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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The town sought leave, pursuant to s. 33.1 of The Municipal Board Act, to appeal a decision of the Municipal Boundary Committee (committee). The committee had dismissed the town's application, pursuant to ss. 53(1)(a) and 60(2) of *The Municipalities Act* and s. 18 of *The Municipal Board Act*, to annex land in a neighbouring rural municipality. The annexation would significantly reduce the rural municipality's property tax base. The town's grounds of appeal included sufficiency of reasons, failure to identify the proper legal tests, and ignoring crucial

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evidence. The rural municipality opposed granting leave. The Court of Appeal chambers judge considered: 1) did the court have jurisdiction to grant leave to appeal under s. 33.1 of *The Municipal Board Act*; and 2) should leave be granted and on what questions of law? HELD: Leave to appeal was granted. 1) The appeal court had jurisdiction to hear the appeal. The rural municipality argued the issue could only be addressed through judicial review. Unlike property assessment appeals, an appeal from a committee decision is an appeal from a first instance decision-maker, and not a second-level appeal. Nothing in *The Municipal Board Act* suggested committee decisions should be treated differently regarding appeals. The appeal panel would not be bound by the chambers judge'sdecision on this issue. 2) The test for granting leave was whether the proposed appeal was of sufficient merit and importance. The chambers judge followed the approach used for appeals from the assessment appeals committee. The 20 proposed grounds were summarized into four questions about adequacy of reasons, ignoring relevant evidence, applying the proper legal test, or deciding based on irrelevant considerations. While the apparent merits were not strong, the appeal was not destined to fail, and the issues raised could have a material impact on the outcome. The questions raised new and unsettled points of law that transcended the particular circumstances, and therefore, the proposed appeal was of sufficient importance to grant leave.

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***Larocque v Yahoo! Inc.*, 2023 SKCA 62**

Leurer Tholl Kalmakoff, 2023-05-25 (CA23062)

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The appellant appealed a decision adjourning certification of a proposed class action until after an Ontario court decided whether to approve a settlement agreement in a class action arising from the same events. The proposed class action sought to represent individuals who suffered loss from an internet data breach. The Ontario settlement established a fund of $15 million to resolve claims of all Canadian residents unless they opted out. The appellant unsuccessfully opposed certification of the Ontario action but did not opt out of the Ontario settlement. The Court of Appeal considered: 1) was the appeal moot and, if so, should the court decide it on its merits; and 2) did the judge err in law by adjourning the certification application pending the

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outcome of the Ontario application to approve the settlement agreement?
HELD: The appeal was dismissed, with costs to the respondent. 1) Although the appeal was moot, there was good reason to consider it. In the year since leave had been granted to pursue the expedited appeal, the final approval of the Ontario settlement was heard, the appellant unsuccessfully opposed the approval, the Ontario judge approved the settlement, and the Ontario judge directed the Saskatchewan action be permanently stayed. That stay decision was also appealed and was dismissed by the Court of Appeal in 2023 SKCA 63. The adjournment appeal was moot because resolution could not affect the appellant's interests. The resolution of the appeal on its merits may assist in future class action litigation and the parties had thoroughly argued the issues before the court. 2) Rule 1-5(1) of *The Queen's Bench Rules* allows a judge discretionary authority to adjourn an action. Discretion must be exercised judicially. The appellate court can only disturb the exercise of discretion if the judge made a palpable and overriding error in the assessment of the facts, failed to correctly identify the applicable legal criteria, or failed to give any or sufficient weight to a relevant consideration. The chambers judge decided it was premature to decide the certification issue when it would be soon decided whether another class action would subsume the proposed class. There was no unfairness in the process the judge followed in the adjournment decision. When an adjournment is requested, usually fairness requires the judge to be alert to how the parties' interests will be affected if the hearing is delayed. The judge had all the required evidence to assess the interests of the parties in relation to the adjournment and explained how the outcome of the Ontario proceedings could affect the result of the Saskatchewan certification application. The fact that the Saskatchewan statement of claim contained causes of action not advanced in the Ontario action did not mean the judge below erred. The judge below was aware of the appellant's argument and the adjournment did not cause "prejudice." The Court of Appeal noted it was a common and accepted practice for the adjournment to be granted on oral motion of a party. Lack of a formal notice of application for adjournment did not provide a basis for appellate intervention in the judge's exercise of discretion.

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***Larocque v Yahoo! Inc.*, 2023 SKCA 63**

Leurer Tholl Kalmakoff, 2023-05-25 (CA23063)

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Larocque v Yahoo! Inc. (2023 SKCA 63)

Naber v Naber

R v Custer

R v E.C.O.

R v Ochuschayoo

Tetrad Auto Service Ltd. v Universal Tire & Services Ltd.

White City (Town) v Edenwold (Rural Municipality)

The appellant was the plaintiff in a proposed class action seeking compensation for losses caused by an internet data breach. The appellant appealed an order permanently staying her action because of a court-approved settlement of an Ontario class action arising out of the same events. The Saskatchewan action contained statutory causes of action not included in the Ontario action. The Ontario settlement created a fund to compensate the members of the class, including the appellant. The settlement was subject to several conditions precedent, including that the Saskatchewan action be permanently stayed or dismissed as a class action. The respondent applied in Saskatchewan for a permanent stay, which was granted. The Court of Appeal considered: 1) did the judge err by considering the stay request separately from a certification hearing; 2) did the judge err in his best interests analysis; 3) did the judge err by ordering costs against the appellant; and 3) what costs should be ordered in this appeal? HELD: The appeal was dismissed, except for the issue of costs in the court below, which was set aside and remitted for redetermination. 1) The judge was correct that his jurisdiction to permanently stay the Saskatchewan action was not displaced by *The Class Actions Act*, and the judge did not need to hear the certification application before considering the permanent stay request. The Court of Appeal explained how ss. 6(2) and 6.1(b) of *The Class Actions Act* were not relevant because the question before the court was whether any Saskatchewan claim should go forward in the face of the Ontario settlement, not where and how a disputed claim should go forward in the face of ongoing overlapping multi-jurisdictional actions. 2) The judge did not err in concluding the settlement was fair, reasonable and in the best interests of the class. The Court of Appeal does not reweigh the factors considered by the judge below. The question of whether a court in these circumstances should inquire into the reasonableness of a settlement in another jurisdiction remains, arguably, open. The judge below described the notion that potential class members would achieve compensation greater than the settlement through the provincial legislation claims as “highly speculative and probably quite doubtful” and did not err in how he considered this factor. 3) The costs order in the court below was made without receiving submissions from the appellant, and thus was unfair. The costs order was set aside and remitted. 4) Section 40 of *The Class Actions Act* applied to the appeal. In a costs award, the Court of Appeal may consider public interest, whether there was a novel point of law, whether the action was a test case, access to justice or any other factor. Costs on the tariff would be modest and the Court of Appeal wished to permit a body of jurisprudence on this issue to develop in the Court of King’s Bench before weighing in. Thus, the Court declined to order any costs in connection with the appeal.

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***Goertz v Owners, Condominium Plan No. 98SA12401*, 2023 SKKB 95**

Scherman, 2023-05-05 (KB23095)

Costs - Assessment - Solicitor-Client
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Practice - Procedure - Costs

The applicant condo corporation applied to assess solicitor-client costs, which had been awarded six years before. The respondent opposed assessment of any costs. The court considered: 1) was the respondent an insured under the condo corporation's insurance, so that payments made by the insurer for solicitor-client costs incurred were payments the respondent could claim the benefit of; 2) has the insurer waived any subrogation rights it had against the respondent; 3) has the applicant made an admission that its claim for assessment of solicitor-client costs was not a subrogation claim; 4) was the applicant's application for assessment of solicitor-client costs the proper procedure to pursue a subrogation claim and was it made to enforce the insurer's subrogation rights; 5) was the judge functus because he had ordered solicitor-client costs previously?
HELD: 1) The respondent was not an insured under the insurance policy. The issues raised in the respondent's claim against the condo corporation engaged the general commercial liability and officer and director liability insured under the policy, and therefore the insurer had a duty to defend and pay the lawyers' fees for the applicant condo corporation. The insurance policy defined who was insured and did not include the applicant as an individual unit owner for this type of claim. Further, as a general principle, insurers do not insure for losses from the intentional actions of an insured. The respondent's proceedings against the applicant were an intentional act, and therefore, the respondent could not claim to be an insured in respect of the loss he caused. 2) Because the respondent was not an insured, the principle that an insurer may not subrogate against its own insured in respect of an insured loss did not apply. 3) The respondent argued that permitting the applicant to receive solicitor-client costs would constitute double recovery, because the insurer had already paid the legal costs. The respondent's argument was based on an out-of-context excerpt from the applicant's correspondence. Legal costs were paid by the insurer and were being sought for recovery on the insurer's behalf. 4) The application in the name of the condo corporation for assessment of solicitor-client costs was the appropriate procedure to enforce the insurer's subrogation rights. In insurance law, the doctrine of subrogation permits an insurer who has paid an insured's loss to recover some of its expenditure by exercising all legal rights of recovery which the insured would have had against a third party for that loss. The insurer does not commence an action in its own name against the person responsible to pay. No limitation period issue arose because the award of solicitor-client costs was already made in the proceedings. 5) The judge was functus regarding awarding solicitor-client costs. The judge was not *functus* in respect of assessment or deciding new issues of rights regarding insurer subrogation. The parties were directed to arrange a date and time for assessment of costs through the local registrar.

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***Naber v Naber*, 2023 SKKB 100**

Norbeck, 2023-05-12 (KB23092)

Corporate Law - Oppression
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Statutes - Interpretation - *Business Corporations Act*, Section 18-3, Section 18-4

The applicant, Ken, filed an originating application in the nature of oppression pursuant to ss. 18-3 and 18-4 of *The Business Corporations Act* (Act), alleging the respondents, Lorraine and Naber Seeds, had conducted business in a manner that unfairly disregarded Ken's interests. Ken sought injunctive relief in relation to a lease of all the farmland used in the farming operations of Naber Seeds. At the time of the application, Ken and Lorraine had been married for 59 years and were both in their 80s. Naber Seeds was incorporated in 1974, and Naber Holdings was created in 1999 following receipt of tax advice. Lorraine became the majority shareholder and director of Naber Seeds, and Ken was the minority shareholder of Naber Seeds and the majority shareholder and director of Naber Holdings. Each corporation owned several quarters of farmland. Approximately four years ago, Lorraine filed a petition for divorce. A staying fiat preventing sale of the farmlands in 2021. In September 2022, Lorraine removed Ken as director of Naber Seeds. Lorraine stated Ken was given notice of the meeting but chose not to attend. Ken said he did not get full notice and could not attend in the middle of harvest. In March 2023, Lorraine leased all the land owned by Naber Seeds to a third party for the 2023 growing season. The Naber Seeds land had not been leased previously. Ken said he intended to continue farming the Naber Seeds land in 2023, that farming gave his life meaning and that damages could not compensate for the harm of loss of his way of life and identity. The court considered: 1) what was the proper test for an interlocutory injunction and had the applicant met the requirements; and 2) should costs be granted?
HELD: The injunction was granted and the lease set aside. 1) When deciding to grant injunctive relief, a judge considers whether the claim raises a serious issue to be tried; whether there is a meaningful risk of harm that cannot be monetarily compensated; the balance of convenience; and the overall justice of the situation. The applicant's claim raised a serious issue. Oppression is a recognized cause of action. He had a reasonable expectation of continuing to farm as he had done for 60 years, and Lorraine leased the lands needed for the business to a third party. Section 18-4 of the Act authorized the court to make an interim order to ensure fairness. Ken argued farming was what gave his life meaning, the two corporations could not successfully function without one another, and farming decisions made one season could be problematic in the future. Ken established meaningful risk of irreparable harm. The balance of convenience favoured Ken. Ken made his wishes to continue farming known to Lorraine. Not farming the whole land together would have a negative financial impact on both parties. The status quo favoured Ken continuing to farm the lands. The respondents may suffer harm through loss of the rent funds held in trust with the respondents' counsel. Previous decisions in the divorce proceedings supported Ken's reasonable expectation that he could continue to farm the lands without interruption. The judge made no order regarding Ken paying rent to Lorraine because of an upcoming pre-trial conference in the family matter. An agrologist was appointed to monitor the farm operation and report to the shareholders of both corporations for the 2023 season. 2) The applicant sought solicitor-client costs. Costs in favour of Ken were set at $1,500 in any event of the cause.

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***Tetrad Auto Service Ltd. v Universal Tire & Services Ltd.*, 2023 SKKB 104**

Robertson, 2023-05-17 (KB23093)

Civil Procedure - *Queen's Bench Rules*, Rule 12-1, Rule 12-4, Rule 13-4
Civil Procedure - Service - Personal
Practice and Procedure - Notice of Application - Personal Service

The plaintiff applicant applied under rule 12-1 of *The Queen's Bench Rules* to validate the applicant's irregular service by email. The individual defendant had previously been represented by counsel. Counsel withdrew. The plaintiff served several documents on the self-represented defendant by email. The self-represented defendant did not respond. The plaintiff then applied to court to compel attendance of the defendant for questioning. The court raised whether there was authority for service by email. The court considered: 1) was there proper service of the notice of application; and 2) if not, should the court apply rule 12-1 of *The Queen's Bench Rules* to validate the previous irregular service?
HELD: The application to validate email service was dismissed. 1) The service by email was improper. Rule 12-4(2) allows service by email only where the party being served has filed the email address as their address for service. Here, the defendant had not done so. The proper mode of service would be personal service, which it appears was never attempted. The purpose of service rules is to ensure the person served is aware of the matter and can respond. Personal service is the default, and alternate modes are allowed if expressly authorized by enactment, rule or court order. Service by courier, mail, fax or electronic transmission are permitted by rule 13-4(2) at the address for service filed by the party to be served. Texting is not an authorized mode of service unless expressly authorized for substitutional service. For an order for substitutional service, the person serving the document must establish reasonable steps were taken to locate and serve the party through an authorized service mode, the circumstances made that mode of service impractical, and that an alternative mode of service is likely to provide the person served with notice of the document. 2) Rule 12-1 allows the court discretion to validate or set aside service of a document based on considerations whether the person to be served received notice of the document or would have received notice except for attempts to evade service. In this case there was no evidence the self-represented defendant received actual notice of the documents or attempted to evade service. The court declined to validate service of the documents.

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***K.J.S., B.N.J.S., and I.H.E.S., Re*, 2023 SKKB 110**

Schatz, 2023-05-26 (KB23099)

Family Law - Child in Need of Protection - *Child and Family Services Act*
Statutes - Interpretation - *Child and Family Services Act*, Section 37(1), Section 52(1), Section 61(1)

Statutes - Interpretation - *Act respecting First Nations, Inuit and Métis children, youth and families*, Section 4, Section 18, Section 20

In this matter, Saskatoon Tribal Council Health & Family Services (STC) applied for the short-term wardship of three children, aged six, three and two years, whom they had apprehended in November 2022. STC's draft order, submitted to the court in January 2023, was worded such that the children would be placed in STC's custody rather than that of the Ministry of Social Services (MSS). The court had doubts as to whether it had jurisdiction to grant this order, given that s. 37(1)(c) of *The Child and Family Services Act* (CSFA) states that the court shall order a child found in need of protection "remain in or be placed in the custody of the minister…" and was mindful of the precedent of *L.L.M., Re*, 2017 SKQB 305 (*L.L.M.*). Counsel for STC filed *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (FNIM). In April 2023, STC's counsel requested the court find that the MSS had delegated responsibility for custody of the children to STC in the delegation agreement. Alternatively, she argued that the FNIM gave STC inherent jurisdiction with respect to child and family services. Because this implied that the CFSA did not apply, the court ordered that *The Constitutional Questions Act, 2012* applied and STC must provide notice to the federal and provincial Attorneys General. At the next appearance in May, the Attorney General of Canada took no position but the Attorney General of Saskatchewan, the Constitutional Law branch of Justice and the MSS argued that the court did not have jurisdiction to order the children enter the STC's custody. The court considered whether it had jurisdiction to grant an order pursuant to s. 37(1) of the CFSA which names STC as the party to whom custody was granted.
HELD: The court analyzed ss. 37(1), 52(1) and 61(1) of the CFSA, dealing respectively with orders about children in need of protection; the minister's responsibilities towards children in care; and Aboriginal child welfare agreements, as well as ss. 4, 18 and 20 of the FNIM, provisions concerning conflict of laws (nothing in the FNIM affects the application of a provision of a provincial Act or regulation); affirmation (that the inherent right of Indigenous self-government includes jurisdiction with respect to child and family services); and notice (if an Indigenous group intends to exercise its legislative authority in relation to child and family services, notice must be provided to the Minister of Indigenous Services and the government of each relevant province). The court also considered *L.L.M.*, a very similar case. In it, the court found that the agency in question was not a legal entity to which custody of the children could be ordered. *L.L.M.* featured a delegation agreement similar to that in the instant case and the court found, as in L.L.M., that pursuant to s. 61 of the FNIM, the agreement delegated certain powers of the minister to STC, but those powers did not include "the Minister's powers as a statutory parent" (*L.L.M.*, para 21). Indeed, s. 37 powers could not be delegated. In response to STC's contention that the FNIM granted it the inherent jurisdiction to take custody of the children, the court noted that s. 4 of the FNIM indicates nothing in it affects any provision in provincial legislation, and the court in *Mi'kmaw Family and Children's Services of Nova Scotia v R.D.*, 2021 NSSC 66, found that the FNIM did not replace Nova Scotia's *Child and Family Services Act*. Although s. 18 of the FNIM provides for Indigenous groups to make laws regarding child and family services, STC was not acting pursuant to any law enacted by an Indigenous group. Further, s. 20 describes the notice an Indigenous group is to provide to government. There was no evidence to show that STC was acting pursuant to any legislative authority consistent with the FNIM. Nor was the court able to exercise its *parens patriae* jurisdiction in this case. The court's jurisdiction in child and family services matters derives from ss. 37(1) and 61 of the CFSA. In the result, the court had to deny STC's application.

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***Armstrong v Grant*, 2023 SKKB 111**

Mitchell, 2023-05-31 (KB23100)

Statutes - Interpretation - *Trustee Act, 2009*, Section 16(1)
Wills and Estates - Trusts

The applicant brought an application under s. 16(1) of *The Trustee Act, 2009* to remove the respondent as a trustee of the trusts created by a will. The applicant was the late testator's widow. The respondent was the late testator's sister. The will created two trusts, one for the benefit of the widow and another for the benefit of the child of the widow and the testator. The applicant had a chronic condition and had received disability income benefits since the time of her late husband's death over 15 years before. The applicant widow and respondent sister were co-trustees of both trusts. The trust for the benefit of the child could become a beneficiary of property in the trust for the benefit of the widow in certain circumstances. The applicant had a history of disagreement with the co-trustee regarding the management of the trust for her benefit. The court considered: 1) how should the trust be characterized; 2) should the respondent be removed as a co-trustee; 3) if not, could the applicant as sole beneficiary of the trust for her benefit trigger the application of the rule in *Saunders v Vautier*; 4) if not, could the applicant obtain relief under *The Dependants' Relief Act, 1996*; and 5) costs.
HELD: The application was dismissed with costs paid from the trust. 1) The respondent argued the trust for the benefit of the applicant was a Henson trust. A Henson trust is discretionary trust that allows a beneficiary to retain their entitlement to government benefits while deriving income from the trust at the trustee's absolute discretion. The beneficiary of a Henson trust has no enforceable right to receive anything unless and until the trustee decides to exercise discretion in the beneficiary's favour. The will provided for a gift over only if there was income and capital remaining at the time of the applicant's death. The applicant had never been a recipient of social assistant benefits. The trust was not a Henson trust. Instead, it was an absolute discretionary trust to support and benefit the applicant. 2) The heavy burden to demonstrate a trustee needed removal had not been established. The applicant widow argued the respondent sister should be removed as trustee because the trustees were deadlocked about encroaching on capital of the trust, the sister refused to act in the best interests of the widow, the widow ought to be permitted to manage her own financial affairs, and the sister was failing to apply an even hand between the income beneficiary and capital beneficiary of the trust. The statutory and common law power to remove a trustee is exercised sparingly, and conflict or bad personal relations between a beneficiary and trustee is normally not enough to warrant removal. The judge refused to remove the sister as trustee because the sister was fulfilling her trustee obligations in a reasonable manner by providing regular ongoing income and lump sum payments for home renovations to the applicant, and because the testator deliberately created a balance of power between two trustees. The will allowed encroachment on capital if appropriate for the widow's continued support and benefit, but the sister as co-trustee did not believe payment of the entire trust was needed at that time, and that conclusion was available to the trustee in the circumstances. 3) The common law rule in *Saunders v Vautier* allows beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. The rule could not operate in these circumstances because express language of the trust bequeathed only net income generated from the trust and not the trust property itself, a gift over to the child's trust existed, and the testator expressed an intention in the will not to give the beneficiary any property unless the trustees agreed. The widow did not have an absolute interest in the property held in trust. 4) The judge did not provide relief under *The Dependants' Relief Act, 1996*.

The delay of over 15 years in bringing an application under the Act was excessive. The evidence established the widow voluntarily chose to wait before starting the application. The Act set a six-month time limit for making an application, although the court had discretion to consider applications made after the time limit if appropriate. Prejudice included potential impact on the trust for the child and the unavailability of financial records because of the passage of time. 5) The respondent was successful in the application. Costs in estate and trust matters differ from costs awards in other civil litigation. Awarding costs from the estate requires considering the circumstances of the case and impact of a costs award on beneficiaries, and whether the testator or beneficiary caused the litigation. Here, the application was necessary to determine how the trusts created by the will should continue to operate, and in that way, the judge viewed the litigation as taking its origin in the fault of the testator. Therefore, the sister was entitled to costs of $2,000 out of the trust for the benefit of the widow.

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***Dykstra v Saskatchewan Power Corporation*, 2023 SKKB 118**

Robertson, 2023-06-08 (KB23108)

Civil Procedure - *Queen's Bench Rules*, Rule 2-14(1)(c)

The applicants applied under Queen's Bench Rule 2-14(1)(c) to allow a minor, S.D., to participate in the proceedings without a litigation guardian. They had filed an originating notice several weeks earlier for an order declaring *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations* a breach of their ss. 7 and 15 *Charter* rights. This application was heard while the parties agreed to defer an application to appoint a judge for the action pursuant to Rule 1-5(1). The only issue to be decided was whether S.D. should be allowed to participate as an adult. S.D. was a 15-year-old described as "mature for her age." Counsel was unable to indicate any precedent or test to support the argument that the court should exercise its discretion to treat S.D. as an adult but did refer to cases in which mature minors gave evidence and made health decisions. Finding these had limited application, the court considered two additional cases: *Stachuk v Nielsen*, 1958 CanLII 145 (SK QB) (*Stachuk*) and *McKenna v Nolan*, 1959 CanLII 233 (SK CA) (*McKenna*). *Stachuk* was an appeal of a decision awarding costs against the lawyer for a minor defendant in a debt action for under $100. The court ruled that the requirement for a litigation guardian under *The Queen's Bench Rules* as they existed at that time did not apply to small debt actions, and considered precedents out of Ontario confirming that non-compliance with the rule that a minor be represented by a litigation guardian was not fatal to proceedings. *McKenna*, on the other hand, was an appeal concerning apportionment of damages pursuant to *The Fatal Accidents Act*. Some of the interested parties were children, and the Court of Appeal found that apportionment of damages should not have been made without a guardian to represent them.
HELD: Because no circumstances existed to support making an exception to the rule, and because S.D.'s parents agreed to serve as litigation guardian if S.D. were not allowed to participate as an applicant herself, the court dismissed the application. The parties had agreed to defer the application under Rule 1-5(1). The court referred counsel to Rule 4-5, which describes the process for requesting that the Chief Justice appoint a case management judge.

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***R v Ochuschayoo*, 2023 SKPC 30**

Segu, 2023-05-16 (PC23032)

Criminal Law - Aggravated Assault - Sentencing
Criminal Law – Sentencing – Principles

The accused, D.O., pled guilty to one count of aggravated assault. R.F. returned to her home in May 2022 to find a number of people who were drinking heavily, including D.O. R.F. asked them to leave and they did not, so she decided to go to a neighbour's house. D.O. followed R.F. out of the house and attacked her, apparently with a crowbar. R.F. was badly injured. She had six cuts in her scalp that required staples to close; two skull fractures; a torn left earlobe; a cut on her left cheek; and two fractures in her left hand. R.F.'s neighbour called the police, who immediately administered CPR. R.F. was taken from Big Island to Bonnyville, Alberta and ultimately to Edmonton for emergency care. The Crown sought a sentence of three years' incarceration and ancillary orders. The defence sought a suspended sentence of three years in view of D.O.'s lack of a prior criminal record, her good behaviour since the assault, and her *Gladue* factors. The court found it aggravating that D.O. pursued R.F. out of her own residence; that the injuries D.O. inflicted were so severe; that the assault was so prolonged; that there were so many blows to the R.F.'s head and face; that she required CPR; and that D.O. did nothing to help R.F. when she was suffering after the assault. It was mitigating, however, that D.O. was only 19 years old; she had no criminal record; she pled guilty and turned herself in to police; she had numerous *Gladue* factors; and she had abided by her bail conditions for 10 months.
HELD: The court found that a suspended sentence would focus almost exclusively on rehabilitation and this would not be appropriate in the circumstances, wherein denunciation and deterrence were also objectives. A suspended sentence would not be proportionate. Having found that sentences for similar crimes were in the range of two to four years, the court decided three years would be an appropriate starting point. 33 days were deducted from the total sentence for pre-trial time served. Because most of the cases proffered by the Crown involved an accused with a criminal record, and in considering the *Gladue* factors, the court subtracted a further 180 days. D.O. was sentenced to a total of 882 days in prison and subjected to a s. 497.051 DNA order and a s. 109 weapons prohibition to run for 10 years after D.O. was released. The court waived the victim fine surcharge.

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***R v Custer*, 2023 SKPC 33**

Agnew, 2023-06-29 (PC23038)

Criminal Law - Theft under $5,000

Criminal Law - Assault - Self-Defence
Criminal Law - Citizen's Arrest

The accused, A.C., was charged with theft under $5,000 and assault. At voir dire and trial, she admitted to having stolen a roast and other food from FreshCo. When she left the store, a loss prevention officer (LPO) approached her and asked her to come with him. A.C. resisted, and the two engaged in a struggle while the LPO explained he was arresting her for theft under $5,000 and tried to handcuff her. Most of this episode was captured on the LPO's bodycam; a bystander assisted in taking more video when the bodycam fell off. A.C. was forced to the ground but managed to regain her feet and punch the LPO in the face with her free left arm. She made her way to her car with the LPO in tow and the struggle continued in the vehicle. As she tried to get her key in the ignition, A.C. bit the LPO. Soon after, police appeared on the scene. Defence argued that the force used on A.C. during and after her arrest was excessive and therefore breached her ss. 7 and 8 Charter rights, and that she struck the LPO in self-defence.
HELD: The court did not agree that the LPO had engaged in excessive force in attempting to arrest A.C., and, in any case, confirmed that the Charter of Rights did not apply to citizens' arrests pursuant to s 494(1)(a) of the Criminal Code. At subsection 32(1), the Charter specifies that it applies to the federal and provincial governments. The Supreme Court provided a test in *R v Buhay*, 2003 SCC 30 (*Buhay*), to determine whether a particular actor is subject to the Charter or not, being whether a given actor is, at the relevant time, 1) a part of government; 2) performing a specific government function; or 3) acting as a state agent. Defence argued that in the circumstances, the LPO was acting as a state agent and cited *R v Lerke*, 1986 ABCA 15 (*Lerke*). The court did not find this persuasive. *Lerke* did not stand for the proposition that someone making a citizen's arrest was a state agent, but that such a person exercised a government function. However, since *Lerke*, the Court of Queen's Bench had decided *R v Pillipow*, 2003 SKQB 49, in which the court held that a private individual making a citizen's arrest did not need to give *Charter* rights and warnings. *Lerke* was also decided prior to *Buhay*. *Buhay* concerned private security guards and was directly on point in that regard. Because the LPO would have acted the same without police intervention, per *Buhay*, he could not be regarded as a state agent. The court further pointed out that if private citizens were required to observe *Charter* rights in making citizens' arrests, they would virtually never happen, and this would overturn centuries of common-law precedent. As for the plea of self-defence, the court found it was not reasonable for A.C. to believe that the LPO was assaulting her or using excessive force to detain her. Finally, the police officer who arrived just after A.C. had bitten the LPO did not give A.C. her rights and warnings right away, since she was very emotional at the time, "very frantic" in his words. The court found that the officer had read A.C. her rights and warnings approximately seven minutes from the moment he could first reasonably have done so, given that officers are to provide the right to counsel at a time when the accused is able to understand and appreciate it. The court was not prepared to find this delay unreasonable. A.C.'s *Charter* applications were dismissed and she was found guilty of both charges.

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***R v E.C.O.*, 2023 SKPC 42**

Lang, 2023-06-29 (PC23039)

Criminal Law - Defences - Delay - *Jordan*

The accused, E.C.O., a young person, had been charged with two historic sexual assaults. He filed a *Charter* challenge, alleging the violation of his right to be tried within a reasonable time and requesting a stay of proceedings. The court needed only to decide two issues: 1) When did "the clock start ticking" in the timeline of events; and 2) Had the presumptive ceiling of 18 months, as decided in *R v Jordan*, 2016 SCC 27 (*Jordan*), been reached? The Crown argued that the clock only started "ticking" when the information was sworn (February 19, 2023). Defence took the position that the relevant timeline began on the date E.C.O. was arrested and released (October 21, 2021).

HELD: The *Charter* application was dismissed. The court quoted from *R v C.B.*, 2022 NSPC 47 (*C.B.*), which had a very similar set of facts. In *C.B.*, the defence recognized that according to authorities *R v Kalanj*, [1989] 1 SCR 1594 and *R v Rahey*, [1987] 1 SCR 588, the clock for unreasonable delay begins when the accused is charged, i.e., when the information is sworn; however, because those authorities dated from the 1980s, defence argued that, in keeping with lower court decisions since *Jordan*, the approach should be more flexible. The Nova Scotia Provincial Court rejected this argument, since there were examples of higher courts overturning decisions that accepted an earlier start time for the ticking clock, and it found the Supreme Court had stated the law clearly. Although the defence did not argue for it, the court mentioned that it would not have accepted any arguments on "pre-charge" delay because it had been consistently rejected as the ground for a stay across Canadian jurisdictions. In the words of the court in *R v MacIntosh*, 2011 NSCA 111, to be successful, the accused would need to demonstrate "the delay created a situation where he could not truly make a full answer and defence." Finally, the court noted that, using October 21, 2021 as the start date, the 18-month presumptive ceiling would only have been reached on April 21, 2023. The trial of the matter could conceivably have been conducted and completed by that time. The Crown was never concerned with expediting E.C.O.'s matter since it had always taken the position that the clock did not begin to tick until the information was sworn. Defence argued that it could not realistically have conducted the trial within that time. The court pointed out that that while the clock was still ticking, the onus was on defence to expedite proceedings, and made several suggestions regarding actions defence could have taken.

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