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.

Volume 26, No. 1 **January 1, 2024**

Subject Index

Aboriginal Law - Honour of the Crown

Aboriginal Law - Hunting and Fishing Rights

Aboriginal Law - Treaties - Duty to Consult

Administrative Law - Appeal - Professional Misconduct

Administrative Law - Judicial Review - Law Society - Natural Justice

***R v Sabiston*, 2023 SKCA 105**

Barrington-Foote Tholl Drennan, 2023-09-07 (CA23105)

Charter of Rights - Search and Seizure
Charter of Rights - Search and Seizure - Evidence - Exclusion
Criminal Law - Defences - *Charter of Rights*, Section 8, Section 9

The appellant was convicted of several firearms offences. The police had arrested the appellant for possession of stolen property, being a bullet-proof vest. The police thought the vest looked similar to the ones the police service used and knew the appellant to be a gang member subject to a firearms prohibition in a high crime area and concluded he had stolen the vest. The police had not received reports of stolen vests. While being searched during the arrest, the appellant told the police he had a firearm. The trial judge decided the actual arrest and subsequent search were unlawful and the appellant's ss. 8

Administrative Law - Judicial Review - Standard of Review - Natural Justice - Procedural Fairness - Reasonableness - Reasons for Decisions

Appeal - Criminal Law - Driving Over .08

Charter of Rights - Search and Seizure

Charter of Rights - Search and Seizure - Evidence - Exclusion

Civil Procedure - Application to Strike Statement of Claim - Limitation

Civil Procedure - Applications - Applications without Notice

Civil Procedure - Class Action - Venue

Civil Procedure - Conflict of Interest - Expert Witness

Civil Procedure - *Ex Parte*

Civil Procedure - Pleadings - Application to Strike Statement of Defence

Civil Procedure - Pleadings - Set-Off

Civil Procedure- *Queen's Bench Rules*, Rule 10-3

Constitutional Law - *Charter of Rights*, Section 8 - Search and Seizure

Criminal Law - Appeal - Conviction

Criminal Law - Appeal - Offences Against Persons - Sexual Assault

Criminal Law - Appeal - Standard of Review

and 9 *Charter* rights had been breached. The trial judge also decided the police would have had a legal basis to detain the appellant for investigative purposes and would have discovered the firearm had they done so. After analysis under s. 24(2) of the *Charter*, the trial judge admitted the firearm into evidence. The Court of Appeal considered: 1) did the trial judge's factual findings constitute a reasonable suspicion the vest was stolen; 2) did the trial judge err in her s. 24(2) *Charter* analysis by considering the discoverability of the firearm; and 3) what remedy was appropriate?
HELD: A majority of the court granted the appeal and entered an acquittal, with one judge dissenting. 1) The police's investigative power to search incidental to detention must be reasonably necessary on an objective view of the circumstances known before the search. The reasonable suspicion must be connected to the possibility of a particular crime. A known criminal in a high crime neighbourhood is not enough to ground a reasonable suspicion. The police officer's belief that the vest was stolen was not objectively reasonable. Information volunteered during the detention cannot sustain a suspicion formed earlier. The fact another type of crime could have been the subject of their suspicion in hindsight is not relevant. There was no proper basis for an investigative detention. 2) The decision to admit or exclude evidence under s. 24(2) is a question of law involving judicial discretion. The trial judge considered the three-step test from *Grant*: the seriousness of the breaches; the impact of the breaches on the accused's protected interests; and society's interest in having the matter tried on the merits. The fact that the police could have discovered evidence in another way can be considered in assessing the actual impact of the breach on the accused. Because the trial judge erred in deciding an investigative detention would have been justified because the officers had a reasonable suspicion the vest was stolen, the trial judge's use of discoverability in the s. 24(2) analysis was flawed. There could not have been a lawful search incident to this detention. The firearm was not discoverable. The Court of Appeal undertook fresh analysis based on the trial judge's findings of fact. Because there was no reasonable suspicion sufficient to detain the appellant for possession of stolen property, the *Charter* breachers were not inadvertent, technical or minor and were on the more serious end of the spectrum. The impact of the breaches on the appellant was substantially intrusive. The only way the officers could have discovered the firearm would have been through a breach of the appellant's *Charter* rights to privacy and to be free from unjustified state interference. The truth-seeking function of the trial process would be best served by admission of the firearm and this favoured admission of the evidence. Balancing these factors focusses on the integrity and public confidence in the administration of justice. Firearms offences are serious, but the third branch of the *Grant* test does not tip the balance in favour of admission. 3) In considering whether to enter an acquittal or remit the matter for a new trial, the question is whether, based on all information now available, it is clearly more probable that the accused would be acquitted at a

Criminal Law - Court-appointed Counsel

Criminal Law - Defences - *Charter of Rights*, Section 8, Section 9

Criminal Law - Impaired Driving - Driving Over .08 - *Charter* Violation

Criminal Law - Procedure - Stay of Proceedings

Family Law - Child Support - Arrears

Family Law - Support - Child Support - Extraordinary Expenses

Injunction - Interim

Injunction - Interlocutory

Originating Application - Board of Directors - Governance

Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process

Practice - Standing - Public Interest Standing

Professional Discipline Decision - Appeal - Standard of Review

Statutes - Interpretation - *Cities Act*, Section 307(1)

Statutes - Interpretation - *Non-profit Corporations Act, 2022*

Statutes - Interpretation - *Wildlife Act, 1998*, Section 25(1)(a)

hypothetical new trial. With the firearm evidence excluded, there was no prospect of conviction at a retrial. The dissenting judge agreed with the majority that there was no merit to the argument that the search was reasonable because the police could have lawfully detained the appellant for investigative purposes instead of the arrest that actually occurred. The dissenting judge disagreed with the majority about whether the trial judge erred in the assessment of the *Grant* factors, and would have dismissed the conviction appeal. The dissenting judge also would have dismissed the sentence appeal, even though the trial judge erred in principle by failing to consider whether the *Charter* breaches justified a reduction in sentence.

 Back to top

***R v Demong*, 2023 SKCA 109**

Richards Schwann Barrington-Foote, 2023-09-14 (CA23109)

Criminal Law - Appeal - Conviction
Criminal Law - Appeal - Offences Against Persons - Sexual Assault
Criminal Law - Appeal - Standard of Review

This is an appeal of a conviction for sexual assault under s. 271 of the *Criminal Code*. The complainant was intoxicated at the time of the incident, and the central issues were consent and capacity to consent. The complainant had little or no memory of the event, thus the trial judge applied the *Villaroman* test for making a determination based on circumstantial evidence: whether the accused's guilt "was the only reasonable conclusion available on the totality of the evidence": *R v Villaroman*, 2016 SCC 33 at para 55, [2016] 1 SCR 1000 (*Villaroman*). The trial judge convicted by concluding that the complainant did not consent, but failed to consider capacity to consent.
HELD: The appeal was allowed and a new trial ordered. The trial judge improperly applied the *Villaroman* test by only considering actual consent. Rather, *Villaroman* and the case law on capacity require the trial judge to consider capacity as well. He failed to do so in the manner required by *Villaroman*, thereby committing an error of law. The court considered whether there was adequate evidence to direct a verdict of acquittal, and concluded there was not; thus, a new trial was ordered.

 Back to top

Cases by Name

Abrametz v Law Society of Saskatchewan

Anstead v Saskatchewan Medical Association

C.S.W. v T.D.S.

Edge v Moose Jaw Downtown and Soccer/ Field House Facilities Inc.

Elance Steel Fabricating Co. Ltd. v Three-O-Six Industrial Services Inc.

Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.

Hassan v Mastaan

K + S Potash Canada General Partnership v Aecon Construction Group Inc.

R v Demong

R v McDonald

R v Sabiston

R v Sandfly

R v Wesaquate

UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan (Minister of Education)

Waterhen Lake First Nation v Saskatchewan (Minister of Parks, Culture and Sport)

***Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.*, 2023 SKCA 113**

Leurer Tholl Kalmakoff, 2023-10-10 (CA23113)

Civil Procedure - Applications - Applications without Notice
Civil Procedure - *Ex Parte*
Civil Procedure- *Queen's Bench Rules*, Rule 10-3

Farms and Families of North America Inc. (FNA) and James Mann appealed an interim order of the Court of Queen's Bench which had been granted *ex parte*, without notice to them. When an *ex parte* order is made, the persons affected by it are entitled to a review hearing where they can seek to have the order set aside or varied. At the review hearing, the judge is called upon to consider the matter afresh and decide if the order should have been granted.
HELD: The appeal was dismissed as the proper venue is a review hearing at King's Bench. In reaching this conclusion, the court ruled on three procedural issues. First, the lack of an endorsement required by Rule 10-3(5) did not render the *ex parte* order unenforceable. Second, the fact that a "Corrective Letter" has been sent did not render the judge *functus officio*. Third, the court declined, in this instance, to usurp the proper role of a King's Bench judge on a review hearing of an *ex parte* order.

 Back to top

***Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114**

Leurer Barrington-Foote, 2023-10-13 (CA23114)

Administrative Law - Appeal - Professional Misconduct
Administrative Law - Judicial Review - Law Society - Natural Justice
Administrative Law - Judicial Review - Standard of Review - Natural Justice - Procedural Fairness - Reasonableness - Reasons for Decisions
Professional Discipline Decision - Appeal - Standard of Review

This matter was sent down to the Court of Appeal by the Supreme Court of Canada for a hearing on the issues of penalty and an adjournment request. The Supreme Court of Canada had heard an appeal brought by the Law Society of Saskatchewan (LSS) and

remitted the two issues to the Court of Appeal. P.V.A. also sought costs regarding a number of the hearings to date. The matter originated from an LSS investigation that resulted in the convictions on four counts of professional misconduct against P.V.A. During the proceedings, P.V.A. had requested an adjournment pending completion of tax proceedings related to the charges. The LSS issued a penalty decision on January 18, 2019, having denied the adjournment request. The within appeal was a statutory appeal brought pursuant to s. 56(1) of *The Legal Profession Act*. The court followed the direction of the Supreme Court in determining the standard of review: namely, where the issue on appeal is whether the administrative decision maker has made an error of law, the correctness standard applies. If the issue is whether there has been an error of fact or of mixed fact and law, the palpable and overriding standard applies. This standard was applied to both the penalty issue and the costs issues. In short, there must have been a palpable and overriding error. On the adjournment issue, the court stated that it must decide whether the facts found by the hearing committee that are not the product of palpable error, together with any other undisputed facts, mean that the refusal to grant an adjournment resulted in a denial of procedural fairness.
HELD: The penalty decision and the costs award were set aside and remitted to the hearing committee of the LSS for rehearing. On the penalty decision, the court focused on sentencing and the applicable principles in professional disciplinary proceedings. It considered mitigating and aggravating factors, parity, proportionality, punishment, and the binding effect of precedents. It concluded that the hearing committee had erred in its application of the parity principle and sent the matter down for rehearing. On the adjournment request, the court concluded that there was no breach of procedural fairness in the dismissal of the adjournment request, as it was not satisfied that P.V.A.'s ability to defend against the charges was undermined by the concurrent tax proceedings. The hearing committee's decision was not incorrect, as it was consistent with the duty of procedural fairness. The court also considered whether the refusal to adjourn the proceedings constituted a denial of procedural fairness in relation to the sentencing aspects of the proceeding. It concluded that it was not necessary to answer that question because the court had, for other reasons, determined to send the issue back to the hearing committee for a rehearing on sentencing. P.V.A. was partially successful as to costs, with the exception that costs of the rehearing would remain in the jurisdiction of the hearing committee on rehearing.

 Back to top

***R v McDonald*, 2023 SKKB 180**

Currie, 2023-08-24 (KB23171)

Appeal - Criminal Law - Driving Over .08
Criminal Law - Impaired Driving - Driving Over .08 - *Charter* Violation
Constitutional Law - *Charter of Rights*, Section 8 - Search and Seizure

The appellant appealed his conviction in Provincial Court of driving over .08, contrary to s. 320.14(1)(b) of the *Criminal Code*. The police stopped the accused after observing the vehicle he was driving speeding and swerving out of its lane on a cold evening. Before the appellant was placed in the police officer's car to complete the Breathalyzer test in a warm environment, the officer did a pat-down search of the accused. The appellant argued the search violated his s. 8 *Charter* right to be free from unreasonable

search. The trial judge had decided there was no *Charter* breach and officer safety justified the requirement to enter the police vehicle and pat down search. The Court of King's Bench considered whether a pat-down search had been necessary or appropriate in the circumstances.
HELD: The appeal was dismissed. To consider whether the search was reasonably necessary and thus not in violation of the appellant's *Charter* rights, the court considered the importance of determining whether the appellant was driving over .08 to the public good, the necessity of the search to that determination, and whether the search was excessive interference in the appellant's liberty. It is important to the public good to determine whether a driver was over .08. The search was for weapons, was conducted over clothing, and was brief. The search was not excessive interference with liberty. The search was objectively reasonable in light of potential for an aggressive reaction. The officer was alone and backup would have taken several minutes to arrive. The appellant was polite and co-operative, but had been drinking, was emotionally upset, was resisting eye contact, and others have reacted aggressively after Breathalyzer tests. A general practice of a pat-down search before all Breathalyzer tests would not be objectively reasonable. This search was objectively reasonable and necessary in the circumstances and did not breach the appellant's *Charter* rights.

 Back to top

***C.S.W. v T.D.S.*, 2023 SKKB 182**

Richmond, 2023-09-07 (KB23180)

Family Law - Child Support - Arrears
Family Law - Support - Child Support - Extraordinary Expenses

Arrears and ongoing child support were considered at a trial for a final order for child support regarding a single child of the relationship. The child had a step sibling who was not the subject of the application. Principles of hybrid custody as well as ongoing changes in the residence of the child were considered in arriving at a new order for child support taking the circumstances from July 1, 2021 to July 1, 2023 into account. Quantum issues under consideration included payment of arrears, whether tutoring constituted an extraordinary expense, and reasonableness of various other expenses as s. 7 expenses.
HELD: Arrears were set at $1825 per month from July 1, 2021, and ordered to be paid by the respondent along with an outstanding orthodontic bill. Ongoing support was ordered to be paid, to be calculated by way of set-off of Guideline support going forward upon disclosure of up-to-date income information of the petitioner using the recalculation service.

 Back to top

***Elance Steel Fabricating Co. Ltd. v Three-O-Six Industrial Services Inc.*, 2023 SKKB 198**

Scherman, 2023-09-25 (KB23190)

Civil Procedure - Pleadings - Application to Strike Statement of Defence
Civil Procedure - Pleadings - Set-Off

Elance Steel Fabricating Co. Ltd. (Elance) sought to strike a number of paragraphs from a statement of defence filed by Three-O-Six Industrial Services Inc. (306) in an action based on an Edmonton construction project. Two Saskatchewan actions between the parties were outstanding, each in relation to a different construction project: one in Edmonton and one in Weyburn. This application was in relation to the Edmonton action. The defence claimed legal and equitable set-off based on monies claimed to be owing on a different project in Weyburn. The nature of the monies sought to be set off were in part damages, but in any event were all in relation to the Weyburn project, which is not the subject matter of the Edmonton action.
HELD: Applying the principles of both legal and equitable set off, as well as the applicable *Queen's Bench Rules*, the court concluded that any claim for damages arising out of the Weyburn project did not qualify as a mutual debt in respect of which set-off can be pleaded in the Edmonton action. This was because it was by nature a claim for damages rather than for set-off of a mutual debt. Secondly, the claimed monies did not arise out of the same dealings, transaction or occurrence which were the basis of the plaintiff's claim against the defendant in the Edmonton action. As a result, the court struck four paragraphs from the claim, pointing out that the facts therein pleaded were not permitted to be pleaded by Rule 3-47. Furthermore, the court held that if and to the extent Rule 7-9(2) must be applied to strike these pleadings, each such paragraph was vexatious, immaterial and an abuse of process. Rule 1-6(1) was also relied upon. One paragraph of the pleading respecting a set-off arising out of the same dealings, transactions or occurrence was permitted to remain in the claim, with two additional paragraphs requiring amendment to comply with the rules of set-off and pleading noted above. The court declined to consider whether specific categories of Rule 7-9(2) applied, relying only on Rule 3-47, which permits set-off to be pleaded only in two specified circumstances.

 Back to top

Edge v Moose Jaw Downtown and Soccer/Field House Facilities Inc., **2023 SKKB 207**

Keene, 2023-09-28 (KB23196)

Civil Procedure - Application to Strike Statement of Claim - Limitation
Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process
Statutes - Interpretation - *Cities Act*, Section 307(1)

The defendants applied to strike the plaintiff's statement of claim for disclosing no cause of action, being frivolous or vexatious or being an abuse of the court's processes, pursuant to Rule 7-9(2)(a), (b) and/or (e) of *The Queen's Bench Rules*. The plaintiff had sued the defendants for negligence, wrongful dismissal and breach of *The Saskatchewan Employment Act* and *The Non-profit Corporations Act, 1995*. The plaintiff was terminated from his employment as a general manager during his probationary period. The defendants were a non-profit corporation responsible for managing city-owned real estate and public facilities and staff, and

individual members of the corporation's board of directors, who were also city councillors. The Court considered whether the claim should be struck.
HELD: The plaintiff's claim was struck and the plaintiff was ordered to pay one set of costs. 1) A claim started outside the limitation period is scandalous, frivolous or vexatious and amounts to an abuse of process. Section 307(1) of *The Cities Act* imposes a one-year limitation period for actions for the recovery of damages against a city. The Act defined a corporation controlled by the city as a "city". The claim was for monetary damages. The plaintiff was aware of the facts upon which to base his lawsuit when he received notice of his termination. The plaintiff's lawyer sent the defendants a demand letter approximately seven months later. The plaintiff issued and served his statement of claim almost two years after he received notice of termination. The claim was not issued or served in time and was statute-barred.

 Back to top

***UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan (Minister of Education)*, 2023 SKKB 204**

Megaw, 2023-09-28 (KB23184)

Injunction - Interim
Injunction - Interlocutory
Practice - Standing - Public Interest Standing

The applicant university student organization applied for an interlocutory injunction to prohibit the implementation of a primary and secondary school policy requiring parental consent for students under 16 before they can use a preferred name or gender identity with school personnel. The respondent government opposed the injunction application and opposed the applicant being granted public interest standing to bring the litigation. The applicant filed material illustrating that students who are unable to identify according to their chosen name, pronouns and sexual identity suffer harm. The government filed an affidavit indicating the education ministry had received 18 letters expressing support for developing the policy. Seven letter authors indicated they were parents of school aged children. There was no evidence the authors of the letter were Saskatchewan residents. The government presented affidavit evidence asserting existing policies regarding students wishing to change their name or pronouns were inconsistent, without identifying any specific policies studied or difficulties with implementation of existing policies. There was no indication the policy was discussed with any potential interested parties nor any indication any legal assistance was sought regarding the constitutionality of the policy. The court considered: 1) should the applicant be granted public interest standing; 2) was the application for an injunction premature; and 3) should the injunction be granted?
HELD: The applicant had standing and the interlocutory injunction was granted. 1) The applicant had public interest standing to advance the litigation. The decision to grant public interest standing is discretionary, and involves weighing whether the case raises a serious justiciable issue, whether the party bringing the action has a genuine interest in the matter, and whether the proposed action is a reasonably and effective means of bringing the case to court. The originating application presented significant, complex and novel constitutional issues. The applicant is not required to have a direct connection to the policy. The applicant demonstrated a

link with the claim and its involvement with 2SLGBTQ1+ issues, programs for youths, and policy development. The evidence demonstrated a genuine interest in the issue of gender diversity. The applicant had prepared detailed and complicated pleadings and obtained relevant evidence in a short time period and had experienced legal counsel. The applicant had demonstrated the ability, resources and expertise to advance the claim. The case raised issues of public interest. There was no realistic alternative means to advance this public interest challenge to governmental action. 2) The respondent government argued the application for an interlocutory injunction was premature because the school divisions had not developed procedures for the implementation of the policy. The evidence indicated the policy was already being applied. The application was not premature. 3) The respondent government conceded the application presented a serious issue to be tried. The claim was not frivolous or vexatious. The applicant filed expert evidence about the potential harm suffered by gender diverse students from the policy. The government filed expert evidence that did not comment on the applicant's evidence of the risks faced by gender diverse youth who are unable to express their gender identity through a chosen name or pronoun. Without weighing the evidence, the court was satisfied that a few individuals may be irreparably harmed by the policy. The court noted that the policy as drafted does not restrict or control the use of pronouns. The balance of convenience supported the injunction until the court adjudicated the constitutional challenge to the policy. The ultimate success between the applicant and respondent was unknown. At the preliminary stage, the public interest in recognizing the importance of the governmental policy was outweighed by the public interest of not exposing a minority of students to the potentially irreparable harm and mental health difficulty of being unable to find expression for their gender identity. There was no order as to costs.

 Back to top

***R v Wesaquate*, 2023 SKKB 205 (not yet available on CanLII)**

Bergbusch, 2023-09-28 (KB23194)

Criminal Law - Court-appointed Counsel
Criminal Law - Procedure - Stay of Proceedings

This was J.W.'s second application for court-appointed counsel funded by the state, in relation to criminal charges arising out of an incident alleged to have occurred in 2016. He applied pursuant to s. 15.3 of *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, and more specifically relied upon *R v Rowbotham* (1988), 41 CCC (3d) 1 (Ont CA) on the grounds that he has been denied Legal Aid and could not obtain a fair trial without legal representation. His first Rowbotham application for court-appointed counsel was granted and a trial proceeded on a number of those charges. He was acquitted, but the Court of Appeal sent the matter back for a new trial, resulting in the current application. The Attorney General for Saskatchewan (Court Services) accepted that the established criteria for court-appointed counsel had been met, but took the position that J.W.'s blameworthy conduct would bar him from succeeding. Specifically, it submitted that he was persistently unable to work with counsel.
HELD: Court Services had inappropriately tendered evidence protected by solicitor-client privilege in support of its position, and the accused was entitled to the Charter remedy of court-appointed counsel based on the three-pronged test in *Rowbotham*. Blameworthy conduct in the form of a failure to act sincerely, honestly, diligently, reasonably or in good faith in respect of legal

counsel could disentitle an accused to court appointed counsel; however, the court held that he did no such thing. Following *R v Pastuch*, 2022 SKCA 109, the court found that J.W. was not responsible for his lack of legal representation, and the fundamental principle of ensuring a fair trial supported appointment of state-funded counsel. The charges were stayed pending appointment of counsel pursuant to Part III.1 of *The Constitutional Questions Act, 2012*.

 Back to top

***Hassan v Mastaan*, 2023 SKKB 223**

Bardai, 2023-10-25 (KB23225)

Originating Application - Board of Directors - Governance
Statutes - Interpretation - *Non-profit Corporations Act, 2022*

Two competing boards purported to exercise authority over the affairs of the Islamic Association of Saskatchewan (IAS). The IAS had a constitution and bylaws governing the operation of the organization and its over 1,000 members. In 2022, the imam was terminated by the board of directors for cause, but its decision was not unanimous. There was an ongoing struggle between those supportive of this imam and a group supportive of the decision to terminate him. Shortly after, the applicant board was elected after approximately 85 percent of the IAS members voted. The respondents called their own special general meeting a few months later, but notice was not sent to all IAS members. The respondents did not have a list of eligible voters. After this special general meeting, the respondents purported to exercise authority as the legitimate board, amending ISC registrations and taking steps to try to take control of IAS assets. The applicant board filed an originating application seeking a declaration that it was the duly elected board of directors of the IAS. The respondents brought an application of their own requesting that they be declared the validly elected directors. The court considered whether the special general meeting called by the respondents was properly called and carried out in accordance with the requirements of *The Non-profit Corporations Act, 2022* and the constitution and bylaws of the IAS. The central issue was which board was entitled to direct the affairs of the organization.
HELD: The current board of the IAS was the applicant board until a confidence vote was held. The vote for the respondent board was invalid. The court did not award costs. The court set out the relevant provisions of the IAS constitution and the relevant provisions of *The Non-profit Corporations Act, 2022*. To set aside an election, the court must be satisfied that: i) there were irregularities in the election process; and ii) those irregularities were calculated to affect the outcome of the election. The court was satisfied that there were several irregularities that undermined the fairness of the election and were calculated to affect the result. It was evident from the outcome that only supporters of the respondents attended to vote. The respondents did not have a list of eligible voters. This meant that the court did not know if those eligible to vote received notice or whether those who did vote were in fact eligible to vote. While the respondents asked for a meeting for a specific purpose, the purpose of the meeting then changed without any new petition being circulated. The notice provided to the members was also inconsistent. The bylaws of the IAS required the notice of the special general meeting's agenda be sent by mail or email to members whose addresses had been provided to the general secretary. This did not happen. The place of the meeting was changed at the last moment. The court ordered that there be

an annual general meeting of the members within 60 days. The court ordered that a confidence vote be held on whether the applicant board should be removed as the board of directors. If the applicant board carried the confidence vote, they would remain as the duly elected and proper board. If the applicant board lost the confidence vote, then there would be a new election held for the board of directors. Until the vote was held, the applicant was responsible for the management and control of the IAS.

 Back to top

***K + S Potash Canada General Partnership v Aecon Construction Group Inc.*, 2023 SKKB 225**

Mills, 2023-10-26 (KB23223)

Civil Procedure - Conflict of Interest - Expert Witness

The applicant and respondent had the potential of using the consulting services of the same firm because of a merger. There was the prospect that both parties would seek to use expert witnesses employed by the same firm. The applicant sought an order that the consulting firm not appear as a witness for the respondent due to a conflict of interest, and that the respondent be enjoined from continuing to use the consulting firm in the actions involving the parties. The court conducted a contextual analysis in considering the application.
HELD: The application to enjoin the respondents from using the consulting firm was dismissed. It would be up to the trial judge to determine whether the experts can be accepted based on the legal principles in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, and the weight to be given to that evidence. The application here was premature. No expert reports had been exchanged yet and there was no evidence that confidential information had in fact been passed between the proposed experts. Prior to the merger, the two companies agreed that there would be an ethical wall placed in relation to the litigation. It was clear from case law that the court had jurisdiction to disqualify an expert from giving opinion evidence in the case of a conflict of interest. The court noted that while the conflict of interest principles in *MacDonald Estate v Martin*, [1990] 3 SCR 1235 (*MacDonald Estate*) may be applied to experts, this should be done cautiously. It was clear from the case law and *King's Bench Rules* that experts owe a dual duty to the court and to their client. The hard and fast rules dealing with solicitor-client privilege and conflicts of interest in *MacDonald Estate* did not necessarily apply in all contexts of expert witnesses. There was no evidence of actual disclosure, nor could the applicant point to any situation where confidential information had been used in preparing an opinion.

 Back to top

***Anstead v Saskatchewan Medical Association*, 2023 SKKB 226**

Currie, 2023-10-27 (KB23231)

Civil Procedure - Class Action - Venue

The representative plaintiff sought an order returning the action to the judicial centre of Regina. The class action related to an arrangement negotiated between the Saskatchewan Medical Association (SMA) and the government of Saskatchewan whereby full-time surgical assistants were compensated at a lower rate than office-based physicians for the same services. The action was certified in 2014 in Regina. Pleadings had now closed, but questioning had not started. In 2022, the SMA requested that the Regina local registrar transfer the action to Saskatoon under ss. 22(3) and (4) of *The Queen's Bench Act* because the SMA carried on business and had its headquarters in Saskatoon. The action was transferred to Saskatoon. The applicant argued that the action should be transferred back to Regina because the SMA had acquiesced to the action being in Regina for nine years, and that, at any rate, Regina was the appropriate judicial centre in which to conduct the action. The court determined: 1) whether acquiescence applied; and 2) the location of the appropriate judicial centre.
HELD: The court dismissed the application, finding that Saskatoon was the appropriate judicial centre for the action. 1) The court noted that the principle of estoppel by acquiescence is a common law principle. Common law is subject to statute law, and the application of estoppel by acquiescence was foreclosed by the provisions of s. 5-2(4) of *The King's Bench Act* (Act). This section expressly permitted the defendant to have the action transferred to a different judicial centre, provided the request was made before the action was set down for trial, regardless of how much time had passed. 2) The court applied s. 5-2(1) to determine the appropriate judicial centre. Regardless of where the action was commenced, the court had broad discretionary power to choose the appropriate judicial centre for the action. The court considered what was fair and reasonable in the circumstances of the case, and convenience. For the purposes of s. 5-2(1)(b), the SMA resided in Saskatoon. Its headquarters was in Saskatoon, but it carried on business throughout Saskatchewan. The court found that no judicial centre was "the" judicial centre closest to the place where the SMA carried on business. The applicant argued that there it would be inconvenient for its witnesses if the trial took place in Saskatoon, and that operating times in hospitals would be affected as a result. The respondent provided statistics indicating that many of the class members were retired or not practicing. The court noted that there was still a long time until the action would be at the trial stage. Witnesses could testify at trial by video conference rather than in person. The court concluded that the applicant's potential witnesses residing in Regina was not a significant factor. There was also no evidence before the court as to how surgeries would be affected. The court did not award costs.

 Back to top

***Waterhen Lake First Nation v Saskatchewan (Minister of Parks, Culture and Sport)*, 2023 SKKB 230**

Meschishnick, 2023-10-31 (KB23216)

Aboriginal Law - Treaties - Duty to Consult
Aboriginal Law - Honour of the Crown

The respondent Hamlet of Waterhen Lake South (hamlet) applied to the respondent Minister of Parks, Culture and Sport (minister) and the respondent Water Security Agency (agency) for the necessary permits and approval to construct a marina on the lake in Meadow Lake Provincial Park. The minister determined that construction of the marina did not trigger a duty to consult with Waterhen First Nation (Waterhen) and issued a work permit. The agency issued an aquatic habitat protection permit after receiving

a satisfactory report from a biologist on the impact on the shoreline. Waterhen argued that the respondents did not honour their duty to consult nor their administrative law duties prior to issuing these permits. Waterhen argued that the marina would interfere with its treaty rights to conduct traditional ceremonies and to hunt, fish, trap and gather. Waterhen sought to quash both the aquatic permit and the work permit. The Minister and Agency acknowledged that they were constitutionally obligated to honour Waterhen's Treaty 6 rights under the Natural Resources Transfer Agreement 1930. Even though the creation of Meadow Lake Provincial Park (park) made it "occupied Crown land", Waterhen's members had a right of access to the park to engage in activities protected by Treaty 6 in areas where those activities are permitted. While Treaty 6 does not expressly protect gathering plants for food, medicine or spiritual practices, the province's consultation policy provided that First Nation bands will be consulted about government decisions and actions that have the potential to adversely impact those activities. Waterhen indicated that it was interested in being involved in matters taking place in the park and advised the minister of this. A park advisory group was established to foster communication between the park and Waterhen, but the inland marina was not brought to the attention of Waterhen. The proposed marina would be near a sweat lodge used by Waterhen, and the lake was the sole source of Waterhen's drinking water. In addition, Waterhen argued that both permits should be set aside on administrative law grounds, because it was denied the procedural right to consultation grounded in s. 35 of the *Constitution Act, 1982* and the administrative common law right to procedural fairness. The court considered: 1) whether administrative common law principles applied to set aside the permits issued by the respondents, including: i) procedural fairness in the decision by the agency to defer to the minister on whether a duty to consult was triggered; ii) whether there was a breach of Waterhen's procedural rights when the agency proceeded to consider the application for the aquatic permit without notifying Waterhen; iii) whether issuing the permits was unreasonable; and 2) whether the construction of the marina had the potential to adversely affect Waterhen's Treaty 6 rights.

HELD: The court dismissed the application for judicial review, concluding that there was no duty to consult with Waterhen on the construction of the marina. Waterhen did not establish that the construction of the marina would adversely affect the exercise of its Treaty 6 rights. The court also held that administrative common law principles did not apply to the decisions made by the minister and agency. The court assessed taxable costs to the minister, agency, and the hamlet. 1) The court set out the applicable legal principles. The duty to consult arises out of the honour of the Crown and the goal of reconciliation (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73). Waterhen had to establish an appreciable or discernable impact on the exercise of a treaty right. Public bodies owe a duty of fairness in making decisions that affect the rights and interests of those affected by the decision. Granting the permits constituted administrative decisions. Waterhen had the onus to prove that the decisions were unreasonable. i) The court found that the agency did not owe a duty of procedural fairness to Waterhen in making the decision to defer to the minister on the question of whether a duty to consult was triggered. It was reasonable for the agency to rely on the fact that the minister would conduct an analysis and determine whether a duty to consult had been triggered. ii) The court then considered whether there was a breach of Waterhen's procedural rights when the agency proceeded to consider the application for the aquatic permit without notifying Waterhen. There were some documents forming part of the record as reasons on the decision to grant the work permit, but there was no written decision explaining the reasons for granting the aquatic permit. The central question was whether Waterhen's treaty right to fish would be adversely affected by the construction of the marina. If so, Waterhen had the constitutional right to be consulted before the project was approved. The court could not conclude that Waterhen was entitled to notice and the right to be consulted on whether the aquatic permit should be issued. The court opined that before a decision by an administrative body could affect the rights of a party, the decision must be final. Here, the decision to issue the work permit made the decision to approve the marina, and not the aquatic permit, final. Waterhen did not have a separate and distinct right on administrative law principles to

notice that the agency would be considering whether to approve the aquatic permit. iii) The court considered whether issuing the permits was unreasonable. In issuing the aquatic permit, the agency relied on its own expertise and an expert report on the impact to habitat. Waterhen challenged the reliability of the habitat report, arguing that it was flawed. It argued that the author of the report did not collect samples of water and sediment to compare them to historical data and did not properly consider the impact on fish and fish habitat to maintaining good water quality. Waterhen also argued that the issuance of both permits was unreasonable because it was done without the preparation of a technical report and the submission of that report to the Minister of the Environment. The agency filed a response affidavit from its senior ecologist, which pointed to flaws in the Waterhen affidavit, including a lack of scientific evidence in support of their arguments. There was no evidence that fish species the Waterhen affidavit cited as being at risk actually inhabited the lake. The court found that the shortcomings in the opinions expressed in the Waterhen affidavit called into question its reliability. The court found that Waterhen did not establish that the risks it identified were real or potential risks in this case, and it did not establish that there was a real or potential risk to water quality generally. Overall, the Waterhen affidavit was not sufficiently reliable, because it relied on facts that were not established and provided opinion that was not supported by scientific research. The court concluded that the decision by the agency to grant the aquatic permit was not unreasonable. The court held that administrative common law principles did not provide the proper focus for challenging the decision to grant the work permit. Because the court could not give any weight to the Waterhen affidavit, there was no evidence to suggest that fish populations and habitat would be affected by the development of the marina. 2) The court then considered the decision by the minister that no duty to consult was triggered. The court analyzed the impact on Waterhen's treaty rights. Initially, the park manager inspected the proposed site for the marina, completed an assessment on whether the duty to consult was engaged, and prepared a report. The park manager concluded that the proposed project was not on unoccupied Crown land, occupied Crown land, or public water bodies to which Metis or First Nations had a right of access to exercise treaty rights. The park manager also concluded that the proposed marina would not impact access to Waterhen Lake or other areas that were accessed for traditional use. The area was not currently accessed by First Nations or Metis for traditional use because of adjacent infrastructure. Waterhen argued that the park manager did not conduct a thorough investigation; had he consulted with Waterhen, he would have discovered that the marina channel would cut off access to hunting, trapping, and gathering plants, and that there was a sweat lodge in the area. The court pointed out that the park report did not mention the treaty right to fishing. However, the park manager relied on data on fish populations to conclude that the marina did not present a risk to fish. Waterhen indicated that its members use and rely on the lake's fish, and that an increase in boat traffic and recreational fishing may adversely impact their treaty right to fish. The park's manager did not have the habitat report when a decision was made that the duty to consult was not triggered. The court found that by the time the work permit was approved, the potential for an adverse impact on Waterhen's treaty right to fish was fully considered. After considering the information relied on by the park manager and the agency in approving the aquatic permit, the court found that the decision to issue the work permit was sensitive to the facts. The court concluded that the standard of review was reasonableness, and that deference was due. The decision to approve the work permit was not unreasonable because of the potential for an adverse effect on the treaty right to fish. Waterhen did not establish an appreciable or discernable impact on its treaty right to fish, so no duty to consult was engaged. The court found that there was no causal connection between the development of the marina and any reluctance to host sweat lodges or other ceremonies at this location – there were already existing developments in the area. The new marina would hold only about 10 more boats than the existing marina, and only residents of the hamlet would be entitled to use the marina. There would be no new adverse impact on this treaty right. The court found that it was clear from the evidence that the area where the marina was to be located was closed by provincial law to hunting and trapping because of its proximity to neighbouring developments. There was therefore no causal relationship between the development of the marina and an impact on the treaty rights of Waterhen to hunt and trap, so there was no obligation for the

minister to consult with Waterhen. The court accepted Waterhen's evidence and concluded that plants gathered by its members would have grown on the undisturbed land that had now been excavated. This was a new impact caused by Crown conduct. There was a direct, though modest impact on Waterhen's treaty right to gather food and medicine. The proposed marina and its channel did not prevent Waterhen members from accessing the reserve land from one side but did make access less direct by creating a detour. The court found that in that limited sense, it did negatively affect Waterhen's right to hunt and gather. The minister argued that the impacts on Waterhen's treaty right to hunting and gathering were insignificant and should not trigger a duty to consult. The court considered whether the duty to consult will be triggered where a government decision will have a known adverse effect on a treaty right, no matter the degree. After reviewing the case law, the court held that Waterhen had not established that the detour created by the channel to be cut from the inland marina to the lake would adversely affect its right to hunt and trap on treaty lands in a way that was beyond insignificant. The court found that the impact on Waterhen's right to access the reserve land to the south of the lake was unsubstantial and negligible, and that closing the trail did not trigger a duty to consult. Waterhen did not establish that its treaty right to gather was impacted in a way that was beyond significant and negligible. Waterhen also argued that the Crown did not act honourably because it did not follow its own policy guidelines on the duty to consult, making the decisions to approve the permits unreasonable. The court reviewed case law to conclude that the minister was not bound by statements of policy, because policy is not the law. There were no allegations of bad faith. The court found it was not dishonourable for the Crown to apply the law rather than the policy.

 Back to top

***R v Sandfly*, 2023 SKPC 41**

Segu, 2023-10-20 (PC23047)

Aboriginal Law - Hunting and Fishing Rights
Statutes - Interpretation - *Wildlife Act, 1998*, Section 25(1)(a)

The accused was charged with unlawfully hunting a bull moose, contrary to s. 25(1)(a) of *The Wildlife Act, 1998* (Act). The accused was the chief of Big Island Lake Cree Nation (BILCN). He conceded that he was hunting and shot a moose near a roadway. He did not have a licence. The area was clearly designated as a road corridor game preserve (RCGP), with hunting prohibited within 400 metres of either side of the centre line of the road. There was an agreed statement of facts, with the basic elements of the offence made out. The accused advanced several *Charter* defences, including that the application of the Act and its regulations was contrary to section 35(1) of the *Constitution Act, 1982*; the prohibition against hunting in the RCGP was *ultra vires* the government of Saskatchewan because it infringed the accused's Treaty 6 right to hunt; and the Act unconstitutionally limited the accused's right to be governed by Indigenous laws related to hunting. The Crown took the position that the accused had no right, Treaty or otherwise, to hunt within the properly constituted and *bona fide* road corridor game preserve, and that there was no *prima facie* infringement. The court outlined six issues to be resolved: 1) was the RCGP occupied or unoccupied Crown land; 2) if it was occupied Crown land, was it occupied for a *bona fide* purpose; 3) if the RCGP was validly occupied, did the accused have a right of access; 4) if there was a right of access, was there a *prima facie* infringement of a Treaty right; 5) if there was an infringement, was it justified;

and 6) did the accused have a right to self government and/or hunting, protected by section 35(1) of the *Constitution Act, 1982*, and if so was there an infringement of that right?

HELD: The accused was found guilty of unlawfully hunting a bull moose. The court set out the evidence of the Crown and defence witnesses. The court cited *Mitchell v M.N.R.*, 2001 SCC 33 for guidance on the admission of oral history evidence of the six elders introduced by the defence. While the proposed evidence provided evidence of ancestral practices and an Indigenous perspective on hunting rights, the court was concerned about the reliability of the evidence. The court found the evidence to be admissible, but there were dramatic differences on key points from one Elder to the next, including on BILCN hunting territories, geographical hunting practices, moose populations in BILCN territory, and the consequences of breaching BILCN hunting laws. The court referred to the wording of Treaty 6 for the limitation on Treaty hunting rights as they related to occupied Crown land "taken up for settlement, mining, lumbering or other purposes". In *R v Badger*, [1996] 1 SCR 771, the Supreme Court held that section 12 of the NRTA neither extinguished nor replaced Treaty hunting rights, but did modify them in a significant way. There was no right to hunt on Crown land that was either occupied (meaning put to a use visibly incompatible with hunting), or to which there was no right of access. From the case law and the evidence presented here, the court found that the federal government, through the implementation of the NRTA, had explicitly allowed for provincial legislation regulating the conservation of game. In addition, provincial game laws applied to Indigenous peoples provided that the legitimate purpose was the conservation of game supply. If the legitimate goal of the provincial legislation was the conservation of game, the province was not acting ultra vires its jurisdiction. 1) The RCGP was occupied Crown land, within the meaning of section 12 of the NRTA. It was clear from the case law that the province was entitled to create a RCGP if the goal was wildlife conservation. 2) Here, there was evidence that the *bona fide* intent behind creating the RCGP was the conservation of game. There was adequate previous study, evaluation and consultation with affected groups at the time the RCGP was instituted. The court heard evidence from the original architect of the RCGP system in Saskatchewan. It was undisputed that at the time the RCGP was implemented, there was a serious and legitimate concern regarding moose population decline. There was expert evidence that the purpose of the RCGP program was to conserve and propagate declining moose populations, and to prevent opportunistic hunting of big game populations. The court accepted evidence that moose were attracted to high quality forage by roadways. There was also evidence from both parties that opportunistic hunting from roadways was still happening. 3) There was no right of access. In order to establish a right to hunt on occupied Crown land, the accused had to establish that licensed hunting had been allowed there to non-Indigenous hunters. The court distinguished the case law relied upon by the defence in support of the accused's right of access to hunt on the RCGP. The legislation provided no mechanism for obtaining a license to hunt within a RCGP; no one was allowed to hunt in a RCGP. The province's intent was to create a RCGP for the purpose of conservation, a use that was clearly incompatible with hunting. 4) Given that the court found that the RCGP was occupied Crown land, and that the accused had not established a right of access, the court held that the accused did not establish a *prima facie* infringement of an Aboriginal hunting right. 5) There was no infringement of an Aboriginal hunting right, so an analysis of the Crown's justification for the infringement was not triggered. 6) The defence argued that BILCN had a constitutionally protected Aboriginal right to govern hunting through laws developed in its Indigenous legal order. The argument was that this protected Aboriginal right existed independently from, and prior to, any Treaty right. Therefore, because BILCN never surrendered its right to self government, it argued that the provincial game laws of general application were not applicable to the accused. The court noted that the reasoning in *R v McIntyre* (1992), 1992 CanLII 8317 (SK CA) foreclosed this argument. In that case, it was held that the right to hunt was impacted by both the signing of Treaty 6 and the later modification of those rights by section 12 of the NRTA. The court still went on to apply the test in *R v Van der Peet*, [1996] 2 SCR 507 for identifying Aboriginal rights recognized and affirmed by section 35(1). Under the test, in order to be an Aboriginal right, an activity must be an element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. The court opined that the

request for declaratory relief on behalf of the entire BILCN band exceeded the scope of what the accused was entitled to argue before the court. At the same time, there was insufficient evidence to warrant the extraordinary relief sought. The evidence on current BILCN hunting laws or self governance was inconsistent and vague. The court was prepared to accept that BILCN self-governance in relation to hunting was historically an integral part of BILCN society pre-contact. The evidence did not support an inference or conclusion that BILCN did not consider itself bound by Treaty 6 or section 12 of the NRTA. The evidence also suggested that currently there were no band-developed laws or rules in relation to hunting on BILCN. Even on a flexible application of the rules of evidence, the evidence did not establish that there was a practice of self-governance regarding hunting that existed within BILCN that was integral to their distinctive culture today, that was protected by section 35(1). The court did note that even if one were to assume a right for BILCN to decide what hunting laws it would establish, this still would not entitle the hunting of game within a RCGP. There was therefore no requirement to consider extinguishment, infringement or justification.

Back to top