant's testimony exhibited numerous frailties, including: he could not clearly explain how the charitable aims of the scheme worked; he failed to call to the stand any member of the community who received a charitable donation; he could not explain the need for the "maze of buy-ins and payouts" if the amounts paid were understood to be donations; and he could not explain why community members used false names in the books recording their investments. Having made these factual findings, he focused his attention on the case law with respect to the four elements of the tort of deceit or fraudulent misrepresentation. He found each of these made out on the evidence: a false representation was made by the defendant because he guaranteed early and high returns on high risk investments; he knew the money circles were high-risk investments or was reckless in believing they were, dependent as they were on "a continuing and sufficient supply of seed money… that he could not possibly guarantee… would occur;" the false representations were "material" since they induced the plaintiffs to invest in the money circles; and last, the plaintiffs suffered damages in that as a result of the fraudulent misrepresentation, they each lost all or a portion of the money they invested. The last issue the trial judge considered in coming to his decision was whether the plaintiffs should bear some responsibility for not exercising reasonable care in the circumstances, concluding that the cases reasoned otherwise for policy reasons: a rogue actor should not be allowed to benefit from his deception.

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***R v Nogue*, 2022 SKPC 37**

Hinds, 2022-08-31 (PC22035)

Criminal Law - Care and Control - Driving over .08

J.N. was tried before a judge of the Provincial Court (trial judge) for having a blood alcohol concentration in excess of the legal limit two hours after ceasing to operate a conveyance contrary to s. 320.14(1)(b) of the Criminal Code. It was not contested at trial that he was found in the seat ordinarily occupied by a person who operates a conveyance; the conveyance was a motor vehicle that was not running, found parked in a driveway when the police arrived and detained J.N.; J.N. had the keys in his pocket; it was a cold night, the windows of the vehicle were fogged up, and the accused was not properly dressed for the weather; the detaining officer smelled beverage alcohol "coming from [J.N.];" J.N. failed an ASD test and at the detachment provided two breath samples in an approved instrument resulting in readings of 110 and 100 milligrams of alcohol in 100 millilitres of blood. J.N. raised only one issue at trial: that the Crown had failed to prove that J.N. had driven the motor vehicle.
HELD: The trial judge convicted the accused of the offence as charged. In doing so, he outlined the state of the law with respect to

care and control of a motor vehicle since the 2018 amendments to the drinking and driving provisions of the Code. He recognized that the separate offence of having the care and control of a motor vehicle was replaced with one offence of “operating a conveyance” and that “operating” was defined as including care and control and “conveyance” as including a motor vehicle. He commented that as with the former drinking and driving provisions, a rebuttable presumption of care and control (now called a “presumption of operation” in s. 320.35 of the Code) was legislated into the law with little change, so that the case law relevant to the statutory presumption of care and control continued to be applicable. As such he referred to what he considered the leading authority on care and control, *R v Boudreault*, 2012 SCC 56 (*Boudreault)*, and cases following it, including *R v Poncelet*, 2014 SKCA 30 (*Poncelet*), and *R v Dumont*, 2020 CarswellNfld 174, noting that the presumption was applicable when an accused occupied "the seat or position ordinarily occupied by a person who operates a conveyance" and once the presumption applied, the Crown need not prove de facto care and control on the evidence. The trial judge was cognizant that one of the essential elements of de facto care and control was a “realistic risk of danger to persons or property”. In this case, the trial judge had no problem ruling that J.N. had occupied the seat or position ordinarily occupied by a person who operates a conveyance, such that the presumption applied to him, and he had not adduced any evidence to rebut the presumption by tending to show that, though he occupied that seat or position he did not do so “for the purpose of setting the conveyance in motion.” Though he had found the presumption was applicable, he went on to consider whether the evidence established de facto care and control of the motor vehicle by J.N. in accordance with *Boudreau* and *Poncelet* and found that it did. He stated that J.N.’s presence in the motor vehicle in this case created a realistic risk of danger to persons and property because he had excessive blood alcohol and had a present ability to set the vehicle in motion, either intentionally or unintentionally.

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