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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***Agency Chiefs Tribal Council Inc. v Big River First Nation*, 2022 SKCA 16**

Caldwell Ryan-Froslie Barrington-Foote, 2022-02-04 (CA22016)

Statutes - Interpretation - *Non-profit Corporations Act, 1995*, Section 225

The appellant, the Agency Chiefs Tribal Council Inc., a non-profit membership corporation incorporated pursuant to *The Non-profit Corporations Act, 1995* (NPCA), appealed from the decision of a Queen's Bench chambers judge (see: 2020 SKQB 273). In the decision, the judge granted the respondent's, Big River First Nation's, application for relief from the alleged oppressive conduct of the appellant, made pursuant to the oppression remedy provided by s. 225 of the NPCA. The respondent was a member of the appellant but its Chief and Council decided in 2019 that it would resign its membership in the Agency Chiefs Tribal Council (ACTC) and in the appellant, the body created to conduct key aspects of ACTC's business. The Chief and

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Council passed a resolution on September 9, 2019 to terminate its membership in accordance with s. 116 of the NPCA. The resolution specified when the termination would take effect, defined as the "effective date" that certain specified acts had occurred. The resolution was sent to the appellant, and it took the position that the resignation was effective from the date of the resolution and the respondent was not entitled to make its resignation subject to conditions. It then filed a Notice of Change of Directors with Information Services Corporation, removing the respondent's two representatives from its board of directors effective September 9, 2019. The respondent sought relief from this alleged oppressive conduct. In her decision, the judge determined that the common law governed after noting that s. 116 of the NPCA does not specify how a resignation must be tendered, accepted, or made effective. Considering the principle in the common law that a resignation from a non-profit corporation is effective upon receipt or when it specifies it will be effective, the judge rejected the appellant's argument that the respondent's resolution was effective immediately. Thus, the respondent's resolution could not be interpreted as an immediate resignation, as it was conditional. The judge then addressed the issue of whether the appellant's response to the respondent's resolution was oppressive. She found the appellant's purported removal of the respondent's representatives to be oppressive under s. 225 of the NPCA, after applying the two-part test set out in *BCE Inc.* (2008 SCC 69). The respondent's representatives had not themselves resigned, nor had the appellant followed the requirements of ss. 96 or 97 of the NPCA. and the respondent had a reasonable expectation that it would not be unilaterally expelled from membership in the appellant. The judge did not accept the appellant's argument that the respondent and its representative directors had breached their fiduciary obligations to it. It was therefore appropriate for the judge to grant a remedy sufficient to restore the respondent to its original position, and she ordered that it be added to the register as a member of the appellant and two directors from the respondent replace the two chosen by the appellant. The appellant's grounds of appeal were whether the chambers judge: 1) erred in finding that respondent had not resigned its membership; and 2) erred in finding that removal of the directors and treatment of the respondent as having resigned as a member was oppressive; and 3) erred in granting a remedy.

HELD: The appeal was dismissed. The court found that although the chambers judge committed errors in her reasoning, there was no basis for it to intervene because none of the errors affected the bottom line of her decision. It amended the terms of the chambers judge's order. It determined with respect to each issue that the chambers judge had: 1) not erred in concluding that the respondent had not resigned its membership in the appellant and continued to be entitled to the rights and privileges of a member. However, it interpreted the respondent's council's resolution as reflecting its intention to resign at a future time as no resignation at all rather than the judge's characterization of it as a conditional resignation. The judge also erred in her analysis relating to Indigenous law and custom in the context of her consideration of the NPCA, the unratified "Agency Chiefs' Tribal Council Convention Act", the 1991 agreement between the First Nations members to create the ACTC, and the common law and her understanding of the decision in *Whalen* (2019 FC 732). That decision and similar authorities do not stand for the proposition that every course of conduct or "Act" adopted by a

Criminal Law - Driving over 0.08

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band council that demonstrates a broad consensus of First Nation members is law. There was no basis on the record to conclude that there may have been practices, customs or traditions of the First Nation members that would be relevant to the resignation of a member of a non-profit corporation, or, for that matter, that such customs could be effective despite the fact that they chose to establish the appellant under the NPCA; 2) had not erred in finding the removal of the directors and treatment of the respondent was oppressive. The decision under s. 225 of the NPCA is a discretionary one and the judge did not commit an error of fact, law or mixed fact and law in concluding that the appellant had not complied with the provisions of the NPCA in removing the representatives and finding that the respondent had been denied its rights as a member and excluded from participating. Her finding that the respondent's reasonable expectations had been breached by these acts was supported by the evidence of the past practices of the appellant and considering the relationship between the First Nation members; and 3) had not erred in granting a remedy. The appellant's argument that the respondent was not entitled to withdraw as a member was rejected and thus nothing in its conduct would make it inequitable to grant a remedy.

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***R v Dillon*, 2022 SKCA 17**

Caldwell Schwann Kalmakoff, 2022-02-08 (CA22017)

Criminal Law - Sentencing - Victim Impact Statements
Criminal Law – Aboriginal Offender – Gladue Factors – Appeal
Criminal Law - Sentencing - Totality Principle - Appeal
Criminal Law - Sentencing - Appeal - Standard of Review

The appellant pled guilty to four offences: dangerous operation of a conveyance; flight from a peace officer; unauthorized possession of a firearm; and operating a firearm while prohibited from doing so. He was given a 70-month combined sentence. The facts and circumstances of the offences and of the offender were summarized in an agreed statement of facts, a victim impact statement, the appellant's criminal record and the submissions of the Crown and defence counsel. These were not in dispute. The offences arose from a police pursuit of two vehicles, one of which was being driven by the appellant. The chase was lengthy and at high speeds through urban areas and on grid roads, involved spike belts and running roadblocks and police aiming long guns at the appellant. At its climax, a peace officer rammed his police vehicle into the front passenger side of appellant's speeding vehicle, rendering it inoperable. Loaded firearms with gang colours and insignia that had been thrown out of the vehicle were found in a ditch. Ammunition was located in the vehicle along with red bandanas of the West Side Outlaws street gang. At the time of the offences, the

Family Law - Family Property - Contract - Enforcement

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Statutes - Interpretation - *Non-profit Corporations Act, 1995*, Section 225

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101297277 Saskatchewan Ltd v Copper Sands Land Corp.

Agency Chiefs Tribal Council Inc. v Big River First Nation

Anderson v Forsyth

Canadian Pacific Railway Company v Government of Saskatchewan

appellant had a serious criminal record for similar offences and was deeply involved in the gang lifestyle. He was of Aboriginal descent. Two police officers involved in the pursuit filed victim impact statements at sentencing. The grounds of appeal were that the sentencing judge "inappropriately relied on the information included in those statements;" failed to appropriately consider Gladue factors; and failed to consider the principle of totality.

HELD: The Court of Appeal granted leave to appeal but dismissed the appeal. The court held that the sentencing judge (judge) did commit errors in principle by placing improper reliance on the victim impact statements; failing to explain the effect of Gladue factors on the sentence; and failing "to explain the effect of the principle of totality on sentencing" but dismissed the appeal because it was of the view that none of the errors in principle affected the sentence imposed. First, the court dealt with the judge's use of the victim impact statements filed at the sentencing hearing pursuant to s. 722(8) of the *Criminal Code* and noted that they included passages that the judge was required to disregard, as these criticized the offender, alleged facts about the offences, and expressed opinions as to the sentence the judge should impose. In examining the judge's reasons, the court noted she made extensive reference to the victim impact statements but could not find that she had specifically directed herself to disregard these utterances in imposing sentence. As such, the court could not be satisfied that she had in fact done so. Secondly, the court reviewed the judge's application of the Gladue factors, and did so with particular reference to *R v J.P.*, 2020 SKCA 52, which the court said required that Gladue factors must be considered in every sentencing involving an Aboriginal offender. Along with all other principles of sentencing, the sentencing judge must seek to individualize the offender by "search[ing] for a fit sentence… that is appropriate '[f]or this offence, committed by this offender, harming this victim, in this community'" (see also: *R v Chanalquay*, 2015 SKCA 141, and cases flowing from it). The court expressed that in circumstances where Gladue factors are germane to the sentencing process, the sentencing judge must meaningfully analyze these factors to determine whether and how they bear on the offender's culpability or moral blameworthiness. The court could not find in her reasons that the judge had performed this analysis, nor whether she had asked herself if "Gladue factors had or had not affected [the] moral culpability" of the appellant. Thirdly, with respect to the judge's consideration of the totality principle applicable to consecutive sentences, the court was not satisfied that the judge had gone through the steps set out in *R v Smith*, 2019 SKCA 100, by asking herself whether the combined consecutive sentence was "unduly long or harsh", and required adjustment, which lacuna was an error in principle. Lastly, though the court had identified these errors of principle, it would not intervene because these did not affect the sentence, concluding, after a review of the circumstances of the offence and of the offender, and the central principles of deterrence and denunciation in this case, as well as the prospect of rehabilitation, that the total sentence imposed was not disproportionate to the sentences imposed for these types of offences.

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***R v Whitehead*, 2022 SKCA 19**

Jackson Ryan-Froslie Tholl, 2022-02-10 (CA22019)

D.R.C. v J.E.M.

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Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400

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Criminal Law - First Degree Murder - Conviction - Appeal
Criminal Law - Jury Trial - Instructions to Jury - Appeal
Appeal - Evidence - Grounds - Similar Fact Evidence

The appellant appealed his conviction of first degree murder to the Court of Appeal (court) on the ground that the Queen's Bench trial judge erred in law by admitting into the jury trial what the Crown advanced was probative evidence of the essential mental element of planning and deliberation, though that evidence related to alleged criminal activity distinct from the criminal activity which the Crown claimed constituted the predicate offence of first degree murder. The court described the events central to the appeal, and in doing so focused on four "incidents of violence" culminating in the death of the deceased by stabbing.The four incidents occurred in a two-hour time period and within seven hundred metres of each other. The appellant first engaged in a fist fight with the victim in House 105, and was thrown down to the floor by him; he then walked seven hundred metres to House 608, pushed one person there to the ground, and swung at a second person, his brother-in-law (J.M.) with a knife in his hand, cutting him; on his way back to House 105, he crossed paths with one S.H., threatening him with a knife; and finally, about thirty minutes after swinging at and wounding J.M., he re-entered House 105 and ran at the victim, stabbing him three times and killing him "almost immediately." The court next reviewed the reasons of the trial judge for admitting the evidence of the events at House 608 as similar fact evidence and also reviewed her jury instructions with respect to the use the jury could make of this evidence. The court noted that in ruling the evidence in issue constituted admissible similar fact evidence of planning and deliberation, the trial judge referred to the factors enumerated in *R v Handy*, 2002 SCC 56 (*Handy*) to determine the probative value of that evidence, including the "proximity of both time and place;" that the offences at the two homes "form[ed] a cohesive sequence of events;" "one… [event could not] be excised from the other with any sort of surgical precision;" both attacks were unprovoked; both were stabbings; both occurred in a "physically similar fashion" and in both "the same type of weapon was used." The court was cognizant the trial judge was aware that in deciding whether to admit the evidence, she was to balance its probative value against its prejudicial effect on the jury, and this was demonstrated in her jury charge when she told the jury it was not to use this evidence to conclude the appellant was a bad person who was more likely to have planned and deliberated to kill the deceased for that reason. The court was also aware that in addition to the proffered similar fact evidence of planning and deliberation was the testimony of witnesses that the appellant had first fought with the victim and was thrown to the floor, left shortly thereafter, then came back and stabbed him.
HELD: The appeal was allowed, the conviction set aside, and a new trial ordered. As to the standard of review it was to apply to the trial judge's evidentiary ruling, the court stated the trial judge did not have the discretion to admit evidence whose prejudicial effect on the jury outweighed the probative value of the evidence but was to be accorded considerable deference in making this determination, given her advantageous position to assess the dynamics of the trial and how pieces of evidence might affect the jury.

Nonetheless, if it was demonstrated that "the result of the trial judge's analysis is unreasonable or is undermined by a legal error or a misapprehension of material evidence," the court was required to intervene (see: *R v James* (2006), 213 CCC (3d) 235 (Ont CA)). The court reasoned that though the trial judge referred to the correct authorities to guide her in her analysis of the factors bearing on her assessment of the probative value of the evidence proffered as admissible similar fact evidence, she committed a legal error by failing to actually embark on this analysis. The court noted she simply listed the *Handy* factors without coming to grips with how the events at House 608 were probative of the appellant's state of mind, and whether these events were sufficiently connected to the events at House 105 to amount to evidence of planning and deliberation on the part of the appellant when he fatally stabbed the deceased. In coming to this conclusion, the court reviewed several case authorities where the Crown sought to allow similar fact evidence to prove elements of an offence, including the mental element of planning and deliberation, and noted that "only a few" allowed similar fact evidence "of a crime perpetrated on one victim… [being] admitted as similar fact evidence to prove planning of deliberation of the murder of another person." Ultimately, the court was of the view that by relying on "generic similarities" between the proffered evidence and the evidence of murder, the trial judge failed to recognize that the proffered evidence amounted to prohibited reasoning prejudice and moral prejudice with no probative value, so that no meaningful or reasonable balancing of evidentiary value versus prejudice could be accomplished. Further, said the court, though the Crown had adduced other evidence which could have led the jury to find the mental element of planning and deliberation had been proven, the court could not say that the jury had not applied the inadmissible evidence to make this finding.

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***R v Toulejour*, 2022 SKCA 20**

Jackson Leurer Kalmakoff, 2022-02-10 (CA22020)

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence - Appeal
Criminal Law - Application to Adduce Fresh Evidence - Appeal
Criminal Law - Sentencing - Aboriginal Offender

The appellant appealed the decision of a Queen's Bench judge to declare him a dangerous offender (DO) and to sentence him to an indeterminate penitentiary term (see: 2016 SKQB 84) and applied to adduce fresh evidence. He had been charged with 30 *Criminal Code* offences and pled guilty to seven, including assaults with a weapon contrary to s. 267, aggravated assaults contrary to s. 268, and unlawful confinement contrary to s. 279(2). The offences had taken place between August 2009 and March 2010 and the victims had been the appellant's domestic partner and three of her children. As part of the assaults the appellant had bitten the victims, inflicting severe pain and wounds that left permanent scars. After the appellant pled guilty, the Crown instituted the process under Part XXIV of the Code to have him declared a DO, based on the foregoing predicate offences. The appellant's criminal record included convictions on multiple charges of assaults against four other women with whom he had been in relationships between 2001 and 2007 and he had bitten all of them. A psychiatrist interviewed the accused and prepared an assessment report. In his report, he expressed his opinion that the accused's risk of committing future acts of violence was high and it would be unsafe to assume that he could be managed in the community. The appellant did not appear to remember many of the incidents nor take

responsibility for his actions and seemed unwilling and unable to describe his emotional states. When asked by the psychiatrist, the appellant said that he had not been sexually abused as a child. The psychiatrist qualified his opinion regarding risk because he could not find any research to inform it regarding biting and he had not been able to obtain an explanation from the appellant regarding what caused him to bite women and children. He testified that the information the appellant had imparted to him was unreliable and had to be treated with caution. Following the hearing, the sentencing judge ordered that a Pre-Sentencing Report (PSR) be prepared. The author of the PSR interviewed the appellant and his parents. The appellant, who was Métis, was born and raised in the small northern community of Black Point. His parents provided a supporting and nurturing home. The accused had had little formal schooling. He did not consume alcohol until he was 21 and did not commit his first offence until he was 22. His parents spoke of other people using "bad medicine" on the appellant at that time and the appellant described other occasions since then when he had experienced the effects of bad medicine. For the first time, the appellant revealed to the author of the PSR that he had been sexually assaulted from age six to age 12 by his step-grandfather. He recounted that when he was 16, he planned to kill the man but could not do it. When the DO hearing resumed, the appellant's then defence counsel advised the court that he had received instructions from him to refrain from asking that the psychiatrist be recalled to address the matters in the PSR. On appeal, the appellant's new counsel sought to adduce fresh evidence in the form of a report prepared by a registered social worker/psychiatric nurse. After performing several psychological tests on the appellant, they showed he suffered from severe depression and anxiety. The author stated that the appellant had a positive attitude towards therapy and was committed to addressing his unresolved historical abuse issues arising from the sexual abuse he had experienced. She also diagnosed a permanent brain injury resulting from the abuse. The defence asked that the fresh evidence be admitted to provide further evidence regarding the accused's treatability and to demonstrate that more evidence should be obtained regarding cultural issues in assessing his risk of reoffending and his treatability. The issues on appeal were whether: 1) the fresh evidence should be admitted; and 2) the sentencing judge erred in relying upon the psychiatrist's opinion. The appellant argued that as the psychiatrist did not know how to treat him, there was no evidence to support his opinion that the accused could not be treated, and he was thus entitled to a new hearing; and 3) the sentencing judge appropriately considered the appellant's personal and Indigenous circumstances when assessing his treatability at the designation and penalty stages of the Part XXIV hearing. The appellant argued that judges have an overarching obligation in sentencing Indigenous offenders that transcends the specifics of the submissions made to them. In this case, the judge did not refer to the appellant's reliance on bad medicine and sexual abuse as explaining why he had offended in the way he had. The PSR revealed significant cultural issues that might have provided other means to consider his treatability. The judge should have given less weight to the psychiatrist's report and requested additional evidence and argument.

HELD: The appeal was dismissed. The court found with respect to each issue that: 1) the application to adduce fresh evidence was denied. It had not met the third requirement set out in the *Palmer* test ([1980] 1 SCR 759) in that the evidence proposed to be adduced, either alone or taken with all the evidence before the sentencing judge, did not provide a basis upon which the court could order a new hearing; 2) the sentencing judge had not erred in accepting the psychiatrist's opinion and relying upon it on the basis that it was qualified by the lack of a known treatment for someone who bites women and children. Further, the accused had raised what amounted to a new issue on appeal that contradicted the position he had taken before the sentencing judge, when the appellant's then counsel had argued that the absence of known treatment did not mean that someone is untreatable, whereas the appellant was now arguing that the psychiatrist's opinion should not have been accepted at all because he could not address treatability; and 3) the sentencing judge had not erred in his approach to Indigenous issues. He was entitled to read the PSR and the

psychiatrist's report together and where they were in conflict respecting child sexual abuse and the influence of bad medicine, to give weight to the latter document. The PSR coupled with the fresh evidence might shed some light on the explanations for the appellant's behaviour but such additional evidence as presented on appeal could not have affected the sentencing judge's conclusion on treatability.

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***Rathwell v McLaughlin*, 2022 SKCA 21**

Richards Barrington-Foote Kalmakoff, 2022-02-14 (CA22021)

Civil Procedure - Correction to Clerical Error in Fiat - Appeal
Family Law - Child Support - Material Change in Circumstances - Appeal

This matter was an appeal by C.S.R., the father of a child of his relationship with L.M.M., the respondent, to the Court of Appeal (court) from decisions of a judge of the Court of Queen's Bench sitting in chambers, on four grounds: first, that the chambers judge did not have the authority to correct his fiat for a simple omission correctible pursuant to Rule 10-10(a) of the Queen's Bench Rules -- he had failed to include a reference to childcare expenses under s. 7 of the *Federal Child Support Guidelines* (Guidelines); secondly, that the chambers judge failed to clarify what financial information the parties were to exchange pursuant to the final judgment; thirdly, that the chambers judge was not correct in finding a material change in circumstances justifying an increased of C.S.R.'s imputed income for child support purposes; and fourthly, he erred in awarding costs to L.M.M. by finding she had been largely successful in her applications. The court reviewed the evidence filed in the various applications and the court record in the court below and made the following findings: a final judgment was issued by the Court of Queen's Bench on the terms agreed to between the parties following a pre-trial settlement conference; the judgment contained provisions relating to child support, including the amount of income to be imputed to both parties for child support purposes, and also built in an annual adjustment of 2% compounded on July 1 following the exchange of income information on June 1 of each year; C.S.R. asked the chambers judge to clarify what financial information should be disclosed pursuant to the final judgment, but he failed to do so in his fiat; C.S.R. was an engineering student at the time the final judgment was made and the income imputed to him was based on his starting salary as an engineering technician, and not what he earned while a student; and at the time of L.M.M.'s application to increase C.S.R.'s imputed income, C.S.R. had not earned any income as an engineering technician though he had earned increased part-time student income, which had prompted L.M.M.'s application.
HELD: The appeal was allowed in part. First, the court reviewed the law concerning the principle of functus officio, concluding that as no order had been taken out, the chambers judge could revisit his fiat, and since his reasons for invoking Rule 10-10(a) could not be said to be wrong, dismissed this ground of appeal. Secondly, the court agreed that the chambers judge erred in law by not dealing with C.S.R.'s request to clarify financial disclosure between the parties and exercised its power to do so. Thirdly, following a review of the law interpreting the concept of material change of circumstances in child support legislation, in particular *Willick v Willick*, [1994] 3 SCR 670, and cases within its orbit, the court determined that the chambers judge erred in mixed fact and law by ruling that the event which resulted in the increase of C.S.R.'s income was a material change in circumstances because this type of event had been contemplated by the parties in coming to a negotiated settlement which was incorporated into the final judgment.

The court noted that the parties had agreed that C.S.R. would be imputed income on the basis of his starting income as an engineering technician, though he was earning only casual income as a student at the time of the final judgment. At the time of L.M.M.'s application, he was not yet earning income as an engineering technician. Lastly, as to the question of costs, the court ruled that the chambers judge's analysis was "incomplete and, as such incorrect", and had he properly dealt with the application he would have found that L.M.M. had not been largely successful in her applications and would not have ordered costs in her favour. The court ordered costs in the Court of Queen's Bench in favour of C.S.R., and also costs in his favour on the appeal.

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***Hosseini v College of Dental Surgeons of Saskatchewan*, 2022 SKQB 13**

Gerecke, 2022-01-12 (QB22030)

Statutes - Interpretation - *Dental Disciplines Act*, Section 26
Professions and Occupations - Dental Disciplines - Periodontist - Discipline - Appeal

The appellant, a periodontist, appealed the decision of the Discipline Committee (DC) of the respondent, the College of Dental Surgeons of Saskatchewan, pursuant to s. 38(1) of *The Dental Disciplines Act*. The DC found her to be incompetent in the care of a patient. She had been charged with professional incompetence under s. 26 of the Act. A disciplinary hearing (DH) was conducted at which the respondent's Professional Conduct Committee (PCC) acted as prosecutor. The charge arose as a result of a complaint made by one of the appellant's patients after she had removed and replaced a dental implant. The procedure was unsuccessful and the patient suffered permanent nerve damage. The appellant testified at the DH and admitted that she had made a mistake and had upgraded her skills and training since the incident. The DC heard evidence from an expert witness who testified on behalf of the PCC, and two expert witnesses who testified on behalf the appellant. The DC reviewed their testimonies as to their opinion regarding the procedure and treatment in question and decided to give no weight to the evidence given by one of the appellant's experts because it found that the witness appeared to be acting as an advocate for the appellant. The DC did not find professional incompetence had been established demonstrating that the appellant was unfit to continue in the practice or provision of services ordinarily part of it but that professional incompetence within the meaning of the Act had been established in relation to her treatment of the patient in this case. It noted that she had taken the necessary measures to prevent a recurrence and the public's welfare was therefore not at risk. After the DC rendered its decision in November 2018, the appellant applied to it to reconsider the matter, alleging that it had lost jurisdiction in the first hearing, resulting from a reasonable apprehension of bias. This post-hearing challenge was made after the appellant discovered that the fees charged by the chair of the DC, a lawyer, far exceeded those submitted by the other four members and this suggested that he had played conflicting roles of providing legal opinions to the DC simultaneously to acting as a member of it. After holding a hearing regarding bias (BH), the DC dismissed her application. It then held a penalty hearing (PH). At it, the PCC argued that the appellant's conduct represented a significant failure to adhere to her professional obligations. It requested penalties identical to the costs the DC ordered with the additional costs to reimburse the respondent, including its legal expenses, in the amount of $90,000, being 75 percent of the respondent's actual costs. The appellant alleged that the PCC had acted in bad faith leading up to the hearing, saying that it had increased costs arising from her refusal to abandon her arguments concerning a fair hearing. She advised the DC that there had been an exchange of offers

concerning costs and argued that efforts to settle the penalty dispute prior to the sentencing hearing were not privileged and should be considered by the DC. She also pointed out that in correspondence with the PC, she had acknowledged that she made a mistake, denied negligence and asked for a mediated solution rather than have the DH proceed, but the PCC did not accept the proposal. The correspondence between the parties was identified by the DC but it held that the PCC had not waived settlement privilege and determined the correspondence to be inadmissible. It then imposed certain penalties upon the appellant that included payment of costs, setting the quantum at $50,000. In this appeal, the appellant alleged that the DC had committed errors in each of the DC, BH and PH. The grounds of appeal regarding the DH were whether: 1) the DC erred in law in incorrectly interpreting and applying the Act, and specifically s. 26, by concluding a single incident involving an ordinary error amounted to professional incompetence. The appellant argued that it was impossible to convict under s. 26 without finding that the member is unfit to practice generally or unfit to provide one or more services ordinarily provided by her, because s. 26 sets out an exclusive list of circumstances in which a member may be convicted of professional incompetence. The respondent argued that s. 26 could not be so interpreted: the Legislature could not have intended to hamstring the DC, thereby depriving the appellant's patient of making any professional complaint against her, simply because the procedure constituted a single incident and not a pattern; 2) the DC erred in law and deprived her of a fair hearing: a) in finding professional incompetence on evidence that could not support the finding; b) by misunderstanding the evidentiary purpose of opinion evidence and misinterpreting and assessing opinion evidence offered by the three witnesses; and c) in limiting the cross-examination of the PCC's expert witness; and 3) in rejecting the evidence of one of the appellant's expert witnesses on the basis that she was not impartial. The grounds of appeal relating to the BH hearing were whether: 4) the lawyer chairing the DC was eligible to serve on it; and 5) the lawyer's participation raised a reasonable apprehension of bias. The bylaws permit the chair to appoint an advisor to a panel, but because of the fees charged by the lawyer acting as chair, the appellant asserted that he had been appointed to act in his capacity as a lawyer rather than a layperson panel member because his professional fees were dramatically higher than those of other members of the DC. The grounds of appeal of the PH were whether the DC: 6) had erred in setting the quantum of costs against the appellant; and 7) had erred in excluding the evidence of the correspondence between the appellant and the PCC.

HELD: The appeal was dismissed. The court found with respect to the grounds related to the DH that: 1) the DC had not erred. As the decision was within its discretion under s. 26, it would apply the discretionary standard of review, consistent with the decision in *Strom* (2020 SKCA 112) wherein the Court of Appeal considered a provision in *The Registered Nurses Act, 1998* (RNA) similar to s. 26 of the Act. It would follow the decision in *Nanson* (2013 SKQB 191) wherein the court decided that it would interpret a provision in The Psychologists Act, 1997, similar to s. 26 of the Act, broadly and inclusively. It would also follow the inclusive interpretation established in Strom regarding the provision in the RNA, although it was not bound by it because it could distinguish the case based on the differences between the wording of the RNA's provision and s. 26 of the Act. It determined then that the DC's interpretation of s. 26 was consistent with *Strom* and fell within the interpretive approach in *Nanson*. It would have upheld the decision on the correctness standard as well. It rejected the exclusive interpretation approach advanced by the appellant because it would defeat the purpose of the Act to protect the public interest, by preventing a discipline committee from acting until it sees a pattern of conduct that warrants an order revoking the member's license or the curtailment of carrying out certain procedures; and 2) the DC had not erred with respect to the three sub-grounds, finding that: a) it had not committed the alleged error; b) its decision to restrict the questioning of the PCC's witness about the appellant's professional incompetence was it was a matter for it to decide; and 3) it was fair for it to decide not to give weight to the expert witness' testimony in light of the fact that she testified that the appellant had not committed a mistake when the appellant herself had admitted it. The court found with respect to the decision rendered in the BH that the standard of review governing questions of procedural fairness was correctness. It found with respect to each ground related to the BH that: 4) the DC was properly composed. It had met the requirements set out in s. 34 of the Act that three members of the

panel be practicing dental professionals. There is nothing in the legislation prohibiting lawyers from committee participation, and such a requirement should not be read in; and 5) the appellant failed to object to the composition of the DC at the outset of the DH and the challenge was raised too late. In the alternative, this ground would be dismissed regardless because the three factors in Matsqui ([1995] 1 SCR 3) had not been established to exist. There was no authority in which a reasonable apprehension of bias was found to exist because a tribunal member, paid at an hourly rate, charged considerably more than other members. The court found with respect to each ground related to the PH that the DC had: 6) not erred in setting the quantum. It possessed broad discretion under s. 34(2) of the Act to make orders as to costs of the hearing and investigation; and 7) had not erred in law in excluding the correspondence. The evidence indicated that the correspondence between the parties regarding resolution was exchanged on a without prejudice basis.

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***R v C.L.*, 2022 SKQB 9**

McCreary J., 2022-01-19 (QB22011)

Criminal Law - Application to Reopen Defence Case
Criminal Law - Declaration of Not Criminally Responsible - Hearing

The trial judge was required to make a decision following an application by the accused, C.L., to re-open the defence case. The trial judge reviewed the proceedings: C.L. was found guilty of sexual touching of a person under the age of sixteen after trial; a hearing to determine whether C.L. was not criminally responsible (NCR) followed, pursuant to s. 16 of the *Criminal Code*, at which C.L. had an opportunity to call one T.L. as a witness, but chose not to; and two expert witnesses took the stand for the defence during the NCR hearing, one of whom, Dr. E., was a general adult psychiatrist called by C.L., who had a professional "history with C.L." At the application to re-open, C.L. sought to call to the stand another general adult psychiatrist who had no personal involvement with C.L. C.L. argued that the proposed witness, T.L., was a necessary witness to rebut evidence relied on by the Crown to the effect that C.L. had lied to Dr. E. Dr. E. had testified that C.L. disclosed to him that he had told the complainant's mother he believed the complainant was being sexually abused. The complainant's mother and father testified when asked directly by the Crown that C.L. said no such thing to either of them. The Crown then argued that if C.L. could lie in this way, to the extent that Dr. E.'s opinion that C.L. was delusional at the time of the offence was based on this lie, it should be disregarded by the trial judge. The trial judge noted that T.L.'s expected testimony would not shed any light on what C.L. had said or not said to the complainant's mother and father. As to the need for additional testimony from a second general adult psychiatrist, C.L. advanced that such evidence was necessary because at the time of the NCR hearing, one of the defence psychiatrists was unavailable and the short notice of his unavailability did not permit his being replaced by an alternate witness. At the time, defence counsel did not request an adjournment of the hearing to line up the alternate psychiatrist. C.L. also argued that due to his accent, Dr. E.'s evidence may have been difficult to understand at the hearing.
HELD: The application to re-open the defence case was dismissed. In coming to this decision, the trial judge was guided by *R v Hayward* (1993), 86 CCC (3d) 193 (Ont CA) (Hayward) and the factors considered in that case. She understood that *Hayward* was

to be applied in cases where no conviction had yet been entered. Analogously, no NCR ruling had yet been made in this case at the time of the defence application. The trial judge first considered the evidence of T.L. proffered by the defence, ruling that the testimony of T.L. failed to meet the Hayward factors of relevancy and materiality, as it amounted to prohibited collateral evidence not bearing "upon a decisive or potentially decisive issue in the trial." The trial judge also said T.L.'s proposed evidence failed the Hayward test because T.L. was available to testify during the hearing but the defence chose not to have him do so, and was now trying to undo a tactical decision, and additionally because there was no risk of a miscarriage of justice if the court did not have his evidence. Turning to the request of the defence to re-open the case so the court could hear from a second general adult psychiatrist, the trial judge was not convinced that any persuasive argument had been advanced by the defence as to why the witness had not been called earlier, or why an adjournment had not been requested by the defence when she learned the witness was not available. What is more, the trial judge was not persuaded that the proposed expert's testimony was of sufficient probative value to re-open the hearing, as it would in no way add to the evidence provided by Dr. E. Overall, the trial judge was of the view that she could not countenance any further delay in the trial, as delays were amounting to prejudice to the complainant and to the administration of justice.

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***R v C.L.*, 2022 SKQB 10**

McCreary J., 2022-01-19 (QB22012)

Criminal Law - Declaration of Not Criminally Responsible - Hearing

Following a voir dire to determine the admissibility of a warned statement provided by the accused C.L. to the police (R v C.L. 2021 SKQB 330), and a trial in which C.L. was found guilty of touching a person under the age of sixteen years for a sexual purpose and sexual assault (R v C.L., CRM 46 of 2019, Regina, June 29, 2021), C.L. applied pursuant to s. 16 of the *Criminal Code* to be declared not criminally responsible for the offences due to mental disorder (NCR). In coming to her decision as to whether C.L. was NCR, the court referred to the evidence at trial, which included the warned statement of C.L., his testimony, the testimony of a forensic psychologist and a general adult psychiatrist who had treated C.L. for schizotypal personality disorder, schizophrenia, and attention deficit hyperactivity disorder for several years, and the testimony of the complainant. The trial judge observed that C.L. did not ask for a court ordered assessment to determine his criminal responsibility pursuant to ss. 672.11 and 672.12 of the *Criminal Code*, and as such, no interview was performed by a clinician trained and experienced in gathering relevant information to assist the trial judge in this determination. She was aware C.L. had the onus of proving on a balance of probabilities that he was NCR when he committed the offences.
HELD: Though she had no doubt that C.L. suffered from a mental disorder at the time he committed the offences, the trial judge ruled that C.L. had not proven on a balance of probabilities that his mental disorders "rendered [him] incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong" as set out in s. 16(1) of the *Criminal Code*. With the guidance of the leading cases interpreting these provisions, including *R v Landry*, [1991] 1 SCR 99 (*Landry*), *R v Cooper*, [1980] 1 SCR 1149 (*Cooper*), *R v Chaulk*, [1990] 3 SCR 1303 (*Chaulk*), and *R v Oommen*, [1994] 2 SCR 507 (*Oommen*), the trial judge reviewed the evidence or lack of evidence to determine whether C.L. had proven on a balance of probabilities that he was NCR

according to the meaning of one or the other of the two branches of the test, these being: 1) was C.L. rendered incapable of appreciating the nature or quality of the act or omission, or 2) was C.L. incapable of knowing the act or omission was wrong? In conducting this review, she was mindful that the first branch of the test as restated in *Cooper* required her to ask whether C.L. had "the ability to perceive the consequences, impact and results of a physical act," and that as concerns the second branch of the test, in accordance with *Chaulk* and *Oommen* she was to ask whether the evidence satisfied her on a balance of probabilities that, by reason of mental disorder at the time of the offence, C.L. "was deprived of the capacity for rational perception and consequently the capacity to know that the act was wrong in the particular circumstances of the case, as well as the ability to make a rational choice about whether to do it." The court added further that "wrong" meant morally wrong according to a "public morality standard;" that C.L. must demonstrate his mental disorder prevented him from both knowing what he did was contrary to a societal standard of morality and being unable to "apply that knowledge in a rational way to the act that is the subject of the offence." With respect to the expert testimony of the defence, the trial judge expressed that it did not have the persuasive weight a court ordered assessment would have had because it lacked the clinical stringency of such an assessment. On her review of the evidence with respect to the first branch of the test, the trial judge disagreed with the opinion of the expert witnesses that due to his mental state at the time of the offence, C.L. did not know what he was doing because he was overwhelmed by "persecutory and grandiose delusions," countering that in his statement to the police, C.L. demonstrated that he knew he had touched the complainant's vagina with his hands and penis, and she had "felt that touching", and whether he did the touching for "investigatory reasons, rather than sexual gratification" was of no consequence to the NCR inquiry. As to her review of the evidence related to the second branch of the inquiry, the trial judge again concluded that in what he said in his warned statement and in what he failed to tell his own experts, he demonstrated that he was aware that what he did was morally wrong in the sense that "society would view it as morally wrong for him to sexually touch the complainant." The trial judge also found that C.L. had failed to prove he was unable to rationally apply the knowledge of the wrongness of his actions. The defence experts had not explained the link "between C.L.'s mental illnesses, their effects, and his ultimate criminal acts," and C.L. himself expressed an understanding that he should not be doing these things to the complainant and should have stopped doing them.

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***R v Dr. U.*, 2022 SKQB 20** (not yet on CanLII)

Scherman, 2022-01-19 (QB22016)

Criminal Law - Assault - Sexual Assault
Criminal Law - Evidence - Witness - Expert

The accused, a gastroenterologist, was charged with seven counts of sexual assault relating to five of his patients, the complainants. The Crown sought to have a gastroenterologist practicing in Ontario, Dr. Lumb, qualified as an expert in the medical practice of that specialty with specific reference to diagnosis, patient examinations, endoscopic procedures, treatments, patient care and professional standards and responsibilities appropriate to the practice of gastroenterology and entitled to give opinion evidence regarding these topics. A voir dire was held to determine the admissibility of Dr. Lumb's expert evidence. The Crown had provided the defence with all their written communications with Dr. Lumb and drafts of his reports. The defence had utilized these

documents in their cross-examination of Dr. Lumb in the voir dire. The defence took the position that the anticipated evidence of Dr. Lumb should not be admitted. It submitted that 1) the requirements of necessity and relevance had not been met with respect to his anticipated testimony; and 2) the requirement that Dr. Lumb be independent and impartial had not been met. With regard to his independence, the defence pointed to the following: Dr. Lumb answered that he owed his duty to the Crown to the question posed in the voir dire; in his cross-examination, he testified that he had never previously testified as an expert witness in court and that Queen's Bench rule 5-37 had not been brought to his attention; his reports and opinions had not contained the certification called for by Queen's Bench rule 5-37(3); and finally, Dr. Lumb had altered his draft report in respect of one complainant after Crown counsel had offered comments. Respecting his impartiality, the defence argued that Dr. Lumb had demonstrated a lack thereof in his descriptions of the complainant's experiences where he showed he had become an advocate for the Crown's position, had strayed into arguing in support of the facts alleged by the complainants, and had lost his objectivity and was no longer impartial as regarded the accused.

HELD: The court ordered that Dr. Lumb be qualified as an expert in the practice of gastroenterology with specific reference to the matters described above and was entitled to give opinion evidence thereon. His opinion evidence would be admissible into evidence in relation to whether the alleged touchings, examinations and procedures identified by the complainants in their evidence as the basis for their allegations of sexual assault were done for a proper medical purpose but his opinion evidence respecting the impact upon the complainants of touchings and examinations would not be admissible. The court examined the criteria set out in *R v Mohan* ([1994] 2 SCR 9), specifically to the objections of defence, and found that: 1) the expert evidence directed at the question of whether each of the alleged touchings was for a proper medical purpose was clearly legally relevant to the ultimate issue of whether sexual assaults occurred. The proposed evidence of Dr. Lumb met the test of necessity because without it, the court would be unable to decide, in the context of each complainant's medical conditions, whether the alleged touching was done for proper medical purposes. The benefits to be derived from such evidence outweighed the costs and potential prejudices to the accused. With respect to the defence's concerns regarding Dr. Lumb's independence, it found that that they did not justify a ruling that opinion evidence from him on the issue of whether each of the alleged touchings was for a proper medical purpose should not be admitted. It noted that: Dr. Lumb explained in further questioning that he did understand his role was to provide independent opinion, and when he answered "the Crown" he intended to say the court; despite his having no prior experience, it was satisfied that Dr. Lumb understood his duty; once he was informed of the requirements of Queen's Bench rule 5-37(2), he agreed to provide evidence that was related only to matters within his area of expertise; the failure to provide certification was the fault of the Crown, not Dr. Lumb; and nothing in the communications between the Crown and Dr. Lumb was inappropriate or provided any reasonable basis to conclude that his independence was compromised. Further, it did not accept that the evidence relied upon by the defence established a realistic concern that Dr. Lumb had become an advocate for the Crown. The reports had gone beyond giving focused opinions on the narrow issue of proper medical purpose, but Dr. Lumb's views of the nature of proper examination practices would have some relevance in understanding what is appropriate. If his opinion evidence given at trial included such opinions, the issue could be dealt with at that time or in the weighing of the evidence.

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***Anderson v Forsyth*, 2022 SKQB 21**

Goebel, 2022-01-21 (QB22031)

Family Law - Family Property - Contract - Enforcement
Civil Procedure - Family Law - Minutes of Settlement

The petitioner wife commenced a petition in 2013 related to issues of spousal support and property following separation. In 2018, the parties and their counsel participated in a pre-trial conference, reached agreement and executed minutes of settlement. The agreement dealt with divorce, spousal support for the petitioner and the division of the value of family property. With respect to the latter, the gist of the agreement was to allow the respondent to retain the family farm corporation as his sole property. The petitioner promised to transfer her interest in lands such as the home quarter, and for enumerated sections to be sold and the proceeds of sale to be divided. The presiding judge endorsed the court file: "settlement reached on both division of property and spousal support". The parties encountered difficulties implementing the agreement and the pre-trial conference judge was consulted. Her endorsements on the file indicated that she advised the parties should resolve their dispute by themselves or a party should bring an application pursuant to s. 29 of *The Queen's Bench Act, 1998* (QBA) to get judgment in the terms of the agreement and at that time, the parties could make all arguments regarding validity of the agreement. The parties could not resolve their differences and in December 2020, the petitioner filed a notice of application that sought an order directing that the registrar schedule a date for a pre-trial conference or alternatively, a trial. The petitioner claimed that the minutes were not based on informed consent, were unconscionable based upon her allegations that the respondent failed to provide full and honest disclosure, and that he diverted farm property or misrepresented the value of farm property and facts associated with his income. The respondent filed a notice of application and indicated that he was seeking judgment pursuant to s. 29 of the QBA in relation to the minutes. At the hearing of the competing applications, the petitioner argued that the minutes related to property settlement did not meet the criteria for a valid interspousal contract under *The Family Property Act*, nor did the provisions of settlement fall within the analysis required by *Miglin* (2003 SCC 24). The respondent objected to the petitioner's application and argued that the pre-trial judge ordered a s. 29 application under the QBA and that was determinative. The parties then requested further direction from the hearing judge before proceeding on the merits of their applications and for a threshold determination respecting the issues. The issues were defined as: 1) whether the court had jurisdiction to grant judgment in a summary fashion in a family law matter where minutes of settlement were concluded at a pre-trial conference; 2) what legal issues were raised by the s. 29 application; 3) whether evidence of what occurred in the course of the pre-trial conference was admissible; and 4) whether there was sufficient uncontroverted evidence on material issues to determine the material issues on affidavit evidence or a trial was warranted.
HELD: The court issued a detailed order. Amongst its terms were that the petitioner's application be struck and the respondent's s. 29 application proceed to a summary hearing. The parties should be prepared to address whether the agreement had been concluded in consideration of whether: there was a meeting of the minds; there was a consensus on all the essential terms; and was the agreement conditional upon or subject to the execution of a formal document? If the requirements for an agreement were met, were there any reasons why the court should not grant judgment considering whether: the agreement is valid and enforceable having regard to the petitioner's allegations; the agreement is in substantial agreement with the objectives of the governing legislation; and was there evidence of new or changed circumstances that the agreement no longer reflects the parties' intentions as at the time of execution; whether there is sufficient uncontroverted evidence to make a fair determination of these issues or should a trial be held; and the appropriate determination of costs. The parties were given leave to file supplementary materials within prescribed time periods. Leave was given to cross-examine the other party on affidavit materials with respect to the value of the farming corporation prior to the summary hearing. It found with respect to each question that: 1) that it had jurisdiction in the

circumstances, and the respondent's application aligned with the jurisprudence and the direction of the pre-trial judge. The petitioner's application was dismissed, without prejudice to revisiting the relief requested if the agreement was ultimately set aside; 2) the legal issues pertinent to the s. 29 QBA application were as set out above; 3) it would decline to make a preliminary ruling respecting the admissibility of the evidence related to the pre-trial process and left it to be decided by the hearing judge; and 4) it would leave it to the hearing judge to determine whether viva voce testimony should be provided or whether the matter could be argued on the merits based on affidavit materials. As the respondent conceded that the affidavit evidence regarding the value of the farming corporation was clearly controverted, leave was given to each party to cross-examine the other on the materials in advance of the summary hearing date to pre-emptively address the conflicting evidence.

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***Maddess v Vallati*, 2022 SKQB 25**

Megaw, 2022-01-25 (QB22034)

Real Property - Certificate of Pending Litigation
Family Law - Common Law Relationship - Property Division

The petitioner applied for an order discharging the certificates of pending litigation registered by the respondent against the petitioner's farmland and home quarter. He also sought an order for the respondent to return a vehicle registered in his name and for which he was making payments. The parties were in the midst of family law litigation and there were factual disputes as to when they became spouses and the extent of the respondent's interest in the property that the petitioner owned prior to the commencement of the parties' relationship. The petitioner brought this application because he was trying to obtain financing for cash flow, and this necessitated that he execute a mortgage on the various farm properties, including the home quarter. The lands were affected by the certificates of pending litigation the respondent placed on the titles pursuant to s. 46 of *The Queen's Bench Act*, 1998. Amongst the arguments the petitioner made was that the respondent had no interest in any of the real property registered in his name because they were not spouses as defined by *The Family Property Act* (FPA) and therefore the certificates must be discharged. With respect to the vehicle, he advised that the respondent said she would return it but changed her mind. The respondent asserted that they were spouses as defined by the FPA and that she was entitled to an equal interest in the family home as well as to any increase in the value of the other farmland, and thus the certificates should remain in place. She advised that she kept the vehicle because she needed it to transport the infant child, and further, she had it in lieu of receiving spousal support. HELD: The petitioner's application was dismissed. The court found that in this interim application where the respondent had made a claim under the FPA, the question of her entitlement to a claim should be determined as soon as possible. It allowed the respondent to remain in possession of the vehicle because of the reason she provided, but she would be responsible for the monthly financing costs, insurance and registration.

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***D.R.C. v J.E.M.*, 2022 SKQB 26**

Robertson, 2022-01-28 (QB22017)

Family Law - Support - Child and Spousal Support - *Enforcement of Maintenance Orders Act* - Suspension of Driver's Licence

The applicant, D.R.C., applied to a judge of the Court of Queen's Bench (chambers judge) to cancel the suspension of his driver's licence pursuant to s. 43(1)(b) of *The Enforcement of Maintenance Orders Act* (Act). The chambers judge referred to the court record and the affidavit evidence filed for and against the application, noting that: D.R.C. had been ordered to pay interim child and spousal support in March, 2020; D.R.C. made no payments as required by the order and his driver's licence was suspended through the enforcement efforts of the Maintenance Enforcement Office (MEO); at the time of this application, his payments were in arrears totalling $44,840.93 dollars; D.R.C. was the major shareholder of a construction company which remained active; retained earnings of the company in 2021 were $91,870.44; D.R.C.'s 2020 declared income was $49,522.17; D.R.C. received $60,000.00 in Canada Emergency Relief Benefits in 2021 and owned residential property that generated rental income; he had borrowed money from his father to operate the construction business; he claimed he needed the licence suspension lifted because his inability to drive seriously threatened his health and that of his four children, because food and health needs could only be obtained forty kilometres away in Yorkton.
HELD: The application was dismissed. The chambers judge reviewed the facts before him in light of s. 43(1)(b) of the Act, and case law on point, concluding that this provision could not be interpreted as the applicant suggested because he had presented no evidence which could satisfy him that his health or his children's health "[was] or would be seriously threatened by the suspension." He commented that the very purpose of the legislation was to cause serious inconvenience to defaulting payors, and it was not in his power to relieve the applicant of the exact effect the legislation was designed to produce.

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***R v Sium*, 2022 SKQB 24**

Robertson, 2022-01-28 (QB22033)

Criminal Law - Assault - Sexual Assault - Sentencing

The accused was convicted after trial of committing sexual assault contrary to s. 271 of the *Criminal Code*. At the time of the offence in October 2021, the complainant was 19 years old and the accused was 32. They met for the first time at a party at which the complainant became severely intoxicated. She left with the accused in the belief he was taking her to a friend's house, but they went instead to a hotel where the accused rented a room. The complainant fell asleep and awoke to find the accused removing her pants and then forcibly engaging in sexual intercourse without her consent, and she then passed out again. In the complainant's victim impact statement, she described that she suffered anxiety and fear for her safety and had difficulty trusting other people. She

had blamed herself for what had happened for a long time. The accused had immigrated to Canada from Ethiopia when he was a child. His parents separated when he was seven and he had feelings of abandonment and neglect because of his father's absence in his life. He was raised by his mother who died in 2014. He completed high school in 2003 and then qualified as a crane operator in 2012 and had been employed as a contract labourer since then. He had a seven-year-old daughter, but had separated from her mother, his former common-law partner, in 2021. He visited the child and provided support. The accused's criminal record showed 17 convictions between 2004 and 2015. He had received carceral sentences for offences that included assaults causing bodily harm, possession of a loaded weapon, and possession for the purpose of trafficking. The accused reported as required on bail supervision and complied with the terms of his release order.
HELD: The accused received a sentence of 42 months. The court noted that the accused committed a major sexual assault. It is a serious offence and the accused's degree of responsibility was high: he took advantage of the complainant when she was inebriated and asleep and could not consent to sexual activity and then continued when she awoke in disregard for her lack of consent. The aggravating factors were: the accused's criminal record, although he had had no convictions since 2015; the planning aspect in taking the complainant to the hotel; taking advantage of a helpless victim; and that he caused her harm. The mitigating factor in the accused's favour was that he had been a contributing member of society for several years.

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***Canadian Pacific Railway Company v Saskatchewan*, 2022 SKQB 30**

Kilback, 2022-01-31 (QB22021)

Civil Procedure - Queen's Bench Rules, Rule 5-34(2)

The plaintiff, Canadian Pacific Railway Company, read in during a trial of its action against the defendant, the Government of Saskatchewan, evidence from the questioning of its representative. The defendant then applied pursuant to Queen's Bench rule 5-34(2) to tender explanatory read-ins from the answers given by the plaintiff's representative. It also argued that certain portions of read-ins tendered by the plaintiff should be redacted or not allowed because they contained references to legal advice.
HELD: The application was allowed in part. The court reviewed the general principles applicable to the use of explanatory evidence related to Queen's Bench rule 239, the predecessor to Queen's Bench rule 5-34, set out in *SaskPower International v UVA/B&V Ltd.*, 2008 SKQB 134. It then assessed each of the defendant's requests for read-ins to explain the plaintiff's representative's answers that had been read in by the plaintiff against those principles. It determined that it would permit the defendant to read in portions of the plaintiff's representative's response in four instances, on the basis that: the read-ins were so connected with the part put in by the plaintiff that the two should be considered together as necessary to understand the meaning of the representative's testimony; and the explanatory read-in would establish that the defendant was contesting or had not admitted certain facts or to clarify or explain evidence read in by the plaintiff. It dismissed other requests for explanatory read-ins on the basis that the defendant was using them as a pretence to introduce evidence on its own behalf that should only be allowed through testimony given at trial. It also dismissed the defendant's application to disallow the plaintiff's read-ins because they contained references to legal advice. The defendant had not cited any authority that read-ins containing such references constitute a "just exception" to the normal operation of Queen's Bench rule 5-34. In a separate ruling, the court had decided that the documents containing legal references were

admissible and had dismissed the defendant's request to redact them to remove the references (see: 2022 SKQB 28).

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***R v J.M.*, 2022 SKQB 36**

Scherman, 2022-02-07 (QB22029)

Criminal Law - Sexual Assault - Consent

The accused was charged with sexually assaulting the complainant between September 2015 and August 2016. The complainant reported the alleged sexual assaults in September 2019. At trial, the only evidence presented was the testimony of the complainant: the accused did not testify nor did the defence call any other evidence. The complainant testified that she was a Christian and believed "that sexual contact was to be within the confines of marriage." Her marriage to a minister had ended in 2014. She met the accused in 2015 when he began renovating a house she owned. They were both in their forties. The complainant had a career that involved delivering public education programs regarding HIV and the accused was unemployed. They decided to begin a romantic relationship and the complainant loaned the accused money and provided him with a credit card in his name, with the charges paid from her bank account. At times, the complainant would cut off the accused's access to use of the credit card if he gambled or went on social assistance. They did not engage in sexual intercourse for several months. At one point, the complainant showed the accused a video that she used in her work to help teenagers to understand consent. When examined and cross-examined about this incident, the complainant explained that she wanted to establish boundaries with him. She testified that because of her Christian beliefs, she never wanted sexual intercourse with the accused and would not permit him to touch her unless she was clothed. Eventually, sexual contact occurred and the complainant described a number of different incidents. On one occasion, the accused initiated anal intercourse with her and she said she had not expected it to happen and that they had never discussed it beforehand. Afterwards the accused asked her about it and she told him she didn't enjoy or want it. She testified that she had not consented to any of the incidents in which intercourse had occurred. Since ending her relationship with the accused, the complainant had remarried and began to experience feelings that her sexual purity had been violated during her relationship with the accused.
HELD: The accused was found guilty of sexually assaulting the complainant in the one incident involving anal sex. In that instance, the court found that the Crown had proven beyond a reasonable doubt that the actus reus occurred and that the complainant had not subjectively consented to it at the time. It found the evidence of the complainant to be both credible and reliable regarding this specific incident. There was no evidence to support the defence that the accused had an honest but mistaken belief in a communicated consent. It was not satisfied beyond a reasonable doubt regarding the other alleged sexual assaults that the Crown had proven the essential element of a subjective lack of consent on the part of the complainant. It noted that the complainant appeared to control the nature of the relationship with the accused.

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***Canadian Pacific Railway Company v Government of Saskatchewan*, 2022 SKQB 31**

Kilback, 2022-02-07 (QB22026)

Civil Procedure - *Queen's Bench Rules*, Rule 1-3, Rule 9-26

The defendant, the Government of Saskatchewan, applied pursuant to Queen's Bench rule 9-26 for a partial non-suit. The plaintiff, the Canadian Pacific Railway Company, had commenced an action for repayment of taxes it had paid to the defendant, relying upon a clause in an 1880 contract between it and the Government of Canada in which it was granted an exemption from taxes. The defendant brought this application with respect to a portion of the plaintiff's response to its request for particulars regarding the types of services pleaded in the plaintiff's statement of claim, for which the plaintiff claimed repayment of taxes under The Provincial Sales Tax. In its pleadings, the plaintiff had described the types as including professional services and other services such as repair and installation services, computer services and telecommunication services that were purchased or supplied to it in the construction or working of its railroad. The defendant took issue with the particulars the plaintiff provided respecting professional services as being engineering and legal services and for repair, installation, and computer and telecommunication services, arguing insufficient evidence had been called showing that the plaintiff used these two types of services in relation to its historic main line and therefore it failed to put forward a prima facie case for recovery of taxes on these services. It also argued that granting its application would be in the interests of efficiency and proportionality under Queen's Bench rule 1-3.
HELD: The application was dismissed. The court held that the relief sought, to dismiss a portion of a response to request for particulars, is not available under Queen's Bench rule 9-26, which can only be used to dismiss an action or cause of action as defined by Queen's Bench rule 17-1. The defendants had not provided any authority to support the proposition that a non-suit may be granted to dismiss a claim for a subset of damages claimed in an action where a prima facie case for the underlying cause of action is met. In light of this conclusion, the court did not find that it should grant the application under Queen's Bench rule 1-3, as that rule augments other rules and cannot be interpreted so as to subvert them. Furthermore, granting the application would not materially improve the efficient resolution of the claim as it would not relieve the defendant from calling all or a substantial portion of the evidence it would have to call in any case.

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***Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400*, 2022 SKQB 38**

Smith, 2022-02-07 (QB22040)

Administrative Law - Judicial Review - Labour Relations - Unfair Labour Practice
Labour - Certification of Amalgamated Employees

The Saskatoon Co-operative Association Limited (Saskatoon Co-op) brought an originating application to a judge of the Court of Queen's Bench (chambers judge) for judicial review of a decision of the Saskatchewan Labour Relations Board (board) finding that it had committed unfair labour practices by failing to recognize that the United Food and Commercial Workers, Local 1400

(union), the bargaining unit for Saskatoon Co-op employees, was also the exclusive bargaining unit for the employees who worked for two Co-ops amalgamated into the Saskatoon Co-op (amalgamated Co-ops), and by refusing to remit union dues on behalf of the employees of the amalgamated Co-ops without a vote from these employees to join the union (see: Saskatchewan Labour Relations Board File No. 145-19, 2021 CanLII 37009). Before examining the decision of the board, the chambers judge instructed himself with respect to the standard of review he was to apply by referencing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. He recognized that he was to respect the decision of the board and not disturb it unless it proved to be unreasonable, and "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." The chambers judge then went on to observe that the Board's decision was very thorough and dealt fully with all authorities referred to by the Saskatoon Co-op and the Union and considered all arguments put forward. As to the matter of a vote being required by the employees of the amalgamated Co-ops to show they wished to join the union, he noted the board referred to the certification order itself, which it found established an "all-employee bargaining unit with a provincial scope" which, of necessity, included the employees of the amalgamated Co-ops without the need for a vote. The chambers judge noted the authorities filed by the Saskatoon Co-op did not convince the board otherwise. He noted further that the board reasoned that the Saskatoon Co-op had no justification for not deducting union dues from the employees of the amalgamated Co-ops other than its untenable position that a vote was required before it was bound to recognize the union as a bargaining unit for the employees of the amalgamated Co-ops.
HELD: The chambers judge dismissed the application, concluding that the board's decision was reasonable in that it demonstrated internal coherence and a rational chain of analysis within the facts and law the board was bound to consider, in particular by its reliance on the original certification order.

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***101297277 Saskatchewan Ltd v Copper Sands Land Corp.*, 2022 SKQB 39**

Scherman, 2022-02-08 (QB22041)

Debtor-Creditor Law - Receivership
Bankruptcy and Insolvency - Disclaiming Agreements
Bankruptcy and Insolvency - Interested Parties - Amending Receivership Order

The court-appointed receiver (receiver) for two secured creditors seeking to realize on their security following the default of two corporate debtors, Copper Sands Land Corp. (Copper Sands) and MDI Utility Corp. (MDI), which together carried on the business of a mobile home park called Copper Sands Mobile Home Park (Park), applied to the chambers judge for an order permitting it to disclaim a servicing agreement made between Copper Sands and MDI. In the same application, a secured creditor of MDI, Old Kent Road Financial Inc. (OKR), applied for an order that it be paid money it claimed to be entitled to under the servicing agreement and for amendments to the receivership order to allow that to happen. The chambers judge first reviewed the salient facts which included: Copper Sands was the developer of the Park and MDI the provider of essential services to the Park such as potable water and wastewater services; under the terms of the servicing agreement, MDI was to build the infrastructure needed to provide these

services; Copper Sands paid MDI a monthly fee for these services; the Park was located on land owned by Copper Sands, and the treatment facilities, such as they were, on land owned by MDI (LSD 4); OKR injected funds into MDI and in exchange took an assignment of the servicing agreement and a first mortgage against LSD 4; LSD 4 was later transferred to OKR and leased back to MDI; the water and waste treatment facilities were not completed by MDI or OKR; Park residents were required to boil water and sewage lagoons did not comply with provincial standards; the receiver was arranging for a water main to be connected to RM water supplies for the Park and to contract to truck waste water away from the Park; OKR took control of MDI's board of directors; OKR took no steps to honour MDI's obligations under the servicing agreement; and OKR claimed it was owed $241,708.00 in fees under the servicing agreement.

HELD: The chambers judge allowed the receiver's application to disclaim the servicing agreement once it had put in place alternate arrangements for provision of water and sewage services to Park residences in compliance with provincial standards. In so ruling, he referred to *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc. and Phenomenome Laboratory Services Inc.* (19 July 2016) Saskatoon, QBG 1639/15 (QB), which stated the law on this point correctly: a receiver is not bound by a debtor's contracts and may choose to disclaim all contracts except those which have granted a property right, if in doing so the receiver acts "in a fair and equitable manner having regard to the interests of all parties not preferring one party over another." With this principle in mind, he found it was in the best interests of the residents of the park that the servicing agreement be disclaimed by the receiver so that any connection with MDI could be severed, allowing for the water and sewage problems to be properly dealt with. Next, the chambers judge ruled that OKR's applications should be dismissed. He considered OKR's claim that it be paid the full-service fees under the servicing agreement and pending payment, the servicing agreement should not be disclaimed. The chambers judge disagreed, stating that MDI had been in breach of its obligations under the servicing agreement for a number of years, and OKR had not volunteered to take these over. He could see no legal or equitable basis for payment of the service fees claimed by OKR, and as such, no reason to delay disclaiming the service agreement pending payment. However, on a close reading of the servicing agreement, and in considering that the receiver had taken possession of LSD 4 out of necessity to remedy MDI's non-compliance, the chambers judge allowed payment of 10% of the monthly service fee to OKR, which represented leasing charges for the MDI facility to be paid by the receiver on behalf of Copper Sands to OKR as assignee from MDI of the servicing agreement.

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***R v Levac*, 2022 SKPC 7**

Hinds, 2022-02-14 (PC22005)

Criminal Law - Aggravated Assault - Elements of Offence
Criminal Law - Aggravated Assault - Self-Defence
Criminal Law - Credibility - Reasonable Doubt

The judge of the Provincial Court (trial judge) was required to decide whether the Crown had proven that the accused, P.L.L., was guilty of committing the offence of aggravated assault by wounding. To do so, he needed to make findings of fact, including credibility, from the evidence adduced by the Crown, which included surveillance video and the testimony of the accused, and to

apply these findings to the elements of the offence of aggravated assault and the defence of self-defence, which facts he determined were as follows: the accused, P.L.L., was an inmate of the Regina Correctional Centre at the time of the offence, as was the victim, C.O.L.; C.O.L. had been placed in the same cell as P.L.L. upon his arrival a few days before the alleged offence; at the time of the offence, P.L.L. was 6'1" tall and weighed 240 pounds and C.O.L. was smaller and lighter; the surveillance video recorded the altercation that led to the charge, though it did not have sound; it showed C.O.L. walking "purposely" in the direction of P.L.L. in a hallway towards the cell they shared; C.O.L. appeared to avoid eye contact with P.L.L.as he walked towards him; P.L.L. looked at C.O.L. and turned his head towards C.O.L as he walked past him; C.O.L. continued to walk past P.L.L. for about five feet, then stopped walking forward, and turned 180 degrees, facing P.L.L.; the two of them talked to each other for about 30 seconds, and as they talked, C.O.L. moved within one foot of P.L.L.; C.O.L. then turned and walked away from P.L.L. with his back to him; P.L.L. then struck C.O.L in the back of the head and neck numerous times, and once in the face; then put C.O.L. in a choke hold until correctional officers arrived and separated them; C.O.L. was seriously injured to his neck and back, and face, suffering lacerations including a "gaping wound," which bled profusely; corrections officers were located near the area of the incident; corrections officers "attempt to maintain a safe, secure unit," and they frequently accommodate inmates' requests to move off a unit for safety concerns; there is, however, an "inmate code;" in accordance with this code, an inmate might be labelled a rat for appearing to ask for the assistance of guards in inmate disputes; this label stays with an inmate, and makes him vulnerable to attack by other inmates; the testimony of P.L.L. was credible in that P.L.L.'s movements as seen on the surveillance video were consistent with what he testified C.O.L. had told him before he applied force to him; he testified that C.O.L. aggressively said he should "pack… [his] shit" (leave the unit), to which P.L.L. responded he was not going anywhere; that C.O.L. told him he had no choice, to which P.L.L. retorted "you can't make me," at which point C.O.L. threatened to get his shank to make him leave, then turned and went towards the cell they were sharing a few feet away; and the trial judge believed P.L.L. that he was sincerely fearful that C.O.L. was getting a shank to use on him at the time he attacked him.

HELD: Having these findings in mind, the trial judge then applied the relevant case law to the questions he was required to decide, being whether the Crown had proven beyond a reasonable doubt that the altercation was an aggravated assault by wounding, and whether the Crown had "negatived" the defence of self-defence. Ruling that the Crown had met its onus of proof, he convicted P.L.L. of the offence as charged. He first applied the relevant law to the evidence adduced with respect to the elements of the offence of aggravated assault, as established by ss. 265, 266, and 268 of the *Criminal Code*, and was satisfied that all the required elements were proven: P.L.L. intentionally applied force to C.O.L., which he did not consent to, and to which P.L.L. knew he did not consent, resulting in a wound, that is, a "break in the continuity of the whole skin that constitutes serious bodily harm" and which he should have known would likely cause C.O.L. bodily harm. As to the defence of self-defence, the trial judge first determined that the evidence proved there was an air of reality to the defence (see: *R v Peroz*, 2019 SKQB 298). Once he made that threshold ruling, he turned to *R v Khill*, 2021 SCC 37 (*Khill*) to guide him in his analysis of the self-defence provisions codified in s. 34 of the Criminal Code. He recognized that *Khill* required him to determine whether P.L.L. "believed on reasonable grounds" that C.O.L. threatened to use force against him, that he applied force against C.O.L. to protect himself from this threat of force, and that "the act committed [was] reasonable" on a modified objective standard; that is, in accordance with *Khill*, he was to ask what a reasonable person would have done in the circumstances, assuming one "who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused's belief or actions." The court then analyzed the factors enumerated in s. 34(2). He found P.L.L.'s use of force was not justified under s. 34(2)(b) because a reasonable person in the shoes of P.L.L. would not have acted in accordance with the inmate code but would have approached the corrections officers directly

instead of attacking C.O.L and putting him in a choke hold. He concluded after considering s. 34(2)(c) that P.L.L.'s role in the attack contributed to the threat of force being used on him because he escalated the situation by being "unnecessarily confrontational" and found also that P.L.L. was the bigger of the two men (s.34(2)(e)) and his use of force was excessive (s. 34(2)(g)). Following this analysis, he concluded that P.L.L.'s assault on C.O.L. was not objectively reasonable and, as such, he did not have a reasonable doubt that the Crown had negatived self-defence.

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***R v Whitefish*, 2022 SKPC 9**

McAuley, 2022-02-15 (PC22007)

Criminal Law - Driving over 0.08
Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 10(b)

The trial judge dismissed a charge of impaired driving for lack of evidence that the accused's ability to operate a motor vehicle was impaired to any degree by alcohol, and dismissed a charge of operating a motor vehicle while over the legal limit following the accused's successful *Charter* motion under ss. 8, 9 and 10(b) of the *Charter* which resulted in the exclusion of the evidence of the Certificate of Qualified Technician under s. 24(2) on the basis of the facts she found and in consideration of the applicable law. The accused was the operator of a motor vehicle which was the subject of a number of complaints from the public that its occupants were intoxicated by alcohol, and a person at the Miami Gas Bar had been assaulted by occupants of the motor vehicle; police pursued the suspect vehicle, which pursuit ended when the vehicle veered into the water on Miami Beach; the occupants were detained by a peace officer, Cst. Hall of the RCMP, in relation to the assault complaint; the accused was in the driver's seat; empty alcohol bottles were strewn throughout the vehicle and a half empty bottle of vodka was found in the middle console; Cst. Hall observed indicia of impairment by alcohol from the accused and made an ASD demand that the accused failed, which prompted Cst. Hall to make a breath demand and provide the accused with rights to counsel and police warnings; Cst. Hall took charge of the accused, whom he placed in his police vehicle; the other three passengers were escorted to their homes on the Big River First Nation by a second officer, Cst. Duval of the RCMP; the band office was a few minutes away from Miami Beach; Cst. Hall testified that a tow truck was called to impound the vehicle, but he did not remember how or when that was done, as he had not recorded the times in his notebook or how long it would take for the tow truck to arrive; he testified it was RCMP policy to not leave seized vehicles unattended; Cst. Hall could not explain why Cst. Duval did not stay with the seized vehicle, or why it was necessary to escort the passengers home, as they were not under arrest; at the detachment, the accused elected to call legal aid duty counsel for legal advice prior to providing a breath sample, calling twice, but each time hanging up because he had been put on hold; when asked if he wanted to call again, he expressed annoyance at being put on hold and said, "that's fine; we'll call again later"; after providing the first sample, the accused called legal aid duty counsel and was provided with legal advice, and then provided a second suitable sample; the elapsed time between the police stop and giving the second sample was two hours and 57 minutes.
HELD: The trial judge determined whether the first sample was provided "as soon as practicable" as required by the *Criminal Code*

and referred to cases about the reasonableness of delays while waiting for a tow truck to impound a seized vehicle. She decided that it appeared Cst. Hall had simply followed policy without putting his mind to whether alternatives to simply “waiting in limbo” were available to him, without any idea when the tow truck might arrive. He believed Cst. Hall did not have the accused’s *Charter* rights front and centre; the delay was not reasonable, and the first sample not provided as soon as practicable. As such, she ruled that the defence had proven that the accused’s rights under ss. 8 and 9 had been infringed. She also ruled that the defence had proven the accused’s rights to counsel pursuant to s. 10(b) of the *Charter* had been breached because he provided incriminating evidence in the form of the first breath sample without having been provided with legal advice, though he had not expressly and unequivocally waived his rights to counsel. His saying “that’s fine; we’ll call later” was ambiguous, and so it was incumbent on Cst. Hall to clarify with him what he meant, whether he did not want legal advice anymore or, if not, when he wished to exercise that right. Having found the accused had proven his *Charter* rights had been breached, she went on to consider whether the Certificate of Qualified Technician should be excluded pursuant to s. 24(2) of the *Charter*, finding, following the Grant analysis, that the evidence should be excluded as its admission would bring the administration of justice into disrepute. She reasoned that the ss. 8 and 9 breaches were significant since the accused was deprived of his freedom of movement by the state in unjustified circumstances; and the delay could have affected the breath sample readings. She said the s.10(b) breach was also serious and impactful since the obtaining of conscripted evidence without the benefit of counsel was always of great concern to society. In weighing the various factors, society’s interest in trying the matter on its merits was outweighed by the significance of the breaches to society at large and to the accused in particular.

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