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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***United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2023 SKCA 122**

Kalmakoff McCreary Drennan, 2023-11-10 (CA23122)

Administrative Law - Arbitration - Judicial Review - Standard of Review - Reasonableness
Labour Law - Grievance - Harassment

The appellant union appealed a judicial review that concurred with a board of arbitration decision dismissing a harassment and workplace discrimination grievance. The appellant argued: 1) the board failed to properly consider the elevated workplace expectations and zero-tolerance approach for any bullying or harassment; 2) the decision was unreasonable because it failed to draw an adverse inference when the respondent, Saskatoon Co-operative Association Limited, did not call a witness with material evidence; and 3) the board's conclusion was not justified by the evidentiary record. The Court of Appeal considered the standard of

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review and whether the standard of review had been correctly applied.
HELD: The appeal was dismissed. The parties agreed the standard of review was reasonableness, which requires consideration of whether the board's decision was transparent, intelligible, and justified. No deference was owed to the chambers judge. 1) There was no evidence to suggest a higher standard of workplace behaviour. 2) The "adverse inference rule" is an evidentiary rule and not a legal test. There is no absolute requirement for a trier of fact to draw an adverse inference where a witness is not called; the decision is a discretionary one. Where the witness is equally available to both parties, there is no reason to draw an adverse inference. 3) The board amply demonstrated that it had assessed the evidence in its totality and context and its reasons were clear and intelligible.

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***R v Ali*, 2023 SKCA 127**

Leurer Caldwell Schwann, 2023-11-23 (CA23127)

Criminal Law - Appeal - Conviction
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Criminal Law - Defences - Racial Profiling

The appellant appealed his convictions for serious firearms, drug and proceeds-of-crime offences, on the basis that the search incidental to his arrest was due to racial profiling. The police had stopped the accused after he was observed using a mobile device while driving. The police then discovered differences between the birthdate listed on the appellant's driver's licence and the information on a police database. The police believed the driver's license was fake. The appellant was arrested for wilful obstruction of a police officer, and he was searched. A loaded gun, illegal drugs and a mobile phone were located. The driver's license was not fake. The appellant had argued at trial that the police had violated his *Charter* rights. The trial judge decided there was no evidence of racial profiling. The Court of Appeal considered whether the trial judge erred by: 1) deciding the police acted reasonably in askingthe appellant to leave his vehicle; 2) deciding the arrest was lawful; and 3) rejecting the claim of racial profiling.
HELD: The appeal was dismissed, with one justice dissenting. 1) The appellant argued the police's request that he leave the vehicle was not reasonably required to issue him a ticket. The police had testified that the name and photo of the appellant were similar to those of an individual who had been the subject of a police bulletin a few days earlier. The appellant was asked to leave his vehicle to observe if he had scars or marks on his hand and face, and to ensure the traffic ticket was issued to the correct individual. The appellant's bag made a loud

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Municipal Law - Property Tax Assessment

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clunk against the vehicle. Police found a gun inside the bag. In these circumstances, the police request to leave the vehicle was justified. The trial judge did not err by deciding the appellant's s. 9 *Charter* rights were not violated. 2) The appellant argued the police did not have objectively reasonable grounds to arrest him for obstruction. The trial judge identified and applied the correct legal standard and considered the necessary factors. Intention cannot be presumed in a specific intent offence such as obstruction. Police may infer subjective intention from the totality of the circumstances. There was a basis for the police to reasonably believe the birth date on the driver's licence was inaccurate and to reasonably believe the appellant knew it was inaccurate. The fact the license ultimately proved accurate is not relevant. Police do not need to determine whether the charge would succeed at trial or prove guilt beyond a reasonable doubt before an arrest is made. The trial judge did not err in finding there were reasonable grounds for the arrest. 3) The appellant argued he was the victim of racial profiling at the detention stage. The trial judge's findings of fact must stand unless the appellant establishes a palpable and overriding error or that the finding was the product of a legal error. A lawful arrest or detention is rendered arbitrary when police conduct is tainted by any degree of racial profiling. Racial profiling is any action taken by persons in authority based on actual or presumed membership in a group defined by a prohibited characteristic, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny. Racial profiling may be outside the awareness or intention of the person or group in authority. At the detention stage, the question is how a reasonable person of a similar racial background would perceive the interaction with the police, and whether the person would perceive they were free to leave or compelled to remain. The mere fact of a cross-racial interaction does not prove on a balance of probabilities that racial profiling occurred. The trial judge did not apply the wrong legal test and the trial judge did consider the entirety of the circumstances. The trial judge decided no direct nor circumstantial evidence supported the inference that police were motivated by notions of a propensity for criminality attributable to race. The dissenting justice disagreed on the racial profiling issue and would have decided the trial judge erred by failing to grasp the applicable test for racial profiling. The dissenting justice decided the trial judge did not instruct himself on the applicable legal test for an allegation of racial profiling; conflated the racial profiling argument and the *Charter* analysis; and failed to examine the evidence to determine if there was a basis for an inference of racial profiling. The dissenting justice would have ordered a new trial.

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***Bell v Insulation Applicators Ltd.*, 2023 SKCA 128**

Caldwell Kalmakoff McCreary, 2023-11-23 (CA23128)

Civil Procedure - Disclosure of Documents - Relevance
Civil Procedure - Appeal

The appellants appealed a chambers judge's decision to dismiss their application for document production in an ongoing civil action. The parties were four brothers who worked for a family business in the construction industry. A dispute arose when one brother (the president of the corporation) and his wife were alleged to have inappropriately used corporate funds to cover personal expenses. A report conducted by an accounting firm concluded that the brother and his wife had used the corporate credit card to pay for more than $200,000 in personal expenses that had not been reimbursed to the corporation. A shareholder meeting was called, and the president and his wife were fired. The two of them commenced a civil action against the other three brothers for wrongful dismissal and shareholder oppression. Before questioning took place, the plaintiffs (appellants here) felt that the respondents had not disclosed all relevant documents in their possession. They served the respondents with an application seeking an order for production of specified documents, including the entirety of the file related to the accounting firm's report. The chambers judge only granted part of the relief that the appellants sought, noting that many of the documents sought had already been provided, and that questioning would allow the parties to get clarification, request additional documents and "move the matter along." The appellants argued that the chambers judge erred in assessing the relevance of the documents, and that she failed to engage in a proper proportionality analysis to determine whether production should be ordered. The appellants took the position that the documents spoke to material issues in the litigation, including what communications had been exchanged amongst the respondents in the lead-up to the production of the report by the accountants.
HELD: The Court of Appeal (court) dismissed the appeal. The onus was on the appellants to demonstrate that the documents they were seeking existed and were relevant or potentially relevant. Failing to meet the onus of establishing relevance did not mean that the requested documents were "potentially relevant" by default. The appellants had failed to establish potential relevance, so there was no need for the chambers judge to conduct a proportionality analysis. Decisions about whether to order production of documents involved discretion, so the standard of appellate review depended on the nature of the error alleged. The court could only intervene if the chambers judge made a palpable and overriding error in her assessment of the facts, or if she made a legal error by failing to correctly identify the legal criteria governing the exercise of

Director under The Seizure of Criminal Property Act, 2009 v Dano

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Ketch v Meadow Lake Mechanical Pulp Ltd.

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Mann v Farm Credit Canada

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R v Patterson

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Sasco Developments Ltd. v United Food and Commercial Workers, Local 1400

Sawatzky v Prince Albert Golf and Curling Club Inc.

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her discretion. Parties to civil actions have an obligation to disclose all relevant documents in their possession to the other side, subject to privilege or other exceptions. The court noted that Rule 5-6(1)(b) required that an affidavit of documents "disclose all documents relevant to any matter at issue in an action." Relevance will generally be determined with reference to the elements of the causes of action and the defences in the pleadings. Documents must have some degree of genuine relevance to be caught within the net of a party's disclosure obligation. If a document has not been disclosed, then the party seeking to have it disclosed has the onus to persuade the court that it is relevant. Sometimes the relevance of certain documents may only emerge as new details come out in questioning. If that happens, a party can renew disclosure requests. If a party brings an application alleging that the other party failed to make proper disclosure, the onus is on the applicant to identify with sufficient precision the documents they say have not been disclosed, and to provide a basis in the issues in the pleadings for why those documents are relevant or potentially relevant. The court held that the chambers judge did not apply an improper standard to whether the documents the appellants requested were relevant. The chambers judge properly instructed herself on the law governing the exercise of her discretion. The appellants were required to establish a discernible basis for concluding that the documents they sought existed, and a legitimate reason for why they were relevant. The court also did not agree that the chambers judge materially misapprehended the evidence. There was nothing to suggest that she misunderstood the nature of the disclosure that the appellants sought. The chambers judge was not required to conduct a proportionality analysis each time she concluded that the appellants had not succeeded in demonstrating clear evidence. The respondents' affidavit evidence was that any documentation of the respondents' communications with the accounting firm had already been disclosed.

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***Loraas v Loraas Disposal North Ltd.*, 2023 SKCA 131**

Schwann Tholl McCreary, 2023-11-28 (CA23131)

Civil Procedure - Discovery - Documents
Civil Procedure - Discovery and Production
Civil Procedure - Production of Documents - Redaction of Information
Civil Procedure - Summary Judgment

Several corporate entities and individuals appealed the dismissal of applications to redact the identity of certain individuals named as beneficiaries in a trust deed and to set aside appointments for questioning certain defendants. These applications occurred in the context of litigation related to two brothers who operated waste disposal and recycling businesses. In 2019, the brothers divided the assets of the businesses on a north-south basis through a settlement agreement. The settlement agreement contained an agreement not to compete in the other party's area and required the south party to give up management and control of a company operating in the north area. The company's property was transferred to a trust. The north parties requested the south parties provide information about the trust, trustees and beneficiaries. The south party did not provide the names of beneficiaries because the beneficiaries were not aware they benefited under the trust. The north parties started an action claiming the trust was a sham to hide a south party's continuing interest in the company. Many other applications had been filed, including an application to amend the claim and applications for summary dismissal. The Court of Appeal considered: 1) did the chambers judge err in not redacting the names of undisclosed beneficiaries; 2) does the service and filing of an application for summary judgment affect or displace the operation of Part 5 of *The Queen's Bench Rules* (as they were then known); and 3) did the chambers judge address the arguments?

HELD: The appeals were dismissed. The orders under appeal were discretionary decisions, and the applicable standard of appellate review depends on the nature of the error alleged. 1) The trial judge identified the correct test to decide whether information should be redacted from an otherwise producible document. For information to be redacted, the following conditions must be met: the information to be removed must be not relevant; a compelling reason must exist for the redaction; and existing protections must be insufficient to protect the interest that justifies the redaction. The information was relevant. There is a presumption documents are disclosed in their entirety. Disclosed documents are subjected to an implied undertaking that the information will not be used for a collateral or ulterior purpose. The party seeking the redaction failed to satisfy the test for a redaction. 2) The defendants took the position summary judgment applications ought to be heard before questioning. The civil summary judgment process does not displace the operation of the rest of *The Queen's Bench Rules*. The chambers judge accepted that there are no fixed rules about whether document production and questioning are put on hold pending an application for summary decision. Questioning may be suspended in the discretion of the court, in light of the purpose of summary judgment, the need for proportionality, facilitating resolution of issues, and discouraging delays. Summary judgment requires putting the best evidentiary foot forward. The discretionary decision of whether questioning should proceed before the chambers judge was properly before the chambers judge and there was no reviewable error of fact or law in the chambers judge's approach. 3) The chambers judge was alive to the arguments. There is no rule that once a summary judgment application is filed, all proceedings must be handled by the summary judgment judge alone. The chambers judge may determine interlocutory applications. Further, asserting a defence to an action is no basis to excuse a party from questioning.

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***Mann v Farm Credit Canada*, 2023 SKCA 132**

Leurer Caldwell Dawson, 2023-12-06 (CA23132)

Mortgage - Foreclosure - Application for Judicial Sale - Order *Nisi*
Mortgages - Foreclosure - Farm Land
Mortgages - Foreclosure - Judicial Sale - Order *Nisi* - Appeal

The appellant individual appealed a second order *nisi* for the foreclosure or sale of farmland owned by a separate numbered corporation. The appellant individual leased the farmland. The numbered corporation had granted a mortgage of the farmland in favour of the respondent lending agency. The appellant had subsequently registered a personal property security interest against farmland. The mortgage was in arrears. The lending agency sued for foreclosure or sale of the land. A first order *nisi* was made. Outstanding arrears were paid. The mortgage again fell into arrears. The court made a second order *nisi*, requiring defaults be remedied by the numbered corporation obtaining from the appellant a written release of his registered interest in the land and release of any interest in corporate shares, as well as payment of arrears. The Court of Appeal considered: 1) were the lending agency's pleadings and evidence relating to the appellant's claimed interests in the land sufficient for the finding of the numbered corporation to be in breach of non-financial covenants contained in the mortgage; 2) did the chambers judge err by not accounting for the appellant's claimed interests in the lands when fixing the reinstatement period in the second order *nisi*; and 3) did the chambers judge err by dismissing the appellant's injunction application?
HELD: The appeal was dismissed, with costs to the respondent lending agency. 1) The lending agency's pleadings were not deficient and the chambers judge had sufficient evidentiary foundation to grant the second order *nisi*. The pleadings contained a non-exhaustive list of breaches of non-financial covenants. The notice of application and affidavits disclosed details of the breaches. The registration of the appellant's interest was a default event under the mortgage. The second order *nisi* was not premised on the appellant's interest in the land actually existing, but instead, on the default event of registering the interest without the lending agency's consent. 2) The chambers judge did not err in attaching the conditions to reinstatement of the mortgage. The mortgagor numbered corporation, which did not appeal the second order *nisi*, had the right to reinstate the mortgage, and the appellant did not. The appellant had the right to redeem the mortgage by paying the lending agency in full. There was no unfairness in this case by imposing the appellant's disavowal of his claims against the numbered corporation as a condition for reinstatement of the mortgage. The claimed interest could not stand in priority to those of the lending agency. 3) There was no error in dismissing the injunction application. No statements of defence were filed in the action. Nonetheless, the appellant applied for an injunction to block the sale of the lands until his rights and interests were determined and to compel the lending agency to negotiate a mortgage with him. The appellant was not the land owner and had no standing to claim relief. There was no basis to conclude the proceedings were unfair. Even if the chambers judge had not read the appellant's affidavit, the failure caused no prejudice because the appellant had no right to reinstate the mortgage or insist on delay.

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***Consumers Co-operative Refineries Limited v Regina (City)*, 2023 SKCA 133**

Leurer Barrington-Foote Tholl, 2023-12-08 (CA23133)

Municipal Law - Tax Assessment - Appeal

The appellant owned a refinery complex on a very large parcel of land. It was dissatisfied with its municipal tax bill, arguing that the tax assessor inadequately accounted for the extraordinary size of the parcel when determining the land's assessed value. The appellant initially argued to the Regina Board of Revision (board) that the assessor erred in determining the base land rate, standard parcel size and land size multiplier. The assessor admitted there was an error in the calculation of the base land rate, but not in the way alleged by the appellant. The assessor suggested a slight revision to the assessed value of the land. The appellant appealed to the Saskatchewan Municipal Board (committee). The committee found that the board did not make a mistake when it upheld the property valuation. The court determined whether the committee fulfilled its mandate in its review of the board decision.
HELD: The court set aside the committee decision and remitted the matter to the committee. The committee erred by failing to consider the arguments made to it by the appellant, which resulted in a failure to determine whether the board erred in its identification and interpretation of assessment law and practice. The court pointed out that the main issue was that the committee failed to address the key provisions in the Saskatchewan Assessment Management Agency's Cost Guide as well as key case law that had interpreted those provisions.

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***855 Park Street Properties GP Ltd. v Regina (City)*, 2023 SKCA 134**

Leurer Barrington-Foote Tholl, 2023-12-08 (CA23134)

Municipal Law - Property Tax Assessment
Municipal Law - Property Taxes - Appeal
Municipal Law - Tax Assessment - Appeal

The appellant taxpayer owned a large vacant lot in an industrial park and was unhappy with the 2020 municipal tax assessment. The vacant lot was 20 times larger than other parcels of land that had sold in the area. The assessment was appealed to the Board of Revision and Assessment Appeals Committee (committee). Those appeals were dismissed. The Court of Appeal granted leave to appeal. The Court of Appeal considered: did the committee err in its interpretation and application of the cost guide and decisions related to the base land rate, standard parcel size and land size multiplier curve?
HELD: The appeal was granted, and the matter was remitted to the committee. The committee applied a standard of reasonableness to questions that demanded a correctness review. Therefore, the committee erred in its interpretation and application of the cost guide and past decisions of the committee and the court. This decision was released concurrently with *Consumers Co-operative Refineries Limited v Regina (City)*, 2023 SKCA 133, and was allowed for substantially the same reasons.

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***Sawatzky v Prince Albert Golf and Curling Club Inc.*, 2023 SKKB 199**

Scherman, 2023-09-25 (KB23191)

Civil Procedure - Pleadings - Application to Strike
Practice - Pleadings - Statement of Claim - Striking Out - Cause of Action
Tort Law - Defamation - Libel and Slander - Requirements

The plaintiff, M.S., sued Prince Albert Golf and Curling Club Inc. (PAGCC) for wrongful dismissal and defamation, and brought action against K.T. for defamation alone. PAGCC and K.T. applied to strike aspects of the claim on two grounds: one, that the defamation pleading failed to meet the standards of precision required, and two, that the pleadings do not disclose a reasonable cause of action against K.T. They sought to strike numerous paragraphs of the claim and those claiming relief against K.T. in their entirety. M.S. was the general manager of PAGCC for over four years and was terminated on a "without cause" basis on July 3, 2020, with four weeks' pay in lieu of notice. Among other things, he claimed that various parties including K.T. defamed him in writing. As regards K.T., the defendants had demanded particulars of his role in the alleged defamation. The reply failed to provide any detail supporting a cause of action against K.T. in his personal capacity as opposed to as an officer and director of PAGCC. HELD: Firstly, the court ruled that the pleadings against K.T. in his personal capacity be struck. Counsel provided no legal authority for the proposition that a person, while acting as a director or officer, can also be held responsible personally for his or her actions while so acting. The court stated that there was no legal basis for a claim against K.T. in his personal capacity as pleaded. Thus, the court ordered that paragraph 5 and any reference in the balance of the pleadings to K.T. acting in his personal capacity be struck. Secondly, the court considered various aspects of the defamatory statements as pleaded. The court applied the test under former Rule 173(a) (now Rule 7-9(2)) of *The Queen's Bench Rules*, and the common law test for defamation pleadings. Specifically, the plaintiff must plead the defamatory facts with sufficient precision and clarity to enable the defendants to know the case against them and prepare their defence: *Hope v Gourlay*, 2015 SKCA 27, 384 DLR (4th) 235. Regarding the targets of the defamatory language, the court found that the words "and to other residents of Prince Albert, Saskatchewan" lacked the necessary particularity and should be struck. Statements as well as innuendo were alleged in the pleading. Stating that casual drafting and organization is not a basis to strike a claim, the court reviewed the totality of facts pleaded. On that basis, it was satisfied that the pleading identified both the precise words and the innuendo with sufficient particularity to permit the defendants to know the case against them and prepare their defence. Applying the law of republication, additional paragraphs were struck regarding two alleged republications of the statements, as the pleadings failed to establish the factual basis for an exception to the rule which would allow a republication claim to proceed. Costs were ordered in favour of the respective applicants under two columns given the differing nature of their roles in the application.

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***Ketch v Meadow Lake Mechanical Pulp Ltd.*, 2023 SKKB 241**

Smith, 2023-11-07 (KB23230)

Employment Law - Wrongful Dismissal
Employment Law - Wrongful Dismissal - Damages
Employment Law - Wrongful Dismissal - Just Cause

The plaintiff shift supervisor claimed damages as a result of being wrongfully dismissed from his employment at a pulp mill. The defendant employer ended the plaintiff's employment without notice because he had developed a friendship with a 21-year-old summer student whose father and brother were also employed there. The employer also alleged that the plaintiff had taken extended breaks to hunt gophers with the summer student during working hours. After discovering the friendship, the summer student's father engaged in a concerted effort to damage the plaintiff's reputation at work and in the community. The plaintiff filed human resources complaints with the employer about these actions. The father and siblings went to the plaintiff's home and beat him. The police were called. Following unsubstantiated complaints by the father, the plaintiff's guns were removed from his home. The matter was brought to the attention of the employer, who fired the plaintiff and issued a five-day suspension to the father. Many months later, the plaintiff and former summer student developed a romantic relationship, and eventually married and had four children together. The court considered: 1) whether the employer had just cause for dismissal; and 2) if not, what damages flowed from the dismissal.
HELD: The plaintiff was dismissed without just cause and was entitled to damages. 1) Just cause is defined as employee conduct incompatible with the employee's duties, going to the root of the contract, fracturing the relationship beyond where a second chance would be reasonably expected. The employer has the burden of proving the grounds justifying the dismissal. The facts did not disclose an improper relationship between the plaintiff and summer student at the time of the termination. The two did not become a couple until several months later. The plaintiff did go bow hunting for gophers alone twice after asking the general manager whether he could do so in an area where gophers were a problem. Many employees engaged in personal activities during downtime at this workplace. There was some evidence of extended lunches and breaks, but no evidence that the plaintiff was unavailable to subordinates over radio and no suggestion the employer suffered loss of production or any costs as a result of extended breaks. Although extended breaks were inappropriate, the plaintiff's conduct did not remotely approach a condition that would justify dismissal for cause. There was no evidence from the plaintiff's immediate supervisor. The court drew an adverse inference from the failure to call the on-site manager. 2) The breach of the implied term in an employment contract of indefinite duration to give reasonable notice of employment termination in the absence of just cause gives rise to damages. Reasonable notice depends on the character of employment; length of service; age; and availability of similar employment given the employee's experience, training and qualifications. The plaintiff was in his mid-40s. He relocated to another community to find work. Considering similar cases, the reasonable notice period was 24 months. There was no evidence of relocation costs, which were awarded nominally at $1,500. No bad faith damages were awarded. Mitigation income was deducted.

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***Sasco Developments Ltd. v United Food and Commercial Workers, Local 1400*, 2023 SKKB 242**

Gerecke, 2023-11-10 (KB23235)

Civil Procedure - Interlocutory Injunction
Injunction - Interim Injunction - Requirements
Injunctions - Interlocutory
Labour Law - Picketing - Injunctions
Statutes - Interpretation - *King's Bench Act*, Section 9-7

The applicant employers sought an injunction to prevent the union from picketing and from entering onto the hotel property including the parking lot. The employer hotels and union had been in bargaining to renew a collective agreement for four years. The employers locked out the unionized employees. Union members picketed beside and at the hotel site and distributed leaflets on hotel property. The court considered: 1) what is the test for injunctive relief; 2) what must be established on evidence regarding torts alleged by the employers; 3) what principles apply to the labour dispute context; 4) have the employers established a serious issue to be tried regarding picketing; and 5) should an injunction be granted with respect to leafleting?
HELD: The employer's application was dismissed, and the interim injunction was lifted immediately, with costs to the union. 1) Although there are precedents suggesting in labour dispute situations, a more stringent prima facie case test ought to be used because labour injunction cases rarely go to trial, the union did not oppose the use of the lower serious issue to be tried threshold. If the employer establishes a serious issue to be tried, the court considers the respective harms that would be suffered and the overall equities and justice. 2) The employers pled torts of nuisance, trespass and inducing breach of contract. Admissible evidence must be led that establishes the alleged wrongdoing on all required elements of the tort alleged. 3) Labour injunctions are subject to additional considerations. Not all employer and customer inconvenience from picketing is barred. Picketing is a legal and protected form of free expression. What is reasonable depends on the nature of the business, its location, the volume and nature of traffic crossing the picket line, the nature of the inconvenience caused, people affected, time required for the union to communicate, character and effect of the message, presence or absence of intimidation or potential for violence. 4) The employers did not establish a serious issue to be tried regarding picketing complaints. Section 9-7 of The King's Bench Act requires that affidavits supporting an application for an interim injunction in a labour dispute be confined to facts from the deponents' own knowledge. Affidavits filed on behalf of the employer did not satisfy that requirement, and that information was not considered. Vague and unattributed statements are not admissible evidence. None of the photos showed picketers blocking traffic. There was insufficient evidence of the employer's property boundaries. Evidence demonstrated only one minor instance of a picketer taking a phone call in the employer's parking lot. There was no evidence of any significant wrongful conduct in over five weeks of picketing. Even if there were a serious issue, there was no evidence of irreparable harm. 5) It was not appropriate to grant an injunction in relation to leafleting in the current circumstances. Leafleting is legal unless there is an additional wrongful element. Leafleting does not involve impeding access and is aimed at persuading through informed and rational discourse. The employers say the leafleting constituted the tort of inducing breach of contract and breached The Trespass to Property Act. The employers did not establish on evidence a serious issue to be tried as to whether the leafleters induced any breaches of contract. Inducing breach of contract requires proof of an existing contract, an intention to cause breach, conduct inducing breach and resulting damages to the plaintiff. No signed contracts were in evidence. There was no evidence of any impact or damage to the plaintiff. The question of whether primary

leafleting outside the hotel entrance amounts to trespass under The Trespass Act is not settled. This is a serious issue to be tried. The harms suffered by the union from enjoining leafleting on the hotel property would be more severe than the impact to employers of not enjoining it. There was no evidence of any harm to the employer from the leafleting. The employers' complaints appear trivial. A labour board decision permitting leafleting on a gas bar property was persuasive but not binding.

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***Tompson v Saskatoon (City)*, 2023 SKKB 247**

Danyliuk, 2023-11-21 (KB23238)

Statutes - Interpretation - *Local Authority Freedom of Information and Protection of Privacy Act*, Section 21

The applicant brought an originating application to compel the respondent to provide an unredacted email. The background was a dispute between neighbours, involving how a garage suite was being constructed and whether the local bylaws were being followed. The city considered a bylaw prosecution against the neighbour building the suite, and the issue was referred to bylaw prosecutors. The applicant was involved because of his ongoing complaint that he was never contacted by a bylaw officer or prosecutor. The email sought was between a city lawyer and a private lawyer who represented the neighbour building the garage suite. The city provided the applicant with a copy of the email, but it was completely redacted aside from the names of the sender and recipient. The privacy commissioner denied the applicant's request for an unredacted email, holding that the city properly applied s. 21(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LAFOIP). The court considered: 1) what evidence was properly before the court; 2) what was the proper scope and process of this appeal under s. 46 of LAFOIP; 3) whether s. 21(c) of LAFOIP applied to the email; 4) whether the email should be released to the applicant; and 5) whether any costs should be awarded. HELD: The court dismissed the application. 1) While the applicant provided an affidavit in support of his application, most of it was improper evidence and was struck by the court. 2) The appeal was a de novo proceeding under ss. 46 and 47 of LAFOIP. The procedure involved the court deciding whether to review the disputed record in camera, and then to determine whether the record ought to be released to the applicant. The court reviewed the email in camera to determine whether s. 21(c) of LAFOIP applied. 3) The court concluded that s. 21(c) clearly applied because the email related to the provision of legal advice between the city's lawyer and another person. The intent of s. 21(c) was to allow parties to correspond freely to obtain legal advice or services. The court found that s. 21(c) had a broader scope than classic legal privilege, because the section applied not only to "advice" but also to "other services". 4) The email from the city's lawyer to another lawyer fell within the widest exemption to disclosure in s. 21(c). A proper interpretation of that section exempted the city from disclosing an unredacted copy of the email to the applicant. 5) The court ordered the applicant to pay the respondent $1500 in costs.

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***R v Maple*, 2023 SKKB 202**

Robertson, 2023-11-22 (KB23189)

Constitutional Law - *Charter of Rights*, Section 7, Section 24(1) - Full Answer and Defence
Criminal Law - Procedure - Mistrial
Occupations and Professions - Lawyers - Conflict of Interest

The accused applied for a mistrial in a trial by judge alone, after defence counsel withdrew at the conclusion of evidence by both sides. Counsel withdrew upon learning that he had previously represented R.R., a Crown witness, on a charge involving the complainant. Defence counsel first became aware of the conflict caused by his prior representation of R.R. on the morning of May 5, 2023. At this time a colleague at Legal Aid reminded him of R.R.'s file. This was the day scheduled for closing argument. The matter proceeded before this court for argument with alternate counsel on the issue of a mistrial prior to closing arguments. The defence application relied upon ss. 7, 11(d) and 24(1) of the *Canadian Charter of Rights and Freedoms*. The issues before the court were the impact of counsel's withdrawal during a trial, and whether defence counsel's prior representation of a Crown witness prejudiced the accused such that a mistrial should be directed. The accused argued that his right to a fair trial had been irreparably compromised, specifically by robbing him of the ability to make full answer and defense. The Crown argued that a mistrial was not required and the trial should continue. The court addressed the requirements for leave to withdraw as counsel during a trial as well as the issue of a mistrial. First, the court affirmed that it would not look behind counsel's statement that they were ethically obliged to withdraw, per *R v Myers*, 2015 SKQB 59. On the issue of mistrial, the court applied the following test: the applicant must show significant, irreparable prejudice to a fair trial that cannot be addressed through some other remedy. The prejudice must be so great that, if the trial continued, a miscarriage of justice would result. The court applied the list of factors set out in *R v Charles*, 2015 SKQB 381, and considered all of the circumstances leading to the withdrawal of counsel. Defence counsel contended that they would have conducted the trial differently had they been aware of certain information that R.R. had provided to them under a previous retainer. The court concluded that evidence to that effect was already in evidence and dismissed this reasoning. Instead, it focused on the withdrawal's impact on the accused's right to a fair trial, and whether that sufficed to require a mistrial.
HELD: A mistrial is an extraordinary remedy. It should only be granted in the clearest of cases where there is no alternative relief that could address the problem. Since the defence lawyer had no recollection during trial, his past involvement could not have affected his conduct of the trial. The potential "new evidence" about R.R. was insufficient reason to declare a mistrial. In this case, there was obvious alternative relief available. Saskatchewan Legal Aid undertook to provide new counsel, which it did over the course of three months. During this time, a full transcript of the trial was prepared, such that new defence counsel was in a position to decide how to proceed with the trial, including applying to re-open the case if need be. Therefore, the accused had not established real and significant prejudice to his right to a fair trial which could not be remedied through an alternative remedy. There was no evidence of actual prejudice stemming from the "discovery" of the prior criminal charge against R.R. The application for declaration of mistrial was dismissed. Subject to any defence application to re-open the evidentiary part of the trial, the trial was directed to proceed to closing argument.

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***R v Patterson*, 2023 SKKB 266**

Smith, 2023-12-06 (KB23243)

Criminal Law - Blood Alcohol Level Exceeding .08 - Approved Screening Device
Statutes - Interpretation - *Criminal Code*, Section 320.14(1)(b)

The Crown appealed a Provincial Court acquittal of the accused on the charge of operating a motor vehicle with a blood alcohol concentration of .08, contrary to s. 320.14(1)(b) of the *Criminal Code*. The trial judge relied on the reasoning in *R v Goldson*, 2021 ABCA 193 (*Goldson*), requiring a certificate of an analyst, rather than a certificate of a qualified technician, in respect of the alcohol standard solution, and further, the accused must be given 60 days' notice of filing the certificate of an analyst. The Court of King's Bench considered: 1) was the Crown precluded from arguing the certificate of an analyst need not be exhibited; 2) was the Crown required to file a certificate of an analyst before it could rely on a certificate of a qualified technician; and 3) what constituted "reasonable notice" if the Crown wished to file a certificate of an analyst in evidence?
HELD: The acquittal was overturned, and the matter remitted to Provincial Court for sentencing. 1) The respondent argued the Crown had conceded at trial that the certificate of an analyst must be exhibited for the certificate of a qualified technician to be accepted as evidence, and therefore was precluded from subsequently arguing the analyst's certificate was not needed. The transcript reflected counsel thinking out loud about the implications of evolving caselaw after trial dates were set. There was not a clear concession. The Crown was not precluded from arguing the certificate of an analyst was not required. 2) The certificate of a qualified technician verifies the person taking the breath sample was properly trained and the device was checked and calibrated using a standard sample. The certificate of an analyst verifies the alcohol standard sample used by the qualified technician. The certificate system streamlines evidence. *R v Wright*, 2023 SKKB 236 (*Wright*), concluded the *Goldson* case is incorrect and not binding in Saskatchewan. It is not necessary to enter the certificate of an analyst with the certificate of a qualified technician to make the case under s. 320.14(1)(b). 3) The issue of whether the certificate of analyst needed to be served with 60 days' notice was addressed, even though it was moot. Parliament did not set a specific notice period. Defence counsel could ask for an adjournment if needed. The *Wright* decision stated 14 days' notice was reasonable.

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***Dunford v Dunford*, 2023 SKKB 232**

Tochor, 2023-11-01 (KB23217)

Land - Improvements Under Mistake of Title

The plaintiffs owned an acreage north of Estevan containing a quarter section owned by their parents. Since obtaining title, the plaintiffs made improvements to the acreage but did not check to see if the improvements were on their property or the quarter

section. A survey in 2013 determined some of the improvements were either wholly or partially on the quarter section. The plaintiffs sought relief including an order allowing them to keep the land upon which the improvements were made in exchange for compensation to their parents. The parents disagreed and sought to have the improvements removed as well as damages for trespass.
HELD: The plaintiffs were entitled to retain the land in exchange for compensation to their parents. To obtain the relief, the plaintiffs had to demonstrate the improvements were: 1) lasting improvements and 2) made under the belief that the land was their own. 1) There was no dispute that the improvements were lasting. 2) The parents had prior knowledge of the improvements and consented to them. In addition, the parents told the plaintiffs on numerous occasions that they intended to give the quarter section to them.

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***Director under The Seizure of Criminal Property Act, 2009 v Dano*, 2023 SKKB 243**

Currie, 2023-11-16 (KB23236)

Civil Procedure - Applications - Applications without Notice
Statutes - Interpretation - *Seizure of Criminal Property Act, 2009*, Section 6(1)(a), Section 6(1)(b)

The Director under *The Seizure of Criminal Property Act, 2009* applied, with notice to two financial institutions and the individual respondent, for information about the individual's bank accounts. The application was under ss. 6(1)(a) and (b) of the Act. The application was unopposed. The factual basis for making the order was not in issue. The court considered: whether s.6 applied to a financial institution and to bank account information held by that institution.
HELD: The requested order was granted. The purpose of the Act is to identify and obtain forfeiture of property that is proceeds of unlawful activity or is an instrument of unlawful activity. Section 6 empowers the court to authorize the director to enter and search a "place or premises" along with searching and seizing documents and information. The section does not expressly refer to financial institutions or financial information. Credit unions and banks are places or premises. The situation fell within the description in s. 6. The Act also permits authorization to require persons to produce records. The Act applies to property that is money and to money held in a financial institution. An amendment not yet in force adds the words "including a financial institution, private business or other place of business" to the reference to "place or premises". The amendment does not contradict the interpretation given. A person's privacy interest in a bank account does not outweigh the goals of the Act. The Act specifies this type of order can be obtained without notice, but it is always open to a judge to direct the application must be brought with notice where there is a reason to do so.

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***R v Kakakaway*, 2023 SKPC 56**

Koskie, 2023-11-10 (PC23056)

Criminal Law - Application - Video Appearance - Trial - Sexual Assault
Statutes - Interpretation - *Criminal Code*, Section 714.1

The Crown applied under s. 714.1 of the *Criminal Code* to allow the complainant to appear by video in a sexual assault charge. The complainant resided nearly 600 kilometres away from the trial location. She was 17 and the alleged offence occurred five years ago. The Crown proposed that the complainant give her testimony in a soft room in Meadow Lake. The accused did not consent to the application. The defence argued that body language and the complainant's presence were required to determine credibility.
HELD: The court granted the application to allow the complainant to appear by video. The court analyzed the jurisprudence and concluded that the accused would not be prejudiced in any way by video testimony. The complainant had a right to testify in a soft room as a result of her age. The court found that a soft room in Meadow Lake was no different than a soft room in the trial location.

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***R v Villareal Mendoza*, 2023 SKPC 52**

Agnew, 2023-11-20 (PC23051)

Criminal Law - Sentencing - Child Pornography
Criminal Law - Sentencing - Luring
Criminal Law - Sentencing - Totality Principle

The defendant, J.V.M., pled guilty to charges of sexual assault, obtaining sexual services of a person under 18, possession of child pornography, making child pornography, and luring of a child under 16. The defendant attended for sentencing.
HELD: The overarching objective of sentencing in child sexual assault cases is to protect children from wrongful exploitation and harm. Sentences for sexual offences against children should be increased over those given in the past and precedents must be considered in light of that directive. Several factors for consideration include likelihood of re-offense, abuse of a position of trust or authority, duration and frequency, age of the victim, degree of physical interference, and victim participation. The defendant was sentenced to nine years and further prohibited from attending public areas with minors, having contact with the victim, seeking employment placing him in a position of trust over persons under the age of 16, using a computer system for the purpose of communicating with persons under 16 other than family members, and using the internet or other networks to access social media or equivalent services.

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***Fuller v Gerow-Scissons*, 2023 SKPC 54**

Scott, 2023-11-24 (PC23054)

Small Claims - Torts - Negligence

The court understood the plaintiff's claim to be that the defendant was negligent in performing the excavation and refilling of two holes on the street and boulevard, causing damage to her property. She also alleged that the defendant was liable because it did not provide sufficient notice of its work so that she could mitigate any potential damage. The court determined: 1) whether the plaintiff's claim was statute-barred; 2) whether the plaintiff proved on a balance of probabilities that the defendant's actions were negligent; 3) if so, whether the plaintiff proved that the defendant's negligent actions caused damage to her home; 4) whether the defendant was covered by the same statutory immunity as the City of Saskatoon; and 5) whether the plaintiff proved that her neighbours or their corporation were vicariously liable for the damage to her home.

HELD: The court dismissed the plaintiff's action. The plaintiff failed to establish on a balance of probabilities that the defendant's conduct in the performance of its work was negligent and caused damage to the plaintiff's home. 1) The court concluded that the plaintiff's claim was commenced within the two-year time limit required by *The Limitations Act* and was not statute-barred. The court noted that the appropriate date for determining the commencement of an action in Small Claims Court was the date the claim was filed with the court and the filing fee paid. 2) An action in negligence required the plaintiff to establish: i) that the defendant owed her a duty of care; ii) that the defendant breached the requisite standard of care; iii) that the plaintiff sustained damage; and iv) the damage was caused, in fact and in law, by the defendant's breach. The court concluded that there was a sufficiently close relationship between the defendants and the plaintiff such that they owed a duty of care to her. The court was satisfied that a water and sewer contractor was under a legal obligation to exercise reasonable care to nearby property owners when conducting its business and services to not cause damage to property. A defendant's conduct is negligent if it creates an objectively unreasonable risk of harm. The general standard of care in negligence is that of the reasonable person in similar circumstances. Here, the court found that the standard of care was that which would be expected from a reasonable and prudent water and sewer contractor in similar circumstances. The plaintiff argued that the defendant breached the standard of care by operating equipment in such a way that the vibrations from the backhoe caused cracks to form in her home, and that because she was not given notice of the work that was to be done, she could do nothing to proactively prevent the damage. It was undisputed that asphalt was removed from the road and two holes were dug with the use of a backhoe. One of the holes was dug approximately six centimetres from her property. The court found it was the city's responsibility, not the defendant's, to give notice of construction to residents. There was no evidence to suggest what the plaintiff might have been able to do to prevent damage to her home had she been aware of the work. The court found that there was some evidence from which the court could infer negligence on the part of the defendant, but there was also considerable evidence from the defendant to rebut that inference. The plaintiff did not present evidence of the standard of care against which the defendant's work could be measured. There was no evidence of what a reasonable water and sewer contractor would have done or whether such a contractor would have acted differently in this situation. The court noted that when a claim is based on professional negligence, typically expert evidence of the standard of care is necessary. The court did not find that the actions of the defendant fell below the standard of a reasonable and prudent water and sewer contractor when connecting private water and sewer to the city's infrastructure. There was insufficient evidence to conclude that the defendant's actions were negligent.

3) The plaintiff did not prove that the defendant's conduct was negligent by breaching the standard of care, so the plaintiff's claim for damages also failed. 4) The court did not have to consider whether statutory immunity applied, because the court found that the defendant was not negligent in the performance of his work. 5) There was insufficient evidence to find the neighbours or their corporation liable for the cracks in the plaintiff's house. Since the court did not find the defendants liable, the neighbours could not be found to be vicariously liable.

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***R v Bellerose*, 2023 SKPC 58**

Schiefner, 2023-11-29 (PC23057)

Constitutional Law - *Charter of Rights*, Section 8

Police received information from confidential informants that the accused was selling methamphetamine in large quantities. Two different informants provided similar information to two different officers: that the accused was living at a women's shelter, that she was selling drugs, and that she delivered those drugs on a mountain bike. Later, one of the informants provided specific information about the clothes the accused was wearing, a description of her bike, and that she was selling drugs. Officers set up surveillance, and observed the accused leave her building wearing clothing matching the description. A taxi pulled up. After a brief conversation with a male passenger in the taxi, the passenger gave the accused a chainsaw. The accused slipped the chainsaw back into the building through an open window, went back into the building, and left the building on the mountain bike described by the informant. The police then decided to arrest the accused on charges of possession for the purpose of trafficking on the basis of the tips received and the observation of the chainsaw "transaction." None of the officers saw the accused give anything to the passenger, or to anyone else. The police also did not observe the accused deliver anything on her bike. The accused argued that the officers did not have reasonable grounds to believe that she was in possession of a controlled substance. She argued that because her arrest was unreasonable, the search of her person was unlawful and that evidence seized as a result of the search be excluded from the trial.
HELD: The court dismissed the *Charter* application. The court found that there were reasonable and probable grounds to arrest the accused. All evidence obtained by the arresting officers including the methamphetamine was lawfully obtained. The court cited *R v Debot*, [1989] 2 SCR 1140 and Saskatchewan jurisprudence applying that case. Where a decision to arrest is based on information provided by confidential informants, courts must consider whether the information is compelling, credible, and whether the information was corroborated by police investigation prior to making the decision to conduct the search. The courts will consider the totality of the circumstances in determining whether the information constitutes reasonable grounds for arrest. The court found that the confidential informants were credible, because one of the informants had historically been a trustworthy source of information. While the second informant was unproven, his information about the accused was corroborated with the first informant. The information provided was reliable and compelling because it was timely, detailed, and specific. The court was also satisfied that the tip was corroborated at many levels, including the accused's suspicious conduct in receiving the chainsaw and surreptitiously putting it into her apartment through a window instead of the front door.

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***R v Friday*, 2023 SKPC 61**

Hinds, 2023-12-08 (PC23059)

Criminal Law - Aboriginal Offender - Sentencing
Criminal Law - Failure to Stop at Scene of Accident
Criminal Law - Sentencing - Conditional Sentence Order

C.F. pled guilty to failing to remain at the scene after a vehicle accident, contrary to s. 252(1.1) of the *Criminal Code*; breach of recognizance by failing to attend court, contrary to s. 145(5); breach of a release order and failure to attend court, contrary to s. 145(2)(b); failure to stop a conveyance involved in an accident, contrary to s. 320.16(a); failure to stop when pursued by a peace officer, contrary to s. 320.17; and dangerous operation of a conveyance, contrary to s. 320.13(1). In 2018, C.F. rear-ended another vehicle and ran away on foot. He was located by police about one block away. Both vehicles were damaged, but no one was injured. In 2020, police were called to a report of a hit and run. The vehicle hit two other vehicles and drove at high rates of speed and erratically while chased by police. C.F. injured his forehead, but no one was injured in the other vehicles. C.F. had 18 prior convictions, 12 of which involved motor vehicle offences, over the past 35 years. There were several long gaps in his offending behaviour. C.F. was 59 years old with a grade 8 education. C.F. is Indigenous. He grew up with his extended family on reserve. His mother and grandmother died when he was a child. He attended residential school where he endured physical and sexual abuse and mistreatment. C.F. has abused alcohol and other drugs. His criminal record corresponds to the periods of substance abuse. He has been sober for approximately three years. He has 12 children, 34 grandchildren and seven great-grandchildren, and is connected to family and community. He relocated to his reserve about two years ago and was involved in healing and ceremonies. He also attends AA and NA and has sought help for his childhood trauma. Several letters of support were filed. The Crown sought a sentence of two years less a day in jail and six-year driving prohibition. The defence argued significant *Gladue* factors were present and sought a 12-month conditional sentence order with a two-year driving prohibition. The court considered what would be an appropriate sentence.
HELD: The court imposed a 23-month conditional sentence order and a four-year driving prohibition. The aggravating circumstances were the 12 prior driving offences and the role alcohol played in the offences before the court. The mitigating circumstances were the gaps in his criminal record, his guilty pleas, the *Gladue* factors and the causal link to his offending, the significant rehabilitative efforts C.F. has made, and the positive pre-sentence report that indicated a low risk to re-offend. The court reviewed the effect of *Gladue* factors. The cases used by the Crown to support a jail term involved more serious offences and were situations where rehabilitation was a faint possibility. In more similar cases in which offenders had taken steps toward rehabilitation before sentencing, a conditional sentence was imposed. Serving the sentence in the community would not endanger community safety and was consistent with the purposes and principles of sentencing.

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