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.

Vol. 24, No. 3 **February 1, 2022**

Subject Index

Administrative Law - Judicial Review - Procedural Fairness - Breach of Duty

Appeal - Standard of Review

Barristers and Solicitors - Disciplinary Proceedings - Conduct Unbecoming - Appeal

Civil Procedure - Appeal - Application to Adduce Fresh Evidence

Civil Procedure - Limitation Period - Discoverability Principle

***R v T.S.C.*, 2022 SKCA 1**

Jackson Ryan-Froslie Tholl, 2022-01-05 (CA22001)

Criminal Law - Sexual Assault - Mistake of Fact - Appeal
Criminal Law - Sentencing - *Gladue* Factors - Appeal
Criminal Law - Sentencing - Specific Deterrence - Appeal

This was an appeal by the accused T.S.C. from his conviction of one count of sexual assault and the sentence imposed following a trial in the Court of Queen's Bench. (See: *R v T.S.C.* (8 October 2020) Regina, CRM 360/2019 (Sask QB) and *R v T.S.C.*, 2021 SKQB 82 (Sentencing Decision).) He appealed his conviction on the ground that the trial judge erred by failing to properly consider evidence relevant to the element of consent,

Civil Procedure - Pleadings - Application to Strike Statement of Defence

Civil Procedure - Pleadings - Statement of Claim - Application to Amend

Civil Procedure - *Queen's Bench Rules*, Rule 1-3, Rule 1-6, Rule 10-40

Civil Procedure - *Queen's Bench Rules*, Rule 3-72

Civil Procedure - *Queen's Bench Rule*s, Rule 4-44

Civil Procedure - *Queen's Bench Rules*, Rule 4-44, Rule 5-36

Civil Procedure - *Queen's Bench Rules*, Rule 7-9, Rule 11-28, Rule 13-8

Civil Procedure - Summary Judgment

Civil Procedure - Summary Judgment - Appeal

Civil Procedure - Vexatious Litigant - Application for Leave to Commence Action

Constitutional Law - *Charter of Rights*, Section 11(b) - Stay of Proceedings - Appeal

Constitutional Law - *Charter of Rights*, Section 8

which he alleged would have raised a reasonable doubt that the complainant consented to the sexual activity or that T.S.C. honestly but mistakenly believed that the complainant had consented. The grounds advanced with respect to his sentence appeal were that the trial judge only gave lip service to the *Gladue* factors and overemphasized the principle of deterrence. In reviewing the reasons of the trial judge, the Court of Appeal (court) noted that the trial judge found she had no reasonable doubt with respect to consent, both as an element of the *actus reus* and of the *mens rea*, because on the evidence of T.S.C. alone, the Crown had proven absence of consent to the required standard. In particular, the court remarked, the trial judge reasoned he would have erred in law if he had found a reasonable doubt on T.S.C.'s evidence that the complainant had consented because she had agreed to sex with a condom, but when none was produced had sex with him anyway, and that, again on the evidence of T.S.C., she had consensual sex with him a few hours later such that she must have consented to the earlier sexual activity. As well, the court was cognizant that the trial judge ruled she would have also erred in law if she had a reasonable doubt based on the evidence of T.S.C. that the complainant was silent during the sexual activity, let him do it, and that "she did not tell him to stop." The court noted also that the trial judge ruled T.S.C. had not obtained consent as required by s. 273.2(b) of the *Criminal Code*. As to the sentence appeal, the court observed that the trial judge had considered T.S.C.'s personal background as an Indigenous person in relation to the offence he had committed, and was aware of the primacy of s. 718.2(e) of the *Criminal Code* and the governing authorities in relation to it, including *R v Gladue*, [1999] 1 SCR 688, and *R v Ipeelee*, 2012 SCC 13, and that though she commented "it is difficult to quantify the extent [*Gladue* factors] impact on his culpability for the sexual assault", she did reduce the sentence from the starting point of three years' custody because of his reduced moral culpability, which included the effects of the *Gladue* factors. As to the matter of the trial judge's application of the principle of deterrence, the court expressed an awareness that the trial judge justified her consideration of this factor because the evidence showed that T.S.C. held outmoded ideas about women as sexual objects.

HELD: The court dismissed the conviction appeal, granted leave to appeal the sentence, and dismissed that appeal as well. With respect to the conviction appeal, the court agreed with the trial judge on the authority of *R v Barton*, 2019 SCC 33, that the law did not recognize implied consent or consent given in advance, or that consent could be inferred by acquiescence, and agreed that it must be affirmatively given; that a yes in word or deed must be expressed to amount to consent. The court agreed with the trial judge that it would have been an error in law for the trial judge to find that T.S.C. believed he had the complainant's consent because she did not say no. What is more,

Criminal Law - Appeal - Sentencing

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

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

Criminal Law - Motor Vehicle Offences - Impaired Driving - Refusal to Provide Breath Sample

Criminal Law - Offences Against Property - Mischief

Criminal Law - Procedure - Direct Indictment

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence

Criminal Law - Sentencing - *Gladue* Factors - Appeal

Criminal Law - Sentencing - Specific Deterrence - Appeal

Criminal Law - Sexual Assault - Mistake of Fact - Appeal

Family Law - Child Support - Imputing Income - Appeal

Family Law - Child Support - Recalculating on Appeal

Family Law - Custody and Access - Interim

on T.S.C.'s evidence, which showed he took no steps to determine if the complainant was consenting as required by s. 273.2(b) of the *Criminal Code*, it would have been an error of law for the trial judge to so find. With respect to the sentence appeal, the court also agreed that in her reasons, the trial judge had considered and properly personalized the *Gladue* factors as these applied to T.S.C., and though she stated that these were "difficult to quantify" she did put them in the mix along with all the principles of sentencing she was to weigh. As concerned the argument of T.S.C. that the trial judge overemphasized deterrence in arriving at the sentence, the court noted that the sentencing provisions of the *Criminal Code* required the trial judge to emphasize deterrence and denunciation for sexual offences, and since sexual myths and stereotypes held by potential offenders, including T.S.C., increased the risk of sexual offending, the trial judge was correct in emphasizing deterrence and denunciation in order to counter the risks of harm to potential victims.

 Back to top

***Merchant v Law Society of Saskatchewan*, 2022 SKCA 2**

Ryan-Froslie Schwann Kalmakoff, 2022-01-05 (CA22002)

Barristers and Solicitors - Disciplinary Proceedings - Conduct Unbecoming - Appeal

The appellant, Evatt Francis Anthony Merchant, Q.C. (E.A.M.), appealed the finding of conduct unbecoming of a lawyer pronounced by a hearing committee of the Law Society of Saskatchewan (LSS), which also imposed a penalty of eight months' suspension from practise and costs. No facts were in issue before the Court of Appeal (court), as an agreed statement of facts was filed. The court accepted as facts that: E.A.M. and his law firm Merchant Law Group (MLG) had acted for J.S. and were successful in recovering compensatory damages for her pursuant to the Independent Assessment Process (IAP) of the Indian Residential School Settlement Agreement (IRSSA), which had been paid into the trust account of MLG for her benefit; J.S.'s son C.S had outstanding accounts owing to MLG; MLG wrote to J.S. reminding her that she had undertaken to pay MLG for legal services performed by the firm on C.S.'s behalf, which amounted to approximately $20,000.00; J.S. also owed MLG a small sum on her own behalf; MLG asked J.S. to sign a direction to pay the outstanding accounts of herself and C.S. to MLG from the settlement funds, which she did in April, 2014; the funds covered by the direction to pay remained in MLG's trust account, and the balance was paid out to J.S.; in October,

Family Law - Custody and Access - Person of Sufficient Interest

Family Law - Division of Family Property - Appeal

Mortgages - Foreclosure - Application for Judicial Sale - Order Nisi - Amendment

Mortgages - Foreclosure - Order Nisi - Judgment

Mortgages - Foreclosure - Pre-Leave Costs

Professions and Occupations - Registered Nurses - Complaint - Investigation

Statutes - Interpretation - *Act respecting First Nations, Inuit and Métis children*, Section 10

Statutes - Interpretation - *Administration of Estates Act*, Section 46.4

Statutes - Interpretation - *Child and Family Services Act*, Section 4

Statutes - Interpretation - *Freedom of Information and Protection of Privacy Act*

Statutes - Interpretation - *Limitations Act*

Statutes - Interpretation - *Limitations Act*, Section 5, Section 6, Section 20

Statutes - Interpretation - *Trustee Act, 2009*, Section 43, Section 52

2014, MLG applied to the British Columbia Supreme Court (BCSC) for a direction "that it was entitled to retain the amount paid to it in accordance with J.S.'s written instructions;" in July, 2016, the BCSC ruled that the direction to pay was an assignment prohibited by Art. 18.01 of the IRSSA and ordered the funds paid out to L.S., which MLG did promptly; the British Columbia Court of Appeal dismissed MLG's appeal in May, 2017; L.S. filed a complaint with the LSS about E.A.M.'s conduct in October, 2016; the formal complaint was to the effect that he had "induced" J.S. "to provide a form of assignment" of a portion of her settlement funds and to have his firm act on it and that such conduct was prohibited; E.A.M. had sought rulings from the LSS concerning payments of this kind well before this proceeding, and had received a reply from the LSS to the effect that the question was a legal one which was outside of its jurisdiction to answer; the hearing committee convicted E.A.M., finding that Art. 18.01 of the IRSSA prohibited the "assignment" of IPA compensation and that E.A.M.'s conduct constituted the obtaining of an assignment from J.S. and acting on it by withdrawing the funds to pay the accounts. E.A.M. appealed the conviction to the court on the grounds that the LSS hearing committee had erred in law by ruling that a direction to pay was always an assignment; had erred by finding that at the time J.S. signed the direction to pay, the jurisprudence was clear that Art. 18.01 of the IRSSA applied to directions to pay; and that E.A.M. had "special knowledge" of the IRSSA and its implementation and knew that the direction to pay was prohibited by Art. 18.01, although no evidence of his special knowledge had been presented at the discipline hearing.
HELD: The court allowed the appeal from the finding of conduct unbecoming, which made the sentence and cost decision moot. It also imposed costs of the appeal against the LSS. First, in finding that the direction to pay was not necessarily an assignment, the court canvassed many case authorities, including the cases MLG had instituted in British Columbia, *Fontaine v Canada (Attorney General)*, 2016 BCSC 1306 and *Canada (Attorney General) v Merchant Law Group LLP*, 2017 BCCA 198 (Merchant 2017). It reasoned that, fundamentally, an assignment is a transfer of "all or part of one's property, interest or rights" from the assignor to the assignee such that the assignor no longer has a claim to the property, interest or right in the thing assigned. It went on to reason that the direction to pay in this case did not "bear the hallmarks" of an assignment because the direction to pay did not irrevocably transfer the property, interest or rights in the settlement funds held in trust to MLG. Secondly, on the question of the law being "clear" with respect to the application of Art. 18.01 of the IRSSA to directions to pay such as the one at issue, the court pointed out that the term "assignment" was not defined in the IRSSA, then reviewed the case law, commencing with *Baxter v Attorney General of Canada* (2006), 83 OR (3d) 481 (Sup Ct), and concluded that the issue in question had not been decided, or the jurisprudence was

Trusts - *Inter Vivos* Gift - Appeal

Wills and Estates - Administration of Estate - Executors - Fees

Cases by Name

A.G. v Saskatchewan (Government)

Burnouf v Burnouf

CIC Asset Management Inc. v Townsgate Development Corporation

Conexus Credit Union 2006 v Benko

Croissant v Croissant

Dean v Koczka

Hartman Farms v Meyers Norris Penny LLP

Homequity Bank v Lindemann

K.M., Re

Kobialko v SaskPower

Malanovich v Toth

Meadowcroft v Bales

Merchant v Law Society of Saskatchewan

R v B.G.L.

R v Bear

R v Gamble

R v K.B.W.

R v Kolla

R v Legacy

ambiguous as to whether Art.18.01 of the IRSSA applied to the direction to pay in this case, as was acknowledged by the court in Merchant 2017, so that the LSS hearing committee erred in law in concluding that the law was clear and settled that the direction to pay was caught by Art. 18.01, and found that the question was "a proper legal question and an arguable issue." Lastly, the court was cognizant that the hearing committee had instructed itself correctly that E.A.M. could not be found to have committed conduct unbecoming if he held a sincere belief in an incorrect legal proposition (*Groia v Law Society of Upper Canada*, 2018 SCC 27), but went on to find that the hearing committee was incorrect in concluding that E.A.M. did not sincerely believe that the direction to pay was caught by Art. 18.01 of the IRSSA. The court stated that the hearing committee erred on the question of the sincerity of E.A.M.'s belief because of its finding that E.A.M. had "extensive involvement…with the process for determining the claims of residential school survivors." Because no evidence had been proffered upon which the hearing committee could have made this finding, it had erred in so finding. In any event, the court said, the evidence proved that E.A.M.'s belief was sincerely held, pointing to comments made by the court in Merchant 2017 to the effect that it did not find his appeal to be frivolous or vexatious, but on the contrary stated "[w]e are indebted to all counsel for their helpful submissions."

 Back to top

***R v Pennington*, 2022 SKCA 3**

Ottenbreit Barrington-Foote Tholl, 2022-01-06 (CA22003)

Criminal Law - Procedure - Direct Indictment
Constitutional Law - *Charter of Rights*, Section 11(b) - Stay of Proceedings - Appeal

The Crown appealed the decision of a trial judge of the Court of Queen's Bench (trial judge) to stay a direct indictment for unreasonable delay in bringing it to trial in breach of s. 11(b) of the *Charter*. (See*: R v Pennington*, 2020 SKQB 198.) The Crown was of the view that the trial judge had erred in law by failing to follow *R v Gryba*, 2015 SKQB 372 (*Gryba*), which the Crown argued stood for the proposition that preferring the direct indictment restarted the clock on the time within which the Crown was to try the matter before risking a stay for unreasonable delay. Upon a review of the court record and the trial decision, the Court of Appeal (court) observed that the trial judge made the following factual findings and rulings: an information charging the respondent with the offence of possessing child pornography on February 11, 2016 was sworn on August 25,

R v Pennington

R v T.S.C.

Saskatchewan Crop Insurance Corporation v Gustafson

Stephens v MLT Aikins LLP

Toutsaint v Investigation Committee of the Saskatchewan Registered Nurses Association

Yascheshen v Saskatchewan (Government)

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2016; the evidence in support of the charge consisted of unencrypted images on a hard drive seized from the respondent's home on August 24, 2016; also found and seized were three encrypted hard drives, which the police needed to unlock; a date for the preliminary hearing was set for June of 2017; the respondent consented to his committal and an indictment was filed in February, 2018 (first indictment); a first trial date was set for March, 2019, and adjourned at the request of the Crown to December, 2019; two of the encrypted hard drives were unlocked and the results provided to the Crown in February and March, 2019; the respondent filed a *Charter* application to stay the first indictment in June, 2019; while the *Charter* hearing was pending, the Crown filed a direct indictment charging the identical offence as in the first indictment, but expanding the dates so as to include the evidence contained in the unlocked hard drives; in December, 2019, the trial judge allowed the respondent's *Charter* motion and stayed the first indictment; in February, 2020, the respondent brought a second *Charter* motion for a stay of the direct indictment for unreasonable delay in bringing it to trial; the Crown argued, on the strength of *Gryba*, that the direct indictment was a new prosecution so that the time to trial began to run from the date of its filing; the trial judge did not agree that *Gryba* was applicable in this instance because in *Gryba* the new indictment alleged new and different offences, and he was of the view that the direct indictment and the first indictment alleged the same offence, but with expanded dates to incorporate more pornographic images revealed by the unlocked hard drives, and also because *Gryba* was decided before the presumptive periods established by *R v Jordan*, 2016 SCC 27, and was really about the special pleas under s. 607 of the *Criminal Code*; the trial judge then determined that filing the direct indictment did not restart the clock, that as with the first indictment, the clock had started to run on the day the information was sworn and as with the first indictment, and for the same reasons, the direct indictment was stayed.

HELD: The court agreed with the trial judge that the charges in the direct indictment were not new charges, as was the case in Gryba, and dismissed the Crown appeal. The court stated that the trial judge "understood the circumstance of *Gryba* very well" and his reasons for distinguishing it from the case on appeal were correct. Among his other reasons, the court confirmed the trial judge's findings that the Crown in *Gryba* made it clear to the accused that new charges would be laid if the hard drives revealed other images; that unlike in *Gryba*, the direct indictment was "broadly" worded in a way that could encompass any new images which might be found on the hard drives, and further, that the Crown would have used the images associated with the direct indictment as evidence in support of the first indictment at trial, had it not been stayed.

Back to top

***Dean v Koczka*, 2022 SKCA 4**

Richards Ottenbreit Leurer, 2022-01-07 (CA22004)

Family Law - Division of Family Property - Appeal
Civil Procedure - Appeal - Application to Adduce Fresh Evidence
Appeal - Standard of Review

The unrepresented appellant, J.L.D., appealed various findings of a judge of the Court of Queen's Bench (trial judge) following a trial to divide family property and to quantify child support. J.L.D. also applied to adduce fresh evidence on appeal. The court noted that, primarily, J.L.D. took issue with the trial judge's valuation of family property including farmland, machinery, equipment, and other personal assets; and took issue with the income the trial judge imputed to him for calculating child support. as J.L.D. was unrepresented on the appeal, and had in large part repeated the arguments he had made to the court at trial, the court was careful to explain to him that it could not retry the case, but was to review the trial judge's reasons according to a standard of review of palpable and overriding error, given that in cases such as this one, which involved findings of fact and mixed law and fact, considerable deference was to be allowed to the trial judge in his balancing of the many factors at play in dividing family property and imputing income. As to the fresh evidence application, the court noted the evidence sought to be admitted consisted of an affidavit which had exhibited to it a number of documents, including news items about market conditions for canola, general reports from FCC and SAMA about farmland prices and assessments, and photographs of farmyards, including his own. Following its ruling on the fresh evidence application, the court embarked on a review of the salient points in the trial judge's reasons.

HELD: The fresh evidence application was denied, and the appeal dismissed except for one minor finding having no bearing on the balance of the appeal. As to the fresh evidence application, the court referred to the four factors to be considered on such an application, as enumerated in *Walmart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2006 SKCA 142, ruling that J.L.D.'s proposed new evidence failed the test because the exhibits appended could have been adduced at trial or could not have "affected the result" of the trial, as the information in them was general and not specific to the substance of the appeal. The court then went on to consider on an item-by-item basis whether the reasoning of the trial judge revealed error that was palpable or overriding such that the court's intervention was required. In each case, the court stated that the findings and rulings made by the trial judge were ones which he could have made on the evidence at hand, and that J.L.D. had not presented evidence which showed otherwise. In particular, the trial judge indicated that he preferred the evidence of the expert valuator called by C.D.K., the petitioner, who used industry-approved methods of valuation while the evidence of J.L.D., lacking in material respects and based on "bald statements" without "documentary or corroborative support."

Back to top

***Croissant v Croissant*, 2022 SKCA 5**

Caldwell Barrington-Foote Tholl, 2022-01-07 (CA22005)

Family Law - Child Support - Imputing Income - Appeal
Family Law - Child Support - Recalculating on Appeal

This matter was an appeal by S.C. from the decision of a judge of the Court of Queen's Bench (chambers judge) on the ground that he erred in principle in the method he used to impute income from S.C.'s trucking corporation (corporation) to himpersonally for the purpose of determining the amount he was to pay for child support in 2019 and 2020. In canvassing the court record and the reasons given by the chambers judge in imputing income from the corporation to S.C., the court observed that the corporation showed a loss of $160,000.00 in its operations for 2018, the relevant year for purposes of determining child support, and after making a series of attributions to the corporation totalling $214,000.00 against the loss, found the corporation's pre-tax income to be in the black by $53,000.00; these attributions were for such items as a denial of 25% of the capital cost allowance claimed by the corporation with respect to tractor trucks used in the business, a $21,000.00 loan from S.C.'s mother to the corporation for operating expenses, and an entirely personal purchase of $16,000.00 in jewellery from income already accounted for in prior child support orders. The court also saw that the chambers judge made no reference to ss. 18 and 19 of the *Federal Child Support Guidelines* (Guidelines) or to jurisprudence, such as Bembridge v Bembridge, 2009 NSSC 158, to guide him in his task of determining how much, if any, corporate income to impute to S.C. Further, the court took note that the chambers judge both attributed income to the corporation of $53,000.00 and credited S.C. with $ 50,000.00 in dividends paid by the corporation to him for a total income of $103,600.00 for 2018, and then applied the same income to calculate child support for 2019 without further analysis.
HELD: The court allowed the appeal and substituted its own income calculation for that of the trial judge, stating that the chambers judge made fundamental and overriding errors in his imputation of income. First, the court determined that the addition he made to the net loss of the corporation which resulted in a net pre-tax corporate income of $53,000.00 was entirely arbitrary and without foundation. For instance, the court could find no justification for not deducting 100 percent of the capital cost allowance claimed by the corporation instead of 75 percent. Secondly, the court held that the chambers judge made reversible errors in his reasoning by both attributing income of $53,000.00 to the corporation and crediting S.C. $50,000.00 in dividend income. Thirdly, the court ruled that there was no basis for the chambers judge to justify his conclusion that S.C.'s 2020 income should be the same as in 2019. In the result, the court used a grossed-up dividend payment of $69,600.00 as S.C.'s income for 2019 and a grossed-up dividend payment of $50,600.00 for 2020 and recalculated the child support payments, taking into account the respondent's income for those years and the changes to her support obligations to the children.

 Back to top

***Burnouf v Burnouf*, 2022 SKCA 6**

Ottenbreit Schwann Leurer, 2022-01-12 (CA22006)

Civil Procedure - Summary Judgment - Appeal

Trusts - *Inter Vivos* Gift - Appeal

In the main, this matter was an appeal to the Court of Appeal (court) from a decision of a judge of the Court of Queen's Bench (chambers judge) taken by G.B., who advanced that the chambers judge had erred in principle by ordering that his name be removed from two parcels of residential real estate (properties) under s. 109 *of The Land Titles Act, 2000* (Act) without a trial to determine his claim that the properties had been gifted to him by his mother, A.B., though he was not named as registered owner on the land titles (see: *Burnouf v Burnouf*, 2020 SKQB 180). The court accepted the findings of fact made by the chambers judge as far as the narrative of the events which led to the matter coming before her. The court reviewed the court record and affidavit evidence before the chambers judge, and observed that: a trust agreement had been executed by A.B. and G.B. for purposes of estate planning and the properties were placed in their joint names; the trust agreement provided that A.B. was to have sole control of the properties, and had the power to have them transferred solely into her name at any time; subsequently to the execution of the trust agreement, A.B.'s ill health forced her into a care home; the cost of her care was not being met by her income; her daughter and property guardian, S.R., asked G.B. to transfer the properties to A.B. so they could be sold and the income used to pay for her care; G.B. declined to do so, claiming that the properties had been gifted to him years ago by A.B., he had occupied them for many years, and he had made improvements to them that had significantly increased their value; G.B. claimed he did not understand the import of the trust agreement when he signed it; S.R. brought an application seeking relief pursuant to s. 109 of the Act "directing the Registrar of Titles to remove [G.B.]'s name from the title to the three properties and for title to be vested solely in [A.B.]'s name"; prior to the application being taken, G.B. issued a statement of claim for a declaration that he was the donee of an *inter vivos* gift of the properties from A.B., and for an order "authorizing him to apply to the Registrar of Titles for the transfer of those properties into his sole name"; in response to A.B.'s application, G.B. asked that his action and A.B.'s application be consolidated and a trial of the issues be ordered because the evidentiary and legal questions raised needed to be fully sifted by a trial; the chambers judge allowed the application on behalf of A.B., and dismissed G.B.'s request for consolidation of the proceedings and a trial; the chambers judge concluded that G.B.'s actions were "a delay tactic, designed to leave his mother, Annie, languishing in debt while he waits for her death. Such delay would be prejudicial to Annie and would not be in the interests of justice;" and that the trust agreement had precedence over any alleged *inter vivos* gift of the properties.

HELD: The appeal was allowed, G.B.'s action and S.B.'s application consolidated, and a trial of the issues directed. Upon a review of the case law interpreting the scope of s. 109 of the Act, including *Hilmoe v Hilmoe*, 2018 SKCA 92, the court concluded that a proper interpretation of s. 109 in the context of the Act as a whole generally limited its application to correcting errors "arising out of the operation of the land titles system," and that the courts did not view s. 109 as generally suitable to resolve conflicts "between beneficiaries of an estate and the donee of an *inter vivos* gift concerning factual questions of the intention of the donor," as in this case. As such, the chambers judge erred in not consolidating the actions, since both engaged the same questions of fact and law and deciding complex issues of fact and law without a trial in an "ill-suited" proceeding was an error.

Back to top

***R v Bear*, 2022 SKCA 7**

Caldwell Schwann Kalmakoff, 2022-01-14 (CA22007)

Criminal Law - Appeal - Sentencing
Criminal Law - Sentencing - *Gladue* Factors - Appeal

The Crown applied to the Court of Appeal (court) for leave to appeal the sentence imposed on J.B. by a judge of the Provincial Court (sentencing judge) for the offence of break and enter and commit the indictable offence of assault causing bodily harm on the grounds that the sentencing judge made an error in principle which had an impact on the sentence or the sentence was unfit. More particularly, the Crown alleged he failed to emphasize denunciation and deterrence as mandated by the sentencing provisions of the *Criminal Code*, failed to fashion a sentence proportionate to the gravity of the offence and the moral culpability of the offender, and failed to apply *R v Ratt*, 2021 SKCA 7 (*Ratt*), and as a result overemphasized the effect of *Gladue* factors. The court took no issue with the facts the sentencing judge chose to consider at the sentencing hearing, including the contents of the PSR. Prior to trial, J.B. pled guilty to the offence in question on the condition that the custodial portion of the sentence be capped at two years less a day. The victim, C.L., was his intimate partner. J.B. had put her in fear for her safety and that of her two children by sending her threatening texts. As a result, she and the child went to her mother's next door for protection. J.B. forced his way into the house, punched her in the head, nose and body, and swiped her on the side of the head with his cell phone, all in the presence of one of the children. She bled from her nose and suffered a ruptured ear drum and a concussion. He also threatened to kill her. He was under the influence of alcohol at the time. J.B. had entries on his criminal record for similar offences against domestic partners. J.B. was an Indigenous person with alcohol abuse problems. The sentencing judge sentenced him to one year in custody less enhanced remand credit and eighteen months' probation.

HELD: The court gave the Crown leave to appeal but dismissed the appeal. The court did not find that the sentencing judge's reasons demonstrated that he erred by failing "to give primary consideration to the objectives of denunciation and deterrence" as was required of him by the sentencing provisions of the *Criminal Code*, which make abuse of an intimate partner and a member of her family aggravating, and direct him to give primary weight to denunciation and deterrence of the offending behaviour because it constituted abuse of a vulnerable person, being that C.L. was "Aboriginal and female." After commenting about how the court was to read the sentencing judge's reasons, stating that it was to look at the reasons as a whole and not hunt for errors or "finely parse" them, and was to keep in mind "the context of the evidence and the parties' submissions" as expressed in *R v Van Deventer*, 2021 SKCA 163, the court found that in his reasons the sentencing judge did give prominence to denunciation and deterrence as was required, referring to the victim as an "Aboriginal female, which suggests that the punishment should be more severe." The court also remarked that the decision was an oral one delivered immediately following the Crown's submissions to the effect that the sentencing judge needed to give primary weight to denunciation and deterrence. In turning to the alleged error in his treatment of the fundamental principle of proportionality, the court found no reversible error on the part of the sentencing judge. The court agreed that the sentencing cases filed by the Crown established a range of three years' incarceration and higher, but also observed that parity and proportionality must work together to achieve a fit sentence, and citing sentencing cases without bearing in mind the individual offender is an error in law. The court was also aware that the sentencing judge, as required, weighed the aggravating and mitigating factors applicable to the offender, and also the applicable *Gladue* factors, against the seriousness of the offence. The court also

distinguished *R v Ratt*, 2021 SKCA 7, which the Crown suggested required him to reduce the relevance of *Gladue* factors in this case, because C.L. had had the benefit of such considerations on past occasions but continued to offend as before. The court said the sentencing judge did not err in this respect because the offender in *Ratt* exhibited "violent conduct [that] was unrelenting," which was not the case with J.B. In the end, the court was of the view that the sentencing judge had carefully balanced all relevant factors in coming to a fit sentence.

Back to top

***R v K.B.W.*, 2022 SKCA 8**

Caldwell Schwann Kalmakoff, 2022-01-14 (CA22008)

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

The appellant appealed his convictions for sexual assault contrary to s. 271, touching a person under the age of 16 for a sexual purpose and invitation to touching contrary to sections 271, 151, and 152, respectively. He had served his sentence. At trial, the complainant testified that sexual activities had occurred and as he was not old enough to legally consent, that was not in issue. The appellant denied that the alleged incident had occurred and further defended by saying that it could not have occurred for a variety of reasons. At trial, both the complainant and the appellant testified. The trial judge was required to address reasonable doubt under the guidance set forth in *R v D.W.* because it was a "she said/he said" situation. In her oral decision, the judge found that the complainant's evidence was both credible and reliable and accepted it. The grounds of appeal were that the trial judge had: 1) misapplied the burden of proof or the standard of criminal proof; 2) failed to provide sufficient reasons for the verdicts she reached; 3) founded her decision on discriminatory or stereotypical assumptions regarding gay men in the absence of evidence; and 4) erred in law by subjecting his evidence to stricter scrutiny.

HELD: The appeal was dismissed. The court observed that the Supreme Court recently stated in *Mehari* (2020 SCC 40) that it had not decided whether uneven scrutiny, if it exists, can amount to an independent ground of appeal or a separate and distinct error of law. In this case, the court noted that it would address the appellant's arguments about uneven scrutiny of the evidence under the ground that the trial judge failed to adequately explain why she found him guilty. It dismissed each ground because it found that the trial judge had: 1) not erred in the proper application of the criminal standard of proof in the circumstances of this case. She reviewed the conflicting accounts given by the complainant and the appellant and found the complainant's version of what had happened to be reliable and credible, rejected the appellant's denial and explained why she was convinced beyond a reasonable doubt. The judge had not shifted the burden of proof to the appellant. She explained why she rejected his testimony about why the sexual activities could not have occurred and why she was not left with a reasonable doubt by his evidence; 2) the trial judge correctly addressed the appellant's defence that he did not have sex with the complainant, did not shift the burden of proof and had not misapprehended that his defence was that the offences could not have occurred. She explained why she rejected the appellant's testimony regarding his contentions; 3) the trial judge gave adequate reasons and had not applied uneven scrutiny to the evidence. In her credibility assessment, she acknowledged the problems that the appellant had given inconsistent testimony and admitted memory loss. She

had not rejected all of the appellant's evidence but found that his credibility had been critically undermined by some of his testimony; and 4) the trial judge was entitled to draw inferences from the complainant's evidence that the appellant had cleaned his residence prior to their meeting because he intended to engage in sexual activity with the complainant.

 Back to top

***Toutsaint v Investigation Committee of the Saskatchewan Registered Nurses Association*, 2021 SKQB 315**

Gabrielson, 2021-12-07 (QB21302)

Professions and Occupations - Registered Nurses - Complaint - Investigation
Administrative Law - Judicial Review - Procedural Fairness - Breach of Duty

The applicant, a prisoner in the Prince Albert Penitentiary, sought judicial review of a decision of the Investigation Committee (IC) of the Saskatchewan Registered Nurses Association (SRNA) to dismiss his complaint under *The Registered Nurses Act, 1988*. He asked that the decision be quashed. The background to the complaint began in March 2019, when the applicant was being held in an "observation cell" where self-harming or suicidal prisoners are placed for round-the-clock observation by corrections officers. A nurse employed by Correctional Services Canada at the penitentiary, who was a member of the respondent, delivered medication to the applicant. She had crushed it and mixed it with his food. The applicant asked to see the empty package of medication but the nurse stated that the package was in the medication room and refused to show him. The applicant became angry, swore at the nurse and threatened to self-harm. After the nurse and the escorting corrections officer failed in their attempt to de-escalate the situation, the nurse left the area while the applicant's aggression increased. Later that day, the nurse completed a statement/ observation report (SOR) and inmate offence report notification of charge pertaining to the incident. Shortly thereafter, the applicant's offence was deemed minor and he was fined $5.00 by the warden in May 2019. After the charge, the nurse continued to provide care to the applicant. In January 2020, through the prisoners' legal services, the applicant made a complaint in writing to the respondent against the nurse. He alleged that the nurse: was in a conflict of interest between her employment and professional ethics; had initiated proceedings against the applicant which would result in torture or cruel punishment; failed to act in the best interests of the patient; and disclosed confidential information. The IC informed the nurse of the allegations and she provided a written response to them. It issued a written report in January 2021 in which it found that the matter did not meet the threshold for further investigation as the evidence did not support a finding of professional misconduct or professional incompetence. It would not proceed with a formal investigation because there was a conflict between the versions of the incident provided by the applicant and the nurse, and further, she had followed the institutional policies in attempting to de-escalate the situation. There was no evidence to indicate that the applicant had committed any self-harm related to the incident. The applicant then made this application. The issues were: 1) what was the standard of review; 2) whether the applicant was given procedural fairness; 3) whether the applicant should be given public interest standing for the purpose of judicial review; and 4) whether the committee erred in its decision.
HELD: The application was dismissed. The court found with respect to each issue that: 1) the standard of review applicable to

allegations of breach of procedural fairness is one of correctness; 2) the IC provided the applicant with the type of procedural fairness that was warranted by the statutory scheme set out in s. 28 of the Act. This conclusion was based upon an assessment of the *Baker* factors ([1999] 2 SCR 817): the IC was not exercising a judicial function; s. 28 of the Act provided the IC with the power to investigate and decide whether further action was required; the decision had little impact on the applicant, as only a small fine had been imposed; the applicant's only expectation regarding the complaint would be that the nurse would respond, which she had; the statutory procedures set out in the Act were followed by the IC, and a discipline hearing was not required in every case involving a complaint; 3) the applicant had not met the test of public interest standing laid out in *Canada v Downtown Eastside Sex Workers* (2012 SCC 45). The matter was not a constitutional issue of critical importance and was of minor personal importance to the applicant. As a minor complaint, it had been dealt with under the SRNA's mandate and regulatory sphere; and 4) it was satisfied that the IC had not erred. It acted within its powers pursuant to s. 28(3) of the Act. As stated in *Makis* (2020 ABCA 451), the applicant was not entitled to challenge the merits of the decision. It considered the grounds of the applicant's complaint set out above and found that, based upon the findings in the IC's report, none of them required further action.

 Back to top

***Hartman Farms v Meyers Norris Penny LLP*, 2021 SKQB 319**

Scherman, 2021-12-14 (QB21303)

Civil Procedure - Pleadings - Statement of Claim - Application to Amend
Civil Procedure - *Queen's Bench Rules*, Rule 3-72
Statutes - Interpretation - *Limitations Act,* Section 5, Section 6, Section 20

The plaintiff applied for orders permitting it to add the third-party defendant, PriceWaterhouseCoopers LLP (PWC), as a direct defendant in its claim against the defendant, Morris Norris Penny LLP (MNP) and to amend its statement of claim in various respects related to adding PWC as a direct defendant. According to the plaintiff's original claim, it had suffered damages as a result of negligence and breach of contract in connection with professional accounting and tax services MNP provided to it during the years 2008 through 2011. As at 2011, it moved from MNP to PWC for its accounting and taxation advice. The plaintiff alleged that MNP made various errors in relation to its 2009 corporate income tax filings and those of a related corporation. As a result of the errors, the plaintiff had to pay significant amounts in additional tax following a 2016 audit by Canada Revenue Agency. MNP defended the claim, denying any liability, and with leave of the court and the consent of PWC, it added the latter as a third-party defendant to the action. MNP alleged that if the plaintiff suffered the alleged damages, then PWC's finalization of planned corporate reorganizations and related tax documents was the proximate cause of any such losses. PWC's defence to MNP's claim was to deny any liability and any duties owing to the plaintiff or MNP under the alleged circumstances and put the plaintiff and MNP to strict proof thereof. PWC opposed this application, arguing that the plaintiff's proposed claim against it was barred by ss. 5 and 6 of *The Limitations Act* and the amendments the plaintiff sought to make to its claim should not be permitted because to do so would constitute withdrawing admissions of fact. The issues were: 1) whether the plaintiff's ability to commence an action against PWC had expired pursuant to

the Act; 2) if so, whether the plaintiff had met the criteria of s. 20 of the Act so as to give the court discretion to add PWC as a party; 3) whether removing certain paragraphs from the plaintiff's claim constituted the withdrawal of pled admissions of fact; and 4) whether the withdrawal would cause PWC such prejudice that the amendments sought should be denied.

HELD: The application was granted and the plaintiff was allowed the orders it sought in its application. The court found with respect to each issue that: 1) the limitation period under the Act had expired, as the application was made on October 6, 2021. In considering the issue of discoverability under s. 6(2) of the Act, it determined that the plaintiff knew of the acts or omissions on which its claim was based within a reasonable period of time following PWC's production of relevant documents on June 24, 2019. It had not provided evidence to prove that its contemplated cause of action was not discoverable within a reasonable period of time thereafter with the exercise of due diligence; 2) that it would exercise its discretion under s. 20 of the Act to add PWC as a party because the plaintiff's proposed claim fulfilled the conditions set out in s. 20(a) and (b) of the Act. The court was satisfied that it arose out of the same transaction as the original claim and PWC would not suffer actual prejudice if it were added as a direct defendant; 3) it had the discretion under Queen's Bench rules 1-3 and 3-72(3) to permit the plaintiff to amend its claim as requested. It followed the principles set out in *Boisvert* (2015 SKQB 2) and *Cupola Investments* (2021 SKCA 86), subject to determining the issue of prejudice, that the proposed amendments were proper pleadings as required by Queen's Bench rule 7-9(2). It did not find that the amendments constituted withdrawal of admissions. PWC's position that a party cannot withdraw admissions of fact unless it could meet certain conditions was no longer the law as a result of the changes made to *The Queen's Bench Rules*; and 4) PWC would not suffer prejudice or injustice if the proposed amendments to the claim were allowed. It had already exercised its discretion to add PWC as a party notwithstanding the expiry of the limitation period and had decided the question of prejudice under s. 20(2)(b) of the Act, and the same reasons and conclusions operated in the context of deciding whether a withdrawal of an admission should be permitted. If its decision that the proposed amendments were not a withdrawal of admissions was incorrect, it would find that the amendments should be allowed since to do so did not prejudice PWC in its ability to defend the claim.

 Back to top

***Conexus Credit Union 2006 v Benko*, 2021 SKQB 321**

Robertson, 2021-12-16 (QB21304)

Civil Procedure - Queen's Bench Rules, Rule 1-3, Rule 1-6, Rule 10-40
Mortgages - Foreclosure - Order Nisi - Judgment

The plaintiff, Conexus Credit Union, was granted an order nisi for foreclosure for matured and demand mortgages with a 90-day redemption period. The judgment also provided for judgment for two other debts owed by the respondent to the plaintiff. The respondent mortgagor had borrowed $247,378 from the plaintiff and it was secured against residential property owned by the respondent. He had also entered into two different agreements with the plaintiff, who provided him with unsecured loans. The respondent failed to make the required payments on the mortgage loan and in 2021, the plaintiff filed a notice to respondent under *The Land Contracts (Actions) Regulations*. It was stated in the affidavit supporting the application that the plaintiff intended to include

a claim based on the respondent's personal covenant to pay the portion of the amount owing under the mortgage for which a claim was not precluded by *The Limitation of Civil Rights Act*. A Queen's Bench judge granted leave to the plaintiff to commence its foreclosure action conditional on it not being issued until after June 1, 2021. After that date, the plaintiff filed a statement of claim identifying the mortgage loan and the two other debts and sought judgment for each of the three loans pursuant to foreclosure of the mortgage and sale of the mortgaged land. The respondent was noted for default of defence after being served with the statement of claim. The Queen's Bench judge hearing the matter granted the order nisi described above. The plaintiff then filed two judgments in pursuance of an order in Form 10-9F and a bill of costs, asking that the judgments and bills of costs be issued for the two unsecured debts. The local registrar referred the matter to the judge who had issued the order nisi for a decision. The issue was whether the judgments and bill of costs should issue.

HELD: The court found that it was not proper for the plaintiff to include other claims in the statement of claim issued pursuant to the granting of leave to commence an action that was granted only in relation to the mortgage. No leave was granted to commence an action for any other claim for debt, nor would it have been required for the plaintiff's two other claims. They should be filed as separate statements of claim in Part 3 of *The Queen's Bench Rules* and Form 3-9. The plaintiff had not intended anything untoward but was following a practice not previously challenged or questioned by the court. It held that Queen's Bench rule 10-40 and Form 10-40A are designed to deal only with foreclosure/sale/deficiency claims arising from a mortgage loan secured against real property. It held that it had jurisdiction to review and revisit the order nisi and deleted the paragraphs of the plaintiff's claim pertaining to the claims for other debts. However, it ordered that the judgments may issue in Queen's Bench Form 10-9A pursuant to Queen's Bench rules 1-3(2)(b) and 1-6. It decided in the circumstances that it would do so under each rule respectively, to facilitate the quickest means of resolving the claim at the least expense and to cure any contravention so that the judgment could issue on the other debts, though not in the form submitted by the plaintiff.

Back to top

***Malanovich v Toth*, 2021 SKQB 322**

Brown, 2021-12-16 (QB21305)

Family Law - Custody and Access - Interim

The terms of the custody and access arrangement between the parties for their child were first established in April 2019 by a Queen's Bench order. The child's primary residence was to be in Yorkton with the respondent mother. The petitioner was given parenting time every second weekend from Friday after school until Monday morning, one afternoon after school every other week and one overnight each week. The parties eventually allowed the petitioner to increase the amount of parenting time that had been prescribed by the order. The respondent moved with the child to Saskatoon in 2021 and the petitioner successfully applied for and obtained an order in September 2021 that child be returned to Yorkton. The order specified that if the respondent chose to return to Yorkton, the terms of the April 2019 order would remain in full effect but if she stayed in Saskatoon, she would have parenting time

for two weekends out of every three (see: 2021 SKQB 249). An expedited pre-trial was scheduled for late November 2021. The respondent remained in Saskatoon and the child's primary residence became the home of the petitioner. The pre-trial did not result in a final settlement and the trial was set for May of 2022. Less than a month after the pre-trial, the respondent moved back to Yorkton. The petitioner argued that the terms of the September 2021 order governed and the child's primary residence should remain with him. The respondent submitted that the parenting order of April 2019 was operative as she had returned to the Yorkton area. The issue was which parenting order should govern until the trial, given the respondent's delay in moving back to Yorkton? The petitioner took the position that the respondent had made a choice from which she could not now resile, in accordance with the doctrine of estoppel by approbation and reprobation, citing *Iron v Saskatchewan* (1993 CanLII 6744).
HELD: The court found that the April 2019 order governed the parenting arrangement until the date of trial, regardless of whether the parties reached agreement as to how it was implemented. The respondent's absence from Yorkton for a couple of months was not a sufficient alteration of the status quo that had existed for a number of years prior to the short-term September decision. It accepted that the respondent's reason that she had not immediately moved back to Yorkton after the September 2021 order issued because she hoped that an agreement would be reached in the pre-trial. Further, it questioned whether the doctrine relied upon by the petitioner was engaged in such circumstances and if it was ever applicable without modification to custody, access and parenting decisions, which are always governed by the best interests of the child. Since changes to the status quo had occurred since the April 2019 order, such as the increase in the amount of parenting time exercised by the petitioner, it changed the order to permit him to parent the child from Thursday after school to the following Monday morning every second weekend.

Back to top

***Stephens v MLT Aikins LLP*, 2021 SKQB 323**

Elson, 2021-12-17 (QB21307)

Statutes - Interpretation - *Limitations Act*
Civil Procedure - Summary Judgment
Civil Procedure - Limitation Period - Discoverability Principle

The defendants all filed applications for summary judgment against the plaintiff. In all but one of them, the only issue was whether the plaintiff's action was statute-barred under the relevant provisions of *The Limitations Act*. The background to the self-represented plaintiff's action was that in 1996, she and her husband bought a lot in the Village of Lucky Lake. They borrowed $13,500 from the defendant, Canadian Imperial Bank of Commerce (CIBC), to acquire a modular home to place on the property. The plaintiff described the loan as a mortgage and indicated that a promissory note was given in association with the debt. The plaintiff and her husband also gave a mortgage and a chattel mortgage to Trans Canada Credit (TCC), now owned by the defendant, Wells Fargo, in 1999 to secure a loan for $6,989. As with the CIBC mortgage, TCC's interest under its mortgage was protected through a caveat registered against the title to the property. The plaintiff and her husband separated in May 2000 and she moved to Saskatoon with their children. They defaulted on the mortgage to CIBC in August 2000. Her husband remained in Lucky Lake and filed for

bankruptcy in November 2001 and his trustee was the defendant, Deloitte. He was automatically discharged from bankruptcy in August 2002 and in November 2005, he committed suicide while living in Alberta. Of the evidence that CIBC could locate, it advised that it had not pursued foreclosure but employed the law firm MLT Aikins (MLT) to commence a claim against only the plaintiff, presumably because of her former spouse's bankruptcy. Service of the claim was accepted by the plaintiff's son and when she did not defend, default judgment was taken out against her in November 2002. The plaintiff did not apply to have the judgment set aside. CIBC did not renew its judgments pursuant to former Queen's Bench rule 347 before the tenth anniversary, nor did it effect a transfer of title to the property. Thus, enforcement of it would be statute-barred by s. 7.1 of the Act. In the case of TCC, it commenced a claim and obtained a judgment on the promissory note without reference to the mortgage or chattel mortgage agreements in October 2000. Service was accepted by the plaintiff's mother. After the plaintiff and her former husband failed to defend, TCC obtained a default judgment in January 2001. The plaintiff did not apply to set it aside and neither TCC nor Wells Fargo made any effort to renew the judgment before January 2011. The plaintiff pled that because of her husband's bankruptcy, she believed CIBC sold the property in March 2002 by putting up a "for sale" sign on the property and that no foreclosure or judicial sale proceedings took place. Eventually, the defendant Ruckaber purchased it and in 2011, sold it to the mother of the defendant, Couch. When his mother decided to sell the property in 2016, Couch discovered that the names of the plaintiff and her former husband were on the title and contacted the plaintiff to inform her. She demanded that he give up possession of the property to her. He advised that only his mother could do so. Apparently, his mother gave up possession in 2016. The plaintiff contended that she had been misled into believing the property had been sold and held the following defendants to blame: CIBC; TCC/Wells Fargo; the law firm of MLT; the Village of Lucky Lake (Village); Jessiman, a member of the Village council since 1996; Deloitte Touche (Deloitte); Ruckaber and Couch. As a result, all of these defendants had deprived her and her children of the opportunity to reside in the property for 16 years. She made a similar claim on behalf of her former spouse for the period from 2000 to his death. The plaintiff's pleadings also included other allegations made against some or all of the defendants. She alleged breach of contract, fraudulent chattel mortgage, conspiracy, trespass, conversion, unjust enrichment, negligence, defamation, and wrongful death of her former spouse caused by his relocation resulting from the unlawful conduct of CIBC and the other defendants. In a multi-part set of allegations related to fraudulent concealment, the plaintiff said that CIBC and the Village acted in concert to conceal the cause of action regarding the mortgage so that they could post a for sale sign on the property. She named TCC as having executed a fraudulent chattel mortgage and alleged that the defendants CIBC, MLT and CIBC aided it in this exercise. The plaintiff alleged that the defendant Pro Bono Law Saskatchewan (PBLS) had played a role because in 2018, after it assigned a lawyer to her case, he drafted a statement of claim that somehow concealed the plaintiff's cause of action. The plaintiff sought a damages award of $2,339,300.

HELD: The defendants' applications for summary judgment were granted except for that brought by PBLS, as another hearing would be held to deal with its application. The plaintiff's action was dismissed as being statute-barred. The successful defendants' costs were to be taxed under Column 2. The court first determined under Queen's Bench rule 7-2 that there was no genuine issue requiring trial and summary judgment was the proportionate, more expeditious and less expensive means to achieve a just result. It then reviewed: the relevant provisions of both the current Act: ss.5; 6; 7; 18; 19; and 31 and those of its predecessor, *The Limitation of Actions Act* (LAA); the history of limitation periods; and the Supreme Court's decision in *Grant Thornton* (2021 SCC 31) regarding the discoverability rule. It categorized the plaintiff's claims as having three themes: 1) lost possession of the property that included breach of contract, fraud, forgery, conversion and negligence; 2) defamation; and 3) the death of the plaintiff's former spouse. However, in its fiat, the court primarily confined its ruling to the limitations issue, although it addressed, in varying degree, certain

other issues. They included the standing of a deceased party to the action; the concept of abuse of process; the requirements for pleading a defamation claim; and the leave requirements in the *Bankruptcy and Insolvency Act*. In its ruling regarding standing, it declined to exercise its discretion under s. 33(1) of *The Queen's Bench Act, 1998* to appoint a person to represent the plaintiff's former spouse. It found that his estate was not interested in the issues raised in the action and thus neither it nor the deceased had standing to pursue it. In its ruling respecting the limitations issue, the court applied the analysis set out in the Supreme Court's decision in *Grant Thornton* to the plaintiff's alleged claims pursuant to the criteria set out in s. 6(1)(a) through (d) of the Act. It found with respect to the theme of lost property the plaintiff's claim was discovered within the meaning of the Act no later than June 30, 2002, the day on which Ruckaber took possession of the property. The plaintiff's allegations relating to the lost possession of the property became statute-barred on June 30, 2008 pursuant to the six-year limitation period under s. 3(1)(e) of the LAA and s. 31(5)(b) of the Act as against CIBC, TCC/Wells Fargo, MLT, the Village, Jessiman, Deloitte and Ruckaber. Under s. 19 of the Act, the claim against these defendants could no longer be maintained. Regarding the plaintiff's claim against Couch, it determined that it too was statute-barred. The two-year limitation period would have expired on December 31, 2013 or alternatively, in August 2018, two years after the plaintiff was informed by Couch of her title.

 Back to top

***Meadowcroft v Bales*, 2021 SKQB 317**

Robertson, 2021-12-20 (QB21306)

Wills and Estates - Administration of Estate - Executors - Fees
Statutes - Interpretation - *Administration of Estates Act*, Section 46.4
Statutes - Interpretation - *Trustee Act, 2009*, Section 43, Section 52

The two applicants applied pursuant to s. 46.4 of *The Administration of Estates Act* for directions from the court regarding payment of certain claims relating to administration of the estate so that it could be finalized and the net assets distributed to the beneficiaries. The respondent opposed the payment of the claims. The applicants and the respondent were the co-executors appointed by the terms of their father's will and beneficiaries under it. He had died in 2017 and letters probate were granted that same year. The statement of property showed the total value of the estate as being $336,500 and of that amount, the value of the deceased's residence comprised $274,800. The house eventually sold in 2020 for $231,000 and thus the final value of the estate was $291,795. During the administration of the estate, a number of disagreements arose between the applicants and the respondent. Of the items for which the applicants sought direction, the most significant was regarding their claim for executor's fees of $14,589, calculated at five percent of the value of the estate's value. They submitted that the fee be split unequally between them to reflect differences in their estimates of the time they spent working on the administration of the estate. They asserted that the respondent was not entitled to executor's fees because of her difficult conduct and relative lack of assistance. The respondent did not apply for payment of executor's fees and did not agree with payment to the applicants with her exclusion. She stated that she never had any intention of seeking compensation for such fees but took the position in this application that she was "willing to call it even" so that the estate could be settled. Another claim for which the applicants sought direction was for the payment of all legal fees.

HELD: The court decided that no order would be made for payment of executor's fees. As all of the executors were beneficiaries, ordering payment of fees would skew the equal sharing intended by the testator. The applicants' claim for payment of legal fees of $7,000 incurred in bringing the application was granted. It reviewed the relevant provisions of *The Trustee Act, 2009* regarding reimbursement of expenses incurred and payment of fees to trustees for the administration of an estate and a number of cases in which the courts had to determine whether to allow executor's fees and in what amount. It agreed with and followed the approach set out in the decisions of *Novak* (2019 SKQB 261) and *Stecyk* (2019 SKQB 116) that a flat percentage rate should not be used to establish executor's fees, but rather that the court should examine the factors described in *Safian* (1995 CanLII 4020) and consider evidence of the testator's intentions or any agreement for payment. It made the following findings: the will did not provide for payment of executor's fees and there was no agreement between the executors or beneficiaries about payment of executor's fees; the applicants' decision to be paid appeared to have arisen late in the administration and brought into question the authority to order payment after the fact; the estate was small; the time expended by the applicants in administering the estate was significant; the skill and ability required of the executors in the administration of this estate was not high; and the administration took longer than was normal because of the disputes between the parties. Regarding the payment of legal fees, it found that the application brought by the applicants was necessary and proper to allow the estate to be finalised so the actual cost should be paid by the estate.

 Back to top

***Homequity Bank v Lindemann*, 2021 SKQB 326**

Robertson, 2021-12-21 (QB21309)

Mortgages - Foreclosure - Pre-Leave Costs

The proposed plaintiff, Homequity Bank, applied for leave to commence an action under *The Land Contracts (Actions) Act* and to claim pre-leave costs (PLC) against the proposed defendant/respondent mortgagor. The parties had entered into a Canadian Home Income Plan mortgage agreement under which the applicant loaned $48,594 to the respondent secured against real property. By affidavit sworn in May 2021, the applicant's employee attested that the respondent failed to pay property taxes, an act of default under the mortgage. As a result, the entire mortgage became payable in March 2021. In May 2021, the court granted a without notice application by the applicant for an order for substitutional service on the respondent. In July, the applicant filed a Notice of Application for Leave to Commence Action in Form A of *The Land Contracts (Actions) Regulations*, together with affidavits confirming service in the manner authorized by the court order. The application was adjourned by consent to October 2021 when the applicant was granted an order permitting it to serve the respondent by providing service to his lawyer. The leave application was adjourned until December and at that hearing, the respondent's lawyer appeared. The applicant relied upon s. 8(3) of the Act and a provision in the mortgage agreement permitting PLC but did not specify a specific amount, suggesting $1,000. It had also indicated in Form 10-39B of *The Queen's Bench Rules* that it intended to seek PLC and listed as reasons that the respondent: defaulted on the mortgage; refused to accept the applicant's correspondence; refused to accept service; and had alleged trespass by the process server. It argued at the hearing that these examples demonstrated that respondent had deliberately frustrated the applicant's attempt to secure leave and qualified him as a "chronic offender", as described in *Saskatoon Credit Union v MacKay*, 1988 CanLII 4895. In

that case, PLC were granted because the court found the mortgagor to be a chronic offender. The applicant relied on other cases, including *Dubois* (2003 SKQB 472), in which the court extended the rationale for awarding PLC to include costs incurred for substitutional service because the mortgagor deliberately avoided service. The respondent's lawyer did not oppose granting of leave but opposed the award of PLC. With regard to the former, the lawyer introduced evidence from an appraisal firm that the property was valued at $169,000 and at $251,000 in the tax assessment. The applicant had stated that the property was worth between $62,500 and $76,000 while the mortgage balance including arrears was $77,877. The lawyer also pointed out that the applicant's lawyer had demanded payment from the respondent of extra charges including service fees of $1000, an administration fee of $399 and total legal fees and disbursement of $3,878, in its correspondence with him between March and July of 2021. However, none of these extra charges were identified in the applicant's September 2021 Supplementary Affidavit Regarding State of Respondent's Account Under the Mortgage or in the third such affidavit sworn in November.

HELD: Leave was granted to commence the action but the application for PLC was dismissed. The court reviewed the legislation and the jurisprudence related to foreclosure and the supervisory jurisdiction it possessed. It expressed its concern regarding the reliability of the applicant's evidence as to the value of the property and considered that the respondent could have objected to the application for leave because of his apparent equity in it. Regarding the applicant's request for PLC, it observed that some of the applicant's complaints could not justify an award, most obviously the respondent's defaulting on the mortgage. The description of him as a "chronic" offender was made in the absence of evidence that was required regarding the respondent's ability to pay. Although it would not approve the respondent's failure to respond or cooperate with the applicant, it was not satisfied that it amounted to chronic offending or reprehensible conduct so as to justify an award of PLC. It cited the case of *Star Development Corp.* (2019 SKQB 149), in which the court states that where substitutional service has been ordered under Queen's Bench rule 12-10, the person to be served has no duty to assist or cooperate with the process server. However, it considered the most important reason not to grant the application for PLC was that the applicant had not come to court with clean hands. It had not disclosed that its lawyers had demanded payment of charges they knew were not recoverable in the legal action. The court relied on the May 2021 decision in *Churko* (2021 SKQB 164) that found breaches by the mortgagee would not put it in a sound position to seek PLC. It rejected the applicant's argument that *Churko* could be distinguished on the facts and was wrongly decided because it failed to meaningfully consider cases such as *Ledoux* (2005 SKQB 262) and *Dubois*. *Churko* did not create new law but reaffirmed the existing law.

Back to top

***Kobialko v SaskPower*, 2021 SKQB 324**

Tochor, 2021-12-22 (QB21308)

Civil Procedure - Queen's Bench Rules, Rule 4-44

The defendant, SaskPower, applied for an order dismissing the plaintiffs' claim for inordinate and inexcusable delay under Queen's

Bench rule 4-44. The plaintiff and his wife, who died in 2020, had filed their statement of claim in April 2015. They sought damages, alleging that the defendant's employees or agents were negligent in replacing the electrical meter at their residence that caused a fire which destroyed the house. The defendant acknowledged that reasonable progress was made in the litigation in 2015 and 2016, but thereafter, the plaintiffs were responsible for inordinate delay. The plaintiff deposed that he became a full-time caregiver to his wife in 2018 when she was diagnosed with cancer until her death in February 2020. He explained that after March 2020, the COVID-19 pandemic impacted his ability to proceed with litigation.

HELD: The application was dismissed. Costs of $1000 were awarded to the plaintiff. The court held that it was in the interests of justice to allow the matter to proceed. The court applied the tests set out in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 (ICC). It examined whether the delay was inordinate and found that six years and four months between the filing of the claim and the application respectively was indeed inordinate, after it reviewed what steps had been taken by the parties in each year. Questioning had occurred in 2016 but the plaintiff's responses to undertakings given then were still outstanding in 2018. The defendant provided its responses in December 2018. There was no progress in the litigation in 2019. None occurred in 2020: the plaintiff requested a pre-trial conference three times but the defendant refused because the plaintiff's responses remained outstanding. The defendant filed this application in August 2021 but the matter was adjourned by consent until November. The plaintiff's responses were provided in October 2021. The court then assessed whether the delay or any part of it was excusable and determined that: in 2019, the delay was excusable because of the plaintiff's wife's medical problems; in 2020, it was inexcusable. The plaintiff's responses were still outstanding and he had not provided any explanation why he could not have completed them; in 2021, the delay between January and August was inexcusable as the plaintiff had not offered any explanation. In addressing the third test from ICC, assessed against the factors enumerated thereunder, the court determined that the interests of justice required the claim to proceed, despite findings of both inordinate and inexcusable delay. It considered and weighed the following factors as allowing the claim to proceed: the prejudice alleged by the defendants was ameliorated by the existence of reports and records prepared in the normal course of business; evidence that might have been given by the plaintiff's wife had already been provided by the plaintiff during questioning; the litigation was at the stage that a pre-trial conference could be scheduled; and the plaintiff's personal circumstances had been very difficult between 2018 and 2019.

Back to top

***CIC Asset Management Inc. v Townsgate Development Corporation*, 2021 SKQB 327**

Robertson, 2021-12-22 (QB21310)

Mortgages - Foreclosure - Application for Judicial Sale - Order Nisi - Amendment

The plaintiff, CIC Asset Management Inc., applied to replace an order nisi it had obtained from the court in 2019 with a different order nisi. It had been given leave to apply for an order for foreclosure. The 2019 order granted the plaintiff, then the Saskatchewan Immigrant Investor Fund Inc., an order nisi for sale of three townhouse properties and 19 vacant condominium lots in Weyburn. The order specified: that the total amount owing was $960,541; a redemption period of 90 days; the selling officer would be the plaintiff's

law firm; the plaintiff and the defendant were each allowed to make offers to purchase; in the absence of any offers by the end of the listing period, the plaintiff could apply to amend the terms of the order or for foreclosure absolute; and the total minimum sale price was set at $1,245,600, being 80 percent of the appraised valued of the lands. At that time, an appraisal report provided that the total value of all 23 properties was $1,555,000. The total value of the three townhouses was $1,080,000. Each of the 19 vacant condominium lots was valued at $25,000 for a total value of $475,000. Since the order was made, the plaintiff had been granted 15 orders, including amendments to it that added a fourth townhouse property, approving sales of each of them, and in March 2020, extending the listing period for 150 days from date of relisting. In this application, the draft order requested amending and fully substituting the terms of the 2019 order applicable to the 19 vacant condominium lots, that: the total amount due for principal, accrued interest and property taxes under the mortgage was $530,822, and judgment in that amount plus interest; a one-day redemption period; the plaintiff's law firm would act as the selling officer, with power to postpone the listing of the lands; the sale may be listed for up to 180 days; and a total upset price of $165,000 being 89 percent of the appraised value. An appraisal report dated November 2020 estimated the current market value of the lots as at that date at $9,800 each for a total value of $186,000. The plaintiff also filed a certificate of lawyer from its law firm that stated the total funds credited to the action had been paid to the law firm in the amount of $827,975 from the sale of the four condominium units. The issue was whether the plaintiff's application to amend the 2019 order should be granted.

HELD: The application was dismissed. The plaintiff was given leave to apply for foreclosure as provided in the 2019 order. The court found that the proposed draft order was not a minor amendment but effectively replaced the 2019 order. It was not able to sit in appeal on the earlier order. It noted the comments made in *Co-operative Trust v O'Grady* (1985 CanLII 2661) that the rules of equity govern judicial sale and applications for orders for a second one. In this case, it took issue with the proposal in the draft order nisi that the plaintiff's law firm be the selling officer. Although the original order had permitted it, the Court of Appeal's decision in *Sader* (2021 SKCA 154) had affirmed the practice of the Court of Queen's Bench to require an independent selling officer. In addition, the Court of Queen's Bench was reluctant to lower the upset price in applications to amend orders nisi. Based upon the appraisal reports, the upset price for each lot had been reduced from $25,000 to $9,800. It reviewed that aspect of the application against the factors set out in *Taylor* (2018 SKQB 118) and determined that the following factors supported it in declining to order a second judicial sale: reducing the upset price worked to the disadvantage of the defendant and guarantors to whom the plaintiff would look for any deficiency; the plaintiff failed to make offers to purchase; the order had been previously amended; the delay of more than two years since the 2019 order had been detrimental to all of the parties since the real estate market had since worsened; and extending the listing period indefinitely to permit the market to recover would limit the ability of the court to exercise its supervisory jurisdiction.

Back to top

***Yashcheshen v Saskatchewan (Government)*, 2022 SKQB 1**

Layh, 2022-01-10 (QB22001)

Civil Procedure - *Queen's Bench Rules*, Rule 7-9, Rule 11-28, Rule 13-8
Civil Procedure - Vexatious Litigant - Application for Leave to Commence Action

The self-represented plaintiff made an application without notice to obtain the court's approval to allow her commence the within action against the defendants, the Government of Saskatchewan eHealth Saskatchewan. She was required to do so because she had been declared a vexatious litigant under Queen's Bench rule 11-28 (see: 2020 SKQB 160). In her statement of claim, the plaintiff described herself as a women's advocate and sought several declarations that certain provisions in *The Vital Statistics Act* (Act) were unjustifiable infringements of ss. 2(b), 7 and 15 of the *Charter* and were of no force or effect, and that sections 31 and 65 of the Act in particular are unconstitutional. By way of remedy, the defendants should be ordered to pay damages pursuant to s. 24 of the *Charter*. The impugned provisions relate to the process by which an applicant may apply to the Registrar of Vital Statistics to change their "at birth" biological sex designation. The plaintiff pleaded that a declaration of "gender identity" infringed the *Charter* provisions noted above. The provisions of the Act would permit males, by simply declaring themselves to be women, to be granted rights conferred on women based on sex and would enable some males to commit sexual crimes. The pleadings included a copy of a threatening text message sent to her from a trans activist that included several derogatory statements.
HELD: The application was dismissed. The court applied the considerations set out in Queen's Bench rule 7-9(2)(a), (b), and (c) and found the plaintiff's statement of claim to be seriously flawed, vexatious and an abuse of process. It applied that test as it had been adopted by the Queen's Bench judge sitting on one of the plaintiff's earlier applications to gain approval to commence an action (see: 2021 SKQB 33). Her pleadings had not met the general requirements for pleadings set out in Queen's Bench rule 13-8 and were comprised of her opinions and irrelevant evidence, such as the text she allegedly received. It also reviewed the factors set out in *Canada v Downtown Eastside Sex Workers* (2012 SCC 45) to decide that the applicant would not be granted public interest standing to enable her to prosecute her proposed claim because she had not alleged nor shown that she had any real stake in the proceedings, nor did she have adequate means to bring a complex case before the court as required by the second and third factors.

Back to top

***K.M., Re*, 2022 SKQB 4**

Richmond, 2022-01-06 (QB22004)

Family Law - Custody and Access - Person of Sufficient Interest
Statutes - Interpretation - Child and Family Services Act, Section 4
Statutes - Interpretation - Act respecting First Nations, Inuit and Métis children, Section 10

The Ministry of Social Services applied for an order placing a three-year-old child in the care of her paternal aunt, H.S. and her husband, B.S., and designating them persons of sufficient interest. The child was apprehended by the Ministry in June 2019 and had resided with her aunt and uncle since. The child's father had died in February of 2019. Although the child in been in the care of her mother, R.A., she had been apprehended when she was less than a year old after she was assaulted by her mother's friend

while intoxicated. Since the apprehension, three successive temporary orders had been made while the Ministry tried to help R.A. to address her addictions, mental health concerns, parenting practices and housing. However, R.A. had failed to attend meetings or to follow through with any program and to maintain sobriety. In addition to abusing alcohol, R.A. was using crystal meth. She had not seen the child since June 2020, having missed several virtual and in-person visits. R.A. received notice of the hearing but did not appear. Her lawyer advised that she had not been able to obtain instructions from R.A. and was granted leave to withdraw. The Ministry advised that the child was doing well in the care of H.S. and B.S. and they indicated that they were willing to continue to provide care. QBOW Child and Family Services' counsel consented to the relief requested. The strength of R.A.'s connection to her community and heritage was not known.
HELD: The Ministry's applications were granted. The court found that the child was in need of protection under s. 11(b) of *The Child and Family Services Act* (CFSA). It designated H.S. and B.S. as persons of sufficient interest pursuant to s. 23(1)(a) of the CFSA and placed the child in their indefinite custody under s. 37(1)(b) of the CFSA, subject to the conditions that they were not to return the child to parental care without prior written approval of the Ministry or by court order and that R.A. would be able to visit with the child as long as her visits were in the child's best interests. In making its determination of the child's best interests, it had regard to the considerations set out in s. 4 of the CFSA and because of the child's Indigenous heritage, it also had regard for s. 9 and the factors enumerated in s. 10(3) of the *Act respecting First Nations, Inuit and Metis children, youth and families* and found that it was satisfied that the proposed placement met the relevant ones. The placement also met the requirement of priority given to family members in s. 16 of the Act, as H.S was another adult member of the child's father's family.

 Back to top

***Saskatchewan Crop Insurance Corporation v Gustafson*, 2022 SKQB 5**

Robertson, 2022-01-06 (QB22004)

Civil Procedure - Pleadings - Application to Strike Statement of Defence
Civil Procedure - *Queen's Bench Rules*, Rule 4-44, Rule 5-36

The plaintiff, defendant by counterclaim, Saskatchewan Crop Insurance Corporation, applied to strike the defendant's statement of defence and counterclaim under Queen's Bench rule 5-36 for his failure to attend questioning. In the alternative, it requested that the defendant's counterclaim be dismissed under Queen's Bench rule 4-44(a) for want of prosecution. The plaintiff had filed its statement of claim in May 2016. The plaintiff relied upon the specific breach of undertaking by the defendant to attend questioning in February 2021 but it was not his first failure to do so. Since September 2017, the first date scheduled for questioning, the defendant had not responded twice to the plaintiff's appointments for questioning and subpoena duces tecum and had used a number of excuses to change other previously agreed-upon dates. In this instance, the defendant claimed that the plaintiff had not provided him with the necessary documents and he also disputed service of the notice of application on him. In an earlier questioning, the defendant admitted that he had not taken any steps in pursuing his counterclaim and cited as excuses the pandemic and that he had been involved in other litigation. The plaintiff sought costs under Column 3 of the Tariff to be fixed at $5,000.
HELD: The application to strike the statement of defence and counterclaim was granted, without leave to re-file. The counterclaim

was dismissed. The plaintiff was granted judgment and entitled to costs under *The Crown Suits (Costs) Act* and under the factors set out in Queen's Bench rule 11-1(4). In accordance with Item 26(b) of Schedule I "B" for contested notices of application and the complexity of the application, the appropriate amount of costs was $2,000. The court found that the defendant's failure to attend questioning in this case was one of the clearest of cases justifying the extreme penalty of striking the defence and counterclaim. After reviewing the role that the defendant had played in litigation history of this case, the court concluded that his failure to appear for questioning was a deliberate and flagrant breach of Queen's Bench rule 5-36 and part of a persistent pattern of delay and failure to comply with the Rules. The plaintiff had gone to extraordinary lengths to obtain and provide documents to the defendant. The defendant's own evidence in his affidavit showed that he had been served. In the alternative, the court determined that the defendant had forfeited his right to pursue his counterclaim for want of prosecution under Queen's Bench rule 4-44(a). It found the delay of five years in prosecuting it was inordinate. It did not accept the defendant's explanations as excusing delay. The action should not be allowed to proceed based upon the analysis of the factors set out *International Capital Corporation* (2010 SKCA 48). In addressing them, it noted, in particular, the following weighed in favour of dismissal of the counterclaim: that prejudice could be inferred from delay in adjudication of crop failure claims, citing *J.C. Berezowski Farms* (2016 SKQB 94); the length of the inexcusable delay; that litigation was at an early stage as it had not proceeded beyond mandatory mediation; that the plaintiff had expended time and money to pursue the actions but had been frustrated by the defendant's non-co-operation; that the defendant had demonstrated a consistent pattern of non-compliance and delay; the defendant's reasons for delay were not genuine; and it was in the public interest for crop insurance claims to be adjudicated in a timely fashion.

Back to top

***A.G. v Saskatchewan (Government)*, 2022 SKQB 11**

Mitchell, 2022-01-11 (QB22006)

Statutes - Interpretation - *Freedom of Information and Protection of Privacy Act*

The appellant, a medical doctor, appealed pursuant to s. 57(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA) the decision of the respondent, the Saskatchewan Ministry of Health (SaskHealth), to disseminate publicly the names, specialties, and 2018 billings of doctors in the province. Preliminary to the appeal, he brought this application requesting multiple and specific orders with the aim of protecting his own identity and those of other physicians who might participate in the appeal. The Saskatchewan Medical Association (SMA) also brought an application requesting leave to intervene in the appeal pursuant to Queen's Bench rule 2-12. It did so on the basis of being a voluntary professional association to which approximately 98 percent of all physicians working in the province belonged. The background to the appeal and the application was that SaskHealth had initially declined to provide the respondent Leo, a CBC journalist, with the names of all doctors in the province who had billed more than one million dollars for the year 2018. Leo then requested that the Office of the Information and Privacy Commissioner (OIPC) review SaskHealth's decision. Leo subsequently made another access to information request of SaskHealth, requesting a list of the top billing doctors in the province, their location, their amounts billed and areas of practice for 2018. The OIPC released its review report regarding Leo's request for review of his initial request to SaskHealth in which the Commissioner made a number of

recommendations that included that SaskHealth release the names of the top 100 billing physicians, their specialities, and their total payment for 2018. The OIPC released another report in which it further recommended that SaskHealth respond to Leo's second access to information request. SaskHealth wrote to the applicant advising him that it accepted the first OIPC report and it would publish the list as described but it would not comply with the OIPC's second report's recommendation. The applicant then filed an originating application challenging SaskHealth's response. The SMA made its application to obtain intervenor status in the appeal. The applicant made this preliminary application, asking the court to order: 1) that the registrar prepare a public and a private court file and all material submitted would first be filed on the private file in its original form, without the use of any pseudonyms or redactions. The same materials would be filed in the public file but would use pseudonyms and redactions as permitted by the order; 2) that two records be sealed: one containing the names of 100 physicians; and the second containing the names of 10 physicians. Each record displayed the physician's name, practice location, specialties, and total payment amounts received for 2018; 3) the private file was to be sealed; and 4) counsel for the parties would be permitted access to the private file provided that they had signed and filed with the court an undertaking that, among other things, the contents were confidential. Upon the expiry of the time period provided for any appeal from the disposition of the originating application, all copies referring to any contents of the private file in the possession of counsel would be destroyed; 5) that the applicant and the participating physicians may use their own two-letter pseudonyms and all references in any application fiat, reported decision or other material would refer to those pseudonyms; 6) the applicant and any other parties or intervenors would be permitted to redact from any material filed on the public file all information could identify the applicant, any other physician, their specialties or the amount they billed for their medical services (the identifying information); 6) the hearing of the applicant's appeal was to be held in camera respecting the presentation of evidence and argument involving the identifying information. Identifying information presented in any hearing held in the appeal was not to be published, broadcast or otherwise communicated; 7) the order would remain in effect until this matter and any appeals were finally resolved; 8) a copy of the order would be maintained in a prominent place in the public file; and 9) the parties have leave to bring an application at any time to modify the terms of the order.

HELD: The court granted the applicant's requests for the order in part and with some modification. The judge remained seized with the appeal until further order, pursuant to Queen's Bench rules 1-3 and 1-5(2)(i). The SMA's application for intervenor status in the applicant's appeal was granted as it had met the five criteria set out in the Court of Appeal's decision in *Latimer* (1995 CanLII 3921). The order provided that SMA would have the ability to file evidence and present written and oral submissions. It and the applicant were to endeavour to minimize undue duplication in their evidence and submissions. Respecting the applicant's request for the order, the court first reviewed s. 58 of FIPPA, which provides the powers of the court on appeal, and s. 2(b) of the *Charter* as it related to the open court principle and the role of the free press. It noted the Supreme Court's decision in *Sherman Estate* (2021 SCC 25) had established a new test that an applicant must meet when they request that a court exercise discretion in a way that limits the open court presumption. It assessed each of the applicant's requests in light of the test, organized them differently, and found with respect to each that the order would: 1) grant that the records described above be sealed. It concluded that it would be appropriate in the circumstances; 2) grant permission to the applicant and or other participants to use two-letter pseudonyms in all court documents submitted on the appeal, because otherwise, disclosure of identifying information would render the issue moot. Counsel for other participants were to file with the court confirmation that their clients were physicians named in the records in question. The confirmations would be sealed under further order of the court. It would also permit limited and targeted redactions in affidavits and written legal briefs respecting identifying information. Such redactions qualified as reasonable precautions as required by s. 58(3) of FIPPA. The unredacted materials should be filed with the court under seal until further order. They would be available

to the court and counsel and all information would be confidential pending the resolution of the appeal; 3) not to grant the creation of a private and a public court file. It was not necessary because confidentiality had been protected through the anonymization, sealing and redacting of records, as well as the requirement for counsels' undertakings to share the contents only with their clients. SaskHealth was exempted from this last stipulation as its officials were already aware of the information. Creating separate court files was not the usual practice in this province, unlike that of Ontario and as ordered in the Ontario Medical Association decision (2017 ONSC 1650). Unlike the decision in *Britto* (2017 SKQB 259), wherein separate files were allowed to be created, no form of privilege attached to the records at issue or related information; 4) not to grant that hearing of the portions of the appeal where evidence could identify the applicant and other physicians would be held in camera. It was premature and unnecessary to so order because if a party believed it would be necessary to disclose redacted information or evidence in oral argument, then an application for an in-camera hearing may be made then; 5) granted that the order issued in this application should remain in force, but only until the applicant's appeal is decided in the Queen's Bench. At that time, the court can decide whether it should continue if an appeal is taken; 6) granted that the order would be prominently placed on the court file; and 7) granted any party leave to bring an application at any time to seek a modification of the terms of the order.

 Back to top

***R v B.G.L.*, 2021 SKPC 62**

Henning, 2021-12-03 (PC21051)

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

The accused, a young person under the *Youth Criminal Justice Act*, was charged with two counts of sexual assault contrary to s. 251 of the *Criminal Code* and two counts of sexual touching contrary to s. 271 of the Code. The charges related to incidents which were alleged to have occurred in October 2017 and August 2019. The complainant, aged 16 at the time of trial, had gone to the police in October of 2020 regarding the alleged offences. The officer's interview with her had been video-recorded. At trial, the complainant adopted the recorded statement and it was admitted into evidence. In her testimony, she said that she and her brother were friends with the accused and his sister. They knew each other through their church group and often socialized at their parents' houses. She believed that the accused had had a crush on her at the time of the first incident, which occurred at her house where the four children were having a sleepover. She and the accused's sister were asleep on a mattress on the floor of the basement. She was not sure where the accused and her brother were sleeping in the house. She was awakened by what she described as the light from a flashlight affixed to a hat and someone's hands on her breasts under her T-shirt. Although confused, after she said "what are you doing?" the person responded "I don't know" and left. Her friend did not awaken. The complainant identified the second incident as occurring on the last night of her church's annual vacation bible school. She was alone in her own bedroom, located upstairs in her parent's house, and her brother and the accused were sleeping downstairs. She was asleep, wearing pajamas, underpants and was underneath two blankets. She awakened when she became aware that someone was inserting his fingers in her vagina. After she said "what are you doing", the person left the room. In her cross-examination, the complainant made her first

reference to the accused as the alleged perpetrator when testifying about the second incident, but she was not examined on the point. The complainant said that she hadn't told anyone about the incidents because she was scared and didn't think anyone would believe her. She had trouble sleeping after they occurred. In October 2019, she asked a youth leader at her church to pray for her. The pastor of the church learned of the details and advised her to go to the police. The youth leader testified that the complainant was crying when she spoke to her. The accused denied that either of the alleged incidents occurred. He confirmed the friendships between the siblings and that that they had sleepovers at each other's houses. He acknowledged that he had a brief crush on the complainant in 2017 but he had not pursued it, and maintained that position in his cross-examination. Regarding the first alleged incident, the accused said that the only time that both he and his sister had had a sleepover together at the complainant's home, his sister had slept in the living room and the complainant slept in her bedroom. He denied ever having a flashlight attached to his head. He testified that he did not stay overnight at the complainant's house on the night of the second alleged incident as his duties the next day at the bible school were too onerous for him to be allowed to go on a sleepover. His mother corroborated this contention.
HELD: The charges against the accused were dismissed. The court found that it had a reasonable doubt that the alleged offences had occurred. It followed the principles set out in *R v D.W.* because it was a "she said/he said" case. The complainant's version of events, if accepted, would meet the test of sexual assault, but the accused denied that the alleged offences had occurred. The only issue was the credibility of the complainant concerning whether the incidents happened. The accused's denial was capable of belief as it questioned the complainant's credibility because during the first alleged incident, the accused's sister had not wakened in circumstances that would normally rouse someone and in the second incident, it was unlikely that a sleepover would have been permitted on the night in question and that given the complainant's description of the clothing she was wearing and the blankets on her bed, it was difficult to believe that she would not have wakened before vaginal penetration occurred.

Back to top

***R v Kolla*, 2021 SKPC 59**

Cardinal, 2021-12-14 (PC21045)

Criminal Law - Offences Against Property - Mischief

The accused was charged with committing mischief by willfully interfering with the lawful enjoyment of property, being a residence, without legal justification or excuse and without colour of right contrary to s. 430(1)(c) of the *Criminal Code*. The Crown called the complainant to testify and tendered a summary of a warned statement given by the accused to the police. He waived his right to a voir dire and admitted that the statement met the test of voluntariness. The defence called no evidence. The complainant testified that she had been asleep at midnight in her residence when she was wakened by knocking on the door. When she opened it, she recognized the accused as a neighbour who lived across the street, although they had not had any association prior to the alleged offence. The accused seemed intoxicated and told the complainant that he was locked out of his house, so she invited him in. They conversed, and after 15 minutes, the accused told her that he was not locked out of his house. The complainant said that she

decided that the accused had to leave. She lived alone and said that she began to get scared and told him to leave as she was worried that the accused had come into her house wanting to have sex with her. Once at the door, he opened his pants, pulled out his penis and began fondling it while looking at her, but did nothing else to her. Since the incident, the complainant avoided any contact with the accused and worried about people coming over to her house. She kept her doors locked and jammed them shut with knives. The accused told the police that he had been drinking heavily at a party and had had a fight with his girlfriend. When he got to his home, he saw the lights were on in the complainant's house and went over as he needed to talk to someone. He said that he became aroused by her and became uncomfortable because she was wearing a short skirt. He admitted that he exposed himself but could not remember the details. Counsel for the parties agreed that "enjoyment" of property in s. 430 of the Code was to be given a subjective interpretation in accordance with *Maddeaux* (1997 CanLII 1934). However, defence counsel argued that pursuant to *Hnatiuk* (2000 ABQB 314), the Crown must also prove the underlying act was wrongful, such as a violation of a municipal bylaw, a civil wrong or offending some provision of the law.

HELD: The accused was found guilty of mischief. The Crown had proven beyond a reasonable doubt that he willfully interfered with the enjoyment of the complainant's property, her residence. With respect to the actus reus, it noted that it was bound by the decision in McIntyre (2019 SKQB 66) that had adopted the reasoning in *Nicol* (2002 MBCA 151), and the Crown was not required to prove the act complained of was "wrongful." The Crown had proven the *mens rea* of the offence. The *mens rea* of mischief is wilfulness, as defined in s. 429(1). The mental element had been satisfied by showing no more than intentional or reckless causing of the actus reus, interference with the enjoyment or use of property. The accused had interfered with the complainant's property by deliberately lying to gain access to her residence and then, having been asked to leave, by intentionally exposing himself, until the complainant told him to leave or she would have him removed.

Back to top

***R v Gamble*, 2021 SKPC 64**

Jackson, P.C.J., 2021-12-29 (PC21050)

Criminal Law - Sentencing - Dangerous Offender - Indeterminate Sentence

The Provincial Court judge (trial judge) gave his reasons, following a hearing under s. 753.01(5) of the *Criminal Code* brought by the Crown, to sentence the offender, M.W.G., to an indefinite term of incarceration in a penitentiary. The trial judge reviewed the court record which showed the offender, M.W.G., was designated a dangerous offender on June 22, 2012 following a trial for offences including aggravated assault. At that time, he was sentenced to a definite term of incarceration in a penitentiary and placed on a long-term supervision order (LTSO) for nine years to commence upon his release. The trial judge was aware that by the provisions of the *Criminal Code*, a dangerous offender designation remains with the offender for life. The trial judge had convicted M.W.G. of offences committed on June 12, 2018, while he was bound by the terms of the LTSO following his release. These offences involved a police pursuit and the location of various weapons in the vehicle, including a stun gun, a sawed-off 28-gauge shotgun, and ammunition for it, which resulted in numerous firearms charges, a number of which, along with the offence of breaching his LTSO,

opened the door to the application by the Crown for an indefinite term of incarceration in a penitentiary. The trial judge reviewed the evidence elicited at the sentencing hearing, which included, on the Crown side, CDC parole officers who worked with M.W.G. and police from the gangs and guns unit, on the defence side, an expert clinical psychologist qualified to give opinion evidence on the risk management of violent offenders, M.W.G.'s girlfriend and mother of his children, and Father André of SRT8 UP. The court also heard from the assessor approved by the court for purposes of providing expert opinion evidence "relating to assessment, risk management, and treatability of violent offenders." He was cognizant that he must impose the indefinite sentence requested by the Crown unless he was satisfied that "by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted … will adequately protect the public against the commission by the offender of murder or a serious personal injury offence."

HELD: The trial judge, on a review of the evidence and the pertinent case law, ruled that he was satisfied there was a reasonable expectation a sentence for the offences charged followed by a CSO would adequately protect the public against the commission of a serious personal injury offence by M.W.G., and so concluded because the testimony provided at the hearing was consistent that in spite of his indoctrination at an early age into the gang life, his use of intoxicants at a young age, and his propensity to avail himself of firearms, he was capable of overcoming his "behavioural[…] impair[ment]." He observed particularly that while in the penitentiary system, M.W.G. was generally recognized to be highly motivated to change his criminal behaviour, showing that by excelling in his programing for violence; he was quiet, respectful and easy to deal with; his classification had been downgraded to medium until he reoffended; the expert witnesses both agreed that he was intelligent and had the cognitive ability to shed his criminal lifestyle with long-term supervision and treatment in the community, though relapses were likely; though there was evidence to the contrary from the police officers from the gangs and guns unit as to whether he had left the gang, the trial judge accepted that M.W.G. had done so, since the evidence showed he had covered up his tattoos; he noted that M.W.G.'s girlfriend was a mature and level-headed person and believed she would help him to not relapse; he noted that his most active period of violent offending and weapons charges was as a youth, and he had committed one violent offence, the aggravated assault, in 2012. The trial judge was also cognizant that Part XXIV of the *Criminal Code* required him to give paramount consideration to protection of the public; however, he was not to put aside all other sentencing principles and objectives but must also consider these in arriving at a just sentence. With all this in mind, the trial judge declined to impose an indefinite term of incarceration on M.W.G and sentenced him for the offences with which he was charged, followed upon his release by an LTSO for five years.

 Back to top

***R v Legacy*, 2022 SKPC 1**

Green, 2022-01-07 (PC22001)

Criminal Law - Motor Vehicle Offences - Impaired Driving - Refusal to Provide Breath Sample
Constitutional Law - *Charter of Rights*, Section 8

The accused was charged with impaired driving, failing or refusing to comply with a breath demand under the *Criminal Code*, and failing to notify an owner of property damage and failing to report an accident immediately to the police under *The Traffic Safety*

Act (TSA). The accused was parked outside his common law spouse's place of employment and another employee stopped to speak with him. The accused had trouble operating the electric windows of the vehicle and had to open the door. While they conversed, the employee formed the opinion that the accused was intoxicated. She had known him for many years and had seen him sober and intoxicated. After she informed the accused that his spouse was not at work that night, he abruptly drove away, collided with a parked vehicle and then left the scene. The police were contacted and an officer interviewed the employee and the owner of the vehicle. Believing that he had grounds to arrest the accused, the officer attended at his house and observed that a vehicle matching the description given to him earlier was parked in the driveway. The officer knocked at the door, the accused's spouse opened it and he informed her that he wanted to speak to him because he had earlier been seen driving drunk. The spouse said that the accused could not come to the door because he needed to use his walker and then invited the officer into the house. The officer observed that the accused was intoxicated and would not answer his question of how much he had had to drink. After the accused made some belligerent comments to the officer, he was arrested and taken to the police vehicle. He was given the police warning, advised of his right to consult with a lawyer and the formal breath demand was made. Once at the police station, the accused said that he did not want a lawyer and was placed under observation. An officer who was qualified to administer breath tests testified that he established that the instrument was working properly. He said that he believed the accused was quite intoxicated. The accused had not mentioned any medical issues and did not seem to have any problems breathing, yet was unable to provide a breath sample after 12 attempts. The accused did not follow instructions and once appeared to put his tongue over the breathing tube. At one point, the accused did tell the officer that he could not blow because he had a blood clot in his lungs but he did not show any signs of breathing difficulty. The officer himself had a damaged lung and he tested the instrument himself and was able to provide a suitable sample. The defence brought a *Charter* application alleging that the accused's s. 8 *Charter* rights had been violated when the officer made his warrantless entry into his residence and sought to exclude all the evidence obtained following his entrance under s. 24(2) of the *Charter*. A voir dire was held with agreement that admissible evidence from it was to be applied to the trial.

HELD: The *Charter* application was dismissed. The accused was found guilty of impaired driving and failing to provide breath samples. He was acquitted of the charge under the TSA. The court found that the accused's s. 8 *Charter* rights had not been breached. It believed that the officer had lawful grounds to arrest the accused and he went to his house to arrest him, not for the purpose of securing evidence. The entry was lawful because the accused's spouse had been given enough information by the officer about his reasons for being there to provide valid consent to enter. Based upon the evidence that it accepted from both the employee and the police officers, the court was satisfied that the accused was impaired after applying the test from *Stellato* and that his ability to operate a vehicle was impaired by alcohol. It was also satisfied that the accused failed to comply with the breath demand and accepted the evidence of the officer administering the test that the accused did not demonstrate any problem breathing and appeared to avoid providing a suitable sample. His excuse, without further evidence, did not constitute a reasonable excuse. Regarding the charge under the TSA, it noted that there is no definition of "accident" provided in the Act and it adopted the definition from *The Automobile Accident Insurance Act*. As there was no evidence presented of damage to either vehicle or of bodily harm to anyone involved in the collision, the incident did not meet the definition of "accident." The court had reasonable doubt that the accused was culpable for failing to notify the owner of the vehicle of property damage or to report it to the police.

Back to top