The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court. Published on the 1st and 15th of every month.

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***R v Stevenson*, 2024 SKCA 40**

Kalmakoff Drennan Layh (*ad hoc*), 2024-04-11 (CA24040)

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Criminal Law - Evidence - Identity of Accused - Sufficiency
Criminal Law - Evidence - Witness - Credibility
Criminal Law - Evidence - Recognition Evidence

The appellant appealed his conviction of robbery and having his face masked while committing an indictable offence. Identity was the only issue at trial. Two masked men were caught on video robbing a restaurant. Three years after the robbery, a gang member was arrested and offered to provide information about crimes by other gang members in exchange for entry into a witness protection program. The gang member was shown the video, and he identified the appellant as the man with the gun. The defence called no evidence. The Court of Appeal considered whether the trial judge erred by: 1) giving weight to an irrelevant consideration of

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no evidence of a motive to falsely identify the appellant; 2) engaging in circular reasoning by finding the evidence credible because it was consistent with the video evidence; and 3) inappropriately relaxing the approach to assessing reliability of recognition evidence.
HELD: The appeal was denied, with one judge dissenting. 1) Appellate review of witness credibility and reliability considers whether the trial judge's assessment rested on irrelevant or inappropriate considerations or was based on a wrong legal principle. A judge must be aware of potential credibility and reliability problems with witnesses who are untrustworthy because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial. The appellant argued the trial judge had concluded there was no evidence of animosity between the witness and the appellant and thus, there did not appear to be any ulterior motive for the witness to implicate the appellant. The witness testified he was on good terms with the appellant, and heexplained his reasons for testifying. There was some evidence about animus and the witness's motive. The trier of fact was required to recognize that the evidence of this witness must be approached with caution, but there is no legal requirement for independent evidence to confirm the testimony of an unsavoury witness. The trial judge's reasons made apparent that she understood the necessary factors for a former gang member with a substantial criminal record who was acting as a police informant. 2) The appellant argued that the witness had seen the video before testifying and was parroting back what he had seen. The court rejected this argument because the witness gave contextual details that could not have come from viewing the video. 3) The appellant argued the trial judge failed to consider a significant flaw in the witness's testimony. The witness testified he recognized the second person in the video with 100 percent confidence. The witness testified the two men had a significant size discrepancy, but there was no discernible height difference between the two robbers in the video. Credibility relates to honesty and reliability relates to accuracy. A credible witness can give unreliable evidence. The witness was giving recognition evidence, which is considered inherently more reliable than eyewitness identification of someone the witness does not know. The appellant's argument was based on a misinterpretation of the trial judge's reasons. From the video, the judge could not definitively tell which individual was shorter. The other person was not on trial. There was no basis for appellate intervention. The dissenting appellate judge would have allowed the appeal and remitted the matter for a new trial because the trial judge: used the evidence of a good relationship between the appellant and witness to enhance the witness's credibility, rather than as a neutral factor; used witness evidence andvideo evidence as confirmatory; and failed to give proper consideration to a significant flaw in the witness's evidence that may have rendered the evidence of no probative value.

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***Steveco Construction Ltd. v Saskatchewan Power Corporation*, 2024 SKCA 46**

Leurer Jackson Caldwell, 2024-04-26 (CA24046)

Civil Procedure - Pleadings - Application to Strike Statement of Claim
Civil Procedure - *King's Bench Rules*, Rule 7-1
Practice - Parties - Statement of Claim - Application to Strike - Statutory Immunity
Statutes - Interpretation - *Power Corporation Act*, Section 3(2.1)(b)

The appellants appealed the dismissal their claim against the defendant power company, arguing that the judge erred in holding the defendant power company immune from liability under s. 3(2.1)(b) of *The Power Corporation Act* and the terms and conditions of the electricity delivery contract. A fire destroyed the appellants' properties the day after the respondent's employees had been working on a nearby power line. The chambers judge determined under Rule 7-1 of *The King's Bench Rules* that: the qualified expert evidence established the fire did not result from electrical failure, the power corporation had statutory immunity, the action was barred because there was no allegation of gross negligence or wilful misconduct on the part of the power corporation, and the power corporation had no obligation to report the fire to the chief electrical inspector. The Court of Appeal considered whether the chambers judge erred in law by: 1) finding the defendant power corporation to be immune from liability under s. 3(2.1)(b) of *The Power Corporation Act*; and 2) finding the power corporation to be immune from liability under s. 14.1 of the terms and conditions.
HELD: The appeal was dismissed, with costs fixed at $2,000. 1) The chambers judge did not err in finding statutory immunity. *The Power Corporation Act*, at s. 3(2.1), states the power corporation is not liable for loss to property or persons from the supply or use of electrical energy by a customer beyond the point of delivery on the customer's premises. The only evidence on point affirmed the splitter box was the point of delivery, and the fire happened beyond the point of delivery and was not the result of electrical failure. 2) The power corporation's terms and conditions also excluded liability and defined "point of delivery" to mean where the customer's facilities and equipment begin. There was no conflict with the statute, and the chambers judge did not err in finding the terms and conditions were an additional source of immunity for the defendant.

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***Aecon Mining Construction Services v K+S Potash Canada GP*, 2024 SKCA 48**

Tholl McCreary Drennan, 2024-05-01 (CA24048)

Civil Procedure - Amendments to Pleadings
Civil Procedure - *King's Bench Rules*, Rule 3-72(1)(c)
Torts - Conspiracy

The appellant construction company appealed a decision refusing the appellant's application to amend its statement of claim against the respondent potash mining company. The construction company sued the potash mine for payment of $180 million, which the appellant alleged remained unpaid under contracts. The chambers judge's decision allowed the appellant to pursue claims in inducing breach of contract and in the tort of civil conspiracy, but the judge did not allow the appellant to plead all its proposed allegations. The Court of Appeal considered whether the chambers judge erred: 1) by misapplying the plain and obvious test and the law of conspiracy when analyzing the proposed amendments; 2) by failing to consider the pleadings as part of the course of conduct; 3) by providing inadequate reasons; and 4) in finding the amendments were not scandalous and vexatious and they did not contain impermissible evidence and argument.
HELD: The appeal was dismissed. 1) A party may amend its pleadings after a statement of defence is filed by agreement or with the court's prior permission. An amendment should not be permitted if it is plain and obvious that the pleading does not raise a reasonable cause of action. The appellate court reviewed the trial judge's decision on a correctness standard. It was plain and obvious that the denied amendments did not represent a reasonable cause of action in conspiracy. The requirements for pleading an unlawful means conspiracy in this case were: an agreement between the respondent potash mining company and the respondent parent company; the agreement was to do an unlawful act or use unlawful means directed toward the appellant alone or with others; the respondents knew or ought to have known the actions would cause injury to the appellant; and the appellant suffered actual damage. The chambers judge examined these elements. The allegation that the respondents conspired together to misrepresent to the public and capital markets the true financial picture was not conduct directed towards the appellant. It was plain and obvious this part of the proposed amendment was not a reasonable cause of action. 2) The amendments should not be included as necessary background to a course of conduct. The disallowed amendments were, at best, evidence or argument, and would not assist the judge to determine the true points of controversy. 3) The chambers judge's reasons were reasonably intelligible and provided a meaningful basis for appellate review. 4) The respondents sought to have the result of the

Criminal Law - Unlawful Confinement - First Degree Murder - Improperly Interfering with Human Remains

Employment Law - Employee - Independent Contractor

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Landlord and Tenant - Appeal - *Residential Tenancies Act*

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chambers decision upheldfor reasons rejected by the chambers judge. The respondents were entitled to make these arguments, but given the appellant was not successful on its grounds, it was not necessary to analyze this issue.

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***R v Crookedneck*, 2024 SKCA 49**

Tholl Kalmakoff Drennan, 2024-05-07 (CA24049)

Criminal Law - Firearms Offences - Possession of a Firearm
Criminal Law - Firearms Offences - Possession of Restricted Firearm with Ammunition
Criminal Law - Elements of Crime - *Mens Rea*

The appellant was charged and tried on a 12-count indictment involving multiple firearms charges contrary to the *Criminal Code*. A Court of Queen's Bench trial judge convicted the respondent of eight of the 12 counts and sentenced him to just over 32 months in custody. The trial judge acquitted him of a charge of having possession of a loaded firearm because there was reasonable doubt as to whether the respondent had possessed the requisite *mens rea*. The Crown appealed the decision, asserting that the trial judge erred in law by failing to determine whether the appellant was wilfully blind to the fact the firearm was loaded, and further, that she erred in law by determining that the Crown had not proven actual knowledge beyond reasonable doubt.
HELD: The appeal was dismissed. (1) The trial judge did not fail to consider whether the appellant was wilfully blind to the firearm being loaded. Wilful blindness may serve as a substitute for actual knowledge where knowledge is a component of an offence's *mens rea*. Wilful knowledge imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. In this case, the trial judge's considerations of what inferences could be drawn from the evidence went to both actual and imputed knowledge, despite her lack of explicit reference to wilful blindness. The trial judge looked to the evidence and the lack of evidence that went to both routes of knowledge, with a focus on the respondent's subjective awareness. In considering the available inferences, the trial judge was properly focused on circumstances known to the respondent and made no findings of fact contrary to her conclusion that the respondent lacked the requisite *mens rea*. The failure to use the term "wilful blindness" did not render the trial judge's analysis incomplete on the knowledge component. (2) The trial judge

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did not reason in a way that altered the standard of proof for actual knowledge. The trial judge described the s. 95 offence as more nuanced than those pursuant to ss. 91 and 92, as well as the lengthy sentences associated with such offences. All of this was preamble to the trial judge stating that the Crown had to meet its obligation in proving every element of the s. 95 offence beyond a reasonable doubt. This was a correct statement of the law and not demonstrative of any skewing or misunderstanding of the standard of proof by the trial judge.

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***R v Howitt*, 2024 SKCA 51**

Barrington-Foote Kalmakoff Drennan, 2024-05-13 (CA24051)

Criminal Law - Appeal - Fitness of Sentence
Criminal Law - Sentencing - Sexual Interference
Criminal Law - Sexual Interference - Touching for Sexual Purpose - Female under 16
Criminal Law - Sexual Touching of a Minor
Statutes - Interpretation - *Criminal Code*, Section 161

After a judge-alone trial, the appellant was convicted of sexual interference involving the complainant, who was 15 when she met the complainant through an online dating app. The appellant was sentenced to a 39-month term of imprisonment. The trial judge also made ancillary orders, including an order under s. 161 of the *Criminal Code* imposing various restrictions on the appellant for a period of three years following his release from custody. The appellant appealed against the s. 161 order, contending that the trial judge erred by finding he posed a sufficient risk to children to justify the imposition of the order. The appellant also contended that the trial judge erred by imposing conditions that went beyond what was reasonable to minimize the risk.
HELD: The appeal was partly allowed, and the appellant's sentence was varied. (1) Section 161 of the *Criminal Code* permits a court when sentencing an offender for certain enumerated offences to impose a defined set of conditions where "there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the court is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk". The risk an offender poses to children must at least be sufficient to support the conclusion that it would be reasonable to impose conditions of the sort set out in s. 161 to minimize that risk. In this case, the court believed that the nature and circumstances of the appellant's offence and the

information set out in the pre-sentence report provided an evidentiary basis to conclude that he posed a risk to children. The court was also satisfied that imposing conditions that were calibrated to restrict his opportunities to have contact with children in similar circumstances would be a reasonable measure to attempt to minimize that risk. The court was further convinced that conditions prohibiting the appellant from attending within a certain distance of the complainant's place of residence or place of employment, prohibiting the appellant from holding employment or volunteering in situations that would put him in a position of trust or authority over a person under the age of 16, and prohibiting him from using the internet for certain specific purposes were all reasonable measures. (2) The court considered the sentence imposed by the trial judge demonstrably unfit. The standard of review for sentence appeals is deferential in nature, as it permits appellate intervention only if the sentencing judge made an error in principle that had an impact on the sentence or if the sentence is demonstrably unfit. In this case, the court was satisfied that the blanket prohibition on the appellant's use of the internet for any non-employment purpose was clearly unreasonable. The internet use prohibition imposed by the trial judge under s. 161 was not appropriately tailored. The internet use prohibition was also demonstrably unfit because it was too broad and insufficiently connected to the risk posed to children by the appellant. The s. 161 orders prohibiting the appellant from attending places where persons under the age of 16 years may be present or having any contact with a person under the age of 16 years were also considered demonstrably unfit as their reach went beyond what was reasonably connected to the circumstances of the appellant's offences and his risk factors. The court set aside the s. 161 order, replacing it with an order with far more specific prohibitions.

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***R v Whitstone*, 2024 SKCA 52**

Schwann Tholl Drennan, 2024-05-14 (CA24052)

Criminal Law - Appeal - First Degree Murder
Statutes - Interpretation - *Criminal Code*, Section 231(2), Section 231(5)(e), Section 231(6.1)(a)

The appellant appealed against her conviction of first degree murder and asked the Court of Appeal (court) to substitute a conviction of manslaughter. The key issue at trial was intent. The trial judge was satisfied that the appellant was an active participant in the assaults that led to the victim's death and that she intended that the victim would be killed. The trial judge was

satisfied beyond a reasonable doubt that the appellant was the directing and controlling mind throughout the beating, with each of the three possible routes to first degree murder proven by the Crown. The court determined: 1) whether the trial judge erred in assessing evidence from one of the Crown's witnesses; and 2) whether the trial judge erred in finding the appellant intended to cause the victim's death.
HELD: The court dismissed the appeal. 1) The trial judgment read as a whole did not reveal palpable and overriding error; there was no room for appellate interference in the trial judge's findings regarding the witness's evidence. The trial judge included a *Vetrovec* self instruction, rejected a great deal of the witness's evidence, and exhaustively canvassed the evidence to provide extensive reasons for why he believed some of the testimony. 2) The court found that there was ample evidence upon which a properly instructed jury, acting judicially, could reasonably have convicted the appellant of murder. The trial judge found that the appellant intended to cause the victim's death. He also found that the appellant meant to cause bodily harm to the victim, which the appellant knew was likely to cause her death and was reckless as to whether death ensued. The trial judge found as a fact that the appellant instructed one of the others to slit the victim's throat.

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***Grandel v Government of Saskatchewan*, 2024 SKCA 53**

Caldwell Tholl Kalmakoff, 2024-05-15 (CA24053)

Appeal - Summary Conviction - Public Health Order
Constitutional Law - *Charter of Rights*, Section 1, Section 2(b)
Constitutional Law - *Charter of Rights* - Freedom of Association

The appellants had been issued summary offence tickets charging them with offences under *The Public Health Act, 1994* for violating outdoor gathering restriction provisions of a public health order (PHO) in connection with demonstrations to protest measures imposed as part of the efforts of the government of Saskatchewan to combat the COVID-19 pandemic. The appellants filed an originating application in which they sought, among other relief, a declaration that the outdoor gathering restrictions imposed under the PHO were of no force and effect because they violated ss. 2(b), (c) and (d) of the *Charter of Rights*. A Court of King's Bench judge, sitting in chambers, dismissed the application. The appellants appealed against the chambers decision, claiming that the chambers judge erred in various ways, including by: (1) failing to grant them standing to challenge outdoor gathering restrictions imposed under PHOs other than the ones they were alleged to have violated; (2) not striking an affidavit filed by the government; (3) dealing improperly with the evidence of an expert witness; (4) treating the violations of ss. 2(b), (c) and (d) of the *Charter* as though they were the violation of a single right rather than conducting a cumulative analysis; and (5) improperly conducting the analysis

required under s. 1 of the *Charter*.

HELD: The appeal was dismissed. (1) The appellants did not have public interest standing to challenge the 30-person outdoor gathering limit (PHO-30s) that was in force prior to December 17, 2020. In determining whether to exercise its discretion to grant public interest standing, a court must assess and weigh three factors cumulatively, purposively and with regard to the circumstances: (a) whether the case raises a serious justiciable issue; (b) whether the party bringing the challenge has a genuine interest in the matter; and (c) whether the proposed challenge is, in all of the circumstances, a reasonable and effective means of bringing the case to court. In this case, the appellants had not been charged with violating the PHO-30s and the PHOs had long since expired. The appellants also already had personal standing to challenge the outdoor gathering limit under which they had been charged (PHO-10s). Expanding the challenge to include the expired PHOs that had imposed the 30-person limit would have consumed further time and judicial resources without adding anything of practical benefit to the proceeding. (2) The court rejected the appellants' arguments regarding the admissibility of the respondents' affidavit evidence. The court did not accept the appellants' assertion that because the respondent witness' affidavit described things she had observed on social media platforms, she was giving evidence about matters that were not within her personal knowledge. The respondent witness had deposed that the postings referenced in her affidavit and attached as exhibits were things she had personally gathered from various internet and social media sources. In that respect, the fact that certain postings had been made in the form that she exhibited was a matter of which she had personal knowledge. (3) The court rejected the appellants' contention that the chambers judge made errors in the treatment of the evidence of the appellant's expert witness. A determination about whether an expert's opinion is properly admissible involves a question of law insofar as the proper articulation and application of the governing legal test is concerned and as such, it is reviewable for correctness. However, because of the case-specific nature of determinations concerning the admissibility criteria set out in the governing legal test, a chambers judge's decision to admit or reject expert evidence is generally owed deference, absent an error in principle. In this case, the chambers judge found that the expert witness was not a properly qualified expert as it related to providing opinion evidence about matters of public health. The shortcomings identified by the chambers judge were well supported by the evidentiary record. There was also no error in the weight given by the chambers judge to the admissible portion of the expert witness' evidence. (4) and (5) The court rejected the appellants' argument that the trial judge erred in determining that it was not necessary to consider separately whether the appellants' rights under ss. 2(c) and (d) had been violated when conducting his analysis under s. 1 of the *Charter*. Where the factual matrix underpinning a violation of closely related *Charter* rights is largely indistinguishable, it is unnecessary to conduct a separate analysis of each alleged violation, because consideration of the interest protected by one is sufficient to account for the other affected rights in the s. 1 analysis. The live issue in this case was whether the violation of the appellants' right that resulted from the gathering limits set by the PHO-10s was justified under s. 1 of the *Charter*. In that regard, the factual matrix underpinning each of the alleged violations of sections 2(b), (c) and (d) was identical. A separate analysis of each alleged *Charter* violation was not required on the facts of this case. The chambers judge did not err in finding that the public health orders were rationally connected to their objective. A rational connection will be made out where there is a "causal connection between the infringement and the benefit sought on the basis of reason or logic" and it is "reasonable to suppose that the limit may further the goal". In this case, the respondent was not required to prove that outbreaks actually occurred at the gatherings to establish a rational connection. All it needed to show was that there was a reasoned and logical basis to conclude that imposing restrictions on the number of people who could gather outdoors might contribute to achieving the goal of preventing, reducing, or

controlling the spread of COVID-19. The chambers judge found that the government had met that burden, and there was no error in that outcome. (7) The chambers judge did not err in finding that the outdoor gathering limit was minimally impairing. Proper assessment of the minimal impairment component calls for a healthy measure of deference to the government where the measure in issue is aimed at tackling a problem that is complex, may be approached in more than one way, and there is no certainty as to which measure will be most effective. The amount of deference owed is context-dependent, meaning that in times of crisis greater deference may be owed to the government when precautionary but reasoned measures are taken. In this case, the chambers judge did not err by affording deference to the government's choice of measures to achieve the goal it sought to achieve in preventing, reducing or controlling the spread of COVID-19. The 10-person outdoor gathering limit was a temporary measure invoked as part of a coherent and comprehensive package of measures implemented to respond to a once-in-a-century public health emergency. The jurisprudence strongly supported the conclusion that a healthy measure of deference was appropriate. Moreover, the urgency of the objective and the temporary and carefully crafted nature of the outdoor gathering limits satisfied the court that the restriction on the appellants' *Charter* rights was proportionate to the benefits realized.

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***R v Whitstone*, 2022 SKKB 255**

Scherman, 2022-11-25 (KB22276) *Publication ban lifted pursuant to the judge's order of May 13, 2024*

Criminal Law - Unlawful Confinement - First Degree Murder - Improperly Interfering with Human Remains
Statutes - Interpretation - *Criminal Code*, Section 182(b), Section 229(a), Section 279(1)(a)

The Crown argued that the defendant was a "higher up" or the "Queen" of a gang active in North Battleford, and that she directed and participated in the confinement, assaults, and killing of the victim. She was charged with unlawful confinement, first degree murder, improperly interfering with human remains, and theft of a vehicle. The Crown called or presented the evidence of 17 witnesses. The defence argued that substantial portions of the Crown's evidence were not credible nor reliable, and called no evidence. The defendant was the great aunt of a gang member from Edmonton who was killed, and the funeral was held in North Battleford. The victim attended the funeral. One of the co-defendants thought that the victim had information about the death, and the defendant was intent on obtaining this information from the victim. The victim was beaten and confined in three separate residences and died. The Crown argued the defendant was guilty of murder because she meant to cause the death of the victim (s. 229(a)(i)) or she meant to cause bodily harm to the victim that the defendant knew was likely to cause the victim's death and was reckless whether death ensued or not (s. 229(a)(ii)) and for an unlawful object did things to the victim that the defendant knew were likely to cause death (s. 229(c)). The Crown argued that the defendant's culpability was elevated to first degree murder because the murder was planned and deliberate (s. 231(2)) and/or the murder occurred while the defendant committed the offences of kidnapping or forcible confinement (s. 231(5)(e)) and/or the death was caused by the defendant and other individuals involved in a criminal organization (s. 231(6.1)). The defence argued that the defendant's role in the confinement and assaults was simply to

obtain information, and that the Crown did not prove beyond a reasonable doubt that the defendant ordered, participated in, or was involved in the actions that caused the victim's death. The defence argued that the evidence did not establish a connection to a criminal organization. The court made factual findings and determined whether the Crown had proven its case beyond a reasonable doubt.
HELD: The court found the defendant guilty of all charges. The court included a self-caution according to *R v Vetrovec*, [1982] 1 SCR 811 for assessing the evidence of a witness whose testimony may be suspect by reason of the witness being an accomplice, a complainant, or of disreputable character. The court found as a fact that the defendant was probably the Queen or acting Queen of the gang, and that three of the witnesses were soldiers in that gang who were expected to, and did, follow orders given by the defendant. The court found that the immediate cause of death could not be determined, but that the beatings that occurred at the third residence, the stabbing in the throat by one of the witnesses and lighting the victim on fire were all contributing causes of her death. The court found that the defendant was in control and was giving directions or orders as to what was to be done and who was to do it. In the charge of unlawful confinement (s. 279(1)(a)) the evidence was overwhelming and uncontradicted that the defendant was instrumental in the confinement of the victim. The court found that the defendant ordered three others to steal a truck and then to dispose of the victim's body and was guilty of improperly interfering with human remains and theft of a motor vehicle. The evidence established beyond a reasonable doubt that the defendant's instructions were to take the body to a remote location. The court found the defendant guilty of murder under s. 229, and also found that each route under the *Criminal Code* elevating the murder to first degree murder was established by the evidence. The defendant was the directing and controlling mind regarding what happened to the victim. The court noted that it was possible that the intended purpose in the assaults and unlawful confinement initially was to extract information from the victim, but the defendant made the decision to continue the confinement and the assaults after the statement had been provided. The assaults in the final residence extended over many hours, leading to the court's finding that the defendant meant for the victim to die. The court found that the intent to kill was clearly proven, and that the murder was planned and deliberate. The court was also satisfied that the gang was a criminal organization, so s. 231(6) applied to elevate the murder to first degree murder. The benefit to the gang was to demonstrate that anyone who harmed a member of it or an affiliated gang would suffer significant retribution.

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***Holmes v Justanother Farm Ltd.*, 2024 SKKB 55**

Rothery, 2024-03-28 (KB24041)

Business Corporations Act - Appeal

This was an application for leave to appeal an earlier fiat of the court in this matter. The parties had numerous issues regarding debt, ownership of shares, agreements to use agricultural lands, and successive ownership of them. Earlier in the year, one of the parties sought a declaration of her rights as a shareholder pursuant to the provisions of *The Business Corporations Act* (BCA). The Court issued a fiat with respect to that and other matters between the parties. The respondent now wanted to appeal from the fiat of the Court of King's Bench and brought an application to the court for this purpose. However, the court interpreted the provisions of

the BCA as indicating such appeals must be brought before the Court of Appeal and not the Court of King's Bench.
HELD: The Court of Appeal is the proper judicial avenue to bring an appeal from a declaratory decision of the Court of King's Bench under the Act. The application was struck. The respondent argued that the language of the BCA directed appeal applications to the Court of King's Bench. The court dismissed this argument and struck the application. Section 18-10 of the BCA (former s. 242) states that an appeal lies to the Court of Appeal from any order made by a court under this act, with leave of that court. The respondent took the demonstrative adjective "that" as referring to the Court of King's Bench. However, the court rejected this argument, stating that the ordinary meaning of "that" refers to something that is further and less immediate. Therefore, " that" refers to the Court of Appeal in the language of s.18-10 of the BCA. The court also referenced the meaning of "that" from the *Oxford English Dictionary* in support of its reasoning. An application for leave to appeal the decision of the Court of King's Bench under the BCA must be brought before a judge of the Court of Appeal. The application was struck without costs.

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***R v Feltham*, 2024 SKKB 56 (Not yet available on CanLII)**

Mitchell, 2024-03-28 (KB24074)

Constitutional Law - *Charter of Rights*, Section 7 - Disclosure - Full Answer and Defence
Criminal Law - Disclosure
Criminal Law - Disclosure - Third Party Records
Criminal Law - Procedure - Disclosure

The accused was charged with three counts of child luring, one count of child sexual exploitation and one count of invitation to sexual touching. On the second day of trial, the accused initiated an application, invoking s. 7 of the *Charter of Rights*, seeking more Crown disclosure. The defence sought disclosure of the following: a copy of the USB containing the entire logical extraction of the cell phones of two Crown witnesses; can-say statements and/or police reports of two police officers; and can-say statements and/or police reports addressing the officers' handling of the USB.
HELD: The application was dismissed. (1) The court determined that the defence's application was governed by the third-party disclosure procedure in *R v O'Connor*, 1995 4 SCR 411, not the first-party disclosure regime established in *R v Stinchombe*, [1991] 3 SCR 326. In doing so, the court relied upon the decision in *R v Lui*, 2022 NBCA 28 (*Lui*), where the New Brunswick Court of Appeal unanimously concluded that the trial judge in that case erred by ordering the Crown to turn over to the defence the cell phones of six Crown witnesses and any associated memory or SD cards. In *Lui*, the court concluded that all fruits of the police investigation had been disclosed to the defence and if Mr. Lui truly desired disclosure of the cellphones in question, he must bring a statutory third-party disclosure application. In this case, the accused was also deemed to have received disclosure of the fruits of the investigation, which included the information extracted from the cell phones in question most relevant to the prosecution. In the court's view, should the defendant have wished to obtain access to all the information contained on those cell phones, it was necessary to bring a properly focused third-party record application. (2) The court also rejected the argument by defence counsel

that she required can-say statements of the members of the police service whose names appeared on the property evidence report disclosed to her. The Crown's disclosure obligation grounded in s. 7 of the *Charter* does not require it to become an investigator in the prosecution. The Crown also has no obligation to create evidence for disclosure, or to disclose that which does not exist. Accordingly, there was no obligation in this case on Crown Counsel to have the police officers identified in the property evidence report prepare can-say statements and produce those statements to the defence.

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***Iron v Bateman's Jewelery*, 2024 SKKB 59**

Elson, 2024-04-04 (KB24055)

Civil Law - Doctrine of Witness Immunity
Civil Procedure - *King's Bench Rules*, Rule 7-9(2)(b)
Civil Procedure - Pleadings - Application to Strike Statement of Claim
Evidence - Witness Immunity
Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process

The defendant jewelry store applied to strike the plaintiff's statement of claim in its entirety on the basis that the plaintiff's claim was frivolous. The plaintiff had been found guilty of robbing the store. On appeal, the conviction was reversed because of serious procedural flaws in the investigation, and acquittals entered. The plaintiff then started a self-represented action against the store, asserting he was wrongfully convicted and the defendant was responsible. The court considered whether the plaintiff's action ought to be struck as frivolous.
HELD: The defendant's application was dismissed without costs and without prejudice to bring further pre-trial applications to address the doctrine of witness immunity. Rule 7-9(2)(b), relating to a frivolous pleading, aims to prevent delay and the expense so defective or devoid of merit that it is incapable of inspiring reasonable argument. A frivolous claim is groundless and pursued to cause embarrassment. The applicant defendant relied on the doctrine of witness immunity to support its assertion that the plaintiff's claim was frivolous. Witness immunity has two aspects: anything a witness testifies to cannot be the subject of a civil action for slander; and no one can bring a civil action for harm supposedly caused by a witness's testimony. Previous applications to strike claims in connection with witness immunity have succeeded because the claims did not disclose a reasonable cause of action. The doctrine of witness immunity may provide the defendant with a compelling defence, but that does not render a claim frivolous. Further, the definition of "frivolous" related to the motives of the plaintiff. A motive to inflict embarrassment must be discernible from the pleadings or surrounding evidence. There was no evidence from the supporting affidavit or otherwise to suggest any improper motive, despite any shortcomings in the drafting of the plaintiff's claim.

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***R.D.R. v K.D.N.*, 2024 SKKB 72**

Goebel, 2024-04-24 (KB24065)

Family Law - Interim Parenting Order - Variation
Evidence - Admissibility - Intercepted Text Messages

The parties had two children together and separated in 2017. The interim parenting order provided for joint decision-making with the children in the primary care of the mother. There had been no further court proceedings and no final order. In 2022, the mother moved in with her new partner and conceded that her life took a bad turn. She stopped attending counselling sessions, missed taking her medication, turned to alcohol, and was hospitalized for seizures and misusing her prescription medication. She sought help and resumed regular counselling. The father was unaware that any of this was happening. In 2024, the father discovered he could access the mother's text messages on the children's iPad without her consent. He read and took screenshots of messages between the mother, her partner and others alluding to her struggles, and continued to monitor her messages. The father refused to return the children and registered them for school where he lived. The mother had no contact with the children and was reluctant to pick them up given the father's history of family violence. She retained a lawyer and commenced a court application seeking the children's return. The father sought a variation of the interim parenting order. The court determined the following issues: 1) whether the intercepted text messages were admissible; and 2) whether it was in the best interests of the children to vary the interim parenting order.
HELD: 1) The intercepted text messages were inadmissible. The court struck them from the court file and struck any quotations from the text messages contained in the body of the affidavits filed. In Saskatchewan, the court is disinclined to admit improperly obtained evidence unless the proponent can demonstrate that the evidence has significant probative value. Recently, the Court of Appeal upheld a chambers judge's finding that surreptitious recordings were admissible but entitled to little weight (*A.M.D. v M.R.M.*, 2021 SKCA 71). The court characterized the father's actions as an abhorrent breach of privacy and trust, with significant prejudice in admitting the evidence. 2) The court did not vary the interim parenting order. A material change in circumstances was required to vary an interim parenting order. Courts are generally reluctant to entertain applications to vary interim parenting orders, preferring to direct the parties to a final resolution process. Courts will not alter longstanding parenting arrangements absent evidence that the children are at risk of harm or other compelling circumstances. There was uncontroverted evidence that the mother experienced serious health and mental health challenges in the fall of 2023, but the court was not prepared to dramatically alter the interim parenting status quo. The children had been in the primary care of the mother since the parties separated in 2017. The court found that a significant change in the children's interim primary care would unnecessarily destabilize the children pending a final resolution of parenting issues but added to the interim order requirements that the mother participate in an addictions assessment, abstain from non-prescription drug or alcohol use, and follow treatment recommendations.

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***Fabish v Mackenzie Investments*, 2024 SKKB 75**

Elson, 2024-04-30 (KB24072)

Civil Procedure - Application to Strike Statement of Claim - No Cause of Action
Civil Procedure - Setting Aside Discontinuance
Practice - Discontinuance of Action

In this fiat, the court determined the defendant's application for striking the plaintiff's statement of claim despite the plaintiff having filed a notice of discontinuance. The plaintiff's statement of claim alleged that the defendant mishandled the plaintiff's private information. The defendant filed its statement of defence and, after two months, applied to have the claim struck for not disclosing a reasonable cause of action and being an abuse of the process of the court. The plaintiff then filed to discontinue the claim but did not seek the consent of nor inform the defendant. During oral submissions in chambers, the plaintiff claimed she was seeking to pursue this claim through other legal avenues. The defendant argued that this intention warranted setting aside the notice to discontinue, and the court should decide the application to strike the claim. The court had to decide a) whether to set aside the discontinuance; b) if the discontinuance was valid, should the court decide the application to strike the statement of claim, and c) whether the court had jurisdiction, or it should decline to exercise it to decide on the defendant's application.
HELD: The court held that the discontinuance should not be set aside or disregarded. The court also found that it did not have jurisdiction to hear and decide the application to strike the claim when there was a valid discontinuance. The court further found that, even if it had jurisdiction to decide this application, it should decline to exercise its discretion to hear and decide the application to strike the statement of claim. Rule 4-49 of *The King's Bench Rules* governs the discontinuance of a claim. While discontinuance is a plaintiff's right, the court's inherent jurisdiction to govern its own process obligates the court to ensure the exercise of this right is subject to an overarching fairness to all parties involved. Therefore, the court can set aside or ignore a discontinuance where it is filed for obstructive, unfair or improper purposes. In this case, the court did not set aside the discontinuance because the circumstances did not establish improper use of this legal avenue. The plaintiff was trying to find and hire a lawyer to prepare a better claim against the defendant. Furthermore, the current discontinuance would not prejudice the defendant. The court observed that the plaintiff properly complied with the discontinuance requirements as set out in Rule 4-49(1). The registrar of the court informed the defendant about the discontinuance a few days before the chambers hearing, which the court considered proper service on the defendant. The plaintiff's discontinuance put a complete end to this action and the court did not have jurisdiction to ignore or set it aside. Striking this claim and setting aside the discontinuance would be an empty victory for the defendant, because it would not prevent the plaintiff from pursuing the claim in some other proceeding.

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***Odelein v Odelein Farms Ltd.*, 2024 SKKB 74**

Currie, 2024-04-25 (KB24066)

Civil Procedure - Summary Judgment
Corporations - Shareholder Loan - Promissory Estoppel - Waiver

The plaintiff sued the defendant family farming corporation (corporation). The plaintiff sought repayment of what he characterized as shareholder loans he had paid to the corporation. Before the family farm was incorporated, several quarter sections of land were held by family members or jointly. The family members discussed establishing a multi-generation family farm so that it could be a source of income for family members through future generations. The plaintiff was a professional hockey player and intended to return to the farm after his hockey career. His financial advisors proposed that the plaintiff set up a corporation for tax planning, and the family members decided to proceed with incorporation of the farm and a formal pooling of assets. The court found that each family member became a shareholder who contributed his or her assets to the corporation with no intention of taking them back or being paid the value. After incorporation, the plaintiff continued his professional hockey career and purchased, leased, or put a down payment on farm equipment from time to time. These transactions were characterized by the accountants as a credit to the plaintiff's shareholder loan account. The court found that each family member understood the plaintiff's contributions as a gift without any expectation of repayment. The court determined: 1) whether the plaintiff's contribution of assets and money was a gift, or a debt owed by the defendant to the plaintiff; 2) if it was a debt, whether promissory estoppel prevented the plaintiff from obtaining repayment of the shareholder loan; 3) if there was a debt, whether the plaintiff waived any right to obtain repayment; 4) if there was a debt, was it a demand loan; and 5) whether the claim was statute-barred.
HELD: The court dismissed the application for summary judgment and dismissed the claim. While part of the shareholder loan account represented a debt owed to the plaintiff by the corporation, the plaintiff was estopped from requiring the corporation to pay out that part. The plaintiff had waived his right to repayment and was not entitled to payment out of that part of the account. The other part of the plaintiff's shareholder loan account consisted of contributions that he gifted to the corporation, so the plaintiff was not entitled to payment out of that part of the account either. 1) The plaintiff's contribution of assets on incorporation was not a gift. His initial contribution was a debt that was owed by the corporation to the plaintiff. However, the three requirements of a legal gift were established with respect to the plaintiff's contributions after incorporation. The legal elements of a gift include: a) an intention to donate; b) acceptance of the gift; and c) a sufficient act of delivery. The court found that on incorporation, each shareholder intended and understood that all shareholders were contributing assets to the corporation on the basis that none of them could receive a return of the assets or payment of their value. The court found that the circumstances of the plaintiff arranging for leases and purchases of equipment established his intention to donate the contributions to the corporation. Through the acceptance of that circumstance by all of the shareholders, the corporation accepted that donation. The requirement of an act of delivery or transfer was completed by the contracts and equipment in the name of the corporation and in the delivery of the equipment to the corporation, making the contributions after incorporation a legal gift. 2) The doctrine of promissory estoppel prevented the plaintiff from requiring the corporation to pay out that part of his shareholder loan account that represented his contribution at the time of incorporation. Promissory estoppel applies where there is both a representation intended to affect legal rights and to be acted upon,

and a reliance on that representation. At the time of the incorporation, each of the shareholders contributed assets with no intention of ever taking them back or being paid the value. However, the shareholders had a mutually expressed intention that the corporation would receive and keep the assets permanently. This constituted a representation that each shareholder would not require return of the contributed assets, inducing the corporation to undertake the operation of the multi-generation family farm. The corporation acted in reliance on that representation, taking on the operation of the family farm and relying on each shareholder's representation that he or she would not require a return of the contributed assets or their value. 3) The court found that the elements of waiver were established. The plaintiff waived his right to require a return of his contributed assets or payment of their value, and that waiver applied to his demand for payment out of the part of his shareholder loan account representing his initial contribution. 4) It was not necessary for the court to explore the extent to which that part of the shareholder loan account was a demand loan given the conclusions on promissory estoppel and waiver. 5) The court did not have to determine whether the claim was barred by the passage of time given the above conclusions.

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***R v Reid*, 2024 SKKB 77**

Chow, 2024-05-07 (KB24075)

Constitutional Law - *Charter of Rights*, Section 11(a), Section 11(b), Section 24(1)
Constitutional Law - *Charter of Rights*, Section 11(a), Section 11(b), Section 24(1) - Unreasonable Delay - Stay of Proceedings
Constitutional Law - *Charter of Rights*, Section 11(b) - Delay
Constitutional Law - *Charter of Rights*, Section 11(b) - Delay - Stay of Proceedings - Trial Within Reasonable Time
Criminal Law - Assault - Sexual Assault

The accused was charged with sexual assault contrary to s. 271 of the *Criminal Code*. The accused thereafter applied for a stay of proceedings, arguing that his constitutionally guaranteed rights to be tried within a reasonable time and to make full answer and defence had been infringed.
HELD: The application was granted. (1) The Supreme Court of Canada in *R v Jordan*, 2016 SCC 27 (*Jordan*) established ceilings beyond which trial delay will be presumptively unreasonable. With respect to those matters tried in superior courts, that presumptive ceiling is 30 months. Once it has been established that the time to trial in a superior court proceeding exceeds 30 months, the Crown bears the onus of demonstrating that the delay is not unreasonable. Where the Crown fails to rebut the presumption that the delay is unreasonable, a stay of proceedings will necessarily follow. *R v Coulter*, 2016 ONCA 704 framed the *Jordan* analysis for adjudicating stay applications in the following terms: (a) Calculate the total delay; (b) Subtract defence delay from the total delay which results in the "net delay"; (c) Compare the net delay to the presumptive ceiling; (d) If the net delay exceeds the presumptive ceiling, it is presumptively unreasonable; (e) Subtract delay caused by discrete events from the net delay (leaving the "remaining delay") for the purpose of determining whether the presumptive ceiling has been reached; (f) If the remaining delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable; (g) If the remaining delay falls below the presumptive ceiling, the onus is on the defence to

show that the delay is unreasonable In this case, the court found that the total delay amounted to 68 months. The court was unable to find that any portion of the 68-month total delay accruing from the date of the swearing of the information to the anticipated date of the conclusion of trial could be properly characterized as defence delay. The court further found that the Crown had failed to demonstrate that any portion of the 68 months of net delay was properly attributable to exceptional circumstances. Finally, the court determined that the matter, considered as a whole, did not rise to the threshold of a complex case as contemplated in *Jordan*.

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***R v Dietrich*, 2024 SKKB 80**

Morrall, 2024-05-09 (KB24077)

Constitutional Law - *Charter of Rights*, Section 10(b) - Right to Counsel
Criminal Code - Appeal - Motor Vehicle Offences - Driving/Care or Control with Excessive Alcohol
Criminal Law - Breathalyzer - As Soon As Practicable

The appellant appealed the decision of the Provincial Court convicting the appellant for impaired driving and a blood alcohol concentration higher than 80 mg after operating a vehicle, contrary to sections 320.14(1)(a) and (b) of the *Criminal Code*. The appellant argued the trial judge made errors in considering the issues the appellant raised under the *Charter of Rights*. The appellant asked the King's Bench Court (court) to consider whether this warranted a new trial or a not guilty verdict on all charges. The appellant argued that the trial judge erred: 1) in concluding that the breath sample demand was made as soon as practicable; 2) in finding that the police officer did not breach the appellant's rights to counsel under section 10(b) of the *Charter*; and 3) in finding that there was sufficient evidence to prove beyond a reasonable doubt that he was guilty of impaired driving.
HELD: The court concluded that the trial judge made no errors, and the conviction was upheld. The court dismissed all of the appellant's grounds. 1) The trial judge found that the time between the failed result and the demand for the breath sample test was 11 minutes. Considering the circumstances of the case, this was proven to be as soon as practicable. The "as soon as is practicable" standard must be applied with reason so that the demand is taken reasonably promptly. The court reviewed the video footage from the police camera and the transcripts from the trial. It concluded the trial judge decided properly on this point. The legal test for this issue was summarized in *R v Goodman*, 2021 SKCA 78, and *R v Peepeetch*, 2018 SKQB 65. The phrase "as soon as practicable" means the breath sample demand must be taken within a reasonable, prompt time under the circumstances of the case. When a demand for a breath sample is made, there is no requirement for the test to be taken as soon as possible. To determine this matter, the court reviews whether the police acted reasonably. The trial judge must then look at the chain of events and what occurred within the two-hour time limit prescribed in the *Criminal Code*. If there is a delay in breath sample demand, the court considers the explanation for the delay. Whether the delay in making a demand for a breath sample is permissible is a fact-specific determination. The exact amount of time for the delay is not the determining factor, but whether the demand was made as soon as practicable depends on the circumstances of the case and the reasonableness of the police actions that caused or contributed to the delay. In the current case, the court found the police officer was conducting various tasks to investigate the matter, such as taking

detailed notes, which led to the 11-minute passage of time for making the demand. The court ruled this was reasonable policing conduct and a reasonable explanation. 2) After reviewing the evidence, the trial judge concluded that the appellant was properly informed of his right to counsel and exercised it. The appellant said he was rushed by the police officer and could not contact his lawyer of choice. However, the trial judge found that the police officer provided alternative options, such as contacting other lawyers or calling legal aid, but the appellant did not wish to make any other phone calls. Section 10(b) of the *Charter* provides that everyone has the right to retain counsel upon arrest or detention without delay. This *Charter* right places two duties upon the state. First, the informational duty obligates the police to inform the detainee of the right to counsel. Second, the implementational duty obligates the state to provide the detainee with a reasonable opportunity to exercise this right. Failure to comply with these duties results in a breach of s. 10(b) of the *Charter*. The implementation duty is satisfied when the police facilitate a single consultation at the time of detention or shortly after to ensure the decision of the detainee to cooperate or refrain from cooperation with the investigation is a free and informed decision. The law is clear in that the detainee does not have a right to obtain, nor do the police have a duty, to facilitate the continuous assistance of a lawyer. If the police are in control of the phone or contact third parties to find information about the lawyer of choice for the detainee, the police must, at minimum, convey accurate information back to the detainee because a detainee must rely on the content and accuracy of the contact information provided to them by the police. If the police deprive the detainee of contacting counsel of choice by providing misinformation, this will result in a breach of s.10(b) of the *Charter*. The reviewing court then asks whether the police honestly believed they were acting reasonably, and whether the police's effort to contact counsel was consistent with what a reasonable person would have done in these circumstances. In this case, the court reviewed the circumstances and concluded that the police did not breach s. 10(b) rights of the appellant because they facilitated contact to a lawyer and provided information about legal aid. 3) The court found that the appellant did not tender any evidence requiring credibility analysis of the facts and evidence at the trial level. The defence did not provide any alternative explanation that contradicted the evidence from the Crown witness. Taking the totality of the evidence from the trial and the credibility and reliability analysis the trial judge conducted in her reasons, along with considering the presence of alcohol in the appellant's blood and the car accident he caused, showed that the trial decision was made properly and without error.

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***Monaghan v Saskatchewan (Social Services)*, 2024 SKKB 81**

Schatz, 2024-05-09 (KB24078)

Administrative Law - Judicial Review - Appeal
Administrative Law - Judicial Review - Jurisdiction
Administrative Law - Judicial Review - Standard of Review - Reasonableness

The applicant, A.M., applied for judicial review of the decision of the Social Services Appeal Board (SSAB) wherein the SSAB denied the appellant's appeal. The SSAB concluded that the Ministry of Social Services (ministry) correctly followed the applicable

regulations and policy in requesting specific financial information from the appellant to determine his continued eligibility for the Saskatchewan Income Support Program. At the judicial review hearing, A.M. argued that the SSAB did not have jurisdiction to make the decision it made, and that the decision was unreasonable. The court had to decide whether the SSAB had jurisdiction to uphold the ministry's ruling and whether the SSAB's decision was reasonable.
HELD: The court concluded that the SSAB had jurisdiction and made a reasonable decision. The Saskatchewan Income Support (SIS) program is established under *The Saskatchewan Income Support Regulations*, RRS c S-8 Reg 13. The regulations set the program's eligibility requirements. They require applicants to provide the ministry with the necessary information to determine their eligibility for income support. In this case, the appellant was required to submit updated financial information, such as a bank statement, to determine his continued eligibility to receive income support. The financial information the appellant submitted showed sums of money deposited in his bank account that were not from the SIS program. Therefore, the ministry suspended his income support payments pending the appellant providing further information about those deposits. The appellant did not provide the requested information, resulting in loss of access to income support payments from the ministry. The appellant chose to appeal the request for further information. Both the Centre Regional Appeal Committee (CRAC) and later, the SSAB dismissed his appeal by stating the ministry acted according to the procedures mandated by the regulations. The court determined that the SSAB had jurisdiction to determine the appellant's appeal from the CRAC's decision because the regulations for the SIS program provided jurisdiction to SSAB to hear appeals regarding the determination of eligibility, variation, suspension or cancellation of entitlement to receive a benefit. A.M.'s appeal fell within the jurisdiction of the SSAB as it concerned the determination of eligibility, which was one of its requirements for providing the requested financial information. The court applied the reasonableness standard of review principles from *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The reasonableness review focuses on the decision made by the decision-maker, the reasoning process, and the outcome of that decision. The reasons must be reviewed by considering the history and context of the matter in which the decision was provided. *Heffernan v Saskatchewan Police Commission*, 2020 SKQB 65 at para 33, affirmed 2020 SKCA 119, provides the summary of reasonableness review by a court. A reviewing court should consider several factors, such as the governing statutory scheme, other relevant common law rules or principles, the principles of statutory interpretation, the evidence before the decision maker and any facts the decision-maker may have taken notice of, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual. The court reviewed the statutory regime governing the SIS program, the eligibility requirements, the matter's history, and the records before the decision-maker. The court concluded that the decision-maker properly followed the statutory requirements and the line of reasoning in the decision was reasonable and responsive to the record before them. Therefore, the decision of the SSAB was found to be reasonable.

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***D.D. v E.S.*, 2024 SKKB 82**

Norbeck, 2024-05-10 (KB24079)

Family Law - Best Interests of Child
Family Law - Decision-Making Authority

Family Law - Parenting Time and Access - Shared Parenting

This decision concerned parenting and decision-making on behalf of a child. The petitioners, the maternal grandparents of the child, sought relief from the Court of King's Bench (court) to obtain primary care of the child and to have interim sole decision-making authority or joint decision-making authority with another relevant party to ensure the child had decision-makers in place until the matter had been heard. They further sought that the father of the child and paternal grandparents (the interested parties in this action) have parenting time every second weekend and half of all holiday parenting time on the condition that the father would be living with his parents. The child's mother passed away shortly after the birth of the child. The child's father had mental health concerns and previous criminal charges. Therefore, the Ministry of Social Services (ministry) put the child in the care of the maternal grandparents upon the death of the mother. The father now sought parenting time and decision-making authority over the child. He had a rehabilitation program in place. The court had to consider what was in the best interests of the child regarding parenting and decision-making.

HELD: The court found that the child should remain in the primary care of the maternal grandparents, with a gradual increase in parenting time for the father depending on his living situation and continued rehabilitation. *The Children's Law Act, 2020* (CLA) in Saskatchewan prioritizes the best interests of the children. *The Child and Family Services Act* (CFSA) prioritizes the preservation or reunification of families. Though these two statutes might differ from each other in their focus, reunification is one of the considerations in an overall assessment of the best interests of children. However, it is trite law in Saskatchewan that the best interests of the child are the prevailing perspective to consider. The best interest analysis must be conducted from the child's perspective and not that of the parents or interested parties. Both s. 10 of the CLA and s. 4 of the CFSA provide non-exhaustive lists of factors for the best interests of the child analysis. In *T.B.S. v S.J.B.*, 2020 SKCA 93, the Court of Appeal stated that the reviewing court should consider all the circumstances relevant to the child's circumstances, apply the relevant best interests factors to the matter at hand and give weight to them accordingly, and determine the appropriate parenting and decision-making order for the child. This process is highly discretionary, and the analysis must be through the lens of the child's best interests and the best possible outcome for the child. Here, the court found and applied the following factors in its analysis: the child's needs, given his age (four years old), stage of development and need for stability, pointed to remaining in the care of his maternal grandparents. The court noted that the maternal grandparents' home was the only home the child had known, and abruptly changing this routine could cause harm to the child. Furthermore, the nature and strength of the child's relationship with the parties weighed in favour of remaining in the maternal grandparents' care as the child had a strong bond with them. The child had just started to form a bond with his biological father, and there needed to be more time for the child and father to become more connected. The court also found that all the involved parties showed they were willing to support the development and maintenance of the child's relationships with others and understood the ministry's plans for the child. The court reviewed the history of care of the child and found that the maternal grandparents had provided primary care to the child so far. Both sets of grandparents and the father prioritized the child's connection to his heritage and Indigenous roots. Both sets of grandparents provided information about their home environment and their plans for the child's care, and the court found that both parties had appropriate plans in place for the child. The maternal grandparents had provided for the child, and the parental grandparents had maintained consistent visits and relationship-building with the child. The paternal grandparents are also willing to provide a suitable home environment for improving the bond between the father and the child. Therefore, the court concluded that both parties were able and willing to care for and meet the child's needs and to communicate and cooperate with one another, respecting any matters affecting the child. The court reviewed the father's history of violence but determined that this factor was not, at the moment, affecting the child negatively because the father was

positively participating in rehabilitation efforts, such as taking parenting courses and remaining clean and sober. Considering all the applicable best interests of the child, the court ordered the maternal grandparents to remain the primary caregivers and decision makers for the child with a schedule for gradual and increased parenting time for the father and parental grandparents.

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***MacDonald v Saskatoon Minor Basketball Association*, 2024 SKKB 85**

Smith, 2024-05-10 (KB24082)

Employment Law - Reasonable Notice
Employment Law - Employee - Independent Contractor
Employment Law - Mitigation

The plaintiff started working for the defendant in 2004 or 2005 and entered into a new employment contract each year. In 2021, the defendant advised the plaintiff that due to the negative effects of COVID-19, her term as Executive Director was coming to an end. The parties agreed that she would continue working for the next three months. She was invited to apply for a restructured position, but it nearly doubled her previous level of responsibility and included a skills requirement that she did not have. The employment contract included a termination pay in lieu of notice clause of 1.5 months' notice. The plaintiff commenced a claim against the defendant in which she sought a notice period of 24 months, in addition to damages for the defendant's breach of the duty of good faith and fair dealing, and costs. The defendant took the position that the plaintiff was not an employee, but rather an independent contractor, so there was no reasonable notice period. The main issues were: 1) whether the plaintiff was an independent contractor or an employee; 2) what a reasonable period of notice was; 3) the applicability of the termination clause; 4) whether the plaintiff mitigated her losses; and 5) whether the defendant breached its duty of good faith and fair dealing.
HELD: The court found that the defendants were liable to the plaintiff for reasonable notice of 19 months and awarded the plaintiff $3,000 in costs. The defendant did not breach its duty of good faith and fair dealing. 1) The court concluded that the only reasonable conclusion after the 16- or 17-year employment relationship was that the plaintiff was an employee of the defendant. 2) The court found that there was no question that a period of reasonable notice was required in this situation. Counsel for the plaintiff argued that 24 months' notice was appropriate in the situation, while counsel for the defendant argued that nine months' notice was appropriate. After reviewing the case law on reasonable notice, the court held that a total of 22 months was required here, less the three months treated as working notice, making the defendant liable for 19 months' salary to the plaintiff. 3) The court found that the termination clause purporting to limit reasonable notice was unenforceable. The plaintiff was entitled to common law reasonable notice. 4) The court found that the defendant did not meet the burden of proof to establish inadequate mitigation by the plaintiff and made no adjustment to the reasonable notice of 19 months. Other than the offers made by the defendant, there was no evidence of mitigation. 5) The court found that there were no grounds on which to award damages for a breach of the duty of good faith and fair dealing. There was no animus toward the plaintiff.

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***Willman v Willman*, 2024 SKKB 87**

Richmond, 2024-05-15 (KB24083)

Contract - Breach of Contract
Contracts - Breach - Misrepresentation
Contracts - Formation - Oral Contract
Contracts - Interpretation - Unjust Enrichment
Sale of Land - Evidence of Contract - *Statute of Frauds*
Sale of Land - Farm Land - Specific Performance

The parties were litigating over ownership and possession of land. The land in question had been the subject of three separate claims since the death of the plaintiff's common law partner, S.M. The plaintiff and S.M. had listed the land for sale in 2010 but were unable to sell prior to S.M.'s death. At the time of S.M.'s death, she had a lawful husband, who had been named executor and sole beneficiary of S.M.'s estate pursuant to a will dated May 19, 1993. The lawful husband entered into an agreement to sell the property to a third party, S.C., in 2012. The plaintiff commenced an action against S.M.'s estate following which a settlement was proposed under which the plaintiff would own the land and chattels for a certain amount. After failed attempts to secure the necessary payment, including seeking help from a friend, J.T., the plaintiff turned to the defendant for assistance, who provided the funds and had the land transferred to the defendant's name. The parties' understanding of the arrangement between them regarding the defendant's acquisition of the land differed, leading to the present litigation. The plaintiff claimed breach of contract, alleging there was an oral agreement requiring the defendant to transfer the land to him.
HELD: The plaintiff's claim was dismissed. (1) The defendant had title to all the land in question. A certificate of title is, subject to certain specified exceptions, conclusive evidence of ownership, so that it can be relied upon in all transactions concerning the land. (2) The parties appeared to have stumbled along with a less than clearly defined lease agreement and vague promises to transfer the land to the plaintiff. The only oral agreement was that the defendant would purchase all the land and the plaintiff or J.T. would have the option to purchase it back. There was part performance as the defendant acquired the land, but J.T. did not complete the purchase. The parties did not discuss what would happen if this purchase was not completed. (3) The court was not satisfied that there had been unfair deprivation. Having the defendant purchase the land gave the plaintiff and his friend additional time to obtain financing, but their plan went awry. (4) The court rejected the plaintiff's estoppel argument. It was unclear on the evidence who suffered the injustice. The defendant purchased land on the understanding that he would receive his full investment back and "something for his trouble". Instead, his money was tied up in the land for years and had incurred legal fees in defending S.C.'s claim against the land. The plaintiff, on the other hand, had lived on the land at no cost for 10 years and had not expended for any major improvements. (5) The court determined that there was no unjust enrichment for the defendant. The defendant had incurred over $70,000 in legal fees and was embroiled in litigation for several years. Between 2014 and 2017, the only way the defendant

could have recovered his investment would have been to sell the land and assets to S.C. There was no evidence that the defendant was unjustly enriched. (6) The defendant did not fraudulently misrepresent the oral agreement. The defendant did not entice the plaintiff into any agreement, as the plaintiff approached him. Also, no transfer would have been permitted in any event until 2017 when the litigation with S.C. was complete. There was also no evidence that the defendant enticed the plaintiff to provide maintenance and upgrades on the land. (7) Even if an agreement could be discerned from the unspoken expectations of the parties, or a promise was made and relied on to the plaintiff's detriment, the plaintiff was well past the time within which he could bring the claim.

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***Saskenergy Incorporated v Unifor Local 649*, 2024 SKKB 96**

Layh, 2024-05-17 (KB24088)

Administrative Law - Affidavit - Amendment of Notice of Appeal - Additional Evidence
Administrative Law - Arbitration - Judicial Review
Evidence - Affidavits - Admissibility

The applicant applied for judicial review of an arbitration decision rendered December 12, 2022, which decided that the applicant breached its unilaterally imposed drug and alcohol testing policy when it sent five employees for testing. The arbitrator provided a record of proceedings including the written record of the arbitration decision and written counsel submissions. However, no evidence transcript was included in the record. In support of its application for judicial review, the applicants served and filed three affidavits. One of the affidavits attempted to rectify alleged shortcomings in the evidentiary record found in the arbitration decision. The affidavit also itemized and summarized the testimony of witnesses presented at the arbitration hearing. The admissibility of this affidavit was challenged by the respondents.
HELD: The court deemed the affidavit inadmissible and disallowed another affidavit confirming the accuracy of the summary of testimony contained in the challenged affidavit. *The King's Bench Rules* do not specifically address the appropriateness of an applicant's tendering of affidavit evidence when such evidence is intended to restate and correct the record that the applicant asserted had been before the tribunal. This absence suggested that an affidavit summarizing evidence by an observer to a hearing, and intended to lie in favour of the applicant, was a suspect practice. The court also rejected the applicant's assertion that the respondents could have challenged the accuracy of the applicant's evidentiary summary with an opposing affidavit. In the court's view, doing so would leave a reviewing court hopelessly lost to make any determination in face of competing affidavits without a transcript of the evidence. The court also considered that it had no assurance that the applicant's affiant's recollection of testimony was accurate.

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***Payne v Saskatoon Housing Authority*, 2024 SKKB 94**

Currie, 2024-05-22 (KB24092)

Administrative Law - Appeal - Order of Office of Residential Tenancies - Questions of Law or Jurisdiction
Landlord and Tenant - Appeal - *Residential Tenancies Act*
Landlord and Tenant - Appeal - Possession Order - *Residential Tenancies Act*
Landlord and Tenant - Possession
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 72

The applicant/appellant was a tenant of the respondent. By a decision dated November 20, 2023, issued under *The Residential Tenancies Act, 2006* (Act), a hearing officer ordered that possession of the rental premises be granted to the respondent. The applicant/appellant filed an appeal with the Court of King's Bench and with the notice of appeal, filed, among other documents, an application for an order dispensing with the requirement to file a certificate of payment of rent on an appeal of a possession order. HELD: The appeal and the application were dismissed. The court found that there was no basis for dispensing with the certificate requirement in the applicant's case nor was it apparent by what authority it should make such an order given that the court had found the certificate requirement to be constitutionally valid. The court determined that the appellant was entitled to proceed with an appeal from the possession order only if he filed a certificate of payment of rent, pursuant to s. 72(1.3) of the Act and s. 10.1 of *The Residential Tenancies Regulations, 2007*. The appellant did not do so in this case and as a result, was not entitled to proceed with the appeal.

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