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.

Vol. 24, No. 22 **November 15, 2022**

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***CPC Networks Corp. v Miller*, 2022 SKCA 95**

Barrington-Foote, 2022-08-15 (CA22095)

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Civil Procedure - Appeal - Application for Leave to Appeal
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Civil Procedure - *Queen's Bench Rules*, Rules 4-22 to 4-24

The applicant sought leave to appeal to a judge of the Court of Appeal sitting in chambers (judge) from two decisions of a management judge of the Court of Queen's Bench (chambers judge) who ruled against the applicant by denying its request that she recuse herself for apprehension of bias and found in favour of the prospective respondents in ordering that the applicant pay security for costs. In its numerous actions and motions commencing in 2010, the applicant claimed various types of economic and corporate malfeasance on behalf of its

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Appeal - Reasonable Apprehension of Bias

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minority shareholders, which included the applicants. These actions included claims against the prospective respondents, who were the former solicitors of the applicants.
HELD: The judge allowed the applicant's appeal to proceed with respect to the chamber judge's decision to grant the order for security for costs but denied the application for leave to appeal the chambers judge's decision not to recuse herself for reasonable apprehension of bias. The judge first directed himself as to the test he was to apply in determining if leave to appeal should be allowed, which he stated was the one specified in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 (*Rothmans*) and which broadly speaking was "concerned with the merit and importance of the proposed appeal." He then looked at the merit of the applicant's proposed appeal from the decision of the chambers judge not to recuse herself for reasonable apprehension of bias. He concluded that the applicant's main basis for arguing the merit of the proposed appeal on this point was that in *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127. Of note, said the judge, the Court of Appeal had overturned previous decisions of this chambers judge for "several errors which called for appellate intervention" in other proceedings related to the applicant's action. However, he went on to say that there was nothing out of the ordinary in a lower court judge's decision being corrected by a higher court, and that intervention by the Court of Appeal did not amount to a finding that the management judge "had acted injudiciously in any way" or that anything in the chambers judge's decision or reasons "might be found to constitute clear, cogent or substantive evidence that could persuade an informed person, viewing the matter realistically and practically — and having thought the matter through — that it… [was] more likely than not that the Chambers judge, whether consciously or unconsciously, would not carry out her duties as case management judge fairly." As to the order for security for costs, after a consideration of the factors in Rule 4-24 he was to consider in exercising his discretion to order security for payment of costs, the judge allowed the application for leave to appeal. He oriented himself on the standard of review of discretionary decisions as set out in *Kot v Kot*, 2021 SKCA 4 and concluded that there were "arguable questions" as to the chambers judge's assessment of the facts relating to the applicant's impecuniosity and its ability to pursue the action if shouldered with the security order. As to the second *Rothmans* consideration, that the proposed appeal was of sufficient importance to be heard, the judge stated that the appeal should be heard as it was of "sufficient importance to the proceedings, and to the meaning and application of Rule 4-24."

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***R v Pastuch*, 2022 SKCA 109**

Richards Whitmore Barrington-Foote, 2022-10-05 (CA22109)

Civil Procedure - *Queen's Bench Rules* Rules 4-22 to 4-24

Civil Procedure - Vexatious Litigant - Application for Leave to Commence Action

Constitutional Law - *Charter of Rights*, Section 11(b) - Unreasonable Delay

Constitutional Law - *Charter of Rights*, Section 7 - Appeal

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Contracts - Insurance Contracts

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Criminal Law - Sentencing - First-degree Murder

Constitutional Law - *Charter of Rights*, Section 7 - Appeal
Constitutional Law - *Charter of Rights*, Section 7 - Court-Appointed Counsel - Appeal
Constitutional Law - *Charter of Rights*, Section 11(b) - Unreasonable Delay
Criminal Law - Appeal - Unreasonable Verdict

A.P., who was tried before a judge of the Court of Queen's Bench (trial judge) and convicted of fraud over $ 5000.00 in relation to a dishonest investment scheme resulting in the loss to investors of $5,523,507.00, appealed her conviction and sentence to the Court of Appeal (court) on the grounds that the trial judge erred in principle in declining to order for a third time that the court appoint a lawyer to represent her at trial; in failing to find that her right under s. 11(b) of the *Charter* to be tried within a reasonable time had been infringed; and on the ground that the guilty verdict was unreasonable and a miscarriage of justice pursuant to s. 686(1)(a)(iii) of the *Criminal Code*. The court extensively reviewed the lengthy and complex proceedings in the courts below as these pertained to the grounds of appeal advanced by A.P., summarizing these as follows: the charges against A.P. were sworn on June 3, 2014; she initially hired a private lawyer, W.S., who sought and obtained leave to withdraw from the case on May 6, 2015, stating that A.P. was unable to "raise sufficient money" for him to defend her on this "complicated" case involving 40 victims and criminal conduct alleged to have occurred over seven years; A.P. then applied for legal aid representation, and was approved for such in July, 2015; following two adjournment requests by legal aid counsel, including February 10, 2016, the staff lawyer who had been assigned to conduct the trial appeared before the presiding Provincial Court judge (court) and forewarned the court that he believed he would not be able to provide "reasonably competent ethical service" to A.P. without a significant reduction in his caseload and "significant assistance on some… specialized issues" which had not at that point been provided by Legal Aid Saskatchewan; on March 22, 2016, senior counsel from legal aid appeared before the court and sought leave to withdraw Legal Aid Saskatchewan from the case, stating she had served A.P. with a notice denying her representation; on April 7, 2016, A.P. brought her first application for court-appointed counsel in accordance with the procedure set out *R v Rowbotham* (1988), 41 CCC (3d) 1 (Ont CA) (*Rowbotham*); the presiding judge of the Provincial Court determined that A.P. "met the criteria for court-appointed counsel" and so ordered; on May 12, 2016, C.F. appeared as court-appointed counsel for A.P.; the matter was adjourned several times, following which a preliminary inquiry was set to be conducted over nine weeks; before the start of the preliminary hearing, the Attorney General preferred a direct indictment on December 1, 2016 which sent the matter to the Court of Queen's Bench without a preliminary inquiry where it was pre-tried over several dates until April 28, 2017, when A.P. applied pursuant to s. 11(b) of the *Charter* for a stay of proceedings for unreasonable delay in bringing the charges to trial; on July 11, 2017, the trial judge dismissed the application for "exceptional circumstances" due to the complexity of the trial as this principle was explained in the influential case, *R v.Jordan*, 2016 SCC 27; following the stay application, a three-month trial

Criminal Law - Sexual Assault

Criminal Law - Unlawful Confinement - Sentencing

Damages - Punitive Damages

Employment Law - Wrongful Dismissal - Evidence

Family Law - Contempt

Family Law - Custody and Access - Contempt

Family Law - Interim Parenting Order - Variation

Family Law - Parenting Time - Primary Residence

Insurance - Contract - Interpretation

Insurance - Duty to Defend

Practice - Costs - Costs against Solicitor Personally

Practice - Disclosure of Documents - Redaction

Practice - Discovery - Documents - Application for Production

Practice - Discovery - Documents - Redaction

Professions and Occupations - Professional Regulation - Complainant

was scheduled to commence November 6, 2017; on June 26, 2017, C.F. appeared before the trial judge and requested leave to withdraw as counsel for A.P. claiming "a breakdown in the relationship between him and the accused;" following a second *Rowbotham* application by A.P., C.W. was appointed to act, and on August 10, 2017, the trial commencement date was rescheduled to September 10, 2018; a series of pre-trial conferences were held addressing trial management issues; the trial judge expressed that following these, he believed "both counsel were prepared and fully ready for trial." However, on the morning of the trial, C.W. appeared requesting leave to withdraw, stating that the solicitor-client relationship had been strained for some time and "complete breakdown was crystalized on September 6th," that there as "no scenario in which …[C.W.] could ethically proceed as counsel" and neither would he act as amicus curiae; a third *Rowbotham* application was scheduled to be heard on September 17, 2018, at which counsel for Court Services attended, opposing the appointment of a third lawyer for A.P.; though A.P. was prepared to testify as to the reasons for the breakdown of the solicitor-client relationship and had a witness who would testify in a similar vein, the trial judge did not hear any testimony, being concerned that A.P. would prejudice her case by revealing her defence to him, and also because her comments raised accusations of unethical conduct on C.W.'s part, which he would not hear unless C.W. were present to defend himself; based on what he had heard from A.P. at the hearing, and the circumstances of the previous withdrawal of C.F., he denied her application for court-appointed counsel, stating he was not satisfied that "a third appointment will not fail for similar or near similar reasons as the two previous failures." At trial, the Crown called 78 witnesses over the course of 19 weeks of testimony at the end of which A.P. asked that an amicus curiae be appointed to assist her with closing arguments, which the trial judge permitted; he had not thought it necessary to appoint an amicus until that point in the trial; an extension by A.P. of the scope of the service of the amicus was denied on May 31, 2019; the trial judge rendered the conviction decision on June 27, 2019, and again reviewed the history of the court appointments of counsel, and their failure, stating that "where the client causes the relationship to break down," she may be faced with consequences such as being required to proceed to trial without the assistance of counsel.

HELD: The court allowed the appeal in part, agreeing with A.P. that the trial judge committed reviewable errors relating "to both the identification and the application of the principles specified in *Rowbotham*," and ordered a new trial. It denied the appeals with respect to the application for a stay of proceedings for unreasonable delay in trying the matter, and for unreasonable verdict, concluding that the trial judge was correct in ruling that the delay caused by Legal Aid Saskatchewan in taking six and a half months to deny services to A.P. was a "discrete exceptional event" as set out in Jordan which was to be deducted from the net delay of 34 months thus bringing the total delay below the presumptive ceiling of 30 months; and also agreed with him that the complexity of the trial amounted to an "exceptional circumstance" as defined in Jordan, which justified a delay of four months in excess of the presumptive ceiling. As to the argument that the verdict was unreasonable, the court was of the view that, though the Crown evidence was not capable of proving that "no marketable product had been produced

Regulations - Interpretation - *Broiler Hatching Egg Marketing Plan Regulations*

Statutes - Interpretation - *Children's Law Act, 2020* Section 44

Statutes - Interpretation - *Criminal Code,* Sections 276(1), 276(2), 278.94

Statutes - Interpretation - *Criminal Code,* Sections 276(1), 276(2), 278.93(2), 278.93(4)

Statutes - Interpretation - *Engineering and Geoscience Professions Act*, Section 32

Tort - Abuse of Public Office

Tort - Appeal

Tort - Bad Faith

Tort - Damages

Tort - Economic Loss

Tort - Misfeasance in Public Office

Torts - egligence - Public Authorities - Public Duty - Vicarious Liability

Case Name

Cameron v The Association of Professional Engineers and Geoscientists of Saskatchewan

CPC Networks Corp. v Miller

or sold" so that the trial judge was incorrect in so finding, the balance of the evidence led at trial was capable of establishing that A.P.'s deception led directly to the investments being made, and also that the evidence was "indisputable" that she had diverted large sums of investments for personal use. With respect to the main ground of appeal, the trial judge's denial of A.P.'s third *Rowbotham* application, the court ruled that the trial judge made an error in law by denying the application on the basis that A.P. had "caused" the withdrawal of previous counsel, and not on whether she was "at fault for the withdrawal of her counsel." The court elaborated that by failing to fully explore A.P.'s explanation as to why she was at odds with C.W. and C.F., even though she was prepared to waive solicitor-client privilege, and in neglecting, because of irrelevant concerns such as pre-judging the case, not to call her and her witness to give evidence, the trial judge made his decision without being in a position to properly determine whether A.P. was at fault in her previous counsels' withdrawal. Without this proper foundation, the court expressed, the trial judge erred in denying her third request for counsel. The court also found that the trial judge was required as a matter of law to fully explore the appointment of an amicus curiae, given that A.P. had stated numerous times during the trial that she needed assistance and, particularly, that she did not understand some of the elements of the offences. It reiterated that the guiding principle a trial judge was always to have in mind was the right of an accused to a fair trial and that it was incumbent on the part of trial judge to protect that right no matter the state of the accused's representation at trial.

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***Slater v Pedigree Poultry Ltd.*, 2022 SKCA 113**

Ryan-Froslie Schwann Kalmakoff, 2022-10-07 (CA22113)

Administrative Law - Judicial Review - Jurisdiction
Corporations - Directors and Officers - Duty - Director Liability
Damages - Punitive Damages
Tort - Abuse of Public Office
Tort - Appeal
Tort - Bad Faith
Tort - Damages
Tort - Economic Loss
Tort - Misfeasance in Public Office
Torts - Negligence - Public Authorities - Public Duty - Vicarious Liability
Regulations - Interpretation - *Broiler Hatching Egg Marketing Plan Regulations*
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Jackson v Jackson

Kelly Panteluk Construction Ltd. v Lloyd's Underwriters

L.D.S. v D.F.

Omorogbe v Saskatchewan Power Corporation

Patel v Saskatchewan Health Authority, 2021 SKCA 115

Patel v Saskatchewan Health Authority, 2022 SKCA 114

R v C.H., 2022 SKQB 14

R v C.H., 2022 SKQB 140

R v Morrison

R v Pastuch

Slater v Pedigree Poultry Ltd.

In the three appeals before the Court of Appeal, the appellants asserted the trial judge erred in finding the appellants liable under the tort of misfeasance in public office. The appellants (defendants at trial) were a marketing board that regulated quota for chickens and two individual board directors, S. and L. The respondents (plaintiffs at trial) were a corporate producer with its own quota and an individual producer who had hired the corporation to manage his quota. Difficulties between the respondents and the board had long existed. In the late 1990s, quota in the industry expanded rapidly. In 1998, director S. wrote a letter that interfered with the corporate respondent's placement of chicks. The board excluded the individual respondent and the corporate respondent from an industry-wide allocation of expansion of quota, cancelled some of the existing quota held by the corporate respondent, and transferred the production unit from the individual respondent to the corporate respondent. The board suspected the individual producer was a sham producer and did not provide the necessary notice or hearing before taking these actions. The actions were overturned by an appeal committee which directed the board to follow a fair process regarding a potential sham producer. In 1999, the board again refused to provide a licence to the respondents and again, the appeal committee reminded the board that it needed to follow a fair process if it suspected a failure to comply with the regulations. In 2000, the appeal committee confirmed that the board's actions toward the respondents bordered on harassment. The respondents sued the appellants for misfeasance in public office. At trial, the respondents were awarded damages for loss of quota capital, loss of income, and punitive damages against director S. The board and individual appellants appealed. The Court of Appeal considered whether the trial judge erred: 1) in the application of the subjective element of the tort of misfeasance in public office; 2) by failing to explain how procedural fairness breaches amounted to deliberate unlawful conduct when the board and directors had an honest mistaken belief the producers were non-compliant with the regulations; 3) by finding the board directly liable for misfeasance in public office; 4) in the application of the statutory immunity in s. 27 of the 1991 *Agri-Food Act*, 5) by deciding the civil claim when a statutory appeal mechanism existed that created a complete and exclusive code to deal with the matter; 6) by deciding a civil action for damages that was a collateral attack on the board's decision; 7) by making factual findings that director S. personally engaged in conduct distinct from his board position; 8) by making factual findings that director L. personally engaged in conduct distinct from his board position; and 9) in the assessment of damages.

HELD: With the exception of setting aside the trial judge's finding of personal liability against director L. for losses from the June placement issue, the appeals were dismissed with costs to the respondents. The tort of misfeasance in public office is an intentional tort with four necessary elements: a public official deliberately engaged in unlawful conduct as a public officer; the public official was aware the conduct was unlawful and likely to harm the claimant; the public officer's unlawful actions were the cause of the plaintiff's injuries; and the injuries were compensable. The tort can be targeted malice or actions with the public officer's knowledge that they have no power to do the act and the act is likely to injure the plaintiff. Subjective awareness can be established through subjective recklessness or a conscious disregard for the lawfulness of the conduct and its harmful consequences. 1) The

trial judge ruled the plaintiffs needed to prove subjective recklessness or wilful blindness to an act or omission being unlawful and likely to harm the plaintiffs. The appellants argued that the plaintiffs needed to establish an element of bad faith or dishonesty. Mere inadvertence or negligence in the exercise of public obligations is not enough. Bad faith includes acts committed with intent to cause harm and acts so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. The trial judge decided the appellants had acted in bad faith. There was no error of law or palpable and overriding error of fact in the trial judge's finding of bad faith. 2) The appellants' argument of a defence of honest but mistaken belief that the respondent producers were non-compliant with regulations was rejected by the appeal court as an "ends justify the means" argument. The board had an obligation to provide the respondents with procedural fairness, regardless of whether the respondents had violated the regulatory scheme or a respondent was a sham producer. The board misled the respondents as to the real reason for cancelling quota and dealt with the sham producer issue without adhering to the statutory requirements. The board withheld quota because of personal dislike or to punish a squeaky wheel. The board's and directors' reasonable suspicion that one of the respondents was a sham producer was not a defence to not providing procedural fairness. The fact a public officer believed their cause was righteous does not mean they could ignore the law governing the exercise of their public functions. There was no error in the trial judge's factual findings or reasoning that permitted appellate court intervention. 3) The board argued that as a corporate entity, it could only be liable for the intentional tort if it was vicariously liable for the actions of its officers and directors, or in relation to policy created and implemented by the board. This argument misstated the governing law. A public authority can be directly liable for misfeasance in public office arising from the actions of its officers. The conduct of individual representatives of a public body may be imputed directly to the corporate entity. 4) Section 27 of the 1991 *Agri-Food Act* provides for broad-based statutory immunity for damages caused by the board's good faith actions, even if in error. The appellants argued that they had a genuine belief they were justified in acting as they did, and therefore, they acted in good faith and the trial judge erred by not extending immunity to the appellants. The appeal court confirmed that the trial judge did not err in the law or application of the concept of bad faith. Bad faith can encompass not only acts committed deliberately with intent to harm, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. The statutory immunity did not apply. 5) The board argued that the respondents ought to have brought their issues through the statutory appeal mechanism and the trial judge erred in law by deciding otherwise. The trial judge was correct in assessing the essential character and factual context of the dispute. The statutory appeal mechanism could not have awarded damages for misfeasance in public office. The essential character of the dispute was misuse of power by a public official, which is not governed by the statutory scheme. The trial judge implicitly concluded the power created by the legislation was not exclusive. The Legislature did not insert explicit exclusive jurisdiction language. The Legislature did not intend the appeal committee to be the exclusive arbiter of all things connected to chicken quota. 6) The appellants' argument that the civil action was a collateral attack on the board's decision was an entirely new argument raised for the first time on appeal. The argument was rejected on that basis. Also, the doctrine of collateral attack must be pleaded as a defence to the action. Furthermore, the civil action was to redress a deliberate wrong designed to harm and not to challenge the validity of a board action regarding allocation of expansion quota. 7) Director S. argued there was no basis for factual findings S. personally engaged in conduct distinct from his board position. There was no palpable and overriding error in the trial judge's credibility assessment. The trial judge did not overlook material evidence. The trial judge provided sufficient reasons. 8) Director L. argued there was no evidence to support the trial judge's finding that L. engaged in separate conduct from the Board. The trial judge correctly instructed himself that the fact the board committed misfeasance did not mean that every director who participated was personally liable. The trial judge found L. not to have personal animosity towards the respondent but found he was fully engaged and wilfully blind and reckless. The trial judge could have drawn other conclusions from the evidence, but this does not constitute a palpable and overriding error permitting appellate intervention. The trial judge, however, made no findings of fact to

support that the board or the individual director L. knew about the letter cancelling the June placement. The appeal was granted to the limited extent of setting aside personal liability regarding the corporate respondent's loss of its June placement. 9) The trial judge did not err in his assessment of damages. The weight the trial judge assigned to an expert witness was treated with deference on appeal. The appeal court rejected the argument that the expert witness had relied on averages from other provinces, as the opinion was based on a site visit and the circumstances of the particular operation. Although the damages were not pleaded precisely, the pleadings were sufficient, and the damages foreseeably flowed from the type of injury. Policy considerations for damages in a negligence action were not applicable to misfeasance in public office. Although quota awards are discretionary, a loss of chance approach was not appropriate because in these circumstances the board had awarded conditional quota to any other producer who expressed an interest. The appellants' arguments that quota could not be sold in 1998 were rejected because the arguments ignored how quota was valued in operation sales at that time, and further ignored the regulatory change that allowed quota to be sold in 2000. The trial judge's factual findings were available on the evidence. The appellants did not prove at trial that the respondents had failed to take reasonable measures to avoid losses. The trial judge had the discretion to award punitive damages and awarded damages against director S. based on the malicious conduct motivated by personal animosity.

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***Patel v Saskatchewan Health Authority*, 2021 SKCA 115**
While this is not a particularly recent decision, the digest was added to the caselaw database only recently.

Caldwell Whitmore Kalmakoff, 2021-08-31 (CA21115)

Administrative Law - Statutory Right of Appeal - Appeal
Administrative Law - Judicial Review - Appeal
Appeal - Fresh Evidence - Requirements
Appeal - Practice on Appeal - Mootness
Practice - Costs - Costs against Solicitor Personally

S.P., a medical doctor, appealed to the Court of Appeal (court) the decisions of a number of judges of the Court of Queen's Bench (chambers judges) dismissing proceedings and appeals he launched because, he argued, he had been ill-treated during the course of a hearing before the Practitioner Staff Appeals Tribunal (PSAT) convened pursuant to s. 15 of *The Practitioner Staff Appeals Regulations* (PSA Regulations) to consider whether his surgical privileges, which were suspended on June 11, 2016, should be reinstated. The court considered five separate appeals brought by S.P. In a number of these, he alleged by way of an originating notice, a notice of appeal and numerous applications that the chambers judges erred by making rulings contrary to his claim that the PSAT panel denied his right to procedural fairness by: declining to implement procedural and in-hearing requests made by him; declining to remove counsel for the respondent, the Saskatchewan Health Authority (SHA), for his alleged prosecutorial misconduct; declining to declare that the PSAT panel was improperly constituted; and dismissing his request that the chambers judge managing S.P.'s applications and sitting on some of them recuse himself for apprehension of bias in that the prosecutor had been a partner in the same law firm as the managing chambers judge. The remaining grounds of appeal concerned rulings by chambers judges with respect to a cost award; concerning S. P's standing to oppose an application by C.L., a plaintiff in a

malpractice suit against S.P.; to quash a summons issued by the PSTA panel compelling C.L. to appear before it; and that S.P. bring records with him. The court found as a fact that the PSAT panel from whose rulings S.P. sought judicial review and from which he had appealed to the Queen's Bench had recused itself on December 22, 2020.

HELD: The court dismissed all S.P.'s grounds of appeal but allowed his counsel's appeal from the costs order made personally payable by him. It first dealt with an application by S.P. to adduce fresh evidence in the form of lengthy affidavits, which the court said did not meet the test for admission as fresh evidence because, for the most part, they were not lead evidence, but consisted of argument, excerpts from proceedings before the PSAT panel, submissions, hearsay, and commentary about the proceedings intended to disparage the PSAT panel and its workings. The court went on to explain that the portions of the affidavits that could be said to be evidentiary could not "reasonably be expected to have affected the result." The court next turned to the grounds of appeal not including the cost award. It agreed with counsel for the SHA that recusal of the PSAT panel on December 22, 2020 rendered all of its rulings null and void so that any decisions rendered by the chambers judges with respect to these were moot, since the recusal "removed the substratum of the legal issues in play on the appeal such that there [was] no longer a live controversy." In reviewing judicial authority concerning the concept of mootness, the court placed primary importance on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (*Borowski*), and its two-step analysis, the first step being whether a "live controversy" continued to exist between the SHA and S.P., which the court stated was clearly not the case since the recusal of the panel rendered all of its rulings void so that any detrimental effect these may have had on S.P.'s right to procedural fairness was gone. The court went on to examine the second step outlined in Borowski: whether, in spite of the proceeding being moot, it should nonetheless consider the question of law "concerning the scope of appellate review permitted by s. 15 of the PSA Regulations." It chose to do so, appreciating that proceedings would be relaunched before the new PSAT panel, and it would be conducive to the ends of justice that the parties know the scope of appellate review of PSAT panel decisions. The court concluded, following a detailed interpretation of s. 15 using the modern approach to statutory interpretation codified in s. 2-10 of *The Legislation Act*, that this provision did not create a right to appeal to the Court of Queen's Bench from procedural or evidentiary decisions made during the hearing before the PSAT. The court reasoned that given the ordinary meaning of the word "decision," "interpreted in a way that is consistent with the scheme and object of the Act and Regulations and with the intention of the Legislature," the Legislature could not have intended to allow appeals from decisions other than final decisions of the panel. To do otherwise, the court said, would defeat the purpose of s. 15 to create an alternative to the judicial process, one that "was less cumbersome, less expensive, less formal and less delayed… resolv[ing] disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly…" (see: *Rasanen v Rosemount Instruments* (1994), 68 OAC 284). Lastly, the court considered the matter of the costs award against counsel for S.P., finding first that though the chambers judge had recused himself before he had made the cost award, he nonetheless retained jurisdiction to make it because he did not recuse himself based on his finding that he was tainted by an apprehension of bias according to law, but did so out of "an abundance of caution." The court then found that the chambers judge erred by imposing costs on S.P.'s lawyer personally, since he based the award only on matters of prolix material and unfocused submissions which did not amount to a "serious dereliction of duty." (With respect to lower court decisions in this matter, see: *Patel v Saskatchewan Health Authority* (10 October 2019) Regina QBG 953/2019 (Sask QB); *Patel v Saskatchewan Health Authority*, 2020 SKQB 194, and *Patel v Saskatchewan Health Authority*, 2019 SKQB 291.)

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***Patel v Saskatchewan Health Authority*, 2022 SKCA 114**

Caldwell, 2022-10-05 (CA22114)

Civil Procedure - Vexatious Litigant - Application for Leave to Commence Action
Court of Appeal - Leave to Appeal - *Rothmans* Criteria
Civil Procedure - *Court of Appeal Rules*, Rule 46.2(1)
Civil Procedure - *Queen's Bench Rules*, Rule 3-57(2)

S.P., who had been declared a vexatious litigant pursuant to Rule 46.2(1) of The Court of Appeal Rules (CA Rules) in 2021 SKCA 140 (designation decision), applied to the Court of Appeal (court) for leave to appeal an interlocutory decision of a judge of the Court of King's Bench (chambers judge) made pursuant to Rule 3-57 of *The Queen's Bench Rules* (QB Rules) in the course of S.P.'s originating application for judicial review of a decision dismissing all but one of the "forms of relief" sought by S.P. The chambers judge ruled that these had been rendered moot in previous proceedings and appeals or S.P. had been previously directed "to proceed through the PSAT [Practitioner Staff Appeals Tribunal] process to conclusion." (See: (27 September 2021) Regina, QBG 1385/2020, QBG 105/2020, QBG 827/2021 (Sask QB) (record fiat)). The court noted that the chambers judge decided that the one form of relief open to being judicially reviewed was whether the recusal decision of the PSAT itself was or was not a "final determination" subject to review. The court observed further that because of this finding, the chambers judge then limited the relevant documents forming part of the "record" to be filed by the PSAT before the chambers judge under Rule 3-57 of the QB Rules to those relevant to the matter of the reviewability of the recusal decision of the PSAT. The court was aware that this application for leave was another of a panoply of actions, proceedings, and appeals by S.P. in his ongoing attempt to circumvent a hearing before the PSAT convened pursuant to s. 15 of *The Practitioner Staff Appeals Regulations* in its determination as to whether S.P. should have his surgical privileges reinstated, and to proceed directly to the Court of Queen's Bench. The respondents, Saskatchewan Health Authority (SHA) and the PSAT, argued that because S.P. had been declared a vexatious litigant, to give full effect to that order, S.P. should be required to apply for leave to file his application for leave to appeal, a "double-leave requirement." SHA and PSAT also opposed the leave application in accordance with the merit criterion as elaborated in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 (*Rothmans*).
HELD: The court denied S.P.'s application for leave to appeal the record fiat. It first ruled against the respondents' position that to give S.P.'s vexatious litigant designation effect beyond that required by the application for leave to appeal itself, Rule 46.2(1) of the CA Rules should be interpreted to include a "double-leave requirement"; that S.J. should have the additional burden of obtaining leave to apply for leave to appeal. Though the court agreed, as decided in the jurisprudence, that an application for leave to appeal is a proceeding and in the designation decision, S.P. was prohibited "from commencing any proceedings" in the court without leave, to interpret the prohibition as requiring leave to apply for leave to appeal would amount to an absurdity since the application for leave to apply for leave to appeal would also be a proceeding, so that S.P. "could never get past the front door of the Registry because he would need permission to knock, which he could only obtain by entering." The court went on to say that the merit approach for leave to appeal explained in *Rothmans* accommodated the respondents' concern that because S.P. was a vexatious litigant the "grant of leave to file [the notice of appeal] should be made on a basis that differs from *Rothmans*." It pointed out that the first rung of the *Rothmans* ladder of merit by which to gauge whether the proposed appeal "warrants the attention of the court" is whether the proposed appeal is "*prima facie* frivolous or vexatious," that this concept includes notions of abuse of process, and where warranted will factor in "the existence of a vexatious litigant order or why an applicant was declared vexatious by this Court", and whether,

given his past history, S.P. was likely to prosecute the appeal abusively. As to S.P.'s proposed grounds of appeal, the court noted that, though numerous and individually prolix, the theme that emerged from them was that the chambers judge had erroneously whittled away at his claims for relief in his originating application to one, the reviewability of recusal decision of the PSAT itself, and thereby wrongly restricted the documents required to be produced by the PSAT under Rule 3-57(2) of the QB Rules. Following a close reading of S.P.'s proposed grounds of appeal, the record fiat, and previous appeals to the court by S.P., the court concluded that the chambers judge's finding to the effect that S.P. was attempting to exhume claims that were dead and buried was correct, and S.P.'s proposed application for leave to appeal, if granted, would "amount to approving an abuse of the court process."

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***Omorogbe v Saskatchewan Power Corporation*, 2022 SKCA 116**

Jackson Leurer Tholl, 2022-10-11 (CA22116)

Civil Procedure - Disclosure in Civil Litigation
Civil Procedure - Discovery - Documents
Civil Procedure - Discovery - Documents - Redaction from Otherwise Producible Document
Civil Procedure - Chambers Application - Disclosure of Information
Civil Procedure - *Queen's Bench Rules*, Rule 5-5, Rule 5-6
Employment Law - Wrongful Dismissal - Evidence
Practice - Discovery - Documents - Application for Production
Practice - Discovery - Documents - Redaction
Practice - Disclosure of Documents - Redaction

The Court of Appeal thoroughly canvassed permissible redactions from a document producible in a civil discovery process. The appellant had sued the respondent, his former employer, for wrongful dismissal. Shortly after the dismissal, the respondent received a bomb threat. The police asked the respondent to identify current and former employees who might be unhappy with the respondent. The respondent emailed the police the appellant's name and advised that another employee had come forward with concerns about the appellant. The police investigated and did not charge the appellant with an offence. During document discovery, the respondent provided the appellant a copy of the email to the police, with the employee's name redacted. The appellant applied for an unredacted copy of the email in accordance with *The Queen's Bench Rules*. The chambers judge dismissed the application, ruling the name of the individual was not relevant to the lawsuit. The appellant appealed. The Court of Appeal considered: 1) what is the correct test to determine when information may be redacted from a producible document; 2) what is the procedure to follow when a party has decided to assert that part of a producible document is properly redacted; 3) did the chambers judge identify and apply the correct test; and 4) applying the correct test, was the redaction proper?
HELD: The appeal court allowed the appeal and ordered the respondent to produce the unredacted email, with costs to the appellant. 1) Following a review of cases from across Canada, the court articulated a three-part test for Saskatchewan. A party seeking to justify a redaction from a producible document must show: the information removed from the document is not relevant to an issue in the action; a compelling reason for the redaction exists in the evidence or record; and the existing protections provided

for in the Rules or by supplemental measures are insufficient to protect the interest that is said to justify the redaction. The Rules contemplate production of the entire document and not part of a document. Rule 5-2 contemplates that producible documents may ultimately turn out to be admissible or irrelevant. Rule 5-4 requires documents produced through discovery be treated as confidential and limits the use of information or documents. Parties could agree or judges could order additional protective measures. Something more than irrelevance is required to justify redaction from a producible document. This test only applies to a redaction of non-privileged information in a producible document. 2) A party that has made a redaction from an otherwise producible document must list in its affidavit of documents the redacted copy and the unredacted original in accordance with Rule 5-6(1). The document in its redacted form should be listed in Schedule 1 of Form 5-6 (documents for which there is no objection to produce). The document in its unredacted form should be listed in Schedule 2 (documents for which there is an objection to produce). The party should then also set out in Schedule 2 the basis upon which it claims the right to withhold production of the unredacted document. A judge may manage disputes over redaction under Rule 5-12 and the court's inherent jurisdiction. 3) The chambers judge did not consider whether there was a compelling reason beyond irrelevance to justify the redaction. 4) This case involved a redaction of information from a single document, rather than a removal of certain documents from a collection of documents. The person named was not a police informer but a person who had come forward to the employer with unspecified concerns. The respondent did not establish a compelling reason to justify the redaction. Therefore, the redaction was not justified and the unredacted document must be produced.

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***Cameron v The Association of Professional Engineers and Geoscientists of Saskatchewan*, 2022 SKCA 118**

Caldwell Leurer Tholl, 2022-10-13 (CA22118)

Administrative Law - Judicial Review - Appeal
Administrative Law - Judicial Review - Standing
Administrative Law - Procedure
Professions and Occupations - Professional Regulation - Complainant
Statutes - Interpretation - *Engineering and Geoscience Professions Act*, Section 32

The appellant appealed the dismissal of his application for judicial review of a decision of the council of the Association of Professional Engineers and Geoscientists of Saskatchewan. Section 32 of *The Engineering and Geoscience Professions Act* allows a complainant to apply to the council to review an investigation committee's recommendation that no further action be taken in relation to a complaint. The appellant had applied for the review. The council had performed the review and decided the investigation committee had not considered all relevant evidence. The council ordered the investigation committee to reinvestigate the appellant's complaints. The investigation committee hired an outside consultant to assist in the second review, and again recommended no further action. The appellant requested to see the evidence before the investigation committee before formally requesting a second review by council. The council had denied the appellant's request for disclosure on materials relied on by the

association's investigation committee. The appellant applied for judicial review of the denial of production of documents. The chambers judge dismissed the application. The Court of Appeal considered whether the chambers judge erred by deciding the appellant either had no standing to apply for judicial review or, alternatively, had standing limited to issues of procedural fairness. HELD: The appeal was dismissed with costs to the respondent. The chambers judge did not err in deciding the appellant was precluded from seeking judicial review of the committee reports. Section 32 of the Act grants complainants limited standing in the process of investigating complaints and disciplining members. The complainant did not have a right to all materials before the investigation committee. The complainant is not a party in this professional discipline process. The only exception in the legislation is the complainant's ability to have an investigating committee's report reviewed by the council. Furthermore, in the absence of exceptional circumstances, courts do not interfere with ongoing administrative processes until they have been completed. No exceptional circumstances existed here.

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***R v C.H.*, 2022 SKQB 14**

Klatt, 2022-01-17 (QB22197) (Publication Ban lifted September 29, 2002)

Criminal Law - Sexual Assault
Criminal Law - Procedure - Admissibility of Evidence - Threshold Relevancy
Statutes - Interpretation - *Criminal Code*, Sections 276(1), 276(2), 278.93(2), 278.93(4)

Before his trial for sexual assault, C.H. brought an application pursuant to s. 276(2) of the *Criminal Code* (Code) to the judge of the Court of Queen's Bench before whom C.H.'s jury trial was to proceed (trial judge) for an order that he be permitted to cross-examine the complainant about sexual activity she may have had with another person, X, after and on the same night as the alleged sexual assault, for the stated purposes of providing an alternate explanation for her injuries, to establish the defence theory that the complainant had a motive to fabricate her evidence, and to provide context for the DNA report, which made reference to two contributors to the seminal fluid in the sample.
HELD: The trial judge granted C.H.'s application and allowed the matter to proceed to the admissibility hearing stage put in place by s. 278.94 of the Code. She first considered the statutory framework for admitting evidence of other sexual activity of the complainant at trial, recognizing that she was to embark on a two-step process as set out in ss. 278.93 and 278.94 of the Code. First, she had to determine whether the proposed evidence was "capable of being admissible," which she interpreted with the assistance of *R v Graham*, 2019 SKCA 63 (*Graham*) to mean that the proposed evidence needed to be potentially relevant to a fact in issue in the trial, or as stated in *Graham*, amounted to a "facial consideration" of relevance, i.e., whether the evidence "makes a fact in issue more or less likely to be true." The trial judge then referred to s. 276(1) of the Code, which states that "evidence of other sexual activity which supports an inference that a complainant is more likely to have consented to the sexual activity which forms the basis for the charge or is less worthy of belief" is "categorically inadmissible" and so can never be part of the weighing exercise of the stage two analysis. In her analysis of the admissibility of the proposed evidence at this first stage, she found that it was evidence capable of being admissible. It did not obviously go afoul of s. 276(1) of the Code and was facially relevant to the fact in issue of the cause of the injuries to the complainant, and though she stated she was less certain about the relevance of the evidence that C.H. claimed

assisted him in establishing the complainant had a motive to fabricate, or that the evidence of other sexual activity might lessen the probative value of the DNA evidence, *R v Ecker* (1995), 128 Sask R 161 (WL) (CA) required her to resolve her doubt in favour of C.H., and admit the evidence for those purposes as well.

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***R v C.H.*, 2022 SKQB 140**

Klatt, 2022-05-31 (QB22198) (Publication Ban lifted September 29, 2002)

Criminal Law - Assault - Sexual Assault
Criminal Law - Evidence - Admissibility - Voir Dire
Statutes - Interpretation - *Criminal Code*, Sections 276(1), 276(2), 278.94

In 2022 SKQB 14 (17 January 2022), the judge of the Court of Queen's Bench who was to preside at C.H.'s jury trial (trial judge) ruled that C.H. "had satisfied the statutory threshold requirements set out in s. 278.93(4) [of the *Criminal Code* (Code)] to proceed to a stage two hearing to determine if evidence… [was] admissible under s. 276(2)". She then proceeded to hold the admissibility voir dire prescribed by s. 278.93(4) of the Code. In doing so, she was alive to the statutory conditions for admissibility in ss. 276(1) and (2) of the Code: first, to be satisfied that C.H. did not seek to elicit the evidence for the prohibited purposes set out in s. 276(1), these being to support the erroneous belief that because of the complainant's other sexual activity, she was more likely to have consented to the sexual activity that formed the basis for the charge or that she was less worthy of belief; second, that the proposed evidence was relevant to an issue at trial; third, that it concerned a specific instance of sexual activity; and fourth, that it had "significant probative value that… [was] not substantially outweighed by the danger of prejudice to the proper administration of justice;" and in conducting this analysis she was to be guided by the non-exhaustive list of factors enumerated in s. 276(3) of the Code.
HELD: The trial judge ruled that the evidence sought to be adduced by C.H. was not admissible at trial. She first set out the proposed evidence C.H. wished to have admitted; that he wished to cross-examine the complainant and a male friend, X, about consensual vaginal intercourse between them a few hours after C.H. had allegedly forced the complainant to have anal intercourse with him and during which she claimed that he choked her and bit her on the neck. She recounted that C.H. wished to present this evidence for three reasons: to provide the jury with an alternate explanation as to how the complainant was injured on her neck; to help establish a motive for the complainant to have fabricated her allegation against C.H. because she regretted having sex with C.H. as she believed X would be less inclined to be her romantic partner; and to "give the trier of fact some context to the DNA report". She was satisfied the proposed evidence would not support the erroneous "twin myths" described in s. 276(1) of the Code, going on to conclude, however, that the proposed evidence was not relevant in the sense that it was not "integral" to the accused's ability to make full answer and defence (see: *R v Goldfinch*, 2019 SCC 38). She observed that C.H. admitted to causing a hickey to the complaint's neck and that the photos of the bruising she saw could not assist the Crown's case in showing otherwise, and that it was mere speculation on the part of C.H. that X had anything to do with the injury. Further, as to eliciting the evidence for the purpose of supporting the defence that the complainant had a motive to fabricate the sexual assault, she stated she could not understand how the evidence of consensual sexual intercourse by the complaint with X was integral to supporting a possible motivation to

fabricate, and was also of the view that there was a risk, as identified in *R v Gordon*, 2018 ONSC 2702, that this evidence would prejudice the jury against the complainant because it might lead it to an assumption, as "is often made that, if a girl or woman says she was sexually assaulted, it must be because she consented to sex that she was not supposed to have, got caught, and now wants to get back into the good graces of whomever's surveillance she is under" – in this case, her boyfriend. As to giving context to the DNA report, she noted that as consent was the main issue, identification was irrelevant, and so the evidence sought to be elicited was unnecessary to C.H. in making full answer and defence to the charge.

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***R v Morrison*, 2022 SKQB 194**

Popescul, 2022-08-24 (QB22192)

Criminal Law - Sentencing - First-Degree Murder
Criminal Law - Manslaughter - Sentencing
Criminal Law - Unlawful Confinement - Sentencing

Following a joint trial by judge and jury at the conclusion of which T.M. was found guilty of first-degree murder and unlawful confinement, and S.V. of manslaughter and unlawful confinement, the presiding judge turned to the task of imposing sentence. In reviewing the evidence heard by the jury, he emphasized in particular that A.G. was shot to death and E-L.E. was unlawfully confined during a planned home invasion by the two offenders and a third, S.V-P., to exact retribution on A.G. in a violent feud between two factions. T.M., S.V. and S.V-P. armed themselves with a rifle, ammunition, a taser, a bulletproof vest, fibreglass knuckles, masks, gloves, handcuffs and zip ties. S.V. was enticed into the endeavour by the promise of payment and loot. S.V. was S.V-P.'s father and was 44 years of age at the time of the offence; T.M. and S.V-P. were in their twenties. Upon breaking into A.G.'s house, the offenders came upon A.G. and E-L.E. sleeping in bed; S.P. punched A.G. with the fibreglass knuckles and S.V-P. tied E-L.E.'s hands behind her back with zip ties; and they were confined in the bedroom while the offenders ransacked the house, taking anything they thought was of value. A.G. was handcuffed and taken back to a vehicle; E-L.E. was left in the bedroom; in the vehicle, A.G. was blindfolded; he was driven into the country, forced to walk through deep snow under the escort of S.P. while T.M. carried the rifle; A.G. was brought to a bluff of trees and shot once in the head and neck area and died; and T.M.'s conviction for first degree murder indicated the jury found T.M. fired the rifle, and not S.V. The trial judge also reviewed the personal circumstances of T.M. and S.V., stating that sentencing T.M. left him with few options and, as a result, was procedurally straightforward. He went into more detail concerning the background of S.V., which was dominated by his Indigenous heritage and the adverse systemic effects of colonialism, manifesting themselves in S.V.'s significant *Gladue* factors, including family breakup, an unsettled and unstable childhood, his parents' separation, his placement in youth custody facilities and group homes, a year in residential school, alcohol and drug use, and criminal offending from an early age, primarily for the purpose of feeding his drug and alcohol addictions, which continued unabated into the present.
HELD: The trial judge sentenced T.M. to life in prison without eligibility for parole until after having served 25 years for the first-degree murder of A.G. and six years in prison to be served concurrently with the life sentence for the unlawful confinement of

E-L.E. He sentenced S.V. to 18 years for manslaughter and six years for the unlawful confinement of E-L.E. to be served concurrently. He also deducted remand time and made all necessary ancillary orders. The trial judge's analysis was directed primarily at fashioning a sentence for S.V. for the manslaughter offence. After instructing himself on the purposes and principles of sentencing contained in ss. 718 to 718.3(4), he determined that a proportionate sentence for S.V. for the offence of manslaughter should be determined with the primary purpose in mind of denouncing and deterring this "horrific" type of offending by imposing a term of incarceration which took into account the "variable" sentencing range for manslaughter of between two and 14 years in prison, the maximum allowable sentence of life in prison, the precedential value of *R v Keepness*, 2010 SKCA 69, the *Gladue* factors that contextualized S.V.'s offending, his moral blameworthiness, and the many aggravating factors related to his offences, concluding that a just sentence was one that exceeded 14 years' incarceration but was less than life in prison to take into account "the unfortunate circumstances of S.V., and the *Gladue* factors that pertain[ed] to him."

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***Jackson v Jackson*, 2022 SKKB 207**

Megaw, 2022-09-13 (KB22200)

Family Law - Contempt
Family Law - Custody and Access - Contempt
Civil Procedure - Contempt of Court - Grounds - Disobedience of Court Order
Civil Procedure - *Queen's Bench Rules*, Rule 11-26
Statutes - Interpretation - *Children's Law Act, 2020*, Section 44

The respondent (mother) applied to have the petitioner (father) cited for contempt of court and to have him sentenced to a term of imprisonment and a fine for his contemptuous actions. The parties had one seven-year-old child together and had been separated for approximately six years. The parents had litigated continually since separation. Parenting arrangements were decided by court orders. The mother was the primary parent with final decision-making for all matters involving the child and the father had prescribed parenting times. In November 2021, the father refused to return the child to the mother at the end of a prescribed parenting time. The father removed the child from school. The mother applied to court for an order requiring the return of the child with police assistance. The father opposed the application. The application was granted. The father appealed. The stay of proceedings pending appeal was lifted by a Court of Appeal chambers judge, who commented that if the father disagreed with the COVID-19 vaccination decision of the mother, the proper route was to apply to court for a variation of existing orders. The father made no such application. The father continued to refuse to return the child to the mother and refused to allow the child to communicate with the mother. The mother applied to the court for a variation. The court ordered supervision of the father's parenting time. The father continued to refuse to comply with the orders or return the child to the mother until he was arrested in British Columbia in late February 2022. The mother and child were reunited. The father was arrested and remained on remand at the time of hearing. The court considered: 1) should the hearing be adjourned; 2) did the father's actions constitute contempt of court orders; and 3) what was the appropriate penalty?
HELD: The father acted in contempt of the existing court orders without any reasonable excuse. The court sentenced the father to

60 days' imprisonment for such contempt, with $2,000 in costs payable to the mother. 1) The court refused the father's adjournment request after submissions were made but before a decision was rendered. The father had filed affidavit material and had been represented by a series of lawyers. He had been provided an additional month to retain counsel and had not done so. The complaints about bias of the presiding judge were not considered at the late stage in the proceedings. Contempt of court concerns must be addressed expeditiously. 2) The father admitted the orders requiring him to return the child were in force and effect. He was aware of the orders. He did not raise any procedural issues regarding the contempt application. He responded to and participated fully in the hearing. The father argued his failure to obey the court orders was justified because of his concern the mother would have the child vaccinated for the COVID-19 virus. His affidavit illustrated the father's view that the court would decide against him in a variation order, and his view that he was entitled to take self-help steps to avoid the vaccination of the child. The father knew the proper course to follow to seek a variation order. He took no reasonable steps to comply with the court order. The court cannot allow citizens to comply with orders they like and not comply with orders they do not like. Contempt of court powers exist as a mechanism to ensure compliance with valid orders and to ensure respect for the rule of law. In family law, contempt powers are rarely used. 3) The mother asked for the maximum term set out in *The Children's Law Act, 2020*. The father gave no indication of an intention to follow court orders in the future. He expressed no remorse. He shouted at the judge. He filed specious preliminary applications. His actions were extreme, deliberate, and deleterious to the child's best interests. A 60-day penalty at the higher end of the range, but not at the top of the range, was warranted. No fine was ordered in recognition of the father's apparent difficult financial circumstances.

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***L.D.S. v D.F.*, 2022 SKKB 226**

Drennan, 2022-10-14 (KB22213)

Family Law - Parenting Time - Primary Residence
Family Law - Interim Parenting Order - Variation

D.F., the father of two children (children) whose ages are redacted in the judgment, applied to a judge of the Court of King's Bench (chambers judge) to vary an interim consent order dated August 12, 2022 giving the children's mother, L.D.S., primary residence of the children and D.F. access to the children every second weekend and half of holiday time. It was not in issue that the consent order reflected the custodial status quo since the separation of the parties in June 2021. D.F. claimed that L.D.S. voluntarily surrendered the care of the children to him on September 13, 2022, and that the circumstances which led her to do so amounted to a material change in circumstances since the making of the interim consent order that justified the variation. The chambers judge was required to make findings of fact from the affidavit evidence and the court record: D.F. had been placed on a peace bond recognizance that he have no contact with L.D.S. flowing from a charge of assault on her in June, 2021; as a result, T., the spouse of L.D.S.'s child care provider was named as an intermediary for purposes of exchanging the children; D.F. knew little about L.D.S.'s circumstances, and relied on what he was told by T.; T. swore an affidavit that painted a picture of L.D.S. not managing very well with the children, struggling with her finances, and being mentally and emotionally unstable; L.D.S. gave D.F. a letter dated September 13, 2022 which stated that "D.F. will provide care for our children for the school year in [redacted] SK 2022. #[redacted],

SK"; D.F. had primary care of the children for seven days when L.D.S. picked them up from school without the consent of D.F. and returned them to their usual residence with her; an ex parte order returned them to D.F.; L.D.S. adduced that she wrote the letter and gave up the care of the children to D.F. because she was in arrears of rent and believed that she and the children were facing imminent eviction; she also deposed that L.D.S. was in arrears of child support, that she relied on the payments to pay the rent, that the payments D.F. did make were through T.'s bank account and appeared to have been "skimmed" by T.; she also said T. had helped her write the letter; soon after giving up the children due to what she believed was her impending eviction, L.D.S. obtained legal advice and realized she was not in danger of being evicted, and sought return of the children on the strength of the interim consent order.
HELD: The chambers judge denied D.F.'s application to vary the interim consent order. With respect to the evidence, she found that L.D.S. was honestly mistaken about the looming eviction; that T.'s evidence was not reliable as it spoke in generalities, and that T. was not an objective witness, as he was using the child support payments; D.F. was in arrears of child support and was relying on L.S.D.'s impecuniosity as a factor in the variation application; and at the time the interim consent order was entered, it was known to the parties and the chambers judge who made the order that L.D.S.'s means were modest and would continue to be for the foreseeable future. The court stated that the situation at hand did not amount to a material change in circumstances that would permit a variation of the interim consent order, and in fact was no variation at all because nothing in the life of the children had changed except for a brief hiatus in the care of D.F. due to her misunderstanding of her legal rights, which she quickly sought to correct. In coming to this conclusion, the chambers judge referenced a line of cases flowing from the seminal case *Guenther v Guenther* (1999), 181 Sask R 83 (QB) including *Gebert v Wilson*, 2015 SKCA 139.

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***Kelly Panteluk Construction Ltd. v Lloyd's Underwriters*, 2022 SKKB 227**

Layh, 2022-10-17 (KB22214)

Civil Procedure - *Queen's Bench Rules*, Rule 7-5(1)
Contracts - Insurance Contracts
Insurance - Contract - Interpretation
Insurance - Duty to Defend

The plaintiff, a construction company, sought summary judgment against the defendant, an insurer, for a declaration that the insurer has a duty to defend the plaintiff in an action CP Rail commenced against the plaintiff for damages of $41 million resulting from the collapse of an earth embankment for a railway crossing. There was no material conflict in the evidence. The parties agreed summary judgment was appropriate to resolve the matter. The court considered: did the insurance policy held by the plaintiff obligate the insurer to defend the action initiated by CP Rail?
HELD: The insurer did not have a duty to defend. CP Rail sought damages of $41 million arising from the failure of an earth embankment that collapsed during the construction of a 31-kilometre rail spur extension near Moose Jaw. If the allegations in the claim were accepted as true and if they described losses or damages that possibly fell within the coverage of the policy, then the insurer owed a duty to defend the construction company against the claim. The parties agreed that CP Rail's claim was within the

initial coverage under the policy because the failure of the embankment was damage done to tangible property. The insurer had the onus to establish whether an exception in the policy applied. The construction company purchased a wrap-up course of construction liability insurance policy and not a builders' all-risk course of construction insurance policy. A wrap-up policy only provides coverage from lawsuits for property damage that contractors have caused third parties. A builders' all-risk course of construction insurance policy provides to site owners the assurance that a contractor will have the funds to rebuild any work that they damage and to the contractor protection against the crippling cost of starting afresh. The court did not rely on the general type of insurance but looked at the specific wording of the policy exceptions. Exclusion clause 8(c)(iii) excluded claims alleging "damage to… that particular part of any property… the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by… the Insured." The court rejected the argument that "any particular part of any property" excluded only the last lift of fill placed on the embankment. The CP Rail claim did not allege that it was only the last lift of fill that caused the embankment collapse. Dividing indistinguishable repetitive works into separate component parts defied a reasonable interpretation of the exclusion clause. Exclusion 8(c)(i) excluded insurance coverage if the construction company was performing operations "at the time of the damage" to property. The CP Rail claim stated that CP personnel arrived at approximately 7:00 am and discovered that the embankment had dropped by several metres and continued to drop through the day. The construction company argued they were not performing operations at the time the damage started and therefore the damage was not excluded. The court declined to interpret the exclusion so narrowly that it applied only at the instant an insured is intentionally touching the property. The exclusions covered work performed on behalf of the construction company, and therefore, the court rejected the construction company's argument that work performed by others on the site was not excluded. Endorsement 22 stated that the policy was amended in that Exclusion 8 did not apply to property damage to the existing surrounding property, not forming part of the project works. The foundation soil was integral to the project works and was not "surrounding property". Thus, the endorsement did not bring the claim back into coverage. The insurance policy excluded the type of loss alleged in the claim.

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