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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Subject Index

***R v Englot*, 2022 SKCA 129**

Caldwell Schwann Tholl, 2022-11-08 (CA22129)

Criminal Law - Appeal - Conviction - Sexual Assault

T.E. appealed his conviction for sexual assault (s. 271 of the *Criminal Code*) following a trial before a judge in the Court of Queen's Bench (trial court). Before the trial court, evidence was received from a material witness, J.M., who testified that he stopped T.E. from engaging in sexual activity with the complainant, who appeared to be unconscious. T.E. testified at trial that the complainant was conscious and consented to the activity. The complainant had no memory of the incident. Testimony had been received that the parties had been attending a house party, where the complainant and T.E. had consumed alcohol. J.M. was concerned the complainant was inebriated and he would leave the lower level of the residence to periodically check on her upstairs. J.M. observed the complainant to be unconscious when he checked on her twice; when he checked the third time, he observed T.E. on top of the complainant and stopped him.

Civil Procedure - Application to Dismiss - Want of Prosecution

Civil Procedure - Class Action

Civil Procedure - Class Action - Designation of Judge

Civil Procedure - Class Action - Jurisdiction of the Court

Civil Procedure - Dismissal - Delay

Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process

Civil Procedure - Production of Documents

Civil Procedure - *Queen's Bench Rules*, Rule 11-1

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

Civil Procedure - *Queen's Bench Rules*, Rule 5-12

Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(b)

Civil Procedure - Small Claims

Class Actions - Procedure

Constitutional Law - *Charter of Rights* - Practice - Standing

Constitutional Law - *Charter of Rights,* Section 1, Section 2(b), Section 2(c) and Section 2(d)

As an unconscious person cannot consent to sexual activity (*Criminal Code*, s. 273.1(2)(a.1), the trial court applied the evidence received as required by *R v W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742: if the trial court believed T.E. or was left with a reasonable doubt on the totality of evidence, he would be acquitted; if T.E.'s evidence was rejected and the totality of other evidence was accepted without a reasonable doubt being raised, then T.E. would be convicted. The trial court rejected T.E.'s version of events. The trial court found other evidence received at trial did not raise a reasonable doubt, and T.E. was convicted. T.E. raised issues on appeal of whether the trial court failed in assessing credibility of his and others' testimony and whether appropriate weight had been apportioned for the evidence received.
HELD: T.E.'s appeal was dismissed. T.E.'s arguments centred on witness credibility and the weight afforded to evidence. The court summarized T.E.'s arguments as raising questions of facts from the trial court's decision. The court applied the standard of review necessary on questions of fact: T.E. was required to demonstrate an error of fact that would render the verdict unreasonable (*R v Biniaris*, 2000 SCC 15, [2001] 1 SCR 381) or prove the trial court erred in applying facts that fatally undermined the process used to reach the verdict (*R v Sinclair*, 2011 SCC 40, [2011] 3 SCR 3; *R v Lohrer*, 2004 SCC 80, [2004] 3 SCR 732). T.E.'s arguments did not disclose an error had been made by the trial court. T.E. emphasized in argument that a statement he made to the police had been misconstrued by the trial court, and this resulted in an error in how his credibility was assessed. The court noted that T.E.'s evidence of consent had been rejected for many reasons, including an assessment by the trial court that his claims of the complainant giving him "special attention" prior to the assault was "fabricated." J.M. testified to discovering T.E. assaulting the complainant. He admitted he had difficulties with his memory during stressful events. J.M. also testified that he thought another individual was present when he confronted T.E. at the lower level of the home, after he broke up the assault. T.E.'s arguments that J.M.'s testimony should be rejected or diminished because of memory issues and a mistake in identification was rejected by the court: the errors alleged were before the trial court and it was entitled to find J.M. to be credible on the central issue of whether he had observed an assault. As T.E. failed to establish the guilty verdict was unreasonable or the process used to reach the verdict was flawed, his appeal was dismissed.

Back to top

***Huard v The Winning Combination Inc.*, 2022 SKCA 130**

Caldwell Leurer Tholl, 2022-11-09 (CA22130)

Civil Procedure - Queen's Bench Rules, Rule 4-44
Civil Procedure - Application to Dismiss - Want of Prosecution
Civil Procedure - Class Action

Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure

Courts - Judges - Disqualifications - Bias

Courts and Judges - Preliminary Screening of *Charter* Applications

Courts and Judges - *Stare Decisis*

Criminal Law - Appeal - Conviction - Sexual Assault

Criminal Law - Assault - Sexual Assault - Sentencing

Criminal Law - Kidnapping Using a Firearm

Criminal Law - Reasonable Doubt - Identification of Accused

Criminal Law - Sentencing - *Gladue* Factors

Evidence - Complainant - Credibility and Reliability

Evidence - Unsavoury Witnesses - *Vetrovec* Warning

Family Law - Access and Custody

Family Law - Access and Custody - Criminal Charges

Family Law - Access and Custody - Interim - Appeal

Family Law - Appeal

Class Actions - Procedure
Civil Procedure - Class Action - Designation of Judge
Civil Procedure - Class Action - Jurisdiction of the Court
Civil Procedure - Dismissal - Delay

The appellants appealed a decision dismissing a proposed class action for undue delay and want of prosecution. Defendants in the proposed class action had applied to dismiss the amended statement of claim approximately 10 years after the last step had been taken in the action. Two judges designated to hear the claim had been appointed to the Court of Appeal since the last action taken by the parties. The parties had not completed procedural directions from the court, including agreeing on a timetable for the certification hearing, cross-examination on affidavits and filing additional affidavits. The plaintiffs had filed no evidence in response to the applications. The chambers judge granted the application and dismissed the proposed class action. The Court of Appeal considered: 1) did the chambers judge have jurisdiction to hear and decide the applications; 2) did the chambers judge err by not adjourning the applications; 3) did the chambers judge err by dismissing the application for delay?
HELD: The appeal was dismissed. The chambers judge had appropriately dismissed the claim for want of prosecution. 1) The chambers judge who decided the application was not designated to consider the certification request pursuant to s. 4(2) of *The Class Actions Act*, which requires the party that commences the action to apply for a designated judge. A judge in civil chambers has jurisdiction to decide preliminary applications relating to class actions. The judges of the Court of King's Bench have inherent jurisdiction. A judge designated pursuant to s. 4(2) has other duties under *The Class Actions Act* post-certification, and post-certification applications are all heard by a single judge where possible. The Act does not interfere with the jurisdiction of judges nor the ability of the Chief Justice to assign and schedule judges. The judge was not *functus officio* after rendering a fiat in relation to one defendant and had the authority to issue an additional fiat dismissing the claim against another defendant for the same reasons. 2) The plaintiffs had requested the chambers judge adjourn the application so it could be heard by a judge designated to hear the proposed class action. The plaintiffs took no steps to request the appointment of a designated judge to hear the application. Nothing was to be gained by an adjournment, as a designated judge would have not had prior history with the file. A judge has discretion to grant or refuse adjournment requests. The judge did not make a palpable and overriding error in the assessment of the facts and did not fail to correctly identify the legal criteria governing the exercise of discretion. There was no error justifying appellate court intervention. 3) The chambers judge considered the appropriate factors in dismissing the claim. A delay of 10 years in a class action is totally unacceptable. Certification applications are to be made within 90 days of the delivery of a statement of defence. The plaintiffs had no

Family Law - Appeal of Interim Order - Remedy

Family Law - Decision-Making Authority

Family Law - Disclosure Obligations - Documentary Disclosure

Family Law - Division of Matrimonial Property - Trusts

Family Law - Parenting Time - Primary Residence

Landlord and Tenant - Appeal - Extension of Time to Appeal

Limitations - Statutory Limitation Periods

Limitations of Actions - Statement of Claim - Statute-barred

Occupational Health and Safety Violations - Sentencing

Practice - Adjournments

Practice - Discovery - Documents - Application for Production

Practice - Production of Documents

Regulatory Offence - *Saskatchewan Employment Act* - *Occupational Health and Safety Regulations*

Regulatory Offences - Public Health Order - Breach

Small Claims - Practice and Procedure

explanation for the long delay at an early stage. The claim involved a product sold for only a few months 13 years ago. The delay prejudiced the defendants' ability to defend the action. There was no evidence of people other than the named plaintiffs would be prejudiced if the action were struck for delay. The chambers judge recognized the action was a proposed class action. The plaintiffs, not the respondents, were ultimately responsible for the delay in this case. There was no basis for the appellate court to interfere with the chambers judge's discretionary decision to dismiss the claim. Delay in civil proceedings has negative effects on the parties and on the public confidence in judicial processes.

Back to top

***Veskovic v Nielsen*, 2022 SKCA 134**

Richards Jackson Barrington-Foote, 2022-11-23 (CA22134)

Family Law - Appeal
Family Law - Division of Matrimonial Property - Trusts
Family Law - Disclosure Obligations - Documentary Disclosure
Civil Procedure - Appeal - Leave to Appeal - *Nunc Pro Tunc*

B.V., the appellant, appealed the decisions made by a Queen's Bench judge in chambers (chambers judge) dismissing his requests to obtain further financial disclosure from the respondent, J.N. B.V. and J.N. are former spouses engaged in proceedings involving the *Divorce Act*, RSC 1985, c 3 (2d Supp), and *The Family Property Act*, SS 1997, c F-6-3. Before the chambers judge, B.V. advanced that J.N. was a beneficiary under two trusts and two corporations and may be affected by a testamentary trust established by a will from her late father (this testamentary trust was not subject to this appeal, as B.V. indicated it would be an issue for trial). He sought orders that would require J.N. to produce financial disclosure for the four entities identified. Between June 2020 and July 30, 2021, B.V. filed a notice to disclose, a notice to file income information, an application for child and spousal support, completed questioning of J.N., and then filed an application seeking answers about the four entities that had arisen in questioning (which also reiterated his outstanding requests for income information to be provided and sought compliance with the notice to disclose). The chambers judge dismissed B.V.'s application, primarily holding that J.N. held discretionary beneficial interests in the entities; she has no legal or equitable right to demand income or assets from the entities. The court reviewed the record and found the following: for the Cinnabar Trust, J.N. is one of the capital and income beneficiaries; J.N. has been a director and officer of J & V corporation since

Statutes - Interpretation - *Bankruptcy and Insolvency Act*, Section 50.4(9)

Statutes - Interpretation - *Court of Appeal Act, 2000*, Section 20(3)

Statutes - Interpretation - *Limitations Act*, Section 17

Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 72(1.1)

Statutes - Interpretation - *University of Saskatchewan Act*, Section 6(1)

Universities - Student Discipline - Exclusive Jurisdiction

Cases by Name

Brinkman v Western Premium Property Management Inc.

Huard v The Winning Combination Inc.

Liao v Saskatchewan (Economy)

Mann v Mann

Miller v Vevang

Omorogbe v Kovacs

R v Englot

R v Grandel

R v King Stud Contracting Ltd.

R v Mikituk

R v Shorebird Investment Ltd.

August 1, 2005, but she does not own any shares; J.N. has been an officer and director of V&J Properties Ltd., but is not a shareholder, and Lobo Trust includes J & V corporation as a beneficiary. Both trusts also include contingencies in 2030 that may result in property being distributed to J.N. and her siblings. The court considered two issues: (1) whether B.V. must obtain leave to prosecute his appeal, and (2) what entitlement does B.V. have to financial disclosure from J.N. on the four entities identified?
HELD: The court allowed B.V.'s appeal in part: the court did not consider it necessary to resolve the issue of whether B.V. must obtain leave to prosecute his appeal, and even if it were required, it should be granted *nunc pro tunc*. The court further concluded that B.V. was entitled to some additional disclosure on the four entities, but not to the extent he sought. On the leave to appeal issue, B.V. filed his appeal without seeking leave from the court. J.N. argued that leave was required and the failure to obtain the same prohibited the court from considering the merits of the matter. J.N. submitted that *Rimmer v Adshead*, 2003 SKCA 19, 224 DLR (4th) 372 as guiding authority meant that in seeking answers regarding family property, B.V. sought a procedural order and not relief contemplated by the *Divorce Act* or *The Family Property Act*. The court did not engage in determining this issue specifically; instead, it determined that to the extent that leave might be required, it should be granted *nunc pro tunc*. Turning to the substantive issue of whether J.N. should provide B.V. additional financial disclosure, the court noted that family property includes an interest in a trust under *The Family Property Act*. The chambers judge erred in not recognizing that J.N. is a capital and income beneficiary of the Cinnabar Trust. Accordingly, the court ordered J.N. to produce the financial statements and tax returns of the Cinnabar Trust for the three years prior to the filing of B.V.'s petition. Given the finding that Cinnabar Trust was family property, and that that trust held shares in J & V corporation, the court also ordered J.N. to produce the tax returns and financial statements for the three years prior to the petition being filed. The court further ordered financial disclosure to be provided for the three years prior to the filing of the petition for V & J Properties Ltd, but unlike the other entities, the court ordered this because the testamentary trust of J.N.'s late father, being an issue for trial, will require the valuation of his shares in this corporation. The court found J.N. had no interest in the Lobo Trust and accordingly the chambers judge was correct in not requiring any disclosure for this entity. The court declined to order costs: B.V. had been successful in obtaining additional disclosure from J.N., but the disclosure ordered to be provided was narrow.

Back to top

***Omorogbe v Kovacs*, 2022 SKCA 136**

Schwann Leurer McCreary, 2022-11-23 (CA22136)

R v Z.J.L.B.

Shahadu v University of Saskatchewan

T & C Steel Ltd., Re (Bankruptcy)

Veskovic v Nielsen

Yashcheshen v Janssen Inc.

Zimmerman v 101102070 Saskatchewan Ltd.

Civil Procedure - *Queen's Bench Rules*, Rule 5-12
Civil Procedure - Production of Documents
Practice - Discovery - Documents - Application for Production
Practice - Production of Documents

The appellant was granted leave to appeal on the issue of whether the chambers judge erred by not ordering the respondents to produce documents in their unredacted form. The appellant had been reported to the police and investigated regarding bomb threats. No charges were laid. The appellant filed several actions against his former employer, the police service, police chief, and certain constables. The action against police constables alleged harassment, intimidation, abuse of public office, fabrication of court records, defamation, obstruction of justice and perjury. The respondents filed an affidavit of documents that did not identify redactions made to the documents nor why they refused to produce the redacted documents in an unredacted form. The appellant made an application for the respondents to produce additional documents, create and produce documents, and to cross-examine the respondents on their affidavits. The respondents made an application to dismiss the appellant's claim for disclosing no reasonable cause of action or for being frivolous and vexatious. The chambers judge dismissed the appellant's action entirely and decided the cross-examination would not assist in resolving issues and the respondents had not failed to disclose all relevant documents. The Court of Appeal considered whether the chambers judge erred in not ordering the respondents to produce documents in their unredacted form.
HELD: The appeal was dismissed with one set of fixed costs to the respondents. Under the rules of court, parties to an action have an obligation to disclose the existence of relevant documents in their possession, custody or control and an obligation to produce documents for inspection unless there is a proper reason to withhold production. The respondents did not have the unredacted documents in their custody or control. They could not compel production from the person or entity that had the unredacted document. A party must at least attempt to retrieve the document by using best efforts. The chambers judge erred insofar as the issues were framed in terms of relevance and privacy, instead of the disclosing party's possession or control. The chief of police, a non-party to this action, had control over the police investigation file. The chambers judge was taken to have ruled the respondents could not be ordered to produce documents over which they had no power or control. The respondents did not have the power to compel the chief of police to produce the documents in unredacted form. There was no error with the result of the chambers judge's decision. The appellate court confirmed that Rule 5-15 provided the appellant the ability to apply for production of the unredacted documents from the non-party chief of police.

Back to top

***Liao v Saskatchewan (Economy)*, 2022 SKCA 137**

Richards Leurer McCreary, 2022-11-28 (CA22137)

Administrative Law - Judicial Review - Natural Justice/Procedural Fairness
Administrative Law - Natural Justice - Procedural Fairness
Administrative Law - Judicial Review - Immigration
Civil Procedure - *Queen's Bench Rules*, Rule 11-1

The appellant was an applicant under the Saskatchewan Immigrant Nominee Program who applied for judicial review of decisions taken by the Ministry responsible for the administration of the program. The appellant had applied four times in seven years to the program, with variations in the descriptions of her employment history in China. The appellant was advised that the program integrity unit was assessing the information provided by her in any application. The Ministry communicated with the appellant's counsel and the appellant's employer. The appellant had submitted an apparent business card that described her as a statistician. Her employer confirmed business cards were not provided in her employment. In a letter dated December 20, 2019, the appellant was informed the Ministry had concluded she had made misrepresentations to the Ministry, her current application would not be processed, and she would be ineligible to apply for a nomination under the program for two years. In an email dated February 10, 2020, the Ministry informed her the decision was based on the findings of misrepresentation and there was no process for a second review. The appellant had applied for judicial review on the basis the Ministry had not followed a fair process and made an unreasonable decision. The application for judicial review was dismissed with costs to the Ministry. The Court of Appeal considered: 1) did the Ministry follow a procedurally unfair process; 2) was the Ministry's December 20, 2019 decision unreasonable; 3) was the Ministry's February 10, 2020 decision unreasonable; and 4) did the chambers judge err in ordering the appellant pay costs to the Ministry?
HELD: The appeal was dismissed, with costs to the respondent. 1) Procedural fairness is context specific. In a previous similar case, the procedural fairness was decided to be at the lower end of the spectrum, and required an affected person be told of the case to meet and be given the opportunity to respond. The chambers judge did not believe the appellant's assertion that she was not aware of third application existed, because the same contact information was used for the second and third application. The appellant did not identify what information she would have provided if she had been expressly informed the third application was still open before the decision was made. There was no basis to conclude the Ministry's process was unfair. 2) The December 20, 2019 decision presented an internally coherent and rational analysis. The appellant's obvious disagreement with the Ministry's conclusion does not mean the decision was unreasonable on the record. The Ministry identified several misrepresentations including her declaration of her occupation, a fabricated business card, and who prepared and submitted the third application. The appellant did not challenge the finding that the business card was fabricated. The December 20, 2019 decision was reasonable. 3) The program guidelines did not contemplate a secondary review when an application was dismissed because of an applicant's misrepresentation. Therefore, the February 10, 2020 decision not to grant a secondary review was reasonable. 4) Rule 11-1(1) of *The Queen's Bench Rules* confirms the expansive discretion given to trial courts over matters of costs. The chambers judge did not misapply a governing principle or rule or disregard a material fact or consideration. The costs award was not obviously unjust. Unlike Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, *The Queen's Bench Rules* do not provide that costs should

only be awarded if there are special reasons for the costs.

 Back to top

***Mann v Mann*, 2022 SKCA 138**

Richards Tholl McCreary, 2022-11-18 (CA22138)

Civil Procedure - Appeal
Statutes - Interpretation - *Court of Appeal Act, 2000*, Section 20(3)

The applicant applied pursuant to s. 20(3) of *The Court of Appeal Act, 2000* to overturn a decision of a Court of Appeal judge in chambers. The chambers judge had dismissed an application to disqualify a lawyer and law firm from representing the respondents in the appellate court or any other court. The chambers judge ruled he did not have jurisdiction over proceedings in other courts. Although the judge had jurisdiction regarding proceedings in the appellate court, he declined to exercise his jurisdiction. The Court of Appeal considered whether the chambers judge had made a reviewable error when he decided not to exercise his jurisdiction.
HELD: The court dismissed the application dismissed with fixed costs to the respondents. The court may interfere with the decision of the chambers judge only if the judge made an error in principle, disregarded or misapprehended a material fact, failed to act judicially or made an unjust decision. The conclusion of the chambers judge was correct and independently justified by the facts. The court saw no error in declining to consider whether the lawyer and law firm should be removed and disqualified from acting on the appeal when the applicant had known the relevant facts for at least three years; the applicant did not raise the conflict of interest issue when the proceedings underlying the appeal were addressed in the Court of Queen's Bench; the applicant had not pressed this issue in other Queen's Bench proceedings; and there were ongoing proceedings involving the same issue in the Court of Queen's Bench. Since the chambers judge's decision, the court below released a decision addressing the same issues raised in the application and that decision had been appealed to the appellate court. Therefore, the court would be addressing the same issue in another appeal. Thus, the chambers judge's decision was also justifiable to avoid duplication of proceedings.

 Back to top

***Miller v Vevang*, 2022 SKCA 139**

Richards Leurer McCreary, 2022-12-01 (CA22139)

Family Law - Access and Custody
Family Law - Parenting Time - Primary Residence
Family Law - Decision-Making Authority
Family Law - Access and Custody - Interim - Appeal

Family Law - Appeal of Interim Order - Remedy
Family Law - Access and Custody - Criminal Charges

The appellant appealed an interim parenting order regarding the parties' eight-year-old child, which ordered the appellant have parenting time with the child every second weekend and alternate Wednesdays. The Court of Appeal considered whether the interim parenting order should be set aside.
HELD: The fiat appealed from did not explain what the parenting status quo was or how those conclusions were reached in light of the deeply contradictory affidavits. In order to provide the parties with a timely and cost-effective resolution, the Court of Appeal assessed the situation and put an appropriate order in place rather than remitting the issue. The affidavit evidence indicated that the status quo before 2019 and leading up to the chambers hearing was one where the child resided principally with the respondent (petitioner in the court below) and the respondent had primary parenting responsibilities. The affidavit evidence did not reliably establish a week-on week-off pattern. Parenting status quo should not be changed on an interim basis unless there is a compelling reason to do so, and there was no such reason. The parties were directed to work out a holiday and birthday parenting schedule. The fact the appellant was charged with impaired driving causing death and the possibility of a period of future incarceration did not sustain the respondent's position that she should have sole decision-making authority.

Back to top

Yashcheshen v Janssen Inc., **2022 SKCA 140**

Caldwell Schwann McCreary, 2022-12-06 (CA22140)

Civil Procedure - *Queen's Bench Rules*, Rule 7-9(2)(b)
Limitations of Actions - Statement of Claim - Statute-barred
Limitations - Statutory Limitation Periods
Practice - Adjournments
Statutes - Interpretation - *Limitations Act*, Section 17

The self-represented appellant appealed an order striking her statement of claim. The appellant had commenced an action against the respondents for damages as a result of her addiction to a pharmaceutical product manufactured and marketed by the respondents. The claim was dismissed because it was filed well after the applicable two-year limitation period had expired. The chambers judge remarked the claims were the very definition of a vexatious pleading. The Court of Appeal considered: 1) was the chambers judge required to adjourn the hearing; 2) did the chambers judge err when he struck the statement of claim; 3) did the chambers judge err by awarding costs to the respondents?
HELD: The appeal was dismissed, with one set of fixed costs to the respondents. 1) The chambers judge did not err in dismissing the appellant's adjournment request. In the court below, the appellant left the courtroom partway through submissions related to her adjournment request. There was no evidence the appellant was so unwell that she required an adjournment. The appellant had been granted three prior adjournment requests. The appellant had filed affidavits and written submissions before the hearing of the respondent's application to dismiss her claim. The appellant had left the courtroom before the chambers judge could ask her

questions and the appellant failed to discharge the onus of establishing it was unfair to proceed with the hearing at that time. 2) The chambers judge was not tasked with making determinations on the merits of the claims set out in the appellant's pleadings. The only issues were discoverability and the applicable limitation period. The appellant knew the damage had occurred and it had been caused or contributed to by the respondents at least seven years before the statement of claim was filed. The chambers judge did not err by not considering s. 17 of *The Limitations Act*. The two-year limitation period under s. 5 of *The Limitations Act* applied. The chambers judge did not err by not expressly addressing each argument or issue raised in the appellant's written submissions. The chambers judge erred in characterizing the statement of claim as vexatious. A vexatious pleading is started for an ulterior motive or maliciously to delay or annoy. The claim was frivolous, or in other words, one that could not succeed, and thus still was an abuse of process of the court and may be struck out under Rule 7-9 of *The Queen's Bench Rules*. 3) The chambers judge awarded $2000 in costs against the appellant and described her behaviour as contemptuous. Nothing brought the judge's characterization of the events into question.

Back to top

***Brinkman v Western Premium Property Management Inc.*, 2022 SKKB 223**

Danyliuk, 2022-10-06 (KB22216)

Landlord and Tenant - Appeal - Extension of Time to Appeal
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 72(1.1)

C.B. and A.T. applied to a judge of the Court of King's Bench (chambers judge) for leave to extend the time to appeal the decision of a hearing officer appointed pursuant to *The Residential Tenancies Act, 2006* (RTA) awarding them $100.00 in damages on their claim for $27,000.00 against their landlord for alleged wrongs committed by it (see: *Brinkman v Western Premium Property Management*, 2022 SKORT 791). The chambers judge was most concerned with the "woefully deficient" materials in support of the application.
HELD: The chambers judge dismissed the application "without prejudice to renewing same by filing proper material in a timely manner, as set out below" and then indicated the material he would require in order to consider the application in light of the applicable law; then went on to consider s. 72(1.1) of the RTA, which permitted such an application for up to two years following the signing and dating of the decision "if the proposed appellant can establish that the proposed appellant did not receive notice of the decision or order." He went on to conclude that the test he was to apply in deciding whether to exercise his discretion in favour of granting leave was that set out in *Dutchak v Dutchak*, 2009 SKCA 89 and applied in *Hoffart v Carteri*, 2019 SKCA 23, being generally that the prospective appellant needed to persuade the chambers judge "that it is just and equitable to extend the time for appeal" on the basis of four factors, these being: first, whether the applicant has a reasonable explanation for the delay; second, whether the applicant "possessed a bona fide intention to appeal within the time limited for appeal;" third, whether the applicant had an arguable case to make to the chambers judge; and, fourth, whether "there will be no prejudice to the respondent" other than that incurred due to the appeal process itself if leave is granted. The chambers judge stated he would reconsider the application to extend the time to appeal once proper material was filed "in a timely manner" by the applicants touching on these factors.

 Back to top

***R v Mikituk*, 2022 SKKB 233**

Keene, 2022-10-24 (KB22224)

Criminal Law - Kidnapping Using a Firearm
Criminal Law - Reasonable Doubt - Identification of Accused
Evidence - Complainant - Credibility and Reliability
Evidence - Unsavoury Witnesses - *Vetrovec* Warning

C.A.M. proceeded to trial before a judge of the Court of King's Bench (trial judge) on a number of charges arising from an incident in February 2016, which included kidnapping and abduction while using a restricted firearm, to wit, a pistol, and carrying a concealed weapon, to wit, a pistol. The charges were not sworn until 2021, when the complainant, C.F., claimed to police that he had learned the identity of C.A.M. as the second person who had kidnapped him. The Crown theory was that M.K., C.A.M.'s accomplice, lured C.F. to a hotel room with a promise of drugs, where C.A.M. was waiting in possession of a pistol in the waist band of his pants hidden by his shirt, which he revealed to C.F. M.K. told C.F. that C.A.M. was a member of the Terror Squad street gang. He was then handcuffed, placed in a car and told by the two perpetrators that he was being driven to Calgary to deal with his drug debt. C.F. was the sole Crown witness. C.A.M. defended the charges on the basis that C.F. was an unsavoury witness who could not be trusted to provide truthful or accurate testimony, thus raising a reasonable doubt about the C.A.M.'s guilt with respect to the charges, pointing to three main areas that he argued made C.F.'s testimony an unsafe foundation for a finding of guilt beyond a reasonable doubt: first, in his initial statement to the police soon after the incident, he denied anything of a criminal nature had happened to him, continuing to do so when approached by police subsequently, and in advance of the trial, gave two further statements to the police, and gave testimony at the preliminary inquiry that was inconsistent with prior statements and with his testimony at trial; second, C.F. had a serious and lengthy criminal record including entries for robbery, property, trafficking in firearms, and drug-related offences, and was a career criminal and drug trafficker; at the time of the incident, he was an intravenous user of cocaine and morphine, as a result of which his perception and memory of the incident were faulty; and lastly, C.A.M. maintained his late identification and the circumstances of that identification made it incumbent on the trial judge to have a reasonable doubt that C.A.M. was involved in the incident at all, whether it was criminal activity or not.
HELD: The trial judge convicted C.A.M. of the included offence of kidnapping and abduction simpliciter, being of the view the Crown had failed to prove beyond a reasonable doubt that the object in C.A.M.'s waistband was a pistol, though he nonetheless convicted him of carrying a concealed weapon because this object met the definition of "weapon" in the *Criminal Code* in that it looked like a pistol and was intended by C.A.M. to intimidate C.F. The trial judge believed C.F.'s testimony, and found it proved each fundamental element of these offences beyond a reasonable doubt. He addressed each of C.A.M.'s challenges to the veracity and accuracy of C.F.'s testimony. With respect to C.A.M.'s request that the trial judge self-instruct himself in accordance with *R v Vetrovec*, [1982] 1 SCR 811 (*Vetrovec*) that he must scrutinize C.F.'s testimony with extra care, especially since no corroborative evidence had been adduced by the Crown to support his testimony, he stated that though he thought the basis for the request was "borderline," out of an abundance of caution, he warned himself accordingly. He reconciled C.F.'s blanket denial to the police about the abduction in February 2016 and his detailed testimony at trial about the abduction by accepting C.F.'s explanation that he did not "wish their

involvement because he was an addict, a drug dealer and he did not want to cause trouble for himself or his family." He also accepted that C.F. had no motive to accuse C.A.M. of these crimes and believed him when he said he needed to show he was "done with his past life" by testifying for the Crown. As to C.F.'s criminal record, the trial judge agreed with scholarly opinion that it is doubtful offences, other than those of direct dishonesty, have much weight in assessing credibility, and in any event, he was satisfied on C.F.'s testimony that he had beaten his addiction to drugs, and that his offending was a result of feeding his drug habit and not because he was a career criminal. In considering inconsistencies between C.F.'s accounts of the events, the trial judge found these immaterial. He stated, for instance, that it made sense that C.F. might waver on the amount he owed on the drug debt since it was only an estimate. The trial judge also believed C.F. when he testified that at the time of the abduction, he was not high, drug sick, or drunk, just tired, basing this assessment on his being "straightforward," understandable," and that he did not vacillate in his evidence. Similarly, the trial judge found that C.F.'s testimony concerning how he came to know the person with the pistol or imitation thereof was C.A.M. made logical sense and was in accordance with his life experiences. He accepted that C.F. had been in close confines for several hours with the person he came to know as C.A.M. during the abduction, and simply needed to put a name to the face, which he was able to do starting with information he obtained from an inmate at the Drumheller Institution, which was confirmed when he was a prisoner on the same range at a correctional facility with the person he claimed was C.A.M. and whose name he saw on a list of inmates. Lastly, the trial judge noted that C.F. made a strong identification of C.A.M. in the dock.

 Back to top

***T & C Steel Ltd., Re (Bankruptcy)*, 2022 SKKB 236**

Scherman, 2022-10-28 (KB22228)

Bankruptcy - Procedure
Statutes - Interpretation - *Bankruptcy and Insolvency Act*, Section 50.4(9)

The applicants asked the court to extend the time to file their proposals. The applicants had given notices of intention to make a proposal to only their unsecured creditors. One of the respondents opposed the application because the information filed with the court did not establish the applicants were likely to make a viable proposal to their creditors.
HELD: The court granted the extensions sought. Section 50.4(9) of the *Bankruptcy and Insolvency Act* provides a court may grant a requested extension if the applicants are acting in good faith and with due diligence, are likely to make a viable proposal if the extension is granted and no creditor would be materially prejudiced by the extension. An objective standard is applied. The only issue in dispute was whether the applicants were likely able to make a viable proposal. The affidavit filed in support of the application stated an honest belief that a viable proposal will be made in this matter but provided no factual basis for the belief nor whether the financial information and projections provided to the proposal trustee were accurate and truthful. Two reports of the proposal trustee before the court showed the applicants had significantly less cash flow than what had been projected. The court had serious reservations whether the applicants' businesses were viable. The evidence and information barely met the test of likelihood of being able to make a viable proposal. "Likely" means might well happen. The proposal trustee, an effective officer of the court, recommended the extensions, despite concerning limitations in the reports. Creditors ought to be given the opportunity to decide, as they are primarily affected. The judge remained seized of any future time extension applications.

 Back to top

***Shahadu v University of Saskatchewan*, 2022 SKKB 248**

Smith, 2022-11-17 (KB22244)

Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process
Statutes - Interpretation - *University of Saskatchewan Act*, Section 6(1)
Universities - Student Discipline - Exclusive Jurisdiction

The University of Saskatchewan (university), on its own behalf and on behalf of other named defendants, brought an application to a judge of the Court of King's Bench (chambers judge) to strike the statement of claim of H.S., a former Ph.D. candidate in the School of Environment and Sustainability in the College of Graduate and Postdoctoral Studies (college), who was expelled from the program on February 2, 2018 for "failing to register for three consecutive terms," as the record showed. The statement of claim which issued from the Court of King's Bench (court) in July 2022 sought relief against the University and the other defendants for alleged actionable wrongs against it and the other defendants arising from his expulsion and from being required to attend regular meetings with his program supervisors starting in 2016 to "review his academic progress." The court record revealed further that H.S. was aware by way of written notice from the college and the university of the internal procedures available to him for appealing these decisions and that he appealed the supervisors' meeting requirement to the college level appeal board, which was denied on or about March 21, 2017. He appealed this dispute no further. He did not appeal his expulsion at any level. The university and the other defendants took the position that the statement of claim was manifestly and clearly statute-barred and commencing a claim that was doubtlessly out of time was an abuse of the court's process and was to be struck. The university also argued the law was settled that the court did not have the jurisdiction to question purely academic decisions of the university, which it stated was what H.S. was asking it to do, and so the statement of claim should be struck as an abuse of process for this reason as well.
HELD: The chambers judge agreed with the university and struck H.S.'s statement of claim for being an abuse of the court's process on both grounds. There was no dispute that the applicable limitation period was two years from the date of H.S.'s expulsion on February 2, 2018, and that no discovery issue was in play because "the plaintiff knew what was happening while it was happening." As to the exclusive jurisdiction of the university with respect to academic matters such as expulsions and supervision of academic performance, the chambers judge referred to *Hebron v University of Saskatchewan*, 2015 SKCA 91 and *Taheri v Buhr*, 2021 SKCA 9, and concluded that except in cases of judicial review, "internal academic affairs" of the university were inviolable, because to question these would "wholly undercut the integrity of the University as a degree-conferring institution."

 Back to top

***R v Shorebird Investment Ltd.*, 2022 SKPC 41**

Schiefner, 2022-11-22 (PC22040)

Constitutional Law - Charter of Rights, Section 8 - Unreasonable Search and Seizure
Constitutional Law - Charter of Rights - Practice - Standing
Regulatory Offences - Public Health Order - Breach

The defendant, Shorebird Investment Ltd. (Shorebird), proceeded to trial before a judge of the Provincial Court (trial judge) on the charge of "contravening s. 61 of *The Public Health Act, 1994* by failing to collect the first and last names, and contact information, of all patrons who dined at their restaurant at Tobin Lake, Saskatchewan on or between March 2, 2021 and March 9, 2021, as required by s. 12 of the Public Health Order dated February 18, 2021, made pursuant to s. 25.2 of The Disease Control Regulations." Shorebird defended the charge on the basis that the Public Health Order (PHO) contravened a number of the Charter-protected rights of its restaurant patrons, with particular emphasis on their right to be free from unreasonable search and seizure under s. 8. It was not contested by Shorebird that the PHO in question had the force of law and that the Crown had the power to enforce it by prosecution as a provincial regulatory offence. Neither did Shorebird contest that the PHO mandated that it maintain a "Dine-In List" at its restaurant containing the full name, telephone number or email address of the patron on the day he or she attended its restaurant, and to produce it when required by a public health officer; that the purpose of this requirement was to provide an easy and effective way to contact trace patrons in the event of a COVID-19 outbreak at the restaurant to attempt to contain the spread of the outbreak by notifying the patrons of their exposure to the virus. The Crown's position was that Shorebird did not maintain the Dine-in List as it was compelled by the PHO to do and that the patrons had standing to raise the alleged *Charter* breaches and not Shorebird.

HELD: The trial judge denied the *Charter* application and convicted the accused. Upon a review of the Crown evidence, which was in large measure uncontested by Shorebird, the trial judge made the following findings of fact: in March of 2021, COVID-19 was a "serious public health threat in Saskatchewan" to which the Province of Saskatchewan responded by making orders "for the purpose of preventing, reducing and controlling" its transmission; the Province identified "food, beverage and liquor serving premises," of which Shorebird's restaurant was one, as places particularly prone to outbreaks of COVID-19 due to the intermingling of persons from various locations; if maintained as required, the Dine-in List was an effective way to allow public health officials to notify persons of their exposure to COVID-19 and for them to take necessary steps to prevent its spread; an outbreak of COVID-19 was declared for the Shorebird restaurant on March 9, 2021, with exposure dates of between March 2, 2021 and March 9, 2021; one of the owners and operators of the Shorebird restaurant contracted COVID-19, and first exhibited symptoms on March 7, 2012, being hospitalized for 29 days, most of these in the intensive care unit; public health inspectors attended the Shorebird restaurant on January 7, 2021, January 15, 2021, March 2, 2021, and March 9, 2021 in order to monitor compliance with the Dine-In List; at each visit, a voluntary "sign in sheet" or "guest book" was seen on a table in the front entrance of the restaurant, which did not show the full names and contact information of the patrons in accordance with the PHO; health inspectors observed patrons enter the restaurant without being requested by restaurant staff to complete the necessary information; health inspectors met with an owner and operator of the restaurant an each visit, explaining the purpose of the Dine-In List and that proper compliance was mandatory. The trial judge appreciated that no patron testified on behalf of Shorebird but disagreed with the Crown that absence of evidence from patrons was fatal to the defence because the evidentiary foundation for the motion had been supplied by the Crown witness and documentary exhibits; and was also cognizant that the patrons were not the persons charged with the offence. *By R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, "no one, including a corporation, should be convicted of an offence if the law pursuant to which they have been charged is unconstitutional." Moving on to the heart of the matter, the trial judge ruled that the collection of patron

information on the Dine-In List was a “search” as contemplated by s. 8 of *Charter* because the dine-in patrons had “a reasonable expectation of privacy in the information that restaurants [were] required to collect” because, as confirmed in *R v Cole*, 2012 SCC 53, the information to be provided by the patrons “result[ed] in the collection of temporal information (when) and geographic information (where) about that same individual in a place where the patron “would generally not [have] been observable by the state;” the patrons had a subjective expectation of privacy in the collected information which could be inferred from the fact that some patrons did not leave their names and addresses and others “left inappropriate comments;” and that the expectation of privacy was objectively reasonable because the patrons had a right to expect a level of anonymity “to act in public while at the same time preserving their right to be free from identification and surveillance by the state.” Having concluded that a search had occurred, the trial judge then focused on whether the Crown had proven it was a reasonable search based on the well-established criteria set out in *Collins*, [1987] 1 SCR 265, asking: was the search authorized by law, was the law authorizing the search reasonable, and was the search conducted in a reasonable manner? He concluded that compliance with the requirements of the Dine-In List was authorized by law, was an effective and proportionate method of contact tracing, which was a proven method of locating persons who might be infected, and the public health officials “acted promptly, appropriately, and out of a genuine concern for public health and safety”. Having found no breach of the *Charter*, the trial judge could have set down the pen, but chose nonetheless to go on to an analysis of s. 1 of the *Charter*: if a s. 8 *Charter* breach were proven, was the PHO a reasonable limit of the right to be free from an unreasonable search and seizure “prescribed by law as can be demonstrably justified in a free and democratic society?” The trial judge ruled that it was because the “restaurant PHO” was a proportional response to an urgent and dire public health emergency and minimally impaired the privacy interests of Shorebird and its patrons.

Back to top

R v Z.J.L.B., **2022 SKPC 45**

Daunt, 2022-11-22 (PC22042)

Criminal Law - Assault - Sexual Assault - Sentencing
Criminal Law - Sentencing - *Gladue* Factors

The accused, Z.B., was convicted after trial of sexually assaulting R.C., his intimate partner and the mother of his two children, by not obtaining express consent from her and being reckless or willfully blind as to whether she was consenting to sexual intercourse on two separate occasions (see: 2022 SKPC 44). In sentencing Z.B., the trial judge had the benefit of a Pre-Sentence Report (PSR) and the Victim Impact Statement (VIS) of R.C. in addition to the facts she found at trial.
HELD: The trial judge reviewed the purpose and principles of sentencing contained in ss. 718 to 718.201 of the *Criminal Code* (Code), and determined in this case she was to give particular emphasis to Z.B.’s Gladue factors as enunciated in *R v Gladue*, [1999] 1 SCR 688 and in subsequent cases such as *R v Chanalquay*, 2015 SKCA 141, finding that the history of colonialism and of the residential school experience was intergenerational and indirectly led to Z.B.’s attitude to women, and his view that women were sexual objects, then stated that “the legacy of colonialism and residential schools especially changed the way women and children were treated in Cree communities, fostering the very attitude that led to Z.B.’s offending.” She also found significant that R.C.

involved the justice system in their lives “as a bargaining chip in this couple’s negotiations on the terms of their relationship” and regretted doing so. The trial judge noted that in her VIS, R.C. expressed that the only effect the offences had on her was her concern Z.B. would go to jail, that he was “an amazing father” and she “just wanted… [Z.B.] to see it from my point of view, that there a consensus [sic] for his actions and now that he does, I forgive him.” As to the aggravating factors that R.C. was a vulnerable person because of personal circumstances, including because she was Aboriginal and female (s. 718.04), and that she was to consider “the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims” (s. 718.201), the court did not find that Z.B. was particularly vulnerable but “on the contrary, she seems resourceful when it comes to equalizing power imbalances.” When the Crown proposed a global sentence of incarceration of between three and one-half and four years because Z.B. was being sentenced for two major sexual assaults as defined by *R v Bear*, 2022 SKCA 69, the trial judge stated that the offences were not major sexual assaults because they “affected R.C. hardly at all and had minimal impact on her sexual integrity” so that the three-year starting point for an offender like Z.B., with no criminal record, did not apply. In considering the primacy of deterrence for offences such as this, she said “any sentence of incarceration serves no deterrent purpose in this case, and has the collateral effect of punishing the victim and the children she shares with Z.B.” She also found that Z.B. had now “learned the error of his ways” and was remorseful. In the result, she suspended sentence and placed Z.B. on probation for three years, intending its terms to have a deterrent as well as a rehabilitative effect.

Back to top

***Zimmerman v 101102070 Saskatchewan Ltd.*, 2022 SKPC 49**

Demong, 2022-11-28 (PC22045)

Courts - Judges - Disqualifications - Bias
Small Claims - Practice and Procedure
Civil Procedure - Small Claims

The defendant, 101102070 Saskatchewan Ltd., operating as Moose Jaw Window Cleaning, brought an application that the court recuse itself from hearing the upcoming trial of the matter based on an apprehension of bias. The defendant further sought an order directing that a letter dated October 18, 2021, with attached articles be removed from the court file. The defendant was scheduled for an upcoming trial against the plaintiffs, J.Z. and J.Z., who asserted that the defendant improperly cleaned windows and damaged their property. The defendant asserted that it followed industry-standard practices in window cleaning and no damages resulted. The defendant further filed third-party notices to manufacturers connected to the plaintiffs’ property: Kohltech International Ltd. and Westrum Lumber Ltd. The defendant filed the letter dated October 18, 2021 with attached news articles prior to a case management conference. The court reviewed the entire court file, which contained the letter, in advance of a subsequent pre-trial motion brought by the defendant to strike portions of the plaintiff’s claim. At that motion, the court inquired with the defendant if they intended to call an expert to testify at trial, as the materials contained within the letter would not ordinarily be admitted into evidence. The defendant argued that the court inappropriately reviewed materials prepared for case management that are “without prejudice”, and because of this review, an apprehension of bias has arisen. The issues for the court to determine were: (1) whether the letter and attachments ought to be removed from the court file, and (2) whether the court should recuse itself as a reasonable

apprehension of bias had occurred.
HELD: The defendant's application was dismissed. The court directed the clerk of the court to place the letter and articles under seal until the appeal period from trial expired and determined that there was no reasonable apprehension of bias. The court considered the issue of whether it was appropriate to remove the letter and attachments and noted that the filing of this type of material with the court is common by litigants and counsel. Unfortunately for litigants, news and technical articles are not sufficient to be admitted in the place of proper evidence adduced from an expert. The court considered the two arguments advanced by the defendant for the removal of the letter and attachments and was not persuaded of the position advanced. The defendant's assertion that case management conferences are "without prejudice" was not supported by provisions of *The Small Claims Act, 2016*, SS 2016, c S-50.12 that direct judges presiding at case conferences to ensure the parties are ready for trial. The defendant also submitted that materials at King's Bench pre-trial materials are removed after the meeting is complete, and the same principle ought to apply for matters before the Provincial Court. The court rejected this argument as the stages when conferences occur indicate the differences between the courts: pre-trial settlement conferences in King's Bench are intended to be the last opportunity for litigants to resolve matters prior to trial, while case management meetings occur earlier in proceedings, and while they permit settlement discussions, the court is also considering the procedural steps the litigants will follow to advance their matter to trial. The court directed that the clerk of the court seal the letter and attachments in an envelope under seal with instructions that they remain under seal until such time as any appeal period has expired. If not being reviewed by a superior court, the letter and materials can be returned to the owner. The court cited the recent case of *Patel v Saskatchewan (Health Authority)*, 2020 SKQB 194, which contains principles to consider in a recusal application and recites the test to be applied for reasonable apprehension of bias (from the dissent in *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369): "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly." In addition, the court explored the concept of judicial neutrality and comments that have been made about the reasonable person test. The court dismissed the defendant's application for recusal in applying the test in considering whether a reasonable person would conclude upon learning that a court had reviewed a court file in preparation for a trial. The court confirmed that it received no materials related to settlement and judicial impartiality was not compromised. The court confirmed the upcoming trial and advised the parties that costs of this application can be addressed at its conclusion.

Back to top

***R v Grandel*, 2022 SKPC 48**

Hinds, 2022-12-02 (PC22044)

Constitutional Law - *Charter of Rights*, Section 1, Section 2(b), Section 2(c) and Section 2(d)
Courts and Judges - Preliminary Screening of Charter Applications
Courts and Judges - *Stare Decisis*
Regulatory Offences - Public Health Order - Breach

The applicants in this matter were charged with offences contrary to Public Health Orders (PHOs) issued pursuant to *The Public Health Act, 1994* relating to ten-person outdoor gathering limits put in place in response to the COVID-19 pandemic. They responded to the charges by advancing the argument that the PHOs in question infringed their rights pursuant to ss. 2(b), (c) and (d) of the Charter, and the limit to these rights imposed under the authority of PHOs was not justified by s. 1 of the Charter. The Charter motion was scheduled to be heard by a judge of the Provincial Court (trial judge) from January 16 to 20, 2023. On September 20, 2022, the decision in *Grandel and Mills v Saskatchewan and Dr. Saqib Shahab*, 2022 SKKB 209 (*Grandel and Mills*) was handed down. In it, the King's Bench Justice ruled that PHOs in force from December 17, 2020 to May 30, 2021 restricting outdoor gatherings to ten persons were an infringement of the right of the applicants under ss. 2(b), (c), and (d) of the *Charter* but the limit to these rights was justified under s. 1 of the *Charter*. As a result of *Grandel and Mills*, the Attorney General for Saskatchewan brought an application before the trial judge to have the *Charter* motion summarily dismissed. The trial judge was required to decide, first, whether he had the jurisdiction to dismiss *Charter* applications summarily; second, whether *Grandel and Mills* had decided the legal question in issue in the application before him; and third, whether *stare decisis* applied so that *Grandel and Mills* was binding on him.

HELD; The trial judge allowed the summary dismissal application. He first found on the authority of *R v Wesaquate*, 2022 SKCA 101, that statutory courts like the Provincial Court had the jurisdiction to "control their own process as a part of ordinary trial management" and trial management included the power to weed out and summarily dismiss *Charter* applications that had no "reasonable prospect of success." He next considered whether *Grandel and Mills* had decided the legal question in issue in this application and concluded that it had, because the same PHOs were in issue and the same *Charter* arguments advanced that the outdoor gathering limits were unconstitutional and could not be saved by s. 1. Turning to the matter of *stare decisis*, the trial judge reiterated the fundamental importance to the justice system of adhering to authoritative precedent, citing the leading cases on point, including *R v Comeau*, 2018 SCC 15. He remarked further that "vertical *stare decisis*" required that he follow binding judicial authority "unless one of the two exceptional circumstances in *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] SCR 1101 (*Bedford*) apply", these being first, whether a new legal issue had been raised before him that was not considered in *Grandel and Mills*, and second, whether "the fundamental parameters of the debate [had] been shifted by new circumstances or evidence." He went on to decide that neither of these exceptional circumstances applied, repeating that the issues were identical in both *Grandel and Mills* and the case before him, and as to shifted circumstances or evidence, the further expert evidence proposed by the applicants concerning the rationale for enacting the PHOs would not "fundamentally shift the parameters of the debate."

 Back to top

***R v King Stud Contracting Ltd.*, 2022 SKPC 47**

Agnew, 2022-12-08 (PC22046)

Regulatory Offence - *Saskatchewan Employment Act* - *Occupational Health and Safety Regulations*
Occupational Health and Safety Violations - Sentencing

King Stud Contracting Ltd. (King) came before the court to be sentenced for a violation of *The Occupational Health and Safety Regulations, 1996* (OHS), which resulted in the serious injury of a worker. In February 2021, a first-year electrician

apprentice, D.B., who was 20 years old and had been an employee of King for four months, attended a work site at a townhouse with the principal of King and another employee. D.B. and the principal were working together on a platform that raised them five metres into the air to install roof rafters. D.B. asked his boss if they should wear fall arrest equipment that was available at the site; the principal of King brushed the suggestion aside. While working on the rafters, D.B. moved to his right; the gate on the platform he was working on opened and he fell to the ground. D.B.'s spine fractured: he will be a quadriplegic for the rest of his life. Less than six months prior to D.B.'s accident, King had been issued an OHS violation for use of the platform that D.B. worked from: King had been told not to use this platform for workers, and only for materials. Despite this violation, King did not abate in its practice of using the platform for workers. In addition to this OHS violation, King had been subject to nine others prior to the accident. Following the accident, King would be cited for additional OHS violations that occurred at two separate work sites. King commenced operations in 2016, and its gross earnings ranged from $150,128 to $370,667. The company size varied from 2-5 employees. The principal of King and his wife had access to dividends and earnings of more than $100,000 in four of the six years the business had been operational. The issue for the court to determine was what would be an appropriate sentence to impose for the OHS violation that issued when D.B. was injured.

HELD: King was sentenced to pay a fine of $90,000.00 with a surcharge of $36,000.00 for a total penalty of $126,000.00. The time for King to pay the penalty would be determined after the parties had an opportunity to speak to it. The court cited *R v Westfair Foods Ltd.*, 2005 SKPC 26, 263 Sask R 162 (*Westfair*), and referred to it as a seminal case in sentencing corporations for OHS violations causing injury. The court applied the criteria from *Westfair* – such as the size of the business, scope of the economic activity involved in the accident, maximum penalty, etc. – against the facts received before it. The court noted that in 2014, the maximum fine available for OHS infractions resulting in injury or death increased from $300,000 to $1.5 million exclusive of the 40% surcharge. The court considered the legislature's intent analogously to the Supreme Court's approach to sentencing sexual offences against children in *R v Friesen*, 2020 SCC 9, 391 CCC (3d) 309 (*Friesen*): a legislator's decision to increase a maximum sentence should generally result in imposing higher sentences than those imposed in cases that preceded the increase in maximum sentence. The court cited *R v Hoyeck*, 2021 NSSC 178, a decision that concluded *Friesen* was applicable to OHS decisions. Accordingly, the court considered prior decisions from 2014 concerning sentencing on OHS matters to be of limited utility. In balancing the *Wayfair* criteria, noting the increase in maximum fines, and taking care to impose a fine that would deter King (and others) from OHS violations without collapsing the business, the court fined King $90,000.00 and imposed the surcharge of $36,000.00 for a total penalty of $126,000.00, which represents approximately one year of "net proceeds" available to King from its operations.

Back to top