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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***Tress v FCA US LLC*, 2024 SKCA 31**

McCreary, 2024-03-18 (CA24031)

Civil Procedure - Class Action - Certification
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The applicant applied for leave to appeal an interlocutory order of a judge of the Court of King's Bench (chambers judge), specifically a certification decision under *The Class Actions Act*. The respondent, FCA, designed, manufactured and distributed diesel-powered motor vehicles. The applicant alleged that those vehicles did not comply with the standard levels of emissions, causing the vehicles to be of lower value than the purchase or lease price the consumers paid. Prior to the certification process, FCA provided a software update for the emission control of the

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vehicles, ensuring compliance with standard limits without affecting performance. The chambers judge dismissed the applicant's application for class certification, finding that a class action was not a suitable procedure to adjudicate this matter and that the applicant did not meet the requirements of an adequate representative of the proposed class. There was no evidence of exhibiting further deficiencies after the software update, loss of value, reduced ability and reliability of the vehicles, and the other alleged inconveniences. The applicant brought this appeal based on 12 grounds that the chambers judge erred in fact, in law, and mixed fact and law. The issues for determination were: 1) whether the proposed appeal established sufficient merit to warrant the attention of the Court of Appeal (court); and 2) whether the proposed appeal was of sufficient importance to warrant determination by the court.
HELD: Leave to appeal was denied, as the proposed appeal lacked sufficient merit to grant leave. The court has a discretionary power to grant leave to appeal an interlocutory order of a King's Bench judge. The applicant, on balance, must show that there are grounds for grant of such discretion. The legal test considers merit and importance of the matter. The sufficiency of merit examines the nature of the matter, process, undue delays, mootness, and costs of the proceedings. The sufficiency of importance examines the matter for prejudice, unusual issue of practice, unsettled point of law, and particular implications. The applicant had not met the evidentiary threshold to establish that he had suffered compensable loss. A lack of evidence establishing that threshold means there is no identifiable class. Here, the alleged losses did not rise to that level, and the defendant rectified the alleged defects by providing software updates to control emissions. The alleged errors of assessing evidence are reviewable under the palpable and overriding error standard. The chambers judge correctly and properly relied upon facts from both parties' evidence. The applicant, furthermore, argued that the chambers judge erred in not considering all of the statutory factors of s.6(1) of *The Class Action Act*. The court explained that those factors are conjunctive, meaning the court must be satisfied on each element before certifying the class action. This also means if the proposed class action fails on one factor, the court need not analyze the rest of the factors. If one element of the test for certification is not made out, the certification application fails. The alleged errors of the chambers judge regarding the residency requirements of the applicant failed because the applicant did not tender evidence of his Saskatchewan residency before the court at the time of commencement of the certification. Since the application failed on other grounds, it would be moot to adjourn the matter and wait for the applicant to provide residency information. The court did not examine the "sufficient importance" part of the test because the appeal substantially failed on the merits part. Leave to appeal was denied with costs awarded to the defendant.

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***BTA Real Estate Group Inc. v Kaiss*, 2024 SKCA 33**

Leurer, 2024-03-19 (CA24033)

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The appellant was appealing a judgment regarding the respondent bankrupt's discharge from bankruptcy, the other respondent being the trustee. The appellant and the bankrupt had been involved in other proceedings stemming from different court actions, but all relatively related to the issue of bankruptcy. The appellant and the trustee disagreed about the contents of the appeal book. The appellant wanted to include all contents of the bankruptcy file and all the documents from other court proceedings the bankrupt was involved in, including pleadings, evidence, and orders. The trustee disagreed, stating that documents from those other proceedings were not separately filed in the bankruptcy file and did not form part of the record before the chambers judge, who ruled on the discharge conditions that were the subject of the main appeal here. The issue to determine was whether the appeal book should also include the pleadings, evidence and orders made in other proceedings.
HELD: The court ordered that the appeal book contain the entirety of the record from the other court proceedings. It was satisfied that the records of other court proceedings had been before the chambers judge. The appellant made several references to the said proceedings in their affidavit and brief of law at the King's Bench level, to which the respondent trustee did not object at that time. A party can refer to such records without formal proof of them because the Court of King's Bench has the power and means to review its own records. Furthermore, the material forming part of an appeal book should be the material that allowed this court to perform its appellate function. The principle of judicial efficacy required the parties to refrain from including irrelevant or duplicate material in appeal books. In this case, the documents the appellant wanted to include were relevant to the appeal function and process of the court. The court noted that the parties on either side had argued that this matter ought to be decided based on *The Court of Appeal Rules* alone, but the court found that s. 190 of *The Bankruptcy and Insolvency Act* and Rule 9 of the *Bankruptcy Rules* could have bearing on whether the appellant should have been permitted to adduce the records in the lower court at all. The issue of relevance about the substance and nature of the evidence was left for the panel judges to decide in the main appeal.

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***Walker v Hunter*, 2024 SKCA 34**

Caldwell Barrington-Foote Kalmakoff, 2024-03-20 (CA24034)

Civil Procedure - *Queen's Bench Rules*, Rule 7-1(2), Rule 7-1(3)(a)
Wills and Estates - Appeal
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This was an appeal from a chambers decision striking the appellants' originating application pursuant to Rules 7-1(2) and 7-1(3)(a) of *The Queen's Bench Rules*. The appellants were four of six siblings in the Hunter family: L.H., M.H., B.H., and V.C. The fifth sibling, L.H., was deceased. His wife, D.G., was named as a respondent. D.C., D.E. and the sixth sibling, B.H., were named as personal representatives for the estates of L.H. and the appellants' mother, G.H. B.H. was also named personally and as personal representative of their father's estate. D.E. was a lawyer and D.G.'s brother-in-law. At issue was title to 7.5 quarters of farmland, some of which the appellants' father transferred to himself, L.H. and B.H. as joint tenants, and some of which he transferred to L.H. and B.H. as joint tenants. The transfers occurred in 1996. Their father died in 1998, their mother in March 2007, and L.H. in December 2007. The other siblings were aware of the 1996 transfer but believed it had been done to allow B.H. and L.H. to continue farming the land and to use the lands as security to obtain financing to purchase other land. In April 2008, following L.H.'s death, B.H. transferred the land to himself as surviving joint tenant and to D.G. as beneficiary of L.H.'s estate. Also in April 2008, D.C. emailed D.E. in his capacity as executor of L.H.'s estate to ask how the lands were and would be dealt with. He identified concerns and information regarding the appellants' belief that their father intended for each of the six Hunter children to ultimately share in the distribution of land. D.E. responded by letter providing his legal opinion that any issue would be barred by *The Limitations Act* (the Act) because the 1996 transfer was unconditional and no complaint had been raised. V.C. responded via email asserting their parents' intention to allow B.H. and L.H. to leverage the land and continue farming it, after which it was to be distributed equally between the children. D.E. did not respond. Nothing happened until 2018 when the appellants brought an originating application claiming they were wrongfully disinherited and B.H. and D.G. were unjustly enriched as he held the subject lands in trust. They sought orders directing the Registrar of Land Titles to cancel the titles held by B.H. and D.G. and to issue new titles in the name of their mother's estate, as well as damages and an accounting in their parents' estates. They argued the limitation period was suspended under s. 17 of the Act, which provides that limitation periods

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established by it or any other Act or regulation are "suspended during any time in which the person against whom the claim is made: (a) wilfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or (b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage". The appellants allege that concealment occurred when D.E. opined that a claim was statute-barred because the transfer of land was unconditional, and when he did not note that the transfer to joint tenancy might give rise to a resulting trust. The respondents brought an application to strike the originating application and the chambers judge granted it, finding there was no evidence of fraudulent concealment and that the two year limitation period fixed by s. 5 of the Act had expired. She struck the application and did not address the claim for an accounting. On appeal, the appellants claimed the chambers judge erred in identifying the test for fraudulent concealment and by dismissing the entire application including the accounting.

HELD: The appeal was dismissed in part relating to the test for fraudulent concealment; it was allowed in part relating to the request for an accounting. The chambers judge explained her reasoning for her conclusion, referring to the leading decision *M.(K.) v M.(H.)*, 1992 CanLII 31 (SCC), and to *Giroux Estate v Trillium Health Centre* (2004), 2005 CanLII 1488 (ON CA), as well as *WP v Alberta*(No. 1), 2013 ABQB 295. She concluded there is a two-part test for fraudulent concealment that requires: 1) abuse of a confidential or fiduciary relationship; and 2) deliberate concealment of facts establishing an element of unconscionability in the special relationship. In applying the test, she found that D.C. and D.E. did not owe fiduciary duties to the beneficiaries of G.H.'s estate because they were not her executors. However, she agreed that if a resulting trust existed because of the 1996 transfer, then a special relationship did exist between B.H. and the appellants because B.H. was then the trustee of their share in the lands. She found this insufficient to meet the first part of the test but also found there was no evidence to support the second part of the test for fraudulent concealment. There was no evidence of D.E.'s intention to wilfully conceal the possibility of a resulting trust and, without it, there could be no basis to claim fraudulent or wilful concealment. The chambers judge found it was clear, or should have been with diligence, that the lands were transferred to a third party and that B.H. was taking the position this was proper. The limitation period, therefore, began to run in May 2008 and expired long before the application was made. The appellate judges noted that s. 17 does not actually require fraudulent concealment, but only a wilful act or omission of the kind specified in that section. They reviewed the principles of statutory interpretation specified in s. 2-10 of *The Legislation Act* and held that the absence of this discussion in the fiat does not mean the chambers judge did not interpret the statute. They found that, in fact, she essentially approached s. 17 as a codification of the equitable doctrine of fraudulent concealment. The question on appeal was whether she was correct in interpreting s. 17 as a codification. As the question had not been considered by the appellate court before, it canvassed the caselaw that

Richer v Parole Board of Canada

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considered s. 17 of The Act and the equitable doctrine of fraudulent concealment. They referred specifically to *Kequahtooway v Saskatchewan (Government)*, 2018 SKCA 68 as being consistent with the chambers judge's approach and as helpful in discussion of the case law relating to fraudulent concealment. It then canvassed the principles that apply when determining whether legislation should be interpreted as a codification, and the circumstances around the legislative amendments, and considered comments from the minister in support of a conclusion that s. 17 was intended to codify the equitable doctrine. The appellate court then turned to the question of whether it codified the equitable doctrine at the time or as it has since come to be understood, which is important because the appellants argued it determines whether a special relationship is required. The court considered the previous iteration of this section, s. 4 of *The Limitation of Actions Act*. After reviewing the legislative history of the provision alongside the caselaw, the appellate court found that s.17 does not require a special relationship between the parties and the chambers judge, therefore, erred; however, it does require proof that the wrongdoer wilfully concealed facts or wilfully concealed the appropriateness of a remedy. The appellants acknowledged that D.E. did not act deceitfully and, therefore, the claim failed. Secondly, the appellants either knew or ought to have known that loss or harm had occurred as a result of the transfer and, therefore, s. 17 could not avail them. Once knowledge is present the suspension of the limitation period does not continue. The appellate court found that the judge erred in law by striking the claim entirely because she did not consider that portion of the application requesting an accounting. The appeal was allowed in part.

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***Richer v Parole Board of Canada*, 2024 SKCA 37**

Leurer Tholl McCreary, 2024-04-03 (CA24037)

Courts and Judges - Jurisdiction
Criminal Law - Appeal - Prerogative Remedies - *Habeas Corpus*
Criminal Law - Extraordinary Remedies - *Habeas Corpus* - *Certiorari* in Aid

The appellant was serving a life sentence for first-degree murder. He was granted day parole that was later revoked. He unsuccessfully appealed the decision of the Parole Board of Canada (PBC) and concurrently applied to the Court of King's Bench for *habeas corpus* with *certiorari* in aid in accordance with Rule 3-63 of *The King's Bench Rules* seeking an order releasing him from the penitentiary, with or without conditions. The chambers judge examined the procedures in the Corrections and Conditional Release Act, SC 1992, c 20 (CCRA), and associated Saskatchewan jurisprudence that addressed habeas corpus in similar situations. He declined jurisdiction and dismissed the application by applying the *Peiroo* exception. This exception, found in *Peiroo v*

Canada (Minister of Employment and Immigration), 1989 CanLII 184 (ON CA) (*Peiroo*), holds that a superior court should decline to exercise *habeas corpus* jurisdiction where there is a complete, comprehensive and expert procedure for review of an administrative decision. The appellant applied to the Court of Appeal claiming the chambers judge erred in declining jurisdiction and framed the issues as whether the chambers judge erred: 1) in finding that he was bound by precedent to decline jurisdiction; and 2) otherwise in declining jurisdiction: (i) did Parliament intend for the CCRA to displace habeas corpus; (ii) is the application of the *Peiroo* exception unconstitutional; and, (iii) did the *Peiroo* exception apply in this case? The hearing of the application was bifurcated, with the parties arguing only whether the judge should hear it or decline to do so. The chambers judge did not hear submissions on the substantive issues or address the merits of the application.
HELD: The appeal was denied. The court canvassed the caselaw establishing the basis for *habeas corpus* applications and reiterated the SCC's confirmation that prisoners serving in federal penitentiaries have a right to review administrative decisions that negatively affect their liberty. This is done by way of *habeas corpus* application to superior court or by judicial review to Federal Court. The *Peiroo* exception to this remedy applies where Parliament has already put in a place a complete, comprehensive and expert procedure for review of an administrative decision that is at least as broad as the *habeas corpus* review and no less advantageous. The court surveyed the Saskatchewan jurisprudence that applied this exception; specifically, *R v Ross*, 2009 SKCA 24; *R v Latham*, 2009 SKCA 26; *Meigs v Institutional Head of Saskatchewan Penitentiary*, 2015 SKQB 405, affirmed in *Meigs v Saskatchewan Penitentiary*, 2016 SKCA 79; and *R v Latham*, 2016 SKCA 14. It then considered the appellant's argument that the exception had been overtaken by two SCC decisions and one from Alberta: *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 (*Chhina*), *R v Bird*, 2019 SCC 7 (Bird) and *DG v Bowden Institution*, 2016 ABCA 52. The court conducted a thorough review of jurisprudence across the country and found that neither *Bird* nor *Chhina* had overruled the Saskatchewan jurisprudence on this issue. It then applied the framework from *Chhina* to determine whether the chambers judge was correct in declining jurisdiction. First, the court examined the basis for which the legality of the detention was being challenged, which was an alleged failure of the PBC appeal division to properly assess the PBC's decisions and those of the parole officers. The court considered the jurisdiction of the PBC appeal division and the appellant's ability to access it for review of the PBC's decision. It examined s. 147 and found it provided PBC with broad remedial authority that exceeded the remedies available through *habeas corpus*. For this reason, the appeal was denied. The court did not consider the constitutional issue because it was not properly raised in the lower court and new issues are not generally permitted.

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***J.L. v T.T.*, 2024 SKCA 38**

Caldwell Kalmakoff Drennan, 2024-04-04 (CA24038)

Courts and Judges - Duty to Assist Self-Represented Litigants
Evidence - Hearsay - *Browne v Dunn*
Family Law - Appeal - Parenting - Child Support

The appellant (petitioner) appealed against the trial decision alleging that the trial judge was biased against him, and that she made

several errors that affected her conclusions on parenting and child support. The appellant also sought to introduce evidence on the appeal. The parties went to trial over issues of parenting and child support for their four-year-old. The trial judge ordered the child to reside primarily with the respondent in Saskatoon, and the appellant would have extended parenting time on specified weekends and holidays. The trial judge ordered joint decision-making responsibility except for matters related to health care, where the respondent would have the final say. The trial judge made findings about the parties' incomes, ordering the appellant to pay ongoing and retroactive child support. The parties never cohabited. Shortly after the child was born, the appellant's mother came to help the respondent with the child, resulting in the child moving back and forth between the appellant's residence and the respondent's residence. The mother-in-law was heavily involved in the child's care, and the respondent did not spend much time parenting the child on her own. The Court of Appeal (court) determined whether the trial judge: 1) erred in determining an appropriate parenting order; and 2) erred in the determination of child support obligations.

HELD: The court allowed the appeal and ordered a new trial to determine parenting arrangements. The court also allowed the appeal related to retroactive child support and set aside that part of the trial decision. There was no merit to the appellant's argument that the trial judge was biased against him, and the application to adduce additional evidence was also dismissed. 1) The court found that the trial judge made several material errors that affected trial fairness. The trial judge failed to discharge her duty to assist the appellant as a self-represented litigant in that she provided him with information about both the rules of evidence and the examination of witnesses that was legally inaccurate. A judge who presides over a trial has a duty to ensure that it is fair to all participants (*Stephens v Canadian Imperial Bank of Commerce*, 2021 SKCA 155). The trial judge also erred by making legally incorrect evidentiary rulings and improperly limiting the scope of the appellant's direct examination and cross-examination. This prevented the appellant from leading evidence relevant to the issues on parenting and challenging the respondent's credibility. The appellant was the petitioner and applicant, so he was required to present his evidence first by conducting examination-in-chief of his witnesses. However, the trial judge did not provide an on-the-record explanation about the rules of evidence or the proper manner of questioning his witnesses. The purpose of the rule in Browne v Dunn is to ensure fairness to all parties by giving a witness the opportunity to speak to contradictory evidence that the opposing party intended to call later. The trial judge erred because this rule did not apply to evidence the appellant led during his case in chief. The rule also did not require the appellant to predict and pre-emptively lead evidence on every matter about which the respondent and her witnesses might say something different. The court noted that a party conducting cross-examination is entitled to suggest facts to a witness and to question them "on relevant and otherwise admissible areas – without proof – provided they have a 'good faith basis'" for doing so. The court noted that while the rules of evidence are often relaxed in family law proceedings, hearsay evidence should not be relied upon for the truth of its content in making final determinations about crucial issues, such as parenting, unless it fits within a traditional exception to the hearsay rule or is admissible under the principled approach. Here, the respondent was allowed to benefit from a relaxation of the hearsay rules, but the appellant did not receive a similar benefit. The court concluded that the errors were so significant that the appellant could not be said to have had a fair opportunity to present his case. The court found no other alternative but to send the matter back for a new trial to determine parenting because it was not possible for the court to make the necessary findings of fact to craft a final parenting order. 2) The court set aside the retroactive support order and remitted the matter to the Court of King's Bench. There was no error in the trial judge's determination of the appellant's income for support purposes, nor in the finding that the appellant had an obligation to pay child support. The trial judge did not refer to any jurisprudence in her reasons for ordering retroactive child support, nor did she mention the governing principles or conduct a detailed analysis of that issue. The trial judge did not consider whether making a retroactive order of this nature would entail hardship for the appellant. The trial judge's failure to conduct this analysis was a legal error.

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***Jones Westar Holdings Ltd. v Round Hill (Rural Municipality No. 467)*, 2024 SKKB 17**

Hildebrandt, 2024-01-31 (KB24042)

Civil Procedure - Pleadings - Statement of Claim - Application to Amend
Practice - Pleadings - Statement of Claim - Application to Strike - Cause of Action - Frivolous/Vexatious - Abuse of Process
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Torts - Negligence - Causation

The plaintiffs, J.J. and B.J. and Jones Westar Holdings Ltd. (collectively Westar), applied pursuant to Rule 3-72(1)(c)(ii) of *The King's Bench Rules* for leave to amend their statement of claim to specifically add the tort of misfeasance in public office against two rural municipalities (RMs). They alleged bad faith and *ultra vires* conduct in the handling of land transfers and weed control on railway rights of way. The defendants opposed the application and applied for an order disallowing the proposed amendments. They argued the amendments added a new cause of action and a new type of damages, were statute-barred by the limitation period in s. 344 of *The Municipalities Act* (the Act), and subject to striking pursuant to Rules 7-9(2)(a), (b), and (e). They argued the application was frivolous, vexatious, an abuse of process, and that it disclosed no reasonable cause of action. They sought enhanced costs. The plaintiffs did not dispute that they were beyond the limitation period but argued the clear reference to the tort of misfeasance in public office only clarifies the existing claim, which references bad faith and *ultra vires* conduct on the part of the RMs.
HELD: The plaintiffs' application was dismissed. The judge disallowed the proposed amendments on the basis that they constituted a new claim that would be barred by the Act and struck. The court reviewed the Act, which shortens the limitation period to one year for claims against municipalities. It then reviewed Rule 3-72 and the recent case *Reed v Dobson*, 2021 SKQB 252, which confirms the court's wide discretion to allow such amendments provided there is no injustice to the other side. The defendants brought the application to disallow the amendments to ensure the limitation period was considered in light of *Siwak v Red River Valley Mutual Insurance Co.*, 2019 SKQB 226 (*Siwak*). The court distinguished *Siwak* on the basis that the plaintiffs here acknowledged they were beyond the limitation period. It then turned to a thorough comparison of the original and amended claims, noting the former was 11 paragraphs, while the latter was 25 and revealed qualitative differences. The court noted the amended claim echoed the original pertaining to noxious weeds, but the prayer for relief expands the damages beyond nuisance and negligence in a radical departure from the original claim. Regarding the express reference to the tort of malfeasance of public office, the plaintiffs relied on *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 (*Harpold*) where the Court of Appeal found sufficient factual narrative to conclude the tort of misfeasance in public office had been pled despite the self-represented litigant's poorly drafted claim. The court considered *Kennedy v Western Will Organic Farms Ltd.*, 2021 SKQB 89, which applied *Harpold*, and noted that litigants should not lose their day in court because counsel has not been "elegant or precise". To determine whether a claim includes the tort of malfeasance of public office, the court must also consider the elements of tort. It reviewed *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 and *Slater v Pedigree Poultry Ltd.*, 2022 SKCA 113, which confirmed that, in addition to the deliberate unlawful conduct and requisite knowledge, the plaintiff must prove the requirements common to all torts, i.e., causation and damages, and they must be pled in the statement of claim. Ultimately, the court distinguished *Harpold* because here the original

claim did not disclose deliberate unlawful conduct or focus on the actions or inactions of the public officers, in stark contrast to the proposed amended claim. In *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, the Supreme Court specifically rejected an approach of reading a claim of misfeasance in public office into the pleadings of bad faith and improper purpose, which mirrored the case at bar. Similarly, the second element of knowledge was not included in the claim. No injury or damage to the plaintiffs was mentioned, nor was there an allegation of causation. Because there was no allegation of injury in the original statement of claim, there was no ground for compensation; rather, the relief requested suggests judicial review as the legal nature of the claim for which damages cannot be claimed. The proposed amended claim would remove judicial review and substitute a claim in tort. Because none of the elements of the tort of misfeasance in public office were pled in the original statement of claim, the court found that the proposed amendments amounted to a new cause of action. It turned to whether the application was statute-barred and subject to striking. It cited *Bourgault Industries Ltd. v Canada (Agriculture and Agri-Food Canada)*, 2011 SKCA 29 and *Schneider v Humboldt (City)*, 2007 SKQB 45 in stating the court's discretion to allow amendments can be significantly restricted by an intervening limitation period and found that s. 344(1) of the Act barred the newly proposed cause of action. It then considered whether the proposed amendments were subject to striking pursuant to Rules 7-9(2)(b) and (e) as they were scandalous, frivolous, vexatious and an abuse of process. The judge applied *Edge v Moose Jaw Downtown and Soccer Field House Facilities Inc*., 2023 SKKB 207, which held that claims commenced outside the applicable limitation period are scandalous, frivolous or vexatious and amount to an abuse of process, finding that the plaintiffs' claim would be struck if the amendments were permitted. The court then considered whether the claim could be struck pursuant to Rule 7-9(2)(a) as disclosing no reasonable cause of action. The analysis resulted in uncertainty whether the claim would be struck, but this was not necessary to determine since it was already determined it could be struck pursuant to Rules 7-9(2)(b) and (e) as being scandalous, frivolous, vexatious, and an abuse of process.

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***R v Bird*, 2024 SKKB 32**

Danyliuk, 2024-03-01 (KB24030)

Criminal Law - Aiding and Abetting
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The accused was charged with aggravated assault under Section 268 of the Criminal Code for an incident that occurred while the accused was a serving prisoner in the "max unit" of the Saskatchewan Penitentiary where another inmate was badly beaten. The trial judge had to determine whether the accused could be found guilty by virtue of being a party to the offence pursuant to s. 21 of the *Criminal Code*.
HELD: The accused was found not guilty. (1) The Crown did not prove beyond a reasonable doubt that the accused was a party to the offence pursuant to section 21 of the *Criminal Code*. The Crown, in establishing the standard of proof, does not need to prove

every single fact or matter beyond reasonable doubt or explain every issue or matter that arises during the trial. Rather, the Crown must amass sufficient evidence to satisfy the trier of fact of each element of the offences charged beyond a reasonable doubt. Where a separately indicted accused is being prosecuted as an abettor and there is evidence that more than one person participated in the commission of the alleged crime, the Crown is not required to prove the identity of the other participants or the precise part they played in order to prove the accused's guilt. In this case, there was no evidence that the accused participated in any assault and his evidence about beseeching the primary assailants to stop was uncontroverted. The Crown also failed to prove what the accused did or refrained from doing that assisted the other inmates in perpetrating the assault. The fact that the accused watched the assault was insufficient to ground criminal liability.

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***R v Chipesia*, 2024 SKKB 35**

Gerecke, 2024-03-01 (KB24026)

Appeal - Summary Conviction - Public Health Order
Statutes - Interpretation - *Public Health Act, 1994*, Section 61

The court considered a summary conviction appeal. The appellant was convicted for violating gathering restrictions under s. 61 of *The Public Health Act, 1994* (the Act). The trial judge found that the appellant's participation in an outdoor event violated a public health order made pursuant to the Act and *The Disease Control Regulations*. At the time, outdoor gatherings were restricted to no more than 10 people. The trial judge found that the appellant did not provide advance notice of her intent to raise s. 2 *Charter* issues concerning her right to freedom of conscience and religion, and he did not give effect to any *Charter* arguments. The appellant sought to have the conviction overturned and the fine withdrawn.
HELD: The court dismissed the appeal, finding it to be without merit. Section 813(a)(ii) of the *Criminal Code* provides a right of appeal from a summary conviction offence sentence. Under s. 686(1)(a), an accused could succeed on an appeal of her conviction if the verdict was unreasonable or unsupported by the evidence, on the basis of a wrong decision on a question of law, or if there was a miscarriage of justice. The appellant's appeal failed because she did not file or serve any notice that challenged the validity of the public health order, nor any law or regulation. Without notice, neither the Provincial Court nor the Court of King's Bench had jurisdiction to consider a *Charter* challenge. The court referred to other cases where the validity of public health orders imposing gathering restrictions were challenged and upheld. The appellant did not adduce any evidence.

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***R v Walls*, 2024 SKKB 36**

Robertson, 2024-03-04 (KB24043)

Constitutional Law - *Charter of Rights*, Sections 11(b), Section 24(1) - Delay - Stay of Proceedings
Constitutional Law - *Charter of Rights*, Section 11(b) - Delay - Stay of Proceedings - Trial Within Reasonable Time
Criminal Law - Aggravated Assault
Criminal Law - Procedure - Crown Delay
Criminal Law - Procedure - Disclosure

The accused was charged with aggravated assault contrary to Section 268 of the *Criminal Code*. This decision addressed pre-trial applications by the Crown and defence.
HELD: (1) The Crown's application to admit the accused's police statement as voluntary was granted. In determining admissibility of statements, a two stage-inquiry is conducted. The first is an examination of three factors in a contextual analysis: whether the statement was made without threats or promises by a person in authority, whether the statement was made in an atmosphere free from oppression and whether the statement was made by an accused with an operating mind. The second stage inquires whether the statements were made without impermissible police trickery that would shock the community. (2) The defence's application to stay the charge for delay was dismissed. The trial delay in this case was below the ceiling for trial in the Court of Queen's Bench set out in *R v Jordan*, 2016 SCC 27. While 11 months was deemed a long time for a straightforward charge of aggravated assault, the delay was not unreasonable. The delay in Provincial Court was partly attributable to normal prosecution time, partly due to delay in Crown disclosure and partly due to the defence delaying plea and election when it should have been able to do so earlier. The delay, though concerning, was not one of the rare and clear cases where charges should be stayed for delay.

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***T.E. v B.B.-H.*, 2024 SKKB 41**

Megaw, 2024-03-07 (KB24033)

Family Law - Custody and Access - Mobility Rights - Interim Application - Best Interests of the Child
Statutes - Interpretation - *Children's Law Act, 2020*, Section 10, Section 15

The mother (petitioner) made an interim application to have the parties' child relocate from Regina to Saskatoon with her. The father (respondent) opposed the relocation. The child had special needs and received treatment from health care professionals and various agencies, all located in Regina. A shared parenting arrangement had been in place for almost four years and the parents co-parented the child cooperatively. The court considered whether to grant the interim relocation application.
HELD: The court found that it was not in the child's best interests to relocate to Saskatoon and declined to grant the interim application. The court applied the criteria in s. 10 of *The Children's Law Act, 2020* to determine that it was in the child's best interests to continue to reside in Regina pending a pretrial conference. The unique circumstances of the child required additional clarification evidence to be called to detail the child's present circumstances and what those circumstances might look like if the move were authorized. The mother's plans for employment in Saskatoon at the end of a maternity leave were not yet in place; there

was incomplete evidence before the court to make an interim change in the child's life. The court found that the mother's move was not connected to the needs of the child, nor was it necessary to improve her own employment or educational future.

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***Director under The Seizure of Criminal Property Act, 2009 v Warnecke*, 2024 SKKB 43**

Keene, 2024-03-12 (KB24034)

Civil Procedure - Addition of Defendants - Pleadings - Amendment
Civil Procedure - Noting for Default - Application to Set Aside
Civil Procedure - Parties - Adding Parties
Forfeiture - Seizure of Criminal Property
Practice - Amendment to Pleadings - Statement of Claim - Adding a Defendant - Discretionary Order

The applicant filed a notice of application seeking that the property seized in connection with a police investigation into the respondent's sale of marijuana be forfeited to the Crown because the money was acquired due to unlawful activity. The applicant also sought to add Health Canada as a party to the application. The issue for determination was whether the applicant's use of a notice of application was fatal to the forfeiture request.
HELD: The application to set aside the forfeiture request and the application to add Health Canada as a party were both dismissed. (1) Under Rule 3-49 (2) of *The King's Bench Rules*, an action under *The Seizure of Criminal Property Act, 2009* (SCPA) should be commenced by originating application. However, Rule 1-6 (1)(b) allows the Director under the Act (director) to cure the irregularity. Rule 1-6 (6) also prohibits the court from setting aside a proceeding solely on the ground that the proceeding was initiated by a commencement document other than the one required by the rules. (2) Section 2-26 of *The Legislation Act, 2019* provides that deviations in form do not invalidate a form if the deviations do not affect the substance, are not likely to mislead and the form is organized in the same way as the form that was supposed to be used. In this case, the respondent was served with a clearly worded notice of application and detailed supporting documents which made him aware of the application's purpose. The director had no intention of misleading the respondent and the respondent did not appear to have been misled or confused. (3) A necessary party is one who "should be bound by the result of an action" because the question before the court "cannot be effectually and completely settled unless he is a party" (*Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 at para 32). Health Canada had no interest in the property subject of the director's action and would not be bound by the result of the action.

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***Eloufy v Association of Professional Engineers and Geoscientists of Saskatchewan*, 2024 SKKB 45**

Robertson, 2024-03-14 (KB24032)

Administrative Law - Appeal - *Engineering and Geoscience Professions Act* - Good Character

The appellant applied to be an engineer-in-training licensed by the Association of Professional Engineers and Geoscientists of Saskatchewan (APEGS) (the respondent). The council of APEGS (council) had the authority to govern the affairs and business of the association, and to register and license individuals as members to practice professional engineering. The council could also delegate this authority to the registrar. The registrar advised the appellant that his application to become a professional engineer was rejected due to the allegation that he had falsely claimed to be a professional engineer. The appellant requested a review of the registrar's decision and was represented by counsel during the review hearing. The evidence before council was that the appellant represented himself as being a professional engineer to obtain employment in British Columbia. When he failed to provide proof of his status to the employer, his employment ended. The council confirmed the registrar's decision but revised the timeframe to reapply from five years to three years. The court considered the appellant's application to quash the decision.
HELD: The court dismissed the appellant's application. The standard of review was correctness on questions of law and palpable and overriding error on questions of fact or mixed law and fact. The court found that the council was entitled to deference in determining the consequences for breaching professional standards. As the governing body of the profession, it was best placed to decide the relative seriousness of professional misconduct and the appropriate consequences. The court found that the council failed in its duty to provide reasons. While a finding of inadequate reasons would usually result in the appeal being allowed, that result was not inevitable if the reasons were readily apparent from the record. Here, the reason for the council's decision was obvious from the record. The court was satisfied that the council upheld the registrar's refusal of the application because it accepted that the applicant had falsely and repeatedly claimed to be a professional engineer. The court declined to make a cost award given the valid ground for appeal.

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***Scotia Mortgage Corporation v Yamniuk*, 2024 SKKB 48**

Rothery, 2024-03-22 (KB24049)

Civil Procedure - Costs - Solicitor-Client
Civil Procedure - Payment of Money into Court
Debtor and Creditor - Mortgage - Foreclosure
Mortgage - Foreclosure - Application for Judicial Sale - Order *Nisi*
Mortgage - Foreclosure - Application to Confirm Judicial Sale

The plaintiff sued the first defendant for foreclosure of the mortgage granted for the purchase of her property. The plaintiff obtained various orders throughout the process, including an order *nisi* for sale by real estate listing, an order for immediate possession of the property, and an order confirming sale. Counsel for the plaintiff finally applied for an order assessing solicitor-counsel costs, which

was opposed by counsel for the second defendant, Royal Bank of Canada (RBC), who had been added to the action because they had an enforcement charge against the property subordinate to the mortgage granted by the plaintiff.
HELD: An *ex parte* order granted by the court because of inaccurate submissions by counsel does not preclude the court from making decisions regarding the proceeds of the judicial sale in accordance with the law. Solicitor-client costs are assessed after the balance of sale proceeds is paid into court. They are not retained by counsel for the mortgagee until after the application for assessment of solicitor-client costs is decided. (2) Any costs incurred by counsel for the mortgagee in confirming sale and providing the order confirming sale are included in the standard solicitor-client costs to be awarded. Decisions considering the amount of standard solicitor-client costs are solely within the context of a judicial sale and the resulting confirmation of sale of the mortgaged land. There is no separate transaction that amounts to the "expenses of the sale." Given that counsel for the plaintiff was required to apply for immediate possession and subsequently apply for substitutional service on mortgagor, the solicitor-client costs were increased to $7,500. (4) Inspection fees cannot be added to a mortgage account by reason of s. 8(1) of *The Limitation of Civil Rights Act* and are not recoverable. (6) As RBC was required to seek the court's assistance in determining the entitlement of the plaintiff and respond to the assertions of the plaintiff's counsel regarding entitlement to solicitor-client costs, RBC was entitled to costs.

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***Walkington Estate v 102087390 Saskatchewan Ltd.*, 2024 SKKB 50**

Robertson, 2024-03-22 (KB24037)

Landlord and Tenant - Action for Possession
Landlord and Tenant - Summary Order of Possession
Lease - Commercial Lease

The applicant applied by originating application for an order of possession of its property following expiry of a lease agreement with the respondent. The issue for determination was whether the application for possession should be granted to the applicant. This issue also raised questions as to the ability of the application to proceed and the manner in which the application should be heard.
HELD: The matter was adjourned *sine die*. The court has flexibility when sitting in chambers to move into court sitting to hear witness evidence under section 3-2 of *The King's Bench Act* and Rules 3-55(e), 6-11 and 6-13 of *The King's Bench Rules*. Whether the court will determine an application by summary judgment or trial in dealing with applications for writ of possession under ss 52(2) of *The Landlord and Tenant Act* will depend on the individual circumstances of each case. In this case, there was no proof that an order had been made by the Provincial Mediation Board, which is a prerequisite to the matter proceeding to a hearing under section 52(3) of *The Landlord and Tenant Act*.

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***Haines v Kuffner Estate*, 2024 SKKB 51**

Klatt, 2024-03-26 (KB24039)

Wills - Wills and Estates - Probate
Wills and Estates - Wills - Formalities - Holograph Will
Wills and Estates - Wills - Holograph Will
Wills and Estates - Wills - Interpretation

This case involved the validity of a holographic will that was written and signed on an iPad by an individual whose death was imminent. Before passing, she sent a message on her iPad to two of her siblings with the title “My holographic will” in which she named an executor and directions for her estate to be distributed. This individual had no previous will and no spouse or children. The executrix applied to the court pursuant to s. 37 of *The Wills Act* (the Act) to declare this electronic message as the deceased's last will and testament. The applicant was seeking to apply for letters of probate in the estate. No one appeared in opposition in this case. The court had to determine whether the proposed will was a valid testamentary document despite not being executed with complete compliance with the formal requirements of the Act for holographic wills.

HELD: The court granted the application. The electronic message was a valid will. The deceased had been hospitalized after a fall in her home. Her condition was becoming more unstable as the days passed by. Before becoming unconscious and taken to the intensive care unit, she wrote a message titled “My holographic will” and sent it to two of her siblings. After her passing, the family could not locate any will in her house. In her will, the estate was directed to dispose of the assets between the two nieces. The siblings of the deceased supported these wishes. The court started by reasoning that s. 37 of the Act states that the court, upon application, can give effect to an instrument, despite its being non-compliant with the formal requirements of a will, if the court is satisfied the will or a document other than a will embodies the testamentary intentions of a deceased. In Saskatchewan, under the Act in sections 7 and 8, there are formal requirements for a valid testamentary instrument. A holographic will needs to be wholly in the handwriting of the testator, signed, and may be made without other formalities such as witnesses. In an application under s. 37 of the Act, the applicant wanting to have the document admitted to probate has the burden of proof to provide “substantial, complete and clear evidence of the deceased’s testamentary intentions relative to the document in question.” The jurisprudence in Saskatchewan shows that s. 37 should be interpreted broadly to enable courts to validate a will even if it is non-compliant with formal requirements. The court then reviews the document to find whether the document is testamentary in nature and whether it discloses a true testamentary intention. Then, the court examines whether the document represents the deceased's final wishes and whether the document shows “the deliberate and final intentions of the testator and the words used convey this intention with sufficient clarity to allow the court to interpret it with some certainty.” The law is settled that the ultimate question concerns the testator’s true intentions behind the document, not the form of the document used by the testator. The court applied the law to the facts of this case and found the will was valid. The message was sent from the deceased’s personal electronic device, and the message identified the sender's email. The two siblings provided affidavit evidence that the deceased used her iPad to communicate with them and others at the end of her life. The beneficiaries of the will also deposed that they used to communicate with the deceased via electronic messaging to and from the deceased’s iPad. There was no evidence that the deceased had a decline in cognitive abilities. The last messages of the deceased to her family members showed her clarity of thought and an awareness that her death was imminent. The message titled “My holographic will” also shows testamentary intentions. She also ended that message by typing the date and her name. The other messages also showed her worries that she was running out of time to get her affairs in order before passing. Though the will message does not meet the formal requirements of a holographic will,

the message shows a clear testamentary intention that represented the deceased's deliberate and final wishes regarding the disposition of her estate. The court concluded that the broad interpretation of s. 37 of the Act is responsive to the modern reality that some people rely on electronic devices as their only means of communication. Similarly, the deceased, near the time of her passing, was too weak to write or speak, and the only available means of communication to her was her iPad. Any other finding respecting this will would deny the agency of the deceased to direct the disposition of her estate and her last wishes. The message was a valid will, and the named executrix could apply for letters probate in the estate of the deceased. The court also awarded the applicant costs on a solicitor-client basis, payable by the estate.

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***R v Wesaquate*, 2024 SKKB 53**

Tochor, 2024-03-26 (KB24040)

Criminal Law - Sexual Assault - Pre-Trial Application
Statutes - Interpretation - *Criminal Code*, Section 574

The Court of Appeal ordered a new trial on charges of sexual assault and assault causing bodily harm. The Court of King's Bench considered two applications brought by the accused in advance of the trial: 1) an application for a stay of proceedings on the sexual assault charge on the basis of abuse of process; and 2) an application for a stay of proceedings due to unreasonable delay contrary to s. 11(b) of the *Charter*.
HELD: The court dismissed both applications for a stay of proceedings. 1) The court dismissed the accused's application for a stay of proceedings based upon an abuse of process. The court found that s. 574 of the *Criminal Code* permitted the Crown to prefer an indictment alleging a count of sexual assault after the accused had already been discharged from the count of sexual assault with a weapon during his preliminary inquiry. Case law set out that it was permitted for the prosecutor to prefer a charge that was based on facts disclosed in the evidence. Sexual assault was a lesser included offence of sexual assault with a weapon but had different requisite elements. The accused was discharged from the offence of sexual assault with a weapon, but he was not discharged from the offence of sexual assault. The court reviewed the evidence from the preliminary hearing to determine whether the sexual assault charge was properly founded on the standard of whether the test for committal was met and was satisfied that there was evidence upon which a reasonable jury, properly instructed, could convict on a charge of sexual assault. The court stressed that this was different from determining whether the charge against the accused was proven beyond a reasonable doubt. 2) The accused acknowledged that the current trial date did not exceed the ceiling set in *Jordan*. The computation of delay restarted at zero when a new trial was ordered, and an accused was not permitted to bring a s. 11(b) motion for delay that occurred in his first trial absent exceptional circumstances (*R v J.F.*, 2022 SCC 17). Here, the court did not have the evidentiary basis to conclude that the accused's circumstances were exceptional as contemplated by the case law. The court was not satisfied that there was justification to depart from the general direction in J.F. that delay in the first trial was not to be considered in a retrial.

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