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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***Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16**

Barrington-Foote Tholl Kalmakoff, 2023-01-27 (CA23016)

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Practice - Pleadings - Statement of Claim - Application to Strike - No Reasonable Cause of Action
Torts - Defamation

The appellant rancher appealed an order striking his defamation claim against the respondent Water Security Agency for disclosing no reasonable cause of action. The claim alleged employees of the respondent agency had written and said words to the effect he was a violent person or had alluded to violence against the agency's officials. The appellant had answered two demands for particulars. The chambers judge concluded communication to the appellant's lawyer did not constitute communication to another person, and the statement of claim and

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particulars did not give the agency notice of the case to meet. The Court of Appeal considered: 1) what is the legal test on an application to strike a statement of claim for disclosing no reasonable claim in defamation; 2) did the chambers judge err in finding the statement of claim and particulars did not disclose a reasonable cause of action; 3) did the chambers judge err by failing to order the statement of claim be amended; and 4) did the chambers judge err by failing to strike the claim pursuant to Rule 7-9(b) or (e)?
HELD: The appeal was allowed, with costs in the appellate court only. 1) An application to strike pursuant to Rule 7-9(2)(a) requires the court to assume the plaintiff can prove everything alleged in the claim; strike claims only in plain and obvious cases; consider the claim, particulars and any document referred to in the claim; and consider whether the facts are sufficient to establish the required legal elements for the cause of action. Where feasible, a plaintiff should be given the opportunity to amend pleadings to correct deficiencies before the pleadings are struck, even where the plaintiff has not applied to amend. In a defamation claim, the allegedly defamatory words do not need to be produced verbatim but must be sufficient to identify the allegedly defamatory language and its publication enough to prepare a defence. 2) The particulars provided alleged agency employees who visited the plaintiff's ranch on a specific date said, to each other and to supervisors, words to the effect that the plaintiff was a dangerous person. Exact words were not identified, but the nature of the communications was sufficiently clear. This aspect of the claim ought not to have been struck. Allegations against other unknown persons were not sufficiently specific and were properly struck. 3) The chambers judge was obliged to take account of evidence filed by the respondent agency that disclosed sufficient particulars of missing dates, identities and words when considering whether the plaintiff could amend the claim to cure the defects. Even if the claim had been deficient, the judge ought to have ordered it be struck only if the defendant failed to amend the claim to cure the defect. Given the appellate court found the claim was sufficient, no amendment was now necessary. 4) Rule 7-9(2)(b) provides that a pleading may be struck if it is scandalous, frivolous or vexatious. Rule 7-9(2)(e) provides that it may be struck if it is otherwise an abuse of process. The claim could not be struck for either reason. The agency asserted it had not acted in malice. The court could not decide whether there was malice without making credibility determinations it could not make based on conflicting affidavits.

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***Bouvier v Bouvier*, 2023 SKCA 17**

Richards Jackson Caldwell, 2023-01-31 (CA23017)

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Practice - Judgments and Orders - *Res Judicata* - Issue Estoppel

The appellant appealed an order striking her application for compensation for lost income from eight quarters of farmland that remained in her ex-husband's possession while he pursued an appeal that was unsuccessful. The chambers judge struck her claim on the basis that the issue of post-order income was res judicata. The Court of Appeal considered whether the chambers judge erred by deciding the issue of post-order income had been before the Court of Appeal in the previous appeal and was *res judicata*.
HELD: The appeal was allowed. The previous appeal had rejected the arguments that the ex-husband had not received adequate notice of the application for judgment, that there was insufficient evidence to deal with property division, and that it was an error to divide family property unequally. The previous appeal addressed whether there was an error in ordering transfer of ownership to the land, and the question of post-order income was not before the court in the previous appeal. The issue estoppel form of *res judicata* did not apply because the income question had not been before the court in the previous appeal. The chambers judge wrote that the post-order income issue could and should have been raised in the previous appeal. The doctrine of res judicata can extend into the realm of issues that could have and should have been raised in an earlier proceeding through cause of action estoppel. Neither issue estoppel nor cause of action estoppel applied in this case because the claim for post-order income only became available after the property division order was made. The Court of Appeal does not decide new claims or new causes of action arising between parties after the decision under appeal was delivered.

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***Gaunce v Gaunce*, 2023 SKCA 18**

Caldwell Schwann McCreary, 2023-02-09 (CA23018)

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Family Law - Divorce - Division of Family Property
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The appellant appealed an order of retroactive child and spousal support under the *Divorce Act* and division of family property under *The Family Property Act*. The appellant and respondent married, had one child, and separated after ten years. The parties met during an RCMP

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ride-along. The appellant was and is an RCMP officer. The respondent was interested in applying for the RCMP but agreed not to pursue a policing career during their relationship. The respondent earned significantly less as a hairstylist during the marriage. The Court of Appeal considered whether the trial judge erred: 1) in the division of family property; 2) in ordering the duration and amount of spousal support; 3) in ordering retroactive support.
HELD: The appeal was granted in part, the ongoing spousal support amount and duration were varied, and the orders for retroactive support were set aside. The court ordered fixed costs of the appeal only to the appellant, and costs in a fresh evidence application to the respondent. 1) The basic procedure for distribution of family property is to identify and value the property owned by the spouses at the time of application, determine whether any of the property or its value is exempt from distribution, determine whether any property ought not be distributed equally and decide how to distribute the property. The trial judge's approach was not equitable. It was necessary to value the family property and associated debts. The appellant had been ordered to make an equalization payment more than half the net value of the family property and to provide spousal support in lieu of an equalization payment. The appeal court was able to identify, value and divide the family property on appeal. Family property was the family home, vehicles, bank accounts, pension plans, and household goods. Liabilities included mortgages, debts to third parties, bank loans and credit cards. The trial judge erred by not accounting for the loan the appellant owed his parents. The value of family property net of debt was $213,685. The appellant's pension, included in family property, was valued at $291,831. To order the appellant to pay a lump-sum cash equalization payment would be financially ruinous. Property division was effected by division of the appellant's pension at source so the respondent received 36.6 percent of its value at valuation date. Each party would otherwise retain the family property in their possession and the respondent was ordered to vacate the family home, which remained in the appellant's name. 2) The appellant argued the trial judge should have found the respondent did not require spousal support and he did not have means to pay it because of his responsibility for the family debts. There was no basis for appellate intervention in the trial judge's finding the respondent was entitled to spousal support. The trial judge had misapprehended the economic consequences of the family property division, and improperly accounted for the consequences of property division in the spousal support award for nine years. Spousal support is awarded to provide compensation when a relationship has economically benefited one spouse at the expense of the other and to relieve the financial need that a spouse has experienced after a relationship has ended. Section 15.2 of the *Divorce Act* specifies the considerations and purposes of a support order. Despite limited evidence, the roles in the marriage resulted in the respondent experiencing economic hardship from the end of the marriage. The respondent had rejoined the workforce and both parties had since re-partnered. After six years, the respondent had not yet achieved economic self-sufficiency. Spousal support was ordered for seven and one-half years, starting from the date of the pre-trial interim order. Fresh evidence was not admitted under Rule 59 of *The Court of Appeal Rules*.

Landlord and Tenant - Commercial Lease - Breach - Forfeiture

Municipal Law - Bylaws - Enforcement

Practice - Judgments and Orders - *Res Judicata* - Issue Estoppel

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Wills and Estates - Costs - Solicitor and Client Costs

After the respondent had testified at trial, the appellant became aware she was pregnant with her new partner who denied being in a spousal relationship. The appellant applied to reopen the evidence, and the trial judge declined to reopen the trial or review the spousal support order. Appeal courts should not interfere with trial judge discretion absent an error of law. The trial judge was correct that the relationship between the respondent and her new partner might create a new circumstance that would warrant re-examining the amount or duration of spousal support. The appellant also was due to receive backpay that would affect his income for 2020. The parties could make an application if they could not agree on a valuation. The court added a spousal support review in no later than 18 months. 3) Retroactive awards of child support should be based on a holistic view and consider the reason for the delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child, and whether a retroactive award creates hardship. The trial judge's reasons did not explain why the appellant was ordered to pay $3000 in retroactive child support. The evidence at trial established the appellant had contributed more than the support amount required by the *Guidelines* during the relevant time. The implicit finding that the appellant engaged in blameworthy conduct was unsustainable. Further, the trial judge decided a lump sum award would likely create hardship. There was no basis for the retroactive order. The trial judge did not explain the reasons for the $17,000 retroactive spousal support order. A spouse has no general legal obligation to provide for a separated spouse's legal interests, unlike the interests of a child. The needs of the recipient, conduct of the payor, reasons for delay in seeking support and hardship on the payor are relevant considerations. The appellant had paid the major household bills before the interim order. There was no formal claim for spousal support from date of separation to date of petition. A lackadaisical approach to bill payments was not blameworthy conduct where there was no suggestion of deceit, concealment of assets or failure to make appropriate disclosures. There was no evidence the respondent had unmet needs or accumulated debts during the relevant period. There was no entitlement to retroactive spousal support, and the court set that award aside.

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***6517633 Canada Ltd. v Gibson Creek Farms Ltd.*, 2023 SKCA 19**

Leurer, 2023-02-01 (CA23019)

Contract - Breach of Contract - Damages
Landlord and Tenant - Action for Possession
Landlord and Tenant - Appeal - Damages
Landlord and Tenant - Commercial Lease - Breach - Forfeiture

Cases by Name

The appellant landlord appealed an order dismissing its application for a writ of possession during the first year of a two-year farmland lease. The appellant had demanded the tenants clean up grain bins and apply glyphosate or vacate the property. The tenants received professional advice against applying herbicide at that time and refused to agree to terminate the lease prematurely or vacate the land. The chambers judge decided the landlord had attempted to terminate the lease prematurely and failed to provide sufficient details to the tenants, and nothing justified the grant of a writ of possession. The chambers judge ordered the landlord pay solicitor client costs to the tenants. Section 55 of *The Landlord and Tenant Act* at the time the appeal was launched provided for an appeal to a judge of the Court of Appeal sitting in chambers. The appellate court chambers judge considered whether the chambers judge erred: 1) in finding the landlord had provided inadequate notice of alleged breaches of the lease to the tenants; 2) by deciding the application based on affidavit evidence alone; and 3) by ordering the landlord pay solicitor and client costs.
HELD: The appeal of the order refusing a writ of possession was dismissed. The appeal of solicitor and client costs was granted and substituted with costs taxed in the usual way. 1) Section 9 of *The Landlord and Tenant Act* provides a landlord can repossess if a default of the lease continues for two calendar months. Section 10 of the Act limits repossession unless the tenants have notice of the particular breaches and reasonable time to cure the breach and avoid the forfeiture. There was no error in the finding the landlord had provided inadequate notice to the tenants of their alleged breaches of the lease. The notice alleging failure to farm the land in a “proper and husband like manner” was vague and did not permit the tenants to remedy any particular breach. Any possible breach related to cleaning bins was cured. Without analyzing whether the glyphosate application was a requirement of the lease, the timing of the landlord’s notice deprived the tenants of the ability to cure the breach, and thus the notice was inadequate. 2) There was no error in deciding on affidavit evidence alone. The Act contemplated a summary proceeding. It was unclear whether the objection to the issue being decided on affidavit evidence was a new issue raised on appeal. 3) Trial courts have broad discretion over costs. Solicitor and client costs must not be awarded casually and never without reasons to identify the conduct warranting such costs. In the absence of such reasons, the appellate judge considered the matter afresh. Solicitor and client costs are rare, exceptional, awarded to censure scandalous, outrageous, reprehensible conduct in the litigation, or in exceptional cases to provide the other party complete indemnification of costs reasonably incurred. The landlord’s application was misconceived, but was not scandalous, outrageous or reprehensible. Within the litigation, the landlord did no more than bring forward arguments the judge did not accept. Solicitor and client costs were set aside and instead, costs were taxed in the usual way. In another case, tenants may be able to claim legal expenses as damages from the landlord’s breach of the tenants’ right to quiet possession, but that was not pleaded here.

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***R v Burnouf*, 2023 SKCA 21**

Caldwell Tholl Kalmakoff, 2023-02-08 (CA23021)

Criminal Law - Sentencing - Dangerous Offender - Appeal
Criminal Law - Sentencing - Dangerous Offender - Long-term Offender
Criminal Law - Sentencing - *Gladue* Factors - Appeal
Criminal Law - Sentencing - *Criminal Code*, Section 719(3)

The appellant received a dangerous offender designation in 2016, and was sentenced to a determinate period of incarceration followed by a long-term supervision order (LTSO). He pleaded guilty to a second breach of the LTSO for consuming intoxicants and was sentenced to 18 months of incarceration, minus credit for pre-sentence custody calculated on a 1 to 1 basis. The appellant appealed the sentence on the grounds that the sentencing judge erred by: 1) failing to consider *Gladue* factors; 2) not granting 1.5 to 1 credit for time he spent in custody before sentencing; and 3) not taking into account a separate period the appellant spent in custody arising out of an unrelated charge. The Crown conceded that the sentencing judge failed to consider *Gladue* factors. HELD: The appellant was granted leave to appeal, but the sentence appeal was dismissed. 1) Because the sentencing judge did not consider *Gladue* factors, the Court of Appeal (court) was required to "sentence the appellant afresh, without deference to the sentencing judge" (*R v Lacasse*, 2015 SCC 64; *R v Courtoreille*, 2022 SKCA 110). The court nevertheless found that the sentence of 18 months imposed by the sentencing judge was appropriate in the circumstances. Compliance with conditions was "abysmal" and the circumstances warranted a meaningful sentence. 2) Credit for time in custody on a 1 to 1 basis was appropriate (*R v Bourdon*, 2012 ONCA 256). 3) The appellant was not entitled to credit for three months spent on remand for an unrelated charge. Under s. 719(3) of the *Criminal Code*, for a court to take it into account and grant credit, the time spent in custody must be as a result of the offence, or sufficiently linked to the offence for which the offender is being sentenced in order for credit to be granted.

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***Zhang v Wehner*, 2023 SKCA 22**

Leurer Tholl Drennan, 2023-02-08 (CA23022)

Civil Procedure - Limitation Period
Statutes - Interpretation - *Limitations Act*, Section 16(1)(b)

The plaintiff filed a statement of claim in the Court of Queen's Bench alleging that two of the defendants restrained him while the other defendant assaulted and battered him. The plaintiff was in a relationship with one of the defendants and lived with her at the

time of the alleged incident. The claim was dismissed by the chambers judge on the basis that it was issued more than two years after the date on which the events were alleged to have occurred. The plaintiff appealed on the grounds that: 1) the chambers judge failed to consider the application of s. 16(1)(b) of *The Limitations Act*, SS 2004, c L-16.1 (*The Limitations Act*); and 2) that he was unfamiliar with court processes and that the COVID-19 pandemic caused delays that should have been considered.

HELD: The Court of Appeal (court) allowed the appeal, set aside the chambers decision, and remitted the matter to the Court of King's Bench. It was not plain and obvious that the plaintiff's claim could be dismissed or struck based on the expiry of a limitation period. 1) While in most circumstances, an action for damages based on assault and battery must be commenced within two years from the day on which the claim is discovered under s. 5 of *The Limitations Act*, there is an exception to this general rule found in s. 16. Under s. 16(1)(b) there are two separate situations where no limitation period applies: one where "one of the parties who caused the injury was living with the claimant in an intimate and personal relationship" and the other when "the claimant was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury." The plaintiff argued that both exceptions could apply to him. The court found that the chambers judge erred by failing to consider the application of s. 16(1)(b) of *The Limitations Act* and conducted a statutory analysis of the section to determine whether the phrase "one of the parties who caused the injury" would apply to the other two defendants who were not in a relationship of dependence with the plaintiff. The court found that the use of broad language in the section removed the benefit of a limitation period for any party who directly participated in the actual perpetration of violence. The court concluded that "when a defendant actively participates in a joint physical attack on a plaintiff, at a time when the plaintiff is in a relationship with one of the other defendants as described in s. 16(1)(b)(i) or s. 16(1)(b)(ii), and the physical encounter causes the injuries that are the subject of the claim, there is no limitation period applicable to a claim for trespass to the person, assault, or battery as against the defendants who acted in concert." 2) The court did not give effect to the plaintiff's argument that the pandemic or confusion about the process should extend the limitation period.

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***Ghremida v Elgahwas*, 2023 SKCA 23**

Leurer Tholl Drennan, 2023-02-09 (CA23023)

Family Law - Child Support - Appeal
Family Law - Costs

The appellant and respondent addressed the division of family property, family support, parenting, and child support after a trial at the Court of Queen's Bench (*Elgahwas v Ghremida*, 2020 SKQB 311). The appellant appealed the amount of child support the trial judge ordered him to pay. The trial judge set the amount according to the *Federal Child Support Guidelines*, SOR/97-175 (*Guidelines*). The issue on appeal was whether child support should have been calculated on some other basis, given the age of the children and the appellant's high income. Specifically, the Court of Appeal (court) considered: 1) whether the trial judge erred by failing to reduce the amount of child support payable to the respondent to reflect that the appellant had been directly paying many of

the children's expenses; and 2) what order should be made given that the appellant failed to pay the full amount of child support ordered pending the outcome of the appeal.
HELD: The Court of Appeal dismissed the appellant's appeal and ordered costs. 1) The trial judge did not err by failing to reduce the table amount of child support according to what the appellant was already paying directly to the children. The trial judge explained he was satisfied that support should be paid to the two adult children attending post-secondary education, because the parents had no expectation that these adult children would provide for their own living expenses or post-secondary education costs. While the appellant spent significant amounts on the adult children, this was his own choice, and the trial judge found that the *Guidelines* support remained appropriate. After the parties' separation, the appellant continued to pay the children's expenses directly, providing the children with luxury vehicles and credit cards which they used as they saw fit. The court interpreted the appellant's argument as not raising a question about the quantum of child support but, rather, a question of to whom child support should be paid. The court rejected the argument that the trial judge erred by not ordering direct payment of some expenses to the children. The appellant never asked the trial judge to make such an order, and the court indicated that it is "generally loath to entertain a wholly new argument on appeal." The appellant did not explain why the support ordered at trial was inappropriate, or what the children's expenses actually were. The *Guidelines* amounts can only be increased or reduced under s. 4 if the party seeking the change has rebutted the presumption that the table amount is appropriate. There must be a specific reason for displacing the *Guidelines* figure. Here, the court's starting point was that the table amounts were appropriate given that the parents' approach had been one of an "open cheque book". Therefore, it was necessary for the appellant to present a budget to displace the presumption that table support was appropriate. There was no error in the trial judge's conclusion that the presumption that support in the amount fixed by the *Guidelines'* tables had not been displaced. 2) Pending the hearing of the appeal, the appellant refused to pay spousal support and child support in the full amounts that were ordered under the trial decision. He did not seek a stay or partial stay of the ordered support pending the appeal. By the time of the appeal hearing, the appellant was in arrears by over $150,000 despite steps taken by the respondent to enforce her support entitlements. The appellant did not contest that he had the means to pay the ordered amount of support. The court found that the appellant's conduct involved a "blatant disregard for an existing and enforceable court order" and the kind of "reprehensible, scandalous or outrageous conduct" that could trigger an award of solicitor-client costs. Here, the court ordered costs to be paid to the respondent in the amount of $17,500.

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***Christianson v Richardson*, 2022 SKKB 269**

Mills, 2022-12-13 (KB22256)

Civil Procedure - Questioning - Correcting an Answer
Civil Procedure - *Queen's Bench Rules*, Rule 5-31

The plaintiff sought relief in the form of a declaration that she was the beneficial owner of a quarter of farmland. The two defendants, who were registered owners along with the plaintiff, applied to a chambers judge of the King's Bench to strike out the affidavit of the plaintiff, sworn pursuant to Rule 5-31(1) of *The Queen's Bench Rules*, to correct what the plaintiff believed was an incorrect answer

provided by her at a questioning in the action. The chambers judge was to determine whether the plaintiff had met the requirement that her affidavit to correct the information she provided at the questioning was made and served on the defendants "as soon as… practicable after [she realized] that the answer was… misleading."

HELD: The chambers judge allowed the application and struck the affidavit. He found that the plaintiff was aware before the completion of the questioning on April 21, 2021 that she unintentionally answered a question to her detriment to the effect that it was her intention to distribute the proceeds of the sale of farmland to herself and the defendants equally, and that, though her counsel had an opportunity to ask her questions in rebuttal to "correct" her answer, he had failed to do so. The chambers judge then noted that the affidavit was sworn on July 5, 2021 but went unserved until April 27, 2022. He then went on to describe what he understood to be the purpose of the rule, being "to reduce or, if not, eliminate the prejudice occurring as a result of the incorrect answer" that would accrue the longer the answer went uncorrected. In this case, he concluded, the passage of time had made it more likely that the money and time expended by the defendants would be wasted if they could not rely on the answer the plaintiff had provided at the questioning to advance their defence.

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***F.A.C., Re*, 2022 SKKB 281**

Goebel, 2022-12-28 (KB22269)

Adoption - Dispensing with Consent of Birth Parent
Adoption - Dispensing with Consent of Birth Parent - Best Interests of Child
Adoption - Proof of Service of Birth Parent
Statutes - Interpretation - *Adoption Act, 1988*, Section 5, Section 23(2)

The child, F.A.C., when three months old in April 2019, was placed by the Minister of Social Services (MSS) "due to protection concerns" with the applicant, S.M., the birth mother's cousin, and with his maternal aunt, C.B. Since that time, they had taken care of him well. His birth parents readily acknowledged that they were unable to care for him due to adverse personal circumstances. On June 27, 2019, the birth parents signed a document on MSS letterhead which stated that the placement would last "until the child reaches 18 years of age." On September 18, 2021, the birth mother signed a document prepared by C.B., which read in part, that "I consent to agree that [F.A.C.] be adopted by my cousin [S.B.] until he reaches his 18th birthday" and in September, 2021, the birth father sent a message via Facebook Messenger in which he said, in part, "you have my full consent to follow through with the adoption." S.M. commenced proceedings to adopt F.A.C. and brought an application before a chambers judge of the King's Bench to dispense with the consent of the birth parents to do so. Service of the application and accompanying documents on the birth parents proved difficult, and in June 2021, an order for substitutional service was granted, allowing the birth parents to be served by Facebook Messenger. The court record revealed a number of attempts at service, all of which fell short of the legal requirements, were faulty in a number of ways, or did not satisfy the chambers judge that the birth parents knew the adjourned date of the application.

HELD: The chambers judge dismissed the application to dispense with the consent of the birth parents to the adoption of F.A.C. without prejudice to it being placed back before the court with appropriate evidentiary materials with proof of notice to the birth parents of the new application date and that they received a copy of her decision herein. She first referred to s. 5(2.2) of *The Adoption Act, 1998* (AA), which set out three disjunctive criteria for the exercise of her discretion not to give notice of an application to dispense with the consent of the birth parents to an adoption, one of which included that to do so "is in the best interests of the child" and the other being that notice of the application might be dispensed with if it "is necessary in the circumstances of the case." The chambers judge reasoned with reference to *R.C. & T.G. v A.C. & B.D.*, 2017 ONSC 6960, that in spite of this wording, the best interests of the child was to be the overriding consideration in deciding whether to dispense with the consent of the birth parents or to give them notice of the application to dispense. Though she "suspected" it was in F.A.C.'s best interests, the evidentiary foundation in this case was insufficient to allow her to properly exercise her discretion; in particular, she had no evidence as to F.A.C.'s "needs, interests, capacities, the home environment, meaningful relationships, plans for the future" or whether the birth mother understood the legal effect of an adoption order, and that such an order could not be made conditional on her being able to have contact with the child. The chambers judge was very aware that as her decision to order F.A.C.'s adoption was final and not appealable, she was to exercise her discretion with extra care.

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***R v Wright*, 2023 SKKB 1**

Hildebrandt, 2023-01-03 (KB23001)

Criminal Law - Evidence - Identification - Proof
Criminal Law - Evidence - Identity of Accused - Sufficiency
Criminal Law - Motor Vehicle Offences - Driving While Disqualified

The accused was charged with failure to stop a motor vehicle while being pursued by a peace officer, contrary to s. 320.17 of the *Criminal Code*, and operating a vehicle while prohibited from doing so, contrary to s. 320.18. The Crown called three police officers as witnesses, two of whom testified to slowly driving past the vehicle with a flashlight. A third police officer thought the individual looked like the accused. The vehicle, registered to the accused's common law spouse, was later found stuck in the snow near the house shared by the accused and his spouse. The accused called no witnesses. The only live issue was the element of identity. The judge considered: had the Crown proven the identity beyond a reasonable doubt?
HELD: The accused was found guilty on both counts. The judge was mindful of the fragilities of eyewitness testimony. Witnesses provided specific evidence of the driver's age, skin tone and uniquely styled moustache. The evidence went beyond merely identifying an Aboriginal male. Shortly after the encounter, two officers verified the identity of the accused from photos of him sent in response to their description. The witnesses had the opportunity to identify the accused accurately and reliably as the driver, and the provision of photos did not taint their observations in the circumstances. The surrounding circumstances supported the conclusion the driver of the truck was the accused. The Crown had proven identity, and all elements of both counts, beyond a reasonable

doubt.

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***R v Dittmer*, 2023 SKKB 4**

Hildebrandt, 2023-01-05 (KB23007)

Appeal - Criminal Law - Impaired Driving
Criminal Law - Appeal - Crown

The accused was charged with operating a conveyance while his ability to do so was impaired, contrary to s. 320.14(1)(a) of the *Criminal Code* (Code). He was acquitted by Provincial Court judge (*R v Dittmer*, 2017 SKPC 17). The Crown appealed. The issue was whether the trial judge erred by misapprehending the nature, scope and purpose of drug recognition expert (DRE) evidence. HELD: The Court of King's Bench found that the trial judge erred by misapprehending the nature, scope and purpose of the DRE evidence. The court overturned the acquittal and ordered a new trial. The court first discussed the case law on DREs for background on the nature and scope of DRE evidence, and how a DRE's credentials are statutorily deemed to exist. DREs are not ordinary witnesses; rather, they are experts with knowledge "beyond the experience and knowledge of the trier of fact" (*R v Bingley*, 2017 SCC 12 at para 24). The primary purpose, supported by the case law, of the DRE 12-step evaluation is to determine whether a person's ability to drive is impaired by drugs. The class of drugs is a secondary consideration. The trial judge erred when she instead found that the primary purpose of the DRE evaluation was to determine whether drugs were in the accused's body and, if so, what class of drugs. Identifying the class of drugs believed to cause the impairment is not a required element of s. 320.14(1)(a) of the Code. The trial judge's approach relied on case law that predated both Bingley and the enactment of s. 320.12(d) and ignored the recognition by the Supreme Court in *Bingley* of a DRE's expertise. The trial judge's approach to the DRE evidence, which effectively gave it no weight at all, was incorrect.

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***Prince Albert (City) v Cumberland House Cree Nation*, 2023 SKKB 11**

Rothery, 2023-01-13 (KB23011)

Civil Contempt - Essential Elements
Civil Contempt - Penalties
Civil Procedure - *Queen's Bench Rules*, Rule 10-26, Rule 11-26, Rule 11-27

The City of Prince Albert (City) applied for an order pursuant to Rule 11-26 of *The Queen's Bench Rules* (rules) declaring four respondents, being a Cree Nation, its chief, a development corporation, and its sole director and shareholder (collectively the respondents) "all in civil contempt of the court order of Meschishnick J. granted July 26, 2022, in these proceedings." Having been unable to get the respondents to complete work as required by compliance orders intended "to allow for the required barrier-free access to… [a building they owned] for wheelchairs," the City applied to a chambers judge of the King's Bench under s. 40 of *The Construction Codes Act* for an order that was granted, and required the respondent corporation to comply with the City's compliance orders by July 29, 2022. The order was served on all respondents in accordance with the law and nothing was done by the respondents to obey the order by the deadline.

HELD: The chambers judge declared all the respondents in contempt. None of them appeared in court to answer to the accusation. In coming to the decision, she quoted from *Carey v Laiken*, 2015 SCC 17 (*Carey*), which articulated the essential elements for a finding of civil contempt and its purpose. She agreed that the purpose of the remedy of civil contempt was to maintain the rule of law by giving the courts "the ability… to enforce their process and maintain their dignity and respect." She went on referencing *Carey*, and the three elements which a court must be satisfied beyond a reasonable doubt are satisfied before declaring a person in civil contempt: there must be a clear and unequivocal order; the person who is alleged to have committed the civil contempt has actual knowledge of the order; and thirdly, "the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels." The only one of these elements upon which the chambers judge saw fit to delve into in detail was the third. She was satisfied beyond a reasonable doubt that as the chief and the director and shareholder of the development corporation were served personally, all respondents had actual knowledge of the order, and by their non-attendance in court or any response to the application by way of an excuse for their non-compliance, "the Court can only conclude that the respondents are intentionally disobeying the Order of Compliance." She then moved on to impose a penalty, which took the form of an order that the respondents, jointly and severally pay solicitor-client costs in the amount of $10,000.00, and pointed out that if this amount was not paid, by rule 10-26(b) the natural persons, being the chief and director, were liable to be imprisoned.

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***Custer v Saskatchewan Government Insurance*, 2023 SKKB 13**

Meschishnick, 2023-01-17 (KB23018)

Insurance - Automobile Accident Insurance - Benefits - Income Replacement Benefits
Regulations - Interpretation - *Personal Injury Benefits Regulations*, Section 20
Statutes - Interpretation - *Automobile Accident Insurance Act*, Section 112(2)

The plaintiff, A.E.C., applied to a chambers judge of the King's Bench for summary judgment allowing his claim against Saskatchewan Government Insurance (SGI) for excluding his "room and board" as a benefit under s. 20(d)(vii) of *The Personal Injury Benefits Regulations* (PIBR), and due to him by SGI as part of the income replacement benefit to which he was entitled as a result of his injuries from a motor vehicle accident. A.E.C. and SGI filed a joint agreed statement of facts in the application. A.E.C. was hired as a handyman and caretaker at a lakeside lodge owned by the employer. Included in the employment contract was an

amount paid to him by his employer for food and lodging. The three meals a day and the room were supplied at the lodge by the employer. SGI and A.E.C. agreed that the amount paid for food and lodging was fair. A.E.C. argued the room and board should be included in the benefit payable by SGI, which countered that the room and board was "simply a reimbursement of expenses."
HELD: The chambers judge ruled against the plaintiff, finding that the room and board was not a benefit under s. 20(d)(vii) of the PIBR. Relying in large measure on *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95 (*Holtby-York*), he reasoned that the sum paid to A.E.C. for room and board was not in the nature of discretionary spending. A.E.C. could not use this amount as he saw fit but was required to eat and room at the employer's lodge so the amount paid was not "earned in the sense of being payment for work or services:" *Holtby-York*. In coming to this conclusion, the chambers judge stated the room and board arrangement "is designed for reimbursement of the Plaintiff for his expenses associated with having to stay at his employer's premises."

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***Yang v Saskatchewan Finance*, 2023 SKKB 15**

Bergbusch, 2023-01-18 (KB23013)

Civil Procedure - Amendments to Pleadings
Civil Procedure - Pleadings - Striking Out
Statutes - Interpretation - *Provincial Sales Tax Act*, Section 3(1)(o), Section 5, Section 8.11, Section 43.4
Taxation - *Provincial Sales Tax* - Collection and Remission

S.Y., a self-represented business owner doing business through E & E, a corporation, issued a document out of the King's Bench purporting to be a statement of claim naming "Saskatchewan Finance" as a defendant, which the Government of Saskatchewan (Saskatchewan) applied to strike pursuant to Rule 7-9 of *The Queen's Bench Rule*s (rules). Through materials on file and affidavit evidence, the chambers judge was able to discern the background events which led to the complaint by S.Y. against "Saskatchewan Finance," to the effect that: in response to economic hardship brought on by the COVID-19 pandemic, Saskatchewan enacted legislation that allowed businesses to defer the remission of provincial sales tax (PST) from March 2020 to July 31, 2020 without being subject to interest and penalties provided they continued to file their PST tax returns; on July 31, 2020, businesses were to pay the deferred PST in full or arrange for a payment schedule; S.Y. did not file E & E's tax returns during this period and did not pay the deferred PST on July 31, 2020, or arrange for a payment schedule; E & E was audited by the Ministry of Finance, which resulted in the imposition of penalties on the amount of sales tax due and interest for late remission effective December 17, 2021; E & E paid the PST and interest but refused to pay the penalty; and S.Y. issued the statement of claim on September 28, 2022. Saskatchewan argued the claim did not disclose a reasonable cause of action, was frivolous, and should be struck.
HELD: The chambers judge agreed with counsel for Saskatchewan that the claim should be struck because S.Y. failed to plead facts that, if proven, would amount to a reasonable cause of action; and also it was so obviously "destined to fail" that it was

frivolous. Nonetheless, on the invitation of counsel for Saskatchewan, the chambers judge did his best to make sense of the pleadings in an effort to save the claim in some manner by amendment, and was able to find a kernel of an action in the pleadings, materials and evidence on file, being one of overpayment of PST and the operation of s. 8.11 of *The Provincial Sales Tax Act*, which allows an action to be brought by a taxpayer alleging overpayment of taxes, and the consequential imposition of interest and penalties. The statement of claim was struck and the plaintiff given 30 days to serve and file an amended statement of claim.

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***Sun Country Regional Health Authority v Mamchur*, 2023 SKKB 17**

Mitchell, 2023-01-25 (KB23014)

Civil Procedure - Summary Judgment
Contract Law - Negotiation - Pre-Negotiation Duty of Good Faith
Contracts - Breach - Consensus - Doctrine of Frustration
Contracts - Breach or Performance - Implied Terms
Costs - Enhanced Costs
Equity - Doctrines - Relief against Forfeiture

The respondent J.M. is a medical doctor who, while a medical student, entered into four bursary agreements (returns of service) with the applicant, Sun Country Regional Health Authority (SCRHA), of $25,000.00 each for a total of $100,000.00. Each of the agreements was identical and cumulatively committed J.M. to work for the SCRHA for four years and be "available for up to fulltime practice for the term of this contract…" Each return of service included a clause that "stipulate[ed] in the event he should terminate his return of service agreement prior to the conclusion of the four years, he agreed to repay the monies paid to him on a prorated basis." At the start of his return of service, J.M. entered into a rural relief physician agreement (RRPA) with the SCRHA by which he committed himself to "provide full-time continuous rural relief physician services within the SCRHA for a period of 160 days, in exchange for a signing bonus of $11,000." The RRPA also "placed the liability for any default of the agreement on [J.M.] on a pro-rated basis." J.M. retreated from his return of service and RRPA obligations by taking work with another health district, though he had not completed 90.82 % of the return of service agreement and 72.5% of the RRPA. In his communications with SCRHA personnel, he stated to the effect that he was overworked in general and overwhelmed by the on-call requirements and that he wanted to discuss working in Weyburn, which was his "initial plan." The SCRHA commenced an action for breach of contract and unjust enrichment against J.M. on June 11, 2015 to recover the amounts paid to J.M. on a pro-rated basis, totalling $98,796.92. J.M. vigorously defended the claim. SCRHA was of the view J.M.'s defences had no merit, that there was no genuine issue to be tried, and on March 30, 2016, brought an application for summary judgment in the King's Bench for the dismissal of J.M.'s statement of defence and ordering enhanced costs of $40,000.00. Upon the launching of the summary judgment motion, "this litigation quickly became mired in procedural skirmishes in this Court, and in the Saskatchewan Court of Appeal. See, for example: …2017 SKCA 6 and …2018 SKQB 79, 35 CPC (8th) 296". [Also see: (9 May 2017) QBG-RG-01366-2015 (Sask QB) and (29 June 2018) QBG-RG-01366-2015 (Sask QB)]. In the summary judgment application, the SCRHA took exception to an affidavit of a

medical doctor, E.H., filed on behalf of J.M.

HELD: The chambers judge struck out those portions of the affidavit of E.H. that were not statements of fact, but argument, speculation, and "unsourced" opinion from an affiant not qualified in the proceeding to give such opinions, contrary to Rule 13-30 of *The Queen's Bench Rules* (rules). He then allowed the summary judgment application and ordered costs against J.M. in the amount of $25,000.00. In allowing the summary judgment application, he made extensive reference to the case law flowing from the source case*, Hryniak v Maudlin*, 2014 SCC 7 (*Hryniak*), and codified in rules 7-2 to 7-8. He endorsed the idea expressed in *Hryniak* that a "shift of culture" was necessary "in the civil justice system which favours an adjudicative process that is "accessible – proportionate, timely and affordable" and that summary judgment proceedings could assist in achieving this goal. He then instructed himself as to the "two-stage analysis" developed in *Hryniak* and adopted in *Tchozewski v Lamontagne*, 2014 SKQB 71: first, the judge must consider all of the evidence, and material on the court file, after allowing the parties to "put their best foot forward" to determine if there exists a "genuine issue to be tried;" and secondly, if so, he was to move on to the second stage of his analysis: whether the genuine issue to be tried can be adjudicated without a "full-blown trial." The chambers judge appreciated that the factors to be considered at the second stage included whether witness credibility needed to be tested by cross-examination, "better evidence on key issues [would] be available at trial," and whether after a review of such factors, he was confident that a "tailored" approach would allow for weighing evidence, evaluating credibility and drawing reasonable inferences. He then waded through the voluminous affidavit evidence and material on file in relation to the defences advanced by J.M., considered the relevant case law, and concluded that there was no genuine issue to be tried. The chambers judge considered each of J.M.'s defences in turn with the principles of statutory interpretation in mind and found that the wording of the contracts and the factual matrix of their creation were clear and contained no ambiguity; no bad faith on the part of SCRHA in the performance of the returns of service agreements or the RRPA was demonstrated by J.M., and as far as a duty to exercise good faith in negotiating contracts, no such duty was recognized by the law in Saskatchewan; there were no implied terms that the SCRHA would "take all necessary steps to ensure that [J.M.] secured full-time employment as a physician either in Weyburn or a single location in SCRHA" or that he was to be released from his return of service commitment "in the event he exercised due diligence but through no fault of his own was unable to secure a satisfactory medical practice arrangement," because to give effect to this proposition would "rewrite the express terms of a contract." The doctrine of frustration of contract had no application to the proven facts in this case because the nature of the work was not "unforeseen or inevitable;" on the facts, J.M. simply wanted out of his commitments, and walked away from them; and that the amalgamation of the health regions including the SCHA into the Saskatchewan Health Authority by *The Provincial Health Authority Act* (PHAA) ended his contractual obligations was patently untenable since by the express terms of the PHAA, the return of service agreements and the RRPA continued as written and the new provincial health authority "is substituted for any former regional health authority with respect to any agreement to which the former regional health authority was a party, including contracts of employment."

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***Indian Head (Town) v Adler Enterprises Inc.*, 2023 SKKB 18**

Norbeck, 2023-01-25 (KB23015)

Civil Procedure - Contempt of Court
Civil Procedure - *Queen's Bench Rules*, Rule 11-26, Rule 11-27
Municipal Law - Bylaws - Enforcement
Practice of Law - Representation by Non-Lawyer

The applicant town applied for an order declaring the respondent corporation in contempt of court for continued failure to comply with a consent order to remove a sign and junked vehicles or construct a solid screen enclosure around the junk. In the contempt application, the town sought a declaration, fine, order the town could take such actions necessary to enforce the consent order, and costs on a solicitor and client basis. During the application, the respondent corporation's sole officer and director asked the court to allow the corporation to be represented by a non-lawyer. The court considered: 1) should a non-lawyer be permitted to represent the corporation; 2) was the respondent in civil contempt of the consent order; and 3) what remedy or punishment was appropriate? HELD: The court found the respondent in civil contempt, authorized the town to enforce the court order, fined the respondent, and awarded costs to the town. 1) The non-lawyer was granted leave to represent the respondent corporation. Representation by a non-lawyer can prejudice a corporation. The court has discretion to permit or deny a non-lawyer from appearing on behalf of a corporation. The corporation did not have the means to continue proceedings with a lawyer and the sole officer, shareholder and director of the corporation requested to proceed with the non-lawyer. The non-lawyer appeared capable of understanding the issues. 2) The respondent was guilty of civil contempt. Civil contempt requires a clear and unequivocal order that the party alleged to have breached an order knew about, and intentionally did, what the order prohibited or intentionally failed to do what the order compelled. The elements of civil contempt must be proven beyond reasonable doubt. The respondent argued it had not consented to the order and was unaware of its terms. The court does not sit in appeal of its own matters and had no jurisdiction to set aside the consent order. The respondent was aware of the order. The respondent had sought extensions and had referred to the consent order in letters to the town. Photos showed the required work was not done. The corporation provided no explanation for its failure to do what the order required in the specified timeframe. 3) The town was authorized to take actions reasonably necessary to enforce the consent order without further notice, including entering lands and removing vehicles and other items. A fine of $2,500 was sufficient to uphold the rule of law and respect for court orders. This was not a case for exceptional awarding of solicitor and client costs.

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***Bovier v Crary Company*, 2023 SKKB 21**

Tochor, 2023-01-27 (KB23016)

Civil Procedure - Application to Dismiss - Want of Prosecution
Civil Procedure - Class Action - Designation of Judge
Civil Procedure - Dismissal of Action for Want of Prosecution

The defendants applied for an order dismissing the plaintiffs' claim under Rule 4-44 of *The Queen's Bench Rules* because of inordinate and inexcusable delay. The plaintiffs had started a class action against the respondents claiming damages because of a

breach of a duty to maintain a distributorship in Saskatchewan contrary to s. 24 of *The Agricultural Implements Act*. Very few steps were taken for six years. Then, the plaintiffs requested a designated judge be appointed. A designated judge was appointed. No steps were taken for eight years and eight months after the designated judge was appointed. No one appeared on behalf of the plaintiffs. The chambers judge considered: 1) does a chambers judge have jurisdiction to decide pre-certification applications; 2) was the delay inordinate; 3) was the delay excusable; and 4) was it in the interests of justice for the claim to proceed?
HELD: The application was granted, and the plaintiffs' claim was dismissed. 1) Following a recent Court of Appeal decision, a judge in chambers has the jurisdiction to decide the application, but it is generally desirable for pre-certification applications to be heard by the designated judge. Fairness, efficiency and judicial economy supported the chambers judge deciding the application instead of deferring to the designated judge. The application was procedurally straightforward, did not intersect with principles unique to class actions, and the designated judge in this case had not yet been involved in the matter. 2) The delay was inordinate. Almost no activity had occurred for nearly 17 years. Delays of 3.5 to 5 years have been characterized as inordinate in other cases. 3) The delay was inexcusable. The plaintiffs did not appear to explain the delay. 4) It was not in the interests of justice for the claim to proceed. A court must assess carefully whether justice requires that the case proceed even if inordinate and inexcusable delay has occurred. Delay prejudiced the defendants in their presentation of their case. The delay was very long. Litigation remained at the earliest stage. There was no explanation from the plaintiffs. The application to dismiss the class action for delay was granted, with costs set at $1000 in favour of the applicants.

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***Merchant Law Group LLP v Canadian Broadcasting Corporation*, 2023 SKKB 22**

Bardai, 2023-01-30 (KB23021)

Civil Procedure - Pleadings - Application to Strike
Civil Procedure - Summary Judgment

In 2016, the plaintiffs commenced an action against the defendants, alleging that the defendants published, aired, and broadcast stories about the plaintiffs that were defamatory, libelous, and slanderous, resulting in irreparable harm to the plaintiffs. The defendants relied on the defences of responsible communication on a matter of public interest, fair comment, innocent dissemination, passive instrument, truth, and qualified privilege. There have been many procedural decisions on this claim, but the decision here concerned the admissibility of certain affidavit evidence on a summary judgment application that was filed by the defendants in February 2022. One of the affidavits appended information from an "unknown" source. The plaintiff objected to this affidavit and sought to strike portions of it based on: 1) relevance, inadmissible opinion, and speculation; and 2) inadmissibility of the "business records" appended to the affidavit pursuant to s. 52 of *The Evidence Act*, SS 2006, c E-11.2.
HELD: 1) The court struck one paragraph in its entirety because it was irrelevant and struck portions of five other paragraphs in the defendant's affidavit because they were either opinion evidence or commented on the state of mind or intentions of the plaintiff. 2) The court observed that at this stage it was unclear whether records appended to the affidavit were business records at all. Even if they were, they may still be admitted pursuant to hearsay exceptions even if they did not meet the specific exception in *The*

Evidence Act. The defendants obtained the records from an unknown source. While necessity could be met, the requirement of threshold reliability, on either a procedural or substantive basis, was not satisfied and the hearsay could not be admitted under the principled approach for the truth of its contents. While the court held that the records could not be introduced for the truth of their contents, they were allowed into evidence – not to prove what they said, but to prove what the defendants looked at and relied upon in making the publications and news stories in issue.

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***Davidner v Towill*, 2023 SKKB 25**

Morrall, 2023-02-02 (KB23022)

Wills and Estates - Accounting
Wills and Estates - Costs - Solicitor and Client Costs

The applicant and respondent were siblings in an originating application relating to an estate matter. The applicant requested accounting orders from the respondent in her capacity as both executrix and power of attorney for the deceased. The issues were: 1) whether the court had jurisdiction to make the accounting orders requested by the applicant; and 2) whether the court should exercise its discretion to make the accounting orders. To determine these issues, the judge considered ss. 18, 18.1 and 20 of *The Powers of Attorney Act, 2002*, SS 2002, c P-20.3; s. 55 of *The Trustee Act, 2009*, SS 2009, c T-23.01; and applied *Bryant Estate v Stuart*, 2021 SKCA 54 (*Bryant Estate*). The judge noted that *Bryant Estate* overturned the previous "show cause" requirement on the beneficiary as a precondition to obtaining an accounting. Instead, *Bryant Estate* introduced the lesser standard that the accounting be "reasonable in light of all the relevant circumstances".
HELD: 1) Given that the applicant was an adult family member of the grantor as well as a beneficiary of the estate of the grantor, the judge determined that the court had jurisdiction to order an accounting pursuant to *The Trustee Act* and *The Powers of Attorney Act*. 2) The judge applied Bryant Estate to determine whether the court should exercise its discretion to make the requested accounting orders. Given the principles enunciated in *Bryant Estate* relating to the timeliness of an accounting being a potential reason for not ordering a "mandatory" accounting, the judge found that no accounting should be ordered at this time relating to the respondent's duties as executrix. This was because the judge found that the respondent was close to finalizing the distribution of the estate and would soon provide a final accounting. The court then analyzed the accounting order sought from the respondent in her role as power of attorney, and reviewed the powers granted through five separate powers of attorney prepared by the deceased. The court found that the evidence did not establish that the respondent exceeded the scope of her authority. The judge considered the fiduciary nature of the power of attorney relationship and the need to monitor that granting of power. Under the broad principles noted in *Bryant Estate*, the judge ordered that a full bank statement must be provided that included withdrawals and deposits, complete descriptions of the nature of the transaction as can be garnered from the bank, and the balance after each transaction. However, the judge found it inappropriate for the respondent to be required to provide her own affidavit explanations with respect to the transactions as she remembered them. The court declined to award costs, finding that both parties bore some responsibility for the acrimonious nature of the proceedings. Neither party established a proper foundation for solicitor-client costs as outlined in

Siemens v Bawolin, 2002 SKCA 84.

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***R v Arendt*, 2023 SKPC 5**

Agnew, 2023-01-17 (PC23002)

Criminal Law - Search Warrants
Constitutional Law - *Charter of Rights*, Section 8

The accused applied to excise portions of the Information to Obtain (ITO) put before the justice who issued the search warrant (justice) which resulted in the seizure of evidence of drug trafficking at his home. He argued before the trial judge of the Provincial Court that the excised sections of the search warrant were not "sufficiently credible and reliable evidence" and that, taken together, they undermined the reliability of the ITO to such an extent that the search warrant could not have issued.
HELD: The trial judge agreed with the accused that the excised and revised portions of the ITO were defective in a number of serious ways, which included the affiant's misrepresentation of the daily surveillance report (DSR). He conducted a detailed parsing of the ITO and took guidance from the governing case law, emphasizing the distinction between "facial" and "sub-facial" validity of warrants, ruling that the justice would not have known of the discrepancies between the affiant's version of the DSR and its actual content, so that facially, these portions of the ITO were capable of providing credible and reliable evidence for the justice to issue the warrant; but "sub-facially", if the justice had known of the discrepancies, it would not have been reasonable for him to issue the warrant because he could not have had any faith in the believability of the evidence he had initially accepted on a facial review or of any of the affiant's evidence. He went on to say that "it remains for the Crown to decide whether it believes the warrant can be saved by step six of the *Garofoli* procedure" (*R v Garofoli*, [1990] 2 SCR 1421), and if not, whether the evidence derived from the search and seizure should be excluded pursuant to s. 24(2) of the *Charter*.

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***R v Wong*, 2023 SKPC 7**

Agnew, 2023-01-17 (PC23003)

Constitutional Law - *Charter of Rights*, Section 8
Constitutional Law - *Ultra Vires* Legislation
Constitutional Law - Vagueness of Legislation
Courts and Judges - Judicial Comity
Regulatory Offences - Public Health Orders - COVID-19

The defendants were charged with the regulatory offence of attending "an outdoor gathering of more than 10 people contrary to a Public Health Order (PHO) made on December 14, 2020 by… the Chief Medical Officer (CMO) for the Province of Saskatchewan" and authorized by ss. 25.1 and 25.2 of *The Disease Control Regulations* (DCR) as part of the Government of Saskatchewan's (Saskatchewan) response to the COVID-19 outbreak. The defendants raised four constitutional questions, arguing before the trial judge of the Provincial Court that: first, by accessing their SGI records in order to identify them, the Crown breached their right to be free from unreasonable search and seizure pursuant to s. 8 of the *Charter*; second, ss. 25.1 and s. 25.2 of the DCR and the PHO itself made pursuant to these provisions were unconstitutionally vague; third, s. 25(2) of the DCR and the PHO were ultra vires Saskatchewan and so of no force and effect; and fourth, that the PHO was not authorized by statute. The trial judge addressed each of these in turn.

HELD: The trial judge dismissed all the constitutional arguments and found the defendants guilty as charged. As to the defendants' submission that the SGI information obtained by the Crown without judicial authority was subject to a reasonable expectation of privacy and therefore was obtained in a manner that breached their rights under s. 8 of the *Charter* to be free from unreasonable search and seizure, the trial judge referred to the governing judicial authority and concluded that, as a number of statutes including The Traffic Safety Act permitted SGI to provide personal information to "a peace officer, judge or justice of the peace acting in the course of his or her duties," SGI's own Privacy Statement available on the internet which stated that "without your consent, we can share your information with law enforcement for enforcing the laws or carrying out a lawful investigation," and as the defendants voluntarily provided this information to obtain a driver's licence, they could not be said to have had a reasonable expectation of privacy, and the SGI records were admissible at trial. Turning to the constitutional vagueness argument, the trial judge referred to *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, from which he extracted the legal concept that a law is constitutionally vague if it does not clearly "delineate a risk zone" which citizens are able to appreciate may result in sanction if entered. He went on to apply this principle to the applicable portions of ss. 25.1 and 25.2 of the DCR and concluded that "there can be no doubt but that the language of the DCR authorized the PHO, and that the PHO prohibited precisely the activity in which the defendants engaged, in clear terms." Moving on to the ultra vires submission, he pointed out that it appeared most of the arguments made by the defendants that s. 25.2(2) of the DCR and the PHO put in place under its auspices were invalid, had previously been considered and rejected in R v Friesen et al. and *R v Hinderager Holdings Ltd.*, 2022 SKPC 50 (*Hinderager*). Following a detailed review of the defendants' submissions in the case before him and those made in *Hinderager*, he concluded that, except for two "new" arguments made before him, the judge in *Hinderager* had previously decided all other points raised by the defendants, and by the principle of comity, also called horizontal *stare decisis*, as elucidated in *R v Sullivan*, 2022 SCC 19, he was bound by the rulings in *Hinderager*. As to the two new ultra vires arguments, he understood these to be first, that in empowering the CMO to make public health orders which "in his opinion" were needed, the legislation provided the CMO with more discretion in making public health orders then the Minister of Health had himself since he was required to have "reasonable grounds" before making public health orders; and secondly, that the *Hinderager* decision with respect to re-delegation or sub-delegation of legislated power to the executive would have been decided differently if the judge had considered an Alberta case. (The trial judge considered a third "new" argument, which he found was in fact not new.) He dismissed the other two new submissions with respect to ultra vires. As to the fourth argument that the PHO was not authorized by the governing statute, he rejected it as well because by operation of any of the provisions of ss. 38 and 45 of *The Public Health Act, 1994* (PHA) and s. 25.2(2) of the DCR, the powers granted to the CMO were validly authorized by legislation.

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***R v Chartier*, 2023 SKPC 4**

Schiefner, 2023-01-19 (PC23007)

Criminal Law - Sentencing - Sentencing Principles
Criminal Law - Sentencing - Multiple Offences
Criminal Law - Sentencing - *Gladue* Factors

The offender pled guilty to 17 offences from four separate Informations, including possession of controlled substances for the purpose of trafficking, possession of a firearm (with readily accessible ammunition in a motor vehicle), possession of a firearm and ammunition while prohibited by court order, operating a motor vehicle while prohibited, and resisting arrest. The sentencing judge determined an appropriate sentence for multiple offences by applying the totality principle and the approach set out in *R v Smith*, 2019 SKCA 100 (*Smith*).

HELD: The sentencing judge held that a total global sentence of 54 months (4.5 years) was appropriate. The Crown argued for a total global sentence in the range of six years, based on the offender's prior criminal record, and the fact that the offender was bound by a firearms prohibition and driving prohibition. Defence submitted that a sentence in the range of 2.5 to 3.5 years would be more appropriate, given mitigating personal circumstances and *Gladue* factors. The sentencing judge reviewed sentencing principles set out in s. 718 of the *Criminal Code*, along with s. 718.2 for the factors of parity, totality, and restraint. The sentencing judge applied the approach set out in *Smith* for imposing a sentence where there are multiple offences: 1) determine a fit and just sanction for each individual offence; 2) decide if any or all of the offences will be served concurrently or consecutively to one another; 3) if consecutive sentences are imposed, determine the cumulative sentence under the totality principle to ensure that the total sentence is not too long, unduly harsh, or would exceed the overall culpability of the offender; and 4) if an adjustment to the total sentence is necessary, direct that individual sentences be served concurrent to each other rather than reducing the length of the individual sentences. The judge also discussed situations where the Code directs that sentencing judges "shall consider" imposing consecutive sentences instead of concurrent sentences. Section 718.3(4)(b)(i) mandates that the sentencing judge consider imposing consecutive sentences for offences that do not arise out of the same event, series of events or criminal transactions. A sentencing judge may impose consecutive sentences where the offences involve separate infringements of the community's right to peace and order; for example, the distinct offences of drug trafficking and possession of a weapon. Concurrent sentences are more commonly imposed when offences are closely related and arise out of the same incident. *Gladue* factors were present. The offender was 29 years of age and Métis. Both of his parents attended residential schools, and the offender was exposed to abuse, substance abuse, and domestic violence from an early age. The 29 entries on his criminal record with related offences was an aggravating factor. All incidents before the sentencing judge occurred while the offender was either on probation or on bail or bound by a court order. The offender's early guilty pleas and personal circumstances were mitigating factors. The sentencing judge looked to the most serious of the individual offences involved to determine that a sentence of 54 months was an appropriate global sentence. The sentences for the drug offences were to be served concurrent to the sentences for the weapons-related offences.

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***R v Pelletier*, 2023 SKPC 1**

Lang, 2023-01-23 (PC23006)

Criminal Law - Aggravated Assault - Sentencing
Appeal - Criminal Law - Sentencing - Driving with a Blood Alcohol Level Exceeding .08 - Causing Bodily Harm

The accused pled guilty to two counts: 1) aggravated assault under s. 268(1); and 2) operating a conveyance within two hours of having a blood alcohol concentration equal to or exceeding 80 mg alcohol in 100 mL of blood, causing bodily harm. The accused had been drinking at her aunt's residence with the victim, and decided she wanted to leave. The victim and accused loaded the children in the van and the victim drove the vehicle. An argument ensued and the accused started hitting the victim, so he pulled over and exited the vehicle. The accused then got into the driver's seat and tried striking the victim with the vehicle. The accused hit and pinned the victim against a hotel, and later drove over top of the victim. The accused left the scene, leaving five young children inside the car. The victim sustained life-threatening injuries. The only issue for the court to decide was an appropriate sentence. A pre-sentencing report had been completed.
HELD: Taking into consideration the significant mitigating circumstances of the accused, the court imposed a period of incarceration of two years, followed by two years of probation, a two-year driving prohibition, DNA order, and a 10-year firearm prohibition. The court stressed that three years would normally be an appropriate sentence given the facts. Here, the accused had no criminal record, entered guilty pleas, had considerable *Gladue* factors, accepted responsibility for her actions and apologized to the victim in court, took rehabilitative measures prior to sentencing, remained sober for two months at the time of sentencing submissions, and had family support. Aggravating factors included: the vicious, prolonged nature of the attack resulting in serious injuries to the victim; the fact that the weapon used was a vehicle capable of inflicting lethal harm; the accused was highly intoxicated (blood alcohol levels more than two times the legal limit); there were five young children in the car at the time of the attack; the accused fled the scene following the incident; and the attack was against a domestic partner.

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