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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***R v Omer*, 2022 SKCA 147**

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This matter was an appeal to the Court of Appeal (court) by a Sudanese refugee from his conviction for aggravated assault by stabbing the victim, T.M., multiple times and causing her "extensive and life-altering" injuries; and an application by him for leave to appeal his sentence of seven-and-a-half years' incarceration. He was convicted and sentenced before a trial judge of the Provincial Court [(26 March, 2021) Saskatoon, Provincial Court (Sask)]. His ground of appeal with respect to his conviction was that the trial judge erred by failing to properly apply the principles from *R v Vetrovec*, [1982] 1 SCR 811 [*Vetrovec*] and his proposed ground on the

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sentence appeal was that "the trial judge failed to account for his personal circumstances, particularly the fact that he [was] a Black Sudanese refugee, leading to an error with regard to the principle of parity." The court recognized that the only issue at trial was identity, whether the Crown had proven beyond a reasonable doubt that the appellant was the person who stabbed T.M., and that on sentencing the primary issue was whether the trial judge made an error in principle that had a bearing on the sentence.

HELD: The court dismissed the appeal from conviction, granted the application for leave to appeal sentence, and allowed the sentence appeal. As to the conviction appeal, the court reviewed the evidence of identity adduced by the Crown before the trial judge, in particular the eyewitness testimony of C.C., a friend and neighbour of the appellant, who testified in considerable detail concerning the appellant's behaviour before, during and after the offence. He testified that: the appellant entered a running van through its driver's side door with the intention of stealing it while T.M. was seated in the front passenger seat, heard her screaming and crying and falling out of the van, which was then driven away. The court also observed that the Crown had led video evidence matching C.C.'s testimony, as well as a "chain of witnesses" tying the appellant to the stolen van and evidence such as knives and the van key found on his person. The court also noted the trial judge's reference to T.M.'s "in-dock identification" of the appellant as the person who had stabbed her. The court was cognizant that before the trial judge, the appellant argued that C.C.'s evidence was "untrustworthy" and his testimony should be scrutinized with great care, as one would dissect the testimony of unsavoury witnesses, and that the trial judge was required to instruct himself in accordance with the *Vetrovec* caution; and further, that the appellant submitted to the trial judge that C.C. was akin to a jailhouse informant because he gave his account for the first time to police following his arrest on drug charges; was otherwise discreditable because he had a criminal record including entries for fraud and using a forged document; and he had intentionally turned away from the incident so as not to observe it or help T.M. The court appreciated that the trial judge rejected these submissions and found that C.C. was not an unsavoury witness to whom *Vetrovec* applied, though he then went on to explain that if he had any doubt as to C.C.'s ability to tell the truth, his testimony was supported by other overwhelming evidence. Following a review of *Vetrovec* itself and other cases in its orbit, the court could find no basis to interfere with the trial judge's finding that C.C. was not a witness to whom *Vetrovec* would apply, but then added that he nonetheless went on to subject his evidence to a detailed credibility analysis that touched on C.C.'s lack of motive to lie and the strong corroborative evidence in support of his testimony. As well, the court pointed out that a specific *Vetrovec* warning was intended for jury trials and did not apply to judge-alone trials because a trial judge, unlike a juror, appreciates the dangers of convicting on the uncorroborated testimony of witnesses "prone to favour personal advantage over public duty." Moving on to the sentence appeal, the court appreciated that the appellant belonged to a racialized minority, which might have an impact on his moral culpability so as to invoke the application of s. 718.(e) of the Criminal Code, the genesis for *R v Gladue* [1999] 1 SCR 688

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(*Gladue*) and all the jurisprudence that followed which enshrined *Gladue* factors as the sine qua non in sentencing Indigenous offenders; though the court expressed that, unlike an Indigenous offender, the appellant needed to present evidence showing how his racial background made him more prone to criminal activity than the general population, and having chosen not to do so, the court could not take into account the fact that he was a black Sudanese refugee in reviewing the trial judge's sentence. However, the court went on to hold that the trial judge made a fundamental error in sentencing the appellant that had an impact on the sentence by finding no mitigating factors in his favour and by completely ignoring the submissions of his counsel, which spoke to his alienation from family, his agitation and worry concerning his children who had been taken from him by their mother and whose whereabouts he did not know, his addiction to alcohol and methamphetamine, and his efforts to better himself through support groups for drug addiction and his involvement with the Sudanese Community Association. As a result, the court proceeded to sentence the appellant anew with his personal circumstances in mind, and after canvassing the relevant cases concerning severe stabbing offences, where the accused showed callous disregard for their victims, and who suffered life-altering injuries, sentenced him to a six-year period of incarceration.

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***Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses' Association*, 2023 SKCA 11**

Jackson Leurer Tholl, 2023-01-17 (CA23011)

Administrative Law - Duty of Fairness - Duty Owed to Complainant
Administrative Law - Natural Justice - Procedural Fairness
Criminal Law - Prisons and Prisoners - Regulation of Prisons - Prisoners' Rights
Professional Discipline - Dual Ethical Obligations

The incarcerated appellant had filed a complaint with the Saskatchewan Registered Nurses' Association against a nurse employed at a penitentiary alleging the nurse violated her ethical duties by initiating a disciplinary charge against the prisoner and by failing to take actions to minimize patient safety incidents. The appellant was in a mental health observation cell when the nurse provided the appellant with crushed medication. The appellant questioned whether the dose was correct and asked to see the packaging. The nurse refused. The appellant became distressed, swore at the nurse and engaged in self-harming behaviours. The nurse filed a mandatory report recording the incident, and a secondary optional report to commence a disciplinary proceeding against the appellant as a prisoner. The nurse's optional complaint led

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Professional Discipline - Dual Ethical Obligations

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to prison discipline for the appellant. The professional association investigation committee investigated and dismissed the appellant's complaint at the investigation stage. The appellant unsuccessfully sought judicial review. He appealed the court's decision on the grounds he, as the complainant, was denied procedural fairness by the investigation committee. The Court of Appeal considered: 1) did the appellant have standing to challenge the findings of the investigation committee related to issues of procedural fairness owed to a complainant; and 2) did the investigation committee breach a duty of procedural fairness owed to the appellant? HELD: The appeal was dismissed with one judge dissenting. 1) The appellant had standing to challenge the alleged breach of a duty owed to him as the complainant through judicial review. A limited duty of fairness was owed to a complainant at the investigation stage. That duty is different from the duty owed to a member of a regulated profession. 2) There was no breach of the limited procedural fairness obligation. The nature of the decision made by the investigation committee was a screening decision. The investigation process was flexible and not court-like. A decision to take no further action is final. The legislation does not make the complainant a party to the complaint. The complainant has an indirect personal interest in the proper consideration of his own complaint. The complainant would have a reasonable general expectation that the committee would take his complaint seriously. The legislation gave the committee wide discretion over how to conduct the investigation. The legislation requires a report, but does not require detailed reasons. The failure to consider sufficiently important issues raised by the complaint would breach the duty of fairness. The complaint raised four important issues: conflict of interest, participation in proceedings that could result in cruel treatment, failure to act in the complainant's best interests as the nurse's patient, and disclosure of the complaint's confidential information for the purpose of discipline to the complainant. The court assessed whether the committee considered these four issues, with reference to all the documents before the committee, and concluded the committee was alive to the issues and considered them. The dissenting judge concluded the chambers judge erred by finding the committee had provided the complainant procedural fairness. In detailed reasons, the dissenting judge explained how the investigation committee failed to engage in the issue of how a member of the medical profession ought to resolve dual loyalties between the ethical obligations to the patient and the obligation to an employer in the prison context. Although the court ought not to parse the committee's reasons for error, the dissenting judge saw no basis to conclude the committee engaged with any of the identified issues. Instead, the dissenting judge viewed the committee's reasons as concluding the complaint was a minor matter of no consequence and not worthy of further investigation, notwithstanding conflicting details and the significant public interest component raised by it.

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***R v Gardener*, 2023 SKCA 12**

Caldwell Tholl Kalmakoff, 2023-01-18 (CA23012)

Constitutional Law - *Charter of Rights*, Section 11(b) - Delay
Criminal Procedure - Trial Delay - Stay of Proceedings

The Crown appealed a stay of proceedings on charges that the accused possessed cocaine for the purposes of trafficking. The trial judge had stayed the charges because trial delays infringed the accused's right to be tried within a reasonable time under s. 11(b) of the *Charter of Rights*. The trial judge used 912 days to get to trial as a presumptive ceiling for trial within a reasonable time. After that ceiling, the Crown had the burden of establishing the accused's s. 11(b) right had nonetheless not been infringed. The time to conclusion of the trial would be 1,318 days. The trial judge characterized 216 days as defence delay, and 77 days for the first of two COVID-19 adjournments as an exceptional circumstance that did not count towards the presumptive ceiling. A total of 1,025 days remained, and the trial judge found infringement. The Court of Appeal considered whether the trial judge erred by failing to characterize the second COVID-19 adjournment as an exceptional circumstance.
HELD: The appeal was granted. Whether something is an exceptional circumstance is a question of fact. The trial judge misapprehended the accused's admission in the transcript of an exchange discussing the second COVID-19 adjournment. The accused, through his counsel, admitted court COVID-19 protocols required an adjournment of the scheduled preliminary inquiry, the circumstance was discrete and exceptional within the meaning of *R v Jordan*, and the matter was rescheduled to the earliest possible date. As such, the second adjournment delay of 221 days also ought to have been deducted from the delay. When that delay was deducted, the net delay to the anticipated end of the trial was 804 days, which was under the presumptive ceiling. The stay of proceedings was set aside and the matter remitted to the Court of King's Bench for trial.

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***Fibabanka A.S. v Arslan*, 2023 SKCA 13**

Jackson Caldwell Schwann, 2023-01-24 (CA23013)

Civil Procedure - Civil Trial - Limitation Period - Discoverability
Limitation of Actions - Discoverability Principle
Statutes - Interpretation - *Limitations Act*, Section 5, Section 6, Section 18

The appellants, three Turkish financial institutions, appealed a chambers judge's decision to strike their claims because the claims were statute-barred pursuant to *The Limitations Act*. The appellants had brought actions to set aside the transfer of shares to a trust established by the respondents on the basis the transfer was a fraudulent conveyance within the meaning of *The Fraudulent Preferences Act*. The chambers judge decided the appellants ought to have known about the transaction in the summer of 2013, and the claims were commenced more than two years after the claim was discoverable. The Court of Appeal considered whether the chambers judge erred in striking the appellants' claims for being statute-barred pursuant to *The Limitations Act*.
HELD: The appeal was dismissed. A decision whether a limitation period has expired before a statement of claim was issued was a question of mixed fact and law. Unless there was a discrete error of law, appellate intervention was only warranted to correct a palpable and overriding error. Section 5 of *The Limitations Act* set a general limitation period of two years from the day when a claim was discovered. Section 6 stated a claim was discovered on the day the claimant became aware of the claim or ought to have known about it. The appellants argued the chambers judge applied an unduly onerous standard for foreign creditors. The chambers judge understood the hurdles faced by foreign creditors in enforcing a money judgment in Canada and took that into account. The appellants attempted to raise a new issue on appeal, regarding whether the appellants ought to have knowledge of the fact of the share transfer only, or also knowledge of the alleged fraudulent nature of the transfer and constituent elements of the claim. There was no basis for the court to consider a new argument on appeal, especially because it was a fact-dependent exercise. Further, the facts, not the law, were what must be known or ought to have been known by a plaintiff to start the limitation clock running. Error or ignorance of law did not postpone a limitation period. In assessing discoverability, a judge may consider the actions of a similarly situated plaintiff. The judge could have reached the same conclusion without the similarly situated comparator consideration. The appellants argued the chambers judge made an unwarranted and improper comparison to another Turkish financial institution that started a claim much sooner. This argument was based on a misreading of the chambers judge's reasons. A limitation period will not be tolled while a plaintiff takes no steps to investigate where there was a need for inquiry. The appellate court refused to re-weigh the evidence regarding the steps the plaintiffs ought to have taken through reasonable diligence. The plaintiffs had the burden of providing they exercised reasonable diligence. There was no need to delay commencing proceedings in Saskatchewan until after proceedings concluded in the Turkish court.

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***N.T.G. v J.A.M.G.*, 2022 SKKB 264**

Robertson, 2022-12-02 (KB22250)

Family Law - Child Support - Arrears
Family Law - Child Support - Arrears - Enforcement

The applicant applied to stay enforcement of maintenance, to reduce child support arrears, for parenting time with children, for communication between parents and for costs. No one appeared to oppose the application. Since the child support order had been made, the applicant had re-partnered, had two young children with her new partner and had no paid employment. The court considered: 1) should the enforcement of child support be suspended; 2) should the lien on the applicant's bank account and driver's license suspension be lifted; 3) should arrears be reduced or extinguished; and 4) what was the proper costs order? HELD: 1) Enforcement of child support was stayed for six months. The applicant had re-partnered and was no longer in paid employment. Her only source of income was the Canada child benefit, which was being garnisheed. The child benefit was intended for the benefit of the children in the applicant's care. Section 53.1 of *The Enforcement of Maintenance Orders Act, 1997* provided general authority for the court to suspend enforcement measures, but only for up to six months. 2) The judge did not lift the lien on the applicant's bank account or the suspension of her driver's licence. Section 43 of *The Enforcement of Maintenance Orders Act, 1997* authorizes a court to review the suspension of a driver's license where arrears are of less than three months or where the person's health is or would be seriously threatened by the suspension. The applicant had the onus of establishing those criteria and did not seriously contend that those circumstances existed. 3) Child support arrears had accumulated for almost four years. At the time the arrears began to accumulate, she was employed and chose not to pay the ordered child support. She had temporarily chosen to stay home with her young children rather than work outside the home for income that could be used to pay her child support obligations. The applicant did not establish on the balance of probabilities that she could not pay and would not in the future be able to pay arrears. The amount owing was neither reduced nor expunged. 4) The applicant was represented by Legal Aid. The application was unopposed. There was no order of costs.

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***R v Levac*, 2022 SKKB 271**

Mitchell, 2022-12-09 (KB22257)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Sentencing
Criminal Law - Criminal Code, Part XXIV - Dangerous Offender - Long-term Offender

The sexual offender (offender) was convicted after trial by a judge of the Court of King's Bench and declared a dangerous offender under Part XXIV of the *Criminal Code* (Code): 2020 SKQB 171 (Conviction Decision) and 2022 SKKB 215 (DO Ruling). He chose to exercise his discretion to sentence the offender to a determinate sentence of imprisonment pursuant to s.753(4)(b) of the

Code, followed by a long-term supervision order, as opposed to an indeterminate sentence. He first reviewed the facts and circumstances of the offence and the offender: the female 14-year-old victim was sexually assaulted twice by the offender after being lured to the home he was sharing with his mother; the offences involved full penile penetration without a condom; the offender committed the offences within a few weeks of meeting the victim at a recreational facility where he had ostensibly volunteered to assist her with weight training; at that time the offender had just been released from the penitentiary and was under daily supervision by probation services; the offences had a profound effect on the victim and her mother psychologically and emotionally; the offender was almost continuously under some form of incarceration from the time he was a young offender until the present; he was an unrepentant violent sexual offender with a high risk to reoffend and had served lengthy periods in the penitentiary system as a result; a pre-sentence report indicated that his mother was his primary source of support at present and had always been supportive of him; and the court-appointed psychiatrist reported that the offender had become institutionalized with the result that his "psychosocial functioning" distorted his "values and interpersonal relationships." The judge then surveyed the legal landscape in which he was to conduct his analysis to arrive at a fit and fair sentence for the offender and for society, and in particular sought guidance from cases pertaining to the following provisions of the Code: s. 718.1 - the primacy of proportionality, that a sentence must be proportionate "to the gravity of the offence and the degree of responsibility of the offender; s. 718.01 - offences against children, that a sentence "shall give primary consideration to the objectives of denunciation and deterrence;" s. 718.2(a) - aggravating and mitigating factors increase or decrease a sentence, in particular, s. 718.2(a)(ii.1) which makes offences against minors aggravating, while s. 718.2(a)(iii.1) makes a significant impact of the offence on the victim aggravating; s. 718.2(b) -parity, that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; s. 718.2(c) - consecutive sentences, "combined sentences should not be unduly long or harsh; and s. 718.2(d) and (e) - restraint, consideration of the possibility of a lesser sentence. The judge also put great store, as he appreciated he was required to do, in *R v Friesen*, 2020 SCC 9 in which the Supreme Court called on courts to impose higher sentences for offenders who commit sexual offences against children, and *R v L.V.*, 2016 SKCA 74.

HELD: The judge sentenced the offender to 10 years' and 14 years' incarceration to be served concurrently to conform to the principle of totality, followed by a 10-year long-term supervision order. As to proportionality, he understood he was to perform his analysis with protection of the public as his guiding aim. As to mitigating and aggravating factors, he found little in the way of mitigation except, to a limited extent, the offender's mother's support and some tentative steps to "acknowledge and to investigate his Indigenous ancestry" and as to aggravating factors, he found these to be many, and included the young age of the victim, the severe impact of the offences on the victim, "the degree of physical interference," his extensive criminal record revealing "an abhorrent history of crimes of sexual and physical violence committed against women," his having committed the offences while under daily supervision, and his "extraordinarily high risk for recidivism."

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***Creekside II Condominium Corporation v Saskatoon (City)*, 2023 SKKB 2**

Gerecke, 2023-01-04 (KB23004)

Administrative Law - Judicial Review - Municipal Bylaws
Administrative Law - Judicial Review - Record

Civil Procedure - Queen's Bench Rules, Rule 3-56(3)
Limitation of Actions - Actions Against Municipality

The applicant condominium corporation applied for judicial review of a water billing decision made by the city. The city was the decision-maker, author of the bylaw to be interpreted, and respondent to the judicial review application. The applicant argued the city misinterpreted which rate applied under its own bylaw and overcharged for water. The condominium received water through two sizes of meters. The larger meters were used primarily for landscaping and twelve units received their water through the larger meters. In 2019, a member of the applicant's board of directors learned units with a larger meter had been billed since 2011 at a higher rate than other units. She followed up with the city and received information in March 2020. The city argued its interpretation was correct, and a one-year limitation period applied to any recovery of damages. There had been no hearing. The city filed a record of proceedings including the bylaw and reports and resolutions of city council. The court also received affidavits from the applicant's resident board of directors and from city officials. The court considered: 1) what material was properly before the court; 2) when did the city make the decision; 3) was the decision reasonable; and 4) what was the effect of the statutory limitation period and delay? HELD: The application was allowed, and recovery limited to one year. Judicial review is an important way to control illegal government action. The parties agreed the court had jurisdiction to review how the city interpreted and applied its bylaw. The parties agreed the standard of review was reasonableness for non-adjudicative administrative action. 1) On judicial review, the general rule is that only the evidentiary record before the decision-maker is admissible. There are exceptions. Any exception must be relevant and necessary evidence. The affidavits were admissible and any after-the-fact justifications in affidavits were given reduced weight. 2) The applicant argued the decision was made in 2021, when the city sent an explanation to a board member. The city argued the decision was made when the bylaw was amended in 2009, and a consistent interpretation was applied to about 100 multi-unit residential properties. The decision was not simply made for one residential property, but applied to all multi-unit residential properties, and the city made the decision at issue when the bylaw amendments were implemented, in 2009 or 2010. Any contemporaneous reasons for the decision no longer existed. 3) Without reasons from when the decision was made, the court closely examined the bylaw and a 2009 report to determine whether the city's interpretation fell within the range of reasonable alternatives. The bylaw indicated the rates in Part II A applied where the ratio of dwelling units to meters was less than or equal to four. Part II B applied where the ratio of dwelling units to meters was greater than four. The applicant condominium argued the bylaw did not contemplate different units in the same multi-unit residential property being billed at different rates. The city had historically calculated ratios for each unit. The 2009 amendment changed the language and removed language that would have spelled out the calculation to be done for each unit, rather than for the condominium complex overall. The bylaw used the plural word "meters," and not the singular, but this alone did not make the city's interpretation unreasonable. The city's interpretation was unreasonable because it required completely ignoring the wording of the bylaw and instead relying entirely on the internal logic of what the city wanted to achieve with the rates. The bylaw stated that which rate applied was to be determined by the ratio of dwelling units to meters. "Dwelling units" referred to the units within a multi-unit residential property. The city's objective did not require the city's interpretation of the bylaw and could be achieved by setting rates to ensure the water utility broke even. It was not appropriate to interpret words in a bylaw without any reference to those words at all, relying solely on context. Nowhere did the bylaw state that where irrigation of multiple units was served by a meter, the number and ratio of dwelling units was irrelevant. The city's interpretation was unreasonable. 4) The one-year limitation period for claims against the city in s. 307(1) of *The Cities Act* applied. The limitation period was re-set each time the bylaw was amended and new bills were sent. The remedy only goes back one year before the service of the originating application. Rule 3-56(3) of *The Queen's Bench Rules* states the court may refuse to grant a remedy if there has been undue delay in making the application. The interpretation started in 2009. The applicant said they did not discover the issue until

2019. After discovering the billing anomaly, the applicant asked the city to explain the billing to them. That explanation was not fully provided until spring 2021. Issues were raised requiring investigation and consideration by the applicant's board of directors, including whether they could install separate irrigation meters. The applicant also attempted to persuade the city to change its interpretation in the summer and autumn of 2021. The application was started in February 2022. The applicant pursued the issues diligently and with sufficient dispatch. There was no undue delay. Even if there had been undue delay, no substantial prejudice would be suffered by the city by judicial review of the issue. The legislation created a six-month time-limit to challenge an illegal bylaw, which is published and publicly available. In contrast, an interpretation is not published and therefore, there is no trigger for a definitive time limit on an interpretation. The city could amend the bylaw on short order. There were approximately 100 other multi-unit residential properties in the city, but what those other multi-unit residential properties may do was speculative. If the parties could not agree on the amount of refund owing, they were invited to make further submissions on that issue.

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***Desai v North Ridge Development Corporation*, 2023 SKKB 3**

Kilback, 2023-01-05 (KB23002)

Employment Law - Discrimination
Human Rights - Discrimination - Family Status
Statutes - Interpretation - *Saskatchewan Human Rights Code*, Section 2(1) - "family status", Section 36

The complainant alleged her former employer discriminated against her on the basis of family status, by failing to allow her time off work to care for her ailing mother and for discriminatory discipline. The complainant worked as assistant controller in a finance department comprised of six employees. The complainant lived with and cared for her 84-year-old mother, who was in cancer treatment. Shortly thereafter, the complainant requested a three-month leave of absence so she could accompany her mother on an international trip to visit relatives. The leave of absence was denied because the finance department would be busy completing year-end reports, and the employer proposed alternatives of deferring the leave, retiring, or rescheduling hours. The complainant suddenly left work to stay with her mother in Calgary due to her concerns that her mother was weak and unhappy. She did not take her mother to a doctor, but concluded her mother was too unwell to travel back to Saskatoon. She informed her manager that she was in Calgary and could not return to work. Her manager denied her time off, and the complainant agreed to return to work the following week. The employer sent a letter stating that her absence from work was not approved and the if she did not return, her employment would be terminated. The complainant was upset by the letter, felt unvalued, felt that no further holidays or accommodations would be available to her, and that the employer thought she should prioritize work over her mother's care. The complainant resigned on two weeks' notice and worked through the notice period. She cared for her mother until her mother died three months later. The court considered: 1) does family status under *The Saskatchewan Human Rights Code* (Code) include an adult child with responsibility to care for an ailing parent; 2) what are the criteria for *prima facie* family status discrimination; 3) did the employer discriminate against the complainant on the basis of family status; and 4) if so, what remedies were appropriate?
HELD: The complaint was dismissed. 1) Elder care obligation as a characteristic of a parent and child relationship can fall within

family status protection under the Code as a matter of law. The Code defined family status as meaning the status of being in a parent and child relationship. The definition was not limited only to relationships of parental responsibility for a minor child. The Code does not refer to age, minor status or dependence. An inclusive interpretation supports the broad goal of anti-discrimination legislation. Elder care obligations have been recognized as falling within family status in other jurisdictions, and consistent interpretation of provincial human rights statutes is favoured. 2) The criteria to establish a *prima facie* case of family status discrimination were uncertain. Three cases from other jurisdictions had taken different approaches. The *Campbell River* test required a change in a term of employment resulting in a serious interference with a substantial parental or other family obligation (see: 2004 BCCA 260). The *Johnstone* test required a childcare obligation engaging the complainant's legal responsibility rather than personal choice, the complainant had made reasonable but unsuccessful efforts to meet those obligations some other way, and the work rule caused more than a trivial interference with the childcare obligation (see: 2014 FCA 110). The *Moore* test required the complainant prove a protected characteristic, an adverse impact and that the protected characteristic was a factor in the adverse impact (see: 2012 SCC 61). The court determined it would apply the *Moore* test. *Moore* was the leading framework for *prima facie* discrimination. A consistent discrimination test is desirable. The self-accommodation requirement in Johnstone has been criticized as contrary to human rights objectives. The *Johnstone* approach opens the complainant to an invasive inquiry before the employer even considers accommodation requests. The availability of reasonable alternatives may be relevant after *prima facie* discrimination is established. A legal obligation to care for a minor does not fit with elder care cases. 3) A *prima facie* case of discrimination was not established in this case. The court assumed but did not decide the complainant's elder care obligation to her ailing mother was protected by family status. The complainant's family obligations were not a factor in the employer's denial of a one-week leave of absence and letter threatening termination of employment. In the past, the employer had allowed flexible work schedules and leaves of absence to permit the complainant to care for her mother. In relation to the week she requested to stay with her mother, apart from the complainant's own subjective choice that mother was too ill to travel in the cold, there was no medical advice or other objective evidence of a health or care concern requiring the complainant to stay in Calgary with her mother rather than return to Saskatoon for work. The court concluded that there was no evidence the mother was too weak or ill to travel and that the complainant stayed in Calgary because she preferred to have her brother drive with her and her mother in cold weather, rather than because of legitimate family care obligations. There was no need for the complainant to have been absent from work because she had reasonably available alternatives to care for her mother, and thus the *prima facie* case was not demonstrated on the evidence. The letter was not discriminatory. There was no basis to conclude the employer would not be open to further accommodation requests. The discipline threatened in the letter did not occur because the complainant returned to work and then resigned. The employer did not force her to resign. The complainant chose to resign so she could spend time with her mother in the months before she died. The wish to spend more time with an ailing loved one is understandable, but does not necessarily create an elder care obligation protected from discrimination under family status. The link between a prohibited ground and adverse treatment was not established. The complaint was dismissed with no order of costs. Section 36 of the Code prohibits awards of costs unless there is vexatious, frivolous or abusive conduct, which was not present in this case.

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***Stephens v Pro Bono Law Saskatchewan Inc.*, 2023 SKKB 5**

Elson, 2023-01-06 (KB23008)

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Civil Procedure - Application for Summary Judgment
Torts - Negligence - Causation

Pro Bono Law Saskatchewan Ltd. (PBLS) applied to a judge of the Court of King's Bench for, among other types of relief, an order for summary judgment dismissing the statement of claim of B.S. for damages against PBLS. B.S. claimed damages were due to her because of her treatment at the hands of one of its lawyers at the pleading stage of an action. B.S., contrary to the lawyer's advice, issued a statement of claim on her own which included numerous persons and entities whom she held responsible for the loss of her home and all ensuing personal misfortune, including the village authority where her house was located as a defendant. The judge noted that B.S.'s pleadings were unclear as to the grounds of her complaints, but he was able to determine that she was claiming PBLS had acted negligently by not drafting her claim to include the village.
HELD: The judge was satisfied that he was able to fairly decide the matter summarily under Rule 7-2 of *The Queen's Bench Rules* without the necessity of having the action proceed to trial. He then reviewed the affidavit evidence and summarized B.S.'s involvement with PBLS, which he said was a limited retainer by which a PBLS lawyer was to give her advice, draft a statement of claim and assist her at the mandatory mediation session. He went on to note that the evidence indicated that B.S. and the staff lawyer disagreed as to whom to add as defendants in the claim; the lawyer would not include anyone but the CIBC, but B.S. wanted to add the village in which the home was located, which the lawyer considered to be frivolous and vexatious and something he would not do; B.S. commenced her own claim against the village and others, as a result of which the PBLS lawyer declined to act for her any further. The judge next considered the elements of the cause of action in negligence which B.S. was required to prove on a balance of probabilities, in particular, the elements of standard of care and causation, finding that evidence, both lay and especially expert opinion, was lacking to show that the PBLS lawyer failed to meet the standard of care required of him in declining to add the village as a defendant in the statement of claim; that, in other words, she failed to show this advice was unreasonable; on the matter of causation, he found B.S. failed to adduce evidence to prove that PBLS, in not adding the village as a defendant in the statement of claim on her behalf, had a "causative impact" on the dismissal of her claims against the other defendants. The judge was aware that the claims of the other defendants were struck for being statute-barred and not because of the failure of PBLS to assist her in properly adding the village in her statement of claim.

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***Nexus Holdings Inc. v Saskatoon (City)*, 2023 SKKB 6**

Elson, 2023-01-06 (KB23009)

Civil Procedure - Pleadings - Statement of Claim - Striking Out - Abuse of Process
Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(e)
Limitation of Actions - *Cities Act*
Limitation of Actions - Discoverability Principle
Statutes - Interpretation - *Cities Act*, Section 307(1)

The City of Saskatoon (City) brought an application pursuant to Rule 7-9(2)(e) of *The Queen's Bench Rules* to a chambers judge of the Court of King's Bench for an order striking a statement of claim issued by Nexus Holdings Inc. (Nexus) on September 15, 2021, alleging actionable wrongs committed by the City against it for requiring payment of $137,092.34 in "offsite levy charges" (levy) as a condition for "approval of [a] condominium application" prior to allowing Nexus to subdivide a property it had purchased into condominiums. Nexus pled that the combined operation of ss.168 and 169 of *The Planning and Development Act, 2007* (PDA) empowered the City to impose a levy in these circumstances only if it would incur "capital costs" because of the subdivision and conversion to condominiums, which it claimed was not the case here. The City maintained in its defence that capital costs were incurred, but regardless, Nexus' action was statute-barred by operation of s. 307(1) of *The Cities Act* (CA), which provided that no action was to be brought against it "after the expiration of one year from the time the damages were sustained" and if an action had been commenced, it could not be continued "unless service of the claim [was] made within that one-year period". It argued further that Nexus knew or ought to have known the limitation period expired prior to the issuance of its claim, and the law was clear that by proceeding in the face of this knowledge, Nexus was abusing the process of the court and its action must therefore be struck out.

HELD: The chambers judge allowed the City's application and ordered that Nexus' claim be struck out as an abuse of the court's process. He was mindful that s. 307(1) of the CA applied, "notwithstanding" *The Limitations Act* (LA), with the result that s. 6 of the LA, which codified the common law discoverability principle, was not directly applicable to s. 307(1), but "serve[d] as an interpretive tool for consideration of the limitation engaged here." He then proceeded to a review of the court record and the affidavit evidence in light of the submissions of counsel to determine when Nexus had "discovered" the facts necessary, as stated in *Stephens v MLT Aikins LLP*, 2021 SKQB 323 (referencing *Grant Thornton LLP v New Brunswick*, 2021 SCC 31), to draw a "plausible inference of liability on the defendant's part." His analysis led him to accept the submissions of the City that Nexus possessed or should have possessed the requisite material facts to launch its action on September 3, 2020, when Nexus completed the payment of the levy; and rejected the arguments of Nexus that it could not have known of material facts which did not exist and which only came into existence when the City refused its demand to repay the levy on June 15, 2021 or similarly, since the City had yet to prove what capital costs it incurred, its claim "remain[ed] undiscoverable." In response to Nexus' submissions, the chambers judge said that Nexus misunderstood the concept of discoverability, elaborating that "discoverability does not pertain to discovery of material facts upon which one can conclusively or unequivocally determine liability" but to discovery sufficient to draw a "plausible inference of liability," and Nexus had such knowledge when it paid the levy under what it described as duress. Continuing on to the City's argument that proceeding with the claim was an abuse of the process of the court, the chambers judge referenced a number of decisions including *Walker v Mitchell*, 2020 SKCA 127 (*Walker*), and *Campbell v Cooper*, 2017 SKCA 55, and concluded that it was "plain and obvious" that Nexus had sufficient knowledge of the material facts to launch its claim before the expiry of the one-year limitation period; there was no dispute on the evidence as to the facts in issue, and the evidence clearly showed that Nexus "had knowledge of all the facts that would cause [its] claim to be statute-barred" (*Walker*).

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***R v Weber*, 2023 SKKB 8**

Popescul, 2023-01-10 (KB23010)

Criminal Law - Procedure - Appointment of Counsel
Statutes - Interpretation - *Criminal Code*, Section 684

The applicant applied for court appointed counsel for a summary conviction appeal. The Ministry of Justice opposed the request and the Crown Prosecutor took no position. The applicant was convicted of common assault, received a suspended sentence and was placed on probation for 18 months with conditions. The applicant had appealed in 2021. The grounds of appeal were that the applicant had been wrongfully convicted contrary to the evidence, may have been manipulated by Crown or defence counsel for the purpose of cross examination, and his *Charter* rights were breached. After many months of delay, the appeal hearing was set for January 2023, and the application for court appointed counsel was heard in December 2022. The accused had been denied Legal Aid and was impecunious. The court considered: should counsel be appointed to argue the appeal?
HELD: The application was dismissed. Section 684 of the *Criminal Code* permits the court to assign counsel if it is in the interests of justice and the accused does not have sufficient means to obtain counsel. The application depended on whether the appeal was arguable, whether the appeal could be presented effectively without legal assistance given the applicant's education and ability and the complexity of the issue, whether the court would be able to decide the appeal properly without the assistance of counsel, the seriousness of the offence, and the penalty imposed. The charge and facts were straightforward. Video evidence existed. The conviction was fact-based. The judge had reviewed the trial transcript. There did not appeal to be an arguable ground of appeal. The offence was relatively minor. The penalty did not involve incarceration. The issues were not complex. The judge had no doubt the appeal could be decided properly without the assistance of counsel for the applicant.

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***Mbonyimana v Workers' Compensation Board*, 2023 SKKB 9**

Turcotte, 2023-01-12 (KB23005)

Administrative Law - Judicial Review - Workers' Compensation Board
Administrative Law - Judicial Review - Undue Delay
Civil Procedure - *Queen's Bench Rules*, Rule 3-56(3)

J.C.M. filed an originating application for judicial review with the Court of King's Bench on June 4, 2021 "to set aside the decision of the Workers' Compensation Board Appeal Tribunal (board) dated December 6, 2018" that denied his appeal from the Workers' Compensation Board (WCB) decision of February 7, 2018 terminating his wage loss benefits. His former employer, KPCL, who employed him when he was injured on September 24, 2013, applied pursuant to Rule 3-56(3) of *The Queen's Bench Rules* (Rules) for an order that the court refuse to grant J.C.M. any remedies he sought in the originating application "on the basis of undue delay and that granting an order in favour of the Originating Application [would] be detrimental to good administration and [was] substantially prejudicial to the interests of KPCL." The relevant facts were not in dispute and were summarized by the chambers judge: following the denial of his appeal by the board, J.C.M. approached a number of advocacy agencies for assistance in bringing an appeal of the board's decision to the proper forum; these included the Worker's Advocate (OWA), the WCB's Fair

Practices Office, Ombudsman Saskatchewan, the Quebec Legal Aid Office and Justice Pro Bono Quebec; he was relentless in his efforts to have these agencies point him in the proper direction, but was never directed to the Court of King's Bench and the availability of a judicial review application until November 27, 2020, when the Fair Practices Office informed him " he could seek to challenge the board's decision in the Court of Queen's Bench; instead of taking this route immediately, he continued to seek assistance from OWA, and the other agencies, when on May 12, 2021, a different advocate from the one he had been dealing with at OWA told him to proceed for relief in the Court of Queen's Bench, which caused him to file his originating application on June 4, 2021; J.C.M. was a refugee from Rwanda and did not have the financial means to retain a lawyer; he also suffered from a language barrier as English was his third language, and as a result, communication was slow and subject to misinterpretation.
HELD: The chambers judge dismissed KPCL's application. He first referred to the leading cases concerning undue delay in commencing a judicial review proceeding, including *LaBrash v Saskatchewan Veterinary Medical Association*, 2017 SKQB 267, which cited *Henry v Saskatchewan (Workers' Compensation Board)* (1999), 172 DLR (4th) 73 (Sask CA), the leading case on undue delay of this kind. He commented that he was to apply a two-stage approach to the question: first, was there undue delay having regard to the actual lapse of time, and was this lapse of time reasonably explained in all the material circumstances; and, second, if there was an undue delay in launching the application, would continuation of the application "likely cause substantial hardship or substantial prejudice to the rights of any person or [be] detrimental to good administration." The chambers judge found the lapse of time to be long, being 31 months, but also found that it was less than in some of the case authorities that found the delay not to be unreasonable. He concluded that the elapsed time was reasonable because it was clear from the evidence that J.C.M. had decided soon after the board's dismissal of his appeal that he intended to seek redress, but due to his unfamiliarity with Saskatchewan law and court system, and his poor language skills, was unable to find his way to the courtroom in a timely way.
Though this ruling concluded the matter, for appeal purposes, the chambers judge also went on to consider the second stage of the analysis, disagreeing with KPCL that it would be prejudiced by an increase in its premiums if the application were allowed to continue since such an eventuality was conjectural at this point; and also disagreed with KPCL that allowing J.C.M.'s judicial review application to continue would go counter to finality and certainty of proceedings, since in the context of WCB proceedings, its decisions were always open to review.

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***Kuffner v Jacques*, 2023 SKKB 14**

Tochor, 2023-01-18 (KB23012)

Civil Procedure - *Queen's Bench Rules*, Rule 7-2, Rule 7-5
Civil Procedure - Summary Judgment
Wills and Estates - Will - Testamentary Capacity - Proof in Solemn Form

Following an application by J.K., the beneficiary contesting the deceased, P.E.J.'s, testamentary capacity to make a will dated July 9, 2014, the Court of Queen's Bench judge rendered a judgment in the matter of *Kuffner v Jacques* [(6 May 2019) Moose Jaw, QBG 22/19 (Sask QB)] and ordered that the testamentary capacity of the deceased, P.E.J. to execute the will be proven in

solemn form. J.K. then applied to have the issue decided in accordance with the summary judgment procedure established by Rules 7-2 and 7-5(1) and (2) of *The Queen's Bench Rules* (rules). The King's Bench chambers judge was required to decide whether this procedure was available to J.K. and, if so, whether he should exercise his discretion and decide the issue accordingly and without the benefit of a full trial.

HELD: The chambers judge first decided that the judgment made previously by the judge in the originating application for proof in solemn form was binding on him and disagreed with J.K. that in finding there was a genuine issue for trial, the judge did not mean that a trial was required, commenting that "there cannot be any misunderstanding of [the judge's] conclusion that a trial of this issue is required in these circumstances." He was reassured in this conclusion by *Fourney v Manson*, 2020 SKQB 215. Having so found, he was aware he needed to go no further, but in the event he was wrong, went on to determine whether he would have exercised his discretion to decide the issue without a full trial. After canvassing a line of authorities commencing with *Hryniak v Mauldin*, 2014 SCC 7, he extracted the basic principle that was to guide him in the exercise of his discretion: if he was not convinced that he was able to satisfactorily "weigh the evidence, evaluate credibility and draw inferences" based on affidavit and documentary evidence, he should have the issue decided by a full trial. He did find such to be the case because he could not choose between the evidence of J.K. and the evidence the estate on many central questions, such as the mental functioning of the testator, with one side saying his thinking was clear and his decisions forceful, and the other side saying the opposite.

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***R v Friesen*, 2022 SKPC 50**

Hendrickson, 2022-11-17 (PC22048)

Constitutional Law - *Constitution Act, 1982*, Section 52(1)
Constitutional Law - Delegation by Provincial Legislature
Statutes - Interpretation - *Disease Control Regulations*, Section 25.2
Statutes - Interpretation - *Public Health Act, 1994*, Section 45, Section 46

The applicants were charged with failing to comply with public health orders restricting the number of persons permitted to gather outdoors and failing to require patrons of its business from entering without proof of vaccination for COVID-19 made pursuant to section 38 and subsection 45(2) of *The Public Health Act, 1994* (PHA) and section 25.2(2) of *The Disease Control Regulations* (the Regulations) contrary to section 61 of The Public Health Act, 1994. The applicants advanced a three-pronged argument before the trial judge that the public health orders (PHOs) were "inconsistent with the provisions of the Constitution Act, 1982 and [were] null and void and of no effect." First, they argued, "the power conferred under section 25.2 of [the Regulations] exceed[ed] the authority granted in the [PHA];" second, "section 25.2 of [the Regulations] transforms a legislative power into an administrative power and is thus illegal;" and third, "executive regulations and orders amounting to the exercise of legislative power invalidly intrude on the exclusive authority of the Legislature and the Regulation and [PHOs] involve the exercise of a substantive legislative power properly the subject of direct legislative enactment." No facts were in issue.

HELD: The trial judge dismissed the application. Following a review of the legislation in question and the relevant judicial authority, including *Katz Group Canada Inc. v Ontario (Health and Long Term Care)*, 2013 SCC 64, along with the cases considered in it, and

Hudson's Bay Company ULC v Ontario (Attorney General), 2020 ONSC 8046, from which he adopted a two-step process to assess whether a regulation is ultra vires its "parent" statute: what is the statute's scope and purpose, and does the regulation fall within these? He then expressed that the clear scope and purpose of the PHA was "the protection of the health and well-being of the people of Saskatchewan" and that in order to accomplish this purpose in the face of the COVID-19 pandemic, the regulatory powers enumerated in s. 46 of the PHA, which included empowering the Minister of Health to make orders "in the public interest to prevent, reduce or control the transmission of COVID-19, a communicable disease and health hazard" were invoked. He disagreed with the applicants' argument that because s. 46 of the PHA did not specifically allow for "the creation of administrative orders" like PHOs, these were *ultra vires*, and in doing so appealed to a long "chain" of case law supporting a broad interpretation of the regulatory powers contained in the PHA, which would include granting the minister the authority to make administrative orders if necessary to accomplish the goal of preventing, reducing and controlling the transmission of COVID-19. As to the second argument that, if the Regulation did not fall outside the regulation-making power enumerated in s. 46 of the PHA, the Regulation drafted was an unlawful "re-delegation" of statutory power since it passed on that statutory power unfettered and without limiting direction to an administrative body, and so in effect re-delegated legislative power "to itself to be exercised in an administrative or discretionary fashion". The trial judge disagreed that this was so because he was satisfied the Regulation provided the Chief Medical Officer with powers and duties which did not usurp those contained in s. 45 of the PHA itself, but in fact "augment[ed] the order making power created by [it]". The applicants' third prong of argument was that "the [Regulation] effect[ed] an invalid sub- delegation", or a transformation of "a legislative power, ostensibly granted under section 46 of the Act into an administrative power vested in the Minister." Again, the trial judge disagreed with the applicants that the executive branch of government acted unconstitutionally in this way, because, as with the second prong of the applicants' argument, among other reasons, he found that the Regulation did not affect an invalid sub-delegation because "administrative necessity" required that in order to effectively achieve the objectives of the PHA, it was within the Minister's power to sub-delegate some of his authority to the Chief Medical Officer. Having rejected the three-pronged ultra vires argument of the applicants, the trial judge considered the further submission of the applicants that the Regulation was inconsistent with the *Constitution Act, 1982*. He appreciated that the thrust of this submission by the applicants was to challenge the legality of delegation of statutory authority altogether; that delegated authority is fundamentally undemocratic and therefore incompatible with the *Constitution Act, 1982*. In rejecting this attack, the trial judge relied on *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 218, in which the court stated it rejected the notion that delegated laws offended any constitutional principles, but that to the contrary "delegated laws have been described as the lifeblood of the modern administrative state", and that judicial review of state enactments was capable of protecting and preserving the rule of law. Lastly, the trial judge referred to *R v Keough*, 2022 SKPC 23 and acknowledged that though he was authorized to rule on the constitutionality of the PHOs he was not permitted to provide a remedy, though no issue of that kind arose in this case.

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***R v Friesen*, 2023 SKPC 9**

Agnew, 2023-01-17 (PC23005)

Constitutional Law - *Ultra Vires*

Regulatory Offences - Public Health Order - Breach

The defendant was charged with attending a public outdoor gathering at which more than 30 people were in attendance, contrary to the Public Health Order in effect at that time, which was put in place in order to reduce the spread of the COVID-19 virus. HELD: The trial judge of the Provincial Court adopted his reasons from *R v Wong et al.*, 2023 SKPC 7 and *R v Drebit et al.*, 2023 SKPC 8 with respect to the constitutional arguments advanced by the respondent in the case before him, and based on his reasoning in these cases, dismissed the constitutional law arguments of the defendant. The trial judge viewed the video evidence of the gathering, which showed the defendant in attendance in a crowd obviously larger than 30 persons. He also rejected the defendant's suggestions that the police treated him unfairly by only ticketing him, and that they also acted unlawfully by not warning people at the gathering that they might be charged before issuing tickets. The trial judge also rejected this defence. He stated that no evidence was tendered by the defendant proving he was the only person ticketed or that the police did not warn people that they could be charged, and in any event, he knew of no authority requiring police to warn before ticketing.

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***R v Charles*, 2023 SKPC 6**

Daunt, 2023-01-06 (PC23001)

Criminal Law - Firearms
Criminal Law - Procedure - Search and Seizure - Search Warrants
Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 24(2)

The accused was charged with several drug and firearms offences following a search pursuant to a warrant of a dwelling house at which he was present and where drugs and firearms were located. Upon arrest, he was searched incidental to arrest and a cell phone was found on his person, which was also searched pursuant to a warrant. Under s. 24(2) of the *Charter*, the accused challenged the admissibility at his trial before a judge of the Provincial Court (trial judge) of the evidence obtained at the dwelling house and from his cell phone for purported breaches of his section 8 *Charter* right to be free from unreasonable search and seizure and his section 9 *Charter* right not to be arbitrarily detained. The accused submitted that the grounds affirmed in the Information to Obtain (ITO) were not sufficiently "credible, reliable, compelling and corroborative" to support the affiant's reasonable grounds to believe that a warrant of search and seizure should have been issued by the justice. The *Charter* motion and the trial proper were conducted together. The *Charter* motion required the trial judge to review the ITO and warrant and to quash the warrant if she was not satisfied "there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place" (*R v Morelli*, 2010 SCC 8). In order to make this determination, and because the evidence in support was provided by informants, she carefully parsed the ITO with the guidance of the "*Debot* factors" (*R v Debot*, 1989 CanLII 13 [SCC] as applied in *R v Protz*, 2020 SKCA 115), these being: is the information provided by the confidential informants compelling, credible and corroborated, and in the totality of the circumstances, capable of meeting the standard of reasonable grounds to believe? HELD: Following her examination of the ITO, the trial judge concluded the information provided by the informants in the totality of the

circumstances could not amount to reasonable grounds to believe that evidence of firearms or drugs implicating the accused would be located at the dwelling house specified in the warrant. As a result, she quashed the warrant. The trial judge did not find the information provided by the informants to be compelling, credible, or corroborative. She was concerned the informants were not independent of each other, noting that three of them were quoted as saying the accused had “multiple firearms,” which led her to doubt that these were the exact words they used and suspect the affiant was paraphrasing. She observed that the affiant did not say the informants “personally observed the accused in possession of firearms;” the informants’ “history” of providing tips was not long so they had no track record of reliability, which was not adequately made clear to the justice, as required by the affiant’s duty to “provide full and frank disclosure;” the tips were totally lacking in detail or were silent as to how the informants obtained them; no information was provided by the informants that might prove the accused possessed the firearms, nor did they establish his connection with the dwelling house; and the tips were not corroborated by such information as searches of databases to determine if the accused occupied the dwelling house. As the warrant was wrongly obtained, the search and seizure was deemed to be unreasonable and the arrest of the accused arbitrary and unlawful under ss. 8 and 9 of the *Charter*. As the warrant to seize and search the cell phone was based on the defective warrant, the evidence derived from it was also seized in contravention of s. 8. She then went on to consider whether the evidence of the searches should be excluded from the trial under s. 24(2) because its admission would bring the administration of justice into dispute, ruling it inadmissible because the entry into the dwelling house was akin to a home invasion by numerous police officers with firearms drawn, and discharging pepper spray, “bringing in a military-style armoured vehicle and blasting orders through bullhorns, telling residents to shelter in place;” 12 persons were forced out of the house in January weather and arrested without any grounds for arrest; the accused was in the same position with respect to the legality of his arrest, based as it was on the defective warrant; and though the evidence would have been sufficient to try the case on its merits, she found that the seriousness and impact of the breaches on the accused outweighed society’s need to see the matter tried on the merits.

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