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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***Chapman v Somerville*, 2022 SKCA 88**

Richards Tholl McCreary, 2022-08-04 (CA22088)

Family Law - Custody and Access - Appeal
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The mother, A.C., appealed a trial decision that dismissed her request to move the parties' four-year-old daughter to Alberta. A.C. and the respondent father, D.S., had been exercising shared parenting pursuant to an interim order that had been granted in 2019. The parties met in Alberta in 2015. The parties moved to Saskatchewan in September 2016 and their daughter was born in September 2017. The parties separated on June 25, when A.C. took the child with her and moved to Alberta. D.S. successfully petitioned for the child to be returned to Saskatchewan and the interim order for shared parenting took effect in August 2019. Trial of the matter commenced in April 2021 and the Court of King's Bench justice (trial judge) rendered her decision in

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June 2021 (see: 2021 SKQB 178). The trial judge considered the relocation issue, amongst other matters before her, and found that the child's best interests would be served remaining in her father's care in Saskatchewan after completing an analysis of best interests of the child as required by section 15 of *The Children's Law Act, 2020*, SS 2020, c 2 (Act). A.C. raised five grounds of appeal: (a) Did the trial judge err in her application of the double bind factor? (b) Did the trial judge err in placing inordinate weight on D.S.'s limited parenting time, if the move were to be allowed? (c) Did the trial judge err by improperly assessing A.C.'s financial situation? (d) Did the trial judge err in the way she analyzed the parties' parenting plans and applied the best interests test? (e) If A.C. were otherwise unsuccessful in her appeal, did the trial judge err by not ordering shared parenting to continue until the child commenced first grade?

HELD: A.C.'s appeal was dismissed with costs payable to D.S. The court defined the standard of review applicable: the determination of parenting arrangements is an exercise in judicial discretion and, as such, the scope of appellate review is narrow and deferential. However, errors of law, including a failure to correctly identify the criteria that govern the exercise of a trial judge's discretion, are reviewed on the standard of correctness. The court did not find that the trial judge made an error on the "double bind" arguments before her as alleged by A.C. The double bind problem is seen as prejudicial to an applicant in a mobility matter where if they advise the court that they will leave the jurisdiction if a child is not permitted to relocate with them, they are seen as being self-interested. If, however, they advise the court that they will stay in the jurisdiction if a child is not permitted to relocate, then their interests in relocating could be seen as weak or insincere. The Act at subsection 15(2) explicitly prohibits considering whether the parent relocating with the child would remain in the jurisdiction if their application were not granted. A.C. contended that, as D.S. testified that if A.C. were remaining in Saskatchewan, shared parenting could continue, he had raised the double-bind issue and the trial judge erred in allowing the hearing of this evidence. A.C.'s arguments on this point were dismissed by the court because the trial judge had not considered the evidence received from A.C. in her reasoning. The trial judge was alive to the prohibition provided by the Act and her decision referenced subsection 15(2). Further, the trial judge had not erred in placing inadequate weight on D.S. becoming an access parent if the child relocated to Alberta. The trial judge had conducted an analysis of the best interests of the child, which by necessity required contemplation of either party becoming an access parent, and her decision is afforded deference. The trial judge was aware of the financial situation of the parties and the child support payable to A.C. if she had been permitted to relocate with the parties' daughter and her conclusions that A.C. would earn less money in Alberta was grounded in the facts before her. The court found no error in the consideration of A.C.'s financial situation that would support an appeal. The trial judge did err in completing a sequential analysis of the best interests of the

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child where she first considered the best interests of the child generally (and found that shared parenting would be preferred) and then considered whether it was in the child's best interest to remain in Saskatchewan or relocate to Alberta. The court found that while it was an error for the trial judge to contemplate a hypothetical scenario that was not available for consideration, she did not ultimately make an error because a consideration of whether the daughter would remain in Saskatchewan or relocate to Alberta was completed after a complete consideration of sections 10 and 15 of the Act, which is what was required of her. The court did not consider it appropriate to assess the merits of A.C.'s request for shared parenting of the child to continue until grade one, as this issue was not put before the trial judge. With all of A.C.'s arguments rejected, her appeal was dismissed with costs payable to D.S.

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***Swift River Farms Ltd. v Pillar Capital Corp.*, 2022 SKCA 89**

Richards Caldwell Barrington-Foote, 2022-08-04 (CA22089)

Mortgages - Foreclosure - Judicial Sale - Order Nisi - Appeal

Swift River Farms Ltd. (Swift River) appealed to set aside an order nisi for judicial sale by real estate listing (order nisi) and an order confirming the sale of property (final order) obtained by the respondent, Pillar Capital Corp. (Pillar). Swift River defaulted on a mortgage granted by Pillar that was registered against lands in the rural municipalities of Montrose and Loreburn (collectively, the lands). As the lands are farmland, the mortgage was subject to *The Saskatchewan Farm Security Act*, SS 1988-1989, c S-17.1 (Act). Swift River defaulted by not paying the amounts owed pursuant to the mortgage in 2019. Pillar served Swift River with a notice of intention to attend to mediation as contemplated by the Act. The parties entered into a forbearance agreement in November 2019 that stated in part that there would be a delay in enforcement proceedings until February 29, 2020, on the condition that if default continued, Swift River would not oppose enforcement proceedings. Swift River failed to pay the mortgage indebtedness by February 29, 2020, as contemplated by the agreement and Pillar sought and received leave to file a claim against Swift River. Swift River sent an email after receiving the claim that stated no defence would be filed. The email further stated that Swift River was negotiating the sale of the lands to a potential purchaser. Swift River attended the hearing for the application for an order nisi heard on October 27,

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2020, and successfully argued that the redemption period should be 120 days and the upset price should be $5,500,000.00 for the lands. Swift River failed to redeem the lands. On March 19, 2021, Swift River applied to open the noting for default that had occurred when no defence had been filed. In response, Pillar responded by filing its application for an order confirming sale. Pillar filed an affidavit from the selling officer disclosing that four offers had been received for the lands and that it had entered a contract to sell the lands for $5,800,000.00. The affidavit of the selling officer and the details of the offers received were not provided to Swift River. The applications came before a chambers judge. The chambers judge considered and concluded there were no grounds permitting the order nisi to be set aside and acceded to Pillar's request for a final order. At hearing, it was disclosed that Swift River had entered a lease for the lands to a third party that would continue until December 31, 2021. The chambers judge ordered that the lands would be delivered to the purchaser unencumbered by the lease. Swift River raised three issues for consideration: 1) The chambers judge erred in granting an order for sale when particulars of the offers received for the lands had not been provided to Swift River; 2) The chambers judge erred in concluding title could vest to the purchaser notwithstanding the provisions of *The Land Titles Act, 2000* (LTA), related to leases of less than three years in length, and 3) The chambers judge erred in not finding exceptional circumstances to set aside the order nisi. The chambers judge failed to consider that the forbearance agreement was unenforceable or void, and significant prejudice resulted from the chambers judge's failure to consider its defences on the value of the lands.

HELD: The court confirmed the order nisi but set aside the final order. As there was mixed success, no costs were ordered to be paid. The failure to provide the affidavit grounding the final order to Swift River was found to be a material error as it deprived Swift River of knowledge of the case to be met. Pillar's arguments, principally that disclosure of the affidavit to Swift River did not matter as the upset price had been exceeded by $300,000, was not viewed favourably by the court as the issue was one of natural justice. The purchase price of the lands was relevant, and Swift River ought to have been afforded the opportunity to respond appropriately as procedural fairness requires. The court turned to consider the issue of whether the chambers judge had erred in finding that the third-party lease would not vest with the sale of the property. The court reviewed jurisprudence confirming the common law authority that a lease entered by mortgagor for a property that is subject to foreclosure does not obtain priority over the interests of the foreclosing mortgagee. Swift River's argument that the LTA changes priority based on a lease of less than three years in length where the lessee occupies the lands was not accurate, as nothing in the LTA changes common law considerations that priority continues to remain in favour of the mortgagee. Lastly, the

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court considered whether there had been an error by the chambers judge in finding no exceptional circumstances that would set aside the order nisi. The principal argument advanced by Swift River was that the chambers judge failed to see the forbearance agreement as being void or unenforceable pursuant to the Act. The court rejected this argument, as it appeared the chambers judge did not view the forbearance agreement as being of much weight in the matters before him. If Swift River was correct that the forbearance agreement was void as there can be no contractual prohibition in entering a defence in foreclosure matters, that did not limit Swift River's ability to make submissions for other terms in the order nisi such as the redemption period and price.

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***Mann v Mann*, 2022 SKCA 94**

Leurer, 2022-08-11 (CA22094)

Barristers and Solicitors - Conflict of Interest
Court of Appeal - Chambers - Powers - Matters Incidental to Appeal
Civil Procedure - Appeal - Application Incidental to Appeal
Statutes - Interpretation - *Court of Appeal Act, 2000*, Subsection 20(1)

The applicant applied to a judge of the Court of Appeal (judge) for an order that counsel of record (counsel) for the respondent, 10187148 Saskatchewan Ltd. (7148 Sask Ltd.) be disqualified from acting for 7148 Sask Ltd. "in this court or any other court" for an alleged conflict of interest. The applicant argued that because counsel had acted for both parties and other associated corporations on many corporate and commercial dealings prior to the litigation between them, counsel had obtained private confidential information that would give the respondent an unfair advantage in the litigation. The court was aware from the court record and the affidavit evidence that in May of 2019, the applicant brought an originating application against 7148 Sask. Ltd. and another person to "invalidate certain corporate actions" that was heard before a judge of the Court of Queen's Bench (chambers judge) (see: 2019 SKQB 262). The decision was reserved. Before it was rendered, the applicant applied to the chambers judge to have counsel disqualified from acting for 7148 Sask Ltd. The originating application was ultimately dismissed, which resulted in the chambers judge being *functus officio* with respect to the disqualification application. The applicant appealed the dismissal of the originating application but not the *functus* ruling. Several other proceedings were

initiated between the parties in the Court of Queen's Bench, with counsel for 7148 Sask Ltd. continuing to act for it without any further attempts by the applicant to have counsel disqualified. Many of the orders emanating from these proceedings were appealed to the Court of Appeal. Counsel for 7148 Sask Ltd. was shown as counsel of record on all of these. Following the filing of the appeals, the applicant applied in the Court of Queen's Bench for a disqualification order, which was under reserve at the time of this application.
HELD: The judge dismissed both parts of the application. He found first that it was clear he did not have jurisdiction to make a "first instance" decision concerning the disqualification of counsel acting in "any other court." In doing so, he referred to what he called his "sole authority," s. 20(1) of *The Court of Appeal Act*, which permitted him to "hear and dispose of an application or motion that is incidental to an appeal or matter pending in the court." After considering case law on point, he had little problem ruling that the application to disqualify counsel from acting in the Court of Queen's Bench in proceedings there had no connection with the appeals pending in the Court of Appeal. As to whether, as a chambers judge, he had authority to "declare counsel to be disqualified from acting in an appeal," following his reading of *Canadian National Railway Company v SSAB Alabama Inc.*, 2019 SKCA 33 and *Shingoose v Harripersad*, 2005 SKCA 102, he concluded though he did have such "first instance" power, he could only exercise it in special cases or extraordinary circumstances, as explained in *Geller v Saskatchewan* (1985), 48 Sask R 239, and applied in many subsequent cases. He stated that the facts before him "do not present a special case or extraordinary circumstance that would justify a determination to be made in first instance by a judge of this Court as to whether… [counsel for the respondent] is in a conflict of interest," and that as a decision on an application to disqualify counsel had been fully heard by a judge of the Court of Queen's Bench on the same evidence and reserved, it was not appropriate that the matter be decided on first instance by him.

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***Zoerb v Saskatoon Regional Health Authority*, 2022 SKCA 111**

Ottenbreit Barrington-Foote Tholl, 2022-10-05 (CA22111)

Civil Procedure – Summary Judgment
Doctors and Surgeons - Negligence - Medical Malpractice
Practice - Costs
Tort - Appeal - Negligence - Standard of Care

The appellant appealed the summary dismissal of a negligence action against the respondent pathologist and a vicarious liability action against the respondent health authority. The respondents cross-appealed the failure to award costs to them. In 1990, the appellant had swelling in her jaw. The respondent pathologist was asked to rule out a rare type of non-cancerous tumor and analyzed a tissue specimen taken from the appellant's mouth. The pathologist determined the appellant had a radicular cyst. After 17 years of continuing problems, the appellant was diagnosed with the rare type of tumor. If the tumor had been properly diagnosed in 1990, she would have had minor surgery at that time to prevent further growth, instead of the more invasive surgery that removed and reconstructed part of her jaw in 2007. The respondents had applied for summary dismissal of the appellant's claim. The chambers judge decided the pathologist had not breached the standard of care and dismissed the appellant's claim. The appellant

appealed. The Court of Appeal considered whether the chambers judge erred: 1) in the identification or application of the standard of care; or 2) by declining to award costs to the respondents.
HELD: The appeal was allowed in part. The chambers judge did not err in the identification or application of the standard of care, but the decision to award no costs reflected an error of law and was set aside. 1) The standard of care owed by a physician in professional practice is to use reasonable care and skill. The general practices of the profession or local practices may be judged negligent when those practices do not conform with basic care as easily understood by the ordinary person with no particular expertise in the practices of the profession. A physician has a duty to refer when the physician lacks sufficient experience or expertise. The standard of care focuses on the means and not the outcome. It is not a standard of perfection. An incorrect diagnosis does not mean the diagnosis breached the standard of care. The referring physician's request that the pathologist rule out a specific oral tumor was relevant to determining the standard of care. The respondent pathologist had no prior experience with the rare oral tumor. He had averred to a practice of conducting a literature review and consulting with colleagues when he had no direct experience with diagnosing a rare condition. The Court of Appeal did not agree with the appellant's argument that the pathologist had a duty to refer the task to a more experienced pathologist. Expert evidence confirmed that at the time, the local standard practice was to refer a patient for an external consultation only if uncertainty remained after a literature review and local consultations. Many if not most general pathologists would have been unable to recognize the presence of the rare tumor. General pathologists are routinely asked to rule out rare conditions. The respondent pathologist admitted he came to the wrong conclusion, but this error did not result from a failure to use reasonable care and skill by deciding not to refer to an oral pathologist. 2) The decision to award costs is discretionary, but discretionary powers are never unfettered. The party who succeeds in an action is entitled to costs in the absence of strong reasons to the contrary. The chambers judge provided no reasons to justify failure to follow the general rule and no factors appeared to justify the failure to award costs.

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***Peters Estate, Re*, 2022 SKQB 186**

Danyliuk, 2022-08-11 (QB22175)

Wills and Estates - Estate Administration
Wills and Estates - Procedure

A.P. passed away on March 1, 2022. She had a will executed on September 17, 2007 that named her husband as the executor and sole beneficiary of her estate. The will further stated that if her husband predeceased her, her estate would be divided between her two children and grandchildren and two charities. A.P.'s children were named as her alternate executors. A.P.'s husband died before she did. An initial grant for probate was filed on June 2, 2022 that contained affidavits sworn by the executors on April 25, 2022. The court rejected this application on June 15, 2022, as proof of death (i.e., A.P.'s husband's death certificate) was required pursuant to Rule 16-10 of *The Queen's Bench Rules* (Rules). On July 25, 2022, a representative of the solicitor for the executors removed the application, affidavits and will to have the record corrected. The application was resubmitted along with the previous April 2022 affidavits. The court noted this as a problem: the death certificate had been "slip-sheeted" into the material, but no affidavits attesting to it had been submitted. This raised the issue for the court to determine: what is the proper procedure to use

when correcting an affidavit or exhibit to an affidavit?
HELD: The court reviewed jurisprudence across Canada and concluded there was no authority allowing an exhibit to simply be "slip-sheeted" into a refiling. Rule 16-3 and Rule 13-32 provide guidance to affiants: authentication is required in applications and affidavits filed before the court. Accordingly, the court ordered the appropriate step to be taken was the following: leave was granted to remove, revise, and refile the material but all the same must be re-sworn so that the contents of the application were verified by the applicants.

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***Patel v Van Olst*, 2022 SKQB 199**

Tochor, 2022-08-29 (QB22189)

Civil Procedure - Judge - Apprehension of Bias - Application for Recusal
Judges and Courts - Recusal - Abundance of Caution

A judge of the Court of Queen's Bench (chambers judge) was asked by the applicant, S.P., to recuse himself from deciding applications brought by two lawyers, one of whom was E.V.O., to strike statements of claim issued by S.P. against them. The chambers judge referred to the court record which, he noted, showed that the application to strike was argued on February 24, 2021, and the decision was reserved; on March 24, 2021, before the decision on the motion to strike was rendered, S.P. asked the court to reopen one of the applications to strike so he could make further submissions and, for the first time, apply for the recusal or disqualification of the chambers judge; the application for disqualification was heard before further submissions were made with respect to the application to strike; and the matter of potential bias due to the alleged professional relationship of the chambers judge and E.V.O. was raised by S.P. in court and addressed in a fiat on September, 2020, but no application for recusal was made at that time. S.P.'s main allegation was that the chambers judge was in a conflict of interest because he was a partner in the same firm as E.V.O. and E.L., who had both acted as counsel for the Saskatchewan Health Authority (SHA) during proceedings before the SHA taken by S.P. for reinstatement of his surgical privileges. At the commencement of the disqualification hearing, S.P. requested that the chambers judge disclose facts known to him which might be relevant to S.P.'s conflict of interest charge. Agreeing with S.P. that the law required him to do so, the chambers judge set out facts relevant to his relationship with E.V.O. and E.L., which were to the effect that he was never a lawyer at the same law firm as E.V.O.; he did not know E.V.O. and never spoke to him about S.P.'s proceedings against the SHA, nor about anything else; he never acted for the SHA at any time including when E.V.O. was counsel for the SHA; he was a partner with E.L. from 2001 to 2018; he never communicated with E.L. about her work with the SHA or about any matter involving S.P.; and he did not know anything about S.P. until he heard his name during an adjournment matter on an unrelated file.
HELD: The chambers judge's ratio decidendi was that S.P.'s application that he recuse himself was not brought at the first opportunity so that in accordance with cases such as Merchant v Law Society of Saskatchewan, 2014 SKCA 56, S.P. had impliedly waived his right to request the chambers judge recuse or disqualify himself. The chambers judge pointed out that S.P. himself raised the possibility of potential bias in September 2020, which he did not act on until March 2021, a period of six months, and during this time he participated fully in the proceedings. Though obiter, the chambers judge did speak to the recusal application in

substance, ruling he was not at law required to disqualify himself for actual bias or apprehension of bias, and would not disqualify himself out of an abundance of caution. In making these rulings he relied on a number of cases, and more particularly, *Patel v Saskatchewan (Health Authority)*, 2020 SKQB 194 (*Patel*) and *Sweda Farms Ltd. v Ontario Egg Producers*, 2011 ONSC 5873 (*Sweda*). With respect to actual bias, the chambers judge enumerated a number of S.P.'s charges against him, which included that he acted against his oath of office and in bad faith, to which he answered that the facts he disclosed showed no connection between himself and E.V.O. or E.L. and therefore no actual bias could have arisen. Similarly, he said, the facts he disclosed could not amount to an apprehension of bias, which is to be determined by "whether a reasonable and right-minded person, thinking on the question and having the required information, viewing it in a realistic and practical manner, would conclude that it was more likely than not that the judge, consciously or unconsciously, would not fairly make the decision" (see: *Sweda* and *Jans Estate v Jans*, 2020 SKCA 61). Lastly, he recognized that judges have recused themselves out of an abundance of caution though not required as a matter of law to do so, such as occurred in *Patel*; but, he said, his decision was entirely discretionary and subject to the circumstances at hand, concluding that the application to strike S.P.'s statement of claim had exhausted much time and expense, and to recommence would be an unfortunate waste of judicial resources; and recusing on an abundance of caution when not warranted would invite more challenges against judges for bias for tactical and unmeritorious reasons.

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***Rite-Way Fencing (2000) Inc. v Saskatoon (City)*, 2022 SKKB 205**

Gerecke, 2022-09-13 (KB22199)

Limitation of Actions
Limitations - Statutory Limitation Periods
Practice - Pleadings - Statement of Claim - Application to Strike - Statute-barred - Limitation Period
Statutes - Interpretation - *Cities Act*, Section 307(1)
Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(e)

The defendant city applied to strike the plaintiff's statement of claim on the basis that the limitation period had expired and the claim was an abuse of process pursuant to rule 7-9(2)(e) of *The Queen's Bench Rules* as well as an order releasing a lien bond to the city. The plaintiff was a construction company. The defendant city had awarded the plaintiff a contract to construct a fence. The plaintiff characterized its claim against the defendant as an action to enforce a claim of lien under *The Builders' Lien Act* or a trust claim, a claim against the holdback, an unjust enrichment claim or a claim for debt. The defendant characterized the claim as a claim for recovery of damages precluded by the special one-year limitation period in s. 307(1) of *The Cities Act*, SS 2002 c C-11.2. The claim was issued and served more than one year but less than two years after it was discoverable. The court considered whether the one-year limitation period in s. 307(1) or the basic two-year period under s. 5 of *The Limitations Act* applied to the claim. HELD: The claim was struck. The court ordered the lien bond released. The one-year limitation period in s. 307(1) applied. The statutory language that no action is to be brought against a municipality for the recovery of damages is sufficiently broad to encompass a claim for damages arising out of every conceivable legal relationship that could exist between a municipality and a claimant who is seeking damages that in some way arose out of that legal relationship. Special statutory limitation periods ensure

timely notice, investigation and disposition of claims and allows fiscal planning free of unresolved claims against the public purse. Many types of claims are barred by s. 307(1), including the debt claims which arose under legal relationships between the claimant and the city. Damages is the normal remedy in a claim for breach of contract alleging failure to pay an invoice. The equitable remedy of restitution may not be barred by s. 307(1). The limitation period cannot be subverted by tacking on an ill-fitting claim of unjust enrichment. The plaintiff did not plead a trust claim and the two-year limitation period for such a claim had passed.

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***R v Patron*, 2022 SKKB 206**

Robertson, 2022-09-13 (KB22210)

Criminal Law - Evidence - Witness - Videoconference
Criminal Law - Procedure
Criminal Law - Procedure - Jurisdiction
Statutes - Interpretation - *Criminal Code*, Section 714.1, Section 625.1

The Crown applied to allow a witness to testify by videoconference pursuant to s.714.1 of the *Criminal Code*. The witness was a Toronto lawyer who was working for B'nai Brith Canada when she made a complaint that led to the charges before the court. It was proposed she testify from her office using a laptop. The court also summarized matters discussed at the pre-trial conference required by s. 625.1 of the *Criminal Code*, including health measures, timing of witnesses, the effect of the Queen's death on the proceedings, and the self-represented accused's claim that the prosecution breached his religious rights.
HELD: The application to testify by video was granted. The court reviewed the statutory criteria. The location and personal circumstances of the Toronto lawyer was a neutral factor. The witness would need a few travel days by air and highway at a time when unnecessary travel should be limited. The uncontroversial and short anticipated evidenced favoured video testimony. The suitability of a lawyer's office for remote testimony favoured video testimony. Trial fairness would not be compromised by remote testimony. The offence was serious and may be of public interest and requiring witnesses to travel for brief testimony increases the potential for transmission of illness, particularly in a jury trial. The accused opposed the application, but he made no claim of prejudice. The statutory factors favoured granting the Crown's application. The pre-trial conference addressed COVID-19 precautions at trial. The self-represented accused objected to shorter hearing days to accommodate the religious observance of Crown witnesses. The court declined to interfere with the Crown's discretion in calling witnesses. The death of Queen Elizabeth II did not remove the court's jurisdiction over the matter. The accused did not bring a formal *Charter* claim that the prosecution breached his freedom of religion. A previous *Charter* challenge on this ground had already been decided and the court rarely reconsiders its decisions.

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***R v Levac*, 2022 SKKB 215**

Mitchell, 2022-09-16 (KB22203)

Criminal Law - Dangerous Offender Application
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Criminal Law - Sentencing - Dangerous Offender - Determinate Sentence - Long-term Supervision Order
Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - Sexual Touching
Criminal Law - Sexual Interference - Touching for Sexual Purpose - Female Under 16

The Crown applied to have P.L. declared a dangerous offender and sentenced to an indeterminate period of incarceration. P.L. had been found guilty of four counts of sexual assault and sexual touching of a person under 16 years of age, contrary to ss. 271 and 151 of the *Criminal Code*. P.L., a 31-year-old male, met the victim, a 14-year-old female, at a gym. A few weeks after they met, P.L. invited the victim to the house he shared with is mother. When she arrived, he carried her to his bedroom, threw her on his bed, got on top of her, removed her clothes and inserted his penis in her vagina. A second assault occurred a few days later. The victim told P.L. she did not want to see him again and stopped communicating with him. While awaiting sentencing, P.L. was charged and convicted of aggravated assault of a fellow inmate contrary to s. 268(2) of the *Criminal Code*. P.L. was estranged from his father and had regular contact with his mother. Both parents had supported him financially, including paying for private psychological counselling. P.L. had achieved his general equivalency diploma. His most recent offences were committed shortly after completing community corrections sex offender programming. He had been held in remand for approximately four years. P.L. had only recently acknowledged his Métis ancestry. The court considered: 1) was P.L. a dangerous offender; and 2) was an indeterminate or determinate sentence appropriate?
HELD: P.L. was declared a dangerous offender. An unspecified determinate sentence and lengthy supervision order would adequately protect the public. 1) The Crown proved beyond a reasonable doubt the four elements necessary for a dangerous offender designation. Sexual assault contrary to s. 271 is a serious personal injury offence identified in s. 752(b) of the *Criminal Code*. The offences were part of a pattern of violent conduct. P.L. had a significant criminal history of violence and sexual violence starting from age 14 and continuing over a period of 17 years. He had prior convictions for threats, unprovoked attack of a stranger, firing a rifle, choking and sexually assaulting a female victim while walking to the store, indecent phone calls to female youth centre staff and female RCMP officers, breaking into victims' residences and sexually assaulting them, and assaulting guards and inmates while incarcerated. The psychological report indicated past violence was driven by many diverse factors and P.L. did not demonstrate enough self-awareness to control his behaviour. P.L. continued to reoffend despite having been arrested, prosecuted, convicted and incarcerated many times. The pattern demonstrated a substantial degree of indifference to the reasonably foreseeable consequences of his behaviour. The Crown established P.L. was unable to control his sexual impulses and there was a likelihood he will reoffend. A pattern of past violent conduct helped predict future risk. The psychological report opinion was that P.L. exhibited a high risk to continue to commit acts of sexual violence. P.L.'s conduct was intractable. He had repeated sexually predatory behaviour involving strangers and minors. He offended shortly after completing the only treatment program he ever completed. P.L. did not testify so there was no direct evidence of remorse or insight into his behaviour. 2) A sentencing judge must impose the least intrusive sentence that protects the public from risk of violent harm. Under s. 753(4.1), an indeterminate sentence must be imposed on a designated individual unless there is a reasonable expectation a lesser measure will adequately protect the

public. Section 718.2(e) requires consideration of the unique circumstances of an Indigenous offender. The Crown argued for an indeterminate sentence. P.L. argued for a sentence of two to three years followed by a 10-year supervision order. P.L. was intelligent enough to know he was almost at the end of the road. P.L. had not previously completed programming while in the federal penitentiary system and he would now benefit from such programming. P.L.'s recent acknowledgement of his Indigeneity could motivate him positively. P.L. has been incarcerated almost all his adult life and has never functioned responsibly as an adult in the community. He was not provided with close supervision and supports when previously released into the community. Crown counsel had previously indicated that if a determinate sentence were appropriate, the Crown wanted to make submissions as to duration. A time for those submissions would be scheduled.

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***Zazula v Nichol*, 2022 SKKB 222**

Layh, 2022-10-03 (KB22209)

Appeal - Small Claims Court
Small Claims - Costs
Tort - Negligent Misrepresentation - Negligence
Torts - Duty of Care
Tort - Intentional Infliction of Suffering

The plaintiff appealed a decision of the Small Claims Court, dismissing his claim for damages as a result of interactions between the plaintiff and the father of the plaintiff's former tenant. The self-represented appellant presented oral submissions that did not correspond to the written submissions filed by the appellant's former lawyer. The court considered: 1) the standard of review for the trial judge's factual findings; 2) whether the facts established negligent misrepresentation; 3) whether the facts established the tort of intentional infliction of mental distress; 4) whether the trial judge erred in awarding costs of $1,500 against the appellant; 5) whether the trial judge erred in her consideration of certain witness testimony; and 6) whether factual findings were contrary to the evidence.
HELD: The appeal was dismissed, with costs of $1,500 to the self-represented defendant. 1) The standard of review for appeals from the Small Claims Court is correctness on questions of law, palpable and overriding error on findings of fact, and reasonableness for questions of mixed fact and law. 2) The five requirements for negligent misrepresentation are a duty of care based on a special relationship, an untrue or misleading representation, a negligent action by the party in making the representation, reasonable reliance by the representee, and detriment from the reliance resulting in damage to the representee. The trial judge found no special relationship between the plaintiff and the defendant. The defendant was a neighbour, but the parties were not friends or business acquaintances. The defendant was the father of the plaintiff's tenant. No special relationship was obvious from the evidence. The defendant told the plaintiff that the defendant's daughter would be a good renter. The trial judge found this representation was not untrue or misleading. The defendant subjectively believed his daughter would be a good renter. She was a good renter for approximately a year. There was no reviewable error in finding no untrue or misleading statement. Two of the elements of the tort were not established. 3) The tort of intentional infliction of suffering requires flagrant and outrageous conduct,

calculated to harm the plaintiff and causing the plaintiff visible and provable harm. The trial judge decided the plaintiff had not proven any of the factual allegations underpinning the plaintiff's tort claim, and that the defendant's fear the plaintiff might shoot the defendant would not support the plaintiff's tort claim against the defendant. There was no basis to disturb the trial judge's findings or conclusions. 4) The trial judge ordered the plaintiff to pay the defendant $1,500 in costs. The trial lasted three days. The plaintiff made baseless claims and attempted to abandon his claims at the last minute. The plaintiff was too busy to attend court to hear the trial judge's decision. The costs were 6% of the amount of the claim, which was below the 10% maximum set in the Regulations. There was no basis to interfere with the trial judge's discretionary costs award. 5) The testimony of three witnesses the plaintiff argued the trial judge ought to have considered was irrelevant to the claims alleged. There was no basis to interfere on appeal. 6) The trial judge provided reasons supporting her findings of fact and there was no basis to interfere on appeal. The appeal court awarded the defendant costs of $1,500 because of the appellant's conduct including two last-minute adjournments.

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***Kashuba v Wilton (Rural Municipality)*, 2022 SKQB 180**

Meschishnick, 2022-08-03 (QB22373)

Civil Procedure - Pleadings - Striking Out
Administrative Law - Judicial Review - Municipal Board
Municipal Law - Powers of Municipality

The Rural Municipality of Wilton #472 (Wilton) filed an application to strike the originating application brought by T.K., operating as a board member of the organized Hamlet of Lone Rock (Lone Rock), or in the alternative, that security for costs be ordered. Lone Rock sought judicial review to quash a resolution passed by Wilton removing T.K. as a board member of Lone Rock in May 2021 and permitting T.K. in his personal capacity the ability to attend Wilton's office to review documents pursuant to s. 177 of *The Municipalities Act*, SS 2005, c M-36.1 (Act). In further relief, Wilton sought to have T.K. declared a vexatious litigant. The court noted some confusion in the way the style of cause was framed: was T.K. acting in his personal capacity or on behalf of Lone Rock? The court completed its analysis as though Lone Rock had filed the application. The broader context of the present application related to another dispute between Lone Rock and Wilton being adjudicated under s. 77 of the Act (appeal board action). In January 2022, the panel formed in the appeal board action ordered Wilton to disclose documents. Given the resolution of Wilton removing T.K. from the board of Lone Rock, an email was circulated by counsel for Wilton advising that T.K. could not attend the premises for inspection of the disclosure documents ordered. The court outlined the preliminary issue that it would deal with prior to any further proceedings: would it be appropriate to strike Lone Rock's pleadings?
HELD: Lone Rock's originating application was struck, and it was ordered to pay enhanced costs of $5,000.00 to Wilton. The court summarized how disputes between an organized hamlet and municipality are to be resolved: s. 77 of the Act requires disputes to be dealt with before an appeal board. The court cited *Indian Point Golden Sands (Organized Hamlet) v Parkdale (Rural Municipality No. 498)*, 2002 SKQB 362, 224 Sask R 233 for the proposition "…if the Hamlet has a dispute with the Municipality, it is required to seek its remedy under the Act and Regulations. It has no standing to bring an injunction application." Accordingly, the court held that Lone

Rock had no standing to seek the present relief. The court noted that the appropriate remedy to quash the resolution of Wilton could have been brought by T.K. in his personal capacity. The court also considered the disclosure issue to have been settled and not appropriate for adjudication: Wilton had already provided the documents it viewed as appropriate for disclosure to Lone Rock and had posted a copy to its website. As pleadings were struck, the court did not consider the relief to order security for costs. The court did not declare T.K. to be a vexatious litigant as the application was considered with Lone Rock as the applicant and not T.K.; however, the court *obiter* was concerned with the pattern of litigation occurring between T.K. and Wilton. In ordering enhanced costs against Lone Rock, the court provided an overview of the history of litigation between the parties and other proceedings involving T.K. and Wilton and noted that Lone Rock ought to have been aware that it did not have standing to seek judicial review and that Lone Rock and its board may be taking a carefree attitude towards litigation when they are not personally responsible for costs.

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***2238649 Alberta Ltd. v Graham Carillion NBJV*, 2022 SKQB 190**

Popescul, 2022-08-16 (QB22191)

Civil Procedure - Security for Costs
Civil Procedure - Queen's Bench Rules 4-22 to 4-25

This matter was an application by Graham Construction & Engineering LP and a number of associated entities (Graham) to a judge of the Court of Queen's Bench (chambers judge) for an order for security for costs in relation to four actions brought by 2238649 Alberta Ltd. (649 Alberta Ltd.) and 101200672 Saskatchewan Ltd. (672 Sask. Ltd.) against Graham in which they claimed that Graham was liable to them under various heads of relief emanating from contracts to provide information technology and electrical services to two multi-million-dollar projects referred to by the chambers judge as the North Battleford Project and the U of S Project. The chambers judge canvassed the evidence and the court record and summarized the facts material to the matter: 672 Sask. Ltd. was unable to complete its contracts with Graham with respect to the North Battleford Project or the U of S Project; a receiver was appointed pursuant to the *Bankruptcy and Insolvency Act* by a judge of the Alberta Court of Queen's Bench "to hold all of the current and future assets, undertakings and properties of every nature of 672 Sask Ltd. (and a number of other related entities);" during the course of the receivership, 649 Alberta Ltd. was incorporated; the receiver entered into an assignment agreement with 649 Alberta Ltd. to purchase"accounts receivable, actions, contract claims and choses in action from the Receiver;" under the terms of the assignment agreement, 70 percent of any monies collected would be retained by 649 Alberta Ltd.; 649 Alberta Ltd. was "…incorporated solely for the purposes of attempting to assist the Receiver in collection of receivables and [was] not an operating company;" it had no exigible assets and was a non-resident holding company; the receivables included the claims against Graham; and 672 Sask Ltd. was in receivership at the time of the application with no material assets; no evidence was before the court as to whether the two sole directors, officers and shareholders of 649 Alberta Ltd. (owners) had the financial means to assist the corporation in pursuing the action; and the receiver did not pursue claims against Graham in its own right.
HELD: The chambers judge allowed the application and made an order requiring that security for costs be paid jointly by both corporations with respect to each of the four actions, and to be satisfied by paying funds into court or by posting "bond[s] satisfactory to the local registrar." Following his review of the case law explaining the reasoning behind security for costs, he

proceeded to an analysis of the factors contained in Rules 4-22 to 4-25 of *The Queen's Bench Rules* by which he was to be guided in determining whether it was "just and reasonable" that he exercise his judicial discretion in favour of the applicants, and in doing so framed his reasons in accordance with the non-exhaustive considerations listed in rule 4-24. The chambers judge stated that the policy behind security for costs was "… designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if he loses" (see: *Crothers v Simpson Sears Ltd.*, 1988 ABCA 155 (*Crothers*)). He also appreciated that he should be mindful of defendants who seek an order for security for costs as a strategy to shut down meritorious claims. Upon his analysis of the considerations set out in rule 4-24, the chambers judge concluded that the situation before him was exactly the same as that before the judge in *Crothers*. It was evident to him that the intention of 649 Alberta Ltd. was to roll the dice on recovering an award from Graham where the likelihood of success was slim, and then simply walking away if it was unsuccessful, knowing that Graham could do nothing to recover the cost of the litigation. He noted that the receiver was not prepared to pursue the claim. He observed that 649 Alberta Ltd. had failed to prove on the evidence that it was unable to pay security for costs through the assistance of its owners. He also delved into the merits of the actions, one of the considerations he was required to examine, recognizing that Graham had raised valid arguments showing that it had a strong defence to the claims. He also found that 649 Alberta Ltd.'s actions were destined to fail because, among other reasons, they were likely statute-barred; since 672 Sask Ltd. was in receivership, it did not have standing separate from the receiver to maintain the actions; 672 Sask Ltd. had not proceeded to arbitration as required by its construction contracts; and no authorization to commence the actions was obtained by the receiver from the Alberta Court of Queen's Bench.

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***1522137 Alberta Ltd. v Shaking Prairie Properties Ltd.*, 2022 SKQB 201**

Elson, 2022-09-01 (QB22195)

Civil Procedure - Security for Costs
Civil Procedure - Queen's Bench Rule 4-23(3)(b)

The defendants in an action commenced by an Alberta corporation (137 Alberta Ltd.), which had no assets in Saskatchewan, brought an application under Rules 4-22 to 4-25 of *The Queen's Bench Rules* (rules) before a judge of the Court of Queen's Bench (chambers judge) for an order for security for costs. The chambers judge reviewed the background facts of the matter as found by the chambers judge in 2019 SKQB 27 on a previous application by the defendants to strike the statement of claim of 137 Alberta Ltd., which facts showed that 137 Alberta Ltd. entered into a contract with the defendant SPP Ltd., a Saskatchewan corporation, to purchase a commercial property in Saskatchewan. The other defendants were a director and officer of SPP Ltd. and the realtor who acted for 137 Alberta Ltd. on the purchase. The commercial property proved to be a "financially disastrous investment" for 137 Alberta Ltd., who claimed that the defendants misrepresented "the status of the property, the quality of the investment and related matters." The issue before the chambers judge was whether the affidavits of the defendants complied with Rule 4-23(3)(b), which requires the applicant to aver the specific "nature of the claim or defence." The chambers judge noted that the affidavits of the defendants in this case simply averred a belief held by the deponents that "they had a good defence on the merits and that there is a reasonable possibility the claim could be dismissed with costs payable by the Plaintiff."

HELD: The chambers judge allowed the application and made an order for security for costs. Following a review of the history of the rule, equivalent rules in Nova Scotia, Ontario and Alberta, and case law on point, he concluded that the requirement to depose positively to details of the defence was an anomaly left over from previous incarnations of the rule; no such requirement was found in the rules of other provinces; and the cases tended to apply the rule leniently. In the result, he concluded that the positive averment of a belief in a meritorious defence, in combination with the pleadings contained in the statements of defence, amounted to compliance with the rule.

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***Gibson v Saskatchewan (Government)*, 2022 SKKB 211**

Smith, 2022-09-20 (KB22202)

Civil Procedure - Dismissal - Delay
Civil Procedure - Disposition without Trial - Dismissal for Delay
Civil Procedure - Prejudice - Want of Prosecution - Delay
Civil Proceedings - Pleadings - Striking Out
Practice - Dismissal for Want of Prosecution - Delay Caused by Counsel

The defendant applied to strike the plaintiff's statement of claim for delay when little or no progress was made in the 17 years since the claim was issued. The plaintiff's claim concerned minor injuries from a slip and fall while the plaintiff was incarcerated. The statement of claim and defence were filed and mandatory mediation occurred within months of the injury. The plaintiff's first counsel withdrew two years later. Three years later, the plaintiff serviced notice of change of lawyer. A further three years later, the plaintiff served notice of an intent to proceed. Around that time, the attending physician died. A further six years later, the plaintiff requested the defendant complete a pre-trial conference request. The defendant declined because they had never received the plaintiff's statement of documents. Another three years later, the plaintiff sought to arrange a pre-trial conference. The defendant responded with the application to strike the claim for delay. The court considered: 1) whether the defendant had demonstrated that the plaintiff's delay in advancing the claim was inordinate; 2) whether the plaintiff had tendered a reasonable excuse for the delay; and 3) whether the plaintiff established that it was in the interest of justice for the claim to proceed.
HELD: The claim was dismissed for failure to prosecute in a timely fashion, with no order of costs. 1) The plaintiff's delay in advancing the claim was inordinate. The slip and fall claim was straightforward. The 17-year delay was longer than the delays the court had ruled inordinate in similar cases. 2) The plaintiff did not provide a reasonable excuse for the delay. To overcome a substantial delay, the plaintiff must provide a proportionately compelling explanation. The plaintiff argued his previous lawyer was responsible for the delay and he had himself been incarcerated for some of the delay period. The court noted the plaintiff engaged counsel and commenced the claim while incarcerated. The plaintiff was not blameless because he chose and maintained counsel who failed to press the matter forward. 3) It was contrary to the interests of justice for the claim to proceed, as demonstrated by several factors. The defendant would suffer prejudice because of the death of a critical witness and the effect of the passage of time on witnesses' memories. The 17-year length of delay was substantial. The litigation was still at an early stage. The government is an institutional litigant and therefore effect on reputation was not a significant factor. The defendant was not responsible for any of

the substantial delay periods. The plaintiff's counsel had a dilatory approach, but the plaintiff was responsible to oversee his lawyer. The plaintiff's negligence claim did not implicate a broader public interest beyond the litigants themselves.

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***R v Tawiyaka*, 2022 SKPC 25**

Lang, 2022-08-22 (PC22031)

Criminal Law - Impaired Driving - Sentencing
Criminal Law - Driving While Disqualified - Sentencing
Criminal Law - Sentencing - Principles of Sentencing
Criminal Law - Sentencing - Indigenous Offender - Gladue Factors
Statutes - Interpretation - *Criminal Code*, Section 718.2(e)

A judge of the Provincial Court (judge) was called upon to sentence L.T., an Indigenous offender, following her guilty pleas to the offences of impaired driving and driving while disqualified committed in August of 2020. The facts concerning the offences or L.T.'s driving record and background, as revealed by a pre-sentence report (PSR) and representations of her counsel, were not at issue. The offences consisted of an uneventful roadside stop on suspicion that L.T. was driving while disqualified. The judge was aware that L.T. was repeatedly convicted of drinking and driving offences and offences of driving while disqualified. He surveyed her criminal record which showed seven offences of driving while over .08 in 1983, 1986, 1989, 1995, 1999, 2004, and 2018, and four offences of driving while disqualified in 1989, 1995, and twice in 1996. For these, she received fines and two mandatory minimum custodial sentences of 24 and 120 days. The judge noted significant gaps in her offending, of five years from 1999 to 2004 and of 14 years from 2004 to 2018. He placed great weight on L.T.'s Gladue factors, referencing the governing cases, *R v Gladue*, [1999] 1 SCR 688, and *R v Ipeelee*, 2012 SCC 13. He gleaned these factors from the PSR, and they included: untimely and tragic deaths of family members, including an infant sister who froze to death after falling out of a horse-drawn wagon; loss of her eldest daughter to sepsis and drug overdose; and the loss of seven out of 11 siblings due to medical issues; she suffered abuse at the hands of two partners with whom she had children; she was removed from the family home in Grade 3 and placed in a residential school for seven years, though she was unaware of any abuse there; she had her first child at 17; she experienced family abuse of alcohol and the removal of younger siblings from the home; she was injured in a vehicle rollover accident in 2004, which cracked a vertebra and resulted in life-long pain and mobility problems. On the positive side of her life, the judge noted that she had a long history of employment that included work in the housing department of her reserve for 13 years; she last consumed alcohol on one occasion in October of 2020 and had maintained sobriety since then; through treatment and counselling, she came to recognize that she used alcohol during times of grief and loss; she had turned to traditional spiritual and cultural ways to help her with her sobriety; she had close family and friends, her closest friend being of the view that "she is taking her healing seriously to move forward;" she continuously cared for disabled brothers in her home; and she was considered an Elder of her reserve and took her role seriously. The Crown served a Notice of Intention to Seek Greater Penalty under the *Criminal Code* (Notice), which the judge recognized required him to impose a minimum sentence of 120 days in jail. The Crown's position was that as a serial drinking and driving offender, L.T. should be sentenced to a term of 18 months in jail, one year of probation and a five-year driving prohibition. The

defence argued for the minimum jail sentence of 120 days and probation.
HELD: The judge agreed with the defence and sentenced L.T. to 120 days' jail, probation for 24 months, and a three-year driving prohibition. He expressed frustration that the Crown had filed the Notice since he believed forcing a minimum sentence was contrary to the spirit of s. 718.2(e) of the *Criminal Code* (Code) which required him to consider all sentencing options other than incarceration for Aboriginal offenders to reduce the overrepresentation of Indigenous persons in Canadian jails. He then conducted a detailed comparison of the cases filed by the Crown in support of its sentencing position, as required by the principles of parity and proportionality codified in the sentencing provisions of the Code. In doing so, he found that the cases filed by the Crown had no application to L.T., commenting that L.T. was not the type of offender the Crown was trying to suggest she was, but was one whose offending was a product of her Gladue factors and who was making profound efforts to surmount their effect on her.

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***R v B.J.M.*, 2022 SKPC 38**

Anand, 2022-09-09 (PC22036)

Criminal Law - *Youth Criminal Justice Act* - Adult Sentence
Statutes - Interpretation - *Youth Criminal Justice Act*, Section 72(1)(a), Section 72(1)(b)

Following the guilty plea of the young person, B.J.M., to second degree murder, the Crown applied to a judge of the Youth Justice Court (youth court judge) pursuant to s. 72 of the *Youth Criminal Justice Act* (YCJA) for the imposition of an adult sentence on him. Evidence was called before the guilty plea was entered, including that of an expert on gang life. An agreed statement of facts, pre-sentence reports, B.J.M.'s criminal record with written summaries of offences, a history of institutional incidents, and B.J.M.'s journal written while on remand were all filed. No facts about the offence or the personal background of B.J.M. were in issue. The youth court judge summarized the material facts of the offence which were that B.J.M., who was 17 years of age and a few months from his 18th birthday, was a gang member with the Terror Squad street gang; he was at a local restaurant and was called by another Terror Squad member to remove a rival gang member from a house; B.J.M. was known to carry a handgun; he went to the house and followed the rival gang member outside, at which time he shot him in the back, resulting in the rival gang member's death. In making his determination as to whether B.J.M. was to be sentenced as an adult under s. 72 of the YCJA, the youth court judge was required to decide on a standard "of careful consideration of all the relevant factors" whether the Crown had proven on this standard, first, that the presumption of diminished moral blameworthiness or culpability of B.J.M. had been rebutted, and second, whether a youth sentence would be "of sufficient length to hold the young person accountable for his or her offending behaviour."
HELD: After reviewing pertinent case law, the youth court judge allowed the application and ordered that B.J.M. be sentenced to an adult sentence of life in prison with no eligibility for parole for seven years. He noted that the maximum youth disposition for this offence was seven years, three years of which were to be served in the community. He first turned his attention to the matter of the presumption of diminished moral blameworthiness or culpability of B.J.M., finding on the facts that the Crown had satisfied its onus of rebutting the presumption that B.J.M., was not, because of his youthfulness, blameworthy or culpable as an adult would be. He determined that factors which generally indicated youthfulness, such as immaturity of action, dependency on others, impulsiveness,

and peer pressure were not demonstrated by B.J.M., whom he found "possessed and exhibited adult-like maturity at the time of the murder." These were: B.J.M. was not financially dependent on his mother as she alleged but admitted in the court reports that he was selling drugs and committing robberies to support himself; his motivation for the murder showed adult-like maturity in that being a gang member he wanted to make a name for himself as someone people feared in order to protect any family he might have in the future; he made a conscious decision to maintain his gang affiliation after the murder for protection during his time in prison; and though he had a level of empathy for others, he was able to put these feelings aside when it served a purpose within the gang subculture. The youth court judge then focused on whether the Crown had proven to his satisfaction that the length of a youth sentence was insufficient to hold the young person accountable. He instructed himself with reference to *R v R.D.F.*, 2019 SKCA 112 (*R.D.F.*), and the two objectives of s. 72(1)(b) of the YCJA set down in that case, these being, first, that the sentence "reflect the seriousness of the offence and the young person's role in it", and second, that the youth sentence be long enough to provide "reasonable assurance of the young person's rehabilitation to the point where he or she can be safely reintegrated into society." As to the first objective, he found that "the unique systemic or background factors that may have played a part in bringing the offender before the courts," that is, B.J.M.'s Gladue factors, led him to doubt a youth sentence would reflect the seriousness of the offence and the young person's role in it. As to the second *R.D.F.* objective, the youth court judge stated that he was not satisfied a youth sentence would be long enough to provide a reasonable assurance that B.J.M. could be safely reintegrated into society because his "entrenchment in gang subculture" was deep and the prospect of his rehabilitation was slight, especially since he needed to maintain his gang affiliation for protection while incarcerated.

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***R v R.H.S.*, 2022 SKPC 39**

Tomka, 2022-09-23 (PC22037)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Unlawful Confinement - Sentencing
Criminal Law - Break and Enter - Sentencing
Criminal Law - Sentencing - Principles of Sentencing
Criminal Law - Sentencing - Indigenous Offender - Gladue Factors
Statutes - Interpretation - *Criminal Code* - Sentencing Provisions

Following a trial before a judge of the Provincial Court (trial judge), the offender, R.H.S., a 30-year-old Indigenous man, was convicted of unlawfully confining a 17-year-old Indigenous girl in a vehicle by not letting her get out while a second person drove the vehicle into the country, where she was forcefully removed and held face down on the ground by R.H.S., who penetrated her vagina with his penis until he ejaculated. He also pled guilty to kicking open the door of a residence where his intimate partner lived, and once inside, grabbed her so she would not call the police and "threatened her". Later the same day, he came back, again kicking the door open, entering the home, where he found the same victim. He raised his fist to her and threatened to hit her. He was to be sentenced by the trial judge for these offences and a number of other administrative offences such as failing to comply with release conditions. The Crown filed cases, a pre-sentence report, R.H.S.'s criminal record, and victim impact statements of the victim and

her mother. The Crown asked for a sentence in the range of nine to 11 years' incarceration; the defence, a global sentence of 4.5 years.
HELD: The trial judge sentenced R.H.S. to 2,182 days' incarceration (six years) consecutive time for the sexual assault and the break and enter before credit for remand, and concurrent time for all remaining offences. He also made all necessary ancillary orders. Following his review of the relevant goals and principles of sentencing, which he stated required him in this case to give primary importance to deterrence and denunciation, and the appropriate case law, including *R v Whitehead*, 2016 SKCA 165 (*Whitehead*), *R v Charles*, 2021 SKCA 114, which referred to the seminal cases, *Gladue*, *Chanalquay*, and *Ipeelee*, *R v Nayneecassum*, 2022 SKPC 10 and *R v Friesen*, 2020 SCC 9 (*Friesen*), which instructed courts about the need to increase carceral sentences for sexual assaults on minors, he turned to the task of determining a proportionate sentence "having… regard to the offender's unique individual circumstances" (see: Whitehead). In this particular case, he recognized that, as R.H.S. was an Indigenous offender, he was to concentrate his analysis on "the unique systemic or background factors that may have played a part in bringing the offender before the courts" and thereby achieve a proportional sentence for R.H.S. He organized his analysis under the following headings: the gravity of the offences, the harm caused by the offences, and the circumstances of the offender, including his Gladue factors, aggravating and mitigating factors, and parity. During the course of this inquiry, he concluded that *Friesen* reiterated the seriousness of the offence of sexual assault of minors, which in this case was made more grave by the violence perpetrated on the victim, who was very traumatized by the offence; that the personal background of R.H.S. and the systemic factors which affected his life as an Indigenous person including that he lived from house to house as a young person, and had no parental guidance, was abused by his mother and grandmother, started drinking alcohol at eight years of age, and had a youth and criminal record with entries from 2007 through to the present, most of his offences having been committed while intoxicated; all of this did contribute to his offending and decreased his moral blameworthiness; as to parity, he found that the Crown's case authorities were distinguishable on their facts but again referred to *Friesen*, which he said had effectively raised the starting point sentence for sexual assault of minors beyond the three-year range.

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