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The Crown appealed the summary conviction appeal court (SCAC) judge's decision to quash the conviction and enter an acquittal for failing to comply with an approved screening device (ASD) demand. The SCAC judge found that the ASD demand had not been made immediately in the circumstances, because the officer took time to perform background checks on the respondent from the patrol vehicle after the officer formed a reasonable suspicion and before he made the ASD demand. The officer initially stopped the respondent's vehicle because it was unregistered. The officer took two minutes to perform computer checks on the vehicle and to

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report the stop before he approached the respondent in the vehicle. He then formed a reasonable suspicion that the respondent had alcohol in his body but told the respondent to "hang tight for a second" and walked back to his police car alone. The officer prepared an ASD and conducted computer background checks on the respondent. The officer waited for the respondent to finish up a phone call before demanding a breath sample. The respondent refused to comply with the demand, saying that he thought too much time had passed. The main issue was whether the SCAC judge correctly concluded that the ASD demand had not been made immediately.
HELD: The Court of Appeal (court) granted the Crown leave to appeal but dismissed the appeal against the acquittal entered by the SCAC judge. The court found that the SCAC judge came to the correct legal conclusion that the ASD demand had not been made immediately in the circumstances. The background checks conducted in the circumstances of this case did not present an unusual circumstance warranting a flexible interpretation of the word "immediately". Section 320.27(1)(b) of the *Criminal Code* (*Code*) states that if a peace officer has reasonable grounds to suspect that a driver has alcohol in his or her body, the officer may require the driver to "immediately provide" a breath sample. The immediacy requirement requires both that a peace officer demand forthwith a breath sample and that the driver provide forthwith a breath sample (*R v Woods*, 2005 SCC 42; *R v Breault*, 2023 SCC 9). The requirement for immediacy preserves the constitutionality of a breath demand: if the demand is not made immediately, then the driver is unlawfully detained at roadside. If the driver does not immediately provide a breath sample in response to a lawful demand, then the driver commits an offence under s. 320.15(1) of the *Code*. The question is no longer whether a delay was reasonable in the circumstances; rather, what must be determined is whether there exists "an unusual circumstance" that justifies a more flexible interpretation of the word "immediately".

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***R v R.C.M.*, 2024 SKCA 6**

Jackson Kalmakoff McCreary, 2024-01-17 (CA24006)

Criminal Law - Appeal - Irregularity - Miscarriage of Justice
Criminal Law - Assault - Sexual Interference - Conviction - Appeal
Criminal Law - Sexual Assault - Sexual Interference - Conviction - Appeal

The appellant was convicted of sexual assault and sexual interference and sentenced to a term of imprisonment for 4.5 years. The appellant appealed the conviction and sentence. At the time of the offence, the appellant was 18 and the complainant was 13. The appellant was in a

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relationship with the complainant's aunt. The complainant testified that there was an outdoor gathering with a bonfire in the backyard. The appellant began touching the complainant, and then led her to a trailer parked in the backyard. The complainant testified that the appellant forced vaginal intercourse with her. The incident stopped when the appellant heard something outside the trailer. The complainant testified that she confronted the appellant with her aunt, but he claimed that the complainant initiated it. She testified that the appellant told her that he would kill himself if she reported the incident to police. The aunt testified, corroborating the social event as the complainant described it. The defence called only a sheriff who was in the courtroom during the trial, who testified that he saw someone in the gallery try to motion to tell the complainant what to say when she was on the witness stand. With regard to the conviction appeal, the appellant argued: 1) that the trial judge erred in law by not applying the requisite level of scrutiny to the complainant's evidence, resulting in a lower standard of proof; and 2) that his conviction was the product of a miscarriage of justice because the trial judge failed to properly address the trial fairness concerns that arose from the evidence of the sheriff about the woman in the gallery who was allegedly influencing the complainant's testimony. For the sentence appeal, the appellant argued: 3) the trial judge erred in principle by failing to consider the appellant's youth and prospects for rehabilitation as mitigating factors; and 4) that the sentence of 4.5 years was demonstrably unfit.

HELD: The Court of Appeal (court) dismissed the conviction appeal, and granted leave to appeal the sentence appeal but dismissed it. 1) The court dismissed the appellant's first argument. The court noted that findings of credibility and reliability of witnesses were findings of fact, and generally subject to a deferential standard of appellate review. The court found that the trial judge reviewed and considered the complainant's testimony thoroughly and carefully considered each inconsistency in the complainant's testimony as argued by the appellant's counsel, directly addressed the evidence about the woman in the gallery, and addressed the argument that the complainant's evidence was less worthy of credit because of her "combative" demeanour towards defence counsel. 2) The trial judge concluded that the complainant's testimony had not been influenced in any way by the woman's actions. Given this finding of fact, there was no basis for suggesting that trial fairness or the appearance of trial fairness had been adversely affected. The mere fact that someone in the courtroom did something that may be perceived as an attempt to influence the testimony of a witness did not, without more, render a trial unfair. In assessing whether a conviction was the product of a miscarriage of justice, the court noted that an accused person is only entitled to a fair trial, not a perfect one, and that it was inevitable that minor irregularities will occur from time to time. Minor irregularities do not constitute a miscarriage of justice. To meet the standard of a miscarriage of justice on the basis of an irregularity, the appellant had to show that the gravity of the irregularity was enough to "create such a serious appearance of unfairness it would shake the public confidence in the administration of justice" from the perspective of a reasonable and objective person, having

regard to the circumstances of the trial. 3) The court was not persuaded that the trial judge erred in his consideration of the mitigating factors of the appellant's youth or rehabilitative prospects. The appellant did not testify at trial, and counsel did not make extensive submissions on the appellant's personal circumstances. The pre-sentence report noted that the appellant grew up in a positive family environment with no issues with alcohol or drug abuse. The appellant's youth and potential for rehabilitation were the only real mitigating factors present in the case, and the court was satisfied that the trial judge turned his mind to them. The trial judge concluded that these factors were entitled to less weight due to the *Code* and jurisprudence requiring him to give primary attention to denunciation and deterrence for sexual offences committed against children. 4) The court was not persuaded that the sentence of 4.5 years was demonstrably unfit. The court could not conclude that the sentence was clearly excessive, an unreasonable departure from a fit sentence, or that it diverged unreasonably from the types of sentences that would be expected for similar offenders in comparable circumstances. The trial judge correctly observed that the approach to sentencing cases involving sexual assaults committed against children meant that a fit sentence must be greater in these circumstances than what would be imposed where the victim was an adult. He fairly observed that there was no sentencing range fixed by the court for sexual offences involving child victims. Particularly aggravating in this case was the relationship and familydynamic that the appellant exploited in committing the offence, the degree of physical interference and risk of harm to the complainant, and the amount of harm going forward for the complainant.

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***Curry v Athabasca Resources Inc.*, 2024 SKCA 7**

Kalmakoff McCreary Drennan, 2024-01-18 (CA24007)

Contracts - Appeal - Unequivocal Conduct - Silence - Unjust Enrichment - Juristic Reason

The plaintiff (appellant) initially brought an action against the defendants (respondents) for damages for breach of contract and unjust enrichment. The plaintiff was a professional geologist and sole proprietor of a geological consulting business. The defendants were incorporated to pursue investments in natural resources. The plaintiff provided geological work to the defendants for an initial project, and it was a success. The defendants later asked the plaintiff if he would be interested in continuing to work for them in an increased capacity. He agreed and emailed them to advise that he would be seeking increased compensation of $60 per hour, plus a one percent gross overriding royalty regarding oil revenues. The defendant did not reply directly to this email and there were no further discussions on compensation for the

new role. The defendants immediately engaged the plaintiff to perform additional work for the defendants. Based on his work, the defendants drilled six wells that generated significant revenue. When the plaintiff asked to be paid based on his understanding of what he would be compensated, the defendants refused. The plaintiff filed a statement of claim alleging breach of contract, arguing that the email gave rise to a new contractual arrangement. In the alternative, he pleaded unjust enrichment. The defendants denied that there was a new contractual relationship that included the gross overriding royalty as compensation, denied breaching any contract and denied that they had been unjustly enriched. They also pleaded that the plaintiff's claim was statute-barred. The chambers judge granted the defendant's application to dismiss the plaintiff's claim, finding that the absence of juristic reason element of unjust enrichment had not been met. The Court of Appeal (court) determined: 1) whether the chambers judge erred in concluding that a new contract had not been formed on the terms set out in the appellant's email; and 2) if not, did the chambers judge err in concluding that unjust enrichment did not apply?

HELD: The court allowed the appeal and set aside the chambers judge's decision. The appellant established a *prima facie* claim for unjust enrichment, so the court remitted the matter to the Court of King's Bench for the second stage of the unjust enrichment analysis and, if necessary, the respondent's limitation period defence. 1) The court did not find that the only conclusion a reasonable person could have reached, based on the evidence before the chambers judge, was that the respondents agreed to the gross overriding royalty term proposed in the email. A valid contract is only formed when three elements are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms were sufficiently certain. The court used an objective test to determine whether a contract has been formed, and if so, the terms of that contract. Where there is a lack of clear and unequivocal communication on contractual terms, the court determines whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer, and whether a reasonable person would consider the conduct to have constituted an acceptance. When the argument is that the contractual term was agreed to through conduct including silence or acquiescence, rather than express acceptance, such conduct must be sufficiently clear, unambiguous, or absolute to objectively demonstrate an intention to create a binding legal relationship on those terms. Here, the chambers judge found as a fact that it could not be inferred from the respondent's conduct that she agreed to the appellant's proposed terms. There was no palpable and overriding error in the chamber's judge's conclusion that the parties had not reached *consensus ad item* on the term proposed by the appellant. 2) The chambers judge erred by dismissing the appellant's claim for unjust enrichment. The court found that the chambers judge erred in concluding that the contract pertaining to the initial project constituted a juristic reason for the respondent's enrichment. The chambers judge found that the parties had not entered into an agreement governing the work that the appellant provided to the respondent. While the chambers judge was correct to find that the lack of agreement meant that a new contract had not been formed, the facts as he found them did mean there was an absence of a contract at the relevant time, which negated the existence of a juristic reason for the benefit to the respondents by the appellant's work. The fact that the parties had not reached a new contractual agreement did not mean that the old one was revived or that it continued to be in force. The plaintiff must prove the following to succeed in a claim in unjust

enrichment: (i) an enrichment; (ii) a corresponding deprivation; and (iii) the absence of a juristic reason for the enrichment (*Pettkus v Becker*, [1980] 2 SCR 834). There are two stages of the "juristic reason" element of the unjust enrichment analysis. At the first stage, the plaintiff must prove that the defendant's enrichment cannot be justified by any of the established categories of juristic reason. If successful, the plaintiff makes out a *prima facie* case for unjust enrichment. At the second stage, the defendant may rebut the *prima facie* case of unjust enrichment by demonstrating that there is a residual reason to deny recovery. The existence of a valid contract is a juristic reason that will prevent a claim of unjust enrichment from succeeding. However, the court stressed that in order to form a juristic reason for enrichment, a contract must be valid, enforceable, and in existence at the time the benefit was conferred upon the defendant or when the deprivation was suffered by the plaintiff. A contract that is illegal, unenforceable, or otherwise invalid will not amount to a juristic reason for enrichment, nor will a contract whose validity is unclear because the elements of the contract are not present, or a contract that is unenforceable because its essential terms cannot be determined with a reasonable degree of certainty.

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***R v MacKay*, 2023 SKKB 284**

Hildebrandt, 2023-09-13 (KB23269)

Criminal Law - Murder - First Degree
Criminal Law - Evidence - Admissibility - Out-of-Court Statements - Hearsay

The accused was charged with first degree murder. A *voir dire* was conducted regarding the admissibility of two video statements made by the accused's daughters. The recordings and interviews with each daughter were reviewed on the *voir dire*. For each proposed witness, the issues were whether the statement should be admitted as an out-of-court statement under s. 715.1 of the *Criminal Code* or under the principled exception to the rule against hearsay.
HELD: The statement made by E. was admissible pursuant to both s. 715.1 and the principled exception rule, but the statement made by V. was not admissible. The five criteria required by s. 715.1 were met. With respect to the principled exception, necessity was established in that E. had no recollection of the events. In addition, the circumstances of E.'s statement had inherent indicia of trustworthiness. V.'s statement did not meet the five criteria under s. 715.1 as it did not describe the act complained of. As a testimony of peripheral evidence, the testimony was also not necessary and should not be admitted through common law.

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***R v Wright*, 2023 SKKB 236**

Popescul, 2023-10-03 (KB23226)

Appeal - Criminal Law - Impaired Driving
Constitutional Law - *Charter of Rights*, Section 7, Section 8, Section 9, Section 10(b)
Criminal Law - Impaired Driving - Roadside Screening Devices - Demand for Breath Sample - Forthwith

The appellant (B.S.M.W.) appealed a decision from a judge in provincial court (trial judge) convicting him of operating a conveyance while impaired by alcohol contrary to s. 320.14(1)(a) of the *Criminal Code* (impaired driving) and operating a conveyance while his blood alcohol concentration (BAC) was equal to or exceeded 80 mg of alcohol in 100 ml of blood, contrary to s. 320.14(1)(b) of the *Criminal Code* (over 80). At trial, the Crown ultimately entered a stay of proceedings with respect to the impaired driving charge. After hearing the evidence and rulings on a multiplicity of evidentiary and procedural matters as well as motions alleging breaches of B.S.M.W.'s *Charter* rights, the trial judge found him guilty of the over 80 charge. B.S.M.W. was fined $1,500 and prohibited from driving for one year. B.S.M.W. appealed the trial judge's ruling to the Court of King's Bench, alleging that the trial judge made several errors concerning the dismissal of B.S.M.W.'s *Charter* motions as well as errors of law in respect of his other rulings. On April 25, 2021, B.S.M.W. was stopped at a check-stop in the rural municipality of Corman Park, south of Saskatoon. The police officer conducting the stop recited to B.S.M.W. a mandatory alcohol screening (MAS) demand. At the time of the demand, the officer was not physically carrying an approved screening device (ASD). The officer noted that B.S.M.W. was smoking a cigarette and knew from his training that he was required to wait five minutes before administering the ASD test. Once B.S.M.W. had extinguished the cigarette, the officer went to acquire an ASD from another officer who was nearby, which took approximately 30 to 90 seconds. B.S.M.W. failed the ASD test. The officer then had reasonable and probable grounds to believe that B.S.M.W. was impaired by alcohol and that he was operating a conveyance while his BAC was equal to or exceeded 80 mg. A formal Breathalyzer demand was made and B.S.M.W. was advised of his right to counsel. The officer then transported B.S.M.W. to the nearby RCMP detachment in his patrol car. Upon arriving at the RCMP detachment, B.S.M.W. was given an opportunity to contact a lawyer. After B.S.M.W. reached the voicemails of two different lawyers, the officer then referred to the Saskatoon city phonebook and indicated to B.S.M.W. that he could call another lawyer or speak to Legal Aid. B.S.M.W. indicated that he would like to speak to Legal Aid, and he was given the opportunity to do so. The number for Legal Aid was called, and B.S.M.W. was given the opportunity to have a private conversation with the Legal Aid lawyer who answered the phone. Once B.S.M.W. hung up the phone, he was asked if he was satisfied with the call, to which he replied that he was. B.S.M.W. then provided two samples of his breath, both of which resulted in failed readings. The Certificate of a Qualified Technician was completed and signed, and the Notice of Intention to Produce Certificate portion of the document was also completed and served upon B.S.M.W. that same night. On August 24, 2021, two separate Certificates of an Analyst were completed, and the Notices to Produce Certificate respecting both of these were also completed and served upon B.S.M.W. on April 19, 2022, a period approximately 15 days prior to his scheduled trial. Both Certificates of an Analyst were digitally signed. First, B.S.M.W. argued at trial that the Certificates of an Analyst were deficient because they were not physically signed. Second, B.S.M.W. argued that the Certificates of an Analyst provided to him on April 19, 2022, did not give him the reasonable notice required under s. 320.32 of the *Criminal Code*. B.S.M.W. also challenged the constitutionality of s. 320.27(2) of the *Criminal Code*, which authorizes MAS for the presence of alcohol in drivers. B.S.M.W. argued that s. 320.27(2)

should be declared invalid as it infringed upon his s. 8, 9 and 10(b) *Charter* rights. Section 320.27(2) gives police officers that have an ASD in their possession the authority to collect breath samples without first forming a reasonable suspicion that the driver is impaired by alcohol. B.S.M.W. submitted that the removal of the reasonable suspicion requirement that was present in the former legislation renders s. 320.27(2) unconstitutional. Lastly, B.S.M.W. raised a number of technical issues and argued that the implementational component of his right to counsel had been breached. After reviewing these arguments, the trial judge dismissed them and found B.S.M.W. guilty of the over 80 charge. B.S.M.W. appealed to the Court of King's Bench, which then had the following issues to consider: 1) Did the trial judge err in law by concluding that s. 320.27(2) is constitutionally valid? 2) Did the trial judge err in law by concluding that the peace officer complied with s. 320.27(2) because a) the peace officer was not physically holding the ASD at the time he made the demand and/or b) the sample was not taken "forthwith" or "immediately" as required by the *Criminal Code* and the *Charte*r? 3) Did the trial judge err in law when he concluded that the Certificates of an Analyst were admissible even though they were electronically signed? a) Must the Crown introduce the Certificate of an Analyst into evidence in order to be permitted to rely upon the presumption of accuracy central to the Certificate of a Qualified Technician as stipulated by s. 320.31? b) Does affixing a signature electronically on a Certificate of an Analyst render it invalid? 4) Did the trial judge err in law when he concluded that the Crown had provided reasonable notice of the Crown's intention to tender the Certificate of an Analyst because reasonable notice in this context is at least 61 days? 5) Did the trial judge err in law when he decided that the peace officer had fulfilled his implementational duties pursuant to s. 10(b) of the Charter?
HELD: The appeal court held that in determining issues of law, the standard of review is correctness.1) The court held that although s. 320.27(2) prima facie infringes on B.S.M.W.'s s. 8 *Charter* right to be free from unreasonable search or seizure, the trial judge was correct in law in finding that it is saved by s. 1. The trial judge cited *R v Morrison* (14 March 2022), CRM-SA-00222-2020 (*Morrison QB*), which undertook an *Oakes* analysis to determine the constitutionality of s. 320.27(2). In *Morrison QB*, the court held that s. 320.27(2) satisfied the first stage of the *Oakes* test: the impugned legislation has a pressing and substantial objective, namely, to reduce the number of impaired driving incidents in Canada. The court in *Morrison QB* went on to apply the second stage of the test and found that s. 320.27(2) had a rational connection to its objective of deterring impaired driving. The appeal court then considered the trial judge's finding that s. 320.27(2) satisfied the minimal impairment and proportionality prongs of the second stage of the *Oakes* test. Ultimately, the appeal court found that the trial judge made no errors in his factual findings, that he correctly applied the facts to the law, that he arrived at the correct ruling, and that he made no findings that could be considered unreasonable or an error in principle. In respect of the other *Charter* breaches alleged by B.S.M.W., namely, ss. 7, 9, and 10(b), he conceded through his counsel at trial that if there was an s. 8 breach saved by s. 1, there would be no utility in conducting a *Charter* review for those sections because they, too, even if violated, would be saved by s. 1. a) In determining the issue of whether the ASD demand was unlawful because the officer did not have the ASD physically in his possession at the time of the demand, the appeal court found it useful to consider the types of possession considered under s. 4(3) of the *Criminal Code*. Although the appeal court conceded that the types of possession contemplated by s. 4(3) were not determinative of the issue at hand, s. 4(3) was useful in that it contemplated a type of possession that was more expansive than actually having an ASD on one's person at the time of the demand. As such, the appeal court found no error in law with the trial judge's finding that the officer did have the ASD in his possession at the time that the demand was made. b) B.S.M.W. argued at trial that the change in wording from "forthwith" to "immediately" in s. 320.27(2) indicated that Parliament wished to narrow the time limit afforded to police officers in administering an ASD test, and that his s. 9 *Charter* protection from arbitrary detention had been violated by the 5.5-to-6.5-minute delay. The appeal court held that the trial judge was correct in law by ruling that the immediacy requirement under s. 320.27(2) was met. In his

decision, the trial judge considered *R v Sweet*, 2022 SKQB 122, which cited *R v Anderson*, 2014 SKCA 32 and *R v Janzen*, 2006 SKCA 111, and correctly found that "forthwith" and "immediately" were to be assigned the same meaning, which is "without unreasonable or unjustified delay". After considering the jurisprudential changes that came into effect after the trial judge rendered his decision, the appeal court found that the trial judge was correct in finding that the 5.5-to-6.5-minute delay in administering the ASD test was reasonable and justified in the circumstances and did not constitute a violation of B.S.M.W.'s s. 9 *Charter* right. 3)a) The appeal court found that it was not necessary for the Crown to tender into evidence the Certificate of an Analyst to rely on the presumption of accuracy central to the Certificate of a Qualified Technician as stipulated by s. 320.31. In coming to its conclusion, the appeal court cited *R v MacDonald*, 2022 YKCA 7, 419 CCC (3d) 100 and *R v Lohnes*, [1992] 1 SCR 167, both of which stated that the matter is one of statutory interpretation. 3b) The appeal court found that the fact that the Certificates of an Analyst were signed electronically did not invalidate them. Section 845 of the *Criminal Code* explicitly allows documents to be signed electronically in certain cases, which is affirmed by ss. 14(1) of *The Electronic Information and Documents Act*. Further, the common law allows documents to be signed electronically, as in *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, [2017] 9 WWR 172. 4) The appeal court held that the trial judge made no error in law by ruling that the Crown gave reasonable notice to B.S.M.W. of its intention to tender the Certificates of an Analyst. The trial judge cited *R v Turgeon*, 2021 SKQB 236, 86 MVR (7th) 224 and *Regina v Szpejer*, 2021 ABPC 198, both of which held that Parliament did not intend to create a 61-day notice period. The appeal court agreed with the trial judge on this point and held that 14 days was reasonable notice under the circumstances. 5) The appeal court held that the trial judge was correct in finding that B.S.M.W.'s s. 10(b) *Charter* right was not breached. After citing *R v Willier*, 2010 SCC 37, among other relevant authorities, the trial judge concluded that B.S.M.W. had an obligation to exercise diligence when exercising his s. 10(b) *Charter* right to counsel and that if he was not satisfied with his call to Legal Aid, it was his responsibility to make this known. However, since B.S.M.W. did express his satisfaction with the call, the trial judge held that there was no infringement of his s. 10(b) *Charter* right. The appeal court agreed with this and found that the trial judge made no error in law in respect of the alleged s. 10(b) violation.

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***Bemrose v Manz*, 2023 SKKB 261**

Bardai, 2023-12-05 (KB23259)

Class Action - Application to Cross-Examine

The plaintiff was the proposed class representative commencing a claim against a chiropractor (defendant), alleging sexual assault of the plaintiff and others. As against the Chiropractors' Association of Saskatchewan (association), the statement of claim alleged that the association had a duty to inform the public of investigations and to stop or prevent the chiropractor from engaging in inappropriate behaviour, that it was negligent, potentially breached a fiduciary duty, and was vicariously liable for the conduct of the defendant. The court determined whether to permit the plaintiff to cross examine on the affidavits from members of the association.

HELD: The court dismissed the plaintiff's application to cross-examine, because cross-examination was unlikely to assist the court in determining the issues on certification. The state of the law in Saskatchewan is that there is no automatic right to cross-examine an affiant on his or her affidavit; leave of the court is required. For class actions, there is no enhanced right of cross-examination. In a certification application, the court must answer five questions set out in s. 6(1) of the Act: whether (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues; (d) a class action would be the preferable procedure for the resolution of the common issues; and (e) there is a person willing to be appointed as a representative plaintiff. The court found that cross examination would not assist in dealing with these issues.

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***Richardson Pioneer Limited v Stadnyk*, 2023 SKKB 265**

Mitchell, 2023-12-06 (KB23268)

Civil Procedure - Costs Award - Costs Thrown Away
Civil Procedure - Default Judgment - Application to Set Aside

The defendant entered into an agreement to supply barley to the plaintiff. Drought conditions left the defendant unable to provide the amount of barley he had agreed to deliver. The defendant contacted the plaintiff to explore a buyout arrangement as provided in the contract. Instead, the plaintiff was served with the statement of claim commencing this action. The defendant alleged that the process server inaccurately advised him that no further action would be taken against him until the parties completed mediation. A default judgment issued in favour of the plaintiff. The defendant applied under Rule 10-13 of *The King's Bench Rules* to set aside the default judgment. The court determined whether: 1) the noting for default and the default judgment should be set aside pursuant to Rule 10-13; and 2) if so, what were the plaintiff's "costs thrown away"?
HELD: The court allowed the application and set aside both the noting for default and the default judgment. The court ordered the defendant to file his statement of defence. The plaintiff was entitled to its costs thrown away in the amount of $6,746 payable within 60 days. 1) The court noted that the decision whether to set aside a default judgment was discretionary. The factors a court considers in determining whether to set aside a noting for default and a default judgment include: whether the application to set aside the default judgment was made expeditiously; whether there was a satisfactory explanation for delay in commencing the application; whether the applicant's proposed defence raised arguable issues; and whether the respondent would be seriously prejudiced if the default judgment were set aside. The court found that the defendant's failure to file a statement of defence in a timely manner was not due to the defendant either wilfully or knowingly ignoring the statement of claim and the consequences of failing to join issue with it. The court found that the defendant had an arguable defence on a bona fide issue to be tried. The court was not persuaded that the situation would amount to serious prejudice or irreparable harm to the plaintiff if the default judgment were set aside. The court noted the substantial amount of the default judgment ($133,261) and was persuaded that the defendant should at least have the opportunity to defend against it. 2) The court accepted that "costs thrown away" were intended to indemnify plaintiff's counsel for costs unnecessarily and uselessly incurred by the defendants' actions, but that such an order was a

discretionary decision (*Oz Merchandising Inc. v Canadian Professional Soccer League Inc.*, 2016 ONSC 4272). The court exercised its discretion to order less than complete indemnification, ordering $5,000 for legal fees plus $1,746 in disbursements.

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***Yang v Myriad 419 Condominium Corporation*, 2023 SKKB 278**

Rothery, 2023-12-19 (KB23257)

Statutes - Interpretation - *Condominium Property Act, 1993*, Section 63

The applicants (plaintiffs) each owned a condominium unit. The respondent was the condo corporation. The applicants alleged that an accident happened in each condo unit when they were both away. The respondent entered each unit and completed repairs. The applicants disputed the cause of the accident and refused to pay the respondent for the costs of repairs. In response, the respondent registered liens pursuant to s. 63 of *The Condominium Property Act, 1993* (CPA) on the basis that the damage to the units constituted "common expenses". The applicants sought an order vacating the liens on the basis that the respondent was statute-barred from pursuing its remedy under the liens. The applicants argued that because the respondent did not take enforcement proceedings to enforce the liens within two years of registration, the effect of *The Limitations Act* rendered them statute-barred, and that the liens must now be vacated. The basis for this argument was s. 63(2)(b) of the CPA, which stated that the lien "may be enforced in the same manner as a mortgage." The court considered whether the respondent was required under s. 63 of the CPA to commence a foreclosure action, or whether it had other remedies available.
HELD: The application to vacate the liens was dismissed. The liens registered against each condo unit remained enforceable. The legislation granted a condominium corporation the option to merely rely on its lien registered in accordance with s. 63 of the CPA rather than being required to commence a foreclosure action within two years. The condo corporation had options other than an action for foreclosure, including collecting on the lien when the unit holder sold the unit, or suing the unit holder for the outstanding debt.

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***Klev v Lowes*, 2023 SKKB 279**

Robertson, 2023-12-19 (KB23258)

King's Bench Rules, Rule 4-2(c) - Request for Directions
Statutes - Interpretation - *Wills Act, 1996*, Section 37

The testator's will named his executor and trustee (the applicant) and alternate (the respondent). The will contemplated written

instructions that could be provided to the trustee. The testator dictated instructions to his nominated executor in the form of a list identifying personal property for distribution, which was signed by the testator. He died shortly after. The applicant filed a Form 6-5 notice of application seeking a declaration that the hand-written list for distribution of personal property be recognized as evidence of the testator's final testamentary wishes. The respondent argued that the application should have been filed by a Form 3-49 originating notice. The court determined whether the application for declaration should be by notice of application or originating notice.
HELD: The court held that the application seeking a declaration to recognize the list should have been brought by originating notice, not notice of application. However, the court exercised its discretion to cure this procedural mistake. Section 37 of *The Wills Act, 1996* authorized a court to order that a document is effective despite not complying with the formal requirements of a will if the court is satisfied on a balance of probabilities that the document embodies a final expression of the deceased as to the intention for disposal of his property upon death. Here, an originating notice was available as an option because the application seeking a declaration clearly fell within Rule 3-49(a) and (b) of *The King's Bench Rules* pertaining to the administration of the estate. This rule gave the applicant the choice of an originating application as an alternative to proceeding by statement of claim. A statement of claim is likely preferable if material facts are in dispute. Actions commenced by originating notice are intended for claims that are suitable for summary determination.

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***Olivares v Spott*, 2024 SKKB 2**

Rothery, 2024-01-05 (KB24003)

Civil Procedure - Application to Strike Statement of Claim - Frivolous and Vexatious
Statutes - Interpretation - *Limitations Act*, Section 5

The plaintiff alleged in his claim that when the defendants arrested him in October 2017, they forcibly confined him, committed an aggravated assault on him, and unlawfully detained him for 40 days at the Saskatoon Correctional Centre. The plaintiff commenced his claim in April 2023. The defendants applied to strike the claim on the basis it was statute-barred and therefore frivolous, vexatious and an abuse of the court's process.
HELD: The court struck the plaintiff's claim in its entirety because it was statute-barred.

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***R v Sewap*, 2024 SKKB 7**

Scherman, 2024-01-12 (KB24006)

Criminal Law - Dangerous Offender Designation - Intractability
Statutes - Interpretation - *Criminal Code*, Section 753

The court found the offender guilty of aggravated assault (the predicate offence), in which the offender took part in a planned beating and stabbing of another inmate. The offender had a long history of violence towards others, with 43 convictions on his criminal record. The Crown applied under s. 753 of the *Criminal Code* for a dangerous offender designation and indeterminate custody. The court determined whether the dangerous offender requirements were met, and what designation or sentence should be imposed.
HELD: The court found that the offender was a dangerous offender pursuant to s. 753(1)(a)(i) and sentenced him to an indeterminate sentence. The Crown proved that there had been a persistent pattern of aggressive behaviour that displayed a substantial degree of indifference respecting the reasonably foreseeable consequences of the offender's behaviour. The court was not satisfied by the evidence adduced during the hearing that there was a reasonable expectation that a lesser measure under s. 753(4)(b) or (c) would adequately protect the public. To be declared a dangerous offender, the Crown had to prove that the offender had a high likelihood of harmful recidivism and the intractability of his violent pattern of conduct. However, the court noted that proving intractability did not mean the Crown had to prove beyond a reasonable doubt that every suggested potential treatment an offender might benefit from had been provided.

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***Pointer v Saskatchewan Government Insurance*, 2024 SKKB 5**

Currie, 2024-01-15 (KB24004)

Civil Procedure - Application to Certify Class Action
Statutes - Interpretation - *Class Actions Act*, Section 6(1)

The plaintiff sought an order certifying the action as a class action. The plaintiff sued SGI for misfeasance in public office and a breach of the duties of utmost good faith and fair dealing. The claim was not grounded in the failure of SGI to pay no-fault benefits; rather, the claim was based on SGI's alleged failure to assess unscheduled permanent impairment. The plaintiff alleged that this failure tainted SGI's administration of all no-fault claims.
HELD: The court dismissed the application for certification. The action remained a regular court action. After outlining the five criteria for certifying an action as a class action under s. 6(1) of *The Class Actions Act*, the court found that three of them were not capable of being remedied by amendment: identifiable class, preferable procedure and representative plaintiff. The proposed class definition was too broad, there was no identifiable class, and it was impossible to determine issues that were common to the class members

when the class had not been identified. The court could not determine whether a class action was the preferable procedure. The plaintiff did not meet the requirements of a representative plaintiff because he did not have a minimum level of general knowledge about the action to give instructions on behalf of the class.

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***Sheppard v Sun Country Health Authority*, 2024 SKKB 9**

Robertson, 2024-01-26 (KB24008)

Civil Procedure - Application to Strike Statement of Claim - Limitation
Civil Procedure - Pleadings - Application to Strike - No Reasonable Cause of Action

The village of Pangman applied to strike a claim because it failed to disclose a cause of action and was otherwise barred by a limitation period. The claim challenged the village's authority to unilaterally charge for attendance of the fire department and sought recovery of payment and additional damages for alleged defamation.
HELD: The application was granted. The claim did not contain any specific allegations of defamation. In addition, the claim related to an incident that occurred on September 10, 2021. The claim was issued on September 8, 2023. The municipal limitation period is one year pursuant to subsection 344(1) of *The Municipalities Act*.

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***Lavendar v Saskatoon Real Estate Services Inc.*, 2024 SKKB 16**

Danyliuk, 2024-01-29 (KB24010)

Appeal - Sufficiency of Reasons
Landlord and Tenant - Appeal - Residential Tenancies

A hearing under *The Residential Tenancies Act* was held on November 30, 2023 by telephone. The landlord was seeking an order for possession, but only the landlord's representative participated in the hearing. The tenant took issue as to whether he had received proper notice of the hearing and whether he was afforded proper opportunity to be heard.
HELD: The appeal was allowed. The decision of the hearing officer was quashed, and the matter remitted back to the Office of Residential Tenancies for a new hearing. The hearing officer's decision provided little in the way of facts and evidence and gave no reasons for the outcome of the hearing. From the decision, it was impossible to say whether the hearing officer paid more than lip service to the required analysis.

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***Paziuk v Regnier*, 2024 SKPC 4**

Schiefner, 2024-01-11 (PC24001)

Small Claims - Contract - Implied Condition - Good and Workmanlike Manner

The plaintiff asked the defendant to complete paint and body work on his car after it was side-swiped. Although the car passed SGI's body integrity inspection, the plaintiff was unsatisfied with the defendant's work. The plaintiff filed a statement of claim alleging breach of contract for providing inferior quality work. The defendant disputed the claim and filed a counterclaim alleging non-payment of fees for services rendered, arguing that the plaintiff insisted on taking the car before the work was complete. HELD: The court dismissed the plaintiff's claim in breach of contract. The court found that the reason the work was inferior was because the plaintiff refused to give the defendant sufficient time to complete the work. The court found that the defendant was entitled to additional compensation for some of the additional work he did on the plaintiff's car for which he had not been paid. Neither party produced a copy of a contract for services. Here, the law was clear that in the absence of an agreement setting out the manner in which the work was to be carried out, there was an implied condition that the work be carried out in a good and workmanlike manner. The degree of skill was the ordinary skill possessed by those in the particular trade. If there is no price set out for services rendered, there is an implied contractual term to pay a reasonable price. The plaintiff was not entitled to damages for inferior work because he picked up the car before the work could reasonably be completed.

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***Truong v Le*, 2024 SKPC 5**

Demong, 2024-01-03 (PC24002)

Small Claims - *Caveat Emptor* - Gratuitous Agent
Statutes - Interpretation - *Small Claims Act, 2016*, Section 36(3)

The plaintiff commenced an action to recover the cost of repairs that were made to a used vehicle after it had been purchased by the plaintiff in a private sale. The plaintiff alleged that negligent misrepresentations were made by omission and by explicit statement by the defendant. She asserted that had she known about the defects, she would not have purchased the vehicle. The defendant relied on the common law defence of caveat emptor, asserting that the plaintiff knew that the car was being sold 'as is' and without any warranty. The court determined: 1) whether caveat emptor applied; 2) whether the defendants negligently or fraudulently misrepresented the condition of the vehicle and if so, what was an appropriate remedy; 3) whether the defendant acted as a

fiduciary for the plaintiff during the transaction; and 4) who was entitled to costs.
HELD: The court found that the repair costs arose from the defendant's breach of his duty to act in the plaintiff's best interests, awarding judgment in favour of the plaintiff for the amount spent to repair the vehicle. 1) The court outlined the law of *caveat emptor*, which applies when the defendant seller is not in the business of selling used vehicles. In this situation, the plaintiff cannot rely on the statutory protections under *The Consumer Protection Act* or the implied conditions of quality and fitness under *The Sale of Goods Act*. Under *caveat emptor*, the seller of a used car is not under any duty to disclose defects to a potential buyer unless he has actively concealed them. Fraudulent misrepresentation by the seller of a latent defect has an impact on the principle of *caveat emptor*. The court found that the plaintiff was a relatively recent immigrant to Canada with only a marginal understanding of English. She had never owned a car and had no understanding whatsoever about how to purchase a vehicle, or even a basic understanding of car mechanics. The defendant was familiar with vehicle mechanics and knew that the car in question had been declared a total loss by SGI. 2) The plaintiff's claim for damages arising from the defendant's failing to disclose a latent defect (that it had been found to be a total loss) failed. While the defendant misrepresented the status of the vehicle as a total loss, no damages flowed from that misrepresentation because the court did not know why the vehicle was determined to be a total loss or whether any of the issues with the car were connected to it being a total loss for insurance purposes. 3) The court also found that the defendant acted as the plaintiff's gratuitous agent in locating a vehicle and breached his duty to act in the plaintiff's best interests. The court found that the defendant failed to look out for the plaintiff's best interests when he sought to sell her a vehicle that he knew had been a total loss and which had a number of mechanical problems and failed to direct her attention to those problems. 4) The court awarded costs under s. 36(3) of *The Small Claims Act, 2016* in the maximum amount allowed (ten percent of the judgment), in addition to out-of-pocket expenses for the filing fee, service fees, and mileage.

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***R v Wasacase*, 2024 SKPC 10**

Evanchuk, 2024-01-23 (PC24005)

Criminal Law - Long-term Offender
Criminal Law - Sentencing - Joint Submission

A taxi driver picked up two heavily intoxicated women from a Tim Horton's. The driver's interaction with the women was recorded by a dashcam. During the journey, the accused pulled out a knife, held it to the driver's neck and demanded cash. The driver pulled over and took the weapon from the accused. The accused persisted and ultimately stole the debit/credit machine from the console as well as a phone. Since birth, the accused had been the victim of horrific physical, sexual, and emotional abuse. The accused's criminal history, which included manslaughter, numerous robberies, and aggravated assaults, began when she was 12 and had continued without interruption, demonstrating a clear pattern of offending. The issues before the court were whether the accused met the statutory definition of a long-term offender and whether the proposed joint submission of a sentence of eight years' incarceration was appropriate.
HELD: The accused had a long criminal history involving bladed instruments during spontaneous acts of violence. The accused met

the criteria for designation as a long-term offender. The recommended submission was appropriate in the circumstances. Sentencing is an individualized process that requires consideration of the specific offence and the offender. In this instance, the court had to consider the gravity of the offence and degree of responsibility of the offender, her lengthy record and predisposition for violence, as well as the presence of a number of *Gladue* factors.

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