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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***Zielke v Law Society of Saskatchewan*, 2021 SKCA 156**

Caldwell Leurer Tholl, 2021-12-01 (CA21156)

Practice of Law - Non-Lawyers Practising Law - Exceptions - Appeal

The appellant, M.Z., appealed to the Court of Appeal (court) the decision of the chambers judge granting the Law Society of Saskatchewan (LSS) an injunction pursuant to s. 82 of *The Legal Profession Act, 1990* (LPA) enjoining him from representing persons for a fee in the Provincial Court for offences under *The Traffic Safety Act* (TSA) and as parties in claims made pursuant to *The Smalls Claims Act, 2016* (SCA) (see: *Law Society of Saskatchewan v Zielke*, 2019 SKQB 166, 42 CPC (8th) 116 (chambers decision)). It was not contested by M.Z. that he was engaged in such services for a fee. The court reviewed the chambers decision and observed that in his interpretation of the applicable legislation, being ss. 30(1) and (2) of the LPA, the relevant provisions of *The Summary Offences Procedure Act* (SOPA) and the SCA, the chambers judge justified his decision to find M.Z. had breached the prohibition against non-lawyers practising in any court in Saskatchewan because "charging a fee is not expressly permitted in the SOPA and SCA" and is expressly prohibited by the LPA. The court observed further that the reasoning of the chambers judge was dominated by the distinction between acting in court as an agent for a fee,

Civil Procedure - *Queen's Bench Rules*, Rule 7-1, Determination of a Question

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which he found was not allowed by s. 30(1)(b) of the LPA, and acting as an agent free of charge, which he found was allowed by implication. The court stated its analysis was primarily one of statutory interpretation and was to be reviewed for errors of law on a correctness standard. HELD: The appeal was allowed, and the injunction against M.Z. was lifted. The court made reference throughout to the modern rules of statutory interpretation as pronounced in s. 2-10 of The Legislation Act, which establishes that the words in an Act are " to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature" and that an Act is to be construed as being remedial and "is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects." The court recognized that this provision was a codification of the decision of the Supreme Court of Canada, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27. It also referred to specific rules of construction when required. The court reasoned first that the chambers judge erred in interpreting ss. 30(1)(a), (b), (c), and (d) of the LPA, and did so by not heeding the plain language of s. 30(1) and the four specific prohibitions created by subsections (a), (b), (c), and (d), of which only (d) bars the charging of a fee or reward for "perform[ing] any work or service." The court concluded that "work or service" was in the nature of solicitor practise which could be done gratis, but the other three subsections related to practise before the courts which could not be performed in any circumstances by a non-lawyer, whether charging a fee or not. The court then turned to the question of how to reconcile the absolute bar against a non-lawyer practising in the courts contained in s 30(1) of the LPA, and the permitted use of "agents" in the SOPA and the SCA, which the court found extended well beyond simple appearances for adjournments, but encompassed acting as lawyers, including cross-examination of witnesses and argument. The court stated, with respect to the SOPA, that the Act itself by way of s. 51 resolved the conflict between it and the LPA by providing that where enactments conflict with SOPA, SOPA prevails. M.Z. was permitted to act for persons charged with traffic offences subject to the specific limitations set out in the SOPA. As to charging fees for this work, the court was aware that the SOPA and the SCA were silent as to charging fees, but did not disallow them. In deciding that fees were allowed to be charged for agency work under SOPA, the court looked at the purpose of permitting agents to perform functions in court analogous to lawyers, concluding that such was allowed in order to benefit the courts as a whole, since unrepresented defendants were a burden to the justice system. By not allowing paid agents, the field of potential agents would be drastically restricted and, as a result, this policy objective thwarted, which could not have been intended by the drafters. Turning more briefly to the SCA, the court pointed to s. 33 which states that parties may be "represented at trial by lawyers or agents," and by the rule of statutory interpretation which holds that all words in a statute are to be given a specific meaning, "agents" must mean a group not included with lawyers. As such, the court determined that the

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SCA allowed non-lawyers to represent parties in small claims matters in the Provincial Court, in direct conflict with ss. 30(1)(a) and (d), and that, unlike the SOPA, neither provision can give way to the other. The solution implemented by the court, and supported by the case law, was one based on the interpretive notion that an exception to the application of ss. 30(1)(a) and (d) of the LPA to s.33 of the SCA was carved out because the latter created a "positive entitlement" to representation by an agent, leaving ss. 30(1)(a) and (d) otherwise intact "without qualification as to whether the agent received payment or reward."

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***Walmart Canada Corp. v Estevan (City)*, 2021 SKCA 157**

Richards Jackson Barrington-Foote, 2021-12-02 (CA21157)

Municipal Law - Appeal - Property Tax - Assessment
Statutes - Interpretation - *Cities Act*, Section 163(f.1)(iii)

The appellant, Walmart Canada Corp. (Walmart), which operated a big box store (building) in the City of Estevan, appealed the decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee). The Court of Appeal (court), in reviewing the record of proceedings, was cognizant that Walmart had appealed the assessment of the assessor, SAMA, to the Board of Revision (board) on the ground that SAMA used an income approach to assess the property and not a cost approach in circumstances that it believed made the income approach unsuitable for arriving at a fair and equitable assessment value of the property. In particular, Walmart argued that the properties used in arriving at the capitalization rate by which the assessed value of the building was determined were so dissimilar to its store that the capitalization rate achieved was skewed to such an extent, and was so unfair and inequitable to Walmart, as to amount to an assessment that displaced the cornerstone of property assessment, that is, the market valuation standard (MVS) adopted in ss. 163(f.1), 163(f.3), 164.1(2), and 165(3) of *The Cities Act* (Act). The court was also aware from the record that at the board level, SAMA first defended its use of the income approach but, in the alternative, argued against Walmart's proposal that the cost approach be used without the application of a market adjustment factor (MAF). Walmart did not apply such a factor in its proposal, arguing before the board that no comparables existed by which to arrive at the MAF. SAMA, on the other hand, maintained that the six "Appendix K sales" it had filed before the board were adequate for the purpose of calculating a MAF. The board agreed with Walmart and ordered that SAMA reassess the building

based on the cost approach method and a neutral MAF of 1.0. SAMA appealed to the committee. The court canvassed that appeal and its results, observing that the committee decided that the cost approach was the preferable method by which to assess the store, that MVS dictated that a MAF calculation be applied to the value of the store, and that the Appendix K sales be used for that purpose. Walmart did not agree that the Act required the application of a MAF when no suitable comparable sales were available and appealed to the court. The court acknowledged that it was required to determine whether the decision of the committee that the MVS necessitated the application of a MAF in every assessment was an error of law and therefore unreasonable. HELD: The appeal was allowed, and the matter returned to the committee to deal with the issue "of the comparability of the properties said by SAMA to be appropriate for developing a MAF." The court reviewed the Act, and in particular the MVS provisions, and noted that by s. 163(f.1)(iii), the MVS requires that "the assessed value of a property reflect… typical market conditions for similar properties," and so, the court held, a MAF fashioned from dissimilar comparables cannot achieve equity, since equity will only be recognized as having been achieved by close adherence to the MVS. The court also pointed to the Manual, Handbook and Cost Guide by which SAMA conducts its assessments and noted that the Cost Guide requires that in calculating the MAF, the assessor must identify similar properties, and in certain circumstances the Cost Guide stated that an MAF need not be part of the valuation. As such, the court said neither the Act nor the Cost Guide mandated the use of a MAF to achieve the MVS. The court went on to find that the committee erred in law by requiring SAMA to determine the MAF from the Appendix K sales without first determining whether it was reasonable for the board to conclude that the Appendix K sales lacked comparability with the building, and hence the court returned the matter to the committee for it to determine the comparability of the Appendix K sales with the building.

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***Walmart Canada Corp. v Prince Albert (City)*, 2021 SKCA 158**

Richards Jackson Barrington-Foote, 2021-12-02 (CA21158)

Municipal Law - Appeal - Property Tax - Assessment

The Court of Appeal (court) considered an appeal by Walmart Canada Corp. (Walmart) from a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee) allowing the appeal of the City of Prince Albert (city) from the decision of the Board of Revision (board) which had rejected the assessment of the assessor imposing a market adjustment factor (MAF) of 1.43 to Walmart's store (building). The court stated this appeal raised similar questions to *Walmart Canada Corp. v Estevan (City)*, 2021 SKCA 157 (*Walmart*

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Estevan), and that it accepted the evidence and arguments from that case. The court reviewed the proceedings below: the assessor used a cost approach to assess the building, a method which required calculating the replacement cost new of the building adjusted first for depreciation to arrive at a RCNLD; the assessor then calculated a market adjustment factor (MAF) using the methodology set out in the Cost Guide developed by SAMA to further adjust the RCNLD; the Cost Guide required the assessor to first identify "improved properties with comparable buildings or structures that are sales;" the assessor chose ten properties in the city to compile the data for the MAF calculation and arrived at a MAF of 1.43; Walmart did not agree with the assessment and appealed to the board; Walmart argued before the board that the ten properties were not comparable to its building and were not valid for calculating the MAF, and that a "neutral MAF of 1.0" should be applied; in its analysis, the board reviewed "four principle components of similarity" concluding that the properties identified by the assessor were dissimilar to the building and no "market evidence" existed to justify the MAF of 1.43, and agreed with Walmart to apply a neutral MAF of 1.0; the city took the matter up with the committee, which reinstated the MAF of 1.43, reasoning that the market valuation standard (MVS) mandated by ss. 163(f.1) and 165(5) of *The Cities Act* to achieve equity and fairness in property assessments required that a MAF be calculated and applied even if the assessor were limited to properties in the city which might not be ideal comparators; and that a neutral MAF could not be part of the MVS. Before the court, Walmart argued, as it did in Walmart Estevan, 1) that the committee erred in law by finding that the MVS required that a meaningful MAF be arrived at, 2) that the committee erred in law when it found that "MVS and equity are met by applying a MAF to properties that are not comparable to the properties in the MAF group if they are 'the only evidence of market conditions'", and 3) that the committee erred in law by overturning the board's factual finding concerning the dissimilarity of the properties to the building without first finding them unreasonable.
HELD: The court allowed the appeal on all three grounds. As to ground 1), it ruled in the affirmative and directed itself *to Walmart Estevan*; as to grounds 2) and 3), the court found that the committee erred because the MVS and equity could never be achieved if properties dissimilar to the building were used as comparators to arrive at the MAF, and the committee could not overturn the board without first ruling that the board's factual findings about the incomparability of the properties identified by the assessor were unreasonable. In the result, the matter was returned to the committee to evaluate the reasonableness of the board's finding that the identified properties were not comparable to the building.

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***Harsch v Saskatchewan Government Insurance*, 2021 SKCA 159**

Ryan-Froslie Schwann Kalmakoff, 2021-12-02 (CA21159)

Civil Procedure - Pleadings - Statement of Claim - Striking Out - Appeal
Statutes - Interpretation - *Automobile Accident Insurance Act*, Section 86.1

The appellant, J.H., appealed to the Court of Appeal (court) the decision of the chambers judge striking her statement of claim under Rule 7-9(2)(a) against the defendant R.B. as it did not disclose a reasonable cause of action. (See: *Harsch v Saskatchewan Government Insurance and Bernuy* (16 November 2020) Regina, QBG 1035 of 2019 (Sask QB)). The statement of claim alleged that R.B., "as an employee and representative of Saskatchewan Government Insurance, failed to act in good faith in her handling of the claim" in a number of enumerated ways. R.B., the personal injury representative working for SGI, had terminated J.H.'s no-fault benefits payable pursuant to *The Automobile Accident Insurance Act*, RSS 1978, c A-35 (Act) following an automobile accident in which J.H. was injured. The court agreed with the chambers judge that only the facts pleaded were to be considered in determining whether a reasonable cause of action was disclosed by the pleadings. The facts were assumed to be true for the purpose of the striking application. It also acknowledged that the decision to strike a claim was to be scrutinized on a standard of correctness. In canvassing the reasons of the chambers judge to strike the claim against R.B., the court noted that the chambers judge, though she reasoned correctly that J.H. need not plead that R.B. had acted with malice or intent to harm J.H., and that recklessness or serious carelessness can amount to bad faith, went on to hold that by failing to plead facts which if proven would displace the good faith immunity clause in s. 86.1 of the Act, J.H. fell short of proving absence of good faith on the part of R.B. The court noted further that the chambers judge believed no facts had been pled that opened the door for R.B. to be sued personally, separate from SGI, again because the facts failed to surmount the good faith immunity clause.

HELD: The court allowed the appeal and dismissed the application to strike the statement of claim, and in doing so referenced pertinent and authoritative case law and scholarly comment on the matters in issue. First, the court dealt with the duty of an insurer such as SGI to act in "utmost" good faith in its dealings with persons in the position of J.H. The court noted that such a duty was recognized at common law and was given legislative sanction as it pertained to SGI in s. 171 of the Act (see: *Saskatchewan Government Insurance v Schira*, 2020 SKCA 88). The court also stated that a breach of the duty of good faith is actionable independently of the contract of insurance and will be proven when bad faith is shown by the insurer. In the case of no-fault automobile accident insurers like SGI, bad faith will be shown when "the denial [of benefits] was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process:" *Fidler v Sun Life Insurance Company of Canada*, 2006 SCC 30 (*Fidler*). The court then went on to consider the reasoning of the chambers judge with respect to her finding that material facts that could displace the good faith immunity clause were absent from R.B.'s pleadings, concluding that the chambers judge erred in law by striking the claim because J.H. had pled facts which could support a failure to act in good faith as established by such cases as *Fidler*. The court then reviewed the law governing pleading a claim against an individual adjuster employed by an insurer, and in doing so extracted two principles, that: 1) the actions of the employee must be tortious in their own right and; 2) the law did not close the door to individual liability of an employee acting within the scope of their employment if the employee's tortious actions exhibited "a separate identity or interest from that of the corporation or employer so as to make the act or

conduct complained of their own." The court was satisfied that J.H. had pled facts which could prove the individual liability of R.B. for failing personally to act in utmost good faith in her dealings with J.H. and so found the chambers judge had erred in that regard as well. Fundamentally, the court said, the chambers judge erred in law because her reasons showed that she believed that to support the claim against R.B., J.H was required to plead facts which could prove the good faith immunity clause was not an absolute bar to her action against R.B. when the law was clear that a plaintiff was not required to plead facts which could overcome a defence to the claim, and that s. 86(1) of the Act was "simply a defence and, at that, hinges on a factual finding of good faith:" *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98.

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***MacInnis v Bayer Inc.*, 2021 SKCA 160**

Barrington-Foote, 2021-12-02 (CA21160)

Civil Procedure - Appeal - Notice of Appeal - Application to Extend Time

The applicant, A.M., applied to a Court of Queen's Bench judge (chambers judge) for certification of a class action against Bayer Inc. and Bayer Healthcare LLC. (Bayer) involving Essure, "a permanent form of female contraception." She was represented by E.F.A. Merchant, Q.C. and other lawyers from Merchant Law Group (MLG). The chambers judge dismissed the certification application. A.M. applied for leave to appeal to the Court of Appeal (court) and was granted leave to do so by a chambers judge of the court on March 30, 2021. By the Court of Appeal Rules (Rules), A.M. was required to serve and file the notice of appeal within fourteen days of leave being granted. The record showed that the notice of appeal was not served and filed within the prescribed time, and in spite of efforts by court registry staff to have the matter dealt with in some way, no application for leave to extend the time to serve and file the notice of appeal on Bayer was brought until October 7, 2021, and heard on November 24, 2021.
HELD: The chambers judge granted the application, which was taken pursuant to s. 71 of the Rules and ordered that upon the notice of appeal being served on Bayer by December 14, 2021, along with proof of service, the appeal could proceed on the condition that the applicant's factum and appeal book were also filed before that day. He reviewed Rule 71 which permits a judge of the court to enlarge or abridge time periods fixed by the Rules, and the case law pertaining to Rule 71, in particular, *Wood v Wood*, 2001 SKCA 2, and stated that he had "unfettered discretion" provided he acted judicially and took into account four considerations: 1) did the applicant have a true intention to appeal "while the right of appeal existed;" 2) was there an arguable case on appeal; 3) was the respondent likely to suffer prejudice if the application to enlarge the time was allowed; and 4) was there a reasonable explanation for the delay? The chambers judge made findings of fact from the affidavits filed and the court record, finding that 1) he was satisfied that A.M. had a bona fide intention to appeal before the allotted time had expired; 2) as leave had been granted to appeal, the requirement of an arguable case had been met; 3) he was not persuaded that Bayer would suffer any prejudice, and in particular was unconvinced by its argument that during the period at issue, 100 individual claimants had chosen to sue on their own and not be part of the class action, and so the delay caused it prejudice because it now had to defend more claims; and 4) weighing

against granting the application was the lack of a justifiable excuse for the significant delay, being that the excuse was the inaction of counsel due to “incompetent file management” and indifference to the Rules. In the balance, the chambers judge was satisfied that it was just and equitable to extend the time to file and serve the notice of appeal. He also ordered costs in the amount of $5000.00 in favour of the respondents payable forthwith.

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***Co-operators Life Insurance Company v The Spencer Health Network Inc.*, 2021 SKCA 161**

Jackson Tholl Kalmakoff, 2021-12-09 (CA21161)

Insurance - Contract - Interpretation - Appeal
Contract Law - Interpretation - Appeal

The appellant, the Co-operators Life Insurance Company, appealed from the trial decision of a Queen’s Bench judge that granted judgment in favour of the respondent/plaintiff, Spencer Health Network Inc. (see: 2018 SKQB 244). The parties had entered into a service agreement in 2001 and under its terms, the respondent contracted to provide vision care benefits (the Spencer plan) to individuals who had extended health care (EHC) benefit insurance under group contracts of insurance issued by the appellant. In exchange, the latter agreed to pay “access fees” to the respondent for individuals coming within EHC insurance plans. In 2008, the appellant informed the respondent that it had discovered that it made an overpayment to it regarding a specific contract for the Johnston Group Inc. (the Johnston contract) that did not fall within the terms of the service agreement. After receiving this notice, the respondent, having believed that the service agreement encompassed all individuals within the appellant’s book of business, then discovered that the appellant had not paid the access fees for other contracts that it considered similar to the Johnston contract and sued the appellant for breach of contract. The appellant counterclaimed to recover what it considered its overpayment with respect to the Johnston contract. The trial judge interpreted the service agreement and held that the appellant was required to pay access fees for all employees under group contracts of EHC insurance issued by it, whether or not they had access to the Spencer plan or were receiving benefits under it. Having determined that the only limiting factor in the service agreement was whether the appellant issued “a group contract of extended health insurance,” the trial judge turned to the question of which of the various contracts or arrangements referred to in the evidence came within this interpretation. The judge examined the evidence regarding the various and complicated types of contracts issued by the appellant and found that it was required to pay access fees for some, but not all of its insurance contracts or arrangements and ordered it to pay access fees to the respondent for the Johnston contract and all but one of the eight arrangements it had with Retailers, Wholesalers and Manufacturers Group Insurance Trust (RWAM). He awarded damages to the respondent for the value of the RWAM arrangements. He dismissed the appellant’s counterclaim as a result. On appeal, the appellant challenged the trial judge’s interpretation of the service agreement and his application of it to the Johnston Group and seven RWAM groups. It argued that he had erred in law: 1) by failing to give effect to important words in the contract, by failing to give greater weight to the definition of “access fee” when he was considering the interpretation of the clause and focused

instead on the definition of “insured lives” to interpret the clause establishing the appellant’s obligation to pay the access fee with reference to the definition of that phrase in the service agreement; 2) in his factual findings regarding the surrounding circumstances. It made several arguments under this ground, amongst which were that he had not considered: the impact of an initial draft of the service agreement that did not include the definition of “access fee”. The appellant later added it for the purpose of making it clear that the fee was to be consideration for the provision by the appellant to its clients of access to the Spencer Plan; and the special knowledge held by the respondent’s principal related to the interpretation of the provision in the service agreement regarding access fees; 3) in finding that the appellant was required to pay the access fees for the Johnston contract; and 4) in finding that the appellant was required to pay the access fees for all but one of the RWAM groups. It raised other issues as well, arguing that the trial judge had erred by finding that the respondent was not estopped from claiming a breach of contract because it had not challenged how it had been paid under the service agreement until the overpayment had been identified. It also argued that the judge erred in not finding that the respondent was out of time to bring its action. The appellant also appealed the trial judge’s dismissal of its counterclaim.

HELD: The appeal was allowed in part. The court found that although the trial judge had not erred in his interpretation of the service agreement and its application to the Johnston contract, he had erred in his application of the service agreement to the seven RWAM groups and it set aside his award of damages with respect to those groups. As a result, it did not consider the appellant’s other grounds of appeal relating to estoppel or limitation periods. It upheld the trial judge’s dismissal of the appellant’s counterclaim. The court noted that the standard of review of the trial judge’s interpretation of the service contract, involving issues of mixed fact and law, was palpable and overriding error, absent an inextricable question of law. After reviewing the trial judge’s reasons, it found with respect to each ground that he had: 1) not erred because he did not commit the error of failing to consider a material part of, or give effect to important words in, the contract. It found that it would have arrived at the same conclusion as the trial judge, even if he had erred by approaching the interpretation of the clause in question. If he had emphasized the definition of “access fee,” it would have served only to reinforce his conclusion; 2) had not erred by failing to take into account surrounding circumstances. The appellant was attempting to find error with the trial judge’s findings of fact and none of its arguments rose to the level of demonstrating that he had made a palpable and overriding error of fact. He had not erred by failing to take into account how the definition of “access fee” came to be added to the service agreement. Its inclusion in the next iteration did not support the appellant’s argument, but rather indicated the opposite, and this ground was an attempt by the appellant to recast the argument it had made under the first ground. The judge’s finding of fact regarding the principal’s knowledge was based on his assessment of the credibility of the witnesses, and in this instance, he did not commit a reversible error by not giving greater weight to what the principal knew about the appellant’s business in his interpretation of the service agreement; 3) had not erred in his application of the service agreement to the Johnston contract. It was based on the evidence provided by one of the appellant’s employees. It could not find he made a palpable and overriding error of fact in reaching the conclusion that Johnston contract was included as a group contract of EHC insurance issued by the appellant, regardless of whether the contract could be considered to be of the stop loss variety; and 4) had erred in finding that the service contract applied to seven of the RWAM groups. He made a palpable and overriding error of fact when he held that the appellant had issued a group contract of EHC insurance that was being administered by RWAM with respect to those groups because there was no evidence before him on which to make that finding.

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***S.M. v A.P.R.C.*, 2021 SKCA 162**

Leurer, 2021-12-10 (CA21162)

Family Law - Custody and Access - Interim Order - Appeal - Application to Lift Stay

The petitioner father (the applicant) made an appellate chambers application seeking to have the stay of an interim order lifted, pending the hearing of the appeal of the interim order. It had been granted by a Queen's Bench chambers judge regarding the custody and access of the applicant's 16-month-old son (see: 2021 SKQB 294). The filing of an appeal from that decision by the child's primary caregiver, the appellant, had stayed the execution of those parts of the interim order that were the subject of the appeal, as well as staying the proceedings pursuant to Court of Appeal rule 15. The interim order had provided that the appellant, a relative of the child who had stood in the position of his de facto mother since his birth, would be recognized as a person of sufficient interest and that his primary residence would be with her. The applicant, recognized by the chambers judge as the child's father, would share joint decision-making regarding him with the appellant. The chambers judge directed that the applicant, a resident of Nova Scotia, was to have parenting time with the child in that province for the months of December, 2021 and March, June and July, 2022. An expedited pre-trial conference was to be arranged by the Local Registrar. Because of the effect of the stay, the applicant also requested an order granting him parenting time to make up for the loss of it in December. The appellant opposed the grant of any of the relief sought by the applicant. However, the parties agreed that the stay should be lifted to allow a pre-trial conference to proceed in the Court of Queen's Bench. The appellant had appealed the parts of the order designating the applicant a joint decision-maker with her regarding the child and his being allowed parenting time in Nova Scotia. She argued that the chambers judge had erred in law in determining that it would be in the best interests of the child to be separated from his primary caregiver in Saskatchewan, taken to Nova Scotia and placed in the care of a party whom he had never met for a period of 30 days as opposed to introducing him to the applicant gradually. She requested instead that: she be granted interim final decision-making, although she would provide information to, and consult with, the applicant about the child; and the applicant's parenting time be required to be exercised in Saskatchewan. The applicant argued in his application that, given the appellate standard of review governing the review of the chambers judge's finding regarding the child's best interests and his need for stability, it was likely that the decision would be upheld. The child's need for stability suggested that, absent an overarching reason not to, the automatic stay should be lifted. He also asserted that it would be in the child's best interests for him to establish a relationship with him as soon as possible.
HELD: The application to lift the stay of execution of the interim order was denied, subject to conditions. The stay of proceedings was lifted. The chambers judge found that it was in the child's best interests to leave the stay of execution in place. He directed that the applicant have up to 15 opportunities for unsupervised parenting time with the child in Regina in each calendar month commencing in December, 2021. These opportunities were governed by the following stipulations: for the first three, the applicant's time with the child was not to exceed three hours and for the fourth to the seventh, not to exceed eight hours. After the seventh, the applicant would be able to parent the child for up to 36 hours, including overnights. The appellant's consent had to be obtained if any changes beyond these prescriptions was proposed. To assure the timely prosecution of the appeal, the appellant was directed to perfect it no later than December 29, 2021. The chambers judge reached the conclusion that the child's best interests would be served if the child were not taken to Nova Scotia, pending the hearing of the appeal, focusing on the short time frame between the

hearings of this application and that of the appeal. He found that that because the interim order would alter the status quo, allowing the child to be removed to Nova Scotia for one month, it might cause him harm. However, as the interim order recognized that it was in his best interests to have the opportunity to develop a relationship with the applicant, it would impose as a condition of maintaining the stay that the appellant must provide the applicant with the specified parenting opportunities. The judge acknowledged that the cost to the applicant of having parenting time with the child in Regina might limit his use of these opportunities but refused to order the appellant to contribute to the applicant's costs.

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***R v Van Deventer*, 2021 SKCA 163**

Jackson Ryan-Froslie Tholl, 2021-12-15 (CA21163)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Conviction - Appeal
Criminal Law - Assault - Sexual Assault - Evidence - Credibility - Appeal

The appellant appealed his conviction by a Queen's Bench trial judge for sexually assaulting a young child. In 2017, when the complainant was nine years old, she disclosed to her parents that the appellant had done things of a sexual nature to her. They informed the police and he was charged with sexually assaulting the complainant between February 2013 and January 2016. At trial, the Crown witnesses were the complainant, her parents and a police officer. The officer had video-recorded her interview with the complainant. The recorded interview was admitted into evidence at trial under s. 715.1 of the *Criminal Code*. The appellant was the only witness called for the defence and in his testimony, he denied that any of the alleged sexual activity had occurred. In her oral decision, the trial judge outlined the principles governing the trial, reviewed the evidence of all of the witnesses and applied the tests set out in *R v D.W.* (*D.W.*). She evaluated the complainant's credibility and reliability first, and found that she accepted her evidence and said that "the necessary corollary of this conclusion" was that she did not believe and rejected the appellant's denial. In the context of the totality of the evidence, the judge was not left in reasonable doubt by his denial and decided that the appellant was guilty. The appellant appealed on a number of grounds, foremost amongst which was that the trial judge erred in her application of the burden of proof, particularly with regard to her evaluation of his credibility.

HELD: The appeal was allowed. The conviction was set aside and a new trial ordered. The court considered only the ground noted above and did not address the others. With respect to it, it found that the trial judge had erred in law in her application of the principles in *D.W.* by stating that she must reject and disbelieve the appellant's testimony as a necessary corollary of finding the complainant to be credible and reliable, and then did not conduct any other analysis of credibility. This determination did not leave room for an assessment of the appellant's evidence or the evidence as a whole. The court then laid out the approach that should be taken in applying *D.W.* in cases such as this involving an accused's testimony that consisted only of a bare denial that the sexual activity did not occur. The judge must consider all the evidence, and although there is no required sequence in which the credibility and reliability of witnesses must be assessed, the judge must avoid comparing the complainant's and the accused's evidence and

choosing their preferred version. The judge must consider an accused's bare denial of the allegations in the context of the evidence of the complainant and as a whole. The findings of credibility and reliability regarding a complainant's testimony about the alleged conduct can be the reason for rejecting the testimony of the accused when considered in the context of the entirety of the evidence but where it is so found, it cannot result in an automatic finding of a lack of credibility on the part of the accused.

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***Thomas v Saskatchewan Indian Gaming Authority Inc.*, 2021 SKCA 164**

Schwann Leurer Kalmakoff, 2021-12-15 (CA21164)

Employment Law - Wrongful Dismissal - Damages - Appeal
Civil Procedure - *Queen's Bench Rules*, Rule 11-1

The appellant appealed the decision of a Queen's Bench trial judge to dismiss his claim for wrongful dismissal by the respondent, the Saskatchewan Indian Gaming Authority Inc., and to find that it had had just cause and thus the appellant was not entitled to damages. The appellant also appealed the judge's decision to award costs to the respondents on Column 2. The appellant's employment as procurement process support officer with the respondent began in 2011. He applied for a promotion to a management position in the same department and when informed by the director of it that a woman had been selected, the appellant became angry. The director testified that he became frightened by the hostility and aggressive manner exhibited by the appellant, who accused him of being racist and not supportive of the advancement of Indigenous men. Another supervisor testified that he entered the room during this exchange and believed that the appellant might hit the director. After the director filed a complaint with the respondent's Employee Relations Department (ERD), it investigated the matter. It put the appellant on leave and instructed him not communicate with other employees pending the conclusion of the investigation. The appellant then left the building but told other employees that he had been placed on leave and then contacted another employee the next day, telling him of the investigation an asking him to download some tender templates and e-mail them to him. Ten days after the event, the ERD advised the appellant by letter that his employment was terminated immediately, with cause. The letter stated that the appellant had breached the respondent's Employee Code of Conduct Policy and Anti-Harassment & Workplace Violence Policy. It also said that he had breached the respondent's directions as to communications and confidentiality respecting the investigation and asked another employee to provide property of the respondent to him. The director also contributed to the letter, describing the appellant's behaviour toward him as threatening and his comments as inappropriate. The appellant filed his statement of claim alleging that he had been terminated without just cause and sought to recover the wages he would have earned during the appropriate notice period as well as aggravated damages; alleged that the respondent engaged in unfair conduct towards him, causing mental distress and damage to his reputation by falsely accusing him of threatening a supervisor; and publicizing his dismissal before the end of an appeal period. The trial judge found that the appellant had engaged in misconduct that was incompatible with the fundamental terms of the employment relationship during his meeting with the director. The appellant had leaned forward and pointed his finger at the director. His conduct was aggressive and insubordinate, not only to the director but also to the respondent itself. The appellant's

actions had breached the respondent's policies which he knew applied to him. The respondent had just cause to dismiss the appellant without notice or pay in lieu thereof. The judge also found that, on their own, the appellant's breaches of the ERD's instructions and the Code of Conduct regarding confidentiality by trying to obtain proprietorial documents would not have justified dismissal, but taken together with his conduct at the meeting, they supported that the respondent had cause. The appellant's claim for aggravated damages was not supported by the evidence. The appellant's grounds of appeal were whether the trial judge erred: 1) in concluding that the respondent had just cause to dismiss him without notice. Amongst such errors were his findings that: i) the appellant's conduct amounted to insubordination, whereas his findings only supported a conclusion that he was insolent, a much less serious form of misconduct than insubordination; ii) the appellant's conduct violated the respondent's Anti-Harassment & Workplace Violence Policy because the judge had not found that the director had reasonable cause to believe that he was at risk of injury, so the appellant's conduct did not meet the definition of workplace violence; iii) the appellant's conduct was misconduct when he was simply complaining to his supervisors of what he perceived as discriminatory treatment; and iv) that a single act of misconduct was sufficient to amount to cause. The appellant had had no previous history of misconduct and the director had testified that the incident was very much out of character; and 2) in awarding costs to the respondent on Column 2 of the Tariff. He had not provided explicit reasons for doing so and their absence constituted a legal error. There was no reason to depart from assessing costs on Column 1.

HELD: The appeal was dismissed. The court stated that the standard of review that applied to the determination whether the appellant's misconduct amounted to just cause for dismissal, a question of mixed fact and law, is one of palpable and overriding error, absent an extricable error of law. In accordance with the decision in *McKinley v BC Tel*, 2001 SCC 38 (*McKinley*), the determination of the question involves a contextual analysis with an eye to proportionality. It found with respect to each ground that: 1) the trial judge had not erred and thus there was no basis upon which to interfere with the judge's determination regarding aggravated damages. It gave no effect to the appellant's arguments for the following reasons: i) the judge may have been incorrect describing the conduct as insubordinate, but he correctly instructed himself on the law respecting what amounts to just cause and his reasons demonstrated that regardless of whether the proper label was applied to the appellant's misconduct, he focused on its seriousness and its effect on the continuing viability of the employment relationship; ii) the appellant's conduct had breached the policy. The appellant's argument here was based on an improperly narrow reading of one portion of the policy. The evidence of the director and the supervisor supported the judge's conclusion that the appellant's action amounted to disruptive behaviour towards the director, in violation of the policy, and there was no need for the judge to make a specific finding that the director reasonably feared for his safety so as to engage the definition of "workplace violence"; iii) the judge assessed the manner in which the appellant had expressed his displeasure, not the subject matter. The motivation for the appellant's actions was not the issue; and iv) the judge applied the proper contextual approach required by *McKinley* and concluded that as a result of the appellant's conduct during that meeting, the employment relationship could not continue because it had been severed irretrievably. It was not correct to say that a single incident of misconduct can never justify immediate dismissal; and 2) had not erred, as the award of costs is within the discretion of a judge under Queen's Bench rule 11-1. Further, the absence of reasons for the award was not itself a justification for appellate intervention.

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***Zelinski v Zelinski*, 2021 SKCA 165**

Ottenbreit Barrington-Foote Kalmakoff, 2021-12-16 (CA21165)

Real Property - Easements - Registration - Appeal
Real Property - Right of First Refusal

The appellants, Gustav and Dolores Zelinski, appealed the decision of a Queen's Bench chambers judge to dismiss their originating application made under s. 11 of *The Queen's Bench Act, 1998*. She rejected their claims that they had an easement to maintain a water well and associated pipeline and a right of first refusal (ROFR) relating to two quarter sections of land (the subject land) owned by the respondent, Kimberly Zelinksi (Kimberly). At the same hearing, the chambers judge granted the application made by the other respondent, J. Pidkowich (Pidkowich), pursuant to s. 107 of *The Land Titles Act, 2000*, for an order discharging the easement registered by the appellant in 2016 against the subject land, as he wanted to buy it unencumbered from Kimberly. The appellants' alleged claims originated in 1986. At that time, Gustav and his brother Gregory Zelinski (Gregory) agreed to work together to farm certain lands they each owned, together with seven quarters that belonged to their father's estate that were subject to the terms of his will. In the agreement, which was not reduced to writing, Gustav agreed to purchase and relocate his residence on an acreage to be created by Gregory by subdividing the subject land. Gustav claimed that he asked for and obtained from Gregory a ROFR to purchase all of Gregory's land. The agreement also included that Gustav was to dig a well on the subject land, at Gregory's suggestion, because the water was better there, and then to install a pipeline from the well. The alleged verbal grant was not documented and no caveat was filed with the land titles registry claiming an easement. In 1993, the appellants and other siblings of Gustav successfully challenged their father's will. Each received land held by the estate and the joint farming arrangement between Gustav and Gregory ended. Gustav later went bankrupt and in 1996, a final order of foreclosure was granted to Farm Credit Corporation (FCC) in relation to the subject land. The order provided that the right, title, and interest in the subject land of all of the defendants named in the foreclosure action, including the appellants and Gregory, be foreclosed and the subject land be vested in FCC. In 2001, the subject land was sold by FCC to Gregory and Kimberly as joint tenants. Gregory died in 2010 and title issued to Kimberly as the surviving joint tenant in 2011. In 2016, the appellants filed a notice of interest claiming a non-mutual easement (registered easement) in the land titles registry against the subject land as the servient tenement and against the acreage as the dominant tenement. Kimberly's counsel advised the appellants that she denied the existence of the registered easement but was prepared to enter into a water easement agreement; however, the parties did not resolve their issues. Pidkowich then filed his originating application, seeking the discharge of the registered easement and in support of it, Kimberly deposed that the non-mutual easement was registered without her consent. She also attested that she married Gregory in 1989 and lived with him across the road from both the acreage and the subject land during their marriage and at no time had Gregory ever told her that he had granted a ROFR or an easement to Gustav. The appellants responded with their originating application that sought a declaration that the registered easement was valid and an order that Kimberly honour their ROFR and sell the subject land to them. At the hearing, the chambers judge determined that she could decide the applications summarily because the evidence was not controverted, the essential facts were not in dispute and the law was not complex, citing *Saskatchewan Valley Potato Corp. v Barrich Farms*, 2003 SKCA 118 (*Barrich Farms*). She found that Kimberly had never consented to the grant of an easement and that, accordingly, it could

not exist. She also concluded that if Gregory had verbally granted the water easement and a ROFR in 1986, both had been extinguished by the FCC foreclosure. In addition, she held that if there had been a verbal grant of an easement, it would have been unenforceable pursuant to s. 4 of the Statute of Frauds. In their appeal, the appellants argued that the chambers judge erred: 1) by failing to find that there was a water easement over the subject land enforceable against Kimberly. They also submitted that the judge failed to consider the issue of whether there was an equitable easement, citing the decision *in Sauer v 648657 B.C. Ltd.*, 2019 BCSC 43 (*Sauer*) as authority for their position that an unregistered easement may not be extinguished by a final order of foreclosure. The judge then erred by dismissing their claim summarily rather than directing the matter to trial; and 2) by failing to find there was a ROFR, or by failing to order that the issue be set for trial.
HELD: The appeal was dismissed. The court found with respect to each ground that the chambers judge had: 1) not erred in determining that a water easement had been created that was personally enforceable against Kimberly. She was a joint tenant of the land from 2001 to 2010, and sole owner since 2010. Her uncontested affidavit evidence was that she had never consented to the grant of easement and there was no evidence that she authorized Gregory to do so on her behalf. Regarding the ground that the judge erred failed to find that there was an equitable or implied easement, or to direct a trial of that issue, it found that the judge had erred by failing to address the issue of whether an equitable easement could have been found to exist. However, the appellants had not contested that the trial judge's application of the *Barrich Farms* test to determine that she could summarily decide the applications. In its examination of the matter, it found that, based on the test, the evidence related to the claim for an easement was simple, largely uncontested and sufficient to decide summarily whether an easement existed. It then considered six scenarios concerning equitable easements and decided that there were no grounds on which to find the creation of any of them in this case. In addition, the appellants were named in the foreclosure action and when title issued to FCC, it was conclusive proof that that it held title free from all interests. Kimberly was entitled to rely on the register when she acquired her interest as a joint tenant of the subject land and her title would not be defeasible at the behest of the appellants, as she had no knowledge of their claim and there was no evidence of bad faith. This case was distinguishable from *Sauer* for these and other reasons; and 2) had not erred. An ROFR is a contractual right and Kimberly was not in a relationship with Gregory or a part of any dealings between the brothers at the time the appellants purchased the acreage. If there had been an enforceable contract between the appellants and Gregory, Kimberly was not a party to it. The chambers judge had not erred by failing to order this issue be sent to trial for the same reasons as those given regarding the first ground.

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***Consumers Co-operative Refineries Limited c/o Federated Co-operatives Limited (SK) v Regina (City)*, 2021 SKCA 166**

Jackson, 2021-12-15 (CA21166)

Civil Procedure - Appeal - Application for Leave to Appeal
Municipal Law - Tax Assessment - Assessment Appeals Committee - Leave to Appeal

The applicant, Consumers Co-operative Refineries Limited, sought leave to appeal a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board (see: 2021 SKMB 23). The committee had dismissed the applicant's appeal from

a decision of the Regina Board of Revision. The board had in turn dismissed an appeal from a decision of the assessor for the city of Regina. The applicant owns the Consumers Co-operative Refinery located in the city of Regina (the subject property), which is zoned as heavy industrial and treated as a regulated property for the purposes of tax assessment. The land of the subject property is designated non-primary industrial land and was valued using the cost approach. The issues before the board were whether the assessor had erred in the Land Size Multiplier (LSM) curve that applied to the land assessment and whether equity had been achieved in the assessment. The underlying issues related to the assessor's determination of the base land rate (BLR) and standard parcel size (SPS). At the hearing of the applicant's appeal to the board, it argued that the assessor had made multiple errors relating to the calculation of the BLR, the LSM and the SPS. It asserted that the assessor had not followed the Saskatchewan Assessment Management Agency's (SAMA) 2015 Cost Guide or previous decisions of the Court of Appeal and the committee in determining the assessment. The assessor acknowledged that it had mistakenly treated what had been one sale as two transactions in its initial assessment so as to use eight sales rather than seven as a basis of calculation. As a result, the assessor recommended that this land model be applied and recalculated the SPS as 500,000 square feet (11.5 acres), a BLR of $4.34 and a LSM curve of 103 percent (the assessor's recommended model). The assessed value was reduced from $291,543,500 to $278,543,112. After this admission, the appellant submitted to the board that the assessor's methodology be given zero weight. It asked the board to accept its proposed remedy: namely, that the BLR be $4.39 per square foot, the SPS be 100 acres (4,356,000 square feet) and the LSM be 130 percent. In this application, it argued that both the board and the committee had treated the assessor's recommended model as the initial assessment and put the onus on the applicant to prove error in that recommendation and overcome assessor discretion rather than treat the assessor's recommended model and its proposed remedy as two remedial options. In doing so, both bodies committed a significant legal error that influenced the treatment of the evidence and argument of both the applicant and the assessor/city (the argument). Its proposed grounds of appeal were that: 1) the committee erred in law by requiring the applicant to allege: i) a proposed remedy; ii) error in the assessor's proposed remedy; and/or iii) error in the decision of the board; 2) the committee erred in law by deferring to assessor discretion: i) after the error in the assessment had been admitted; ii) on positions taken during the appeal; and/or iii) on the assessor's proposed remedy. The appellant submitted that the argument applied to both the first and second grounds in that the board and the committee committed a significant legal error because they had not treated the assessor's recommended model and the appellant's proposed remedy as two remedial options; 3) the committee erred in its interpretation of the Cost Guide and the decisions in *Consumers Co-operative Refineries Limited v Regina (City)*, 2020 SKCA 111 and *GMRI Canada Inc. v Saskatoon (City)*, 2009 SKCA 145 in relation to the determination of BLR, SPS and LSM curve; and 4) the committee erred in law or exceeded its jurisdiction by failing to consider the appellant's arguments or by failing to consider relevant matters by misconstruing the appellant's arguments, or both.

HELD: Leave to appeal was granted only with respect to the third and fourth proposed grounds. Under s. 33.1 of *The Municipal Board Act* (MBA), the appellate chambers judge has jurisdiction to determine the application. The standard of review was established in the decision in *Saskatoon (City) v North Ridge Developments Corporation*, 2015 SKCA 13, being whether a judge is sufficiently concerned about the correctness of a decision to warrant granting leave, including whether the appeal is *prima facie* destined to fail. The court must also consider importance. The *Rothmans* framework applies to the consideration of applications for leave to appeal made pursuant to s. 33.1 of the MBA. Following *Lepage Contracting Ltd.* (2020 SKCA 29), it may be necessary for the application judge to examine the merits of the proposed appeal in some detail, albeit with circumspection. The chambers judge reviewed each of the grounds and dismissed the first and second, primarily by considering them under the fundamental flaw

argument and finding no merit. She was not persuaded that the assessor's admission of error could open the door to the wholesale re-analysis proposed by the appellant. The assessor had not changed its methodology but simply changed one sale in the area that benefited the appellant. Otherwise, the first ground had no merit and was destined to fail. The decisions of the board and the committee did not support the proposed appellant's position. The second ground was a refinement of the fundamental flaw argument and was destined to fail. The proposed appellant had not shown that the committee erred in relying on the assessor's discretion and arguing that the board and the committee should have redone the assessor's work simply because the assessor discovered an error in the valuation of one of the comparator parcels and rectified it to the benefit of the proposed appellant. Leave was granted regarding the third ground because it was not found to be destined to fail, despite its presenting four issues as questions of law when they appeared to be questions related to evidence. It met the test of importance because it raised a new issue of the extent to which the board (and the committee) is required to engage with the component parts of an assessment or whether it is sufficient to consider the assessor's decision in general terms. Further, both it and the fourth ground were linked, and leave was granted regarding the latter, respecting whether the committee erred by failing to find that the board erred by not addressing the issues raised by proposed appellant in it argument regarding the BLR, the SPS and the LSM curve, or whether it is sufficient to find the board's conclusions to be reasonable.

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***Gran v Nakonechny*, 2021 SKQB 288**

Crooks, 2021-11-02 (QB21288)

Civil Procedure - *Queen's Bench Rules*, Rule 7-1, Determination of a Question
Statutes - Interpretation - *Automobile Accident Insurance Act*, Section 104

The plaintiffs applied pursuant to Queen's Bench rule 7-1 for determination on a point of law. The other parties to the action consented and a Queen's Bench judge confirmed the matter should be set for hearing. The question raised by the plaintiffs was whether s. 104(2)(a)(ii)(A) of *The Automobile Accident Insurance Act*, the version of the provision in effect at the pertinent time, required a plaintiff to prove a defendant intentionally caused or attempted to cause bodily injury. In this case, the plaintiffs brought an action against the defendant claiming for their non-economic losses arising from a collision that occurred when the defendant's vehicle crossed into oncoming traffic and collided with their vehicle. Prior to the plaintiffs commencing their action, the defendant had been charged with the following *Criminal Code* offences: dangerous operation of a vehicle causing bodily harm contrary to s. 249(3); impaired operation of a vehicle causing bodily harm contrary to s. 255(2); failure/refusal to provide blood sample contrary to s. 254(5); and dangerous operation of a vehicle contrary to s. 249(1). He pled guilty to the first charge and the remaining charges were stayed. The defendant acknowledged his driving had been dangerous because he was tired, fell asleep and caused the crash. During sentencing, the Crown conceded that there would have been issues proceeding on the second and third counts and stated that it was not an impaired driving case. In the application under Queen's Bench rule 7-1, the plaintiffs argued that despite the grammatical and ordinary meaning of the wording of s. 104(2)(a)(ii)(A) of the Act, the provision in force at the time of the collision, its

drafters did not intend any victims of criminally-convicted drivers to be excluded from claiming non-economic loss, and the requirement to demonstrate that a defendant had the intent to cause bodily injury was in error. The ordinary meaning is contrary to the purpose of the legislation and inconsistent with legislative intent. They pointed to comments made in debate, recorded in Hansard in 2002 when s. 104 was enacted, and again in 2016 when the Act was amended respecting the meaning of "non-economic loss" in s. 41.16, as supporting their position. The plaintiffs acknowledged that a similar question of law had been addressed in *Vitalaire* (2018 SKQB 71), wherein the court found that victims of drivers convicted of an offence set out in s. 104(2)(a)(ii)(B) must demonstrate that the driver intended or attempted to cause bodily injury as set out in s. 102(2)(a)(ii)(A). They suggested that this decision was distinguishable because they had raised issues which were not before the court in that case, such as additional commentary from Hansard.

HELD: The court determined the question of law and held that s. 104(2)(a)(ii)(A) requires a plaintiff to prove a defendant intentionally caused or attempted to cause bodily injury. It remained open to the plaintiffs to prove at trial that the defendant intentionally caused the bodily harm and if unsuccessful, the trial judge may award costs. The defendant was the successful party in this application and costs were fixed at $1,500, assessed on Column 2, based on the complexity and extensive historical material involved. The court reviewed the principles of statutory interpretation and the contents of the debate proceedings in Hansard relied upon by the plaintiffs and found that the intention of the legislators was clear when the 2002 amendments were discussed: it is clearly reflected in s. 104 of the Act that in order to claim non-economic loss pursuant to s. 104(2)(a)(ii), the operator must have intentionally caused or attempted to cause the injury. It was not satisfied that the excerpts of the 2016 Hansard supported the plaintiff's position, and in any case, s. 92(7) of the 2016 Amendment Act indicates that the legislature intended the amendments to be prospective. Although not bound by the decision in *Vitalaire*, its interpretation of s. 104 of the Act was consistent with that judgment.

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***R v Bear-Knight*, 2021 SKQB 308**

Elson, 2021-11-26 (QB21295)

Criminal Law - Sexual Assault - Reasonable Doubt

The trial judge was required to determine whether the Crown had proven beyond a reasonable doubt the guilt of the accused R.B-K., who was charged with the Criminal Code offences of sexual assault and assault by choking arising from the same complaint. In doing so, he first reviewed the foundational case law concerning the presumption of innocence, reasonable doubt, assessing the credibility of witnesses, and the application of the principle of reasonable doubt in cases such as the one before him, in which the credibility of the complainant and the accused was central to his analysis. In reviewing the evidence of the witnesses at trial, he was mindful that inconsistencies in the testimony of the Crown witnesses, including that of the complainant, and of the accused, were more or less relevant in the truth-finding process depending on many dynamic factors arising during the trial. He was cognizant that in this case, as in most cases of sexual assault, the only direct evidence available about the activities which gave rise to the charges was that of the complainant and the accused, and so any material inconsistencies between prior accounts from the

complainant and accused of what happened, such as in police statements and their testimony, and any external inconsistencies between the testimony of the complainant and the accused and the other witnesses were paramount to his analysis of reasonable doubt. In reviewing the evidence of the complainant and the accused, he concluded the two accounts could not, for the most part, be reconciled. He found the complainant's evidence was to the effect that the accused-initiated sex with her while she was sleeping on the floor and that he then forced sexual intercourse on her, meanwhile squeezing her neck with his hands so she could not breathe and slapping her in the face. He noted she testified that she indicated she did not consent by repeating to him that she was tired and, after the second slap, screamed at the top of her lungs. The trial judge summarized the evidence of the accused which was to the effect that he and the complainant had been cuddling on a beanbag chair, and when the other persons present went to bed, she pulled his pants down and performed fellatio on him, which then led to sexual intercourse during which she was smiling and moaning, until her demeanour abruptly changed and she pushed him away from on top of her and told him to stop, then ran into a bedroom where others were sleeping. The trial judge paid particular attention to the testimony of the complainant to the effect that she had told the police she had consented to part of what happened but had said that because she believed by not expressly saying no, she had consented, though in fact she did not. The trial judge summarized the evidence of the other witnesses who were with the complainant and the accused during the time leading up to the incident, and observed that the evidence of the accused accorded with that evidence much more than did that of the complainant, and did so in material respects, in particular, that during the evening the complainant danced with the accused, with their hands on each other, he gave her a foot massage, cuddled with her on a beanbag chair, and watched a movie with her and others, none of which the complainant had testified to. The trial judge reviewed the elements of the offences, and in particular, of the offence of sexual assault, focusing his analysis on the consent element of the actus reus, that the Crown must prove beyond a reasonable doubt that the complainant did not consent to the sexual activity.

HELD: The trial judge dismissed the charges, ruling with respect to the sexual assault charge that the Crown had failed to prove beyond a reasonable doubt the essential element of lack of consent by the complainant to the sexual activity. He made reference to *R v Ewanchuk*, 1999 SCC 711 to the effect that in considering the element of lack of consent, the trial judge must examine the complainant's state of mind and whether she held a subjective belief she had not consented to the sexual activity. The trial judge acknowledged that the complainant's belief she did not consent was to be tested for credibility by the evidence. This inquiry, the trial judge said, was distinct from a consideration of the mental element of the offence, which requires a determination by the trier of fact of whether the accused knew of, or was wilfully blind to, the complainant's lack of consent. Given the opposing accounts of the nature of the sexual activity provided by the complainant and the accused, the trial judge turned to the required *D.W.* analysis, as reconsidered in a number of other cases, including *R v Ryon*, 2019 ABCA 36, which referenced *R v Carrière* (2001), 151 OAC 115 (Ont CA) and *R v Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, to the effect that in cases where credibility is crucial for determining guilt beyond a reasonable doubt, "the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt" and is not to turn the trial into a credibility contest between the complainant and the accused. With this principle in mind, and upon a review of the evidence as a whole, the trial judge found he had a reasonable doubt that the lack of consent element had been proven beyond a reasonable doubt because he could not find that either version of what happened was implausible.

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***W.K.P., Re*, 2021 SKQB 309**

Goebel, 2021-11-26 (QB21296)

Family Law - Child in Need of Protection - Evidence Required

The trial judge rendered her decision after a trial conducted pursuant to s. 36 of *The Child and Family Services Act* (Act). The trial was held to determine if the child, W., born in 2006, was in need of protection as that concept is understood and applied by the Ministry of Social Services (MSS) within the framework of the Act and as interpreted by relevant case law. The trial judge made findings of fact from the trial evidence which consisted of *viva voce* evidence from child protection workers with the MSS and voluminous "business records" created by workers, consisting primarily of reports and notes concerning W.'s case. As to the business records, the court relied on *A.M. v Ministry of Social Services*, 2020 SKCA 114, which stands for the proposition that if the documents to be tendered in evidence meet the requirements of s. 50 of *The Evidence Act*, they are considered an exception to the hearsay rule and are admissible at trial. The trier of fact is then to weigh the evidence for relevance, reliability, and necessity, choosing to give it great weight, some weight, or no weight. She agreed that she may also accept evidence not for its truth but as part of the narrative or background in the trial. She agreed further that all evidence should be allowed into the trial which sheds as much light as possible on the needs of the child and the family, with a view to keeping the family unit intact, unless removing the child was the only option for maintaining his safety and well-being. She found that the evidence, both viva voce and documentary, proved on a balance of probabilities that: W. lived with his mother, N.K. and a younger brother, R.; W.'s father had some connection with the family but did not live with them; that the MSS had a history of involvement with N.K. "due to reports relating to suspected substance use and mental instability;" W. was apprehended on May 24, 2019 by the MSS following a fire in the apartment where the family lived; the MSS placed W. with his paternal grandmother, D.P., in whose care he remained until the trial; MSS documents recorded that W. was contented living with D.P. and that he believed N.K. had not attempted to see him because she blamed him for the fire; that the cause of the fire was unknown; that N.K. was persistent in her attempts to see W.; that since W.'s apprehension, N.K. had numerous clean toxin screens, and had participated in personal counselling; N.K. planned to move to Swift Current to be closer to W., so her future plans were on hold; the MSS had not proven on the evidence that N.K. "lacks the capacity to be a safe parent at this time;" W. was "a healthy, intelligent and pro-social youth with no unique or special needs;" the MSS did not believe W. needed a psychological assessment or counselling; the MSS had no protection concerns with N.K. at the time of trial; home visits by protection workers since 2019 had raised no concerns with W.'s living conditions; MSS records did not reveal any reasons why N.K. and W. were not reunited after W.'s apprehension; none of the MSS workers' notes showed that W. was told his mother wanted contact with him; and MSS notes indicated that W. agreed to family counselling with his mother, but none was arranged.
HELD: The trial judge ruled that MSS had not met its heavy burden to show that W. continued to be in need of protection at the time of the trial, and that, as such, an order would not be made setting out terms by which it was to assume legal responsibility for W. The trial judge found that the MSS had failed to satisfy this evidentiary burden because it had failed to fulfil its duty to ensure that attempts be made to reunite W. and N.K., and had not shown that, because W., who was not a vulnerable child in any way, had expressed a wish to stay with D.P., that his wish was sufficient to declare him a child in need of protection and keep him away from

his mother. The trial judge then encouraged discussions between N.K., D.P., and W.'s father to reach an agreement "on a care arrangement that best meets [W.]'s interests and wishes."

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***United Food and Commercial Workers, Local 1400 v P&H Milling Group*, 2021 SKQB 310**

Smith, 2021-11-30 (QB21297)

Labour Law - Collective Bargaining Agreement - Interpretation

The union, United Food and Commercial Workers, Local 1400 (union), sought judicial review of a decision of an arbitrator appointed under the terms of a collective bargaining agreement (CBA) finding that the term "sick leave" did not encompass a situation involving workers for the employer, Parrish & Heimbecker Limited Saskatoon (P&H), who had complied with the COVID-19 self-isolation requirements of P&H and the government but were denied sick pay by P&H. The arbitrator agreed with P&H that the term "sick leave" could not be interpreted so as to include quarantining due to COVID-19 because P&H's decision not to pay sick leave benefits "accords with a plain reading of the Sick Leave Program which forms part of the Collective Bargaining Agreement." The union argued that the arbitrator's decision was unreasonable because it was made on too narrow a basis and failed to apply a "purposive interpretation" to the meaning of "sick leave."

HELD: The chambers judge agreed with the union and quashed the arbitrator's decision, ordering that the grievors be given access to the sick pay to which they were entitled while away from work due to "COVID-19 protocols" on the basis that the arbitrator's decision was unreasonable. In coming to his decision, he referenced *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and instructed himself that in reviewing the decision, he must ask if both the "rationale" of the decision and its outcome were unreasonable. He then concluded that the reasoning process by which the arbitrator arrived at his decision was unreasonable because it was based on an overly strict interpretation of the words "sick leave" in the CBA without regard to the principles of contractual interpretation in the context of the CBA, and in doing so relied on the pronouncements of the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 and the Court of Appeal in *Stacey Estate v Lukenchuk*, 2020 SKCA 55, which led him to decide that he must determine the meaning of "sick leave " by an interpretation of the CBA "harmonious with [its] scheme and object … and with " a fair, large and liberal interpretation that best attains [its] objects." With these authorities in mind, the trial judge interpreted "sick leave" contextually and ruled that the meaning of the words must include any health-related absences, which would include COVID-19 isolation protocols of an employer or government which prevents a worker bound by a CBA from working.

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***R v Steer*, 2021 SKQB 311**

Allbright, 2021-12-03 (QB21301)

Criminal Law - Manslaughter - Sentencing

The accused pled guilty to a charge of manslaughter contrary to s. 236 of the *Criminal Code*. At her arraignment, she pled not guilty to the sole charge of second-degree murder but entered a guilty plea to the lesser included offence of manslaughter. Both the Crown and the defence were satisfied that the facts supported the plea and the Crown consented to the entry of the plea under s. 606(4) of the Code. The circumstances surrounding the offence were presented in an agreed statement of facts. The accused was described as a 28-year-old mother of four young children, two of whom were one-month-old twins. They had recently had to have emergency surgery in Toronto because of a rare medical condition. On the night of the offence, the RCMP and paramedics were called to the accused's residence because one of the twins was not breathing. The residence was a trailer in which the accused lived with her children, her husband and other members of the accused's family. The accused, her husband and her mother were interviewed and told the officers that the accused had found the baby was not breathing at about 3:00 am. The child was pronounced dead and after an autopsy, the cause of death was attributed to blunt force trauma to the head causing a hemorrhage in the brain. The police continued to question the family and the accused said that she found the child unresponsive in her bassinette but then altered her statement and said that the child had been sleeping on her mother's chest. When she checked on her around 3:00 am, she was not breathing. The accused's husband and mother both provided statements saying that after the husband had fed the child at 1:00 am, he returned her to the latter's care and the child went to sleep on her chest. They were both wakened by the accused when she found the child. About 17 months after the offence, the accused was arrested and admitted to the police that she lost control on the night in question because the child wouldn't settle and confessed that she had thrown her against the wall. She said that her family must have known what happened but were trying to protect her. She told the police that if she had had help, her daughter would still be alive. In the Pre-Sentence Report (PSR) prepared for the court, the author described that the accused's family was poor and she had possibly suffered physical abuse as a child. She was bullied and had not done well in school and was diagnosed with having a learning disability. The accused began a spousal relationship at 16 and then married when she was 19 and her husband was 28. Their first child was born having extensive medical needs and their second child might have learning disabilities. The accused's marriage was troubled. She suffered from depression, mental health problems and negative self-image all of her life but had apparently did not acknowledge that she was depressed. The PSR provided detailed reports from various people employed at the Saskatchewan Hospital, where the accused was a patient. They stated that the accused was regarded as a model patient, helpful and respectful of others, and had become a role model. She was receiving treatment for her mental health issues, taking high school classes and excelling in her studies. It was thought that the abuse she suffered in her childhood had had an impact on her ability to learn when she was young. The author of the PSR summarized that the accused's childhood had been marred by abuse and poverty and she suffered from depression. Her marriage had not been good and she had experienced high-risk pregnancies, birth trauma, and may have suffered from post-partum depression. She and her family had to live in a three-bedroom trailer with her parents and her three siblings. The trailer had been condemned by Public Health right after the child's death as unsanitary and infested with rodents. People who had known the accused before the offence happened and those who came to know her at the hospital said that the incident was very out of character for her. The Crown submitted that pursuant to sentencing principles, decisions of the Court of Appeal dealing with the death of a child caused by a parent and the provisions of the Code, such as ss. 718.01, 718.2(a)(ii.1) and

718.2(iii), the accused should receive an eight-year term of imprisonment. It argued that the sentence should be at the higher end of the spectrum of infant manslaughter cases. It argued that, in addition to many other aggravating factors under s. 718.2, the accused had lied numerous times, even insinuating that her three-year-old daughter was responsible before she finally confessed that she had lost control 17 months after the offence. This was significantly aggravating, although it acknowledged that the protective role her family took may have influenced the manner in which she presented information to the authorities. However, the accused was an adult at the time of the offence. It offered a list of the extensive mitigating factors present. The defence took the position that an eight-year sentence was excessive under all of the unique circumstances of this offence and of the accused, and suggested that a sentence of four to four and a half years would be fit and appropriate, followed by a period of probation. Counsel suggested and the Crown agreed that the accused should receive enhanced credit for the 600 days she had spent in remand, equaling 40 months. The accused's family had shown strong love and support for her that would continue after her release. The defence noted, with the consent of the Crown, that the accused had had limited sleep for four days prior to the offence and was left with the care of the two babies and two other children who were three and four years of age during the day of the offence.

HELD: The accused was sentenced to six years' incarceration. After calculating enhanced credit for the accused's time on remand, 1,221 days remained to be served. The court stated that the principles of deterrence and denunciation set forth in ss. 718.01 and 718.02 of the Code were the primary considerations and the sentence had to reflect the gravity of the offence. The degree of the accused's culpability fell at the upper end of the spectrum set out in *LaBerge* (1995 ABCA 196). It had regard to the Court of Appeal's sentencing decisions in manslaughter cases involving young children. It agreed with the Crown's presentation of the mitigating and aggravating factors. It noted regarding the former that they included that the accused: had no criminal record; committed a single act of violence; entered a guilty plea before trial; and had shown strong progress at the hospital and had become a role model. It agreed with the Crown's identification of the aggravating factors and that the accused's delay in telling the truth was one of them but it did not find that to be "significantly" aggravating. The court took into account that the accused was described as hysterical when she realized that the child had died and the role played by her family in giving their version of what had happened to protect her. As well, it would be difficult for the accused to resile from her initial comments. It also disagreed with the Crown's position that the accused did have support contrary to her statement that if she had had help, the offence would not have occurred. The PSR clearly indicated the difficulties the accused faced looking after four young children, dealing with the crisis of the twins' medical emergency and living in a small space that was uninhabitable.

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***Cameron v Association of Professional Engineers and Geoscientists of Saskatchewan*, 2021 SKQB 318**

Keene, 2021-12-14 (QB21299)

Administrative Law - Judicial Review - Self-Regulated Bodies - Standing of Complainant

The applicant, D.C., applied to a judge of the Queen's Bench Court (chambers judge) for judicial review of decisions rendered by the investigation committee of the Association of Professional Engineers and Geoscientists (APEGS), a body corporate created by *The Engineering and Geoscience Professions Act*, SS 1996, c E-9.3 (Act) having powers and processes in place to investigate and, if

warranted, prosecute professional misconduct of its members. The chambers judge reviewed the record of the proceedings before the investigation committee following the complaint of D.C. concerning what he alleged was the unprofessional conduct of two APEGS members; considered the affidavit evidence submitted by the parties, the submissions of counsel and written briefs, and made the following material findings of fact: the registrar of the council of APEGS, its administrative body, received two written complaints from D.C. on August 15, 2017; the complaints were considered by the investigation committee, which provided its written recommendation to the council on January 24, 2019, that no further action be taken and that the complaints not be turned over to the discipline committee; pursuant to s. 37(7) of the Act, on February 19, 2019, D.C. asked the council to review the investigation and the committee's recommendation that no further action be taken, which the council voted to do; the investigation committee conducted a second investigation with the assistance of an outside consultant and on September 19, 2019, provided its written reports to the council again recommending no further action be taken; the recommendations were provided to D.C. on September 26, 2019; in conducting the review, the investigation examined further documents as requested by D.C.; D.C. remained unsatisfied and wrote to council on October 11, 2019 requesting the evidence gathered by the investigation committee be provided to him so he could make a presentation to the council; he did not, prior to taking the application for judicial review, formally request a further review by the council; and the council denied his request for the "files" on the two members.

HELD: The chambers judge held that D.C.'s standing before him was limited and engaged only a determination of whether the council had conducted its statutory function with procedural fairness towards him, and he found that it had done so. He pointed out that D.C. was simply a member of the public, and that a reasonable interpretation of the Act and its discipline provisions would lead to the conclusion that, though the ultimate aim of the complaint and investigative process was protection of the public from the unprofessional actions of its members, the Act was not aimed at satisfying the rights of individual complainants but protection of the public in general. He went on to find that confidentiality was required in this process and was consistent with the purposes of the Act. To disclose to a complainant's documents and material generated and created during the investigation of a member would be an unwarranted invasion of the member's privacy should he be exonerated of any professional misconduct. He found the applicant had low-level procedural fairness standing and that the reasons provided to him by the council for not taking further action had fulfilled that requirement.

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***Vance Estate, Re*, 2021 SKQB 320**

Klatt, 2021-12-14 (QB21300)

Wills and Estates - Retroactive Application of *The Wills Act*

This matter was an application to a judge sitting in the Surrogate Court (chambers judge) for a grant of administration (with will annexed) of the estate of J.B.G.V., who died on June 6, 2021, having made a handwritten will in October 2004 when he was 19 years of age leaving all of his estate to the applicant (will). The applicant attempted to argue that the will was valid though it had

been revoked by provisions of *The Wills Act* in force in 2014 at a point in time when the deceased had cohabitated with a person –- not the applicant – for two years. *The Wills Act* was amended on March 16, 2020, and repealed the provisions which had resulted in the revocation of the will in 2014. The applicant submitted that the repeal should be interpreted as having retroactive effect, thus reviving the will.

HELD: The chambers judge concluded that the rules of statutory construction developed by case authority and given legislative sanction did not allow her to override the presumption against the retroactive effect of legislation in this case. She was cognizant of the modern approach to statutory interpretation which provides that "Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects": Section 2-11 of *The Legislation Act* and *Rizzo & Rizzo Shoes Ltd. (Re)* ([1998] 1 SCR 27), and that rules of construction applying this modern approach are to be used to determine whether the legislature had clearly expressed or, by necessary implication, intended the retroactive application of legislation, and in doing so agreed with the reasoning in *Bernesky v Smith*, 2003 SKQB 96. In deciding that the legislature had not intended that the amending legislation should have retrospective application, she reviewed the comments of the responsible minister and his officials before the hearing committee which clearly showed that the amendments were not intended to resurrect wills which had been invalidated, and found these comments were consistent with the wording and intent of the legislation. It was apparent to her that the legislature was aware that retroactivity would reanimate many old wills, giving rise to all manner of unintended and disruptive consequences, and also that the legislature recognized that persons adversely effected by the repeal of the legislation now had access to other legislated relief.

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***R v Hanson*, 2021 SKPC 61**

Evanchuk, 2021-12-16 (PC21047)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Sentencing

The accused pled guilty to sexually assaulting a young person under the age of 16 contrary to s. 271(1)(b) of the *Criminal Code*. The offences occurred after the accused had become grossly intoxicated at a party. The accused had begun drinking at a gathering at his parents' house, after which he attended a party at the home of friends where, at 2:45 am, he opened the closed door of the bedroom of their 13-year-old daughter, entered the room and climbed into bed with her. He was not wearing any clothes from the waist down and could not recall how or when his trousers and underpants were removed. He placed his hand under her shorts on her buttocks. She wakened immediately, told the accused she was 13, and pushed him away. He attempted to touch her a second time, but the complainant was able to push him off the bed and then saw that his penis was exposed. The accused then left the room and the house. The complainant reported the incident to her mother the next morning. At trial, a victim impact statement written by the complainant's mother was read into the record and described how the assault, which occurred just before the complainant started high school, had caused her to suffer acute mental trauma and lingering effects. She felt that although she had done nothing wrong, she had been deprived of her life as a normal teenager and knew her disclosure would reverberate in the small community in

which she and the accused lived. The accused was 38 years old and had no previous record. He had three children and shared custody of them with his former wife. Over 40 individuals, including the accused's former wife and her husband, provided character references. He was described as a loving, responsible and caring parent who had made many contributions to his workplace and the community. The accused expressed remorse for his actions and took full responsibility for them. He sought treatment and voluntarily abstained from drinking. Since the offence, the accused had been on unpaid leave from his position and suffered from severe stress. He had complied with his very strict bail conditions. Defence counsel argued that the six-month mandatory minimum jail sentence prescribed by s. 271(1)(b) of the Code constituted cruel and unusual punishment and violated the accused's s. 12 *Charter* rights. He submitted that an appropriate sentence would be for a shorter incarceral period or in the alternative, a community-based sentence. The Crown argued that the court should impose a six-month sentence of imprisonment followed by a lengthy period of probation. HELD: The accused was sentenced to six months' imprisonment. The court found that a period of probation was not necessary. It determined that because the appropriate sentencing range for the accused in the circumstances was between six and ten months of incarceration, it was unnecessary to address the constitutionality of the mandatory minimum sentence because the provision was not disproportionate in this case. In determining an appropriate sentence, it had regard for the sentencing principles set out in s. 718 of the Code and took note that where an offence involves the abuse of children, the primary concern is denunciation and deterrence under s. 718.01 of the Code. It also considered the framework that applies to s. 12 *Charter* challenges established by the Supreme Court. The court noted the importance of the Supreme Court's direction in *Friesen* (2020 SCC 9) that sentences for child sexual abuse must increase and that judges must consider the age of the victim, the location of the offence, whether the victim was sleeping, the stated impact the conduct had on the victim and potential for future psychological harm. The court found that in this case, the gravity of the offence was severe and the accused's responsibility was great. Amongst the mitigating factors the court took into account were that the accused had been a productive member of society and a good parent and his actions resulted from excessive drinking and a momentary lack of judgment. His apology and remorse were both sincere. The aggravating factors were that the violation of the young person had occurred while she was asleep in own home where the accused had been an invitee. The severity of the act was worsened by the accused's persistence, the age gap between him and the complainant and the lasting and painful effect of the offence on the complainant. After reviewing the sentencing imposed in other cases involving similar charges as well as those where a conditional sentence had been imposed, it found that a conditional sentence was not appropriate in this case.

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***R v Abdallah*, 2021 SKPC 63**

Gray, 2021-12-13 (PC21048)

Criminal Law - Assault - Sexual Assault

The accused was charged with sexually assaulting the complainant contrary to s. 271 of the *Criminal Code*. The trial was conducted with the assistance of an interpreter. When the interpreter raised concerns that the accused did not understand the form of Arabic being spoken, the trial was adjourned. Counsel agreed that it could proceed after the transcript of the Crown evidence was verbally translated to the accused and he testified with the assistance of a Masalit interpreter who was present by video. The complainant

and the accused each testified and their version of events were similar up to the point where the complainant alleged that after she got out of the accused's vehicle, she stumbled due to having an MS attack, the accused surprised her by appearing behind her, and then he managed to push her into the back seat, remove one leg of her pants and her shoe and began to have intercourse with her despite the fact she was yelling and screaming at him. He stopped and she was able to get out of his vehicle, whereupon he drove off. The police officer who first interviewed the complainant after the alleged incident testified that the complainant was nervous, embarrassed and began crying. Her description of what had happened during the sexual assault was vague on details and she had trouble explaining what had transpired. The officer asked her to go to the hospital for a sexual assault examination but the complainant refused. Another officer testified that the complainant provided her underpants about a month after the incident, but the lab results were inconclusive. The accused testified that the complainant kissed him while they were in the vehicle and then got in the back seat and took off her clothes. He said she invited him to have intercourse with her and he did, but stopped when she asked him to, and she had not screamed and yelled. After they got dressed, the complainant refused to get back in the vehicle so he waited to see if she could get a taxi but eventually left.

HELD: The accused was found not guilty. The court found that the Crown had proven that the accused met the complainant on the date in question and sexual contact between them occurred but it had not proven beyond a reasonable doubt that the complainant had not consented to that contact. After reviewing the evidence, it found that it did not accept that of the accused in its entirety but it had not found a basis on which to reject it outright. When considering all of the evidence along with the testimony of the complainant, who was not particularly compelling or coherent, it was unable to determine whom to believe. The benefit of the doubt must favour the accused.

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***Islam v Nash*, 2021 SKPC 65**

Demong, 2021-12-22 (PC21049)

Motor Vehicles - Accident - Liability

The plaintiff brought an action de novo in the small claims civil division of Provincial Court against the defendant. He sought to recover damages in the amount of $700. The parties had been involved in a motor vehicle accident in a parking lot and after reporting it to their respective Saskatchewan Government Insurance (SGI) adjusters, SGI determined that the plaintiff was at fault and he had to pay a $700 deductible to get his vehicle repaired. Each of the parties had been driving on roadways in the parking lot that did not provide direct access to parking spaces. As they each approached the intersection of these roadways, the defendant turned left in front of the plaintiff's vehicle and collided with the driver's side of it.

HELD: The plaintiff's action was allowed. The court found that the defendant was negligent and responsible for the accident. A copy of the judgment would be provided to SGI and it was to remit the plaintiff's deductible to him. If, in 90 days, the plaintiff had not received payment, he was to notify the court and it would award damages of $700 to him. It followed the decisions in *Weiman* (2002 SKPC 48) and *Willey* (2007 SKPC 88) and determined that the roadways on which each of the parties was driving in the parking lot

in question qualified as thoroughfares, as opposed to alleys, and were thus deemed to be highways. Consequently, s. 219(1) of *The Highway Traffic Act* (Act) governed. When the defendant approached the intersection, she should have yielded to the plaintiff's vehicle, which was to her right, but failed to do so. She was in breach of the rules of the road as set forth in the Act. The failure was indicative of a failure to meet the standard of care required of a careful and prudent driver.

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