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***Peter Ballantyne Cree Nation v Saskatchewan*, 2024 SKCA 55**

Kalmakoff, 2024-05-28 (CA24055)

Aboriginal Law
Civil Procedure - Appeal - Extension of Time
Civil Procedure - Appeal - Leave to Appeal
Limitations - Leave to Appeal - Extension of Time - Arguable Case

The applicant proposed appellant first nation sought to have its own application for leave to appeal dismissed and sought an order extending time to file a notice of appeal. The applicant applied for leave to appeal a decision disallowing an amendment to add a cause of action to its claim, issued in 2004 related to the 1942 construction of a dam that flooded land. Aspects of the claim were dismissed as time-barred, but the claim in the tort of trespass was a continuing wrongful act and was not time-barred. The Court of King's Bench judge rejected the proposed amendment on the basis the proposed claim had already been decided. The applicant took the

position its initial application for leave to appeal had been mistaken, the decision was final, and leave was not required. The Court of Appeal judge in chambers considered: 1) was the decision final or interlocutory; and 2) should an extension of time be granted?
HELD: The application for leave to appeal was dismissed and time for serving and filing a notice of appeal was extended pursuant to s. 9(6) of *The Court of Appeal Act, 2000*. 1) An interlocutory decision is a decision made during an action that relates to an issue other than the ultimate matter in issue. A final decision disposes of the substantive rights of the parties in a final and binding way. A final decision does not need to conclude the whole dispute between the parties. An order striking a statement of claim or refusing an amendment is final if it precludes a plaintiff from being able to pursue a cause of action. The decision refused the applicant's amendment and precluded the applicant from pursuing a cause of action. The decision was final and leave to appeal was not required. 2) Where leave to appeal is not required, s. 9(2) of *The Court of Appeal Act, 2000* requires notice of appeal be served within 30 days after the date of decision. Section 9(6) provides the time for filing may be extended where, in the opinion of the judge, it is just and equitable to do so. It was just and equitable to extend time in this case because: the appellant intended to appeal and brought the application for leave to appeal within the time limit; the explanation for the delay was reasonable; the respondents would not suffer prejudice beyond that normally encountered in an appeal; and the appeal met the low threshold of raising an arguable case. It was arguable that the judge below may have erred in his interpretation of an earlier appeal decision.

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***R v Wright*, 2024 SKCA 56**

Leurer Jackson Tholl, 2024-05-29 (CA24056)

Criminal Law - Evidence - Identification
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Criminal Law - Evidence - Identity of Accused - Sufficiency
Criminal Law - Evidence - Photo Line-Up

The appellant was convicted of two driving-related offences after trial. Identity was the key issue. Police officers saw a lone person inside a truck as it drove past the stopped police vehicle. The truck turned around and accelerated past the vehicle again. Police stopped pursuit. Another police officer heard the description of the driver, including information about his mustache, and recognized it as the appellant. A photo was requested and the initial officers agreed it was the person in the vehicle. The vehicle was then found in a snowbank, close to

where the appellant's spouse lived. The Court of Appeal considered: did the trial judge err by failing to consider sufficiently the inherent frailties of eyewitness evidence?
HELD: The appeal was dismissed. The trial judge instructed herself of the frailties of eyewitness evidence from paragraph 41 of the leading case, *R v Bigsky*, 2006 SKCA 145. The trial judge paid appropriate attention to potential problems and weaknesses of the evidence. A witness's level of confidence should not be confused with the reliability of their testimony. The trial judge did not use the witness's confidence to bolster reliability of the evidence. Viewing photographs of a single person and asking if that person committed the offence substantially increases risks of misidentification. The trial judge adequately examined those risks, noting the photos were viewed while police were still pursuing the appellant and before their memories faded. The circumstantial evidence that supported the reliability of the officers' testimony attenuated concerns raised by viewing the photographs. The circumstantial evidence was discovered by the witnesses after identifying the appellant. The trial judge's use of circumstantial evidence was not in error. The trial judge was entitled to accept the eyewitness evidence and find it to be reliable.

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***3sHealth v Canadian Union of Public Employees*, 2024 SKCA 106**

Caldwell Schwann Bardai, 2024-11-19 (CA24106)

Civil Procedure - King's Bench Rule 1-4(2)
Contract - Interpretation
Contracts - Interpretation - Ambiguity

The appellants, including 3sHealth and associated members of the employer partner committee (EPC), appealed a decision by the Court of King's Bench interpreting the trust agreement governing the Saskatchewan Healthcare Employees' Pension Plan. The respondents included several unions representing health employees and union partner committee (UPC) members. The issues concerned the interpretation of provisions under the trust agreement, particularly s. 10.05, which outlines mandatory processes for resolving disputes related to contribution rates and benefit improvements. The Court of Appeal (court) had to review whether the lower court erred in interpreting the provisions of s. 10.05 of the trust agreement about the process of giving notice, invoking the mandatory process (mandatory meeting, mediation, and arbitration process), and who is authorized to provide notice to the other party.
HELD: The appeal was allowed in part. The court set aside portions of the Court of King's Bench decision while clarifying the interpretation of s. 10.05 of the trust agreement: 1) notices

under s. 10.05(a) must propose an increase in contribution rates to be valid; 2) authorized agents of the UPC can issue mediation notices under s. 10.05(b); and 3) The chambers judge's direction to proceed with mediation and arbitration was vacated. The court relied on *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, and *Housen v Nikolaisen*, 2002 SCC 33, emphasizing that contracts must be interpreted based on the ordinary and grammatical meaning of their terms in the broader context of the agreement as a whole. The chambers judge erred in interpreting that notices could be effective immediately. The Court of Appeal clarified that while notices could be served at any time, they only became effective on January 1 of the next triennial period (every three years). This interpretation reflected a regular cycle of discussions and stability in contribution rates. The court also found the chambers judge erred in allowing notices without a specific proposal to increase contribution rates. The plain language of s. 10.05(a) required that notices under this section involved a wish to increase contributions, supporting the principle that benefit improvements and funding obligations were intertwined. The court upheld the chambers judge's finding that non-members of the UPC, such as a CUPE representative, could issue a mediation notice on the UPC's behalf. The trust agreement did not explicitly limit the authority to members, and there was evidence that the EPC had been informed of the UPC's delegation of authority to the representative. The court held that the chambers judge exceeded jurisdiction by ordering mediation and arbitration when the parties had not requested such relief. This contravened Rule 1-4(2) of *The King's Bench Rules*, which limits the court's authority to granting relief explicitly sought by the parties. The court set aside the previous decision and directed the parties to interpret the trust agreement according to its reasons.

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***R v Wahobin*, [2024 SKCA 107]**

Schwann, 2024-11-05 (CA24107)

Courts and Judges - Jurisdiction - Provincial Court - *Summary Offences Procedure Act*
Criminal Law - Summary Offences - Procedure
Criminal Law - Trial - *Ex Parte*
Regulatory Offence - Appeal - *Traffic Safety Act*

The appellant was convicted in Provincial Court for using a mobile phone while driving, contrary to *The Traffic Safety Act*. He did not attend his trial and was convicted in his absence (*ex parte*), resulting in a $500 fine and an $80 surcharge. He appealed the conviction to the Court of King's Bench and that court dismissed his appeal. He then sought leave to appeal to the Court of Appeal for Saskatchewan (court), arguing that his trial in absentia constituted a

Wills and Estates - Estate Administration - Powers and Duties

Wills and Estates - Formal Accounting

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Cases by Name

3sHealth v Canadian Union of Public Employees

Bistretzan v Krpan

Croft Farms Ltd. v Protein Powered Farms Inc.

Dayman v Frei

Haas v The Saskatchewan Veterinary Medical Association

Lessard v University of Saskatchewan (College of Medicine)

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miscarriage of justice. The court had to decide whether the summary conviction appeal court judge erred in law by failing to recognize a miscarriage of justice due to the ex parte trial, whether the Provincial Court had jurisdiction to proceed with the trial in the appellant's absence, and whether the summary conviction appeal court judge had jurisdiction to hear the appeal under *The Summary Offences Procedure Act, 1990* (SOPA).
HELD: The court dismissed the application for leave to appeal, finding no jurisdictional errors or miscarriage of justice in the Provincial Court or the Court of King's Bench proceedings. The appellant should have applied for reconsideration of his conviction under SOPA rather than appealing under the Criminal Code. The summary conviction appeal court judge did not overlook any miscarriage of justice, as the law permits a traffic offence trial to proceed in the absence of the accused. The court held that the summary conviction appeal court lacked jurisdiction to hear the appellant's appeal under s. 813 of the *Criminal Code*. The appropriate option for a conviction by default was under s. 23 of SOPA for an application for reconsideration. Relying on the case of *R v Kimery*, 2010 SKCA 153, the court emphasized that SOPA creates a specific process for addressing default convictions, which precludes appeals under the Criminal Code. Since the appellant failed to apply for reconsideration within the 60-day timeframe provided under s. 23 of SOPA, his subsequent appeal was procedurally improper. The Provincial Court had authority under s. 20 of SOPA to conduct a trial in the appellant's absence if he failed to appear. The summary conviction appeal judge correctly found that the requirements of SOPA had been met. The appellant was served with the offence notice and attended his first appearance, where he was informed of the trial date. The certificate of offence was complete and proper. The evidence from the police officer supported the conviction. The court concluded that the Provincial Court judge did not err in proceeding with the trial in the appellant's absence. While *ex parte* proceedings may raise fairness concerns, the court found no evidence that the trial process was unfair or that the outcome would have been different if the appellant had attended. Under s. 839 of the *Criminal Code*, leave to appeal is granted sparingly and only on questions of law that are either generally significant to the administration of justice or compellingly meritorious. The court applied the framework from *R v Bray*, 2017 SKCA 17, and found that the appellant's proposed appeal did not raise any significant or compelling legal issues.

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***Lessard v University of Saskatchewan (College of Medicine)*, 2024 SKCA 109**

Schwann Tholl Drennan, 2024-11-27 (CA24109)

Administrative Law - Judicial Review - Standard of Review - Natural Justice - Procedural Fairness - Reasonableness - Reasons for Decisions
Administrative Law - Judicial Review - Standard of Review - Reasonableness
Education - Universities - Powers of University - Judicial Review

The appellant, an undergraduate student in the Doctor of Medicine Program at the University of Saskatchewan, appealed her discontinuation from the program due to her inability to complete academic requirements despite receiving various accommodations for her disability. The College's Student Academic Management Committee (SAMC) discontinued her after she failed to meet the conditions for promotion. The appellant's appeals to the College's Academic Appeal Committee and the University Appeal Board (board) were dismissed. She then sought judicial review at the Court of King's Bench, which was also dismissed. At the Court of Appeal (court), the appellant argued that the reviewing judge erred in applying the reasonableness standard and that she was denied procedural fairness. The court had to decide whether the King's Bench judge erred in his review of the university's decision, amounting to denying the appellant procedural fairness, and whether the board's decision to uphold the discontinuance of the appellant from the medical program was reasonable.
HELD: The court dismissed the appeal, finding no breach of procedural fairness and affirming the reasonableness of the board's decision. The court held that the appellant was afforded fair opportunities throughout the accommodation and appeal processes. Additionally, the board acted within its jurisdiction in concluding that the university properly implemented its accommodation policies. The appellant argued that the reviewing judge at the Court of King's Bench focused on a jurisdictional issue instead of her central argument: whether the university had accommodated her to the point of undue hardship. This, she contended, denied her a fair hearing. The court rejected this argument, holding that the reviewing judge correctly assessed the scope of the board's appellate jurisdiction under the university's academic appeal framework. This framework limits appeals to whether the university failed to implement approved accommodation policies when such failure impacted the assessment of academic performance. The court concluded the reviewing judge did not breach procedural fairness. The reviewing judge appropriately addressed the case within the legal and factual constraints of the board's jurisdiction. Applying the reasonableness review framework from *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65, the court emphasized the need for decisions to exhibit justification, intelligibility, and transparency. It found the board's decision met this standard. The appellant's accommodation plan did not provide for unlimited deferrals of final examinations. Over the years, the university had granted numerous deferrals and extensions, including eight deferrals for a single module. However, when the appellant requested a deferral for a supplemental exam in January 2021, she failed to provide timely and sufficient medical documentation. The board and the reviewing judge both emphasized that procedural fairness and reasonableness require students to participate cooperatively in the accommodation process. The appellant's failure to meet this standard supported the decision to deny her deferral request.

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***Haas v The Saskatchewan Veterinary Medical Association*, 2024 SKCA 110**

Leurer Schwann Drennan, 2024-11-27 (CA24110)

Administrative Law - Judicial Review - Saskatchewan Veterinary Medical Association
Administrative Law - Judicial Review - Professional Association Bylaws - Procedural Fairness
Administrative Law - Natural Justice - Procedural Fairness

The appellant, a veterinarian and member of the Saskatchewan Veterinary Medical Association (SVMA), appealed the dismissal of his judicial review application. He sought to overturn the SVMA's amendment to its bylaws prohibiting the declawing of cats for cosmetic or non-therapeutic purposes, passed at its 2021 annual general meeting (AGM). The appellant alleged procedural fairness issues in the notice provided for the AGM and argued that the SVMA had violated its statutory obligation by notifying members by electronic notification instead of regular mail. The Court of Appeal (court) had to decide whether the SVMA failed to meet its duty of procedural fairness by issuing electronic notice of the AGM instead of using ordinary mail; whether the contents of the electronic notice were sufficient to inform the appellant of the AGM's business and agenda; and whether the bylaw amendments about the declawing procedure should be invalidated due to the alleged procedural defects.
HELD: The court dismissed the appeal, holding that the SVMA's electronic notice complied with the requirements of procedural fairness. The appellant failed to establish procedural unfairness. The court agreed with the Court of King's Bench that the electronic notice was effective as the SVMA provided it on multiple occasions and made the AGM's material accessible online. The appellant failed to show that he would have read the notice even if it had been mailed to him. The bylaw was also upheld. The appellant argued that the SVMA's reliance on electronic communication breached section 6(4) of *The Veterinarians Act, 1987* (the Act) and article 9.3 of the SVMA bylaws, which mandate that notice of the AGM be sent by regular mail. The SVMA contended that electronic notice was permissible under section 10(2) of *The Electronic Information and Documents Act, 2000*, which allows electronic communication if it is accessible and usable for future reference. The court concluded that while the Act imposes an obligation to provide notice by mail, this obligation is directory rather than mandatory. Non-compliance does not automatically render the meeting invalid if no prejudice occurred. The court applied the Baker factors (see: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) to assess procedural fairness. In terms of the nature of the decision, the court found that the decisions made at professional association meetings are policy-driven, not judicial in nature, and typically require less stringent procedural standards. Regarding the statutory scheme factor, the court found that the purpose of the notice requirement is to ensure members can participate in governance. This goal was met through multiple electronic communications, which Dr. Haas accessed through the SVMA's member portal. As to the importance of the decision, the court found that the decision's impact on the appellant was relatively minor, as it affected his ability to participate in the AGM rather than imposing discipline or significant personal consequences. In terms of legitimate expectations, the court found that although the appellant may have expected notice by mail, there was no evidence that he relied on this expectation or that electronic notice prejudiced him. The court found that the appellant received adequate notice of the AGM, including multiple electronic communications with a link to the full AGM package containing details of the bylaw amendment. The appellant argued the electronic notice's content was insufficient and failed to alert him to significant business at the AGM, including the proposed bylaw amendments. The court rejected this argument, noting that the electronic notice included access to the full AGM package, which detailed the proposed amendment and its rationale. The court

deemed this sufficient to meet the requirements of article 9.3 of the bylaws and procedural fairness standards. The use of electronic communication did not prejudice the appellant, and the content of the notice adequately informed members of the AGM's business.

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***R v Maple*, 2024 SKKB 89**

Robertson, 2024-05-16 (KB24084)

Constitutional Law - Charter of Rights, Section 7, Section 24(1) - Full Answer and Defence
Constitutional Law - Charter of Rights, Section 24(1) - Disclosure
Criminal Law - Defences - *Charter of Rights* - Disclosure
Criminal Law - Defences - *Charter of Rights*, Section 7

The accused was charged with attempted murder contrary to s. 239(1)(b) of the *Criminal Code*, by slashing the victim's throat with a knife. At trial, the Crown presented evidence. The defence elected to call no evidence. Final argument was adjourned. Then, defence counsel was given leave to withdraw, and new counsel brought an application for a mistrial, which was dismissed (see: 2023 SKKB 202). A second new defence counsel appeared and sought the criminal record of a Crown witness, and then applied to stay charges for the Crown's failure to disclose the witness's criminal record and the witness's history of violence toward the victim. The defence argued this failure prevented defence from investigating the witness as an alternate suspect for the alleged assault. The court considered whether: 1) the records were subject to first party disclosure or third party production; 2) the Crown had a duty to disclose the criminal record and history of Crown witnesses; 3) if there is no general duty, was there a duty in this particular case; 4) there was a breach of a duty to disclose, what is the appropriate remedy; and 5) the trial should be re-opened to allow for further cross-examination of the Crown's witness.
HELD: The evidentiary part of the trial was re-opened on a very exceptional basis. 1) The defence relied on ss. 7 and 24(1) of the *Charter*. The Crown has a duty to disclose all relevant evidence to the defence. Disclosure is generally limited to material in the Crown's possession. Where defence seeks records in the hands of a third party, the accused must bring an application for production of likely relevant material by serving the third party. Relevance means reasonably likely to be probative to an issue at trial or competence of a witness. Previous cases confirm there is no general duty for the Crown to obtain and provide witness criminal records. The categorization of first party and third party records is not rigid. 2) The Crown does not have a general duty to disclose the criminal record of Crown witnesses nor to disclosure records from unrelated investigations involving Crown witnesses. 3) In this particular case, the Crown did not have a duty to disclose these records. The victim, Crown witness and accused all knew each other. The records were not directly related to the accused's charge. The records were not relevant to either the defence's or prosecution's theory of the case. The records did not impeach a witness. 4) The application for a stay was dismissed. A stay is only appropriate in the clearest of cases where prejudice to the justice system or the accused's right to make full answer and defence cannot be remedied. Late disclosure does not automatically justify a stay. 5) Although no application was made, upon questioning from the judge, Crown and defence agreed that re-opening the trial for further cross-examination would be appropriate if the application for stay was dismissed. The trial was reopened because of the change of defence counsel, change of defence theory,

serious nature of the charge and importance of a fair trial. Similar applications were discouraged.

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***R v Kotyk*, 2024 SKKB 187**

Norbeck, 2024-10-29 (KB24183)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sexual Assault - Administering Stupefying Drug
Statutes - Interpretation - *Criminal Code*, Section 718

The offender pled guilty to administering a stupefying drug (Tramadol) with the intent to commit sexual assault, contrary to section 246(b) of the *Criminal Code*. The offence occurred in June 2022 when the offender, the complainant's former addiction counsellor, invited the complainant to his home, where he surreptitiously added two pills of Tramadol to her wine. The complainant drank some of the wine. Then the complainant noticed the pills, avoided drinking the wine further, and later confronted the offender, who admitted to drugging her. The complainant experienced effects from the drug and sought medical attention, subsequently reporting the incident to the police. A search of the offender's residence uncovered matching medication, leading to his arrest. The court had to decide the appropriate sentence for the offender by considering the gravity of the offence, mitigating and aggravating factors, and the other appropriate ancillary orders.
HELD: The court sentenced the offender to eight months in custody, reduced by 180 days of time served, resulting in 60 days in custody. The offender was placed on 18 months of probation with conditions including counselling for addiction and mental health,no contact with the complainant, and participation in programming for sexual offending and anger management. For sentencing purposes, the court referenced section 718 of the *Criminal Code*, which outlines the fundamental sentencing objectives such as denunciation, deterrence (general and specific), rehabilitation, public protection, and proportionality. The court emphasized the seriousness of offences under section 246(b), as the administration of stupefying drugs renders victims vulnerable. Citing *R v Lai*, 2018 BCSC 2441, and *R v Lemmon*, 2012 ABCA 103, the court highlighted that such offences typically warrant custodial sentences to reflect the offender's moral culpability and the gravity of the crime. The court considered the following aggravating factors: 1) the complainant had a previous professional relationship with the offender as her counsellor; 2) the offender's surreptitious administration of the drug demonstrated predatory intent, and 3) the complainant suffered disorientation and required medical treatment. The court considered the following mitigating factors: 1) although made close to trial, the offender's guilty plea saved the complainant and another witness from the stress of testifying; 2) the offender admitted to drugging the complainant when confronted and cooperated fully with the police investigation; 3) the court recognized the offender's alcohol addiction and his expressed willingness to seek treatment. The defence argued for a community sentence, citing the offender's role as a caregiver for his elderly parents and his intent to pursue rehabilitation. The Crown argued for a custodial sentence, stressing denunciation, deterrence, and public safety. The court determined that the seriousness of the offence and the need for denunciation and deterrence outweighed other considerations, concluding that a community sentence would not adequately address the gravity of the crime. After reviewing the matter, the court rendered the sentence with credits for time served and additional ancillary orders such as a lifetime registration in the sexual offender database, a DNA order, and a 10-year firearm ban.

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***Nahachewsky v RMD Engineering Inc.*, 2024 SKKB 196**

Elson, 2024-11-07 (KB24193)

Civil Procedure - Documents - Disclosure
Civil Procedure - Discovery - Disclosure - Documents - Examination
Civil Procedure - *King's Bench Rules*, Rule 5-6
Practice - Demand for Particulars - Discovery

The plaintiff sought money judgment and general damages against the defendants for his shareholding in two corporations. The parties were at the document production stage in their litigation. The plaintiff brought this application to compel the defendants to make better document disclosure as he was dissatisfied with the documents provided thus far. The court had to decide whether the documents requested by the plaintiff were relevant to the issues raised in the pleadings, as governed by The King’s Bench Rules, and whether documents related to a purported new corporate entity (new RMDI) were relevant and required disclosure.
HELD: The court granted the plaintiff’s application for better disclosure in part and ordered the defendants to produce financial and machinery-related records, including valuation documents. The court denied the plaintiff’s request for disclosure related to new RMDI, citing insufficient evidence. The court reviewed Rule 5-6 of *The King’s Bench Rules*, which requires disclosure of all documents “relevant to any matter in issue.” It emphasized that relevance includes both materiality (connection to issues in the pleadings) and logical relevance (probative value to the facts in issue), citing *Canadian National Railway v Clarke Transport*, 2013 SKQB 394. The court found that the plaintiff’s requested documents, including tax returns, general ledgers, and bank transaction histories were relevant to these issues. The court held that such records were necessary to evaluate financial transactions, asset valuations, and shareholder interests. The plaintiff sought documents related to new RMDI, alleging that it replaced RMD Innovations after its dissolution. The court determined there was insufficient evidence in the pleadings or record to justify the request. The plaintiff’s claims about “corporate manoeuvring” were speculative, and disclosure would only be appropriate if further evidence arose during questioning.

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***Bistretzan v Krpan*, 2024 SKKB 199**

Mitchell, 2024-11-12 (KB24197)

Wills and Estates - Estate Administration - Powers and Duties
Wills and Estates - Formal Accounting

Wills and Estates - Powers of Attorney

The applicant sought an order under *The Powers of Attorney Act, 2002* (POAA) for formal accounting from the respondents regarding their actions as attorneys under an enduring power of attorney (EPA) granted by their late mother. The EPA covered the period from August 25, 2015, until their mother's death on January 12, 2023. The applicant, a beneficiary of the mother's estate, argued that the respondents failed to provide satisfactory documentation of managing their mother's affairs. The court had to decide whether the applicant was entitled to a formal accounting from the respondents under section 18.1 of the POAA, whether both of the named defendants should be required to provide formal accounting for their respective actions under the EPA, and what timeframe the accounting should cover.
HELD: The court only allowed the application for a formal accounting for the first named defendant. Section 18.1(2)(b) of the POAA permits a beneficiary of a deceased grantor's estate to request a final accounting from the attorneys who acted under the EPA. Relying on *Ostlund v Dolan*, 2016 SKQB 69, and *Bryant Estate v Stuart*, 2021 SKCA 54, the court clarified that while beneficiaries no longer need to prove cause for an accounting, the request must be reasonable in light of the circumstances. The burden lies on the applicant to show the reasonableness of the request. The second defendant had minimal dealings with the affairs of her late mother. The court concluded that it was unreasonable to require the second defendant to provide a formal accounting, given her limited role and the absence of evidence suggesting broader involvement. The first defendant handled the mother's financial transactions and other personal matters. The court found that the first defendant's actions under the EPA warranted a formal accounting. While the first defendant argued that this could be addressed during probate proceedings, the court rejected this, as probate had not yet commenced. The court also found that the EPA was used minimally before 2021. Therefore, the court limited the scope of formal accounting from January 1, 2021, to January 12, 2023. The court ordered the first named defendant to prepare the formal accounting in accordance with Form K of *The Powers of Attorney Regulations*.

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***R v McFarlan*, 2024 SKKB 200**

Hildebrandt, 2024-11-12 (KB24195)

Criminal Law - Appeal - Conviction - Sexual Assault - Assessment of Credibility
Criminal Law - Evidence - Witness - Credibility
Sentence - Sexual Assault - Appeal

The appellant appealed his Provincial Court conviction and sentence to the Court of King's Bench (court). He was found guilty of committing sexual assault on a minor complainant contrary to section 271 of the *Criminal Code* by touching the minor complainant for sexual purposes contrary to section 151 of the *Criminal Code*. He was sentenced to six months in custody, followed by two years' probation and other ancillary orders. The court had to decide whether the trial judge made an error by failing to provide sufficient reasons and whether the trial judge misapprehended the evidence, particularly regarding the reliability of the complainant's testimony and other witnesses.

HELD: The court allowed the appeal, quashed the conviction, and sent the matter back for a new trial. The court relied on the standard of review for conviction appeals as established in *R v Helm*, 2011 SKQB 32, and *R v Kruk*, 2024 SCC 7, emphasizing that appellate courts defer to the trial judge's findings unless there is a palpable and overriding error or legal misapplication. The trial judge's reasons failed to address the reliability of key witnesses and contextual evidence, such as the complainant's testimony about a "butt-grabbing game" common among classmates. The court noted this omission constituted an error of law because the adequacy of reasons is essential for appellate review, as outlined in *R v Gagnon*, 2006 SCC 17. The court found that the trial judge misapprehended or failed to adequately weigh other aspects, such as the crowded hallway at the time of the incident, the testimony about the butt-grabbing game and the lack of direct identification of the perpetrator, and the discrepancies in the witness testimony about the alleged touch and the appellant's movements, undermining the credibility and reliability findings. The trial judge failed to adequately address the possibility that the alleged touch could have resulted from the classmates' "game," as raised in defence submissions. The court referenced *R v W.(R.)*, [1992] 2 SCR 122, emphasizing that even child witnesses must meet the standard of proof for credibility and reliability. The trial judge's failure to engage with these principles in detail contributed to a finding of insufficient reasons. The appeal was allowed. The court quashed the conviction for sexual interference and set aside the finding of guilt on the sexual assault charge, directing a new trial. The sentencing appeal was deemed moot due to the decision on conviction.

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***R v MacDonald*, [2024 SKKB 198]**

Morris, 2024-11-15 (KB24196)

Criminal Law - Manslaughter - Sentencing
Criminal Law - Sentencing - Manslaughter - Range
Criminal Law - Sentencing - Sentencing Principles

The offender pled guilty to manslaughter under section 236(b) of the Criminal Code for unlawfully causing the death of the victim. The incident occurred on October 20, 2021, following a drunken altercation in the victim's home, which started as a consensual fight and then escalated, and during which the victim attacked the offender with a pen and the offender used a chokehold with a fibreglass-casted arm. Despite the victim's "tapping out" multiple times, the offender maintained the chokehold, resulting in the victim's death by asphyxiation. The victim's autopsy also noted high blood alcohol levels and the possibility of ethanol toxicity as a contributing factor. The court had to decide the appropriate sentence for the offender by considering the relevant sentencing principles.
HELD: The court rendered a five-year sentence in custody with 96 days' credit for time served. The court ordered additional ancillary orders, such as a 10-year prohibition on firearms and a DNA order. The court waived the victim fine surcharge due to the offender's financial situation. The court applied the sentencing principles pursuant to section 718 of the *Criminal Code*, emphasizing proportionality, denunciation, deterrence, and rehabilitation. The court also considered the offender's Indigenous background and the systemic factors contributing to his behaviour, including a traumatic childhood marked by abuse, neglect, and poverty per the principles established in *R v Gladue*, [1999] 1 SCR 688. The court also relied on the framework from *R v Laberge*, 1995 ABCA 196,

to assess moral culpability and the degree of risk created by the offender's actions. While the offender initially acted in response to the victim's aggression, he escalated the situation by using a prolonged chokehold after the victim "tapped out". The court found the offender's culpability to be moderate. While intoxication and the consensual nature of the fight were mitigating, his decision to maintain the chokehold and his lack of assistance to the victim afterward were aggravating. The court considered precedents, including *R v Mullen*, 2017 SKQB 237, where an eight-year sentence was imposed for a strangulation-related manslaughter in a domestic context, and *R v Burt*, 2018 BCPC 233, where a five-and-a-half-year sentence was given for a chokehold-related death in a correctional setting. The court concluded that a five-year sentence for the offender was consistent with the parity principle. The court considered the following aggravating factors: 1) use of the fibreglass cast as a weapon, 2) failure to assist the victim post-incident, and 3) the crime occurred in the victim's home, where he should have felt safe. The court considered the following as the mitigating factors: 1) guilty plea, avoiding the need for trial, 2) genuine remorse, 3) lack of a prior criminal record, 3) the impact of *Gladue* factors.

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***Croft Farms Ltd. v Protein Powered Farms Inc.*, [2024 SKPC 20]()**

Stang, 2024-05-10 (PC24017)

Contracts - Agreement for Sale
Contracts - Agriculture
Contract - Breach
Courts - Provincial Court - Small Claims - Breach of Contract

The plaintiff sued the defendant for breach of a contract for the purchase and sale of fava beans, alleging the defendant had not paid the full price. The defendant counter-claimed, alleging the plaintiff did not provide the full quantity of beans, which obligated the defendant to buy more beans from another supplier at a higher price. The court considered: 1) did the defendant breach the contract by not paying for all the beans the plaintiff supplied, and if so, how much money was the plaintiff owed; 2) did the plaintiff breach the contract by not supplying the full amount of beans and if so, was the plaintiff responsible for the defendant's higher costs, and was the set-off equal to the amount the defendant owed the plaintiff; and 3) was the dockage material included with the beans part of the commodity and/or did promissory estoppel apply?
HELD: The defendant breached the contract and was ordered to pay the plaintiff $30,000 plus costs, and the counter-claim was dismissed. 1) The facts were mostly not in dispute. The contract specified the amount and quality of beans to be delivered in a five-month period, when the defendant requested delivery. Beans were delivered in many truckloads. A sample from each truckload was analyzed to determine the percentage of dockage. The net weight of beans delivered was 2,834.2929 tons. The contract was for 3,000 tons, with 5 percent variation tolerated. After the last truckload, one of the defendant's employees confirmed all beans required by the contract were received. Weeks later and after the end of the delivery window, the defendant stopped payment on the final cheque and informed the plaintiff they were 166 tons short. By that time, the plaintiff had sold all remaining beans to another buyer. When the defendant stopped payment on the cheque, the defendant breached the contract by not paying for the beans within 14 days. That breach was partially remedied, but the plaintiff was still owed $30,313.18. 2) The plaintiff did not breach the contract

by providing 2,834.2929 tons of beans rather than 3,000. The actions and inactions of the defendant prevented the plaintiff from complying with the obligation to provide an additional 165.7 tons. The defendant controlled the timing of the delivery of beans and arranged for the trucks to pick the beans up from the plaintiff's farm. It was an implied term of the contract that the defendant would arrange for the delivery of all the beans during the delivery window. The plaintiff's responsibility was to ensure the beans were available to be loaded on the trucks when the trucks arrived during that delivery window. The non-delivery of the beans was caused by the defendant's actions during the delivery window. This constituted a repudiatory breach, and the plaintiff had no further obligation to supply beans. 3) Dockage is plant material that is not the grain or pulse. The contract specified grade 2 beans, and beans cannot be graded without the dockage removed. Therefore, dockage was not included in the contract. There was no variation of contract. The employee who confirmed the total amount was received made a mistake, and the mistake did not constitute a waiver. Promissory estoppel did not apply to this case.

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***Dayman v Frei*, [2024 SKPC 25]**

Demong, 2024-05-29 (PC24018)

Contracts - Breach - Damages - Implied Term - Workmanlike Manner
Contracts - Breach - Faulty Workmanship - Small Claims
Small Claims - Breach of Contract - Tort
Small Claims - Costs
Small Claims - Expert Witness

The plaintiff alleged the defendant breached a contract and was negligent in two contracts for home renovation services. The plaintiff alleged the defendant's services were deficient in that he improperly installed a cement-based underlay that bubbled up several inches and damaged vinyl plank flooring. The plaintiff sought damages of $30,000. The defendant claimed he provided the services in accordance with the plaintiff's instructions and any damage was outside his control. The court considered: 1) whether the parties entered into a written agreement for a residential basement renovation that specified the manner in which the underlay was to be installed; 2) did the services provided meet generally accepted industry standards; 3) if the manner of flooring product installation was less than good and workmanlike, did the manner of installation cause incidental damage; 4) if the defendant was negligent or in breach of contract, did the plaintiff sustain damage and in what amount; 5) was either party entitled to court costs, and if so, how much?
HELD: The plaintiff was awarded damages of $23,509.39 plus pre-judgment interest of $1,967.46 and court costs of $6,403.43. The plaintiff had the burden of proving that: the services provided were less than good and workmanlike; they did not comply with the recommended installation process; and that because of the defendant's failure to meet the standard, the plaintiff suffered a loss and the extent of the loss. The measure of damages is an amount of money that would put the plaintiff in the position he would have been in had the breaches not occurred, which is usually the reasonable cost of repair. The plaintiff, defendant, and other subcontractors testified to the events, including cutting out part of the existing concrete floor down to the sand. No moisture testing

was done, and no vapour barrier was installed. The concrete floor was not fully cleaned before the underlay was installed. The plaintiff called an expert witness, who was qualified to offer opinion evidence on flooring contracting, inspections for flooring deficiencies, industry standard on installing flooring, and estimating costs of flooring and concrete work for residential basements. The expert witness had inspected and prepared a report about the nature and cause of the problems with the flooring in the plaintiff's house. He testified the underlay product required moisture testing prior to installation, and at the levels of moisture present, a vapour barrier was required and was not installed. Water vapour from the concrete floor caused the overlay to fail and caused damages in all areas where the underlay was used in the basement. The expert's opinion was accepted. 1) There was no express agreement as to the way the work was to be done, and therefore, there was an implied contractual condition that work would be done in a good and workmanlike manner, and materials would be fit for purpose. 2) The final work product was utterly deficient, did not follow manufacturer's specifications, and was not merely a minor deviation from perfect work, and thus the work fell below the standard. 3) The manner of installation and failure to follow manufacturer's specifications caused the loss. 4) Three quotes for the anticipated cost of repair were before the court. None of the quotes included all repairs needed with no unnecessary repairs. The court made an educated damages estimate. 5) Barring exceptional circumstances, the judge normally assessed general court costs under s. 36(3) of *The Small Claims Act, 2016*, in the sum of approximately 5% of the total damages awarded. The court allows full costs where the plaintiff made a formal offer to settle equal or less than the amount awarded at trial. There was no indication of such an offer in this case. The court awarded further out of pocket expenses for the filing and service plus the costs of the expert witness, reduced for reasons explained.

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***R v Sobrinho*, 2024 SKPC 38**

Hinds, 2024-11-14 (PC24031)

Criminal Law - Evidence - Affidavits - Cross-Examination
Criminal Law - Evidence - Search Warrant
Criminal Law - Search and Seizure - Validity of Warrant

The accused was charged with multiple drug-related offences and failing to stop his car as ordered by the police. While waiting for his upcoming trial, the accused brought an application for leave to cross-examine the police officers who authored key affidavits in support of obtaining search and tracking warrants. The application was part of a broader *Charter* challenge regarding alleged violations of ss. 8, 9, and 10(b) of the *Charter of Rights*. The court had to review whether the accused met the threshold for granting leave to cross-examine an affiant and whether the grounds he advanced justified the cross-examination of the affiants on their affidavits.
HELD: The court granted leave to cross-examine one of the officers who was the primary affiant. The court emphasized that the purpose of the cross-examination was to assess the reasonableness and honesty of the affiant's belief in the grounds for the warrants. The court applied the test from *R v Garofoli*, [1990] 2 SCR 1421 (*Garofoli*), as explained in *Douglas Pennington v Her Majesty the Queen*, 2019 SKQB 12 (see paras 7-8 for the application of *Garofoli* test in Saskatchewan). Leave to cross-examine an affiant is granted if there is a reasonable likelihood that the cross-examination will elicit testimony of probative value to the review of

the warrant's grounds. The applicant must show a logical connection between the proposed cross-examination and the validity of the warrants. The threshold is not onerous but serves to prevent unnecessary or irrelevant questioning. The applicant identified specific discrepancies and omissions in the affidavits, including unverified details from informants, generalized descriptions, inconsistencies, and conflicting reports on the quantities of cocaine and cash seized during the investigation. The court found that these issues met the threshold for cross-examination, as they could undermine the reasonableness of the issuing justice's decision to grant the warrants. While the application focused on cross-examination, the court indicated that the outcome of these examinations could impact the broader *Charter* challenge seeking to exclude evidence under s. 24(2).

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***R v Ironbow*, [2024 SKPC 40]**

Daunt, 2024-11-19 (PC24032)

Constitutional Law - *Charter of Rights*, Section 10(b) - Right to Counsel
Constitutional Law - *Charter of Rights*, Section 10(b), Section 24(2)

The accused was charged with impaired driving and driving with a blood alcohol concentration exceeding 80 mg per 100 mL of blood, contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*. She applied to exclude the breath test results, alleging a violation of her right to counsel under section 10(b) of the *Charter of Rights*. Specifically, she argued that she did not have sufficient privacy during her consultation with her lawyer at the roadside. The court had to decide whether the accused's rights to counsel were violated under section 10(b) of the *Charter* because of inadequate privacy during her conversation with her lawyer, and whether the breath test results should be excluded if a *Charter* breach were found.
HELD: The *Charter* application was dismissed. The breath test results were deemed admissible, and the case was allowed to proceed to trial. The court relied on legal precedent, emphasizing that section 10(b) requires private consultations between an accused and their counsel. Any actual or perceived invasion of privacy could constitute a *Charter* breach if the accused reasonably believed they could not consult in private. The court noted that privacy includes being out of earshot of police officers but does not require being out of their sight (See *R v Walkington* (1974), 17 CCC (2d) 553 (Sask CA)). After her arrest, the accused was informed of her right to counsel and chose to contact her lawyer immediately. The arresting officer facilitated her call by placing her in her own vehicle for privacy. The officer stood outside the vehicle to maintain visual contact but was engaged in a conversation with another officer. The court did not find the arresting officer, or any other officer, actively listened to or overheard the accused's conversation with her lawyer. The video evidence confirmed that the officers were preoccupied with their discussion and remained outside the vehicle. The court acknowledged the accused's subjective feelings of anxiety and intimidation but concluded that her belief that she was being overheard was not objectively reasonable. The court held that the accused's right to counsel was not breached. She was provided with a reasonable opportunity to consult her lawyer in private, and no evidence demonstrated an invasion of her privacy.

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