CaseMail

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.

Volume 25, No. 12 June 15, 2023

Subject Index

Civil Procedure - Class Actions - Application to Strike

Civil Procedure - Class Actions - Certification - Application to Stay - Appeal

Civil Procedure - Court of Appeal Rule 15

Civil Procedure - *Queen's Bench Rules* - Expert Witnesses

Corporate Law - Shareholder Loans

***R v Dela Cruz*, 2023 SKCA 36**

Schwann Leurer Drennan, 2023-03-22 (CA23036)

Criminal Law - Appeal - Conviction and Sentence
Criminal Law - Appeal - Summary Conviction - Question of Law
Court of Appeal - Leave to Appeal - Sufficient Merit and Sufficient Importance

The appellant was convicted of sexual assault and sentenced to 14 months' imprisonment minus credit for pre-sentence custody followed by 12 months of probation. He appealed both his conviction and sentence pursuant to s. 813 of the *Criminal Code* (Code), and a summary conviction appeal court judge (KB judge) dismissed that appeal. The appellant then sought leave to appeal the dismissal decision pursuant to s. 839 of the Code. That provision

Court of Appeal - Leave to Appeal - Sufficient Merit and Sufficient Importance

Criminal Law - Assault - Sexual Assault

Criminal Law - Appeal - Conviction and Sentence

Criminal Law - Appeal - Summary Conviction - Question of Law

Criminal Law - Appeal - Unreasonable Verdict

Criminal Law - Beyond a Reasonable Doubt

Criminal Law - Evidence - Admissibility - Electronic Documents

Criminal Law - Sentencing - Aggravated Assault

Criminal Law - Witness Credibility and Reliability

Evidence - Witnesses - Examination - Inconsistent Statements

Insurance Law - Material Change in Risk

Practice and Procedure - Summary Judgment

Regulatory Offences - Public Health Order - Breach

Statutes - Interpretation - *Public Health Act, 1994*, Section 38, 45

authorizes appeals on questions of law alone with the court's leave. The test is that the proposed appeal either raises a question of law that is significant to the administration of justice generally or is compellingly meritorious in its own particulars (to paraphrase *R v Bray*, 2017 SKCA 17 [*Bray*]). Although this case failed to meet the test, the court considered it appropriate to provide further reasons for the dismissal.
HELD: The appellant argued with respect to his conviction that the KB judge erred in his assessment of the trial judge's interpretation of "witness demeanour." The trial judge, the appellant argued, imputed a mental disability to the complainant although the evidence showed she was hearing-impaired and did not establish that she suffered from any cognitive issues. This was not, however, what the appellant had argued before the KB judge; he had asserted that the trial judge erred by conducting his own psychological assessment of the complainant. Even if the appellant had not altered this ground of appeal, it would fail on both prongs of the *Bray* test. The KB judge noted that the trial judge had simply observed that the complainant gave the impression that she had a cognitive deficit and he explained why this was the case in his reasons. In terms of the sentence appeal, the appellant argued that the KB judge erred in law by confirming the trial judge's conclusion that the court lacks jurisdiction to order a psychological report at the sentencing stage, citing *R v Bouvier*, 2011 SKCA 87 (*Bouvier*). The appellant argued that *Bouvier* pertained to a Part XXIV dangerous offender sentencing hearing and did not apply to his own sentencing proceedings under Part XXIII. The Court of Appeal agreed that whether *Bouvier* applied in such cases was a live issue. However, that was not the only reason the trial judge denied the psychological assessment: he denied it because he already had sufficient information to apply the sentencing principles under s. 718.2 of the Code to the appellant's circumstances. Leave to appeal was therefore denied.

© The Law Society of Saskatchewan Libraries

Back to top

***Stewart v Stewart*, [2023 SKCA 44](#)**

Richards, 2023-03-22 (CA23044)

Civil Procedure - Court of Appeal Rule 15

The Chief Justice in chambers orally dismissed an application for a stay pursuant to Court of Appeal Rule 15 and followed up with a short written fiat. The applicant wished to stay the King's Bench judgment because of its potential effect on the parties' divorce and pension assets. She was concerned that divorcing the respondent would change her status as

Statutes - Interpretation - *Saskatchewan Insurance Act,* Section 128(2)(4)

Wills and Estates - Wills - Undue Influence

Cases by Name

Abbott Laboratories, Ltd. v Spicer

Odelein v Odelein Farms Ltd.

R v Dela Cruz

R v Friesen (2023 SKPC 20)

R v Friesen (2023 SKPC 21)

R v Kahmahkotayo

R v Kennedy

R v Purcell

Riben Estate, Re

Stewart v Stewart

Wynward Insurance Group v Smith Building and Development Ltd.

beneficiary under his pension plan. The respondent was terminally ill.
HELD: It was not necessary in the circumstances to apply for a stay. The divorce judgment stated that the parties were "divorced and, unless appealed, this judgment takes effect and the marriage is dissolved on the 31st day after the date of this judgment." Since the applicant had appealed the judgment, it would not take effect. There was no conflict between Queen's Bench Rule 15-102 and the recently amended Court of Appeal Rule 15. The former Rule 15 automatically imposed a stay on the judgment appealed from; the new Rule meant that the stay was not automatic, reflecting the presumption that the lower-court judgment is correct. The wording of Rule 15 made it clear that although there was no longer an automatic stay, the judgment could still be stayed for other reasons. This application was therefore dismissed.

© The Law Society of Saskatchewan Libraries

Back to top

***Abbott Laboratories, Ltd. v Spicer*, 2023 SKCA 55**

Caldwell Schwann Drennan, 2023-05-10 (CA23055)

Civil Procedure - Class Actions - Certification - Application to Stay - Appeal
Civil Procedure - Class Actions - Application to Strike

The background to this case involved a proposed national class proceeding for claims about the drug sibutramine. The plaintiff (respondent) commenced his action in 2011 but took no steps to advance it for nearly five years. During that time, parallel proceedings were commenced, prosecuted, and resolved in three other provinces. Abbott Laboratories, Ltd. and Abbott Laboratories (appellants) appealed a Court of Queen's Bench chambers decision dismissing their applications to have the plaintiff's action dismissed or permanently stayed. The chambers judge found that it would be an abuse of process to allow the action to proceed to certification but declined to exercise his discretion to dismiss the action or order a permanent stay of proceedings. On appeal, the appellants argued that while it was correct for the chambers judge to conclude that the proceedings were an abuse of process, the action should have been permanently stayed.
HELD: The Court of Appeal (court) allowed the appeal, set aside the chambers decision, and ordered a permanent stay of the class action proceedings as an abuse of process under Rule 7-9(2)(e) of *The Queen's Bench Rules*. The chambers judge erred in his assessment of the three discretionary factors in determining whether it would be fair to stay or strike the class action. In weighing the discretionary factors, the chambers judge misinterpreted or misapprehended a decision relied on by the respondent and gave it too much weight when exercising his discretion not to grant the permanent stay. It was an error for the chambers

Disclaimer: all submissions to Saskatchewan courts must conform to the *Citation Guide for the Courts of Saskatchewan*. Please note that the citations contained in our databases may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

judge to conclude that the case represented a "significant development in the law". The respondent should have known that, as a result of the jurisprudence and concluded actions, he would have to provide some proof of the existence of a plausible methodology for establishing causation on a class-wide basis in the appellants' strike applications. The plaintiff was aware of this impediment and the obligation of putting his best foot forward in the applications. However, he presented the same evidence that was rejected in other jurisdictions, putting nothing new or different before the Saskatchewan courts.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Purcell*, 2023 SKCA 56**

Jackson McCreary Drennan, 2023-05-10 (CA23056)

Criminal Law - Appeal - Unreasonable Verdict
Criminal Law - Assault - Sexual Assault
Criminal Law - Witness Credibility and Reliability
Evidence - Witnesses - Examination - Inconsistent Statements

The appellant, K.P., was tried on one charge each of assault and sexual assault. He was acquitted of the assault charge but convicted of sexual assault [see: *R v Purcell* (Sask QB) Melfort, CRM 5/20, JCM, Oct 5/21]. He was sentenced to ten months' custody followed by two years of probation, and he would have to comply with the *Sex Offender Information Registration Act* (SOIRA) for 20 years (see: 2022 SKQB 66). K.P. appealed both his conviction and sentence. K.P., who was 32 years old at the time of the incidents that gave rise to his charges, had been in an on-again, off-again relationship for approximately two years with the complainant, K.M., who was 19 at the time of the incidents. They had dated while living in a small town in eastern Saskatchewan, but K.M. had moved to Saskatoon for school. K.P. was watching her on a May evening in 2019 when she left her workplace with a co-worker. When she and the co-worker kissed, K.P. became angry and confronted them, though exactly what transpired is controverted and the trial judge did not find it necessary to establish exactly what happened. In any case, K.P. retrieved a promise ring he had given K.M. and texted her at great length that evening. K.M. agreed to meet K.P. the following morning approximately halfway between Saskatoon and their hometown, and it was then that the incidents occurred that gave rise to K.P.'s charges. K.P. admitted that the two of them had engaged in sexual acts but he denied assaulting K.M. The trial judge found the Crown had proven that K.M. had not consented to the sexual acts and that K.P. did not have an honest but mistaken belief that she had consented; however, the trial judge had reasonable doubt regarding the alleged assault and thus acquitted K.P. of that charge. K.P.'s grounds of appeal were as follows: 1) The trial judge failed to assess the complainant's evidence properly, including failing to resolve what K.P. alleged were inconsistencies; 2) The trial judge relied too heavily on the complainant's demeanour in assessing her credibility; 3) The trial judge misapplied the rule in *Browne v Dunn* (1893), 6 R 67 (HL); and 4) The verdict was unreasonable because the conviction for sexual assault was inconsistent with the acquittal for assault.
HELD: K.P.'s conviction appeal was dismissed, as was his sentence appeal but for the SOIRA portion. The court remarked first that the Supreme Court has repeatedly directed appellate courts on the deference they owe to lower courts' findings with respect to

witness credibility (see: *R v Burke*, [1996] 1 SCR 474; *R v Gagnon*, 2006 SCC 17; *R v R.P.*, 2012 SCC 22; and *R v G.F.*, 2021 SCC 20). 1) One of the three locations where K.P. sexually assaulted K.M. was at a greenhouse. K.M. described what had happened and reported she began to "tear up." The two had spoken to one of the greenhouse staff before they left. Defence had called that staff member as a witness at trial, and she testified that she had seen nothing out of the ordinary. K.P. argued that the trial judge had erred in suggesting this was not relevant as it contradicted the complainant's contention that she had been upset. The appellant was concerned that the trial judge had mistaken his argument for one that impermissibly relied on the so-called "twin myths" about how sexual assault victims respond and act. The court found that there was no inconsistency between the complainant's evidence and that of the greenhouse staff member, and so this ground had no merit. 2) K.P. argued that there were inconsistencies in the complainant's evidence regarding their sexual contact at the second location, the bird sanctuary. In cross-examination, K.P.'s counsel had suggested to the complainant that she had told the story somewhat differently at the preliminary inquiry than she did at trial and questioned how K.P. could have grabbed her from the driver's seat after they had both reclined their seats, given there was gear shift between them and suggested she had straddled him. The trial judge did not address this purported inconsistency in her reasons. The court found it perfectly reasonable that the trial judge did not address every inconsistency that defence flagged in the complainant's testimony. Also, it was understandable for the complainant not to recall every detail of the incident that had happened in 2019, nor every detail she had shared at the preliminary inquiry two and a half years earlier. The court also noted that the transcript seemed to indicate the complainant was not familiar with the word "straddle" (she specifically said she did not think she was "strangling" or "straggling" him), so it was clearly not the case that she had admitted to the same. 2) K.P. argued that the trial judge relied unduly on K.M.'s demeanour in her assessment of the complainant's credibility. The court noted that although it was true that demeanour during testimony should not be the only indicator of credibility, case law dictated that it was still a legitimate consideration. Additionally, the Court of Appeal had to be mindful that credibility was a finding of fact and could only be interfered with on a palpable and overriding error standard. Further, the court found that the trial judge's assessment of credibility was based on far more than the complainant's demeanour. 3) On the stand, K.M. had denied that she attempted to add K.P. to her Snapchat account, and K.P.'s counsel presented her with a screenshot of a notification on one of K.P.'s devices that indicated she had. The Crown objected to this, citing the *Browne v Dunn* rule, and the judge agreed that the screenshot could not be tendered. The court agreed that the trial judge erred by giving effect to the Crown's submission that *Browne v Dunn* applied because the point concerned was not substantial and because the subject matter had been introduced to K.M. during examination-in-chief. However, the court noted, it is very difficult for an appellant to argue successfully that a trial judge erred in applying *Browne v Dunn* considering that the defence could have recalled the witness to ask the relevant question. 4) K.M. argued it did not make sense for the trial judge to acquit him of one charge and convict him of the other based on the evidence of the same complainant, whose testimony she described as "consistent and forthright." The court quoted *R v Pittiman*, 2006 SCC 9, for the observation that "different verdicts may be reconcilable on the basis that the offences are temporally distinct, or are qualitatively different…" In this case, though close to one another in time, the offences were qualitatively different. K.P. bore the onus of proving that the verdict was unreasonable and had failed to do so. The trial judge had a reasonable doubt regarding the assault that she had not had regarding the sexual assault. K.P.'s one ground for his sentence appeal was that his sentence was demonstrably unfit. The court reviewed the aggravating and mitigating circumstances in the case and could not find any error in the carceral portion of the sentence. The SOIRA order, however, would not stand because since the sentencing decision, the Supreme Court had ruled in *R v Ndhlovu*, 2022 SCC 38, that s. 490.012 of the Criminal Code was unconstitutional and not justified under s. 1 of the *Charter*. The Crown consented to exempting K.P. from the SOIRA order and the court accordingly set it aside.

© The Law Society of Saskatchewan Libraries

Back to top

Wynward Insurance Group v Smith Building and Development Ltd., 2023 SKCA 57

Schwann Tholl Kalmakoff, 2023-05-12 (CA23057)

Civil Procedure - *Queen's Bench Rules* - Expert Witnesses
Insurance Law - Material Change in Risk
Statutes - Interpretation - *Saskatchewan Insurance Act*, Section 128(2)(4)

Smith Building and Development Ltd. (insured/respondent) was the owner and lessor of commercial buildings. One building leased to a tenant was destroyed by fire caused by arson by an unknown third party. Wynward Insurance Group (insurer/appellant) had agreed to cover the respondent against losses or damage for the value of the property if an insured peril took place. The respondent made a claim on its insurance policy for the losses, but the appellant refused to indemnify the respondent on the basis that the respondent failed to inform it of a material change in risk. The senior claims investigator for the appellants based his refusal to indemnify on an internet search revealing an unverified claim that one of the subtenants (a motorcycle club) was affiliated with the Hells Angels Motorcycle Club, and that taking on such a tenant was a material change in risk that the appellant was not apprised of. The respondent was successful in its action at trial against the appellant in contract and negligence for the value of the insured property, business interruption losses, and costs and expenses. At trial, the main issues were whether there had been a material change in risk, and if not, whether the respondents were entitled to replacement cost coverage. The trial judge concluded that there was no material change in risk based on the evidence presented, and even if there had been, the appellants did not prove that the respondents knew about the connection between the tenant and alleged criminal activities. Without providing a notice of expert witness during the trial, the appellants sought a ruling from the trial judge on whether its police officer witness could provide opinion evidence as a participant expert witness about the nature of the tenant’s relationship with the Hells Angels. The trial judge concluded that the officer was not a participant to the proceedings and therefore did not fall within the participant expert exception recognized in the case law. The Court of Appeal (court) dismissed the appellant’s appeal, and decided the following issues: 1) whether it was an error to refuse to allow the officer to provide opinion evidence as a participant expert without giving notice under *The Queen’s Bench Rules* (Rules); 2) whether the trial judge erred in concluding the appellant had failed to establish a material change in risk; and 3) whether the trial judge erred in awarding replacement cost coverage.
HELD: The appeal was dismissed. 1) There was no error in refusing to allow the officer to provide opinion evidence as a participant expert. The trial judge concluded that the officer was not a participant witness, and therefore his evidence was subject to a notice requirement. The trial judge correctly identified the applicable law and applied it to the facts. He correctly identified that there is a limited exception to the notice requirements under the Rules for participant experts. The court reviewed the role expert opinion plays in litigation as set out in the jurisprudence and the Rules. The appellant’s application at trial for a participant witness was based solely on oral submissions from legal counsel: the trial judge was not provided with a summary of the officer’s proposed evidence, a statement of the officer’s qualifications to express an opinion, or *viva voce* testimony from the officer. The trial judge was asked to permit the officer to testify as a participant expert based on a limited foundation for how that officer fit within that category of expert. The trial judge concluded that the officer was not a participant expert in the proceedings in any way; he was an independent third party. The absence of notice put the defendants at a disadvantage. This could have been remedied at trial by: requesting an

adjournment to provide the appropriate notice; giving the respondent time to prepare its cross examination; or suggesting that the defendant call an expert witness of its own. 2) The appellants failed at trial to establish, on a balance of probabilities, that the presence of the tenant was a material change in risk for the insurance policy. The trial judge did not err in this conclusion. The court noted that the appellant provided limited and unsatisfactory evidence at trial on the elevated risk that was material to the insurance contract. The appellants did not call evidence to show that the tenants were involved in illegal activity showing risk or materiality. The court reviewed the law on insurance contracts, noted the context of utmost good faith and the corresponding duty of an insured to provide information to the insurer. Section 128(2)(4) of *The Saskatchewan Insurance Act*, RSS 1978, c S-26 (replaced in 2020 by *The Insurance Act*, SS 2015, c I-9.11) codified the common law duty to disclose a material risk after a policy is in place. A fact material to the risk is one that "if the facts had been truly represented they would have caused a reasonable insurer to decline the risk or required a higher premium" (*Henwood v Prudential Insurance Company of America*, [1967] SCR 720). However, the insured's duty to disclose only extends to facts which he or she had actual or constructive knowledge of, that are material to the risk being insured. Whether something is material is a question of fact, and the burden of proof rests with the insurer on a balance of probabilities. There was evidence to suggest that the appellant did not consider the mere presence of a motorcycle club to be a material risk: it was aware of the presence of a motorcycle club in 2012 and renewed the policy anyway. The trial judge was not convinced that the respondent had the requisite knowledge of any connection between the motorcycle club and anything criminal. 3) There was no error regarding how the trial judge addressed the replacement cost issue. At trial, the appellant argued that the policy only covered the actual cash value of the property. The respondent argued that it was entitled to replacement coverage, restricted to the limits under the policy ($640,000). The trial judge agreed with the respondent and awarded it the limit under the policy. On appeal, the appellant argued that it was an error to conclude that the respondent was not obliged to rebuild within a reasonable period. The appellant relied on a Queen's Bench case to argue that the respondent received a windfall because it did not attempt to replace the loss within a reasonable period of time. The court was not persuaded; the case relied on by the appellants referred to specific contractual provisions requiring the destroyed property to be rebuilt in order to receive an insurance payout for the replacement value. There was no similar clause in the insurance contract here.

© The Law Society of Saskatchewan Libraries Back to top

***Riben Estate, Re*, [2023 SKKB 72]**

Morrall, 2023-04-05 (KB23069)

Wills and Estates - Wills - Undue Influence

The deceased mother left behind two surviving sons (Carl and Paul) and a daughter, Juanita. All children were involved in contentious litigation over her estate, and Paul had commenced an action against Carl and his mother before she died. Carl and Juanita were co-executors of the estate and applied for probate, but Paul filed a caveat. Here, the court dealt with three applications involving two wills executed by the deceased: the first in April 2021 and the second in July 2021. The first application by Paul was under Rule 16-46 of *The Queen's Bench Rules* for the co-executors to prove the July will in solemn form, and that the court order a trial on the issue of whether Carl unduly influenced the deceased's execution of the July will. The second application, filed by Carl, requested an order under s. 19 of *The Administration of Estates Act*, SS 1998, c A-4.1 that he be appointed as administrator of the

estate pending this litigation. The third application, filed by Paul, requested an order under s. 19 of *The Administration of Estates Act* to appoint the Public Guardian and Trustee as administrator of the estate pending this litigation. Paul provided calculations in his affidavit and stated he was practically disinherited under the July will, calculating that under it he would receive $70,000 less than under the April will. There was affidavit evidence regarding the medications the testator had been taking, not to argue the testator lacked testamentary capacity, but that she was susceptible to undue influence. The court noted that much of the affidavit evidence contained opinion and argument, but there was no application to strike by either party. Uncontroverted affidavit evidence from the deceased's lawyer was important to the court's consideration of undue influence. The lawyer had received instructions from Juanita on how the April will should be amended, including gifting a car to Juanita, and allowing Juanita to reside in the home on the home quarter indefinitely, with the land going to Carl. The testator clearly indicated to the lawyer during a July phone call that she did not want Juanita's instructions followed. The lawyer was careful to obtain instructions from only the testator. Affidavit evidence indicated that the lawyer had no doubts about the testator's testamentary capacity during the signing of the July will, and that the testator was "very sure" she wanted to transfer her property to joint tenancy with Carl. Notes from the meeting also indicated the testator did not want Juanita's instructions to be followed. The testator set up the appointment on her own, arranged for her own transportation, and was alone during the meeting with the lawyer. The court decided the following issues: 1) Whether Paul had standing to bring an application under Rule 16-46 to prove a will in solemn form; 2) What was the legal process and test to prove a will in solemn form under Rule 16-46? 3) Whether Paul provided sufficient evidence to raise questions about undue influence, and if so, whether the respondent provided sufficient evidence to prove there was no undue influence; 4) If there was a genuine issue requiring a trial, who should be the administrator of the estate property pending litigation? and 5) What should the quantum of costs be?
HELD: There was insufficient evidence to warrant a trial on the issue of undue influence. The July will could be probated, so applications regarding the appointment of administrators were dismissed. 1) The applicant clearly had standing to make the application under Rule 16-46 because he was the son of the testatrix and a beneficiary in both the contested July will and the prior April will. He was "interested" in the deceased's estate as set out in case law. The court referred to *Olson v Skarsgard Estate*, 2018 SKCA 64 for guidance on who may have standing to have a will proven in solemn form. 2) The court set out the applicable law in *McStay v Berta Estate*, 2021 SKCA 51 for a summary of the process to prove a will in solemn form. The application to challenge a will on the basis of testamentary incapacity involves two levels of hearings: the first, at chambers to summarily consider the evidence to determine if there is sufficient merit to warrant a trial; and if successful at the first stage, the second stage is a trial to determine the issue itself. The chambers judge has a gatekeeping role to ensure that only those matters in which there is a genuine issue to be tried proceed to trial. In doing this, the chambers judge determines whether the person challenging the will has pointed to some evidence which, if accepted at trial, would tend to negative testamentary capacity and/or prove undue influence. The person challenging the validity of the will must provide an evidentiary foundation to support their position. Here, the applicant did not argue that there was an issue with the deceased's mental capacity in executing the will. Rather, the applicant argued that Carl unduly influenced the deceased in preparing the second will to Carl's benefit. Undue influence exists when a person is coerced into doing something that they have no desire to do. The burden is on the party challenging the testamentary document to prove undue influence. The court summarized five guidelines useful for determining the potential for undue influence upon a testator: a) issues related to the testator's vulnerability as a result of medications or illness must have a close temporal connection to the execution of the will; b) the court should examine the circumstances leading up to the preparation of the will; c) the court should examine the relationship between the testator and the individual who stands to benefit from the will related to control exerted on the testator; d) is the new will significantly different from other previous documents? e) if so, is there a valid reason for the change? 3) The application for proof of the July will in solemn form was denied, and the executors were entitled to probate the July will. The affidavit evidence did not raise a genuine issue requiring a trial to determine whether the deceased was unduly influenced by Carl when executing the

July will. Paul did not establish the necessary foundation to support a genuine issue requiring a trial. The uncontroverted evidence of the lawyer led the court to conclude that there were no indicia to suggest undue influence by Carl during the execution of the July will. The court also considered whether undue influence arose from the narcotics and prescriptions the deceased was taking. While the deceased may have been in a vulnerable state at times due to a combination of factors, there was no evidence pointing to the potential of Carl taking advantage of this vulnerable state to exert undue influence in relation to the July will. The court continued the analysis in the event there was an error, to see whether the respondent provided uncontradicted evidence to affirm the deceased's testamentary capacity. The court noted the timing of Paul's lawsuit – he sued his mother (and Carl) one day after the April Will was executed. Therefore, the fact that Paul received less in the July will than in the one executed in April was not suspicious. In both wills, Paul was not given any power as an executor or alternate and received less than 10 percent of the estate. The application for proof of the July will in solemn form was denied, and the co-executors were entitled to apply for probate of the July will. The uncontroverted evidence of the lawyer provided appropriate explanations for the deceased's behaviour that did not point to undue influence. 4) Because the court found that the July will could be probated, there was no need to designate an administrator. Both applications requesting that administrators be appointed were dismissed. 5) The parties' requests for solicitor-client costs were denied. The court ordered column 2 costs in favour of Carl.

© The Law Society of Saskatchewan Libraries Back to top

R v Kennedy**, 2023 SKKB 73**

Morrall, 2023-04-10 (KB23070)

Criminal Law - Assault - Sexual Assault
Criminal Law - Beyond a Reasonable Doubt
Criminal Law - Witness Credibility and Reliability

M.L.K. pled not guilty to two counts of sexual assault contrary to s. 271 of the Criminal Code and after trial before judge alone, the King's Bench justice provided these reasons. The court reiterated six basic principles applicable to the assessment of evidence in a criminal trial. 1) The Crown bears the onus of proving guilt beyond a reasonable doubt. 2) The Crown is not required to prove any particular fact beyond a reasonable doubt unless it is connected to an element of the offence or a negation of the defence. 3) The court quoted paragraph 39 of *R v Lifchus*, [1997], 3 SCR 320 for the observation that "proof beyond a reasonable doubt" means one "based on reason and common sense" and "logically derived from the evidence or absence of evidence." 4) Regarding the credibility of evidence, the reasonable doubt standard applies. The court considered *R v D.W.*, [1991] 1 SCR 742, and emphasized that the court must acquit the accused if the evidence raises any reasonable doubt about his or her guilt. The court looked to *R v J.H.S.*, 2008 SCC 30 for the principle that where the evidence is conflicting and the court cannot decide whom to believe, the accused is entitled to an acquittal. 5) The elements of a witness' testimony to be assessed are reliability and credibility, and the court illustrated how these are identified with several examples, dwelling on the issue of witness demeanour, which may be significant but must be considered with caution. 6) Finally, the court reviewed case law (in particular, *R v Barton*, 2019 SCC 33 and *R v J.A.*, 2011 SCC 28)

that outlined several myths related to sexual assault: i) no-one can consent to future sexual activity; ii) consent cannot be implied due to a relationship between the accused and the complainant; and iii) consent can be withdrawn at any time. M.L.K., who was 30 years old at the time of trial, was accused of sexually assaulting T.W., the younger sister of two of his close female friends who had recently turned 18, in several separate incidents that occurred on two dates in January and February 2021. The court summarized the evidence of all the witnesses who had attended the party in February when M.L.K. and T.W. had several encounters. The defence argued that M.L.K. and T.W. were engaged in a brief sexual relationship that both wanted to keep a secret because of their age difference and the fact that M.L.K. was friends with T.W.'s older sisters. Defence theorized that once the older sisters found out about the sexual contact, T.W. told them it was non-consensual so they wouldn't be angry with her. The Crown argued that M.L.K. had been frustrated as he had not been in a sexual relationship since before the pandemic started and that his desire for sex motivated him to message T.W. repeatedly, beginning on her 18th birthday in December 2020.
HELD: The court did not find favour with either the defence's or the Crown's theory. M.L.K. and T.W.'s relationship was not discovered until T.W. confessed to one of her older sisters, K.W., who was not angry, contrary to the defence's theory. In terms of the Crown's version of events, there was no evidence that M.L.K. appeared frustrated or angry at any point in the events leading to his being charged. The court allowed that the *actus reus* of sexual assault had been established but turned to the *mens rea*: to find the accused guilty, the court needed to be satisfied that 1) T.W. did not subjectively consent; and 2) M.L.K. was either aware of her lack of consent or was reckless or wilfully blind with regard to whether she consented. The court found T.W.'s sisters and friend, A.I., all quite reliable and credible as witnesses, despite their self-reported levels of intoxication at the party in February, and their stories largely corroborated one another's. On the other hand, M.L.K.'s testimony did not leave the court with reasonable doubt. Specifically, the court did not believe, with respect to the January incident, that M.L.K. did not have specific plans or intentions with regard to T.W. when he had been messaging her repeatedly with compliments about her beauty and had had minimal contact with her before her 18th birthday. The court did not believe that M.L.K. was at about 5/10 on the intoxication scale, as he claimed, since he also claimed his drunkenness made him unable to perform sexually. It was also very hard to believe that T.W. would have stayed in M.L.K.'s room from early in the morning until 8 or 9 pm without food and water. Regarding the February incidents, the court remarked that it seemed odd that T.W. would consent to sex with M.L.K. at a party her sisters were also attending, given that she did not want them to know about the relationship. The court called this an "unbelievable male pornographic fantasy." There were frailties in T.W.'s evidence regarding the January incident that left the court some doubt, so in the result, the court found M.L.K. not guilty of the first count but guilty of the second count of the indictment.

© The Law Society of Saskatchewan Libraries

Back to top

***Odelein v Odelein Farms Ltd.*, 2023 SKKB 86**

Currie, 2023-04-24 (KB23078)

Corporate Law - Shareholder Loans
Practice and Procedure - Summary Judgment

In this matter, L.T.O. sued O. Farms Ltd. (Farms) with respect to the farming business operated by Farms. Earlier, L.T.O. had applied for summary judgment, a Queen's Bench judge had dismissed his application, he appealed, and the Court of Appeal remitted his matter to Queen's Bench (see: 2022 SKCA 28). L.T.O. and his two brothers had all pursued careers as hockey players, and they all discussed how, if they were fortunate enough to play professionally, they would invest their earnings in the family farm and they would farm together at the end of their careers. Of the three, only L.T.O. had a career in the NHL. During his time as a hockey player, his family incorporated, creating Farms. The land and equipment various family members – including L.T.O. – had owned before was rolled over into Farms in exchange for shares in the corporation. The value of these assets was recorded as shareholder loans. L.T.O.'s shareholder loan at the time of incorporation was $819,566. He contributed approximately a further $1,627,975.00 in the form of leases and purchases of farm equipment during his hockey career. He retired in 2006 and farmed with his family for a few years. When he became engaged to his second wife in the fall of 2011, and it was clear he would no longer be farming, he requested repayment of his shareholder loan. His family, however, told him that none of the rest of the family expected repayment of their shareholder loans, given that the funds had been used for the benefit of the family farm. When it was clear he would not be receiving the money, L.T.O. commenced his action against Farms. At this stage, all the court needed to decide was whether to allow L.T.O.'s application: 1) to call a witness, K.L., who was an accountant for Farms around the time they incorporated; and 2) to enter his unredacted divorce certificate into evidence. The court had ordered a hearing for all the members of the family to provide *viva voce* testimony so that the matter could be decided without the need for a trial.
HELD: The court found that allowing L.T.O.'s applications would undermine the summary judgment process. The court had provided a specific order as to what evidence it would require for summary judgment. Pursuant to *The Queen's Bench Rules*, the parties had filed briefs before the hearing of the initial summary judgment application and subsequent hearing. As such, the parties became aware of each other's positions and arguments. L.T.O. had not suggested to the court that Farms' brief presented anything that would require more evidence to be adduced, nor had he sought the leave of the court to adduce further evidence. The court suggested that if it were to allow K.L. to provide evidence, chances were good that Farms would seek to adduce further evidence in rebuttal, thus adding delay and expense to a process intended to reduce delay and expense. L.T.O. would have to argue his summary judgment application again with the same evidence he used the first time.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Friesen*, [2023 SKPC 20]**

Hinds, 2023-02-03 (PC23015)

Regulatory Offences - Public Health Order - Breach
Statutes - Interpretation - *Public Health Act, 1994*, Section 38, 45

The accused was charged with failing to comply with a public health order by participating in a gathering of more than 30 people, contrary to s. 61 of *The Public Health Act, 1994*. The accused applied to quash the proceedings because ss. 38 and 45(2)

did not authorize a minister or medical health officer to issue an order prohibiting gatherings over 30 people. The accused claimed the public health order was invalid and therefore the charge set out in the ticket was a nullity. The court considered: 1) Did the presumption of regularity apply to this case; 2) Did the minister delegate his power to make public health orders and was the designation effective at the time of the ticket; 3) Was the order prohibiting gatherings authorized by ss. 38 and/or 45 of the Act? HELD: The application was dismissed. The minister properly delegated his order-making powers under the Act, and the chief medical health officer's order was valid. 1) The presumption of regularity is an evidentiary principle that in the absence of evidence to the contrary, someone acting in a public capacity is presumed to have been regularly and properly appointed. In this case, there was a prima facie presumption the public health officer had the necessary authority to act under s 45 of the Act, including to prohibit public gatherings. The presumption was not rebutted. 2) The minister testified that he sent an email, drafted by his deputy minister, to delegate in writing his authority to the chief medical health officer. The email satisfied legislative requirements for a delegation. The delegation remained valid after the minister was replaced in his role. The chief medical health officer had authority to issue a public health order under s. 45(1) of the Act. 3) The chief medical health officer was a medical health officer, and s. 38 created a distinct order-making power to order a person to take or refrain from taking any action. The public health order specified the medical officer believed the measures were necessary to decrease or eliminate risk to health from a communicable disease. The order was not *ultra vires* because it applied to more than one person. The minister had the authority to make the order prohibiting public gatherings over 30 people under s. 45. The expiration clause in s. 45(2.3) did not apply because the order was not made pursuant to s. 45(2.2). The order was *intra vires*.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Friesen*, [2023 SKPC 21]**

Hinds, 2023-02-03 (PC23016)

Criminal Law - Evidence - Admissibility - Electronic Documents
Regulatory Offences - Public Health Order - Breach

The accused was charged with participating in an outdoor gathering greater than 30 people, contrary to a public health order. Four witnesses from the police service and the former minister of health testified for the Crown. No one testified on behalf of the accused. The court considered: 1) Had the Crown proven beyond a reasonable doubt that a public health order was in place; and 2) Had the Crown proven beyond a reasonable doubt the accused participated in an outdoor gathering greater than 30 people? HELD: The accused was guilty. 1) The Crown proved beyond reasonable doubt the public health order was in place at the relevant time. As found in a previous decision, the minister made a valid sub-delegation of his order-making authority to the chief medical health officer, who in turn made a valid public health order. The order prohibiting outdoor private and public gatherings over 30 people was in place. Gathering means a coming together of people in a group. 2) On the second day of trial, the accused admitted his identity. The court reviewed the admissibility and authentication of electronic documents. The Crown entered, through police witnesses, video surveillance screenshots and Facebook videos showing the accused speaking to a group of over 100 people. In the video, the accused was introduced by name. No evidence was presented to the contrary and there was no reasonable basis to doubt the integrity of the electronic documents. One witness testified how he had viewed a gathering outside the Legislature through

the video surveillance system and entered several screenshots from the video showing the accused. The screenshots showed the accused speaking to a group of people and in the gathering of people. Approximately 200 people were gathered. Based on the testimony and photographs, the accused participated in an outdoor public gathering of more than 30 people.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Kahmahkotayo*, 2023 SKPC 36**

Schiefner, 2023-05-12 (PC23031)

Criminal Law - Sentencing - Aggravated Assault

The court provided written reasons for sentencing the offender to a period of 18 months' incarceration for an aggravated assault on his ex-father-in-law (victim). The accused told his ex-partner that he wanted to stop by to drop off a birthday present for his daughter. His ex-partner told him not to come over because her father was there. She knew that there was likely to be a confrontation if the two of them were in the same room. Had her father not been there, the offender would have been allowed to come over. The accused went to the house anyway, and a confrontation occurred. The court had found that the victim's demeanour towards the offender was disrespectful and unnecessarily escalated the situation. The offender punched the victim in the face, knocking him to the ground. He kicked the victim in the head more than once while the victim was on the ground. The victim sustained serious injuries, including a broken nose, broken eye socket, and a laceration inside his upper lip that required sutures. The Crown argued for a sentence in the range of 3 years, due to aggravating factors including: the seriousness of the injuries; children were present; and the domestic aspect of the relationship. The Crown noted that the sentencing range for aggravated assault is two to four years' incarceration, assuming an offender of otherwise good character with no criminal record. Defence argued that a non-custodial sentence or a mix of custodial and non-custodial sentences could satisfy the principles of sentencing. Defence pointed to mitigating factors, including provocation by the victim, *Gladue* factors, and the offender's personal circumstances. The offender had a criminal record, but it was limited to an impaired driving charge and a breach of undertaking. HELD: A period of incarceration for 18 months was appropriate here, given the offender's personal circumstances and his moral blameworthiness for what happened. The principles of sentencing could not be satisfied by a community-based sentence. There were *Gladue* factors present; the offender was genuinely remorseful for what happened; he self-enrolled in treatment and completed an anger management program. Provocation did not excuse the offender's conduct, but it was a factor taken into consideration in understanding his moral blameworthiness.

© The Law Society of Saskatchewan Libraries

Back to top