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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***Windels v Canadian Broadcasting Corporation*, 2022 SKCA 72**

Whitmore Leurer Barrington-Foote, 2022-06-20 (CA22072)

Publication Ban and Sealing Order - Appeal

The appellant former executive director of a non-profit charitable corporation providing housing and related services to impoverished people (charity) appealed the lifting of a sealing order and publication ban. Several media organizations had successfully applied to lift the sealing order and publication ban. The former executive director had opposed the application in the court below because investigation reports were preliminary and the information could negatively affect the charity's fundraising and operations. The appeal court considered: did the chambers judge properly consider the elements that apply to limiting open access to court?
HELD: The appeal was dismissed. The open court principle creates a strong presumption

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that the public can attend hearings and report on court files. No exceptional circumstances existed to justify continuing restrictions. Discretionary limits are justified where (1) openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent that risk; and (3) the benefits of the order outweigh its negative effects. The appeal court rejected the appellant's argument that there was a privacy interest that satisfied the first element. Privacy interests that are merely embarrassing but do not involve sensitive personal information relating to personal dignity do not justify restrictions. Anxiety and embarrassment are common in legal proceedings. Charities are not entitled to special consideration merely because of charitable status. Serious risk to an important public interest cannot be purely speculative. The appeal court disagreed with the chambers judge's statement that it was possible the first stage of the test was satisfied because the risk was not grounded in evidence. The fact that an application could be commenced without notice did not in itself not justify continuation of a sealing order. The court below had previously ordered notice of the proceedings to many interested parties. Through that notice, the general information the executive director alleged could damage the charity's credibility was already known to key funders and operations partners. Prior notice undermined all three elements of the test. The first two prerequisites to justify continuing a sealing order were not demonstrated, and so the third element did not need to be considered in depth.

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***Prospect Properties Inc. v Moose Jaw (City)*, 2022 SKCA 73**

Ottenbreit Caldwell Schwann, 2022-06-22 (CA22073)

Municipal Law - Property Assessment Appeal

Prospect Properties Inc. (Prospect), the lead appellant for 13 owners of hotel properties located in Moose Jaw, disagreed with the decision of the Saskatchewan Municipal Board Assessment Appeals Committee (committee) overturning the decision of the Saskatchewan Board of Revision (board) and reinstating the capitalization rate (cap rate) arrived at by the assessor, the Saskatchewan Assessment Management Agency (SAMA), with respect to the 2019 assessment of its hotel to its disadvantage. (See: *Moose Jaw (City) v Various (Altus)*, 2020 SKMB 53 (committee decision) and *Prospect Properties Inc. v Moose Jaw (City)* (15 October 2019) Moose Jaw, Appeal No 19C0067 (Sask Board of Revision) (board decision). The grounds of appeal advanced by Prospect to the Court of Appeal (court) included: that the committee erred in law by not deferring to the board's factual findings and by not deferring to the board's statutory authority to review SAMA's discretion to choose the

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assessment method it thought would best "meet [the] market value standard or achieve equity." The court noted that the evidence showed SAMA was required to calculate a cap rate in order to capitalize the net income of the hotel using the income approach to valuation; as no hotel sales in Moose Jaw were available to allow for the use of a "direct comparison method" (DCM), SAMA chose to look to other cities in Saskatchewan for general commercial property cap rates (GCCR) similar to that of Moose Jaw and then picked five hotels from these cities with similar hotel cap rates; SAMA then chose two hotels from the five which it judged were most closely comparable to each other; the two hotels produced a mean hotel cap rate of 10.66%; the GCCR for Moose Jaw did not include any hotels; SAMA chose not to proceed by way of the DCM of all five hotels and the Moose Jaw hotel but instead chose to proceed by way of the ratio comparison method (RCM); by that method, the GCCR of each city was divided by the hotel cap rate for that city to arrive at a ratio; the ratio for each of the two cities was then averaged and the average ratio so derived was then applied to the GCCR of Moose Jaw, which resulted in a cap rate for Moose Jaw of 8.14%. The court was alive to the board's rationale that, as SAMA had five comparable hotel sales, it had the means to calculate a cap rate for the Moose Jaw hotel through the DCM without recourse to the RCM and would then have avoided the alleged fundamental unfairness to Prospect and the other appellants of calculating a hotel cap rate for the Moose Jaw hotel when Moose Jaw's GCCR did not include hotels.
HELD: The court agreed with the committee decision, and dismissed the appeal, with the result that the cap rate remained as initially set by SAMA. As to the question of the treatment by the committee of the factual findings of the board, the court first ruled that the facts and inferences SAMA, the board and the committee relied on were all the same and that Prospect did not demonstrate that the committee "interfere[d] with the facts as found by the Board" or that the committee misstated any evidence. In particular, the court pointed to the argument made by Prospect that the committee interfered with the board's findings of fact when it stated that "SAMA had used sales of Hotels to establish the ratio and, as a result, SAMA has used comparable sales as contemplated by the RCM" when in fact, no hotel sales were available in Moose Jaw to establish the ratio. The court expressed that this comment did not prove the committee had misunderstood the evidence on this issue since it did not show that the committee meant hotels in Moose Jaw and not the hotels from other cities. Ultimately, the court was unsatisfied that Prospect had met its onus to show that the committee erred in law in its review of the board's decision because it failed to show error on the part of the committee in its treatment of the handling by the board of the fundamental question of whether SAMA's assessment methodology or its application to the material facts and circumstances relevant to the assessment failed to "meet [the] market value standard or achieve equity."

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***R v Wilde*, 2022 SKCA 74**

Ryan-Froslie Schwann Kalmakoff, 2022-06-27 (CA22074)

Criminal Law - Self-Represented Accused - Duty of Trial Judge - Appeal
Criminal Law - Self-Represented Accused - Trial Fairness - Miscarriage of Justice - Appeal
Criminal Law - Conduct of Trial - *Browne v Dunn*

J.D.W., who was unrepresented by counsel at his trial for aggravated assault by breaking the victim's jaw, appealed his conviction, requesting that the Court of Appeal (court) set it aside as it amounted to a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*. He made this argument at trial for two reasons: the trial judge's guidance during the trial was both inadequate and misleading, making the trial unfair; and the trial judge misapplied *R v D.W.*, [1991] 1 SCR 742 (*D.W.*). There was no dispute that the primary issue at trial was the credibility of the Crown witnesses and J.D.W.
HELD: The court allowed the appeal as it concerned trial fairness and chose not to consider the *D.W.* ground of appeal. It set aside the conviction and ordered a new trial. The court first emphasized that not all instances of failures by trial judges to fulfil their duty to assist a self-represented accused amounted to a miscarriage of justice. The court confirmed that an appellant is required to show that the trial judge erred on a standard of correctness in the way he or she chose to "render some assistance to those who are self-represented so that defences available to such individuals are presented with full force and effect": *R v Cathcart*, 2019 SKCA 90. The court found that the trial judge had not assisted J.D.W. in presenting his defences with full force and effect in a number of ways, including that: he instructed J.D.W. that he was required to "decide the case based on the evidence" and that reasonable doubt must be "based on evidence," which was an erroneous statement of the law since reasonable doubt could also arise from the absence of evidence; he interfered with J.D.W.'s cross-examination of a police witness by stating to him that it was not helpful to refer the witness to her notes or reports as these could not be part of the evidence, and therefore failed in his duty by not directing him on the effective use of out of court statements to elicit evidence capable of discrediting the testimony of Crown witnesses; and the trial judge "entered the fray" by asking a Crown witness leading questions which went beyond clarifying his testimony, and instead bolstered the credibility of the witness, reduced that of J.D.W., and likely gave the impression that he was siding with the Crown. As to the rule in *Browne v Dunn*, (1893), 6 R 67 (HL), following a review of the case law considering how it was to be applied, the court was of the view that the trial judge's failure to instruct J.D.W. that the rule required him to give the Crown witnesses "the chance to address the contradictory evidence in cross-examination while he or she [was] in the witness-box", did not amount to unfairness to J.D.W. in this case because the failure to provide the instruction worked in J.D.W.'s favour. The court concluded that the accumulation of errors in the way the trial judge chose to assist J.D.W. amounted to an unfair trial which prevented J.D.W. from effectively challenging the credibility of the Crown witnesses in a case where credibility was the sole issue, and as such amounted to a miscarriage of justice.

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***Merchant Law Group LLP v Slusar*, 2022 SKCA 75**

Caldwell Schwann Tholl, 2022-06-29 (CA22075)

Barristers and Solicitors - Solicitor's Lien - Appeal
Civil Procedure - Striking Statement of Claim - No Reasonable Cause of Action - Appeal
Civil Procedure - Striking Statement of Claim - Abuse of Process - Appeal
Civil Procedure - Appeal - Application to Adduce Fresh Evidence

Merchant Law Group (MLG) appealed to the Court of Appeal (court) the decision of a judge of the Court of Queen's Bench (chambers judge) striking its statement of claim against Bruce J. Slusar and Bruce J. Slusar Law Office, P.C. Inc. (BJS) (See: *Merchant Law Group LLP v Slusar*, 2013 SKQB 204) for not disclosing a reasonable cause of action and being an abuse of process. MLG asserted BJS was liable to pay its account for legal services performed by it on behalf of a residential school survivor (survivor) whose claim was settled by BJS after the survivor's file was transferred by MLG to BJS, on the survivor's request. The settlement resulted in payment of an award of money which was handled and disbursed by BJS. MLG claimed BJS was liable to it on the basis of a solicitor's lien pursuant to *The Legal Professions Act, 1990* and at common law. MLG argued that the chambers judge erred in principle by ignoring altogether its amended statement of claim (second amended statement of claim) in conducting his analysis of whether the statement of claim revealed no reasonable cause of action or was an abuse of process under the applicable former Rules 173(a) and (e) of *The Queen's Bench Rules*, and that had he considered the second amended statement of claim he would have dismissed the application to strike. No evidence was filed on the applications, except a copy of the Indian Residential School Settlement Agreement (IRSSA). The court relied on the pleadings on the court file, submissions of counsel and the reasons of the trial judge in coming to his decision.
HELD: The court allowed the appeal, permitting MLG's claim to proceed as pled in the second amended statement of claim. It dismissed MLG's application to adduce fresh evidence, finding that the proposed evidence did not satisfy the test set out in *R v Palmer*, [1980] 1 SCR 759. Following a review of the case law by which it was to be guided in its analysis, in particular, *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98, the court found that the chambers judge erred in principle in finding that BJS had satisfied him that the statement of claim failed to disclose a reasonable cause of action. It reasoned that the statement of claim as amended by the second amended statement of claim pled the "necessary factual background" to support the action, being that the settlement achieved by BJS arose out of the same claim upon which MLG had performed legal services, and that the case law applicable to the pled facts could support the enforceability of a solicitor's lien in relation to the funds paid to BJS for the benefit of the survivor. Further, said the court, the chambers judge erred in principle by not conducting any analysis on the point, but nonetheless "concluded that such a lien could not exist because it had no foundation in law." Turning to MLG's argument that the chambers judge erred in law by dismissing his lawsuit as an abuse of process, the court disagreed with the chambers judge that the Independent Assessment Process (IAP) and the IRSSA were a complete bar to MLG's lawsuit. The court did not disagree that bringing an action which has been completely resolved in prior proceedings could amount to an abuse of process; however, in this case the court asserted that it was not plain and obvious that the IRSSA estopped MLG's claim. It stated that as demonstrated by the parties who, in argument cited different passages from the same cases to support their competing positions, the application of the IRSSA to MLG's lien claim was properly the subject of dispute pro and con, and so could not have been seen as an abuse of process by the chambers judge.

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***Witzany v Fisher Estate*, 2022 SKQB 103**

Mills, 2022-04-11 (QB22309)

Wills and Estates - Undue Influence - Testamentary Capicity - Proof in Solemn Form

The applicant, S.W., applied to a judge of the Court of Queen's Bench (chambers judge) for an order that three codicils to the will of her deceased mother, C.F., be proven in solemn form. She claimed that C.F. did not have the testamentary capacity to make the codicils, that her half-brother L.F. had exercised undue influence on her to make them, and that a trial was required to determine these issues. The court record showed that the will was executed on December 22, 2016, and the codicils on February 5, 2018, and March 5, 2018. These had the effect of removing S.W. as executor of the will and of disinheriting her from C.F.'s estate, in which she shared under the terms of the will. In support of her application, S.W. filed her own affidavit evidence and that of one D.Y., who kept a diary about what S.W.'s brother, J.F. told her about family interactions concerning C.F.'s estate planning. Medical records covering periods in 2016 and from October 2018 to November 2019 were part of the record. Also filed in the application on behalf of the respondents was the affidavit of K.N., C.F.'s lawyer, who swore that C.F. had testamentary capacity at the time the codicils were made, and that C.F. gave him clear and forceful instructions about the drafting of the codicils and did so in the presence of him alone. He swore he was confident the codicils reflected her wishes, free from any undue influence from anyone.

HELD: The chambers judge denied S.W.'s application that the executors be required to prove the codicils in solemn form by way of a trial of the issues and ordered that "the executors are entitled to apply for probate of the will of December 22, 2016 (will), and the codicils of February 5 and March 5, 2018." In order to assist him in his application of the correct law to the material facts, the chambers judge referred to *Kot v Kot*, 2021 SKCA 4, *McStay v Berta Estate*, 2021 SKCA 51 and other case law to clarify for himself the approach he was to take in determining whether proof in solemn was required; *deBalinhard (Estate) (Re)*, 2014 SKQB 16, on the evidentiary requirements for proof of testamentary capacity; and with respect to the definition of undue influence and the evidentiary foundation for its proof, *Carlson v Carlson (Estate)*, 2018 SKQB 196, *Bachman v Scheidt*, 2016 SKQB 102, aff'd *Bachman v Scheidt Estate*, 2016 SKCA 150 and *Lamontagne v Lamontagne* (1996), 150 Sask R 85 (WL) (Sask QB). The trial judge directed himself that his role was not to weigh or assess the evidence adduced on the application but to determine whether material evidence pertaining to proof of testamentary capacity and undue influence conflicted and therefore required the process of a trial to test and sift the evidence, especially the credibility of witness testimony. In this case, he was not satisfied that the evidence of the applicant, S.W., including the medical records, the journal entries and her affidavit, generally raised a "genuine" issue that C.F. lacked testamentary capacity at the time of the making of the codicils or that she was "coerced into doing that which she did not desire to do". In particular, as to testamentary capacity, he remarked that though the medical records revealed that C.F. had suffered a stroke in 2013, they did not contain any information about how the stroke or any other medical condition may have affected her capacity to make the codicils on February 5 and March 8, 2018.; nor did S.W.'s affidavit or D.Y.'s journal entries provide positive and admissible evidence relevant to C.F.'s cognitive abilities at the time of the making of the codicils. The chambers judge also commented that there was a fundamental contradiction at the heart of S.W.'s submissions: she could not on the one hand argue that C.F. had insufficient testamentary capacity in February and March 2018, but had that capacity on

December 22, 2016, to make the will when her own evidence raised concerns about C.F.'s testamentary capacity on that day. As to the challenge by S.W. to the validity of the codicils due to coercion on the part of L.F., the chambers judge found that if it was L.F.'s intention to exercise pressure on C.F. to oust S.W. from the will, it was illogical that he would not also have coerced C.F. to once again bequeath him the farmland of which she had dispossessed him in the will of December 22, 2016. In ruling against the applicant, the chambers judge placed great reliance on the affidavit evidence of the lawyer, K.N., who he accepted was very experienced and knowledgeable in drafting wills for older testators with communication limitations, as with C.F. He said any doubt he might have as to C.F.'s testamentary capacity or that the codicils were not the free and untrammeled exercise of her own volition were alleviated by K.N.'s evidence, which, along with other corroborative evidence, revealed that C.F. was strong-willed and decisive about estate matters and had in the past disinherited another child who had fallen out of her favour.

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***R v Crawford*, 2022 SKQB 115**

Tochor, 2022-04-20 (QB22313)

Criminal Law - Break and Enter with Intent to Commit Indictable Offence
Criminal Law - Criminal Organization
Criminal Law - Firearms Offences

W.J.C., the accused, pled not guilty to an indictment containing three charges, namely contraventions of ss. 244(1), 348(1)(a) and 467.12(1) of the *Criminal Code*. Section 244 prohibits an individual from discharging a firearm with intent to wound, maim, disfigure, or endanger the life of another. Section 348(1)(a) prohibits an individual from breaking and entering a residence, and s. 467.12(1) prohibits one from committing one or more indictable offences for the benefit of, at the direction of, or in association with a criminal organization. In this case, it was alleged that W.J.C. was a member of an organization known as the Indian Mafia. The crown alleged that W.J.C. attended with two other individuals the residence of the victim who was with his girlfriend to collect on a drug debt of $40. Upon entering the residence, the three accomplices encountered the couple in bed suffering from the effects of drug consumption. Demands were made for the repayment of debt, and upon payment not being forthcoming, the victim was shot in the foot and told not to report the incident to the police. Unbeknownst to the accomplices, members of the Regina Police Service were conducting surveillance on the victim's residence at the time of the shooting. A police officer testified to three individuals exiting the premises, a "heavy-set" man alleged to be the accused walking away from the residence after stopping to talk with the other two accomplices who were leaving in a vehicle. W.J.C. testified in his own defence. He stated that he was visiting the victim as a friend to collect $20 that he had borrowed from his wife. While visiting with the victim, other people that he knew burst into victim's room and demanded money for a drug debt. As W.J.C. was leaving the victim's room, he heard a "loud boom." He returned to the victim's room, was upset by what had happened – the victim had been shot in the foot – and he placed the firearm he saw in the possession of one of the assailants on the ground and then walked home. The court considered the evidence put forward by five witnesses, including the accused, and the issue to determine was whether W.J.C. was guilty of the charges laid against him.
HELD: W.J.C. was convicted of all offences. The court established fundamental concepts involved in a criminal trial including the

presumption of innocence; the crown's burden to prove each element of a criminal offence beyond a reasonable doubt; and critically to this case, how conflicting testimony must be addressed. The court cited the well-known case of *R v D.W.*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 (*D.W.*), requiring a careful analysis of testimony before the court: "First, if you believe the evidence of the accused, obviously you must acquit. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused." In analyzing the evidence before it, the court applied the *D.W.* test and concluded that the evidence of W.J.C was not believable; accordingly, the first two steps of the *D.W.* test were not in his favour. In rejecting his evidence, the court carefully examined the internal and external inconsistencies presented in W.J.C.'s narrative. W.J.C. was ambiguous about his involvement with the Indian Mafia but admitted he was a "general" in the organization. The court found his explanation for what happened in the residence, before his entry and the shooting itself, to be implausible. He was directly contradicted by a police officer who testified she had observed a heavy-set man (whom the court determined to be W.J.C.) exit the premises and talk with two individuals in a vehicle, when W.J.C. had testified that he simply left the scene and walked home. The court took note of his use of the expression "repercussions" in his testimony about the consequence of what would happen if others did not follow his directions, despite denying that he was directing what occurred at the victim's home. The court then completed the third step in the *D.W.* analysis to determine whether the Crown had established each element of the offences. The court agreed with the Crown's submission that W.J.C. was criminally liable under s. 21(2) of the *Criminal Code* because he shared a common intention with his accomplices to carry out an unlawful purpose. The court summarized the legal framework of s. 21(2) adopted from *R v Cooper*, 2020 BCCA 206 which established that there must be three essential elements: (1) an agreement to participate in an unlawful purpose; (2) the commission of an incidental and different crime by another participant; and (3) knowledge, that is, foreseeability of the likelihood of the incidental crime being committed. W.J.C. and his accomplices entered the victim's home with the common intention of collecting a drug debt; a firearm was brought into the residence, while the victim was being intimidated, and it was foreseeable that injury could result from the discharge of the firearm. W.J.C. was a party to an offence under s. 244(1) and was convicted of the same. The victim had not consented to the entry of individuals into his home, and W.J.C.'s entry constituted a break and enter as defined by s. 348(1)(a) of the *Criminal Code*, and given W.J.C.'s admission of being involved with the Indian Mafia, he was further convicted of contravening s. 467.12(1). Accordingly, W.J.C. was found guilty of on all three counts of the indictment.

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***R v Whitehawk*, 2022 SKQB 131**

Robertson, 2022-04-25 (QB22324)

Criminal Law - Media Access to Court Exhibits

Following a jury trial for first-degree murder resulting in convictions against the accused, certain media outlets filed "Requests by Media for Exhibits in Criminal Proceedings" with the Court of Queen's Bench pursuant to a joint policy of all levels of court in Saskatchewan titled *Public Access to Court Records in Saskatchewan: Guidelines for the Media and the Public*. The Canadian

Broadcasting Corporation (CBC) sought leave to make copies of all the exhibits to prepare news reports about the trial but particularly wanted to obtain a copy of a surveillance video that recorded one of the murders. Both Crown and defence opposed the application because some of the exhibits would be used in an upcoming first-degree murder trial involving the same accused. The Queen's Bench judge (judge) who presided at the trial heard the applications.

HELD: The judge allowed the application with respect to one exhibit, a mug shot of the offender, but denied the application as it concerned the other exhibits, ruling that allowing media access to the trial exhibits before the pending trial was concluded "poses significant risk to other important interests, including the right of the accused to a fair trial in a pending jury trial." In coming to this ruling, he first conducted a thorough review of the case law germane to the issue of access to court records, beginning with the "open court principle" which he understood meant the law recognized a "strong" presumption that the courts are always open to the public, subject only to the exception that the principle must give way if it is demonstrated "as a threshold requirement, that openness presents a serious risk to a competing interest of public importance." (See: *Sherman Estate v Donovan*, 2021 SCC 25, 458 DLR (4th) 361.) He then turned to cases considering the open court principle and s. 2(b) of the *Charter*, which guarantees "freedom of the press and other media of communication," recognizing that "the open court principle [is] inextricably incorporated into the core values of s. 2(b) of the *Charter*." (See: *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41.) With respect to court records, he accepted that access to these, including making copies to remove from the court room, was a facet of the open court principle. He was also aware that the law recognized the supervisory authority of the courts over the court record, including court exhibits, and that this authority served the very important purpose of "ensuring compliance with the robust and constitutionally-protected principle of court openness", while also remaining responsive to "competing important public interests" that may be put at risk by that openness: *Canadian Broadcasting Corp. v Manitoba*, 2021 SCC 33. In this case, the judge expressed that the constitutionally protected right of the accused to a fair trial took precedence over the constitutional right to freedom of the press, and that he was convinced no reasonable alternative measure could eliminate that risk. He rejected the suggestion that a challenge for cause of potential jurors could guarantee that a potential juror who had seen news reports about the concluded trial and the exhibits and had formed a pre-conceived opinion of the value of that evidence would not be empaneled on the jury.

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***Kaushik v Kaushik*, 2022 SKQB 135**

Mitchell, 2022-05-25 (QB22334)

Wills and Estates - Unprobated Will - Appointment of Administrator

S.K. applied for appointment as administratrix of the estate of her late father. R.K., one of the respondents and the son of the deceased, was named as an alternative executor of the estate by his late father in a will dated September 22, 1987, the original of which was lost. S.K. and R.K. were the sole surviving children of the deceased; S.K. and R.K.'s brother predeceased their father, and his five surviving children were also named as respondents to S.K.'s application. S.K. and R.K. and the grandchildren of the deceased are the sole beneficiaries of the estate as the spouse of the deceased had predeceased him. S.K. filed her application seeking relief under *The Administration of Estates Act*, SS 1998, c A-4.1 (Act) and primarily sought that she be appointed the

administrator of the estate. The parties filed affidavits that conflicted in evidence. Of the five grandchildren of the deceased, three supported their uncle being named the administrator of the estate and the remaining grandchildren opposed either S.K. or R.K. being named administrators of the estate; they proffered that the matter be dealt with in mediation. S.K. alleged that since their father's passing in 2016, R.K. had failed to provide a full accounting of the estate as required by a previous court order issued in 2020. She further alleged that R.K. had recently been disciplined by his professional regulator and could no longer be trusted. R.K. contended that S.K. had mismanaged the estate of their late mother. The issue for the court to determine was whether to appoint S.K. as the administratrix of the estate and grant the relief she sought or to take other measures to advance the estate forward. HELD: R.K. was named the administrator of the estate. While S.K.'s application was dismissed, the parties were ordered to pay their own costs. The court first considered whether it was appropriate to grant letters of administration pursuant to clause 3(1)(a) of the Act. R.K. and S.K. agreed that a copy of the document purporting to be their father's last will and testament existed, but the original was lost or destroyed. The court proceeded to consider it appropriate to grant letters of administration in this case, which required a reconciliation of competing claims to be the administrator. Section 11 of the Act establishes the priority of individuals who apply for letters of administration on an intestacy, based on the nature of the relationship between the applicant and the deceased. Both S.K. and R.K. had standing to apply for letters of administration in their father's estate as their mother had predeceased their father. To reconcile competing interests, section 17 of the Act authorizes the court to appoint "any person that the judge considers appropriate to be the administrator of an estate." The decision of *Sinclair v Sinclair*, 2013 SKCA 123, 370 DLR (4th) 214 (*Sinclair*) considered section 17. In Sinclair, the court determined that there is wide "discretion to appoint any person the Court thought fit and to the limit the administration as it was fit". Importantly in this dispute, paragraph 33 of *Sinclair* confirmed that the court has inherent jurisdiction to settle disputes respecting the proper administration of an intestacy. The court appointed R.K. the administrator of the estate considering several factors: he was named to be the alternate executor in the will; he had the consent of most of the beneficiaries to act as administrator; the evidence disclosed that R.K. had a close relationship with his father; and, R.K. had been appointed a power of attorney pursuant to a previously executed agreement. The court was not persuaded that regulatory findings against R.K. impacted his ability to be an administrator; however, given that there was some dispute as to whether there had been a "full" accounting as required by the 2020 order, the court did direct that R.K. post a bond. Accordingly, R.K. was granted letters of administration and was appointed the administrator of his late father's estate upon filing a bond with the Local Registrar as required by s. 20 of the Act. Each party was ordered to bear their own costs of the application.

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***Larocque v Yahoo! Inc.*, 2022 SKQB 136**

Elson, 2022-05-25 (QB22335)

Civil Law - Multi-Jurisdictional Class Actions - Stay of Proceedings
Civil Law - Multi-Jurisdictional Class Actions - Approval of Settlements

The defendants, Yahoo! Inc., and Yahoo! Canada Co. (Yahoo) applied to a judge of the Court of Queen's Bench (chambers judge) to permanently stay a proposed multi-jurisdictional class action brought in Saskatchewan by the proposed representative plaintiff, E.L. (Larocque action). The chambers judge referred to the court record and observed that: five months before the

issuance of the Larocque action, a "substantially similar multi-jurisdictional class action was commenced in Ontario" (Karasik action); both actions alleged that Yahoo was liable in tort for breaching the privacy rights of the plaintiffs as a result of three data leaks caused by a third-party actor unrelated to Yahoo and thereby jeopardised the privacy rights of multiple Yahoo customers; neither action alleged that any members of the class in either action suffered actual loss as a result of the data breaches; before certification of the Larocque action, settlement of the Karasik action was negotiated; the settlement agreement was conditional on the supervising judge (Perrell J.) of the Ontario Superior Court of Justice (Ontario court) allowing a consent certification of the Karasik action, and approving the terms of the negotiated settlement, which included the condition that the Larocque action be stayed; E.L. made representations before the Ontario court opposing the consent certification and conditional approval of the settlement; prior to Yahoo's stay application, E.L. filed its application for certification of the Larocque action, which the chambers judge adjourned, "direct[ing] a conditional stay of the Larocque action pending the disposition of the application to approve the settlement of the Ontario action" (See: *Larocque v Yahoo! Inc.*, 2020 SKQB 263); Perrell J. in the Ontario court rendered a decision approving the settlement agreement; and Yahoo filed its application for a stay of the Larocque action. In opposing the stay application, E.L. posited that the chambers judge did not have the jurisdiction to hear Yahoo's application for the stay of Larocque action except within the confines of the certification application, and that because the settlement agreement was not in the best interests of the members of the class, therefore the chambers judge should not endorse it by entering a stay of the Larocque action. HELD: The chambers judge allowed the stay application, ruling that the general stay provisions of *The Queen's Bench Act, 1998* (QBA), contained in ss. 29 and 37, gave him the power and authority to stay any action to prevent multiplicity of proceedings when to do so is appropriate and within the proper exercise of his discretion. Also, he was satisfied that the settlement agreement was properly approved by Perrell J. in accordance with the applicable principles governing the exercise of his discretion and was highly persuasive in assisting him in his "preferability analysis," that is, in his consideration of which of the actions was in the best interests of the members of the class. As to his power and authority to grant the stay of proceedings, the chambers judge reviewed *Ammazzini v Anglo American PLC*, 2016 SKCA 164 and *R v Brooks*, 2009 SKQB 54, which E.L. argued required that the preferability analysis legislated by ss. 6(2) and (3) of *The Class Actions Act* (CAA) be conducted during the certification process. The chambers judge disagreed with this interpretation of the case law, finding that these provisions did not restrict the preferability analysis to the certification process, but that in appropriate circumstances such an analysis could be made during a stay application taken pursuant to the general stay provisions of ss. 29 and 37 of the QBA. The chambers judge then went on to hold that the case before him was such a one because of the thorough analysis of the details of the strengths and weaknesses of the class action made by Perrell J. during the approval process of the settlement agreement, which he adopted because he was satisfied it was within the "zone of reasonableness" endorsed by case law. He then turned to the question of whether Yahoo had satisfied him that the Karasik action should be allowed to resolve by way of the settlement agreement undisturbed by the Larocque action and expressed that it should. In coming to this conclusion, he dismissed two arguments made by E.L. First, he did not agree that by not specifically pleading the privacy tort legislated in Saskatchewan, British Columbia, Manitoba, and Newfoundland, which was pled in the Larocque action, the Karasik plaintiffs doomed the class members to payment of a nominal damage award. He doubted the statutory tort, though it did not require proof of damage as an element of the tort, would have "all but assured a proper compensation". The chambers judge commented that E.L. knew from the decision of Perrell J approving the settlement that he believed E.L. faced a "formidable" task in proving that Yahoo acted "wilfully" as required by the provincial privacy tort. He commented that the case law suggested E.L. would need to prove much more than that Yahoo had inadequate safeguards in place and would likely need to prove that Yahoo knew its actions would violate a person's privacy. Further, the chambers judge agreed with Perrell J. that E.L. faced a near insurmountable task to prove causation, to prove as a matter of fact that Yahoo acted wilfully when it was clearly established that a third-party intruder caused the data breach, and not one of its employees or agents. Lastly, the chambers

judge agreed with Perell J. that E.L. failed to address the real issue, which was whether the settlement was reasonable and fair, not whether the class members might do better if the Larocque action was allowed to proceed.

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***Woodrow v Lepoudre*, 2022 SKQB 143**

Haaf, 2022-06-07 (QB22340)

Family Law - Child Support - *In Loco Parentis*
Family Law - Child Support - *Federal Child Support Guidelines*, Section 5
Family Law - Child Support - Retroactive
Family Law - Costs

Approximately two years after the petitioner and respondent separated, the petitioner claimed custody, access, guardianship over the child's property, child support and costs. The petitioner was pregnant when she met the respondent. The biological father of the child was unknown. The petitioner and the respondent were in a relationship for approximately six years, during which time he stood in the place of a parent to the child. The parties did not marry. The respondent continued contact with the child for about five months after the separation. The petitioner messaged the respondent questioning his personal life and indicating the child had been adopted by someone else. Internet postings appeared making serious negative allegations against the respondent, which the petitioner did not deny posting. Around the same time, contact between the respondent and the child ended. Two years later, the petitioner sought the full Guidelines child support with proportionate sharing of s. 7 expenses retroactive to the date of petition. The respondent took the position he ought to pay half the Guidelines support amount, given lack of support from the child's biological father and the presence of the petitioner's current partner who may also stand in the place of a parent. For the purposes of child support, the court imputed $22,580 annual income to the petitioner, and the respondent's income was $60,440. The court considered: (1) what was the appropriate quantum of support pursuant to s. 5 of the Guidelines; (2) should the support order be time-limited; (3) what was the appropriate s. 7 order; (4) was retroactive support appropriate in the circumstances; and (5) costs. HELD: (1) The respondent was ordered to pay half the Guidelines amount. The respondent admitted to having stood in the place of a parent, and that he therefore met the definition of a parent. Section 5 of the Guidelines gives the court discretion over the appropriate quantum of child support for a person who stand in loco parentis, considering any other parent's legal duty to support the child. The court rejected the petitioner's claim that her current spouse, who paid the majority of her expenses, did not have a parental relationship with the child. The court considered the respondent's income, the income of the petitioner's household, and the needs of the child. (2) Support was not time-limited, but the respondent could apply to have the court review if the petitioner had fostered a relationship between the respondent and the child and possibly end the support after four years. The parties had been separated over four years and the respondent had no contact with the child for most of those years. The future needs of the child were unknown, making a time-limited order inappropriate. Both parties were ordered to make ongoing financial disclosure to each other Either party could apply for a variation if there was a material change in circumstances. (3) It was appropriate deviate from the standard proportional distribution of s. 7 expenses. The respondent agreed to enrol the child as a dependent in his insurance benefits. If insurance did not provide health coverage, the respondent was ordered to pay his full proportionate share of healthcare

costs. No child-care expenses were payable. The child was not in any extra-curricular activities. If the petitioner intended to claim contribution from the respondent in the future, she must provide the respondent in advance details and costs of the activity, and the respondent shall not unreasonably withhold his consent. The respondent then would be responsible for one-half of his proportionate share of receipts. (4) No retroactive support was awarded. The court considered the petitioner's delay in seeking retroactive support, the respondent's conduct, the child's circumstances and hardship created by a retroactive award. The petitioner was responsible for approximately three years of delay in filing and advancing the petition. The respondent participated in the litigation. The respondent had been informed by the petitioner that the child had been adopted by someone else, which created questions about the respondent's legal obligations. The court observed that the petitioner appeared to have falsified correspondence submitted to the court. There was no specific evidence of the child's financial need. Retroactive support would result in hardship to the respondent. The respondent was unable to find work from November 2019 to July 2020 and incurred debt while unemployed. His recent employment had been insecure. (5) Both parties sought costs. Because petitioner did not comply with obligations to provide her financial information in the original application and because the petitioner's counsel could not be located by the court for considerable time on the date of hearing, $1,000 in costs were awarded to the respondent.

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***R v Caulderwood*, 2022 SKPC 21**

Kovatch, 2022-05-31 (PC22021)

Criminal Law - Impaired Driving
Criminal Law - Defences - *Charter of Rights*, Section 7, Section 24

During the trial of C.C. for operating a conveyance while over the legal limit for alcohol, a *Charter voir dire* was held before a judge of the Provincial Court (trial judge) to rule on the admissibility of incriminating statements compelled from her under the provisions of *The Automobile Accident Insurance Act* (AAIA) for accident reporting purposes. During the *voir dire*, the trial judge made the following determinative findings of fact: the investigating officer did not maintain a "red line" between the compelled statements taken under the AAIA and what should have been voluntary statements taken during the *Criminal Code* investigation; the investigating officer did not inform C.C. that she was not under a legal duty to provide a statement during the criminal investigation; C.C. believed she could not leave until she was told she could by the investigating officer; she did not know she had a right to be silent during the criminal investigation; the investigating officer used her admissions that she was the operator of the conveyance and that she had consumed alcohol, confirming his suspicion she had alcohol in her body, to obtain his grounds to make an approved screening device (ASD) demand of her; her failed ASD reading then led directly to her providing breath samples in an approved instrument and the evidentiary certificate of qualified technician that proved her blood alcohol exceeded the legal limit. HELD: The trial judge allowed the *Charter* motion, finding a breach of C.C.'s right to silence as guaranteed by s. 7 of the *Charter*. He then conducted a s. 24(2) *Charter* analysis and excluded all the evidence. His reasoning followed that of *R v White*, [1999] 2 SCR 417 (*White*), and recent cases in which it was considered. He stated he disagreed with the Crown's view that *R v Paterson*, 2017 SCC 15 (*Paterson*), had chipped away at *White* based on its reasoning in *R v Orbanski*, 2005 SCC 37, which permitted compelled statements from police to "form grounds for a screening device demand". He explained that a number of appeal cases

interpreted *Paterson* and a related case, *R v Soules*, 2011 ONCA 429 (*Soules*), that *White* and *Soules* were still good law, and as such compelled statements were not to be admissible for any purpose. The trial judge also disagreed with the Crown that he was bound by s. 320.31(9) of the *Criminal Code*, referred to by the Crown as the *Soules* amendment, and which it argued expressly permitted the admission of compelled statements obtained under the AAIA "for the purpose of justifying a demand made under section 320.27 or 320.28". He found he must disregard this provision, expressing that the pronouncements in *White* and *Soules* were unambiguous that such statements violated s. 7 of the *Charter*. He stated: "Section 320.31(9) did not alter the legal effect of White, and it did not in any way alter or reduce the power of this Court to determine a *Charter* violation exactly as occurred in White". Turning to s. 24(2) of the *Charter*, the trial judge found that the facts in this case were more egregious than in *White*, commenting that the police in *White* drew a blurred red line, whereas in this case, no red line was drawn. He concluded he was therefore compelled to exclude all the evidence proffered by the Crown.

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***Curliss v Adames*, 2022 SKPC 26**

Schiefner, 2022-06-17 (PC22024)

Sale of Goods - Fraudulent Misrepresentation
Contract - Interpretation

D.C., the plaintiff, purchased a boat from M.A., the defendant. Soon after purchasing the boat, which had been described by M.A. as being in "mint condition" and that it "works awesome", it broke down. D.C. alleged M.A. made negligent and misleading representations as to the condition of the boat. D.C. further alleged that a "*defacto* warranty" was created by M.A.'s statements and written advertisement. D.C. saw the boat advertised on Kijiji in 2019. He visited M.A.'s acreage and inspected the boat. Satisfied with the boat's condition, D.C. purchased it. M.A. had provided an express warranty that stated in part: "…the boat, motor and accessories are in good working order and that he has not wit[h]held any information in that regard". On the first day that D.C. took the boat out the lake, it broke down after running for 45 minutes. D.C. called an expert to testify about the condition of the boat. The expert testified that he assessed that a crack had occurred in the upper gears, and this would have been the result of the boat striking an object. The court summarized the expert's evidence: "simply put, detection of the damaged gear prior to its failure would have required disassembly of the drive unit and inspection by someone with advanced mechanical training." The court accepted as a fact that M.A. had not struck any object while owning the boat. The court further determined on a balance of probabilities that the damage to the boat had occurred sometime prior to M.A.'s ownership of the boat. The court determined the following issues: (1) Were the representations made by M.A. in the Kijiji advertisement (indicating that the boat "works awesome" and that it was in "mint condition") negligent or fraudulent? (2) Did the representations in the Kijiji advertisement create a *de facto* warranty regarding latent defects in the boat even if those defects were unknown to M.A.? (3) Did the clause in the bill of sale indicating that the boat, motor and all accessories were in "good working order" effectively create a warranty regarding latent defects in the boat unknown to M.A.? (4) What were the damages and how should they be calculated?
HELD: D.C.'s lawsuit was dismissed, with the court reserving on the issue of costs. While being sympathetic to D.C.'s situation, the court commenced its analysis by discussing the classic maxim, caveat emptor: "Where there is no evidence of fraud or active

concealment, the purchaser of a product may not later complain of defects in that product provided the purchaser had an opportunity to inspect the product before purchase." The court found that there had been no fraud or active concealment by M.A. On the issue of whether negligent or fraudulent representations had been made, the court found that M.A. had no obligation to conduct an extensive maintenance history of the boat prior to its sale. The court found the words "mint condition" and "awesome" to be little more than advertising puffery. Further, the statements in the advertisement were not found in the actual bill of sale where the words used were "good working order". The court explained the law of fraudulent misrepresentation, which requires a statement to be known to be false when made or the person making the statement not caring whether it is true or false. This did not apply to M.A.'s statements and conduct. On the second issue of whether a warranty was created by the words used in the Kijiji advertisement, the court found the comments made to be vague. Again, the use of the words "in good working order" nullified the comments that had been made in the advertisement. In examining the third issue, the court considered the ordinary meaning of "good working order" and relied on the facts that the boat had been in good working order prior to it stalling after 45 minutes of use by D.C. The term "good working order" did not guarantee that the boat was free from latent defects unknown to M.A. While not awarding damages, the court completed a calculation of the same by examining the part and labour required to repair the boat which totaled $1,415.27. The court reserved on the issue of costs after dismissing D.C.'s claim as there was an indication that an offer of settlement may have been presented before trial.

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***R v Lopez*, 2022 SKPC 28**

Rybchuk, 2022-06-27 (PC22025)

Criminal Law - Impaired Driving - Indicia of Impairment
Constitutional Law - *Charter of Rights*, Section 7 - Full Answer and Defence - Lost Evidence
Constitutional Law - *Charter of Rights*, Section 9 - Arbitrary Detention - Overholding

During S.L.'s trial before a judge of the Provincial Court (trial judge) for operating a conveyance while impaired, the Crown conceded that his rights under s.7 of the *Charter* to make full answer and defence and receive a fair trial, and to be free from arbitrary detention under s. 9 of the *Charter*, were infringed. In the result, the trial judge turned to a determination of what remedy under s. 24(1) of the *Charter* was appropriate to address the infringing Crown behaviour. The trial judge made the following salient findings of fact: at 10:30 p.m., S.L. was observed by witnesses to stop his vehicle at a red light, and not drive forward when the light turned green; he did not move the vehicle for several turns of the traffic lights; police officers from the Regina Police Service (RPS) arrived soon after and found him passed out in the driver's seat of the vehicle, which was running and in gear; they observed he had vomited on himself; he did not wake up and regain consciousness until the police smashed out the driver's side window; he smelled strongly of alcohol; he remined groggy and lethargic; breath samples could not be taken because he continued to vomit at the police station; he also urinated on himself; he was placed in police cells, where he remained until 1:30 pm the next day; S.L.'s mother had appeared at the scene, and asked police when she could pick up her son, and was told in 8 hours; she tried to inquire by telephone about her son at RPS detention early the next day but got no answer; so she sent her husband there, who was told to come back at 8:00 am; when he returned to see about S.L., he was told he could not take him home, but would need to wait to pick him up until

called to do so; S.L.'s mother telephoned the RPS and was told they did not know when he would be released; S.L. remained in cells until 1:30 pm; police surveillance video was taken of S.L. while he was in cells; his defence counsel wrote the RPS requesting this video for disclosure purposes 3 days after S.L.'s release; in spite of this request, the RPS took no steps to preserve the video, which was automatically erased after two weeks; police witnesses did not provide any explanation as to why the video was not preserved after defence counsel requested it; and could not provide any reason for not releasing S.J. to his parents early in the morning following his arrest.

HELD: The trial judge canvassed the case law on point in order to decide the appropriate remedies for the *Charter* infringements, and following this review, determined that a panoply of remedies, which included "self-instruction that the missing evidence did not advance the Crown's case," a reduction in sentence and costs would satisfy the need to denounce the state conduct in this case. On the strength of *R v Poletz*, 2014 SKCA 16, 433, and *R v Babos*, 2014 SCC 16, he thought in this case a stay of proceedings would be a disproportionate remedy for the overholding and was not the only available remedy. Similarly, with respect to the destruction of evidence, he found that the absence of the erased video evidence at trial was not fatal to S.L.'s defence since other evidence, including video from the police vehicles and police testimony as to the indicia of impairment, was available to the defence, and as a result the level of prejudice resulting from the breach of the right to make full answer and defence was relatively minor and did not justify a stay of proceedings. He found support in this view from *R v Sheng*, 2010 ONCA 296 and other cases. Having decided that a stay of proceedings would be disproportionate in this case and having instructed himself that the lost video did not support the Crown's case, he found S.L. guilty of impaired driving, expressing that the indicia of impairment proved beyond a reasonable doubt he was impaired to a significant degree in the operation of the vehicle, and any explanation otherwise was mere speculation. Lastly, he invited counsel to make submissions with respect to the reduction in sentence and costs.

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