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 Zheleznikov*, 2023 SKCA 15**

Leurer Kalmakoff McCreary, 2023-01-25 (CA23015)

Criminal Law - Appeal - Summary Conviction Appeal
Statutes - Interpretation - *Criminal Code*, Section 839

The appellant was convicted of sexual assault after a trial in Provincial Court. The Crown proceeded summarily. The trial judge considered the evidence, accepted the complainant's testimony, rejected the appellant's account, and found that the Crown proved the case beyond a reasonable doubt. The appellant appealed the conviction in the Court of King's Bench, which was dismissed. The Court of Appeal found no error of law in the reasoning of the summary conviction appeal judge.
HELD: Leave to appeal was denied. Under s. 839 of the *Criminal Code*, the right to appeal a summary conviction is limited to questions of law, and only with leave of the Court of Appeal. The appellant did not identify an error of law in the summary conviction appeal at King's Bench. The test for granting leave is demanding: leave will only be granted if the appellant establishes that the appeal raises a question of law that is either: (a) significant to the administration of

Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 10(b)

Contract - Breach of Contract - Enforceability

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justice generally; or (b) compellingly meritorious in the particulars of the case in question.

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***R v Fertuck*, 2023 SKKB 32 (not yet available on CanLII)**

Danyliuk, 2023-02-10 (KB23039)

Criminal Law - *Amicus Curiae*

The accused was charged with first degree murder and offering an indignity to a body. Here, a complex voir dire on the admissibility of statements by the accused tendered by the Crown during a "Mr. Big" undercover operation was still ongoing. In this fiat, the court decided the issue of whether an *amicus curiae* (a friend of the court) should be appointed to assist the court. The accused's trial counsel had been granted leave to withdraw, and the court appointed independent interim counsel for the accused. However, the accused decided to represent himself in all further proceedings, despite being strongly encouraged to obtain legal counsel. When the accused advised the court that he was not opposed to the admission of the (presumptively inadmissible) statements the Crown sought to enter into evidence, the court raised the idea of appointing an *amicus curiae* to aid the court. In this fiat, the court determined 1) whether it was in the accused's interest and in the interest of justice to appoint *amicus curiae* in this case; and 2) if so, the extent of the lawyer's rights and responsibilities as *amicus curiae*. HELD: The court found it was in the accused's interest and essential to the overall interest of justice to appoint an *amicus curiae*. The court took the step of designating the appointed lawyer in this case. The court first noted the court's inherent jurisdiction to appoint an amicus as set out in the Supreme Court decision of *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (*CLA*). While not in the role of defence counsel, an *amicus* can be granted wide powers to be active and independent during a criminal trial. In *CLA*, the court made it clear that care must be taken in appointing an *amicus curiae* and in setting the terms of the appointment. The court distinguished the case before it from *R v Pastuch*, 2022 SKCA 109. 2) The court set out the terms of the *amicus curiae* appointment in an order. The terms included the *amicus* assisting the accused on applicable law and procedure, communication with the Crown, and cross-examination, but that the assistance go "only so far as may be required for the Accused to advance a defence at trial."

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Receivership - Priority

Statutes - Interpretation - *Builders' Lien Act*, Section 55(1), Section 55(3)

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Wills and Estates - Trusts - Resulting Trusts

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Cases by Name

***Singh v George Development Corp.*, 2023 SKKB 36**

Crooks, 2023-02-14 (KB23041)

Builders' Lien - Application to Dismiss
Statutes - Interpretation - *Builders' Lien Act*, Section 55(1), Section 55(3)

The applicant defendants sought an order under ss. 55(1) and 55(3) of *The Builders' Lien Act*, SS 1984-85-86, c B-7.1 (Act), declaring that the claim of lien registered by the plaintiff be cancelled, discharged, and vacated. The applicants also sought an order under s. 56(4) that the funds that had been paid into court for the action be paid in trust on behalf of the applicants. The background was a series of commercial disputes over the construction of the Holiday Inn Express and Staybridge Suites in Saskatoon. The plaintiffs registered a lien against the land, following which the applicants paid into court a sum of money. As a result, an order of the court issued wherein the lien was cancelled and replaced by a claim on the money paid into court. The plaintiffs applied for summary judgment in August of 2019, but it was adjourned sine die by consent. The court decided the following issues: 1) does s. 55(1) of the Act apply when the lien is discharged by way of payment into court; 2) should the court extend the time limit set out in s. 55(2); 3) does filing a summary judgment application have the same effect as setting the matter down for trial; and 4) should the funds previously paid into court be paid to the applicants?
HELD: The applicants were entirely successful. The court held that the plaintiff's lien, including any charge over the funds paid into court, had expired. The court dismissed the plaintiff's claim under s. 55(1) of the Act and ordered that the funds paid into court be paid out to the applicants. 1) Section 55(1) stipulates that a lien expires if an action is not set down for trial within two years. This timeframe may be extended by the court. Section 56 sets out that if the court makes an order vacating a registered claim of lien, then the lien "becomes instead a charge on the amount paid into court." Here, the cash had been tied up in the court for over five years. The court held that the charge on the funds expired under the Act if the action was not set down for trial within two years of the day the action was commenced. 2) The court determined that an extension of time was not appropriate in the circumstances. The matter had not been set down for trial, and over two years had elapsed. There was no reasonable explanation justifying the delay outside of the two-year limit. It was incumbent on the plaintiffs to move the matter forward given the strict timelines set out in the Act. 3) Filing a summary judgment application did not have the same effect as setting the matter down for trial. The part of the action regarding the claim and enforcement of the builder's liens was dismissed. The action had "sat dormant" with the court; it had been over three years since the application for summary judgment was adjourned *sine die*. 4) The funds paid into court were returned to the applicant.

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***Gardiner v Canada (Attorney General)*, 2023 SKKB 38**

Popescul, 2023-02-16 (KB23034)

Civil Procedure - Class Action - Designation of Judge
Civil Procedure - Queen's Bench Rules, Rule 12-2
Civil Procedure - Service - Personal

The plaintiffs of a putative class action applied without notice for an order designating a judge to hear a class action certification application under rule 3-90 of *The Queen's Bench Rules*. A designated judge application should only be considered after the plaintiffs have filed sufficient proof of service of the claim on each of the defendants. Rule 12-2 required personal service. The evidence showed that the claim had been served by email, with no delivery or read receipts. The plaintiffs had not applied for an order for substituted service under Rule 12-10. One defendant had not filed statement of defence, notice of intent to defend or an acknowledgement of service. The purpose of the rules respecting service is to ensure that parties are notified when a claim is made against them. The judge was not prepared to validate irregular service of the claim. The application to appoint a judge was not granted because the judge was not satisfied a defendant was properly served. Leave was granted to file additional material in support of the application.

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***102007987 Saskatchewan Ltd. v Khaira*, 2023 SKKB 49**

Popescul, 2023-02-24 (KB23046)

Civil Procedure - Costs - Solicitor-and-Client
Contract - Breach of Contract - Enforceability
Contract Law - Repudiation

When the parties' business relationship soured, they entered into a settlement agreement. The applicant plaintiffs commenced this action, seeking to enforce the terms of the settlement agreement, and for a judgment for the amount unpaid under the agreement. The defendants counterclaimed for the return of money already paid under the agreement, arguing that there had been a

fundamental breach of the contract's non-disclosure and non-disparagement provisions. There was no dispute that the defendants had in fact made payments to the applicants under the settlement agreement. The issues decided were: 1) whether the case could be decided by summary judgment; 2) whether there was a legally enforceable agreement entered into by the parties prior to the settlement agreement; 3) whether there was a fundamental breach of the settlement agreement; and 4) whether costs on a solicitor-and-client basis were appropriate.
HELD: The applicants were entitled to judgment for the unpaid money plus interest as set out in the settlement agreement. The defendant's counterclaim was dismissed. The court ordered solicitor-and-client costs. 1) The court held that this case could be determined by summary judgment. The court was satisfied that there was "no genuine issue requiring a trial" (rule 7-5(1)(a)) because there were sufficient facts in the evidentiary record to resolve the dispute. The only two significant issues were whether a settlement was formally reached before the settlement agreement was signed, and whether there had been a fundamental breach of the settlement rendering it void. 2) The only rational conclusion that could be drawn was that there was no binding agreement that resulted from meetings which took place before the settlement agreement was signed. The elements necessary to create a binding contract were missing. The court referred to the recent Supreme Court of Canada decision *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 for the elements of contract formation. The parties continued to negotiate after the initial meeting, and later ended up executing the formal agreement. Even if the court had found that some type of contract was entered into earlier, the entire agreement clauses of the settlement agreement would have overtaken any previous agreement. The settlement agreement was the only legal contract in place. 3) There was no fundamental breach of the settlement agreement. The respondents did not prove that the applicants breached either the confidentiality or the non-disparagement provisions. They also did not establish that these provisions were such crucial cornerstone aspects of the agreement such that a breach of either of them would result in voiding the contract. 4) Solicitor-and-client costs were ordered. A provision of the settlement agreement allowed for reasonable solicitor/client fees and expenses if the successful party sued the other to enforce the terms. The court noted that it had discretion to award costs pursuant to Rule 11-1 of *The Queen's Bench Rules*, and that it was not bound to award solicitor-and-client costs even when set out in the contract. The court saw no reason not to award solicitor-and-client costs, noting that the respondent's response to the claim demonstrated an effort to obfuscate rather than illuminate.

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***R v Eye Hill (Rural Municipality)*, 2023 SKKB 52**

McCreary (*ex officio*), 2023-03-07 (KB23049)

Receivership - Priority
Natural Resources - Mines and Minerals - Oil and Gas - Environmental Obligations
Natural Resources - Mines and Minerals - Oil and Gas - Orphan Wells

The applicant Rural Municipality (RM) applied to the court to resolve the priority distribution of residual proceeds from the sale of the assets of an oil and gas company from the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 receivership proceedings (CCAA proceedings). The company had been granted licenses to extract resources in Saskatchewan on the basis that

the company assume environmental obligations at the end-of-life stage of the wells so that they did not leak or contaminate the land. The RM sought a declaration that the funds in the estate should be paid to address municipal taxes owed by the oil company, in priority to money owed to any other party. Saskatchewan took the position that the residual proceeds should be granted to it. The court determined: 1) whether the RM was entitled to the proceeds; and 2) whether the residual proceeds were to be used to address environmental obligations.
HELD: The RM's application was dismissed. 1) The RM had no priority claim to funds in the receivership. The RM unsuccessfully argued a trust claim to proceeds from the CCAA proceedings. The court found that, at most, the RM had a lien specific to the property to which the taxes relate. However, the definition of property in *The Municipalities Act*, SS 2005, c M-36.1 does not include proceeds. Even if a lien existed, the Crown took priority over the RM under s. 320 of *The Municipalities Act*. 2) The funds had to be used to address the oil and gas company's environmental obligations. The court applied *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 to come to this conclusion. The company's duty to perform end-of-life environmental obligations was embedded in its license and existed when the license was issued.

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***Reaney v Fradette*, 2023 SKKB 60**

Bergbusch, 2023-03-22 (KB23052)

Practice - Summary Judgment - *Land Titles Act* - Trust
Statutes - Interpretation - *Land Titles Act, 2000*, Section 109
Wills and Estates - Trusts - Resulting Trusts

The applicants commenced an action by originating application seeking that a beneficial interest in a quarter section of land vest in them as joint tenants. The applicants claimed that they transferred the land to their (now deceased) son as a "loan" of property so he could obtain financing to purchase other land, but that he agreed to return the land to them. Title to the land was registered in the deceased's name only, with a Farm Credit Canada mortgage registered as the first charge against title to the land. The applicants argued that the matter was uncomplicated and could be decided summarily. The respondent was the common law spouse and executrix of the estate. She opposed the application and took the position that the land should form part of the estate.
HELD: The dispute could not be decided summarily under s. 109 of *The Land Titles Act, 2000*, SS 2000, c L-5.1 (LTA) because a trial was required to resolve contested questions of fact and law. As a general rule, s. 109 applications should be decided by an action and trial rather than summarily where there is an arguable issue and conflicting evidence, and complexity to the evidence and the law [*Block v Sceptre Resources Ltd.* (1989), 73 Sask R 68 (CA)]. The court set out the nature of the application: the applicants contended that the land was subject to a voluntary transfer resulting trust, and that they lacked donative intent when they transferred title to their son. The court noted that the common law presumption of a resulting trust in the case of gratuitous transfers does not apply in Saskatchewan, and that voluntary transfer resulting trusts are only recognized if certain conditions are met (*Dunnison Estate v Dunnison*, 2017 SKCA 40; *Burnouf v Burnouf*, 2022 SKCA 6). Here, the land was transferred for no consideration, so the issue was whether the applicants could prove a lack of donative intent at the time of transfer. The applicants provided a note in

support of their application, but the respondent provided affidavit evidence from an expert that the note was forged. The applicants did not apply to cross-examine the expert.

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***R v Kerpan*, 2023 SKPC 17**

Scott, 2023-01-06 (PC23021)

Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 10(b)
Criminal Law - Blood Alcohol Level Exceeding .08
Criminal Law - Evidence - Certificate of Analysis
Criminal Law - Impaired Driving

The accused was charged with operating a conveyance while impaired, contrary to s. 320.14(1)(a) of the *Criminal Code*, RSC 1985, c C-46 (Code) and with having a blood alcohol concentration (BAC) equal to or exceeding 80 mg of alcohol in 100 ml of blood within two hours after operating a conveyance, contrary to s. 320.14(1)(b) of the Code. The accused argued that her ss. 8, 9, and 10(b) *Charter* rights were violated, and sought to exclude evidence as a result. She also argued that the Crown did not meet the statutory requirements for the certificate of analyst to be admitted. The court decided the following issues: 1) whether the accused's ss. 8 and 9 *Charter* rights were violated and whether the officer had the necessary reasonable grounds to make the breath demand; 2) whether the accused's s. 10(b) right to counsel was violated; 3) whether the Crown complied with the statutory requirements to admit the certificate of analyst into evidence; 4) whether the Crown proved beyond a reasonable doubt that the BAC exceeded the legal limit; and 5) whether the Crown proved that the accused operated the conveyance while impaired.
HELD: The court found the accused not guilty of having a BAC over the legal limit. The Crown did not meet the statutory requirements for relying on the certificate of analyst at trial. The accused was found guilty of impaired driving. None of the *Charter* challenges were effective. 1) The arrest was not arbitrary under s. 9 of the *Charter* and taking breath samples did not amount to an unreasonable search and seizure under s. 8 of the *Charter*. The officer was not required to perform an ASD test. The officer had reasonable grounds for making the breath demand. The court was satisfied that a reasonable person standing in the shoes of the officer would have believed that the accused's ability to operate the motor vehicle was impaired. The officer observed the accused drive over the median of a divided roadway, strike a light post, and continue driving at erratic speeds. The officer also observed usual signs of alcohol consumption, and the events occurred in the early morning hours. 2) The accused did not establish a breach of her s. 10(b) *Charter* right to counsel. The officer properly informed the accused of her right to counsel, reading from the standard pre-printed card. The accused said she would like to speak to a lawyer but did not have one. The accused was not given resources to locate a lawyer and was not directed to the phonebook located in the same room as her at the station. The officer did facilitate a call to Legal Aid duty counsel, and she spoke with counsel. She did not express any dissatisfaction with the call. The court noted that the officer's testimony could have been more helpful; he should have done a better job of documenting his conversation with the accused and the steps taken for *Charter* compliance. 3) The Crown did not comply with the s. 320.32(2) statutory requirement of notice for relying on the certificate of analyst at trial, and therefore could not use the certificate as conclusive proof of the accused's BAC. There was no endorsement on the certificate of analyst indicating that the Crown intended to produce and rely on the

certificate at trial. If the Crown intends to rely on the certificate of analyst rather than on the viva voce evidence of the analyst, it must also provide notice to the accused of that intention. Disclosure of the certificate is different from giving notice of the intention to produce the certificate at trial. 4) The accused was found not guilty of count two (driving with a BAC exceeding the legal limit) because without the certificate, the Crown could not prove all the necessary elements of the offence. 5) The accused was found guilty of impaired driving. The court asked whether the evidence taken as a whole led to only one reasonable conclusion – that the accused's ability to operate a conveyance was impaired by alcohol. Here, the court considered the circumstances of the accused's erratic manner of driving, which took place at 2:00 am. The court noted that the manner of driving had to be considered along with all other relevant evidence. The court accepted the officer's observations that the accused had difficulty grasping the driver's licence and reduced fine motor skills, along with other signs of impairment.

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***R v Thomas*, 2023 SKPC 15**

Jackson, 2023-01-11 (PC23013)

Criminal Law - *Controlled Drugs and Substances Act*, Section 5(2), Section 5(1)

The accused was on trial for: 1) possession of cocaine for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA); and 2) possession of proceeds of crime of a value exceeding five thousand dollars under ss. 354(1) and 355(a) of the *Criminal Code*, RSC 1985, c C-46. After trial, the defence conceded that the cocaine found in the target vehicle was packaged for the purpose of trafficking, but the live issue was the knowledge and control of the accused. The Crown's theory was that the accused was a key player in a "dial-a-dope" cocaine trafficking enterprise. The defence argued that the accused was in the wrong place at the wrong time and was actually conducting his own side business selling sports cards and footwear. The accused testified at trial. He had been under surveillance regarding a "dial-a-dope" operation via information from confidential informants. The police obtained a mobile phone tracking warrant, ground surveillance, and air support. The air support video recorded 18 short-duration meets involving the target vehicle. The accused was the sole occupant and operator of the target vehicle throughout the surveillance and the phone was always with him in the vehicle. The accused was arrested at a traffic stop. As the officer approached the vehicle, all she could hear was the phone "continually" ringing and buzzing. A search of the vehicle yielded $2000 in cash bundled in two rolls, cash located in a wallet, and individually wrapped packets of crack and cocaine. More cash, phones and an electronic scale were located at the accused's residence. A forensic investigation of the target phone showed numerous references to suspected drug transactions (texts reproduced in the decision). The court determined whether: 1) the accused had knowledge and control of the cocaine as driver and sole occupant of the vehicle; and 2) whether the elements of possession of proceeds of crime offences regarding cash on the accused at the time of the stop, in the vehicle, and at his residence were met.
HELD: The court held that the accused was guilty of possession of cocaine for the purpose of trafficking, and of the included offence of possessing proceeds of crime of a value not exceeding $5000. The cash located at the residence fell short of proving beyond a reasonable doubt that it was proceeds of crime. The accused had knowledge and control of the cocaine located in the target vehicle; there had been no other reasonable alternative advanced on the evidence. The court found that the accused was in

constructive possession of the cocaine. The money found on him and in the car were proceeds of crime based on the evidence as a whole. The accused was the only person ever operating the target vehicle over multiple days for two months. The target phone was also linked to the target vehicle throughout the surveillance, and forensics of the phone revealed multiple messages relating to drug trafficking activity. The business of sports cards and shoes described by the accused was “implausible” and defied common sense, especially given the short duration of the “meet ups” observed via aerial surveillance. The accused was the sole occupant and operator of the target vehicle when the meets occurred. The way the $2000 found in the target vehicle was bundled, described by the expert witness and viewed with the evidence on the whole, left no other reasonable conclusion than that the money was the proceeds of crime.

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***R v D.K.*, 2023 SKPC 14**

Stang, 2023-01-20 (PC23010)

Criminal Law - Young Offender - Second Degree Murder - Sentencing
Statutes - Interpretation - *Youth Criminal Justice Act*, Section 42(2)(q)(ii), Section 42(2)(r)(iii)
Youth Criminal Justice Act - Sentencing

The young offender, D.K., had attacked and killed his mother, M.K., in September 2021 and pled guilty to the charge of second-degree murder about a year later. At that time, the court ordered that reports be prepared to guide him in sentencing, the subject of this decision. D.K. had been thirteen years and four months old at the time of the offence. He had been arguing with M.K. because he wished to live with his father, D.K. senior, and as reported in the Pre-Sentence Report (PSR), D.K. felt that his mother would never allow this to happen. M.K. and D.K. senior had separated in October 2020. Around this time, D.K. senior was convicted of assaulting D.K. and he was subsequently subject to non-contact conditions with D.K., which D.K. found difficult and for which he held M.K. responsible. Since not long after the separation and conviction, M.K., D.K. and D.K.’s siblings had been living with M.K.’s partner, R.B., and D.K. was deeply unhappy with this arrangement. In addition to the PSR, the court had a psychological assessment report (PAR) prepared in May 2022, which incorporated and provided insight on the findings of a school psychologist’s June 2019 report, and a further psychological assessment (PA) ordered to determine whether an Intensive Rehabilitation Custody and Supervision (IRCS) sentence would be appropriate and to help assess his risk of reoffending. The Crown proposed that the maximum sentence be handed down while the defence argued that the judge ought to consider D.K.’s pre-sentence time in custody.
HELD: The court determined that a youth sentence for second-degree murder required him to impose a sanction under ss 42(2)(q)(ii) or 42(2)(r)(iii) of the *Youth Criminal Justice Act* (YCJA), the former provision being an ordinary sentence of custody or supervision and the latter an IRCS sentence. Crown and defence agreed that an IRCS sentence would be appropriate. The aggravating factors in this case were: that M.K. was vulnerable because she was sleeping at the time of the offence, and her pregnancy was close to term; D.K. had taken the life of the unborn child at the same time as his mother’s; his younger siblings were present in the home during the offence; and many victims were profoundly affected. There were, however, many mitigating factors: D.K. had no prior record; he was quite young at the time of the offence; he had difficult personal circumstances, below-average intelligence and

mental illness; he pled guilty and accepted responsibility for his offence; he was willing to take programming; and his family, in particular D.K. senior, supported him. Extensive case law was filed by both sides, but the court remarked that in the cases proffered by the Crown, there had been application to sentence the young person as an adult. No such application had been made with respect to D.K., since the youth must be 14 years of age for the Crown to do so pursuant to s 64(1) of the YCJA. The court determined that it would be appropriate to take D.W.'s pre-sentence custody time into account in deciding the duration of the IRCS order. In the result, the court imposed an IRCS sentence of two years and eight months of custody, sparing D.K. the maximum sentence of four years with pre-sentence credit of close to 1:1. The community supervision portion of the sentence, however, would be longer than one normally imposed under ss. 42(2)(q)(ii) or 42(2)(r)(iii) and would last for four years. The court observed that those provisions of the YCJA do not specifically limit a community supervision order to any maximum period. The PA indicated that D.K. was at a moderate risk to reoffend, but the court expressed its hopes that this level of risk could be tempered by programming, psychological treatment and structure, and noted that the sentence was subject to s 104(1) of the YCJA, meaning that if there were valid concerns regarding D.K.'s likelihood to reoffend toward the end of the custodial portion, it would be possible for the Crown to make application to Youth Court to extend the sentence.

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