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

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***R v Charles*, 2024 SKCA 8**

Leurer McCreary Drennan, 2024-01-19 (CA24008)

Criminal Law - Crown Appeal - Exclusion of Evidence - Invalid Warrant
Constitutional Law - Charter of Rights, Section 8, Section 9, Section 24(2)

The accused was found not guilty of various gun and drug-related charges. The trial judge held that two warrants could not have properly issued to search the accused's residence, motor vehicle and cellphone. As a result, the accused's arrest was arbitrary and contrary to s. 9 of the *Charter of Rights and Freedoms* (*Charter*), and the corresponding search of the accused's cellphone also violated s. 8 of the *Charter*. As a result, the trial judge excluded the Crown's evidence and the accused was found not guilty of all charges, including various gun and drug-related charges. The Crown challenged the trial judge's application of the legal principles related to the warrants in finding that: 1) the accused's *Charter* rights were violated; and 2) the

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evidence from both warrants should be excluded.
HELD: The Court of Appeal (court) dismissed the appeal. The court found no error in the trial judge's analysis affecting her conclusion that there were no reasonable grounds to issue either warrant, nor in her conclusion that the admission of the evidence obtained as a result of the breach of the accused's *Charter* rights would bring the administration of justice into disrepute. 1) The trial judge demonstrated a proper understanding of the limited role of her task in reviewing the decision made by the justice who issued the original warrants. The test on review was whether the issuing justice, acting judicially, could have issued the warrants based on reliable evidence that might reasonably be believed. The reviewing judge considered the amplification evidence detailing the investigation before the warrants were issued. The court noted that a reviewing judge must analyze the evidence that was before the authorizing justice to determine whether there was reliable evidence that might reasonably be believed in the decision to issue the warrants. The trial judge engaged with the evidence considering the appropriate legal criteria. The trial judge applied an appropriate level of deference to the decision of the authorizing justice. The three factors to assist reviewing courts when assessing the reasonableness of a warrantless search also apply to the grant of a warrant: whether the information predicting the commission of a criminal offence was compelling, credible and corroborated (*R v Debot*, 1989 CanLII 13 (SCC), [1989] 2 SCR 1140). The judge found that the warrant authorizing the search of the vehicle was clearly invalid, and the court found no error in this conclusion. There was no evidence before the judge that justified the search. The court also found no error in the judge's conclusion that there were no reasonable grounds to issue the warrant authorizing a search of the residence for drugs. The judge also rejected the warrant to search for firearms at the residence because of the weakness of the information provided by confidential informants related to the presence of weapons at the residence. The judge found the informants' tips uncompelling because they lacked detail and used boilerplate, paraphrased language. 2) There was no legal error in the trial judge's decision to exclude the Crown's evidence. The court noted the deferential standard of review which applies to a trial judge's s. 24(2) determination. The court saw no error in the judge's decision to account for the overall context of the police conduct after she found that the accused's *Charter* rights were breached. The police arrived in an armoured vehicle, surrounded the home, used bull horns to announce their presence, and used pepper spray to get the occupants out of the residence. The court declined to consider the judge's discussion of the breach of others' rights in her evaluation of whether to exclude the evidence because of the general way in which the issue was presented to the court by the Crown.

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***Chenjelani v Institute of Chartered Professional Accountants of Saskatchewan*, 2023 SKKB 264**

Klatt, 2023-12-05 (KB23267)

Appeal - *Accounting Profession Act* - Statutory Limitation

The board of the Institute of Chartered Professional Accountants of Saskatchewan (board) upheld a decision of the discipline committee of the organization which found the applicant guilty of misconduct and imposed a cost sanction. The applicant sought to quash the decision of the board, and to either quash or reduce the costs. The applicant did have the right to file an appeal within 30 days of the decision under *The Accounting Profession Act* (Act), but he filed his application to quash the appeal decision over ten months after the time limit had already expired. The court determined: 1) whether it had jurisdiction to extend the time limit for filing an appeal where not expressly allowed in the statute; and 2) if not, whether the applicant could seek judicial review of the board's decision.
HELD: The court held that the applicant was out of time to appeal the board's decision. The application was dismissed in its entirety. 1) The Act provided for an appeal process and set a time limit for doing so. The court had no inherent jurisdiction to extend the appeal period. 2) Courts will not engage in judicial review of a decision where the applicant had a right of appeal or an adequate alternative remedy that was not pursued. The applicant was aware of his right of appeal and could not circumvent the statutory limitation period by bringing an application for judicial review.

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***R v Mahadeo*, 2024 SKKB 8**

Dawson, 2024-01-22 (KB24007)

Criminal Law - Not Criminally Responsible - Mental Disorder - Second Degree Murder
Statutes - Interpretation - *Criminal Code*, Section 16, Section 235

The accused was charged with second degree murder in the death of his mother. He told police that he stabbed his mother because he believed that by doing so, he could free her spirit and save her. He had a loving relationship with his mother before the incident. The accused had

previously documented episodes of mental illness. Crown and defence counsel jointly submitted that the accused committed the physical acts which caused the death of the victim, but that he should be found not criminally responsible by reason of mental disorder. The court considered the joint submission.

HELD: The court returned a verdict of not criminally responsible. The court did not hold a disposition hearing. The court set out the defence of not criminally responsible by reason of mental disorder in s. 16 of the *Criminal Code* (*Code*). The court cited *R v Bouchard-Lebrun*, 2011 SCC 58 for the fundamental principle of the common law that criminal responsibility can result only from the commission of a voluntary act. A person suffering from a mental disorder within the meaning of s. 16 is incapable of appreciating the nature of his or her acts or understanding that they are inherently wrong. The Crown had the burden of proving the elements of second degree murder, and then the defence had to establish on a balance of probabilities that the accused was suffering from a mental disorder so as to exempt the accused from criminal responsibility. Here, the defence had to establish that the accused was suffering from a disease of the mind and that it was more likely than not that the accused was incapable of appreciating the nature and quality of the act or lacked the necessary knowledge of wrongfulness. The court found that the *actus reus* had been proven beyond a reasonable doubt. The court was satisfied that the accused suffered from a mental disorder at the time of the offence as defined in s. 16 of the *Code*. The evidence established that he was suffering from schizophrenia, was psychotic, and suffered from a severe psychotic episode at the time of the alleged offence. The court found that the accused lacked the capacity to rationally decide whether the act of stabbing his mother was morally wrong.

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***Piett v Canada Revenue Agency*, 2024 SKKB 10**

McCreary (*ex officio*), 2024-01-25 (KB24009)

Costs - Award of Costs - Quantum

In a previous decision, the court denied the certification application in a class action on the basis of abuse of process. The defendants brought an application seeking costs, including on a solicitor and client basis, against both the former proposed representative plaintiff and his counsel. In response, the plaintiff and counsel argued that the order precluded costs on a solicitor and client basis, or costs against the plaintiff's counsel, and cited the doctrine of *functus officio*. In the alternative, they argued that the facts did not justify costs on a solicitor and client basis, or enhanced costs beyond column one of the tariff. The court considered the application for costs.

HELD: The court awarded column three costs against the plaintiff only. The award was made solely on the complexity of the certification application and not on the basis of conduct. The doctrine of functus officio was not engaged. The court held that it was not precluded from deciding whether to grant solicitor and client costs, because the certification order expressly left for another day the issue of quantum. The court added that *The King's Bench Rules* contemplated that an order for costs against a lawyer may be

made on the court's own initiative or on the application of a party. The conduct of abuse of process in the certification decision did not rise to the level of costs on a solicitor and client basis, against counsel personally, or otherwise enhanced related to the tariff. Solicitor and client costs based on pre-litigation conduct were not warranted, because the requirements of: (i) a causal connection between the conduct and the costs borne by the other party in the litigation; and (ii) reprehensible conduct, were not met. The court similarly declined to make a costs award against counsel for the plaintiff because the threshold of conduct amounting to a "serious dereliction of duty or behaviour" was not met.

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***Lopinski v Raji*, 2024 SKKB 15**

Rothery, 2024-01-29 (KB24012)

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

Counsel for the defendants applied to strike the claim in its entirety for failing to disclose a reasonable cause of action. The statement of claim was filed by self-represented litigants related to the apprehension of their child.
HELD: The court granted the defendant's application to strike the claim in its entirety. There was no reasonable cause of action against any of the defendants being advanced by the plaintiffs. The plaintiffs did not plead sufficient facts to make out causes of action for breach of fiduciary duty, misfeasance in public office, or a *Charter* breach.

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***Banerjee v Saskatchewan*, 2024 SKKB 19**

Layh, 2024-02-05 (KB24015)

Civil Procedure - Appropriate Forum

The plaintiff was denied long-term disability benefits in 2016. She was an employee at SaskTel. She commenced an action against the Public Employees Benefit Agency (PEBA) and the Government of Saskatchewan (Saskatchewan) for their refusal to pay long-term disability benefits. Saskatchewan filed a statement of defence and did not raise the issue of forum. Four years after filing its defence, Saskatchewan brought a notice of application requesting an order to strike the statement of claim in its entirety, because the claim should have been dealt with through a prescribed grievance and arbitration procedure. Two years later, Saskatchewan filed a notice of application seeking an order that first judicial review, then arbitration was the appropriate course. The court determined the appropriate adjudicative process for this matter.
HELD: The court held that the plaintiff correctly initiated her claim by statement of claim. Neither judicial review nor arbitration was

the appropriate forum for resolution. The court found that the terms of the Disability Insurance Plan (DIP) governed, and the plaintiff was entitled to rely on its express terms. The court noted that Saskatchewan asked the court for an extraordinary remedy: to change the interpretation of its own document to the detriment of the plaintiff who relied on PEBA's interpretation in commencing her action. The court concluded that the DIP specifically and historically contemplated an action. PEBA did not have the attributes of the types of administrative tribunals specifically established by legislation to make adjudicative decisions. The court ordered costs against Saskatchewan.

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***C.O. v P.O.*, 2024 SKKB 22**

Wildeman, 2024-02-14 (KB24018)

Family Law - Parenting - Variation of Interim Order

The respondent, P.O., applied to vary the interim order of March, 2022 to give him more parenting time with the three children of the marriage. The current arrangement was three weeknights with all three children for one hour; every other weekend with the two older children; and the remaining weekends with the younger child. P.O. now sought to have the care of the children for two weeks out of every four, because he was now working in Newfoundland with a schedule of 14 days on and 14 days off. C.O. objected to P.O.'s proposal, arguing that he was not capable of caring for the children for two weeks at a time. The court reviewed the important criteria in making a decision to vary a parenting order: 1) The foremost consideration was the best interests of the children; 2) the change occasioning the application must be a material change in the children's circumstances; and 3) in the interest of maintaining stability, any interim parenting arrangement, "whether legal or *de facto*," could not be varied by the court without a compelling reason: *Guenther v Guenther* (1999), 1999 CanLII 12554; *Gebert v Wilson*, 2015 SKCA 139; *Seidel v Seidel*, 2021 SKCA 92; *T.C. v A.E.*, 2021 SKCA 79. P.O. further sought joint decision-making responsibility for the children, and gave evidence that C.O. had changed the children's school without his knowledge, despite joint decision-making having been granted in the interim order. HELD: The court found that P.O. did not meet the burden of varying the parenting arrangement to the extent he wished. 1) P.O.'s affidavit evidence did not provide evidence of how he would meet the children's needs. The court was convinced of P.O.'s love for his children and his genuine desire to spend more time with them, but not of how he would manage caring for them for a two-week period. It was not controverted that C.O. had been their primary caregiver for at least the past two years, so the contemplated change to the parenting arrangement would be a dramatic change in the lives of the children. C.O. provided ample evidence about the children and the many responsibilities she had taken on in their lives. 2) The change to P.O.'s work schedule did not necessarily represent a material change in the children's circumstances, but the court considered that it would be in their interests to have as much contact as possible with P.O. The court did not have enough evidence to find that C.O. had been deliberately withholding the children to "punish" P.O. for taking his new job. 3) The court did not find compelling reason to vary the interim parenting arrangement drastically and advised the parties that, should they not reach agreement, and absent a risk to the children or other compelling reason, that remedy would need to be sought at trial. The court ordered that, during his two-week periods in Saskatchewan, P.O. would have parenting time with all the children for an hour one weeknight of each week; two overnights with the two older children; and two days with the younger child. In her evidence, C.O. had not addressed P.O.'s evidence that she had

changed the children's school or daycare without consulting him. The court found there was no need to vary decision-making in the interim order, and cautioned C.O. of her legal obligation to comply with its terms. No costs were ordered.

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***UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2024 SKKB 23**

Megaw, 2024-02-16 (KB24011)

Civil Procedure - *King's Bench Rules*, Rule 3-72
Civil Procedure - Pleadings - Application to Amend

The respondents introduced the Use of Preferred First Name and Pronouns by Students Policy (policy) in August 2023, which applied to all school divisions. The policy provided that parental consent was required if a student under age 16 sought to use a preferred name, gender identity, or gender expression. The applicants filed an originating application to have the policy declared contrary to ss. 7 and 15(1) of the *Charter*, as well as an interim and interlocutory injunction. The respondents argued injunctive relief was inappropriate and questioned the applicant's standing to commence the proceedings. The court granted the applicants public interest standing to bring the action, and issued an interlocutory injunction enjoining the implementation and enforcement of the policy until the *Charter* issues were determined. The government then introduced legislation to add the terms of the policy to *The Education Act, 1995*, and invoked the Notwithstanding Clause contained in s. 33(1) of the *Charter* to declare that the legislation would operate notwithstanding ss. 2, 7, and 15 of the *Charter*. Given these changes to the original litigation, the applicants sought here to amend their pleading to advance a s. 12 Charter allegation, and to amend the facts pled and remedies sought. The respondent opposed the amendments and applied to have the entirety of the existing allegations dismissed, arguing that the court was without jurisdiction to determine allegations of ss. 7 or 15 violations of the *Charter* because the Notwithstanding Clause had been invoked. The respondent added that the invocation of the Notwithstanding Clause rendered the issues in the litigation moot, and accordingly sought to have the claim dismissed. The court decided the following issues: 1) what was in issue on the applications before the court; 2) what was the purpose in making reference to judicial activism; 3) whether leave should be granted to amend the pleadings; 4) was the court's jurisdiction ousted by the invocation of the Notwithstanding Clause; 5) if the court continued to have jurisdiction, at what point should it be exercised; 6) should the court decide the issue of mootness; and 7) costs. HELD: The court granted the application to amend and found that the court continued to have jurisdiction to hear and determine the *Charter* issues raised by the amended originating application, even though the Notwithstanding Clause of the *Charter* had been invoked. 1) The only issue before the court was whether the applicant should be granted leave to amend its pleading, and whether the respondent was entitled to a complete dismissal of the proceedings without any consideration of the *Charter* issues. The appropriateness of the decision of the legislative branch of government to invoke the Notwithstanding Clause was not an issue before the court in these proceedings. 2) The respondent argued that the court's action on this matter would constitute what it called judicial activism. The court found this suggestion revealed a misunderstanding of the role of the judiciary in a constitutional democracy and the role of the court in upholding the rule of law. 3) In determining whether to grant leave to amend the pleadings, the court considered: A) the applicable test; B) the nature of the amendments sought by the applicant; C) whether the use of the originating application was an appropriate pleading to determine *Charter* issues; D) whether any of the proposed amendments

resulted in prejudice or injustice to the respondent; E) whether the proposed amendments alleging a s. 12 *Charter* breach failed to disclose a reasonable cause of action; F) whether any of the proposed amendments were scandalous, frivolous or vexatious; and G) whether the proposed amendments would be an abuse of process of the court. A) The law on amending a pleading is set out in Rule 3-72 of The *King's Bench Rules*. The court noted that amendments to pleadings are generally granted to ensure that the real matters in issue are before the court. B) The applicant sought amendments to the originating application that would: introduce the new legislation into the litigation; advance a claim for additional *Charter* relief based on s. 12; seek a declaratory judgment of the court regarding ss. 7 and 15 of the *Charter*; and introduce additional grounds in support of the relief sought. The court then considered each of the respondent's objections to the amendments sought. C) The court did not agree with the respondent's procedural argument that a different commencement document was required. The court agreed with the applicants that Rule 3-49(1)(h) provided that an action may be started by originating application if a *Charter* remedy was claimed. D) The court was unable to find any prejudice or injustice to the respondent as a result of the s. 12 claim. The court held that the addition of another *Charter* claim to what was already *Charter* litigation was not fundamentally altering the nature of the litigation. There was nothing in the record to indicate that the amendments would cause delay. E) The court was unable to conclude that the s. 12 *Charter* claim would necessarily fail. At this early stage in the litigation, the court was hesitant to engage in a full review of the claim, given the low threshold to be met to allow the claim to proceed. The court noted that while the applicant will have a high bar for the s. 12 claim, that did not prevent the applicant from proceeding with the claim. F) The court found that the language used by the applicants in the proposed amendments was neither vexatious nor scandalous. The court found that the words identified the position to be advanced by the applicants. G) The court was not convinced that any of the proposed amendments constituted an abuse of the process of the court. 4) The court held that the use of the Notwithstanding Clause did not oust the jurisdiction of the court to determine and provide declaratory relief as to whether the subject legislation was in breach of the *Charter*, including the invocation of the Notwithstanding Clause. This was due to the specific wording of s. 33(1) of the *Charter*, the importance of citizens having ongoing access to the courts, and the court's historical and legislated ability to issue declaratory judgments which may have no substantive effect. The words in s. 33 did not remove the jurisdiction of the court to determine whether legislation violates any specific *Charter* provision, or to limit the exercise of such jurisdiction. 5) The court held that it did not have a sufficient evidentiary basis to exercise its jurisdiction to grant declaratory relief. 6) The court declined to address the issue of mootness. The court held that the litigation could proceed on the s. 12 *Charter* argument and the applicant seeking declaratory relief regarding ss. 7 and 15(1). 6) Given the applicant's success on the application to amend the originating application, the court awarded costs in the cause.

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***R v Sunderland*, 2024 SKPC 8**

Tomka, 2024-01-11 (PC24007)

Criminal Law - Impaired Driving - Blood Alcohol Level Exceeding .08 - Rights to Counsel
Constitutional Law - *Charter of Rights*, Section 10(a), Section 10(b), Section 24(2)

The accused was charged with impaired driving and of having a blood alcohol level above the legal limit within two hours of operating a conveyance. At the conclusion of the evidence, the accused was acquitted of the impaired driving charge because the

Crown conceded that there was insufficient evidence. A blended voir dire and trial was held. The Crown called two police officers as witnesses, and entered traffic stop video, the certificate of a qualified technician which indicated two samples of 100 milligrams of alcohol in 100 millilitres of blood, and the certificate of an analyst. The accused argued that his s. 10(a) *Charter* right was violated because the police did not adequately advise him of the reason for his detention. He also argued that his s. 10(b) *Charter* right was violated because there was a six-minute delay in advising him of his right to counsel after his arrest for impaired driving, and because the police steered him towards Legal Aid. Defence sought the exclusion of the breath samples as a remedy under s. 24(2). The court determined on a balance of probabilities whether there was a violation of the accused's *Charter* rights under: 1) Section 10(a); 2) Section or 10(b); and 3) if so, what was an appropriate remedy.
HELD: The court found the accused guilty of having a blood alcohol level above the legal limit within two hours of operating a conveyance. The court found a breach of the accused's s. 10(b) right to be advised of the right to counsel without delay, but it did not exclude the breath samples. 1) The court did not find a breach of the accused's s. 10(a) *Charter* right. The court found that the reason for the detention and arrest were perfectly clear from both the circumstances of the stop and what the officer had told the accused. 2) The accused proved a breach of his s. 10(b) right to be advised of his right to counsel without delay. The court did not accept that there was a reasonable justification for the six-minute delay in advising the accused of his right to counsel. The delay did not meet the immediacy requirements in s. 10(b). However, police properly informed the accused of his right to counsel, and they complied with facilitating a reasonable opportunity to the accused to exercise the right to counsel of choice before his breath samples were taken. The court did not find the police steered the accused to Legal Aid. 3) The court did not exclude the evidence. The court noted that there was no specific amount of delay in advising of the right to counsel that will engage the exclusion of evidence under s. 24(2). Rather, the court considered the circumstances of the case. The court conducted the *Grant* analysis to determine the seriousness and impact of the breach of the accused's *Charter* right, in addition to society's interest in adjudication on the merits and the impact on the public's confidence in the administration of justice. Here, there was one single breach lasting only six minutes. There was no evidence of a systemic institutional issue. The balancing of the *Grant* factors required the admission of the evidence of the breath samples.

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***R v Holynski*, 2024 SKPC 7**

Agnew, 2024-01-22 (PC24003)

Criminal Law - Possession of Child Pornography - Distribution of Child Pornography - Luring
Statutes - Interpretation - *Criminal Code*, Section 163.1(3), Section 163.1(4), Section 172.1(1)(a)

The accused contacted the two complainants via Snapchat to request nude photos of them. Both complainants were under 18 at the time. Both sent images to the accused, and police found nude images of one of the complainants on the other complainant's phone. The court determined: 1) whether the images met the definition of child pornography; 2) whether the accused distributed the images; and 3) whether he was guilty of luring.
HELD: The court found the accused guilty of possession of child pornography, distribution of child pornography, and luring. 1) The court was satisfied that photos showing the complainant's bare breasts met the definition of child pornography in s. 163.1(1)(a)(ii).

The test has four parts: (i) is the person depicted under the age of 18; (ii) does the photograph depict a sexual organ or the anal region of that person; (iii) is the depiction of the sexual organ or anal region the dominant characteristic of the photograph; and (iv) is the depiction of the sexual organ or anal region for a sexual purpose. Images where the complainants' breasts were covered did not meet the definition. Similarly, photographs depicting the buttocks where the genitals were covered and no details could be made out did not depict a sexual organ. 2) The court found the accused guilty of distributing child pornography because he sent images of one complainant which the court found to contain child pornography to the other complainant. 3) The court found that "luring" was a misnomer, and that here the offence was communicating by telecommunication with someone under 18 for the purposes of facilitating the commission of a child pornography offence. The court found that merely requesting child pornography was sufficient, and that the luring charges were made out with respect to both complainants.

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