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

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***Western Eagle Lodge Management General Partners Inc. v North Battleford (City)*, 2022 SKCA 53**

Jackson Ryan-Froslie Tholl, 2022-05-04 (CA22053)

Statutes - Interpretation - *Cities Act*
Municipal Law - Appeal - Property Taxes - Assessments

The appellants, Western Eagle Lodge Management General Partners Inc. (Western Eagle) and Pfeiffer Holdings Ltd. o/a Tropical Inn (Tropical Inn), sought an appeal of decisions made by the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee). Western Eagle and Tropical Inn are situated in the city of North Battleford, which was named as the respondent on appeal. The committee hears appeals from municipal assessments made before the North Battleford Board of Revision (board). The board found in favour of Western Eagle and Tropical Inn when they appealed their 2018 property tax assessments. Before the board, the appellants argued that their properties ought to be assessed by an income approach rather than a cost approach basis. Relying on section 165(3.1) of *The Cities Act*, SS 2002, c C-11.1, the committee

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overturned the board's decisions and stated that there needed to be a change in the "facts, conditions, and circumstances affecting the property" before a change could be made in the assessments. Previously, the 2017 property tax adjustments for the appellants had been reviewed by the board. An individual assessor provided the assessments. The board was sympathetic to the arguments brought by the appellants at that time, namely that an income approach be used rather than a cost approach. The difficulty was that there was insufficient data available to complete an assessment on an income basis. The appellants appealed the board decision to the committee. The 2017 property tax assessment dispute was resolved by consent between the appellants and the respondent, who presented a joint recommendation that was accepted by the committee. Unlike in 2017, in 2018 the respondent relied on assessments being completed by the Saskatchewan Assessment Management Agency (SAMA) and not an individual assessor. SAMA applied a cost approach in arriving at assessments for the properties. The board ruled in favour of the appellants when the matter was brought before them. The distinct issue identified by the board was that SAMA had information related to the income approach that the individual assessor did not have the prior year. The respondent appealed the board's decision to the committee and argued the cost approach ought to be used. The committee then relied on *The Cities Act* in its reasoning that there had not been a physical or external change to the Western Eagle or Tropical Inn when a different assessor from that of the year prior had been used. Further, the committee found that, while an income approach is recommended for types of properties such as Western Eagle and Tropical Inn, it was not a mistake by SAMA to use the cost approach. Western Eagle and Tropical Inn received leave from the court to bring their appeal before the court. The issues the court considered were (1) did the committee err in its interpretation of s. 165(3.1) of *The Cities Act*, and (2) If the committee erred, what is the appropriate remedy?

HELD: The appeal was allowed, and the matter remitted back to the committee. The appellants were also awarded one set of costs for the appeal and one set of costs for the leave application. As leave may only be granted on questions of law, the court determined the standard of review to be correctness. The court elucidated that in statutory interpretation, a court must examine the ordinary meaning of the words and phrases found within the relevant legislation. The court accepted the appellant's arguments that the committee erred in their interpretation of section 165(3.1) of *The Cities Act*. The committee reasoned that a party appearing before them may bring an appeal every year, but there must be new evidence affecting the property physically. The court determined that the error in the committee's logic was believing an appeal in a subsequent year before it required a change in the aspects or characteristics of the property itself. The court cited *South Hill Mall Property Holdings Inc. v Prince Albert (City)*, 2017 SKCA 52, to support its proposition that an appeal can be brought before the committee on a wider basis than physical changes to the property on a year-to-year basis. The appellants had argued before the committee not only that the assessor had changed but further, that the income approach ought to be applied. The court determined this to be a clearly permissible basis upon which to appeal to the board. The committee's narrow interpretation of subsection 165(3.1) was an error in law, and accordingly, the appeal was granted in favour of Western Eagle and Tropical Inn. The matter was remitted back to the committee rather than the board's decision being restored as the court determined that there were conflicting statements between the board decision and the committee

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***McCabe v Kowalyshyn*, 2022 SKCA 56**

Caldwell Ryan-Froslie Leurer, 2022-05-10 (CA22056)

Wills and Estates - Appeal
Wills and Estates - Estate Administration
Wills and Estates - Executor - Removal

Eight of twelve beneficiaries of an estate (collectively M.M.) appealed a court of Queen's Bench chambers decision (2021 SKQB 144) that had been made pursuant to *The Administration of Estates Act*, SS 1998, c A-41.1 s. 50.5 (AEA) approving the sale by the estate of eight quarter sections of farmland to the respondents, N.K. and his wife, D.K. N.K. was also a beneficiary of the estate. The estate owned the farmland and it had been leased by N.K. and D.K. since the 1990s. In prior proceedings, M.M. commenced an action against the executor and the estate, asserting that the farmland was leased at less than fair market value. M.M. also applied for summary judgment to remove the executor from probating the estate. The summary judgment application was adjourned with the parties encouraged by the chambers judge to determine a process for selling the farmland. M.M. filed an originating application seeking directions from the court on the sale of the farmland after competing bids had been received by the executor from a group of four of the appellants (bid-appellants) and from N.K. and D.K. The executor advised that he intended to auction the farmland. When the matter returned to chambers on the originating application filed by M.M., the parties came to a general agreement in the proposed auction process. The agreed-upon process was that the estate would sell the farmland to the highest bidder of the beneficiaries, that the minimum bid would be $950,000.00, and that the auction would run until a day passed without bids. The auction ensued: N.K. and D.K. made the highest offer at $1,325,000.00, which the estate accepted. M.M. did not consent to the sale, despite the results of the agreed-to auction. The executor applied for an order approving the sale under s. 50.5(4) of the AEA. This resulted in the chambers decision under appeal. M.M. filed evidence before the chambers judge, after the decision had been reserved following oral arguments, that showed a municipal assessment exceeding the $1,325,000.00 offer. M.M. also filed an affidavit from a realtor that stated that the farmland would sell for significantly more than the $1,325,000.00 if the sale had been open to the public. In response, the executor was permitted to file an affidavit attaching an appraisal of the farmland that provided a value of $1,209,000.00. The chambers decision permitted the executor's application to sell the farmland to N.K. and D.K. The chambers judge considered that the parties had agreed to the auction process; he noted

Family Law - Parenting Orders

Injunction - Interlocutory - Appeal

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Statutes - Interpretation - *Builders' Lien Act*, Section 13

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Wills and Estates - Appeal

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Cases by Name

Cimmer v Niessner

Jackson v Jackson

Jantzen v TD Life Insurance Company

Kelly Panteluk Construction Ltd. v Canadian Pacific Railway Company

L. & V. Enterprises Ltd. v Dave's Diesel Ltd.

L.J.G. v R.D.G.

that the bid-appellants had made a bid significantly less than the $1,325,000.00 offer just weeks prior; he set out why the sale would be in the interests of the estate; and he considered the evidence of the appraised value of the farmland and expressed his preference for the appraisal over the municipal assessment and the realtor's affidavit. The chambers judge concluded his decision by awarding costs against M.M., payable from their share of the estate's assets. M.M. appealed. M.M. argued that the chambers judge erred when he approved the sale by (1) relying on inadmissible evidence about the market value of the farmland, (2) disregarding and misapprehending material facts about the bidding process, and (3) failing to consider and apply the relevant principles under the AEA
HELD: M.M.'s appeal was dismissed with costs payable to the executor, N.K. and D.K. On the issue of whether the chambers judge relied on inadmissible evidence, M.M.'s argument on the affidavit with the appraisal being filed late was not viewed persuasively by the court given that it had been in response to the late affidavits that had been filed by M.M. The chambers judge had correctly characterized the executor's affidavit as being a response affidavit. The chambers judge was entitled to prefer the evidence of an appraiser over a realtor. He did not misapprehend the bidding process. The court interpreted the chambers judge to have correctly determined that the process was a closed auction between the appellants and the respondents, with agreed-upon rules. M.M. did not have a reasonable basis for objecting to the sale of the farmland. The last issue for the court's consideration was whether the chambers judge had failed to consider the principles of the AEA. The court concluded that no such error had occurred. The chambers judge was afforded deference for his findings of fact related to M.M.'s conduct prior to the auction. The appellants established no palpable and overriding error. The appellant's arguments that the chambers judge erred in principle because he failed to order the sale of the farmland at public auction was rejected. The question before the chambers judge was whether it was in the best interests of the estate to sell to N.K. and D.K. The court dismissed M.M.'s application to set aside the chambers decision and awarded costs in favour of the respondents.

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***R v Ochapowace Ski Resort Inc.*, 2022 SKCA 58**

Richards Schwann Tholl, 2022-05-12 (CA22058)

Aboriginal Law - Self-Governance - Collecting and Remitting Excise Tax - Appeal
Civil Procedure - Summary Conviction Appeal - Dismissal for Want of Prosecution - Appeal
Civil Procedure - Mootness

Ochapowace Ski Resort Inc., 594265 Saskatchewan Ltd., the Ochapowace Band and Denton George (appellants) appealed to the Court of Appeal (court) the decision of a judge of the Court of Queen's Bench sitting as a summary conviction appeal judge (appeal judge) dismissing their appeal for want of prosecution.

Lessard v University Appeal Board, College of Medicine, University of Saskatchewan

McCabe v Kowalyshyn

R v Dacey

R v Evanchuk

R v J.G.

R v Ochapowace Ski Resort Inc.

R v Taylor

R v Weber

Shoman v Mais

Smith, Re (Bankrupt)

Western Eagle Lodge Management General Partners Inc. v North Battleford (City)

(See: 2019 SKQB 5 (dismissal decision).) The appeal to the Court of Queen's Bench from the decision of a judge of the Provincial Court (trial judge) under the summary conviction appeal provisions contained in ss. 812 to 828 of the *Criminal Code* (Code) followed a trial at which the appellants were convicted of offences related to their failure to collect and remit tax from non-Indigenous persons under the *Excise Tax Act*. In his decision, the trial judge rejected the defence proffered by the appellant's that "the requirement to collect and remit tax was a breach of an Aboriginal or treaty right, or that the law recognized self-governance in a way that would exempt the appellants from collecting and remitting the tax for another government." (See: 2002 SKPC 84 (trial decision)). The court summarized the history of the proceedings based on the court records from the courts below noting in particular that: the appeal of the trial decision was filed on November 18, 2002; two years elapsed with no "meaningful steps" being taken, so the Crown applied to dismiss the appeal for want of prosecution in February of 2004; this application was adjourned at the request of the Crown; there followed a period of years in which trial transcripts were corrected due to translation inaccuracies; by fiat of a Queen's Bench judge on February 9, 2011, the transcript was deemed accurate; by correspondence dated February 22, 2012, the appellants indicated to the Crown that they were prepared to proceed to argue the appeal on the "present state of the transcript;" the appellants requested time to prepare the required memorandum of argument, which was to be filed by May 1, 2013; the memorandum was never filed; from December 2016 to May 2017, instead of perfecting the appeal and proceeding with it, the appellants pursued a political solution to the litigation with the federal government, which did not bear fruit; and on April 27, 2017, the Crown applied to dismiss the appeal. The court then reviewed the dismissal decision, observing that the appeal judge applied the available evidence to each of the factors set out in *R v Carter*, 2008 SKQB 458 (*Carter*), and did so in a thorough manner while resolving any conflicting evidence to make any necessary factual findings.

HELD: The application for leave to appeal was allowed but the appeal was dismissed. First, the court considered the applicable standard of review it was to apply to the leave application, which it stated must start with s. 839 of the Code, that the appellants could not obtain leave to appeal unless they satisfied the court that their appeal involved a pure question of law. It then went on to canvass the case law on the meaning of a pure question of law, which it stated excluded errors of fact or mixed fact and law, though it recognized that an error of fact or mixed fact and law might amount to an error of law if the proposed appellant could satisfy the court that the judge below "misunderstood the evidence or ignored material evidence", but absent an error of law, the appeal judge's decisions, which were discretionary, were to be respected. The court agreed with the appeal judge that the proper approach to determining whether leave to appeal should be granted to the appellants was to analyse the evidence against the six *Carter* factors, and went on to do so, with particular attention to the factors of reasons for the delay and merit of the appeal. As to the reasons for the delay, the court found most of these were attempts by the appellants to overturn the appeal judge's findings of fact, not law, and so could not be considered. The court did consider the argument that the Crown should share in some of the blame for the delay because it failed to get involved in moving the appeal forward. The court found no merit in this position since all of the burden to perfect the appeal and move it along was that of the appellants, and not the Crown's. The appellants argued further that seeking a

political solution stopped the clock on the appeal because the federal government included the prosecutions branch (PPSC). The court said the appellants were informed by government officials that the PPSC was independent of the government, and so this argument was also not sustainable. The appellants attempted to advance that the concept of "Honour of the Crown" was a bar to the Crown taking procedural steps to block litigation by Indigenous persons. The court held that the case law was clear that "Honour of the Crown" does not apply to litigation. On the question of merit of the proposed appeal, the court looked at the appeal judge's dismissal decision, ruling that she did not err in her reasons on this point. As to the need for the court to consider the matter of the appellants' sovereignty on questions of taxation, it agreed with the appeal court that in large measure the issue had been decided against the appellants by case law; in particular, *Acadia First Nation v Canada (National Revenue)*, 2007 FC 259 and, by implication, as a result of the *First Nations Goods and Services Tax Act*. The court dismissed the appeal, because, though it granted leave to appeal, the required balancing of all the *Carter* factors in light of the "pronounced" delay by the appeal judge could not be said to have been wrongly exercised by her. Lastly, the record showed Chief Denton George passed away since the appeal. The court agreed with the trial judge that on the principles of mootness, the appeal judge was correct in dismissing his appeal.

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***Kelly Panteluk Construction Ltd. v Canadian Pacific Railway Company*, 2022 SKCA 59**

Ottenbreit Schwann Kalmakoff, 2022-05-17 (CA22059)

Construction Law - Builders' Liens - Trust Fund - Set-off
Contract - Interpretation - Surrounding Circumstances
Statutes - Interpretation - *Builders' Lien Act*, Section 13

Kelly Panteluk Construction Ltd. (the appellant) appealed to the Court of Appeal (court) the decision of a judge of the Court of Queen's Bench (chambers judge) pursuant to *The Builders' Lien Act* (BLA): *Kelly Panteluk Construction Ltd. v Canadian Pacific Railway Company*, 2021 SKQB 223 (decision). The decision permitted Canadian Pacific Railway Company (CP), the owner of a spur line construction project, to retain the contract holdback funds due to the appellant upon completion of the project as a set-off against damages which might become payable in CP's action against the appellant in contract and negligence. The appellant was the contractor for the improvement. It was uncontested that the holdback amount was $12,708,731.96 and also that the project had been certified as completed by the project engineer. The court referred to previous court proceedings brought by the appellant to the Court of Queen's Bench for immediate payout of the holdback. CP responded with its own application for a stay of proceedings, which was unsuccessful. CP appealed this ruling to the Court of Appeal, which allowed the appeal in part, finding that the holdback at issue was contractual, not statutory, and remitting the matter to the Court of Queen's Bench to determine "(a) whether CP was entitled to retain the Holdback pursuant to the Contract by virtue of a claim of set-off in contract or otherwise; and (b) whether CP was entitled to retain the Holdback by virtue of s. 13 of the BLA." (See: *Canadian Pacific Railway Company v Kelly Panteluk Construction Ltd.*, 2020 SKCA 123.) On the current appeal, which followed the chambers judge's ruling on the two questions remitted to her, the appellant argued that the chambers judge erred in law by misconstruing the evidence surrounding the extent of an admission it made with respect to s. 13 of the BLA; by not embarking on an interpretation of s. 13 of the BLA to determine the nature and extent of the right of set-off CP had to the trust funds held by it for the benefit of the appellant by not grappling with the

interpretation of the supply and services contract between the appellant and CP (contract), and in particular, clause 45.9 thereof. The court observed that in effect the chambers judge believed her work was done upon the admission made by the appellant which she believed was a concession that s. 13 of the BLA "permits an owner to set-off damages for alleged non-compliance with the terms of the Contract", and her reading of the wording of clause 45.9 of the contract, which she found did not clearly and expressly remove the right of set-off created by s. 13 of the BLA, so that "CP was therefore entitled to retain the Holdback as a set-off for its claim."
HELD: The court first looked at the correctness of the finding made by the chambers judge that the appellant had conceded CP was entitled to retain the holdback by virtue of s. 13 of the BLA, ruling that she had erred by not appreciating the distinction made by the appellant in its briefs that CP's claim was "the type of claim that may be made under s. 13 provided there is a basis for it in the common law, equity or in the Contract" and the appellant's consistent position that CP had not shown a common law, equitable or contractual right to make a claim to the holdback under s. 13 of the BLA. As the chambers judge had not embarked on an interpretation of s. 13 of the BLA, the court did so, taking its cue from the principles of statutory interpretation contained in ss. 2-10(1) and (2) of *The Legislation Act*. The court then conducted a historical survey of the various embodiments of the BLA, with the assistance of relevant jurisprudence and scholarly publications, placing considerable reliance on a 1984 report to the Minister of Justice, referred to by the court as the Semenchuck Report. Based on this review, the court concluded that s. 13 of the BLA was intended to clarify that a trustee such as CP had the right to set-off against trust amounts above the holdback any "debts, claims or damages, that are related to the improvement" if the right of set-off was shown by the trustee to exist at common law, equity, or contract. In short, the court said s. 13 did not create a statutory right to set off trust funds against a beneficiary's debt or other liability but ensured that the right of set-off as recognized by law had a place in the BLA. The court was then required to interpret clause 45.9 of the contract as a whole to determine whether a right of set-off was contracted by the parties. It relied on the legal principles of contractual interpretation expounded in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, which directed courts to interpret the words in the contract "in the context of the circumstances surrounding its making." The court appreciated that CP was relying on the definition of "Work" as used in the entire contract, and in particular in the phrase "to satisfy any claims against CP or the Work" in clause 45.9 to claim a set-off against the holdback, but disagreed with CP that "Work" was intended there as a reference not to the improvement itself but to the appellant's contractual obligations with CP. As such, the court concluded that the clause 45.9 holdback was intended to protect CP against lien claimants and other third-party claimants, and so CP had no contractual claim to keep the holdback pending resolution of its action against the appellant.

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***Cimmer v Niessner*, 2022 SKCA 60**

Jackson Ryan-Froslie Tholl, 2022-05-18 (CA22060)

Injunction - Interlocutory - Appeal
Contracts - Interpretation - Jurisdiction
Corporate Law - Oppression

T.C. brought two appeals before the court. His application for an anti-suit injunction against the respondents, C.N. and M.N.,

had been dismissed. C.N. and M.N. were then successful in bringing an injunction prohibiting T.C. from selling shares in a corporation that he purported to own. T.C. appealed this decision and it was before the court too. Extensive litigation between the parties was ongoing in Saskatchewan and New Jersey. T.C. claimed ownership of, or at least a security interest in, most shares of a Saskatchewan corporation, Keeley Lake Lodge (1989) Ltd. (corporation). C.N. and M.N. disputed T.C.'s claim to shares in the corporation. The corporation was incorporated in 1988 to hold interests in a hunting and fishing lodge. C.N. was the owner of 100 class A common voting shares which were issued by the corporation. C.N. was an acquaintance of an individual, R.L., who assisted in the marketing of the lodge and acting as a hunting guide. In 1998, R.L., a resident of New Jersey, had immigration difficulties which impacted his ability to act as a hunting guide. R.L. and C.N. entered into an agreement to purchase stock (APS), which purported to transfer 60 of the class A shares in the corporation from C.N. to R.L. in exchange for $60,000.00. C.N. and R.L. backdated the APS and a handwritten scheduled recorded payments through services rendered by R.L. C.N. deposed that the APS was prepared only to permit R.L. to deal with immigration issues and did not reflect a true ownership of the shares. The corporate registry was updated to reflect that R.L. owned 60 shares and C.N. retained 40 shares. C.N. and M.N. sued R.L. in New Jersey in 2015 after disputes arose. As part of the relief, C.N. sought to have the 60 shares reverted to him. R.L. agreed that the APS had been a sham in the pleadings he filed. T.C. became involved in the New Jersey action when he assisted R.L. in 2015. R.L. and T.C. entered a share option agreement (SOA) and a demand loan agreement (DLA). In general, under the DLA, T.C. agreed to lend R.L. money for his legal fees associated with the New Jersey action and R.L. granted a security interest in the 60 class A shares to T.C. In his affidavit filed before the lower court, R.L. stated that T.C. was aware of the problems associated with the purported ownership of the 60 shares in the corporation. T.C. acted swiftly and removed C.N. as an officer of the corporation. By January 2016, C.N. was no longer a director of the corporation and C.N. submitted that he had been frozen out of the corporation. C.N. and M.N. filed a claim in the court of Queen's Bench in 2016 for oppression and conspiracy. The claim included reference to the New Jersey action, where C.N. and M.N. were seeking that the shares be reverted from R.L. to them. They alleged T.C. conspired with R.L. in New Jersey to try to obtain the 60 shares at below market value. After the claim was filed, a settlement was reached by C.N. and M.N. with R.L. to the New Jersey action. R.L. agreed that the corporation would acquire and retire 30 of his class A shares. This had the effect of leaving C.N. with 40 of 70 shares in the corporation. Upon learning of the New Jersey settlement, T.C. demanded that R.L. transfer his remaining shares in the corporation to him. R.L. executed documents to this effect. In September 2016, the corporation attempted to have new counsel appointed in New Jersey. The Superior Court of New Jersey refused this and impounded the 60 shares of the corporation that were subject to dispute. T.C. commenced an action in the court of Queen's Bench against R.L. and his own New Jersey lawyer in September 2016. In October 2016, C.N. and M.N. amended their pleadings and named T.C. as a defendant in their New Jersey action. T.C. was unsuccessful in having this action dismissed. In March 2017, T.C. filed an application for an anti-suit injunction against C.N. and M.N. to prohibit them from continuing their New Jersey action. This application was dismissed. C.N. and M.N. were successful in their New Jersey action; the New Jersey Superior court ruled that T.C. had no interest to the shares in the corporation. In 2018, T.C. applied for an order in the court of Queen's Bench to become the registered owner of the 60 shares. In August 2018, this application was dismissed. In October 2018, T.C. served a notice of intention to dispose of collateral, namely the 60 shares, or T.C.'s security interest in the same. C.N. and M.N. responded with an application seeking an order prohibiting T.C. from proceeding with the sale proposed in his application. They relied on *The Personal Property Security Act* (PPSA). In November 2018, The Superior court of New Jersey issued an order enjoining T.C. from disposing of shares of the corporation. In chambers, in February 2019, an injunction was granted prohibiting T.C. from selling shares of the corporation. T.C. appealed this decision to the court. In May 2017, T.C.'s application for an anti-suit injunction was dismissed by a Queen's Bench Justice sitting in chambers. T.C. appealed this decision to the court. The issues in the anti-suit injunction appeal were the following: (a) Is the appeal moot, and if so, should it be heard in any event; (b) if the appeal is heard, did the chambers judge err in

his application of the principles related to the granting of an anti-suit injunction? The grounds of appeal from the order restraining the sale of the shares were the following: (a) should the chambers judge have dismissed the application because of C.N.'s unclean hands; (b) did the chambers judge err by taking notice of the New Jersey proceedings; (c) did the chambers judge err in finding C.N. and M.N. had standing under section 63 of the PPSA; and (d) did the chambers judge err in his application of the test for granting the injunction?

HELD: The appeal to the anti-suit injunction was dismissed. The appeal regarding the prohibition of the sale of shares was allowed. Neither party was awarded costs. The court first considered the nature of anti-suit injunctions. Authority to grant an anti-suit injunction is found in section 65 of *The Queen's Bench Act, 1998*. The leading case on anti-suit injunctions is *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, 1993 CanLII 124, [1993] 1 SCR 897. The court quoted from the decision where the test was stated: "First, the jurisdiction is to be exercised when the 'ends of justice' require it … Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed … Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy … Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution …" The parties agreed that the chambers judge had applied the correct test but disagreed on the chambers judge's analysis. The court determined the issue of an anti-suit injunction to be moot as the matters in New Jersey had concluded. The court then considered, despite the appeal being moot, whether it should still be considered. The court outlined a three-part test that established the rationale for considering whether a moot matter ought to be considered and determined that judicial resources should not be expended on the appeal. The court then turned its analysis to the injunction prohibiting the sale of shares. T.C. argued that the sham agreement entered by C.N. and M.N. with R.L. should prevent them from receiving relief from the courts as it resulted in C.N. and M.N. having unclean hands. The court referenced the leading case on clean hands in Canada, *Hall v Hebert*, 1993 CanLII 141, [1993] 2 SCR 159, which continued the longstanding doctrine that an individual cannot benefit from their illegal acts. T.C. did not raise the doctrine before the chambers judge. The court did not agree to allow the doctrine to come into effect while determining the appeal. T.C. challenged that the chambers judge erred in taking account the New Jersey proceedings. The court rejected T.C.'s argument that no admissible evidence was available before the chambers judge. The court rejected this argument and referenced Section 47(2) of *The Evidence Act*, SS 2006, c E-11.2, which permits courts to accept orders from foreign jurisdictions. T.C. never challenged the authenticity of the New Jersey orders. The court allowed the appeal of T.C. that C.N. did not have standing under s. 63 of the PPSA to assert as a remedy the prohibition of selling the disputed 60 shares. The court viewed this issue as needing to be determined by examining the statutory interpretation of s. 63 of the PPSA. C.N. claimed to be the beneficial owner of the 60 shares; however, none of the material filed before the courts established that C.N. had a current interest in the shares that is recognized at law as required by s. 63. The chambers judge erred in granting the injunction constraining the sale of shares as C.N. did not have standing under the PPSA. Accordingly, the appeal respecting the anti-suit injunction was dismissed and the appeal regarding the prohibition against the sale of shares was allowed.

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***L. & V. Enterprises Ltd. v Dave's Diesel Ltd.*, 2022 SKQB 87**

Gerecke, 2022-03-29 (QB22094)

Contracts - Formation
Contract - Release from Liability - Interpretation

L.V. Enterprises Ltd. and Brown's Leisure World Ltd. (vendors) brought an action against Dave's Diesel Ltd., 102082963 Saskatchewan Corp, and David Fyck (purchasers) to recover damages for an alleged breach of a "condition clause" contained in an unwinding agreement made between the parties, who mutually agreed to have a question of law decided before a judge of the Court of Queen's Bench (chambers judge) pursuant to Rule 7-1 of *The Queen's Bench Rules*. They agreed that the question of law was whether a release of liability (release) in favour of the purchasers discharged them from the requirement to clean and repair a building, the purchase of which was being unwound by the parties. It was not disputed that the intention of the parties in the unwinding was to reverse the building purchase agreement and put the parties back to the position they were in before the purchase agreement came into effect. The chambers judge had the benefit of an agreed statement of facts and a book of documents filed by the parties in making his decision. He was cognizant that his task was one of contract interpretation, and in particular, the interpretation of the release within the context of the "surrounding circumstances."
HELD: The chambers judge ruled that the release did not discharge the purchasers from the requirement to clean and repair the building which had been damaged and contaminated while in their possession. He did so for a number of reasons. He sifted through all the emails and correspondence exchanged between counsel for the vendors and counsel for the purchasers to extract the essential terms of the unwinding agreement (correspondence), which he said would then provide him with the relevant "surrounding circumstances" to aid him in interpreting the release. He was of the view, by reference to *Corner Brook (City) v Bailey*, 2021 SCC 29 and *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, that establishing the "surrounding circumstances" that led to the making of the release was the basic "interpretive principle" he was to apply, since the release could not be given meaning in isolation. He noted that counsel for the vendors stated numerous times in the correspondence that the unwinding of the purchase agreement must include placing the vendors in a pre-purchase position, and to do so included returning the building to the condition it was in prior to the purchasers' taking possession of it. He referred to one of the emails sent by the vendors' counsel to counsel for the purchasers that set out two options for unwinding the purchase. The chambers judge noted that the second option was accepted by the purchasers and included the words "Floor drains and sumps cleaned … Firewall repaired," which he said was a reference to some of the required cleaning and repairs. He noted that at no time did the purchasers ever state in the correspondence that they would not clean and repair the building. The chambers judge also concluded from the correspondence that it was a term of the unwinding agreement that the parties to it would be required to sign and exchange a release, which they had done. The chambers judge next considered the purchasers' argument that the release was intended to discharge them from any liabilities they had under the purchase agreement, that "the condition of the Premises was clearly "related to" the Purchase Agreement" and not to the unwinding agreement. The chambers judge was not persuaded by this argument, observing that the purpose of the unwinding agreement was to put the parties in the position they were in prior to the purchase of the building, that a condition clause was part of that agreement, as was the exchange by the parties of the release and as such, the purchasers could not now be heard to suggest that the release should have the effect of discharging the purchasers from the very agreement they had negotiated.

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***Smith, Re (Bankrupt)*, 2022 SKQB 109**

Thompson, 2022-04-14 (QB22302)

Bankruptcy - Conditional Discharge - Dishonesty

The trustee in bankruptcy (trustee) and the only proven creditors of the bankrupt (Joneses) filed notices of intended opposition to the absolute discharge of the bankrupt (L.S.) with the superintendent of bankruptcy, which then resulted in a hearing before the registrar in bankruptcy (registrar) to decide on L.S.'s discharge and whether terms should be imposed. The trustee objected to the absolute discharge because he wanted to see L.S.'s financial records to verify the information she provided to him; and the Joneses, who had brought an action to recover $40,000.00 they had loaned her, objected to her absolute discharge because they believed she was dishonest about needing the loan as a result of impecuniosity and about her intention to pay it back. The registrar ordered L.S. to provide financial records that she subsequently found to be incomplete, though she expressed no impediment to conducting the hearing on the basis of the records and documents filed. From these, she noted that the bankrupt had investments of $100,000.00 at the time she pled with the Joneses to help her; the Joneses were neighbours and friends of L.S. of modest means; that she forced them to prosecute a lengthy and expensive action against her to recover the loan, and that she filed for bankruptcy the day before a court application to cite her for contempt for failing to comply with a court order to provide financial records; at that point in time, the amount owing by L.S. to the Joneses was $51,405.86 and they had incurred $7,500.00 in legal fees; L.S. declared non-existent living expenses and underreported her income; she was sophisticated in financial matters and arranged her affairs to insulate herself from the judgment in the Jones' favour; and she claimed she used the Jones' loan to pay other creditors but did not provide proof of this.
HELD: The registrar ordered L.S. to be discharged from her bankruptcy on conditions that the approximate sum of $20,639.00 in her bankruptcy estate fund be paid to the Joneses, and that she pay the balance owing to them by monthly payments of $500.00. She reviewed the objectives of the *Bankruptcy and Insolvency Act*, which she stated were twofold: to rehabilitate the bankrupt so that she might become a productive citizen and to deter debtors from abusing the bankruptcy regime. She concluded in this case that she must emphasize deterrence in her decision because the evidence showed that L.S. was dishonest and had manipulated the bankruptcy system in order to avoid paying what she owed to the Joneses.

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***Shoman v Mais*, 2022 SKQB 106**

Turcotte, 2022-04-11 (QB22312)

Family Law - Interim Parenting Order - Variation
Family Law - Interim Parenting Order - Relocation

Civil Procedure - Court of Appeal Rules 15(1), 15(4) - Stay of Proceedings Pending Appeal
Courts and Judges - Judicial Comity

M.S., the petitioner and mother of two children, A.M., born in 2018, and S.S-M, born in 2020, sought to vary an interim order granted on August 6, 2021(*Shoman v Mais* (6 August 2021) Saskatoon, Div 801/2019 (Sask QB) (interim order)) to allow her to relocate with the children from Saskatoon to Kelowna. The respondent spouse and father, N.M., opposed the relocation. The judge of the Court of Queen's Bench hearing the matter (variation judge) first dealt with whether he had jurisdiction to hear the variation application. He asked himself whether N.M.'s appeal of the interim order had the effect of staying it. He determined with assistance from relevant jurisprudence that as the appeal was restricted to the parental decision-making term of the interim order alone, he had the authority to hear the variation application as the matter of relocation of the children was distinct from the issue under appeal. Next, the variation judge considered the factual underpinnings of the variation application. He concluded that by the principle of comity he was bound to apply the findings of fact made by the interim order judge, which he found were: the status quo was that the children resided primarily with M.S.; A.M. has a heart condition and autism; M.S. "had a handle on" his treatment plan and was "working with the appropriate supports;" the parties were hostile to each other and the resulting conflict was interfering with making decisions focused on A.M.'s care; N.M.'s allegations that the children were in "grave danger" from M.S. had no factual basis; and M.S.'s evidence as to N.M.'s behaviour as it pertained to his ability to parent the children, and especially his ability to satisfy A.M.'s special needs and treatment, was persuasive. In reviewing the reasons of the interim order judge, he noted that primary care of the children remained with M.S., and N.M. was granted "structured and specific unsupervised parenting time". He remarked further that the interim order judge considered N.M.'s parenting time as a means to get the parties "on track" to work together to satisfy the needs of the children, especially those of A.M. He observed further that the interim order judge concluded that M.S. should have sole interim decision-making with respect to medical needs, and "she must meaningfully consult with the father in advance of making any decisions." Overall, he noted that the interim order judge had fashioned an interim order which she hoped would assist the parties to cooperate with each other for the sake of the children. As to the variation application by M.S. to relocate with the children, the variation judge noted her affidavit evidence indicated that she was moving to obtain a position where she would manage an optometrist's clinic in Kelowna, which would allow for flexible hours. He observed she also deposed that her parents, who were helping her care for the children in Saskatoon, were planning to move with her to Kelowna, and that her sister also resided there. N.M. deposed his skepticism of the plan, as he knew of numerous opportunities for optometrists' positions in Saskatoon and was skeptical that M.S. could manage the clinic without being there for long workdays.
HELD: The variation judge dismissed M.S.'s application to relocate with the children to Kelowna and left the interim order unchanged. He referenced numerous cases concerning relocation of children by a parent, agreeing with the jurisprudence that relocation of children on an interim basis is generally not in their best interests and will not be endorsed by the courts except if it is shown on the evidence – which, on an interim application, for the most part consists of conflicting affidavits – that the children are at risk if not relocated or there are other compelling reasons to move them. The variation judge cited the pertinent portions of the *Divorce Act* concerning relocation of children, in particular, s. 16.92 thereof, and agreed that this provision confirmed that relocation decisions must be made in the larger context of the overall best interests of the children. He concluded that in this particular case, it would be highly disruptive to the children to move them because of their special needs which were being treated by a carefully arranged support network in Saskatoon. Finally, the variation judge was of the view that neither party had lived up to the intent of the interim order; that they were to work towards developing a spirit of cooperation in the care of the children, and further was of the view that M.S. brought the variation application for the purpose of thwarting N.M.'s parenting time and, as a result, concluded that the interim order should remain unchanged until some progress in that regard was shown by the parties.

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***R v J.G.*, 2022 SKQB 110**

Tochor, 2022-04-14 (QB22303)

Criminal Law - Assault - Sexual Assault - Victim Under 16
Criminal Law - Sexual Interference - Touching for Sexual Purpose - Female Under 16
Criminal Law - Defences - Honest but Mistaken Belief as to Age
Criminal Law - Proof Beyond a Reasonable Doubt

Following a trial of the accused, J.G., in the Court of Queen's Bench for the *Criminal Code* (Code) offences of sexual assault (s. 271) and touching a person under the age of 16 years for a sexual purpose (s. 151), the trial judge was to determine whether the Crown had proven these offences beyond a reasonable doubt and in accordance with the principles enunciated in *R v D.W.*, [1991] 1 SCR 742, and cases following it. In doing so, he reviewed the testimony of witnesses at trial and made findings of credibility to arrive at the facts he was to apply to each of the essential elements of the offences, and the facts bearing on the defences raised by J.G. in the light of the judicial authorities interpreting these provisions. As to the elements of the offence of sexual assault, he included consent as a proof requirement, both as part of the *actus reus* and the *mens rea*, though s. 150.1 of the Code expressly provides that the consent of a complainant under the age of 16 years is not a defence to a charge under s. 271 of the Code, subject to two exceptions which he stated were inapplicable in the case before him.
HELD: The trial judge convicted the accused of both offences. He assessed the testimony of the complainant, K.C., including her videotaped statement tendered under s. 715.1 of the Code, of J.G. and of one corroboration witness, K.C., under the following headings: mistaken belief in age, capacity to consent, and consent. As to whether the Crown had disproved the defence of mistaken belief that K.C. was above the age of 16, a defence allowed by s. 150.1(4) of the Code, by proving on the evidence to the required burden of proof that he had taken "all reasonable steps to ascertain the age of the complainant", he found the Crown had not done so. K.C. testified she was 15 years of age at the time of the offence, but she and her entourage of underage girls were able to enter a bar. He noted she agreed on cross-examination that by doing so she was "holding herself out" to be someone over the age of 19. He also heard J.G. testify he knew that persons under the age of 19 – the legal drinking age – did regularly gain entry to bars but did not understand him to say that people under the age of 16 did so regularly. The trial judge went on to say there was no evidence which tended to show that in the circumstances J.G. should have taken further steps to ascertain K.C.'s age, or which raised a doubt that he was "wilfully blind or reckless as to her age." Next, he considered whether the Crown had proved to the required criminal standard that K.C. did not have the capacity to consent to the sexual activity as required by s. 273.1(2) (a.1) or (b) due to her level of intoxication by alcohol, concluding that he had a reasonable doubt that she did have the capacity to consent. He referred to her evidence that she had consumed a moderate amount of alcohol and was surprised by how drunk she felt and the considerable detail of the sexual assault she testified to, which, he stated, was in the circumstances inconsistent with lack of capacity to consent. Lastly, he reviewed the evidence with respect to consent as an element of the *actus reus*, and as an element of the *mens rea* as developed in *Ewanchuk*, [1999] 1 SCR 330, and reaffirmed in *R v Barton*. He directed himself that as an element of the *actus reus*, the Crown has proven lack of consent if the complainant "testifies that she did not consent" and the Court

"accepts this evidence." He understood that the inquiry concerns the state of mind of the complainant and does not concern that of the accused at this stage. He found that any inconsistencies in K.C.'s evidence and prior accounts she gave were satisfactorily explained and did not affect her credibility, and that though alcohol did affect her memory, he accepted her evidence that she did not consent to the sexual activity, which he said was corroborated by independent evidence of her post-event demeanor, her crying. As to J.G.'s evidence, he found it very sparse in detail and observed in particular that he did not testify to K.C. communicating in word or act that she was consenting, and since silence as to consent can never amount to consent at law as mandated by s. 273.2 of the Code, J.G.'s defence of belief in K.C.'s consent could not be made out.

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***L.J.G. v R.D.G.*, 2022 SKQB 112**

Richmond, 2022-04-18 (QB22304)

Family Law - Parenting Orders
Family Law - Child Support
Family Law - Division of Property

A judge of the Court of Queen's Bench (trial judge) was required to decide on a number of heads of relief requested by the petitioner, L.G., the spouse of the respondent R.G. and the mother of their daughter, M.G., who was 14 years of age at the time of trial. The trial judge concentrated her analysis on fashioning appropriate orders with respect to two of these, the parenting of M.G. and the division of family property under *The Matrimonial Property Act*, which was in force at the time L.G. issued her petition in the summer of 2013. The evidence before the trial judge consisted of the testimony of L.G. and R.G. and financial records from a number of sources filed by both parties. She commented that the absence of any accurate evidence independent of the testimony of the parties as to the exact property in existence on the day of the petition or its value on that day and at trial made her task to divide matrimonial property more complicated and difficult. As to the matter of the parenting of M.G., the trial judge found on the evidence that on the separation of the parties in December 2012, L.G. moved M.G., who was six years of age at the time, to Moose Jaw from the family farm located near Bengough, where M.G. resided with her mother, until July 2013, when, following a family visit to the farm, M.G. refused to return with her mother, and thereafter remained in the care of R.G. Though interim parenting orders were made granting L.G. parenting time with M.G., R.G. failed to facilitate the visits, claiming that M.G. refused to go. An order was made, which R.G. consented to, that he arrange counselling for M.G. with the intention of assisting mother and daughter to establish a relationship. The most recent failed interim parenting order called for parenting time for M.G. with L.G. every second weekend. As to family property, the trial judge noted it consisted of farmland, much of which was owned half and half with R.G.'s deceased mother, machinery and equipment, vehicles, livestock, tools, bank accounts, and taxable assets such as RRSPs and pensions. HELD: With respect to the question of access by L.G. to M.G., the trial judge first stated that R.G.'s failure to take positive steps to facilitate M.G.'s visits with L.G. was a breach of his obligations under the interim parenting order, and as a parent he was not to abdicate his parenting responsibilities to the wishes of a child. By doing so, she said, he raised doubts about his own parenting abilities, and risked facing a contempt of court application. She relied on the support of *McGinn v McGinn*, 2006 SKQB 105 and

Jackson v Jackson, 2016 ONSC 3466 in commenting on R.G.'s duty to "motivate" M.G. to see her mother. She then ordered counselling sessions for M.G. but with a counsellor in Moose Jaw selected by L.G. and paid for by R.G., and following the counselling, resumption of the previous parenting order. She also reiterated that should R.G. fail to comply with these orders, L.G. had leave to bring the matter before her to determine if R.G. should be cited for contempt and if so, the consequences which should follow. On the matter of the division of matrimonial property, the trial judge had to decide how to make the best of a difficult situation caused by the inadequate evidence, which was "largely… guestimates, hearsay opinions and google searches" in large measure due to the failure of R.G. to comply with disclosure requirements. She firstly oriented herself as to the governing law and fundamental principles which were to guide her in the division of the matrimonial property: the divisible property is that which on the date of the application consists of "property interest the parties may have regardless of the entity or device used to hold [it]" (*Rankin v Rankin*, 2022 SKCA 32); property acquired after the application is commenced is not divisible; subject to any exceptions, exemptions or equities recognized by legislation, property owned by the conjugal partners is to be divided equally; property, including individual pieces of property, may be valued as of the date of the application or at the time of adjudication, depending on which date is fair to the parties; where property such as land has increased in value during this time period due to market forces, the time of trial should be used as the valuation date; and conversely, the date of the application should be used where depreciable assets have been in exclusive possession of one of the parties prior to the time of adjudication. Given the poor state of the evidence due to the fault of R.G., the trial judge decided to proceed as best she could so as not to prejudice L.G. by delaying the trial. She cited the case of *Ward v Allison*, 2019 SKQB 95, which provided her with three options as to how to proceed, one of which was that she "attempt to value with the information provided despite the deficiencies," which she chose to use, combing through the *viva voce* evidence, property statements, livestock sales, tax returns, and other sources, and by drawing inferences from all of this, she was able to divide the property.

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***Jantzen v TD Life Insurance Company*, 2022 SKQB 113**

Gerecke, 2022-04-18 (QB22305)

Civil Procedure - Summary Judgment
Contracts - Insurance Contracts
Criminal Law - Drug Offences - Possession

The plaintiff, V.L.J., filed an action as the personal representative of her deceased son, J.R.J. The defendants, TD Life Insurance Company (TD) and The Canada Life Insurance Company (Canada Life) were insurers of policies issued to J.R.J. for a mortgage and a line of credit. The parties brought competing applications for summary judgment. The defendants denied coverage under the insurance policies as they stated that J.R.J. died because of or while committing a criminal offence. V.L.J. sought summary judgment on the basis that J.R.J. was not committing a criminal offence. J.R.J. was found dead within his home. Fatal quantities of cocaine were found in his system and there was no suspicion of foul play. An autopsy was conducted. The resulting report observed that J.R.J. had a corner of a plastic bag containing white powder suggestive of cocaine tucked into a pocket in his wallet. No other evidence existed within the home that suggested illegal substances to be present. It was acknowledged by V.L.J.

that J.R.J. was addicted to cocaine. The court had two issues to determine: 1) Was this a matter in respect of which summary judgment should be granted; and 2) did the exclusion clauses contained in the insurance policies apply to permit the defendants to deny coverage?
HELD: The court determined that it was appropriate to adjudicate the matter summarily and it found that J.R.J. was in possession of cocaine, a criminal offence, which permitted the defendants to deny insurance coverage. The court commenced its analysis by first determining whether the matter was appropriate for determination by summary judgment. It found that the matter was appropriate for summary judgment as no better evidence was expected to be available for trial and the focus of the court is the interpretation of the insurance policies. Briefly, the court considered onus and standard of proof. While the plaintiff sought a higher onus, the court determined that the matter was to be considered by the civil standard of a balance of probabilities. The defendants bore the obligation of proving that J.R.J. died while committing or in the commission of a criminal offence. The court examined the elements of the offence of possessing a controlled substance. The offence is governed by s. 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA). The offence requires possession beyond trace amounts. The defendants argued two points supporting their denial of insurance coverage: that the cocaine J.R.J. ingested satisfies the elements of the offence allowing the exclusion provisions of the insurance contracts to apply, and the white powder found in J.R.J.'s possession satisfied the elements of the offence. The plaintiff argued that the defendants failed to prove the white powder found in J.R.J.'s wallet to be cocaine. The plaintiff further argued that there is a distinction between possessing cocaine, a crime, and consuming it, which is not a crime as an individual is no longer in possession of the substance. The court considered the exclusion clauses in the insurance policies and found them to be unambiguous, permitting them to be interpreted literally. The court then considered the facts to the applicability of the exclusion clauses contained in the insurance contracts. The court concluded that the white powder substance found in J.R.J.'s wallet to be cocaine. It rejected the arguments of the plaintiffs that the substance could have been something innocuous like sugar or salt, based on how the substance was found concealed in J.R.J.'s wallet. Further considerations in inferring the substance to be cocaine included: the observation of the substance in the autopsy report, in that J.R.J. appeared to have attempted to hide the substance; that cocaine was a part of J.R.J.'s life; and there was a quantity of the substance beyond trace amounts. With the adjudication that the white powder was likely cocaine, the defendants were successful in summarily dismissing the plaintiff's claim as J.R.J. was found to be in contravention of s. 4(1) of the CDSA. The court then considered the issue of whether the cocaine ingested by J.R.J. would be indicative of breaching s. 4(1). The court observed that little jurisprudence existed about ingesting a controlled substance rendering a person to no longer be in possession in the context of insurance disputes. The court concluded that the defendants had not established that J.R.J. died while possessing the cocaine he ingested. If the white powder had not been found in J.R.J.'s wallet, the court would have granted summary judgment to the plaintiff. With its existence, however, the exclusion provisions of the insurance policies applied, and the court found in favour of TD and Canada Life, with costs payable by the plaintiff.

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***R v Weber*, 2022 SKQB 116**

Hildebrandt, 2022-04-19 (QB22307)

Criminal Law - Firearms
Criminal Law - Defences - *Charter of Rights*, Section 11(b)

The accused, J.W., brought an application to stay proceedings resulting from unreasonable delays that are not permitted pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*). J.W. was subject to three indictments. The indictments included criminal and regulatory charges related to weapons and explosives, including a charge of criminal negligence involving the death of J.W.'s 12-year-old son. The Crown proceeded to elect a direct indictment for the charges related to criminal negligence that resulted in the death of J.W.'s son. J.W. argued that proceedings in all three trials be stayed because of unreasonable delay. The defence calculation of the delay from laying charges to the commencement of the scheduled trial for the direct indictment matter was a period of 913 days, or 30.01 months. The Crown vehemently opposed this calculation for all three matters, attributing delays to defence counsel and to exceptional circumstances. The issues for the court to determine were: (a) has the presumptive ceiling been breached, taking into account waivers of delay and exceptional circumstances; and (b) if not, has the applicant otherwise demonstrated that the delay has been unreasonable, thereby breaching his s. 11(b) *Charter* right?
HELD: The court dismissed J.W.'s application. The court found that the presumptive ceiling had not been breached, nor had there been an unreasonable delay. The court determined both issues in turn. The presumptive ceiling had been established in *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631. The Supreme Court established that matters are to proceed within 18 months for trials to be heard in Provincial Court that do not include a preliminary inquiry and 30 months for trials to be heard by a superior court or after a preliminary inquiry. The calculation of delay is to be undertaken by first calculating the days from arrest to the commencement of trial. To arrive at days of net delay, deductions are then made from the days leading from the arrest to trial in which there has been waiver by the defence or exceptional circumstances existing that prevent the matter from proceeding. Upon finding that the presumptive ceiling had been breached, it is the obligation of the Crown to establish that the delays are not unreasonable. If the ceiling has not been breached, it is the onus of the defence to establish that delay has been unreasonable. To determine whether the presumptive ceiling had been breached, the court conducted an analysis of events and counted days within the successive steps in J.W.'s matter. Both parties agreed that the time to commence counting days was on the date that J.W. was arrested. The parties had different interpretations of other events that had occurred from that date to the date of the application. J.W. elected not to file transcripts from court proceedings, which the court commented on critically. Notwithstanding the lack of transcripts and the reliance on court endorsements and audio recordings, the court reviewed each successive event to see if there had been a waiver by J.W. or exceptional circumstances resulting in delay. The court was satisfied that J.W. had waived various times in the calculation for delay, including seeking adjournments after substantial disclosure had been provided. The court further found that exceptional circumstances existed which excused delays found in the matter, namely the COVID-19 pandemic and Crown counsel displaying symptoms of the same on an occasion when the matter was adjourned. Ultimately, the court found that the presumptive ceiling had not been breached at arriving at calculations of 687 days, or 22.57 months of net delay. The court then engaged in an analysis of whether the delay had been unreasonable. As the ceiling had not been breached, the onus was on J.W. to establish that delays had been unreasonable. J.W. produced very little evidence and persuasive authority showing that his matter was subject to unreasonable delay, and the court rejected his arguments. The court was left with only court endorsements and audio recordings to determine how matters had proceeded. The court noted that this was not optimal considering the Crown's arguments that the lack

of filing transcripts ought to result in the dismissal of J.W.'s application. The court did not find a sustained effort by J.W. to expedite proceedings. There was no evidence proffered which demonstrated that the matters had been markedly longer than they should reasonably be. The court highlighted that J.W.'s matter included multi-count indictments; several *Charter* issues; the scheduling of three trials; multiple pre-trial conferences and resolution discussions, and a pandemic. Accordingly, J.W.'s application was dismissed.

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***Jackson v Jackson*, 2022 SKQB 114**

Megaw, 2022-04-20 (QB22306)

Family Law - Contempt
Courts - Judges - Disqualification - Bias
Practice - Evidence - Cross-examination on Affidavit

The respondent mother, M.L.J., sought an order of contempt against the petitioner father, M.G.J. Prior to contesting the contempt application, M.G.J. sought a preliminary order with multiple grounds of relief. Those grounds included orders that the court recuse itself from hearing the contempt application based on reasonable apprehension of bias; an order that the respondent be cross-examined on her affidavits; an order to adjourn the contempt application to permit the petitioner to obtain certain evidence; and an order requiring the chambers proceedings to be recorded "for use on any ultimate appeal." The parties were parents to a seven-year-old child and had been involved in extensive litigation. Following a trial and further proceedings, M.L.J. was found to be the primary parent to the child with M.G.J. having specified parenting time. M.G.J. withheld the child from the mother on the basis that he did not want the child vaccinated against COVID-19. M.L.J. took steps for her child to be returned to her. In a prior court proceeding, after the child had been withheld by the father, a police enforcement clause was ordered. Steps were taken by the RCMP to return the child to M.L.J. Ultimately, the father was arrested for withholding the child and for breaching a court order. M.L.J. filed her contempt application because of the father's breach of court orders. Before M.L.J.'s application for contempt was to be heard, M.G.J.'s preliminary application was to be determined.
HELD: The court determined M.G.J.'s application to be without merit and dismissed it. The court further determined that the hearing on the contempt application shall proceed, and that a date is to be scheduled for that application. The court sequentially considered each issue raised by M.G.J. and dismissed each in turn. On the issue of the court recusing itself, the court stated the test for reasonable apprehension of bias that was stated in *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2, [1978] 1 SCR 369 to be "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." M.G.J.'s arguments centered on two issues that he alleged would result in a reasonable apprehension of bias: that the court had previously ruled in a case where vaccination was ordered, and in prior proceedings the court had found unfavourably against him. The court considered both arguments. Respecting the issue of a previously determined case in which vaccination was ordered, M.G.J. ignored that each case is fact specific. Further, the previous decision would have the same persuasive authority regardless of who the sitting justice was. The court had ruled unfavourably against M.G.J. after

considering two letters he provided to the registrar that had led to a hearing. This did not, however, preclude the court from sitting to determine the present applications, as previous unfavourable results are not evidence of bias. M.G.J.'s arguments to cross-examine M.L.J. were further without merit. M.G.J. conflated issues in his position that the child should not be vaccinated with the actual application of contempt he faced. The contempt application was a discrete application based on M.G.J.'s alleged breaches of court orders. The court heard arguments about M.G.J. seeking additional time to file material before the contempt application was heard. The court scheduled the contempt application several weeks after the present application to permit both parties to follow procedures to include materials for the court's consideration. The court considered the rules respecting cross-examinations and jurisprudence that had considered the issue. M.G.J.'s arguments were dismissed as there is no absolute right to cross-examination and the court could not see any matters in factual dispute that M.G.J. had put forward before the court. Lastly, the court considered the arguments by M.G.J. that a recording be made of court proceedings. The court dismissed this argument as previous cases have determined that recordings are at the discretion of the court. There must be a rational reason to permit recordings: M.G.J.'s arguments did not present such reason. In totality, M.G.J.'s application was dismissed in its entirety and a further court date was scheduled to determine the contempt application.

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***Lessard v University Appeal Board, College of Medicine, University of Saskatchewan*, 2022 SKQB 123**

Scherman, 2022-05-06 (QB22316)

Administrative Law - Judicial Review - Universities
Administrative Law - University Student Accommodation Plans - Judicial Review

In conformity with the Procedures for Student Appeals in Academic Matters of the University of Saskatchewan, L.L., formerly a student in the college of medicine (college) who was "permanently discontinued as a student in its undergraduate medicine program" (MD program) on February 16, 2021, by the Student Academic Management Committee (SAMC) of that college; appealed its decision to the Academic Appeal Committee (AAC); then, upon her appeal being denied, appealed to the University of Saskatchewan's Appeal Board (UAB), which also denied her appeal. She then sought judicial review of the decision of the UAB in the Court of Queen's Bench, which was heard by a judge of that court sitting in chambers (chambers judge). Her sole ground of review was that the UAB erred on a standard of reasonableness by upholding the decisions of the SAMC and the AAC that L.L.'s "deferral requests" were excessive and caused the college of medicine "undue hardship." The chambers judge began the judicial review by canvassing the record of proceedings accumulated during the various levels of decision and appeal. L.L. started the MD program in fall 2015. She claimed an unspecified disability and was referred to U of S Access and Equity Services (AES), who assessed her and provided the college with an accommodation plan. She showed considerable reluctance to register and cooperate with AES. L.L. was having difficulty keeping up with the program, and as a result, requested many deferrals of examinations and of specific clinical skills requirements, many without notice. She also took lengthy leaves of absence. By the date of the decision that she be required to discontinue the program in February 2021, she had been given a conditional promotion to Year 2 Term 2 of the four-year program. The college had acquiesced to final examination deferrals which went beyond her accommodation plan. She consistently gave very short notice of deferral requests and did not provide medical certificates in support

of the deferral requests, though requested to do so by the college. UAB's decision emphasized that accommodation of L.L. had risen to the level of hardship because it "was compromising the integrity of the program, was impacting fairness in relation to other students, and was affecting [the] program's ability to adequately assess competency."
HELD: The chambers judge dismissed L.L.'s application to quash the decision of the UAB to uphold her permanent discontinuance from the MD program. Counsel for the parties agreed that the standard of review was that of reasonableness, as explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The chambers judge directed himself that he must look for the hallmarks of reasonableness of the decision of an administrative tribunal, these being "justification, transparency and intelligibility" and that the review process "cannot be divorced from the institutional context in which the decision was made nor from the history of the proceedings." He was aware that in its decision the UAB had misinterpreted the reasoning of the AAC and the SAMC, erroneously finding that they had arrived at their conclusion on the basis that accommodating L.L. had risen to the level of undue hardship for the college. The chambers judge, however, expressed that though UAB had correctly ruled that L.L. should have been permanently discontinued from the MD program, it had done so for the wrong reason. The analysis that the UAB should have conducted, he said, was not whether L.L.'s permanent discontinuance could be justified on the basis of undue hardship but whether the SAMC had implemented the accommodation plan. He asserted that undue hardship was not the issue and the SAMC had not made its decision on the basis of undue hardship, but on its finding that the college had fully accommodated L.L. The AAC upheld the decision of the SAMC for the same reason. The chambers judge was satisfied that the evidentiary record justified the ruling of the SAMC and the appeal decisions, though the UAB had decided the appeal after considering the wrong question. He stated he would not, however, quash the decision because he had the discretion not to do so where the result of a rehearing was "essentially preordained."

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***R v Taylor*, 2022 SKPC 15**

Henning, 2022-03-25 (PC22019)

Criminal Law - Sexual Assault

While previously charged with sexual assault under section 271 of the *Criminal Code*, M.T. was convicted of assault under section 266 of the *Criminal Code* when the charge he was subject to was changed by the Crown. M.T. and the complainant, N.M., were undergoing training for anticipated positions with Parks Canada and were attending a training session. M.T. and N.M. had been drinking while celebrating the birthday of a colleague in a hotel where trainees were staying. Following the birthday celebration, N.M. followed M.T. into her hotel room. Following consensual kissing, M.T. advised N.M. that she did not want to proceed any further. N.M. went to her bed and was followed by M.T. Despite N.M.'s pleas for M.T. to stop touching her, M.T. proceeded to put his hand down her pants, under her underwear, and touched her vagina. N.M. was able to text another troop mate and leave her room for the night. She estimated that M.T.'s sexual advances lasted approximately 20 minutes. The Crown sought a sentence of six months less one day while M.T. argued for a conditional discharge. M.T.'s immigration status was central to the arguments of both sides, as M.T. was a permanent resident having immigrated from New Zealand. The issue for the court to determine was the sentence to be

imposed for M.T.'s assault of N.M.
HELD: The court imposed a suspended sentence with 15 months of probation. The parties agreed that a result of any conviction under the Criminal Code would make M.T. subject to deportation. The *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), however, permits individuals to appeal being subject to deportation if there were no imprisonment for greater than 6 months. The Crown argued, in their view, for a lenient sentence of six months less one day to allow M.T. the ability to appeal any order of deportation. The court considered sections 718 and 718.2 of the *Criminal Code* in determining the appropriate sentence. Section 36 of the Act, which governs the deportation of individuals convicted of crimes, was viewed by the court to give rise to collateral consequences that must be considered in sentencing. The court's interpretation of section 36 was that inadmissibility under the Act is not triggered by conviction alone, but only in instances where the maximum penalty is for a term of 10 years or a sentence of imprisonment of six months or more is imposed. In addition to the collateral consequences presented by section 36 of the Act, the Court considered other issues impacting its sentencing decision of M.T. The charge M.T. was convicted of was assault and not sexual assault, which results in a different sentencing regime. Further, the background, character, and circumstances of M.T. were very relevant to sentence disposition. M.T. had maintained a positive work history, commenced studies in a Master of Arts program, and was remorseful for assaulting N.M. The court did not view personal deterrence as factor necessary for sentencing. M.T. argued for a conditional discharge. The violation of N.M.'s integrity militated against granting a conditional discharge. Balancing persuasive authority, public policy considerations, the impact to N.M. and the positions of both sides, the court elected not to impose a custodial sentence nor to grant an absolute discharge. A suspended sentence with 15 months of probation was imposed.

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***R v Dacey*, 2022 SKPC 20**

Scott, 2022-03-25 (PC22018)

Criminal Law - Assault - Assault Causing Bodily Harm
Criminal Law - Evidence - Identification

J.D. was charged with committing an assault on E.M. causing him bodily harm contrary to section 267(b) of the Criminal Code. E.M. and a friend, C.B., attended an off-sale store at approximately 3:00 am. E.M exited the vehicle and realized the store was closed. C.B. waited in the vehicle. While E.M. was outside the vehicle, another vehicle arrived at the store. Two men exited the vehicle and approached the store. E.M. advised them that the store was closed. He then proceeded to make an insulting gesture at the two men. A fight ensued. C.B. exited the vehicle and tried to stop the physical altercation. C.B. testified that words to the effect that "shut up or I'll stab you two" were uttered by one of the two men involved in the altercation with E.M. The two men involved in the fight with E.M. then left the scene in a vehicle. E.M. and C.B. testified there were also two women in the car. E.M. and C.B. returned to C.B.'s residence. Later in the day, at approximately 10:00 am, E.M. discovered that he had been stabbed as he awoke in a pool of blood. E.M. and C.B. attended a hospital. Several days after the incident, a police officer presented a photo lineup to C.B. C.B. identified J.D. as one of the assailants at the store. On the night of the altercation, approximately 15 minutes after the fight had ended, a vehicle with J.D. as a passenger was stopped for a random traffic stop. The police officer observed blood on J.D., who identified himself to the officer. J.D.'s photo from his driver's license was placed in the photo lineup that was shown to E.M. and C.B.

The police retrieved video from a theatre across the street from the fight and it showed the physical altercation between the parties. The issue for the court to determine was whether J.D. had committed an assault causing bodily harm against E.M.
HELD: J.D. was acquitted following trial of the matter. There was eyewitness identification of J.D. through C.B.'s identification of him in a photo lineup. E.M. was unable to identify J.D. in the same lineup. The police investigation had discovered other circumstantial evidence that pointed to J.D. as the assailant of E.M. The court found, based on the subsequent traffic stop in which J.D. was a passenger, that the same vehicle had attended the off-sale store. The totality of the evidence, however, did not rise to the level of finding J.D. as the individual who had stabbed E.M. The court found that the photo lineup presented to E.M. and C.B. was flawed. The court observed numerous errors the police had committed that did not follow the guidelines described in The Inquiry Regarding Thomas Sophonow (2001) respecting photo lineups. In addition to unreliable identification of J.D., the court found that the circumstantial evidence in the case was not enough to convict J.D. The court accepted the evidence from the traffic stop; however, inferences other than J.D.'s guilt could be established. The court was not satisfied beyond a reasonable doubt that J.B. assaulted E.M. causing bodily harm to him by stabbing, given the unreliable nature of the evidence in relation to the to the circumstances that immediately preceded the fight. Further, the court was unable to convict J.D. of the lesser included offence of common assault.

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***R v Evanchuk*, 2022 SKPC 16 (not yet on CanLII)**

Jackson, 2022-04-08 (PC22014)

Criminal Law - 911 Calls - Warrantless Entry
Constitutional Law - *Charter of Rights*, Section 8

A voir dire was conducted to address the accused's *Charter* application in which he argued that his section 8 rights were infringed by the search of the subject premises, and evidence obtained should be excluded pursuant to s. 24(2). The police had received a 911 call advising of a domestic dispute involving the accused. There were allegations that drugs and a firearm were present at the residence where police attended. The following issues required determination before the court: whether the accused has a reasonable expectation of privacy in the searched premises; were the police acting lawfully when they entered the premises pursuant to a 911 call; whether third-party consent was given to enter the premises; if police entry was lawful, were the items in the residence lawfully seized, and if necessary, a s. 24(2) analysis.
HELD: The accused's *Charter* application was dismissed and accordingly all evidence obtained would become full exhibits on the trial proper. The court was not satisfied that the accused demonstrated a reasonable expectation of privacy in the searched premises. This alone would defeat the accused's application. In continuing its analysis, the court further concluded that the police acted lawfully in entering the premises and seizing items pursuant to a 911 call. The items seized at the scene were in plain view of the police officers who attended the scene and subject to seizure.

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