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.

Vol. 25, No. 16 **August 15, 2023**

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***R v Murillo*, 2023 SKCA 78**

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The appellant was found guilty after trial of sexual assault contrary to s. 271 of the Criminal Code. The appellant met the complainant at a party, and then they went to a bar until it closed at 3:00 am. The appellant walked the complainant home, but the complainant was locked out of her apartment. They spent some time outside on a swing set, talking. They flirted. The appellant suggested that they either go to a hotel or to his home where his parents also lived. She declined the hotel, and they arrived at his home at around 5:00 am. The appellant claimed that they went to his room, had a beer, and played "truth or dare". The complainant denied that this

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occurred. Both gave conflicting evidence about how they ended up together in the bathroom. The appellant stated that they had been kissing in his room and that she had asked to see his penis, but she said he should wash it first. He claimed that he went to the bathroom to do so, and she came in to kiss him and remove his boxer shorts. The appellant maintained that they then returned to his room and continued to touch each other sexually. He testified that they tried to have sex, but he could not maintain an erection, so they went to sleep. The complainant's version was that when they were both in the bathroom, she got on her knees to avoid him and asked him to leave. She said that after this, they went to sleep, but she woke up to the appellant sexually assaulting her for approximately 90 minutes. He finally stopped when she threw a pillow at him. She testified that when she threatened to call 911, the appellant took her phone away. She then knocked on the appellant's father's door, asking the father to tell the appellant to give her the phone back. The appellant stated that he had woken the complainant up because he wanted her to leave, realizing that his girlfriend was coming over. He testified that the complainant became upset, calling him a liar and a cheater, and threatened to call 911. He testified that when his parents came out after she knocked on their door, she insisted that he had to pay her compensation and that he refused. The trial judge did not believe the appellant's version, stating that it did not "make sense", "especially the sexual incident part". The appellant appealed on the grounds that the trial judge: 1) committed legal errors by providing insufficient reasons in assessing the complainant's credibility; 2) relied on impermissible stereotypes; and 3) applied different standards of scrutiny to the evidence of the appellant and the complainant. The Court of Appeal (court) addressed the first two grounds only.

HELD: The court allowed the appeal, set aside the conviction and ordered a new trial. 1) The trial judge erred in law by failing to address conflicting evidence and the complainant's motive to fabricate. The court cited *R v Villaroman*, 2017 SCC 33 and a case comment by Professor Lisa Dufraimont for the proposition that the trier of fact must at least consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The court found that the evidence of conflicting versions as to how the sexual assaults occurred was important. The credibility of the complainant was a live issue at trial. The trial judge did not refer at all to any of the conflicting evidence by the complainant as to how the sexual assault occurred. Similarly, the trial judge failed to refer to the appellant's argument that the complainant was motivated by a desire to save face and to get money from the appellant. 2) The trial judge erred by invoking common sense assumptions not grounded in the evidence that could not have been the subject of judicial notice, and by relying on stereotypical inferences about human behaviour. The court cited Paciocco J.A. in *R v J.C.*, 2021 ONCA 131 for the legal principles behind this kind of prohibited reasoning as to the plausibility of human behaviour. The trial judge made

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assumptions about what a person in the position of the complainant would do if events unfolded as the appellant claimed. Specifically, the trial judge concluded that it made "no sense" that the appellant and complainant continued to play "truth or dare" when they arrived at the appellant's house at 5:00 am. The trial judge made stereotypical assumptions that a woman would not initiate sex in the way the complainant allegedly did. This error was highly material to the verdict of guilt in the trial.

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***Arkell v Komodowski*, 2023 SKCA 79**

Caldwell Kalmakoff Drennan, 2023-07-06 (CA23079)

Civil Law - Appeal - *Queen's Bench Rules*, Rule 4-44 - Order Dismissing Action for Delay

The appellants (plaintiffs) included 22 individuals who commenced a civil action against the respondents for committing tortious violations of their privacy under *The Privacy Act*, RSS 1978, c P-24 as well as the common law tort of intrusion upon their seclusion. The allegation was that the respondents had unlawfully accessed the personal information of the appellants that was stored in a database system owned and maintained by Saskatchewan Government Insurance (SGI). The appellants sought general, punitive and aggravated damages. After mandatory mediation was completed, no further action was taken by the appellants to move the claim forward. The respondents served the appellants with applications for an order dismissing the action for delay under Rule 4-44 of *The Queen's Bench Rules*. The chambers judge dismissed the action. The appellants argued that the chambers judge made errors in dismissing their claim, including not considering the effect of COVID and ineffective counsel. They also sought to introduce fresh evidence on appeal.
HELD: The appeal was dismissed, and the fresh evidence application was denied. The chambers judge applied the correct framework set out in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 to find that the delay was inordinate and inexcusable. More than five years after the litigation was commenced, it had not progressed beyond the point that it had reached six months after commencement. One of the defendants had died during the delay. His death was significant because the matter had not yet proceeded to questioning, and whatever his evidence might have been was now permanently lost. The issues raised by the appellants were more related to a complaint about how the chambers

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judge weighed and balanced factors under the analysis. The Court of Appeal indicated that the weighing of these factors was discretionary, and that there was no reviewable error in the chambers judge's approach. Ineffective assistance of counsel was not a legitimate ground of appeal in the circumstances of this case. It was not argued before the chambers judge, but more importantly, incompetence of counsel is generally only allowed in very limited circumstances in civil litigation. There was no evidence before the chambers judge about what, if anything, the appellants had done to move the case forward. The court also rejected the argument that COVID prevented the appellants from moving the matter forward. Much of what was required to progress this action could have been done through correspondence, phone calls, or other remote processes. The court was not persuaded that the evidence the appellants sought to introduce met the tests set out in *R v Palmer*, [1980] 1 SCR 759 and recently reaffirmed in *Barendregt v Grebliunas*, 2022 SCC 22. All the evidence the appellants sought to introduce on appeal was evidence they had in their possession and could have put before the chambers judge. The court awarded aggregate costs to the four respondents in the amount of $1,000 each.

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***Steen v Levesque*, 2023 SKKB 92**

Layh, 2023-05-02 (KB23085)

Civil Procedure - Service
Landlord and Tenant - Appeal

S.S. appealed a decision of the Residential Tenancies Office (RTO) in which a hearing officer found that she owed damages of $4,375 to her former landlord, P.L. The parties agreed that S.S. had blocked P.L.'s email address several months before P.L. sent her notice of the hearing to her email address. The parties also agreed that S.S. had not accepted service of the hearing notice that had been sent to her by registered mail. The file that the court received from the RTO did not include a certificate of service. S.S. argued that she had not received notice of the hearing and that the hearing officer had erred by finding that service had been effective. The issue before the court was whether to allow S.S.'s appeal.

HELD: The court granted S.S.'s appeal and directed the matter to be reheard by the RTO. The court reviewed the *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 (Act), and noted that sections 73(4) and 82.1(2) provide a party who has not been served with notice of a hearing to seek an application before a hearing officer to reopen proceedings. However, because S.S. pursued an appeal rather than an application as outlined by sections 73(4) and 82.1(2), the court referenced section 72 of the Act, which governs appeals on the grounds of errors in law or jurisdiction only. The parties agreed that S.S. had not received notice of the hearing. The court cited several cases where, for various reasons, landlords and tenants had not received notice of proceedings and appeals were granted, as a lack of notice constitutes a breach of fundamental justice. The court found that the hearing officer's decision that service had been effected electronically in the absence of a signed certificate of service constituted a jurisdictional error. As a result, the court allowed S.S.'s appeal, set aside the damages award, and ordered a new hearing.

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***Tarasoff v Tarasoff*, 2023 SKKB 102**

Morrall, 2023-05-16 (KB23097)

Contract Law - Formation
Contract Law - Defences - Duress
Contract Law - Unconscionability - Test

The elderly mother (plaintiff) sued her son (defendant) over an alleged breach of a written agreement involving rental income from farmland. The parties disagreed on which agreement constituted a binding contractual relationship between the parties. All dates referenced are from the same year. The plaintiff endorsed the June 10 agreement while the defendant argued that an email exchange from June 5 was the agreement. The farmland had been part of a dispute over five parcels of land resulting from separate litigation between the plaintiff, defendant, and the plaintiff's now deceased ex-husband. A pre-trial was held on June 8, and minutes of settlement entered into on June 9. As a result of the minutes of settlement, the ex-husband received two parcels of land, the plaintiff received two parcels, and the defendant received one. The plaintiff argued that she entered into an agreement on June 10 with the defendant. In that agreement, she transferred her two parcels of land to the defendant, on the basis that the plaintiff would receive all the rents on these lands for the rest of her life. The defendant argued that he was pressured and coerced into signing the agreement from June 10. The defendant argued that there was an email exchange between him and the plaintiff on June 5 wherein the parties agreed to split the rents during the plaintiff's lifetime. The main issues considered were: 1) whether the lawsuit could be appropriately resolved using the summary judgment procedure; 2) whether there were any binding agreements between the parties, and if so, what was the substance of any binding agreement; 3) whether any contractual defences were available to the defendant based on the evidence filed; 4) whether there were any alternate grounds that would vitiate any binding agreements found; 5)

whether the defendant giving $50,000 to the plaintiff to equitably set off the unpaid rents could be binding if the June 10 agreement was binding; 6) what was an appropriate remedy; and 7) who was entitled to costs.
HELD: 1) The court concluded that the summary judgment process was appropriate for resolving the issues between the parties. The court cited *Michel v Saskatchewan*, 2021 SKCA 126 for the law on whether it was appropriate to grant summary judgment under Rule 7-5(1)(b) of *The Queen's Bench Rules*. The court must only grant summary judgement if the result is a fair process that allows for a just adjudication of the issues between the parties. Even where the parties agree it is appropriate to determine the issues by way of summary judgment, the final determination rests with the court. 2) The June 5 email exchange did not form a binding contractual relationship between the parties. The June 10 agreement, while not perfect, was nonetheless binding under the objective standard. The court cited *Neigum v Van Seggelen*, 2022 SKCA 108 for a concise restatement of the requirements for contract formation. For a valid contract to exist, there must be a meeting of the minds regarding all essential terms. A contract is only formed where it would be clear to an objective reasonable bystander that the parties intended to contract, that they reached an agreement on all essential terms, and that the essential terms are sufficiently certain. A meeting of the minds arises when all parties understand and accept the contractual commitments each party has made to the others. The issue is not what the parties subjectively understood or intended, or later came to think the agreement was; rather, it is an objective exercise to determine what the parties' intention was at the time the contract was made. Conduct can be important in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. Courts will be more inclined to find a binding contract if the parties acted as though they thought they had one. The court found that there were several reasons why the June 5 agreement was not a binding agreement. There was a pre-trial date on June 9, so there was considerable uncertainty as of the June 5 date. On June 9, however, settlement minutes provided certainty about the consensus of the parties. Even though the land was not specified by land title description in the agreement, the words "family farm lands in the RM of Montrose" sufficiently described the object of the contract. The comments by the plaintiff in the email clearly showed that the June 5 document was a draft subject to revision by the parties. The plaintiff indicated that she wished to make minor changes prior to endorsing the contents of the document. There was also a lack of execution to the June 5 email. Context was important here: this was not a contract for the supply or purchase of chattels. It related to a land rental agreement that would bind the parties for the rest of the plaintiff's life. The court concluded that two short, largely forgotten, unsigned, informal email exchanges in the morning three days before important negotiations related to contentious litigation did not objectively constitute a binding contractual relationship. The court looked at the timing of the June 10 agreement: it was created and signed after a settlement had been reached with respect to a related lawsuit concerning the farmland. It was signed, and this provided a measure of confidence that there was a mutual agreement as to terms. The fact that the terms of the June 10 agreement were followed for close to four years was an important factor to consider when analyzing the contract under an objective standard. 3) Contract defences were not made out. The defendant did not discharge his onus to prove mental incapacity. By the defendant's own choice, he did not provide any expert evidence. The court found that proceeding without such expert evidence did not meet the necessary burden of proof. The case law required proof of something more than a diagnosis of being "somewhat impaired." At the very least, he should have provided proof from third parties who were there to witness the defendant's physical and mental condition at, or close to the time of the contract's execution. The defendant had counsel at the time of execution, and there were no notes provided in evidence of the lawyer's observations of the defendant. The court added that the

plaintiff was not aware of the defendant's mental capacity. The agreement was fair. There were no indicia from which a court could infer that the plaintiff believed or should have known that the defendant was mentally incapacitated at the time the agreement was signed. The defendant also pleaded duress in relation to the June 10 agreement, in that he felt he was pressured and coerced into signing the contract, and that he did so without independent legal advice. The court found that the defence of duress was not made out. For duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner. The court did not find that the plaintiff applied any illegitimate economic pressure on the defendant to sign the agreement. The plaintiff told the defendant that if he did not enter into an agreement where he would receive two quarters of land but must provide her with all the rental income for the rest of her life from the land, she would give the land to his sister. He could take the deal or not. Contrary to the allegations in the defendant's statement of defence, the defendant did have legal counsel at the time of the June 10 agreement. While it was unknown whether the defendant's counsel was aware or had reviewed the June 10 agreement, the court found a positive inference that the respondent had the benefit of legal counsel in reviewing the agreement. Importantly, the defendant followed the terms of the agreement for four years. The agreement was not unconscionable. The court cited *Input Capital Corp v Gustafson*, 2021 SKCA 56 for the two-part test to determine whether a contract is unconscionable: (a) proof of inequality in the positions of the parties arising out of the ignorance, need or distress of the weaker which left him in the power of the stronger; and (b) proof of an improvident bargain/substantial unfairness in the bargain. The court here found that neither party was more powerful than the other, so there was no inequality of bargaining power. The contract was not an improvident bargain. 4) Alternatively, the defendant also argued that the plaintiff breached the June 10 agreement by not paying taxes or carrying any insurance for the family farmlands. There was also an allegation that perhaps the lease agreement in November 2017 between the parties superseded the agreement of the June 10. However, it was not clear in the statement of defence what relief was requested as a result of this allegation. 5) The defendant argued in the alternative that should the court find the June 10 agreement binding, his $50,000 gift to the plaintiff should apply to set off any of his arrears in rental income as a result of equitable considerations. The court pointed out that neither set-off nor any mention of the $50,000 gift to the plaintiff was set out in the defendant's pleadings. The court stated that the defendant's counsel should have amended the statement of defence. The court entertained the defendant's argument, however, because the plaintiff was not taken by surprise by this claim and responded in her brief of law. The court referred to *Saskatchewan Wheat Pool v Feduk*, 2003 SKCA 46 for the principles of equitable set-off. The case law was clear that a donor cannot retract a gift unless there was undue influence on the donee's part. Here, the defendant argued that his gift of $50,000 to the plaintiff in 2020 should offset his failure to pay the plaintiff the rent collected from the leaseholder. The defendant argued that he gifted the amount so the plaintiff could purchase a residence, believing her to lack sufficient funds to do so. The plaintiff stated that the gift was out of generosity. In both versions, the plaintiff was reluctant to accept the gift, and the defendant was the driving force in pushing the plaintiff to accept it. The court concluded that there was no question that the money given was a gift. An exhibit to the defendant's affidavit attached a "Gift Letter" document drawn up by the defendant's bank and signed by both parties. The gift could not be revoked. 6) The court held that the June 10 agreement was a valid contract, and that no contractual defences were available to the defendant. Set-off was inapplicable. The court declared that the plaintiff had a life interest and was entitled to all compensation arising from any rental agreement pertaining to the land. The plaintiff was entitled to judgment against the defendant for any rents collected by him from the rental of the lands which had not been paid to the plaintiff, but that

taxes and insurance paid by the defendant could be deducted from the amount of the judgment and any future rental income. 7) The plaintiff was wholly successful. The court ordered column 3 costs payable to the plaintiff, given that the defendant did not properly plead a contrary allegation of fact.

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***R v Moth*, 2023 SKKB 107**

Layh, 2023-05-29 (KB23098)

Criminal Law - Request for Adjournment - Non-attendance of Witness - Appeal

The accused was charged with having care and control of a motor vehicle with over 80 milligrams of alcohol in 100 milliliters of blood and while impaired. Several trial dates in provincial court had been set but were adjourned due to the accused's significant medical issues. A trial date was eventually set, and all parties attended. However, while the Crown was preparing the officer to testify, the officer was dispatched to an active shooting in Melville where two people had already been shot and two armed attackers were "on the run." The trial judge refused the Crown's request for an adjournment, referring to *Darville v R* (1956), 116 CCC 113 (SCC) (*Darville*). The Crown appealed, stating that the trial judge failed to judicially exercise discretion under the principles in *Darville*, constituting a reversible error of law. The court considered whether the trial judge's refusal to allow the adjournment constituted an error in addressing the factors set out in *Darville*.
HELD: The court of King's Bench agreed with the Crown and ordered a new trial. A nuanced standard of appeal applied because the decision involved a discretionary order. However, the Supreme Court in *Darville* specifically addressed the factors that a trial judge should consider when deciding to grant an adjournment when a witness fails to attend court. Under *Darville*, the party seeking an adjournment because of the non-attendance of a witness must establish: 1) that the absent witnesses are material in the case; 2) that the party applying has not been guilty of *laches* or neglect in arranging for the attendance of the witnesses; and 3) there is a reasonable expectation that the witnesses will attend court on the date sought by the party applying for the adjournment. Here, the record demonstrated that the trial judge found that all three of the *Darville* factors were met, but still did not grant the adjournment. The trial judge focused on two circumstances outside of the factors in *Darville*: whether the charges against the accused were "serious" charges and whether there was any prejudice to the accused. In refusing the adjournment, the trial judge found that the impaired driving charge, although not minor, was not terribly serious. The court on appeal noted that the Supreme Court of Canada has frequently (and very recently) described impaired driving as a serious offence, and as a scourge. The trial judge did not cite any particular evidence of prejudice to the accused. The record showed that several adjournments had been made at the accused's request over the two-year period, with his own failure to attend a trial date requiring a four-month adjournment and a fine for his failure to appear.

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South West Terminal Ltd. v Achter Land & Cattle Ltd., **2023 SKKB 116**

Keene, 2023-06-08 (KB23106)

Contract Law - *Consensus ad Idem* - Certainty of Terms - Damages
Statutes - Interpretation - *Sale of Goods Act*, Section 6

The plaintiff brought a summary judgment application under Rule 7-2 of *The Queen's Bench Rules*. The parties and the court agreed that there were no genuine issues in the case requiring a trial, making it appropriate for summary judgment. The plaintiff claimed that it entered into a deferred delivery purchase contract with the defendant whereby the plaintiff agreed to buy, and the defendant agreed to sell, 87 tonnes of flax for a contracted price per tonne, to be delivered in the month of November 2021. The defendant did not deliver any flax. The plaintiff sued for breach of contract and damages, plus interest and costs. The defendant denied having entered into the contract. In the alternative, the defendant relied on the statutory defence in s. 6(1) of *The Sale of Goods Act*, RSS 1978, c S-1 (SGA), arguing that the contract was unenforceable because there was no memorandum of the contract made or signed by the parties. The main issue to be determined by the court was the novel issue of whether a "thumbs-up" emoji texted by the defendant to the plaintiff in response to a contract drafted and signed by the plaintiff and sent via text message constituted a valid contract. Specifically, the court considered: 1) whether a valid contract was formed between the parties, including whether there was *consensus ad idem* (a meeting of the minds) and whether there was certainty of terms; 2) whether the statutory requirements in s. 6 of the SGA were met; and 4) what was an appropriate measure of damages.

HELD: The parties had entered into a binding legal contract. The defendant breached the contract by failing to deliver the flax. The plaintiff was entitled to damages. 1) The court was satisfied that a reasonable bystander would conclude that the parties had reached a meeting of the minds, just like they had on numerous previous occasions. The court was also satisfied that there was sufficient certainty of terms in the contract. The court reviewed the law on contract formation as recently stated in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 (*Aga*). The court is to look at "how each party's conduct would appear to a reasonable person in the position of the other party" and whether that conduct was such that a reasonable person would conclude that they had intended to be bound (*Aga*). A contract is only formed where there is an offer by one party that is accepted by the other with the intention of creating a legal relationship and supported by consideration. Here, there was a long-standing business relationship between the defendant and the plaintiff. It was common for the plaintiff to send out a contract by email or text message. Prior to the contract in issue, the plaintiff had completed four contracts with the defendant by having the defendant execute the contract by text message. Each time, the defendant sent back a short response by text meant to confirm the contract – not merely to indicate an acknowledgment of receipt. This was an uncontested pattern of what both parties knew and accepted to be a valid and binding deferred delivery purchase contract and was uncontradicted evidence of the manner in which the parties conducted their business. The court was satisfied on a balance of probabilities that the defendant okayed or

approved the contract just like he had done before, except this time he used a thumbs-up emoji. Considering all the circumstances, the thumbs-up emoji meant approval, not simply that he received the contract and was going to think about it. In these circumstances, a thumbs-up emoji was "an action in electronic form" that could be used to express acceptance as contemplated under s. 18 of *The Electronic Information and Documents Act, 2000*. 2) There was also no uncertainty of terms to invalidate the contract. The defendant relied on two facts to support the argument that the contract was void for uncertainty. First, that the plaintiff did not text a photograph of the general terms and conditions found on the back of the contract; and second, the photograph of the contract sent to the defendant stated the delivery period was "Nov". The court did not accept these arguments. As set out in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, courts are to consider the surrounding circumstances of the contract, or the "factual matrix" when interpreting contracts. Courts must read contracts in the context of surrounding circumstances known to the parties at the time of contract formation, which includes facts that were known or reasonably capable of being known by the parties when they entered into the written agreement. The subjective intention and beliefs of the parties are irrelevant in the interpretive process. Here, a reasonable, objective bystander aware of all the previous contractual history would believe the same contract was being entered into here; the terms and conditions on the back were the standard boiler plate and never changed. The fact that the defendant did not receive the reverse terms and conditions did not invalidate the contract for uncertainty. The court agreed with the plaintiff that the essential terms of the contract were contained on the first page which was texted to the defendant. The agreement conveyed with sufficient clarity the parties, the property, and the price. The parties also knew based on their previous dealings that "Nov" meant the upcoming November as being the delivery date. This was the only logical interpretation, and there was no uncertainty as to the delivery date. 2) The provisions of s. 6 of the SGA were met and the contract was enforceable. The issue was whether there was a note or memorandum in writing and signed by the party. The court found that there was case authority for the use of email and the use of electronic non-wet ink signatures to identify the person signing and to establish that person's approval of the document's contents. The issue was whether the thumbs-up emoji was sufficient to meet the requirements of the SGA in the circumstances. The court found that the contract was "in writing" and was "signed" by both parties for the purposes of the SGA. There was no dispute that the plaintiff electronically signed, and the court found that the defendant's use of the thumb's-up emoji constituted a signature in these unique circumstances. The defendant could be identified through the use of his unique cell phone number. 3) The court accepted the plaintiff's assertion that damages for non-delivery were the difference between the contract price and the market price at the time that delivery ought to have been made. The contract price was set out in the contract, and the market price at delivery was the market price on November 30, 2021 as it was the final day in the delivery period that the defendant was entitled to deliver the flax. Interest was to be applied according to *The Pre-judgment Interest Act*. The case raised novel issues but was not sufficiently complicated to warrant column 2 costs. Instead, the court ordered costs payable to the plaintiff under column 1.

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***Brock Stock Farm Ltd. v Economical Mutual Insurance Company*, 2023 SKKB 119**

Crooks, 2023-06-12 (KB23111)

Insurance Law - Contractual Interpretation - Exception under Exclusion Clause - Ambiguous Term

The plaintiff owned and operated a hog farm. The barn roof had a truss system. The plaintiff carried insurance for the farm buildings under a subscription policy with the defendant insurers. The barn roof partially collapsed in December 2015, but was repaired. No insurance claim was made. In February 2016, part of the roof collapsed, and a claim was submitted under the policy. The insurer denied coverage on the basis that "wear and tear and deterioration" were excluded from coverage under the policy. The court found that this matter was well suited to summary judgment. The issue decided by the court was whether the roof collapse was covered under the insurance policy. The plaintiffs had to establish that the loss claimed fell within the policy coverage. Then the onus shifted to the defendants to demonstrate that one or more of the policy exclusions applied.

HELD: The loss fell within an exception under the insurance policy; therefore, the loss was covered. The court considered that coverage provisions should be construed broadly and exclusion clauses should be construed narrowly, and noted the principle of contra proferentem. It was not disputed that the policy provided broad form coverage which applied to all direct physical loss and damage to the insured property. The loss claimed fell within the "all risk" coverage provided, so the roof collapse was insured unless an exclusion clause applied. The court assessed expert witness evidence from both sides in determining the cause of the collapse. The plaintiff's experts concluded that a combination of wind loading and metal corrosion of the truss plates led to the collapse, but were unable to determine which factor was more of a cause. The insurers argued that it was not wind, but corroded trusses alone that caused the collapse. There was no site-specific weather data available, so the experts had to use data from the closest three weather stations to the barn. The court found that the truss plates were unable to withstand the combined dead load and wind load for which they were initially designed. The barn was not entirely structurally sound as a result of corrosion that had already occurred. The combination of corrosion and this wind event operated together to cause the collapse. The court next considered whether the combination of wind and corrosion of the truss plates causing the collapse precluded coverage under the policy. The court cited *Derksen v 539938 Ontario Ltd.*, 2001 SCC 72 for the proposition that the applicability of an exclusion clause where there were concurrent causes was a matter of contractual interpretation. The Supreme Court of Canada found that coverage could not be precluded by an exclusion clause that only excluded one of the two concurrent sources of liability, absent express language to the contrary in the policy. The policy here used specific language to exclude loss or damage "caused directly or indirectly" by rust or corrosion. Under the specific terms of the policy, there was no coverage where the associated loss was directly or indirectly caused by rust, corrosion, wear and tear or gradual deterioration, unless an exception applied. Since the insurer demonstrated that there were applicable exclusion clauses, the onus shifted back to the plaintiff to establish that the loss fell within an exception to an exclusion clause. The plaintiff argued that the truss plates were part of an "apparatus not otherwise excluded." The insurers argued that the truss system was not an "apparatus", so the exclusion clause applied. The court cited *Saskatchewan Government Insurance v Patricia Hotel (1973) Ltd.*, 2011 SKCA 70 for the approach when interpreting insurance policies. The court found the language in the policy to be ambiguous as to what "apparatus" meant – it was open to the insurers to limit the meaning of apparatus, but they did not do so. After reviewing jurisprudence and dictionary entries for "apparatus", the court found that the truss system met the

definition of an apparatus. When this apparatus failed, the loss fell within the exception under the exclusion clause. Therefore, the loss fell within the exception and was subject to coverage under the policy. Business interruptions were also covered under the policy. The plaintiff was awarded $5,000 in costs.

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***4 Star Ventures (2012) Ltd. v Eizicovics*, 2023 SKKB 121**

Keene, 2023-06-13 (KB23113)

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Equity - Bona Fide Purchaser for Value without Notice
Trusts - Constructive Trusts - Unjust Enrichment

The plaintiff banked with one of the defendants, Innovation Credit Union (ICU). The plaintiff noticed an unauthorized payment to R&B Mechanical of over $110,000. R&B Mechanical did not exist. The person behind the unauthorized transfer was never sued by the plaintiff or any other party and was never made a party to the proceedings. Later, this person became known to the parties, particularly by another defendant, Secured Digital Markets (SDM), as being named Denzel Blackett. Blackett was arrested in Ontario for defrauding one of the principals of the plaintiff. The court did not receive confirmation that he was convicted of fraud, but on the civil standard the court was satisfied that Blackett was the person who orchestrated the unauthorized withdrawal and transfer. The parties stated that Blackett used most of the unauthorized withdrawal to purchase cryptocurrency from SDM. The plaintiff initially sued SDM, Gropper Law PC (a law office that SDM retained for trust deposits), Yaakov Eizicovics (a lawyer), ICU, and the Toronto-Dominion Bank (TD) which provided a trust account for the law office to hold the funds deposited by Blackett. The plaintiff obtained a court order directing that the funds on deposit in the TD/Gropper Law trust account be paid into court. The plaintiff, SDM and ICU were in dispute over who was entitled to the funds. The law firm and lawyer were noted for default. The dispute had generated quite a bit of litigation, but the application here was brought by SDM for a summary judgment for the funds and costs. The plaintiff opposed this. ICU also brought a summary application to strike SDM's cross claim. The plaintiff discontinued its action against TD. The court concluded that this was an appropriate matter for summary judgment. The court determined: 1) whether the plaintiff's claim against SDM should be dismissed, applying an unjust enrichment theory; 2) whether the equitable principle of tracing applied; and 3) who was entitled to the funds paid into court.
HELD: The court granted summary judgment in favour of SDM as a *bona fide* purchaser for value without notice that acquired the funds in the ordinary course of business via a commercial transaction. The court dismissed the plaintiff's claim against SDM. SDM was entitled to the funds held in court plus any accumulated interest and costs. ICU's application to strike was dismissed. The cross

claims brought by SDM and ICU were also dismissed. The court struck several paragraphs from the plaintiff's affidavit, and reproduced SDM's chart setting out the impugned paragraphs and the grounds for striking. The court ordered that the plaintiff pay fixed costs to SDM of $500. The affiant for SDM deposed that they complied with all legislatively imposed customer identification verification and reporting requirements to confirm Blackett's identity before working with a broker to facilitate the cryptocurrency transaction. The court found that SDM did not have notice of the theft until days later, and there was no evidence at all of collusion between SDM and Blackett to defraud the plaintiff. 1) The funds were not subject to a constructive trust in favour of the plaintiff and did not constitute an unjust enrichment of SDM. The court cited *Soulos v Korkontzilas*, [1997] 2 SCR 217 for the circumstances wherein constructive trusts may arise. The court found that the facts did not establish a constructive trust arising from any "wrongful acts". There was no evidence that SDM owed any equitable obligation to the plaintiff as a result of Blackett's purchase of the cryptocurrency. SDM and the plaintiff were strangers to each other. SDM acquired the funds in good faith and without knowledge of the fraud. The court referred to *Pettkus v Becker*, [1980] 2 SCR 834 for the criteria for a constructive trust where there is unjust enrichment. There was also no unjust enrichment, because there was a juristic reason for the enrichment – this was a business transaction. 2) The court found that the doctrine of tracing did not apply. The fact that the funds were received by SDM in good faith and for value without notice acted as a bar to the tracing remedy (*Flexi-coil Ltd v Kindersley District Credit Union Ltd.* (1993), 113 Sask R 298 (CA)). 3) SDM was entitled to the funds paid into court. This was because SDM acquired the funds for good and valuable consideration, in good faith fand without knowledge of fraud, and in the ordinary course of business.

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***Soldan v Plus Industries Inc.*, 2023 SKKB 127**

Bardai, 2023-06-19 (KB23127)

Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process
Human Rights - Complaint - Jurisdiction
Practice - Judgments and Orders - *Res Judicata* - Issue Estoppel

The defendant filed an application to strike the claim of the plaintiff on the basis of collateral attack and abuse of process (Rule 7-9(2)(e), *The Queen's Bench Rules*). The defendant argued that issue estoppel and *res judicata* applied, because the matters raised by the plaintiff had already been adjudicated by the Saskatchewan Human Rights Commission (Commission). The plaintiff worked part-time for the defendant until her home was destroyed by a fire. She was injured, and let the defendant know she could not return to work until a specified date. When she did not return, she was deemed to have abandoned her employment. However, she did ultimately provide a doctor's note. The plaintiff filed complaints with the Ministry of Labour Relations and Workplace Safety and with the Saskatchewan Human Rights Commission. As a result of these complaints, the defendant paid to the plaintiff one week's pay in lieu of notice and $20,000 in relation to the Commission complaint. This decision had been concluded and was not

appealed. The plaintiff filed a new claim in the Court of King's Bench, arguing that the Commission's decision only awarded damages for loss of dignity, feelings and/or self-respect, and that the Commission lacked jurisdiction to grant the relief sought in this claim, including punitive and aggravated damages, compensation for wrongful dismissal, and damages for inconvenience. The plaintiff added that even if res judicata were engaged, the court should still exercise its discretion and allow the claim to proceed. The defendant argued that the plaintiff should not be allowed to re-litigate the issue.
HELD: The plaintiff was barred on the basis of *res judicata*, abuse of process and collateral attack from raising issues that were already before the Chief Commissioner, including discrimination, wrongful termination, and related damages. The court struck most of the claim, but allowed claims based on conduct occurring after submissions were made to the Chief Commissioner. It was clear that the Chief Commissioner considered more than loss of dignity, feelings and/or self-respect. The Chief Commissioner also assessed losses for wrongful termination and benefits and addressed the plaintiff's claim for damages for lost wages, benefits, legal fees and punitive damages. The basic elements of issue estoppel were met. The court determined whether discretion should be exercised to allow the claim or portions of it. *Res judicata* applied to causes of action and issues that were before the Commissioner or could have been put before the Commissioner. Striking a claim on the basis of abuse of process involved a different, broader test (*Behn v Moulton Contracting Ltd.*, 2013 SCC 26). The doctrine of abuse of process is flexible and exists to ensure that the administration of justice is not brought into disrepute. It may be used to prevent re-litigation even where the strict test for issue estoppel and/or cause of action estoppel are not met. The court concluded that allowing the claim to proceed without limiting it to the factual circumstances occurring after submissions were made to the Chief Commissioner would bring the administration of justice into disrepute. It would allow issues which had already been disposed of to be relitigated. Creating a multiplicity of proceedings is a basis for finding an abuse of process (*Livingston v Saskatchewan Human Rights Commission*, 2022 SKCA 127). By commencing this action and not limiting it to events occurring after the date the parties made submissions to the Chief Commissioner, the plaintiff has created an impermissible multiplicity of proceedings. The plaintiff chose her initial forum and could not be permitted to relitigate.

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***James v Saskatoon Housing Authority*, 2023 SKKB 135**

Currie, 2023-06-26 (KB23122)

Landlord and Tenant - *Residential Tenancies Act* - Order for Possession - Appeal

The appellant appealed from an order for possession of his rental unit made in favour of his landlord, the Saskatoon Housing Authority. The appellant argued that the hearing officer failed to engage in the just and equitable test under s. 70(6) of The Residential Tenancies Act, 2006, SS 2006, c R-22.0001 (Act). The court determined: 1) whether the hearing officer erred in law by failing to consider or apply the legal test set out in s. 70(6) of the Act; and 2) whether the hearing officer erred in law or procedural fairness by failing to provide adequate reasons.

HELD: The appeal was dismissed. 1) The officer took all the evidence into account and engaged in the application of the “just and equitable” test as set out in s. 70(6) in deciding to order possession. The appellant did not demonstrate that the hearing officer’s approach to the test was incorrect. This was a discretionary decision, and there was no error in law. 2) The officer provided adequate reasons. There was no error in law or of procedural fairness established.

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***McDonald v Saskatchewan (Government)*, 2023 SKKB 138**

Crooks, 2023-06-27 (KB23136)

Constitutional Law - *Charter of Rights*, Section 15 - Discrimination on the Basis of Age
Justices of the Peace Act, Section 8(2) - Mandatory Retirement

The complainants were former Justices of the Peace (JPs) who were required to retire at 70 pursuant to s. 8(2) of *The Justices of the Peace Act, 1988*, RSS 1988-89, c J-5.1 (JP Act). Each complainant filed a complaint with The Saskatchewan Human Rights Commission (commission) arguing that the mandatory retirement age was discriminatory based on age and was contrary to the *Canadian Charter of Rights and Freedoms* (*Charter*) and *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 (*Code*). The applicant commission applied for a hearing under the Code regarding the complaints, seeking an order: that the mandatory retirement provision breached s. 15 of the Charter; that the section was of no force or effect under s. 52 of the *Charter*; that the government discriminated against the complainants on the basis of age under the Code; and an order to reinstate and reimburse the complainants for lost salary, benefits, compensation, and costs. The commission argued that the section breached s. 15 of the *Charter* and was not justified under s. 1. The commission also argued that the mandatory retirement provision conflicted with the provisions in the *Code* respecting age. The government argued that mandatory retirement was a component of judicial independence and infringed neither the *Code* nor the *Charter*. The government also argued that the *Code* did not apply to judicial tenure as it was not “employment” or an “occupation” as required for the application of the *Code*. The court decided the following issues: 1) whether judicial independence applied to JPs; 2) whether a mandatory retirement age for JPs under the JP Act breached s. 15 of the *Charter*; 3) whether the infringement was justified under s. 1 of the *Charter*; and 4) whether a mandatory retirement age for JPs conflicted with the *Code*.
HELD: The applications were dismissed in their entirety. 1) It was well established that judicial independence applied to the position of a JP. In *Ell v Alberta*, 2003 SCC 35, the Supreme Court of Canada confirmed that the principle of judicial independence applied to the duties of JPs. The duties of JPs involved powers under federal, provincial and municipal laws, as well as under common law. 2) The court found that the imposition of a mandatory retirement age for judicial office holders reflected the implementation and protection of a constitutional principle – judicial independence – and was not a discriminatory practice. Mandatory retirement in the context of judicial independence did not reinforce, perpetuate or exacerbate disadvantage. The *Charter* could not be used to reduce the scope of other constitutional principles, such as judicial independence. It was the commission’s burden to prove on a balance of

probabilities that a *Charter* violation had occurred. The court applied the two-step s. 15 analysis recently reaffirmed in *R v Sharma*, 2022 SCC 39: whether the law: a) created a distinction based on enumerated or analogous grounds, on its face or in its impact; and b) imposed a burden or denied a benefit in a manner that had the effect of reinforcing, perpetuating, or exacerbating disadvantage. The government conceded that the section created a distinction based on age, so the court focused on the second part of the analysis. The commission argued that the section was blunt in its impact, with no judicial independence. While there was precedent from the Ontario Superior Court which found a similar provision to be unconstitutional and not saved by s.1, most cases since then had reached opposite conclusions. 3) The court found that even if there was a breach of s. 15, the section mandating retirement was justified under s. 1. It was minimally impairing and proportional. The court was of the view that the mandatory retirement age at age 75 was no less arbitrary than at age 70. 4) There was no conflict between the *Code* and the mandatory retirement age set for JPs under the JP Act.

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***Dupmeier v Saskatchewan Veterinary Medical Association*, 2023 SKKB 144**

Keene, 2023-06-29 (KB23125)

Civil Procedure - Applications - Affidavits - Application to Cross-Examine
Civil Procedure - *Queen's Bench Rules*, Rule 3-54, Rule 6-13

The applicant was a member of the Saskatchewan Veterinarian Medical Association (SVMA) and was charged by the SVMA's Professional Conduct Committee due to allegations of professional misconduct. After a hearing, he was found guilty of five counts, and was sentenced to fines and costs, with a letter of reprimand placed on his file. He applied under Rules 3-54 and 6-13 of *The Queen's Bench Rules* to order the lawyer who had been retained by the Discipline Committee to attend for cross-examination. One of the lawyers who was legal counsel for the SVMA and who prosecuted the matter was in discussions about joining the same law firm as the lawyer for the Discipline Committee around the same time as the hearing. The applicant felt that the Professional Conduct Committee and the Discipline Committee were not independent from each other, because the two lawyers were "particularly friendly" with each other. The applicant raised concerns about possible procedural unfairness issues. The lawyer for the Discipline Committee replied by affidavit, outlining the measures taken to create a "firewall" between the two lawyers at the firm to prevent any legal conflicts or perceptions of conflict. There had been a previous application to remove the law firm, which had been dismissed.
HELD: The court dismissed the applicant's application to cross-examine. Leave to cross-examine on an affidavit is sparingly, not routinely, granted. It is a discretionary decision. The court must be satisfied that cross-examination will assist in resolving an issue (here, procedural unfairness) before the court. In the court's view, it was highly unlikely that cross-examination would elicit much information. The court did state that this was an extraordinary set of circumstances that hopefully would not be repeated in the

future. There was no need for clarification of the information deposed to, and the court expressed concern that the application appeared to be a fishing expedition that had the potential of going into solicitor-client privilege. The mere fact that the lawyer for the Discipline Committee filed an affidavit did not create an automatic right to cross-examination.

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T.M.D. v N.S.W., **2023 SKKB 150**

Richmond, 2023-07-12 (KB23139)

Family Law - Interim Application - Parenting Time - Domestic Violence
Family Law - *The Children's Law Act, 2020*, Section 10 - Best Interests of the Child

The petitioner (T.M.D.) and the respondent (N.S.W.) had one child. The respondent had no involvement with the child because the petitioner disappeared with the child in August 2021. The petitioner described physical abuse the respondent allegedly inflicted during and after her pregnancy. The police were called, resulting in charges which were later dropped. There was a no contact order in place. Another violent attack sent the petitioner to the hospital for surgery. Ultimately, the petitioner left with the child and a child from a previous relationship and moved to a location where the respondent could not find them. In 2022, the petitioner issued a petition. The respondent filed an answer and counter petition requesting joint decision-making responsibility and parenting time. He disputed the petitioner's claim for child support, asserting that he was in receipt of social assistance. He conceded that the relationship was rocky at times but disagreed with the petitioner's description of domestic violence. The court determined: 1) whether the parties should be required to complete mandatory dispute resolution; and 2) whether, on an interim application, it was in the child's best interests for the respondent to have a parenting time order.
HELD: 1) The court was satisfied that the level of violence in the relationship went beyond mere suspicion and found that the parties should be exempted from participating in mandatory dispute resolution. 2) An interim parenting time order, even a supervised one, was not appropriate in these circumstances. The petitioner would continue to be the primary caregiver of the child on an interim basis. The parties should proceed to a pre-trial. The court required better and more complete information about the respondent's circumstances to fully assess whether it was in the child's best interests to allow the respondent back into the child's life. In coming to this conclusion, the court analyzed the list of factors set out in s. 10 of *The Children's Law Act, 2020*, SS 2020, c 2 to assess the child's best interests. The court noted that while the petitioner's self-help remedy was not to be condoned by the court, it could be explained by the nature and extent of the family violence she described. The respondent had moved to Grenfell and was on social assistance. There was no information about his current circumstances, why he was not working, whether he was able to parent, or how he would provide for the child if an order were made.

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***R v K.R.*, 2023 SKPC 31**

Daunt, 2023-05-03 (PC23029)

Criminal Law - Murder - Second Degree
Youth Criminal Justice Act

K.R., a young offender, was charged with second-degree murder in the stabbing death of B.P. The Crown alleged that K.R. was one of several youths who chased down B.P. and his young daughter on May 28, 2022, in Prince Albert. B.P. was carrying a garden tool for protection, but he was stabbed multiple times and died from his injuries. The court heard testimony from B.P.'s daughter, a police officer, a witness who was driving in the area, and two youths who claimed to have seen the incident. One of the youths, E.T., testified that B.P. struck K.R. in the hand with the garden tool and that K.R. retaliated by stabbing him several times. Medical evidence confirmed that B.P. died from at least four stab wounds that were inflicted by a single-bladed instrument. A search warrant was executed at K.R.'s residence, where shoes with bloodstains were found. DNA from B.P. was found on the shoes. The court had significant concerns about the reliability and credibility of the evidence from the youth. The issue before the court was whether K.R. was guilty of second-degree murder.

HELD: K.R. was convicted of second-degree murder, contrary to section 235(1) of the Criminal Code. The court found that the Crown had proven beyond a reasonable doubt that K.R. had intentionally caused the death of B.P. The court considered the evidence from the witnesses, the video recordings of the incident, the DNA evidence linking K.R. to B.P., and the medical evidence that B.P. died from stab wounds. The court concluded that the totality of the evidence left no doubt that K.R. personally caused B.P.'s death. The court also found that K.R. had the requisite *mens rea*, or criminal intent, to be convicted of second-degree murder. The court noted that the weapon used, the number of stab wounds inflicted, the severity of the injuries, and the location of the stab wounds all indicated that K.R. had intended to kill B.P. K.R. had not argued the defence of provocation, and the court rejected this defence. The court also found that there was no evidence to suggest that K.R.'s intentions were diminished by intoxication. As a result, K.R. was convicted of second-degree murder.

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