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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***J.L. v T.T.*, 2023 SKCA 43**

Richards, 2023-03-29 (CA22043)

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The appellant filed a notice of appeal of a parenting decision, and applied under the newly amended Rule 15 of *The Court of Appeal Rules* to stay the trial decision pending the determination of the appeal. The parents had one child together. The paternal grandmother had inserted herself into the primary care of the infant. The father moved from Saskatoon to Regina, where the grandmother lived, and failed to return the child to the mother as required during a rotating parenting arrangement. Several court orders and police were involved in returning the child to the mother. The mother did not have a vehicle. The trial judge decided the parties had shared decision-making responsibility, and ordered the child reside primarily in Saskatoon, with scheduled weekend access for the father, and ordered the father pay child support. The father did not return the child to the mother after the trial decision. The father sought an order staying the trial decision and substituting an order the child reside primarily with him, with parenting time from Wednesday

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afternoon to Sunday morning each week. The Court of Appeal chambers judge considered whether the trial judgment ought to be stayed pending the appeal.
HELD: The trial decision was stayed and a modified parenting regime put in place pending the outcome of the appeal. On January 1, 2023, Rule 15 was changed to provide, with limited exceptions, that an order is not stayed by filing a notice of appeal. Before the change, the stay was automatic. This case was the first time the changed Rule was considered. The change reflects the basic idea that court decisions are presumed to be correct, not incorrect. The change also addresses a concern that some appellants used the automatic stay as a negotiating tactic or to avoid the impact of a trial decision. When deciding whether to grant a stay, the judge needs to assess the strength of the appeal, assess whether the appellant has demonstrated a meaningful risk of irreparable harm, and assess the balance of convenience. Only appeals raising a serious question as to the validity of the judgment under appeal can ground a stay. The balance of convenience is the core of the analysis. Relevant considerations include the relative strength of the appellant's care, the relative likelihood of irreparable harm, and the nature and amount of such harm. Some cases require a special approach. Appeals concerning parenting of a child necessarily must consider the best interests of the child as the overriding concern. Stays may be in whole or in part, and the chambers judge can order new terms. In this case, the appeal raised serious grounds of appeal. The child had been living with the father in Regina since 2020, and the mother had limited contact with the child because of her difficulty arranging travel. The child was enrolled in school and speech therapy in Regina. The father said he was unable to drive the child to Saskatoon because of his vision problems. The chambers judge reluctantly concluded the child's best interests were served by staying the trial decision pending the appeal and ordering the child reside primarily with the father in Regina with extended weekly parenting time for the mother, if she could arrange transportation. All other aspects of the trial decision would remain, and the Court would expedite the appeal.

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Leurer Kalmakoff McCreary, 2023-03-28 (CA23040)

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The Crown appealed a sentencing decision that had designated G.A.B. a long-term offender and imposed a sentence of two years plus a day in addition to 1,590 days of pre-sentence custody,

Criminal Law - Judicial Interim Release

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Family Law - Child in Need of Protection - *Child and Family Services Act* - Person of Sufficient Interest

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followed by a 10-year supervision order. The Crown had sought a dangerous offender designation and indefinite imprisonment term. G.A.B. had discharged a rifle while adults and children were in the house, hitting the walls and the leg of one adult. The offender was unlawfully at large at the time. The offender was Indigenous, had a chaotic and dysfunctional childhood and began using drugs at a young age. He had a long criminal record, including 22 previous violent offences and 30 previous offences against the administration of justice. Many previous offences were connected to intoxication. A forensic psychiatrist assessed the offender 20 months before the sentencing as unlikely to be able to remain alcohol free and at a high risk of future violence. The offender had made progress while incarcerated and testified extensively about his history of abuse and his current sobriety and rehabilitation efforts. The sentencing judge concluded the Crown had not proven beyond a reasonable doubt that the offender presented a high likelihood of harmful recidivism or that his violent pattern was intractable. The Court of Appeal considered whether the sentencing judge erred by failing to apply the correct legal principles to his assessment of the evidence in determining whether the offender should be declared a dangerous offender under s. 753(1)(1) of the *Criminal Code*.

HELD: The appeal was dismissed. A dangerous offender proceeding evaluates the offender's future threat to public safety. It is forward- and backward-looking. The Crown argued the sentencing judge had only considered the previous nine months and ignored the prior 20 years. The Court of Appeal disagreed. Whether an offender will continue to be a danger requires considering all retrospective and prospective evidence. A judge may accept evidence about more hopeful prospects even in the face of a negative past. The judge did not fail to consider relevant features of the offender's history, including past supervision failures and offences. The judge was entitled not to accept all the expert witness evidence. The Crown appeal was based on a complaint about the weight the trial judge assigned to the evidence, and this was not a basis for appellate intervention. A dangerous offender finding cannot be made if the offender's treatment prospects are so compelling that they raise a reasonable doubt about whether there is a high likelihood of harmful recidivism, or about whether the offender's violent pattern is intractable. Whether an offender's treatment prospects are so compelling is a question of fact. The Crown had the onus of proving the likelihood of future violent conduct and intractability beyond a reasonable doubt. Expert evidence is probative, but the sentencing judge is not required to defer to expert opinion. Evidence of successful treatment must be more than a mere possibility to raise a reasonable doubt, but that evidence does not need to come from an expert or take any particular form. The sentencing judge thoroughly reviewed the expert evidence. The expert examined the offender 20 months before testifying. The judge commented that since that time, the offender's actions showed he was on a different trajectory. The sentencing judge explained his reasons for his conclusions. He accepted the offender's evidence about his deepened insight and motivation to deal with his addictions. The only fair reading of the sentencing judge's reasons was that he was satisfied there was a likelihood that treatment measures would be successful in reducing the offender's risk for future violent offending. Although the sentencing judge could have reached a different conclusion on the evidence, there was no basis for appellate intervention.

Professions and Occupations - Barristers and Solicitors - Fees - Contingency Agreement

Saskatchewan Human Rights Commission - Role of Counsel

Statutes - Interpretation - *Child and Family Services Act*, Sections 37(1)(b) and 38(2)

Statutes - Interpretation - *Criminal Code*, s 679(3)

Statutes - Interpretation - *Criminal Code*, Section 163.1(4)

Statutes - Interpretation - *Criminal Code*, Section 753(1)

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***R v Yates*, 2023 SKCA 47**

Schwann Kalmakoff McCreary, 2023-04-17 (CA23047)

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Code of Professional Conduct - Undertakings
Constitutional Law - *Charter of Rights*, Section 24(1)
Criminal Law - Appeal - Removal of Counsel of Choice
Criminal Law - Curative Proviso - *Criminal Code*, Section 686(1)(b)(iii)

The appellant was convicted of manslaughter contrary to s. 236(b) of the *Criminal Code*, RSC 1985, c C-46 (*Code*). He and his co-accused were initially charged with second degree murder. In advance of the preliminary inquiry, the appellant tendered a guilty plea to the lesser included offence of manslaughter, with the understanding that there would be a joint submission on sentence a few days later. However, the appellant instructed counsel to resile from the joint submission, and to instead proceed by a contested sentencing hearing. The provincial court judge (PCJ) found that the appellant's counsel committed an ethical breach and would be in a conflict of interest if she acted for him at trial. The PCJ disqualified defence counsel from acting (see: 2019 SKPC 41). A trial occurred two years later with new defence counsel. The appellant was found guilty of manslaughter under the party provisions in s. 21(2) of the *Code*. The appellant had discussed robbing an acquaintance (victim) of drugs, and got help from the co-accused, who had a car. The co-accused brought a firearm that they planned to use to scare the victim into giving up the drugs. The appellant messaged the victim, and they found where the victim was and placed him in the back seat of the car. The appellant drove. The co-accused shot the victim in the leg outside of the car, left him there, and he later died from his injuries. The trial judge found that the appellant was aware the gun was loaded, knew that the loaded firearm would be used in the robbery, and found that it was reasonably foreseeable that someone could be seriously injured or killed in the commission of the robbery. The Court of Appeal (court) decided the following issues: 1) Did the court have jurisdiction to hear an appeal from the decision of the PCJ to disqualify counsel? 2) Was it an error for the PCJ to disqualify counsel, depriving the appellant of his counsel of choice? 3) If it was an error to discharge counsel, what was an appropriate remedy? 4) Did the trial judge err in applying the knowledge component required to convict under the party provision (s. 21(2)) of the *Code*?
HELD: It was an error for the PCJ to disqualify counsel, but the court dismissed the appeal from conviction despite this legal error because it did not result in a substantial wrong or miscarriage of

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Peter Ballantyne Cree Nation v Saskatchewan (Government)

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Steveco Construction Ltd. v Saskatchewan Power Corporation

justice. There was no error by the trial judge in applying s. 21(2) of the *Code*. 1) There was no jurisdictional issue preventing the appellant from raising this ground of appeal. A decision to remove or disqualify counsel of choice must be brought after trial, through the normal routes of appeal. The removal of counsel (either before or during a trial proper) is not an issue that can be appealed before the trial has finished. Interlocutory appeals are not permitted in criminal matters. 2) The PCJ erred in law by discharging counsel. There was "no doubt" that courts possess the jurisdiction to remove or disqualify counsel of choice to protect an accused or to protect the administration of justice. Courts must exercise this jurisdiction "with caution." The right to counsel of choice is inferentially entrenched in the *Charter* and in jurisprudence, but it is not absolute, and is subject to reasonable limitations, such as where there is a conflict of interest. An order disqualifying counsel of choice should not be made absent a good and compelling reason for such an order. Where the underlying issue is a conflict of interest, *R v Neil*, 2002 SCC 70 sets the demanding standard as being a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." There was no error in the identification of the law by the PCJ, but there was an error in the application of the law with regards to undertakings and conflicts of interest. The PCJ erred in characterizing the agreement to proceed by joint submission as being equivalent to an undertaking. It was appropriate for counsel to follow her client's instructions by repudiating the joint submission on sentence. Here, there was no undertaking as understood in the Law Society of Saskatchewan's *Code of Professional Conduct*. However, an ethical issue did arise for counsel: whether the guilty plea would restrict the conduct of the defence at trial and, particularly, the duty of loyalty in the face of the client's admission of guilt. While Counsel may have faced an ethical dilemma as to whether she could continue to act for her client and provide him with a complete defence given the guilty plea, the PCJ erred in determining that she acted contrary to the *Code of Professional Conduct* by resiling from the agreement reached. There were flaws in the PCJ's analysis and reasoning process with regard to whether there was a conflict of interest as well. The duty of loyalty is grounded in a fiduciary relationship between counsel and client. It has three parts: a) a duty to avoid conflicting interests; b) a duty of commitment to the client's cause; and c) a duty of candour (*Canadian National Railway Company v McKercher LLP*, 2013 SCC 39). The errors started with the misplaced undertaking analogy as the source of the ethical breach. The guilty plea did prevent counsel from mounting an affirmative defence inconsistent with the admission. However, counsel could still take issue with other elements of the offence. The *Code of Professional Conduct* did not prevent counsel from continuing to act for the appellant in light of his guilty plea. Here, Counsel merely tendered a guilty plea on behalf of her client, and it was not accepted by the court. There was no plea comprehension inquiry and no presentation of the facts. 3) Having found that the PCJ erred in law by discharging counsel, the court next considered whether the PCJ's decision to deny counsel of choice was an error meriting a s. 24(1) *Charter* remedy. The court declined to apply a remedy. The court applied the curative proviso in s. 686(1)(b)(iii) which allows an appellate court to dismiss an appeal from conviction, even in the face of a wrong decision on a question of law, where the legal error did not result in a substantial wrong

or miscarriage of justice. There was no substantial wrong or miscarriage of justice, notwithstanding the error of law committed by the PCJ. The evidence against the appellant was "so overwhelming that any other verdict would have been impossible to obtain." The PCJ's decision was rendered almost two years before the trial, which gave new counsel ample time to prepare a full defence. There was no miscarriage of justice. 4) The trial judge did not fail to grasp the law despite a misstatement of s. 21(2) of the *Code*. The *mens rea* for manslaughter under s. 21(2) does not require the foreseeability of death, only the foreseeability of harm that ultimately results in death as a probable consequence of the common unlawful purpose. Here, the Crown only had to prove that the offender formed an intention in common to carry out an unlawful purpose (robbery, in this case) and that he knew or ought to have known that a probable consequence of carrying out the common purpose was the carrying out by the perpetrator of a dangerous act which a reasonable person could recognize as creating the risk of bodily harm which is neither trivial nor transitory. The offender argued that the trial judge misstated the test by stating it was reasonably foreseeable that someone could be seriously injured, rather than that someone probably would be seriously injured. Based on the wording of s. 21(2), the trial judge misspoke when he used the word could instead of would. However, the misstatement did not affect the reasoning of the trial judge. The trial judge had no difficulty finding the offender guilty of manslaughter as a full participant. The trial judge's reasons had to be read as a whole and in the context of the evidence.

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***R v Envirogun Ltd.*, 2023 SKCA 51**

Richards Jackson Leurer, 2023-05-01 (CA23051)

Environmental Law - Appeal
Environmental Management and Protection Act - Strict Liability Offences

Envirogun Ltd. and Clint Kimery (the appellants) operated a hazardous waste site from 1996 to 2010, holding an operating permit from the Ministry of Environment (ministry). When the permit was issued, the ministry required the appellants to provide reclamation and decommissioning plans for the facility and cost estimates. The appellants did not comply. The appellants had a tax dispute with the municipality, resulting in the municipality taking title to the property where the facility was located. The appellants left behind hazardous waste. The ministry did not know that the municipality had taken title to the property until the municipality requested financial assistance to decontaminate the site. The appellants were convicted in provincial court of failing to comply with an environmental protection order (EPO), contrary to ss. 74(1)(c) and 72(2) of the now repealed *The Environmental Management and Protection Act, 2002*, SS 2002, c E-10.21 (EMPA). They were fined and ordered to remediate (see: 2015 SKPC 18). The appellants appealed to the Court of Queen's Bench, but it was dismissed (see: 2019 SKQB 89). The trial at provincial court took almost two years due to numerous applications made by the appellants. The trial judge rejected the appellants' argument that the charge they faced required proof of guilty intent and held that the offence was one of strict liability. The main argument the appellants made at trial was that any legal responsibility they had under the EMPA ended when they complied with the municipality's order to vacate the property. In the alternative, they argued that they had complied with some of the conditions of the EPO and had exercised due diligence in relation to others. The trial judge found as a fact that the appellants never intended to comply with the EPO and that

their due diligence defences were neither credible nor reasonable. The appellants argued at the Court of Appeal (court) that the appeal judge erred by 1) finding that it was a strict liability offence; 2) misunderstanding the evidence as it related to defences of due diligence and impossibility and misapplying the defence of impossibility; and 3) upholding an unfit sentence. This was a summary conviction appeal under s. 839 of the *Criminal Code*.
HELD: The court allowed the appeal only regarding the issue of whether the offence was a strict liability offence, but dismissed the appeal on that point. 1) The court was of the view that the question of whether the offence was one of strict liability was sufficiently important that it warranted leave to appeal be granted. There was no merit in the appellants' argument that this was a *mens rea* offence. The appeal judge did not err in concluding that the offence created by ss. 74(1)(c) and (2) of the EMPA was a strict liability offence. 2) The appellants were unable to show that there was an error of law on this ground as required by s. 839 of the *Criminal Code*. The appellants' argument was based on how the evidence should have been interpreted. There were significant evidentiary problems with the appellants' "impossibility" arguments. 3) The fitness of a sentence does not give rise to a question of law.

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***M.A.B. and M.J.B., Re*, 2023 SKKB 41**

Bergbusch, 2023-02-17 (KB23043)

Family Law - Child in Need of Protection - *Child and Family Services Act* - Person of Sufficient Interest
Family Law - Child in Need of Protection - Permanent Order - Evidence
Statutes - Interpretation - *Child and Family Services Act*, Sections 37(1)(b) and 38(2)

The Ministry of Social Services (ministry) sought an order pursuant to ss. 37(1)(b) and 38(2) of *The Child and Family Services Act* that two children were in need of protection, their grandmother was a person of sufficient interest, and they remain in her care indefinitely, subject to certain conditions. The mother and two children consented to the order sought by the ministry. The mother was Indigenous and had six children. The children had been apprehended before. The ministry found evidence of drug paraphernalia and the children said they had seen their mother using drugs. The children were removed and placed with their grandmother in a series of short-term orders starting in 2019. All evidence was in the form of affidavits. The court considered whether the children remained in need of protection and whether the proposed consent order ought to be granted.
HELD: The draft consent order was granted with modifications. Even though the parties consented, the court needed to ensure the proposed order would fulfil the goals and requirements of the Act and was supported by relevant and admissible evidence. The court considered the best interests of the children and the principles of cultural continuity in ss. 9 and 10 of *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24. Police records attached to a social worker's affidavits were not admitted as business records because there was no testimony from the police about the creation of the records and therefore the requirements of *The Evidence Act* were not met. The ministry did not seek to admit records in accordance with the principled exception to the hearsay rule. The rules of evidence can be relaxed in child protection proceedings, but evidence still must be relevant and reliable. The mother did not concede the truth of the contents of the police reports. Other business records in which

there was evidence about the creation of the records were admitted. The police reports were considered for a non-hearsay purpose and considered as part of the narrative. The court admitted a ministry report for its trust respecting observations of the children and their grandmother, but not its hearsay statements summarizing information drawn from other sources. Section 28 of *The Child and Family Services Act* does not create an alternate basis to admit police records for their truth, because a child's testimony would not be required for these records to be admitted in evidence. Based on admissible evidence and the mother's admission, the children continued to be in need of protection. The mother was unable to secure safe and stable housing for the children. She moved frequently, and often stayed with her friends, sister, or in a motel. She did not meet with case workers or cooperate with the ministry's offers of assistance. She did not complete toxicology screens twice a week as required. The court could not consider placing the children in the father's care because he has had minimal contact with them since moving to Oregon in 2018. The grandmother was a member of the children's extended family and was designated as a person having sufficient interest in the children under s. 23(1)(a) of the Act. It was in the best interests of the children they be placed with the grandmother indefinitely. They have lived with her since 2019. She openly showed positive emotion to them. The grandmother cooperated with the ministry to address the mental well-being of the children. The grandmother encouraged a continuing relationship with the mother in a stable environment and encouraged contact with siblings and aunts. The grandmother was a member of a First Nation and although she did not engage in many Indigenous cultural practices, she encouraged the children to hear about their culture if they were interested. The First Nation supported the placement with the grandmother. The home environment was suitable. The grandmother had well-managed health conditions. The children's counsel indicated the children preferred to be with their mother, which was not possible. The ministry was to review the circumstances of this order within six months.

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***Steveco Construction Ltd. v Saskatchewan Power Corporation*, 2023 SKKB 57**

Hildebrandt, 2023-02-17 (KB23056)

Civil Litigation - *Queen's Bench Rules*, Rule 7-1(1)(a)

The plaintiff claimed that their industrial shop and residential premises were destroyed by a fire caused by the negligence of the defendant, SaskPower. They alleged that the fire was caused by a surge of electricity into the splitter box. The defendant denied that it was negligent, denied that there was any power surge as alleged by the plaintiffs, and noted that the splitter box was supplied by the customer, and thus beyond the point of delivery as set out in the terms and conditions between the parties. The defendant relied on the immunity provisions in ss. 3(2.1)(b), 3(2.2) and 8(3)(b) of *The Power Corporation Act*, RSS 1978, c P-19 (PCA). The defendant applied under Rule 7-1(1)(a) of *The Queen's Bench Rules* to request a determination on immunity to dispose of the claim. The court determined whether the defendant was immune from liability as a result of either s. 3(2.1)(b) of the PCA or the terms and conditions, and whether such a finding would dispose of the claim in its entirety.
HELD: The defendant was immune from liability under both the PCA and the terms and conditions. There was no need for the action

to proceed to trial, as the defendant was entitled to an order striking the plaintiff's claim in its entirety. Rule 7-1 permits the court to hear substantive applications in advance of a trial and involves a two-step process (*Sun Country Regional Health Authority v Mamchur*, 2018 SKQB 79). The judge granted the request by the defendants to determine this issue under Rule 7-1 and reviewed the affidavit evidence to determine the location of the point of delivery. Under s. 3(2.1)(b) of the PCA, the defendant was immunized from liability where there was damage beyond the point of delivery. The terms and conditions of service stated that the defendant was not liable for any injury beyond the point of delivery, and the parties had clearly agreed in 2008 what constituted the point of delivery. The affidavit evidence established that the defendant was immune from liability because based on the evidence filed, the source of the fire was not electrical, and could not have occurred at the point of delivery. Under s. 14.1(a) of the PCA, the defendant was also limited to liability arising from physical damages occurring as a direct result of gross negligence or wilful misconduct. This kind of conduct was not alleged by the plaintiff.

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***Standing Buffalo Dakota First Nation v Ron S. Maurice Professional Corporation*, 2023 SKKB 42**

Morrall, 2023-02-21 (KB23053)

Barristers and Solicitors - Fees - Taxation
Barristers and Solicitors - Solicitor's Lien
Civil Procedure - Amendments to Pleadings
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Practice - Disclosure of Documents - Solicitor-Client Privilege
Professions and Occupations - Barristers and Solicitors - Fees - Contingency Agreement
Statutes - Interpretation - *Legal Profession Act, 1990*, Section 66

The applicant First Nation filed an originating application citing *The Legal Profession Act, 1990* for return of its property and files from the respondent legal corporation, an order that no fees were owing and a contingency fee agreement was void, and an order for costs on a solicitor and client basis. The legal corporation filed an application striking parts of the originating application and seeking costs on a solicitor and client basis. The First Nation engaged the legal corporation in 2020. Over the next 20 months, the legal corporation received over $420,000 in trust from the First Nation. The First Nation delivered a band council resolution demanding the legal corporation cease all services and hand over their files, all trust funds and a full accounting. As of that time, the total invoices were $382,151. A few days later, six additional invoices totalling $599,982 were issued. Some of those invoices had already been paid by money in trust. According to the invoices, the First Nation owed over $100,000 in fees and $68,347 in disbursements on contingency files and a further $405,894 for fees and disbursements on non-contingency files. The format of the hearing and which procedures should apply are issues to be decided by the hearing judge, not by a case management judge. The matter was at the first stage of the process pursuant to Practice Directive #9. The First Nation claimed the fee agreement with the legal corporation was unfair and the invoices ought to be taxed or assessed. The First Nation and their new legal counsel did not yet

have all the files and therefore they could not fully assess them. The chambers judge considered: 1) Should the first paragraph of the originating application be struck under Rule 7-9; 2) Should the originating application be amended to replace the word “interim” with “final;” 3) Had a full accounting of the money sent to the legal corporation been made; 4) had the legal corporation delivered to the First Nation true copies of all invoices issued; 5) Under s. 66(5) of *The Legal Profession Act, 1990*, what amount of security, if any, should be paid into court for the files held with the lawyer pursuant to a solicitor’s lien; 6) What costs should be ordered, if any; and 7) Should the court retain supervisory authority?
HELD: 1) The law firm applied to strike part of the originating application pursuant to Rule 7-9(2)(a), (b) and (e), for disclosing no reasonable cause of action, or being scandalous, vexatious or an abuse of process. The judge recited definitions of these terms. The First Nation claimed that because the legal corporation was an Alberta corporation operating in Saskatchewan, it was not duly registered to practice law in Saskatchewan under *The Legal Profession Act, 1990* and *The Professional Corporations Act*. The judge took a generous approach to the unprecedented claim. A purpose of the legislation is to prohibit non-lawyers from undertaking court-related activities unless an exception applies. The First Nation’s claim in the first paragraph of its originating application was meritless and had no chance of success. Only human lawyers, not corporations or law firms, can be members of the Law Society of Saskatchewan. Neither act prohibits lawyers from practicing law in Saskatchewan through out-of-province professional entities. The claim was contrary to the national regulatory regime facilitating the inter-jurisdictional practice of law. No competing authorities or logical arguments justified the First Nation’s position regarding the Alberta legal corporation’s status. The first paragraph was struck as having no chance of success and no basis in law. 2) The First Nation applied to amend the originating application to change the word “interim” to “final.” Interim declaratory orders are not generally available when the order would completely determine the issues before trial. The respondent legal corporation contested the amendment. Rule 3-72 sets the requirements to amend pleadings. The amendment was necessary to clarify the issues and any prejudice to the legal corporation could be addressed through a costs award. 3) The First Nation sought a full accounting of funds the legal corporation had received. The legal corporation said it had provided a full accounting. The purpose of the accounting was to determine if the invoices for work done by the legal corporation were fair and reasonable. The assessment process is impressionistic and discretionary and does not require perfect documentary production. The documents provided by the legal corporation were sufficient and described when they received money, how much, and what invoices they applied the money towards. 3) There was no need to order the legal corporation to search for additional invoices beyond those provided. Lawyers do not often forget about their bills. The First Nation was concerned disbursements over $100,000 were described simply as “professional services,” among other concerns. The legal corporation was ordered to provide a detailed description of all claimed disbursements over $1,000 including why the services were necessary and the file for which they were requested. The judge commented that the lack of detail may assist the First Nation more than the legal corporation in the assessment process. 4) The First Nation sought return of all their files, and the legal corporation claimed a retaining lien pursuant to s. 66(3) of *The Legal Profession Act, 1990*. Only disbursements arising out of a contingency agreement may be asserted as part of a retaining solicitor’s lien. Disbursements “outstanding” at the date the lawyers were terminated includes those incurred up to termination, even if the invoices are received after termination of services. The legal corporation provided an employment file it determined was urgent. A litigation file that was ongoing since 2008 did not create material prejudice to the First Nation if they did not immediately have the full file. The purpose of a retaining lien is to encourage a lawyer’s bill to be paid. Not all files were contingency files. The solicitor’s lien related to fees and disbursements for non-contingency files. The legal corporation claimed privilege over materials on files subject to a joint retainer agreement with other First Nations. Privilege belongs to the client and not the lawyer. The parties were ordered to arrange a call to determine any claim of solicitor-client privilege by any other First Nation client asserting such right, and the legal corporation was responsible to contact each First Nation client within 30 days. The

court rejected the argument that amounts paid to lawyers retained to assist the legal corporation with legal work were not properly "disbursements" on the invoice. 5) The court ordered the First Nation to provide security for all outstanding disbursements on contingency and non-contingency files, because the amounts were less likely to be varied on assessment, and that once paid into court, all contingency files be transferred to the First Nation, except any documents where privilege was claimed. The court ordered the First Nation to deposit a further $100,000, approximately one-quarter of the outstanding fees, to secure the release of the remaining files. The First Nation was further ordered to deposit ten percent of any award or settlement received. 6) The legal corporation sought solicitor-client costs in relation to its application to strike. The First Nation argued costs should be in the cause. While the First Nation's legal counsel's argument regarding the first paragraph of the originating application was meritless and prolix, he did not misrepresent factual matters nor make improper allegations. The criteria for solicitor and client costs were not met, but enhanced costs were still appropriate, and fixed at $4,000 for the application to strike and the application to amend the originating application. 7) Jurisdiction was retained over the matter to deal with privilege assertions and the sufficiency of identification of disbursements.

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***R v Quewezance*, 2023 SKKB 67**

Layh, 2023-03-30 (KB23060)

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Criminal Law - Ministerial Review - Wrongful Conviction
Statutes - Interpretation - *Criminal Code*, s 679(3)

In a high-profile case, two sisters, who were convicted of second-degree murder in 1994 and sentenced to life in prison with a 10-year parole eligibility period, applied for interim release awaiting the outcome of a ministerial review of their convictions. The Crown had applied for a publication ban pertaining to any release proceedings (see: 2022 SKKB 260 for this decision, which also sets out the history of the case and the powers of the Minister of Justice to review a conviction in a case of possible miscarriage of justice). The court had been concerned that the defence had not presented a release plan at the release hearing and requested a more detailed plan at an adjourned date. Defence did so, but the Crown argued that the more detailed plan was still inadequate and remained opposed the sisters' release. The court remarked that although it had numerous interim judicial release decisions to inform it, this would be the first decision of an appellate court pending completion of a ministerial review.
HELD: Subsection 679(3) of the *Criminal Code*, which sets out criteria to be considered in interim judicial release decisions, was of assistance in this case. The court adapted the criteria to determine it must be satisfied: (a) the application to the Minister was not frivolous; (b) the accused would surrender themselves into custody according to the terms of the order; and (c) the detention of the accused was not necessary in the public interest. (a) The application to the Minister was clearly not frivolous. The Minister's preliminary assessment of the application took six months and he found there was a reasonable basis to find the sisters were subjected to a miscarriage of justice. (b) Both sisters had a history of failing to abide by parole conditions. Had they complied with conditions, the sisters could have finished their periods of incarceration about 20 years ago. Notwithstanding this, the court believed the sisters' circumstances had changed significantly because of the ministerial review: they had a compelling interest in the

process and its outcome. 27 of the 30 completed ministerial reviews in Canada had been referred to appellate courts or directed to new trials. The court did not find it likely that the sisters would flee instead of awaiting the Minister's decision. (c) The court reviewed *R v Oland*, 2017 SCC 17, which itself endorsed the analysis in *R v Farinacci*, 1993 CanLII 3385 (ON CA) describing two competing interests the court was to balance in considering public confidence in the administration of justice: "reviewability" and "enforceability." Reviewability referred to the concern that mistakes could be made in the justice system and convicted people were entitled to a meaningful review process, while enforceability referred to the interest that "once pronounced, judgments should be immediately enforced." The court found that here, where the Minister had found there may have been a miscarriage of justice, reviewability interests far outweighed those of enforceability. In addition to the foregoing criteria, the court examined the strength of the sisters' case. They argued "that although the elements of a criminal offence govern the conduct of persons at the time of their conduct, the methods of gathering evidence that ensure procedural fairness must be viewed by current standards." Their application raised six points: 1) The criminal justice system considers the circumstances of Indigenous accused in the wake of *Gladue* (1999 CanLII 679, [1999] 1 SCR 688); 2) Systemic discrimination affected the police investigation and trial; 3) In failing to comply with an order to remand the sisters to the correctional centre in Prince Albert, the Kamsack RCMP (RCMP) breached their s. 9 *Charter* rights; 4) The RCMP also failed to record the sisters' statements; 5) Both sisters were intoxicated at the time they gave their statements and the RCMP failed to obtain objective evidence to measure how intoxicated they were; and 6) The voluntariness of their confessions should be considered in light of *R v Oickle*, 2000 SCC 38. The court found these issues had sufficient merit and the public interest did not require their continued detention. Both sisters were released effective immediately, each on her own detailed list of conditions, until further order of the court or until the Minister had made a decision. If their application were dismissed, they would have 24 hours to surrender themselves into custody. If the Minister referred their case to the Court of Appeal or directed a retrial, they would need to apply for continued release under s 679(7) of the *Criminal Code*.

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***Scotia Mortgage Corporation v Gaetz*, 2023 SKKB 70**

Rothery, 2023-04-04 (KB23067)

Foreclosures - Costs - Solicitor-Client Costs
Costs - Jurisdiction and Discretion

The plaintiff was entitled to a deficiency judgment against the defendant, but first required the court to assess solicitor-client costs to determine the total amount of the deficiency. The plaintiff sought a total of $28,425.60, including $9,460 in lawyers' fees and $14,924 in paralegals' fees. The case law in Saskatchewan has set the amount of reasonable solicitor-client costs in foreclosure actions at $5,000. Here, the court determined whether, or how much, of the amount over $5,000 ought to be assessed against the defendant.
HELD: The court found that the amount suggested by the plaintiff was "far too high" for the services rendered by the lawyer and paralegal. The court reviewed the statement of account to reduce the lawyer's hours, and to lower the paralegal rate. The court ordered solicitor-client costs totalling $10,000. The court referred to the law on solicitor-client costs in foreclosure actions (*Rozdilsky v Kokanee Mortgage M.I.C. Ltd.*, 2020 SKCA 1). A mortgagee is generally entitled to solicitor-client costs if the obligation to pay

those costs is included as a term of the mortgage, but the court retains discretion to deprive a party of solicitor-client costs, even in the face of an express contractual obligation, where such costs are not appropriate in the circumstances. The court's discretion over costs exists where the costs claimed are unfair, excessive, and unduly onerous in all the circumstances.

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***Crowe v Saskatchewan Power Corporation*, 2023 SKKB 71**

Crooks, 2023-04-04 (KB23068)

Legal Ethics - Conflict of Interest
Saskatchewan Human Rights Commission - Role of Counsel
Statutes - Interpretation - *Saskatchewan Human Rights Code, 2018*, Section 16, Section 37

The complainant worked as a consultant for SaskPower. She was the primary caregiver for her grandson. She asked SaskPower if she could take parental leave to care for her grandson, formally requesting a parental leave of absence, but it was denied. Later, she provided a medical note stating she required medical leave, and her short-term disability benefits were approved. Her long-term disability benefits were denied. SaskPower communicated expectations regarding her return to work, including inpatient treatment. The complainant took the position that she could not do so, as she was caring for her grandson. The complainant received a termination letter a few months later, stating that the termination was based on the complainant's failure to complete or participate in an approved treatment program and the absence of an acceptable plan to return to employment. SaskPower asserted that undue hardship had been reached in its attempts to accommodate under s. 16 of *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 (*Code*). The Saskatchewan Human Rights Commission (commission) argued that SaskPower failed to continue the complainant's employment because of her disability, contrary to s. 16 of the *Code*. The main issue decided by the court was the role of counsel for the commission. Counsel for the respondents conducted questioning of the complainant. Counsel for the commission interjected on the complainant's behalf, objecting to the line of questioning. The transcript indicated that the complainant believed that counsel for the commission was representing her. The first application was brought by the applicant, the Chief Commissioner for the Saskatchewan Human Rights Commission, seeking a ruling of the court confirming that counsel for the commission had standing to object during the questioning of the complainant. The respondents brought a corresponding application, requesting direction on the commission's ability to object to questions asked during questioning of the complainant or during a hearing. The court determined the following issues: 1) What is the role of counsel for the commission after a complaint is referred to a hearing? 2) Does counsel for the commission have standing to object to questions and advise the complainant during questioning? 3) Whether the complainant should be ordered to comply with the respondent's request during questioning for all of the particulars and communications between the complainant and the commission regarding how the affidavit of documents was put together.
HELD: 1) The complainant and commission are separate parties under the *Code*. Under s. 37 of the *Code*, counsel for the commission has "carriage" of the complaint following the referral to a hearing. The court referred to *Regina Bypass Design Builders v Supreme Steel LP*, 2021 SKCA 82 for the modern approach to statutory interpretation to determine the meaning and intention of

"carriage of the complaint" here. Once the commission exercises its discretion to refer a complaint to the Court of King's Bench for a hearing, the role of the commission changes from an investigative and screening body to a party to the proceeding. The case law indicates that "carriage" in the context of human rights legislation relates to procedural responsibilities in seeing that the complaint gets heard, and not to substantive rights. The commission is not an advocate for an individual complainant and his or her private interests. The commission's focus and responsibility is to advocate in the public interest, and the duty of loyalty of counsel for the commission is to the commission and its objectives under the *Code*. While there may be overlap in the objectives of the commission and the complainant, "counsel for the Commission cannot slip into advocating for the private interests of the complainant." 2) As a party, the commission had standing to raise objections on its own behalf during questioning or at a hearing, but these objections must be founded on a legal or evidentiary basis. The complainant is a self-represented party unless she retains counsel on her own behalf. 3) The complainant was not required to respond to the proposed undertaking or underlying question by the respondents, because the communications requested were protected by litigation privilege.

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***Peter Ballantyne Cree Nation v Saskatchewan (Government)*, 2023 SKKB 81**

Smith, 2023-04-20 (KB23074)

Civil Procedure - Amendment to Pleadings
Civil Procedure - Bifurcation of Issues

Here the court decided a number of "fractious" procedural applications stemming from complex and lengthy legal proceedings. The defendants requested to amend their statements of defence as well as third party claims, and the plaintiff sought an order bifurcating the trial. In 2004, the plaintiff sued all three defendants (Saskatchewan, Canada, and SaskPower) for multiple claims, for flooding portions of reserve occupied by the plaintiff, thereby wrongly depriving it of its use of reserve lands. The defendants applied to the court to strike out the claim on the grounds that it was statute-barred, which was granted by the court. That decision was appealed to the Court of Appeal and was upheld, apart from a claim of continuing trespass. The Court of Appeal confirmed that there was a continuing trespass by the defendants and remitted the matter back to the Court of King's Bench to determine the merits of one of the defendant's arguments relating to consent and damages. After this, the defendants amended their defences to argue that the flooded land was not a reserve, and a Queen's Bench judge agreed. The decision was appealed again to the Court of Appeal, which dealt with the issue by way of issue estoppel; the defendants were precluded by issue estoppel from arguing that the flooded land was not a reserve. However, the Court of Appeal did not disturb the Queen's Bench judge's finding that the land was not a reserve. Here, the court set out the applicable law for amending pleadings, referring to *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86. HELD: The court allowed most of the requested amendments to the defendants' pleadings. The inclusion of the principles of champerty and maintenance was not allowed; these principles have never been a defence to continuing trespass. The court also allowed the plaintiff's application to bifurcate the matter, with the issues of liability between the parties to be decided first, followed by a hearing on remedies if necessary.

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***R v Benedicto*, 2023 SKPC 11**

Beaton, 2023-02-16 (PC23018)

Constitutional Law - *Charter of Rights*, Section 8, Section 24(2)
Criminal Law - Child Pornography - Possession
Statutes - Interpretation - *Criminal Code*, Section 163.1(4)
Statutes - Interpretation - *Customs Act*, Section 99(1)(a)

This was a *Charter* application decision regarding the authority of the Canada Border Services Agency (CBSA) to search cell phones at border crossings. The accused was charged with possessing child pornography contrary to s. 163.1(4) of the *Criminal Code* after his cell phone was inspected pursuant to s. 99(1)(a) of the *Customs Act*, RSC 1985, c 1 (2nd Supp). He attempted to enter the US, then re-enter Canada at North Portal, but was flagged because of a previous charge and acquittal for possessing child pornography. The border officers requested the accused's passcode for his phone, but he refused. He came back the next day, and still could not or would not produce the passcode. The officers seized his phone, but the phone was unable to be unlocked until two years later. When it was unlocked, it contained child pornography. The accused argued that this section was unconstitutional because it allowed for the unlimited search of personal electronic devices at the border without any threshold requirement of grounds or suspicion, and that the evidence should thus be excluded under s. 24(2) of the *Charter*. The court determined: 1) whether the search was legal; 2) whether there had been a detention pursuant to s. 10 of the *Charter*; 3) whether there had been a breach of the accused's s. 7 right to life, liberty and security of the person; and 4) whether the evidence from the phone should be excluded pursuant to s. 24(2) of the *Charter*.
HELD: 1) The court adopted the reasoning in *R v Canfield*, 2020 ABCA 383 (*Canfield*) to find that s. 99(1)(a) of the *Customs Act* was unconstitutional and was not saved by s. 1. Therefore, the search of the accused's cellphone was unreasonable in that it was not authorized by a valid law and breached the accused's rights under s. 8 of the *Charter*. Even so, the evidence was not excluded. The Supreme Court of Canada (SCC) has held that constitutional requirements affecting the right to be free from unreasonable search and seizure, the meaning of detention, and reasonable expectations of privacy are different at the border. The Alberta Court of Appeal in *Canfield* recently held that SCC case law (*R v Simmons*, [1988] 2 SCR 495) should be reconsidered in the context of searches of personal electronic devices because searches of such devices could not fall within the category of routine searches. The CBSA had policies related to the search of personal electronic devices: they were only searched where indicators suggesting that evidence of a contravention may be found on the device, or if there were concerns about the admissibility of a foreign national or permanent resident. However, these policies were not law. 2) The accused's s. 10 *Charter* rights were not breached; he was not detained at the border. The court canvassed the applicable case law on border detentions and noted that while courts have established tests to determine detention, these tests can be difficult to apply and often lead to inconsistent results. It was not clear whether the request for a passcode for an electronic device, without strong particularized suspicion, constituted a detention. Here, the border officers knew that the accused had been charged and acquitted of possessing child pornography, and this was the reason they wanted to inspect his phone. The court found that at most, this was general suspicion but not a strong

particularized suspicion that he possessed a prohibited good under the *Customs Act* (child pornography). The request for the passcode was routine. The accused never provided his passcode, and he was never questioned about the contents of his cellphone: it was seized under s. 101 of the *Customs Act*. The contents of his phone were not accessed until two years later. 3) The accused's s. 7 rights were not breached. He did not provide his passcode, and he was not detained. 4) The court conducted an analysis under *R v Grant*, 2009 SCC 32 to determine if the evidence of child pornography should be admitted or excluded under s. 24(2) of the *Charter*. The court weighed the factors and found that the evidence should not be excluded. To do otherwise would adversely affect the repute of the administration of justice. The border officers believed that they had lawful authority to search the phone, and this belief was not unreasonable. The search was conducted before *Canfield* was decided and was supported by legislation and the jurisprudence at the time. The border officers believed they had the right to seize the phone and hold it until they could determine whether it contained prohibited goods. There was no evidence that the phone was searched unreasonably. It was searched methodically with the applications having the largest storage capacity being searched first, and the officer who conducted the search justified why he searched the applications he did.

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***R v Hotomanie*, 2023 SKPC 22**

Kovatch, 2023-03-21 (PC23024)

Criminal Law - Impaired Driving - Sentencing
Criminal Law - Sentencing - Principles of Sentencing

The accused, E.H., was charged with impaired driving and driving while prohibited after an incident on November 13, 2021. Police observed a blue truck backing up and signaled it to stop. E.H. was the driver of the vehicle, and upon interaction with the accused, the officers noticed signs of impairment. The accused provided two breath samples registering blood alcohol levels of 220 mg and 210 mg. E.H. pled guilty and a *Gladue* assessment report was requested. During the sentencing hearing, the Crown referred to previous decisions involving habitual impaired drivers and argued that the court should focus on denunciation and deterrence. The Crown requested a sentence in the range of 18 to 24 months and a six-year driving prohibition. Defence emphasized the *Gladue* report and the personal circumstances of the accused, arguing for a focus on rehabilitation but conceded that a minimum penalty of 120 days in jail must be imposed due to the notice of greater punishment.
HELD: After considering the positions of both counsel and taking into account E.H.'s personal circumstances and *Gladue* factors, the court sentenced him to eight months in the Regina Provincial Correctional Centre followed by probation for two years. The court considered the accused's troubled upbringing, experiences of abuse, trauma, loss, and his struggles with alcoholism and other health issues. The court also considered the letters filed by individuals attesting to the accused's positive qualities and his dedication as a father, husband, and community member. While the Crown suggested a sentence range based on other cases, it was important to consider the unique circumstances of the accused and the specific direction in the *Criminal Code* to consider the circumstances of Indigenous offenders. The court criticized the Crown's emphasis on lengthy jail sentences for denunciation and deterrence, highlighting the need to consider rehabilitative options and alternative sanctions. The sentence would allow for

rehabilitation and continued treatment for alcoholism rather than strictly punishing E.H.

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***R v Crain*, 2023 SKPC 28 (Not yet published on CanLII)**

Daunt, 2023-03-31 (PC23026)

Criminal Law - Accessory after the Fact to Murder
Criminal Law - Accessory after the Fact - Elements of Offence

Following a preliminary inquiry, the court was to rule on whether the Crown had tendered strong enough evidence to require the accused, K.C., to stand trial on the charge of being an accessory after the fact to murder. The evidence consisted of an agreed statement of facts; viva voce evidence from three witnesses; a statement the court described as “can-say” evidence, and a videotaped statement from another witness, J.M., who was involved with police for unknown reasons two weeks after the incident. The Crown's theory was that K.C. drove the white Ford truck, which was involved in the murder, out of Prince Albert to assist the unknown principal in escaping liability for the murder. The court summarized the events described in the evidence as follows: K.C. was possibly seen in the area shortly before the incident; he was seen driving the truck in the same area of town at some unspecified time after the incident; and three and a half hours after the incident, K.C. parked the truck at his father's residence, which is 15 minutes away from the crime scene. There was no evidence regarding who actually shot D.W. The Crown relied on a blood stain revealing D.W.’s DNA on the rear passenger tire of the white Ford truck, in conjunction with K.C.’s having driven the truck out of the city, and argued it was a rational inference that K.C. did this to assist the unknown principal or principals to escape. Defence pointed out that J.M. did not identify K.C. in court, and further, that he was unsure about the date he saw K.C. drive the truck and thought it was a Monday or Tuesday, whereas the murder took place on a Sunday. Defence also submitted that there was no evidence K.C. attempted to hide the truck, clean it, or destroy evidence. The court reviewed the wording of section 23(1) of the *Criminal Code* and the case law establishing the elements of the offence of accessory after the fact: (1) the crime was committed; (2) the crime was committed by other individuals than the accused; (3) the accused knew the principal was a party; (4) the accused received, comforted or assisted the principal; and (5) in doing so, the accused did so for the purpose of enabling the principal to escape liability.
HELD: The court found there was no direct evidence that K.C. knew the truck had run over the deceased or that he turned his mind to the possibility of DNA evidence being present on the truck. There was no evidence that K.C. took any action to destroy or hide the DNA evidence found on the truck. The blood stain was intact and suitable for forensic testing. The fact that K.C. parked his own truck at his father's residence did not establish that he did so for the purpose of assisting someone else. It could be considered an innocent act. The murder weapon was not found, and there was no evidence linking K.C. to the possession or handling of the weapon. There was no evidence to prove that K.C. was the shooter, but there is also no evidence to prove that he was not. The Crown had failed to present evidence establishing someone else as the shooter. The court ruled that the evidence against K.C. was insufficient to require him to stand trial for the offence. The Crown did not provide evidence to support each element of the offence charged, and the inferences drawn from the evidence were speculative rather than rational. A properly instructed reasonable jury could not convict K.C. based on the evidence presented in the preliminary inquiry.

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