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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***R v Thompson*, 2023 SKCA 66**

Barrington-Foote Kalmakoff McCreary, 2023-05-31 (CA23066)

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The appellant appealed against his conviction of eight *Criminal Code* offences related to a loaded prohibited firearm found in a backpack. The appellant also appealed against the sentence of 49 months and 15 days' incarceration in addition to the 23 months and 15 days of pre-sentence custody and lifetime firearms ban. Police had seen the appellant with a backpack and saw him throw the backpack into a recycling bin. Police recovered the backpack and found a loaded sawed-off shotgun, loose ammunition, needles, a glove, a toothbrush, men's clothing and underwear, a phone and cologne. The key issue at trial was whether the appellant had known the gun was in the backpack. The accused testified he had been given the backpack by someone he had stayed with. He had asked her to bring him his clothes and personal items and he believed that was what was in the backpack. The

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woman testified she had packed the backpack and left her gun and other items in the backpack because she was in a rush. The trial judge disbelieved the evidence of the accused and the woman who testified she packed the backpack. The appellant argued on appeal the trial judge improperly considered his self-interest in being acquitted as a factor that negatively affected the credibility of his testimony. The Court of Appeal considered: did the trial judge's assessment of credibility rest on irrelevant or inappropriate considerations or a wrong legal principle?

HELD: The conviction appeal was allowed and a new trial was ordered. As a result, the sentence appeal was not addressed by the Court of Appeal. Under s. 675(1)(a) of the *Criminal Code*, a person convicted of an offence prosecuted by indictment may appeal against the conviction on any ground of appeal that involves a question of law alone. Credibility findings generally involve questions of fact, not law. Where a trial judge's assessment of credibility rests on irrelevant or inappropriate considerations, or is based on a wrong legal principle, that constitutes an error of law and opens the door to appellate intervention under s. 686(1)(a)(ii). Credibility is about veracity and reliability is about accuracy. The trial judge rejected the defence witnesses' evidence because he found neither to be credible. It is an error of law to reason that testimony given by an accused person is inherently less worthy of belief only because that person has an obvious interest in being acquitted. There is no absolute rule prohibiting trial judges from ever referring to or considering an accused person's interest in the outcome of the case when assessing credibility. The trial judge stated in the reasons for decision that the accused's testimony was "obviously motivated by self-interest." The appellate court needed to read the comments as a whole to determine whether this undermined the presumption of innocence. In this case, the Crown presented six police officer witnesses and one additional witness who was a civilian member of the RCMP. The trial judge made no reference to any other witness being motivated by self-interest. Read in context, the trial judge's reference to the accused's testimony being motivated by self-interest reflected the judge's conclusion that the accused's testimony had to be viewed with suspicion simply because of hist status as an accused person. The accused's interest in the outcome was used in a way that undermined the presumption of innocence.

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***R v Legresley*, 2023 SKCA 71**

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The Crown appealed the acquittal of the accused regarding charges of sexual assault contrary to s. 271 of the *Criminal Code*. The complainant and accused had met through online dating and had previously met in public. They met at a private residence and the accused began touching the complainant sexually. The complainant testified that she felt frozen and was not able to react. She said no three times, started to cry, and never said yes. The accused testified the complainant initially seemed to be enjoying things and he did not hear her object, so he continued. He did not ask at the beginning of the encounter if she wanted to engage in sexual activity. He testified he understood her to say no to a particular sexual act but not to all sexual acts. After some time, the accused asked the complainant if she was comfortable. When she said she wanted to go home, he stopped. The trial judge found the complainant had not consented to sexual activity but acquitted the accused because the Crown had failed to prove *mens rea*, apparently finding the accused honestly believed the complainant had communicated her consent. The Court of Appeal considered: did the trial judge err when he considered the question of honest but mistaken belief in consent?
HELD: The appeal was granted and the matter remitted to the Court of King's Bench for retrial. Section 676(1) of the *Criminal Code* provides for an appeal of an acquittal on a ground involving a question of law alone. The *mens rea* of sexual assault has two components: the intention to touch and knowledge of, or being reckless about or wilfully blind to, the complainant's lack of consent. Section 273.1(1) of the *Criminal Code* defines "consent" to mean "the voluntary agreement of the complainant to engage in the sexual activity in question". To establish the defence of honest but mistaken belief in consent, an accused must have an honest but mistaken belief that the complainant communicated consent, whether by words or conduct. Assumed or implied consent is forbidden. It is a mistake of law to proceed on the basis that silence, passivity or ambiguous conduct constitutes consent. Consent must be specific to each and every sexual act. The accused continued to engage in sexual contact after the complainant said no without clarifying the situation regarding whether the complainant consented. This was at least reckless conduct. Positive affirmation is required. The trial judge did not make factual findings in relation to differing versions of events between the complainant and respondent. The trial judge erred in law in the assessment of the honest but mistaken belief in consent defence. This error affected the outcome. The acquittal was set aside. A conviction can only be substituted when the trial judge has explicitly made all findings of fact necessary to support a guilty verdict. The matter was remitted to be retried.

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***Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400*, 2023 SKCA 72**

Schwann Tholl Kalmakoff, 2023-06-21 (CA23072)

Labour Law - Appeal
Labour Law - Labour Relations Board - Judicial Review
Statutes - Interpretation - *Saskatchewan Employment Act*, Section 6-43, Section 6-111

The appellant employer appealed the dismissal of the employer's application for judicial review of a Saskatchewan Labour Relations Board (board) decision that determined the employer had committed an unfair labour practice by failing to remit union dues and failing to recognize the union as the representative of employees working at two recently acquired retail stores. The certification order required the employer to bargain with the employer in relation to all employees employed by the employer. The collective agreement stated it covered all employees working in its places of business in Saskatchewan. The union demanded the employer provide union cards, dues and payments regarding the employees at those stores. The employer refused, arguing that the union was required to provide evidence of majority support of the employees at the two newly acquired stores. The board decided that: it would not dismiss the application summarily, even though the application was filed after the 90-day window prescribed in s. 6-111(3) of *The Saskatchewan Employment Act*; the union was not seeking to inappropriately extend its rights beyond a valid and subsisting certification order; a vote of the employees was not required; and the employer failed to recognize the union and failed to provide the union required information and thus committed an unfair labour practice. The chambers judge upheld the board's decision as reasonable. The Court of Appeal considered whether the chambers judge correctly applied the reasonableness standard of review regarding the board's decision: 1) to hear the union's unfair labour practice application; 2) to decide no vote was required; and 3) to determine the employer had committed an unfair labour practice by failing to remit union dues.
HELD: The appeal was dismissed. 1) Section 6-111(3) gives the board the discretion to refuse to hear unfair labour practice applications made more the 90 days after the complainant knew or ought to have known of the cause for complaint. The board's decision

reflected the plain wording of the legislation in rejecting the idea of an anticipatory breach triggering the 90-day time limit. The board explained why it heard the application even though it was seven months late with reference to established criteria. To refuse to hear the application would deny bargaining rights which the union asserted arose automatically. The board anchored its reasoning around the concept of a continuing breach occurring. The board's decision was discretionary. The board applied the proper test, applied appropriate factors, responded to submissions of the parties and took into account the impact of its decision on both sides. 2) No vote was required and the union could rely on the existing certification order to sweep in the employees of the newly acquired stores. The wording of the all-employee bargaining unit with provincial scope did not need to be changed or reshaped. The board was not required to follow *obiter dicta* from previous cases. The board's reasons demonstrated the board grasped the employer's argument that precedent required a vote, but decided the authorities relied upon were not dispositive and found the union's cases reflected a more accurate statement of the law and board practice. The board acknowledged the principle of employee choice but did not apply it where it would defeat the existing scope of a valid and subsisting certification order. Furthermore, the right of employee choice was not the appellant employer's right, and the employer's argument was really about freedom from association rather than freedom of association. The board's decision was based on an internally coherent and rational chain of reasoning. The court commented that it was not endorsing a broad principle that all employees of newly acquired locations are automatically swept into existing bargaining unit. Each case of this sort will be decided on its own facts. 3) The employer argued that s. 6-43(1) of *The Saskatchewan Employment Act* requires employer to deduct union dues on the written request of an employee and the union representing the employees, and the employees never provided the written request. The employer had refused to provide to the union the names of the employees in question. The board concluded the absence of written authorizations was the fault of the employer because it did not ensure employees signed the union security cards. The board read the section of the Act as a whole and took the dues deduction obligation in the context of the employer's obligation to provide employee names to the union. The board's interpretive approach was consistent with the modern approach to statutory interpretation. The board did not ignore its earlier decisions and the analysis in the board's reasons supported its conclusion. The board's decision was reasonable. The respondent union was entitled to costs.

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***Zunti v Saskatchewan Government Insurance*, 2023 SKCA 82**

Schwann McCreary Drennan, 2023-07-26 (CA23082)

Administrative Law - Motor Vehicle Accident - Rehabilitation Benefits - Appeal
Administrative Law - Remedies - Prerogative Relief - *Certiorari*/ *Mandamus* - Appeals

The appellant was injured in an automobile accident. He applied to Saskatchewan Government Insurance (SGI) for no fault benefits under Part VIII of The Automobile Accident Insurance Act, RSS 1978, c A-35 (AAIA). SGI provided rehabilitation benefits on a without prejudice basis until it could assess the appellant's medical information. Six months later, SGI denied further benefits

because there was no indication of medical necessity. The appellant disagreed, and the parties went through mediation. The result was an agreement whereby the appellant would undertake an assessment to determine treatment recommendations. He completed an eight-week secondary program, with the discharge report recommending an at-home exercise regime and up to four additional visits. The appellant disagreed with the recommendations, and unsuccessfully appealed to the Automobile Injury Appeal Commission (commission). The issue before the commission was whether the appellant was entitled to additional rehabilitation benefits beyond what was capped by the recommendations in the discharge report. The appellant sought reimbursement of over $8,000 for treatments he paid for out of pocket. SGI took the position that the appellant's condition and symptoms were not related to the accident, and that s. 112 of the AAIA did not require that SGI provide rehabilitation benefits to the point where an insured achieves pain-free status. The appellant appealed to the Court of Appeal (court) on the basis that the commission: 1) lacked jurisdiction to hear his appeal; 2) erred in law by placing the onus on the appellant to prove that he was entitled to further rehabilitation benefits; and 3) made factual errors amounting to errors of law. He also applied to adduce fresh evidence.
HELD: The court dismissed both the appeal and the fresh evidence application. The evidence the appellant sought to adduce was in support of his suspicion that the SGI witness was biased. The court rejected this as being unsubstantiated and found that the proposed evidence was not material or relevant to the issue before the commission. The threshold to establish an apprehension of bias is demanding. 1) The commission had authority to hear the issue of whether the appellant was entitled to benefits beyond what was set out in the discharge report. The court noted that it only had jurisdiction to hear an appeal from a commission decision on a question of law (s. 194, AAIA). Many of the appellant's arguments challenged the commission's findings of fact, including the weight assigned to the evidence. While s. 194 did not permit an appeal from a finding of fact, factual findings may give rise to an error of law in certain limited circumstances (*Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57). The insurer's decision to grant rehabilitation benefits under s. 112 was discretionary. The criteria guiding the insurer's decision to fund rehabilitation benefits was whether the treatment was medically necessary and contributed to rehabilitation or lessened a disability. 2) There was no error in how the commission dealt with the issue of onus. It is generally accepted that an insured bears the burden of proof to establish entitlement to benefits, while SGI bears the burden when benefits are terminated. The court noted that the commission did not specifically address the question of onus, but the court saw nothing in its decision that suggested that the appellant bore the burden of proof. Little weight was given to the appellant's evidence before the commission because there was a lack of context and it seemed to consist of the appellant's unsupported, subjective opinion about his state of health and his argument that further treatments were required. The commission was left with only SGI's medical evidence. There was no medical opinion or evidence indicating that the discharge report's treatment recommendations were inappropriate or that an increased number of treatments was required. 3) There was no question of law behind the issue of whether rehabilitation benefits were medically necessary. Given the limited scope of the court's jurisdiction under the AAIA, the appellant could only succeed if he could demonstrate that the commission decision was made in the face of "no evidence or irrelevant evidence, or in disregard of relevant evidence, or upon a mischaracterization of relevant evidence, or on an unfounded or irrational inference of fact." The appellant adduced virtually no medical evidence, leaving the commission with SGI's uncontradicted evidence that further treatment was not medically necessary. Finally, the appellant asked the court to apply s. 11 of *The Court of Appeal Act, 2000* to grant prerogative relief and to quash the commission decision. The court set out examples of the extraordinary cases in which such relief had been granted and concluded that the appellant's appeal did not fit within the sort of exceptional circumstances where s. 11 relief historically had been allowed.

However, the court was not inclined to grant such relief for the simple reason that the appellant had a right of appeal under s. 194 of the AAIA and his arguments had been dealt with on their merits.

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***Lepage Contracting Ltd. v McCutcheon*, 2023 SKCA 83**

Jackson Tholl McCreary, 2023-08-03 (CA23083)

Employment Law - Appeal
Administrative Law - Saskatchewan Labour Relations Board - Judicial Review - Appeal
Statutes - Interpretation - *Saskatchewan Employment Act*, Section 2-37(3)

The employee (respondent) filed a complaint with the Employment Standards Director for unpaid vacation pay against the appellant employer corporation. The director issued a wage assessment of over $13,000 against the employer. The employer appealed to an adjudicator on the basis that the amount in question had already been paid under an oral agreement with the employee. The employer argued that the oral agreement was an all-inclusive agreement that lumped together wages for hours worked with vacation pay. At the hearing before the adjudicator, there was no documentary evidence to support the employer's claim of an agreement, and there was no evidence of a statement of earnings to the employee with each wage payment showing the breakdown between wages and vacation pay, as required by *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (Act). However, two former employees testified about the practices of the employer which could support the existence of the agreement regarding how wages were paid, and that vacation pay had been paid. The adjudicator made no direct finding as to whether there was an agreement between the employer and employee or if vacation pay had been paid and did not make any findings of credibility. The adjudicator instead relied on s. 2-37(3) of the Act to dismiss the employer's appeal and increase the amount of the wage assessment. The relevant portion of s. 2-37(3) read: "[u]nless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid". The employer appealed the adjudicator's decision to the Saskatchewan Labour Relations Board (board) which also dismissed the appeal. The board found that the adjudicator's reasons were deficient but upheld the adjudicator's decision. The appellant appealed to the Court of Appeal because neither the adjudicator nor the board made a finding of fact that the allegedly unpaid vacation pay had not in fact been paid. The employer argued that it had agreed that vacation pay and wages would be paid together.
HELD: The Court of Appeal (court) allowed the appeal and remitted the matter back to the board for a disposition in accordance with the court's reasons. The court noted that there are strong policy arguments against all-inclusive agreements that lump together wages for hours worked with vacation pay, particularly oral agreements. However, the court held that the Act did not expressly prohibit such contracts and did not penalize their use by deeming amounts paid under such agreements as being unpaid. Not expressly permitting an action and prohibiting it are two very different legislative directives. Part II if the Act sets out that employees are entitled to paid vacation leave, and to receive a statement of earnings with basic information regarding the payment of wages. Failing to provide such a statement is an offence. The s. 2-37(3) deeming provision gives employers the opportunity to prove that

they have in fact paid wages and other amounts not included in a statement of earnings in order to avoid the effect of the deeming provision. The employer was entitled to know whether its evidence regarding the existence of an agreement and that vacation pay had been paid was believed. If the employer's evidence were accepted, it could establish the contrary under s. 2-37(3), preventing the director from relying on the presumption deeming the vacation pay not to have been paid.

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***Manulife Bank of Canada v Taylor*, 2023 SKKB 105**

Robertson, 2023-05-18 (KB23109)

Mortgage - Foreclosure - Application to Confirm Judicial Sale
Mortgages - Foreclosure - Order Nisi - Application for Variation
Mortgages - Foreclosure - Order Nisi - Judicial Sale
Mortgages - Judicial Sale - Upset Price

The plaintiff bank applied to amend two orders nisi for sale by real estate listing to reduce the minimum sale price and to confirm the sale of the mortgaged properties for the reduced sale price. The defendant-owners opposed the applications. The judge considered: 1) did the proposed sales comply with the terms of the order nisi? 2) If not, did the court have jurisdiction to consider the amendment applications? 3) If so, should the court exercise its discretion to grant the applications; and 4) what order of costs would be appropriate?
HELD: Both applications were granted, with no costs awarded. 1) The defendant owners argued the applications should not be considered because the plaintiff did not comply strictly with the orders nisi by accepting offers before the listing period expired and accepting offers below the upset prices. The selling officer must be open to offers during the listing period to ensure the best price but offers can be conditionally accepted during the listing period. The upset price is the minimum price. In this case, proposed sale prices were below the upset price set in the order nisi. Thus, the proposed sales did not comply with the order nisi. 2) Although, as a general rule, judges dismiss applications to confirm judicial sale that do not comply with the order nisi, there is no absolute bar against confirming a sale in that circumstance. The court requires compelling reasons to exercise discretion to confirm a sale despite non-compliance. A key consideration is whether it would be equitable, especially regarding its effect on the debtors. The standard rules for foreclosure actions and judicial sales were reviewed: no pre-leave costs; a 90-day redemption period; upset price calculated as a percentage of estimated market value; an independent selling officer; and fixed costs award at the conclusion. Application to depart from the general rule should be clear and supported by evidence. The plaintiff bank had explained why the offer below the upset price was conditionally accepted. The acceptance of the offers was conditional, and to refuse to vary the order nisi risked losing the best possible offer to the detriment of all parties. An order nisi is not a final order, but is a conditional order that is more amenable to amendment. The court had the discretion to amend the order nisi. 3) Following established factors to be considered on an application to vary an order nisi, the amendment applications were granted to reduce the upset price and confirm the sale at the reduced prices. Affidavit evidence provided a sufficient evidentiary foundation for the sale. Only the third of three reports estimating the value of the property was prepared by someone who had the ability to inspect the interior and exterior of the

building. The earlier inaccurate drive-by valuations were in part the result of the owner's failure to provide access to the properties. The properties were now vacant rental properties. The mortgagor had a right to bid on the sales and did not because the upset price was above the market price. The proposed sale prices were reasonable and obtained on a willing seller, willing buyer market. The independent selling officer was a senior experienced lawyer who understood her role and took court direction. There was some unexplained delay in listing the property after the order nisi was issued. Dismissing the application would prolong the process, add costs, increase losses, and not likely result in a better sale price. 4) Although costs are usually awarded to the successful party, no costs were awarded. The plaintiff was a sophisticated business that chose to use drive-by valuations that proved unreliable. It chose to proceed with a sale rather than first seek a variation of the upset price. The plaintiff bore responsibility for the situation which brought about the applications and, in the circumstances, it was reasonable for the owner defendants to resist the application.

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***Howarth v Leer*, 2023 SKKB 109**

Hildebrandt, 2023-05-25 (KB23102)

Insurance - Subrogation
Civil Procedure - *Queen's Bench Rules*, Rule 7-1
Statutes - Interpretation - *Automobile Accident Insurance Act*, Section 18, Section 103, Section 104, Section 109, Section 110, Section 111, Section 204, Section 209, Section 212
Statutes - Interpretation - Amendment - Retroactive

The defendants applied, pursuant to rule 7-1 of *The Queen's Bench Rules*, for determination of three legal questions to assist in focussing the issues for trial. The defendant was driving and collided with the defendant's parked vehicle. The plaintiff was in the course of his employment and was seated in the parked vehicle at the time of the collision. The plaintiff's employer was registered in Alberta and paid workers' compensation dues in both Alberta and Saskatchewan. Both vehicles were licensed in Alberta. The collision occurred in Saskatchewan. The plaintiff received $37,381.95 in compensation from the Saskatchewan WCB. The WCB pursued a subrogated claim against the defendants for the amount paid to the plaintiff. Although The *Automobile Accident Insurance Act* has since been amended, the amendments did not have retroactive application, in keeping with s. 2-5 of *The Legislation Act*. The chambers judge considered: 1) Did the provisions of *The Automobile Accident Insurance Act* (AAIA), and particularly Parts III and IV thereof, apply? 2) Did ss. 103 and 104 of the AAIA limit the plaintiff's claimable damages to past and future income loss, and preclude the plaintiff from otherwise seeking general damages and special damages? 3) Did the 1997 reciprocity agreement between the Province of Alberta and Saskatchewan Government Insurance preclude the WCB from maintaining a subrogated claim?
HELD: The answer to the first two questions was "yes" and the answer to last question was "no.". The statement of claim was amended accordingly. 1) The AAIA creates a comprehensive no-fault insurance scheme for motor vehicle accidents, with an option to elect tort coverage if certain conditions are met. Non-residents do not have the option to elect tort coverage. Section 18(2) did not exclude the operation of Part II and IV of the Act and did not provide non-residents an option to pursue damages in a civil action. 2)

Sections 103 and 104 expanded the right of persons injured in motor vehicle accidents by impaired drivers to bring an action for non-economic loss. Here, the plaintiff was not convicted of an offence and s. 104 was not applicable. Section 103 did not provide the plaintiff with a right to claim general or special damages. The plaintiff's claim for damages was limited to damages to past income or future income loss. 3) Applying s. 109(1)(a) of the AAIA, an Alberta resident injured in Saskatchewan is entitled to benefits in accordance with any agreement between the insurer and the government of Alberta. The agreement between SGI and Alberta precluded SGI from pursuing a subrogated claim. WCB argued this agreement could not bind WCB and prevent its subrogated claim because WCB did not sign the agreement. Section 204 of the AAIA establishes a separate right of subrogation for the WCB but specifies that WCB has the same remedies as the insurer. WCB's right to subrogation is limited to the maximum yearly insurable earnings paid to each plaintiff. The WCB, pursuant to s. 204, has the same remedies available to it as SGI. Where the accident occurs in Saskatchewan, both SGI and the WCB have a similar right to recover the amount of the benefits paid, pursuant to s. 111, and, in relation to non-economic losses, are subrogated to or an assignee of the insured by s. 105. SGI waived its rights but the WCB did not. Statutory rights of one entity cannot be contractually waived by another entity. SGI did not sign the agreement as an agent of the WCB.

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***Owners, Condominium Corporation No. 101108111 v Sisetski*, 2023 SKKB 112**

Currie, 2023-06-05 (KB23103)

Civil Procedure - Pleadings - Application to Strike Statement of Defence
Civil Procedure - *Queen's Bench Rules*, Rule 7-9

The plaintiff condominium owners had sued the defendant over arrears of condo fees. The defendant had filed a statement of defence, alleging maintenance concerns as the reasons he stopped paying his condo fees in 2018. The plaintiff applied under rule 7-9 of *The Queen's Bench Rules* to strike the statement of defence for failure to disclose a reasonable defence. The chambers judge considered whether the statement of defence disclosed no reasonable defence.
HELD: The defence did not set out a legal basis for withholding payment of condo fees. Frustration over maintenance concerns is not a legal basis to stop paying. Section 54 of *The Condominium Property Act, 1993* provides that an owner is liable for and must pay such condominium fees even if the owner is making a claim against the condominium corporation. Costs of the application were awarded to the plaintiff.

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***Innovation Credit Union v Keshe Holdings Inc.*, 2023 SKKB 113**

Keene, 2023-06-06 (KB23104)

Mortgages - Foreclosure and Judicial Sale - Priorities

The plaintiff mortgage lender applied to have the funds from a sale of land applied to a mortgage and receive judgment for the unpaid balance against the guarantors, and further sought default judgment against the individual defendants for a line of credit. The plaintiff held a mortgage in relation to land owned by the defendant holding corporation. Two individual defendants had provided written guarantees to pay all amounts under the mortgage. The holding corporation and individual defendants defaulted on payment and the individuals further defaulted on a $12,392 payment of a line of credit. The plaintiff noted all defendants in default of defence. An order nisi was applied for and granted, and the land sold with all necessary approvals. The balance of the sale proceeds of $69,987.68 was placed in the trust account of the plaintiff's lawyer pending court direction. The Canada Revenue Agency gave notice that the defendants had failed to remit $45,725 in GST and payroll source deductions. The court considered: did the CRA or the plaintiff mortgage lender have priority for the funds held in trust?
HELD: The CRA had priority. The balance went to the mortgage lender, with judgment against the individual defendants for the balance of the outstanding mortgage, and for the line of credit plus interest and set costs. There was no dispute the corporation failed to remit to the CRA. A creditor, such as the plaintiff mortgage lender, who receives proceeds from the assets of a debtor becomes liable to pay these proceeds to the Receiver General of Canada. The CRA's action against the plaintiff was covered by a deemed trust. A prescribed security interest under regulations to the *Income Tax Act* or the *Excise Tax Act* is the only exception to the Crown's super priority for a deemed trust. The regulations further require the value of the prescribed security interest be reduced by the value of any rights or guarantees the creditor may have. No costs were awarded for the priorities dispute. The plaintiff was awarded costs in relation to the default judgments.

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***Altus Group Limited v Saskatchewan Assessment Management Agency*, 2023 SKKB 129**

Baldwin, 2023-06-19 (KB23117)

Administrative Law - Property Assessment - Judicial Review

The applicant brought an originating application for judicial review of revised property assessments remitted by the respondent in response to a decision by the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee). The applicant was the agent for several taxpayers who owned commercial properties over 6,000 square feet in the city and rural municipality of Estevan. The respondent completed the property tax assessments on the properties. In 2017, the applicant appealed tax assessments on behalf of the taxpayers, on the basis that the assessment model used by the respondent failed to account for and consider sales data for larger properties, resulting in overvaluation and over-taxation of their properties. The applicants had mixed success at the boards of revision, resulting in appeals and a successful cross-appeal to the committee. The committee remitted the matter to the respondent to make adjustments to the assessments according to its instructions. Here, the applicant sought a

declaration that the revised property assessments were incorrect and/or unreasonable, a *certiorari* order setting aside or quashing the revised property assessments, and a *mandamus* order requiring the respondent to prepare and remit revised property assessments. The court determined the following issues: 1) which decisions, acts or omissions of the respondent were subject to judicial review; 2) what did the committee direct the respondent to do; 3) what did the respondent do in response to the directions of the committee; 4) what was the appropriate standard of review to apply to the respondent's actions; 5) were the respondent's actions reasonable; 6) what was the proper outcome of this judicial review proceeding?

HELD: The court dismissed the applicant's originating application for judicial review, finding that the respondent's actions were reasonable in the circumstances of this case. 1) The court found that it was clear that property assessments constituted decisions of property assessors. The aspects of the respondent's decision-making in response to the committee's remittal decisions could be considered within a rubric in accordance with established case law on judicial review. 2) The parties had different views about what the committee directed the respondents to do in the remittal decisions. The applicant argued that the committee directed the respondent to use a curved approach to adjusting cap rates for buildings of a certain square footage, while the respondent argued that the committee directed that no specific adjustment was required. The respondent argued that it was directed to ensure certain specified errors were corrected to provide an accurate, fair, and equitable assessment for the property. 3) The respondent concluded that no additional adjustment was required for the rent size based on the results of their investigation. The applicant took issue with this approach on the basis that the respondent did not investigate whether an adjustment was warranted specifically for buildings over a certain size. 4) The court concluded that the situation did not fall within any of the existing categories where correctness review would be appropriate. Therefore, the court applied the standard of reasonableness. The starting point to determine the appropriate standard of review was *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). The presumption according to *Vavilov* is that the standard of review on judicial review is reasonableness, and that the reviewing court may only derogate from this presumption under limited circumstances. The Supreme Court of Canada has identified six categories where the presumption of reasonableness can be rebutted. The applicant took the position that two different standards of review applied – the standard of reasonableness for the "general review" of the respondent's decisions regarding the revised assessments, and the standard of correctness for the court's consideration of whether the respondent complied with the committee's directions. The respondent argued that the standard of review to be applied to all of its actions and responses was reasonableness. 5) The onus was on the applicant to establish that the respondent's actions were unreasonable. Under *Vavilov*, this meant examining two factors: whether the respondent's actions stayed within constraints it was subject to, and whether the respondent's reasoning was rational, logical and sufficient. The court looked at the directions from the committee to the respondent and found that the directions left some discretion to the respondent. None of the directions were sufficiently specific to create a situation where the decision was the only constraint on the respondent. None of the directions supported only one interpretation. While it was true the respondent had no discretion as to which errors to correct, the method of correction was not specified, and was therefore left to the respondent's discretion. The court found that the respondent was not required to focus its investigation on properties over a certain size, or to make an adjustment based on building size. The respondent was, however, subject to constraints requiring it to investigate and act according to the principles of assessment law and practice. The court found that the respondent operated within these constraints. Because the applicant did not argue that the respondent's reasoning was insufficient, the court focused on whether the respondent's reasoning was rational and logical. The court found that the respondent's reasoning, as described in its affidavit evidence, was both rational and logical. In the respondent's view, a four percent straight line adjustment was appropriate. 6) The court concluded that the respondent's actions were reasonable in the circumstances of the case. The court dismissed the applicant's originating application for judicial review. The respondent was entitled to its taxable costs of the

application.

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***J.M.M. v I.D.M.*, 2023 SKKB 137**

Bardai, 2023-06-27 (KB23123)

Family Law - Variation of Interim Order - Parenting Time

The applicant father sought the production of pay stubs from the respondent mother and variation of an interim order prior to a scheduled trial. The applicant wanted to increase his parenting time over the summer. In addition, he sought the cancellation of a restraining order against his current partner. The respondent had reached out to the father the previous spring about increased parenting time for the father with the child, including overnights. The applicant had been spending more time with the child as a result. The parents were unable to agree about summer parenting time. The respondent took issue with some aspects of the applicant's evidence but did not fundamentally oppose what the applicant sought. She did not take a position on rescinding the restraining order and was prepared to agree to additional parenting time for the father. The respondent undertook to obtain the paystubs from her employer and provide the information to the applicant.

HELD: While the court was not prepared to make wholesale changes to the current parenting order, given the submissions of the parties, the court made minor changes to the parenting time of the applicant based on what the respondent was prepared to agree to anyway. The minor changes to the existing interim order made sense, were in the child's best interests, and were without prejudice to what the trial judge might order with an evidentiary foundation. The court rescinded the restraining order. The court did stress that parents need to stop coming to court seeking to vary interim arrangements, because constant changes to parenting arrangements prior to trial are not in a child's best interests. As a starting point, the court determined whether the variation sought was of an interim order or a final order. For variations of final orders, the applicant must establish first that there has been a material change in the circumstances of the child. To do this, the applicant must demonstrate: a) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; b) that such change materially affects the child; and c) that the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order (*A.M. v Ministry of Social Services*, 2020 SKCA 114 [*A.M.*]). A change is "material" if it is of "sufficient magnitude to compel the conclusion that the previous order might have been different had the circumstances that now exist prevailed at the time the original order was made" (*A.M.*). If the applicant successfully establishes a material change, then the court determines what is in the best interests of the child. If a party seeks to vary an interim order and replace the existing status quo with a new interim order, the applicant must also prove, in addition to the above, that the child is at risk or that there are other compelling reasons to vary the interim order. The test to replace an interim order with another interim order is therefore higher than varying a final order. The court did not find that there had been material changes since the interim order was made. While nearly three years had passed since the original interim order had been made, the court indicated that mere passage of time did not constitute a material change in the needs or circumstances of the child (*Gray v Wiegers*, 2008 SKCA 7).

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***Hoffman v Tytlandsvik*, 2023 SKKB 146**

Megaw, 2023-07-07 (KB23131)

Family Law - Parenting Time and Decision-making - Best Interests of the Children
Family Law - *Divorce Act* - Parenting - Family Violence
Family Law - Trial - Parenting - Child Support - Spousal Support

The petitioner and respondent had three young children together. The petitioner had a home-based bookkeeping business. She earned more from her business than she earned when she worked outside the home before having children. The respondent worked as an on-call centrifuge technician and worked for a local farmer as a labourer. He also had a side venture of making wooden yard game toys. The respondent deliberately misled the court regarding the farm work that he did in 2022. This affected the final assessment of his income. The evidence indicated that the father had been exceedingly demanding of the mother and used derogatory and degrading language about her in the presence of the children. The respondent did not maintain the bank loan payments on the petitioner's vehicle after the separation, resulting in the vehicle being repossessed. The court determined several issues after a trial related to: 1) whether family violence occurred, and how that would affect the parenting regime; 2) the amount of child support based on incomes; and 3) spousal support. The court was satisfied that a judgment for divorce should issue.
HELD: The court did not put a shared parenting regime in place, given the evidence of family violence. The court calculated the petitioner and respondent's income to determine child support amounts. The mother did not establish entitlement to spousal support. 1) The court found that the respondent's behaviour constituted family violence. As a result, the court did not put a shared parenting regime in place. Instead, the court left the parenting arrangement as it had been for the past year under the interim order. The court began with the best interests of the child analysis. The court considered the issue of family violence in ss 16(3)(j) and 16(4) of the *Divorce Act*, RSC 1985, c 3 (2d Supp). When taken in its entirety, the court found that the respondent's actions constituted coercive and controlling behaviour in the form of both psychological and financial abuse. The behaviour constituted a recurring pattern, occurring when the petitioner was vulnerable. The court found that the petitioner feared for her safety and felt anxiety. The court declined to impose a complete shared parenting regime, finding that it would not be in the children's best interests. The court did not reduce the respondent's parenting time. The court determined that the mother would have the ability to make final decisions regarding the children. This could be revisited in a variation application if the father took steps to understand the impact of his behaviours and overcome them. The court cited Cote v Cote, 2023 SKKB 139 for a framework on determining decision-making responsibility between the parties. The court noted that it was important that the parents be seen as participating in the children's lives to the extent possible and noted that there were ongoing concerns here regarding the father's treatment of the mother. The mother had principally been responsible for the care of the children, attending to their day-to-day needs. The court was not prepared to invoke a first option to care for the children regime. There was no evidence pointing to the father being away from the children for long periods of time during his parenting time, or that the children were not being appropriately cared for when the father was called in to work. 2) The respondent provided affidavit evidence about his 2022 farm labour income that was later proven false on the witness stand. He did not explain why he misled the court in the affidavit. The court therefore imputed the respondent's farm income

based on 2021 numbers. For the toy business, the respondent testified that this was taken over by his new partner and had nothing to do with him. Neither he nor his partner provided any documentary evidence showing how many games were sold and at what price. The court was left with the impression that the respondent was minimizing the potential importance of this business, and that it was earning sufficient income that the respondent tried to hide it in these proceedings. The petitioner suggested the amount of $5,000, and the court went with this number in the absence of other evidence. The court applied a *Contino v Leonelli-Contino*, 2005 SCC 63 analysis to determine the appropriate level of child support. First, the court determined the simple set-off amount. Second, the court reviewed the child-specific budgets completed by the parties for the total annual expenses for the children. The respondent's budget included expenses for all the children at his house, including his partner's three children. The court noted that this budget was of little assistance in determining an appropriate child support amount. Given the existing parenting arrangement, the mother had the children most of the total time, which meant that she had a greater responsibility for day-to-day expenses. The father was earning close to two times the income of the mother, and the court found that it would not be fair and reasonable to simply apply the set-off amount from the *Guidelines*. 3) The mother did not establish entitlement to spousal support. The mother did not alter her career path as a result of the birth of the children; instead, she established her home-based business and continued to operate it. Her actual income increased as a result. There was no evidence to suggest that the actions of the mother improved the father's earning ability. The court determined that there should be a retroactive adjustment to have the child support match the evidence established at trial.

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***Affinity Credit Union 2013 v Ritchie Industries Inc.*, 2023 SKKB 152**

Rothery, 2023-07-13 (KB23141)

Bankruptcy - Insolvency
Receivership - Order Approving Sale

R. Ritchie (R.R.) was the sole shareholder and sole director of the two defendant corporations, Ritchie Industries Inc. and Duck Mountain Environmental Ltd. He was also the guarantor of the indebtedness of both corporations to the plaintiff. The receiver had been appointed by the court for both defendants and was also the licensed insolvency trustee for them. Both defendants filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA), which was terminated by the court and resulted in a deemed bankruptcy. The receiver completed a sale of the defendants' assets (real property, equipment, chattels and inventory) and applied for court approval of the sale. The receiver identified a title issue that would require significant litigation but was able to resolve it in a settlement agreement with the purchaser. Counsel for R.R. opposed the sale. After hearing submissions, the court approved the sale. This decision included the court's reasons supporting its decision to approve the sale of the assets of the defendant and the granting of a vesting order.
HELD: The court granted the order approving the sale because the receiver acted reasonably, prudently, fairly, and not arbitrarily (*Royal Bank of Canada v Soundair Corp.* (1991), 83 DLR (4th) 76 (Ont CA) [*Soundair*]). The court assessed whether the receiver acted properly in the sale process. The court summarized the four duties a court must perform in this context, involving a

consideration of: a) whether the receiver made a sufficient effort in getting the best price, and did not act improvidently; b) the interests of all parties; c) the efficacy and integrity in the process by which offers were obtained; and d) whether there had been unfairness in the process (*Soundair*; *The Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289). Counsel for R.R. argued that the receiver failed on all four factors. Specifically, that the receiver did not obtain the best price because there was no public sale process, and that there was no allocation for goodwill in the sale. The receiver explained that the sale was not of a "going concern" business; rather, it was a forced sale within the context of a receivership, and that made it subject to a discount. The court agreed with the receiver. The court found that the receiver acted providently, resolving a difficult legal issue concerning clear title to the asset and obtaining certainty for the parties. The court had to consider the interests of all parties in determining whether the receiver acted properly in the sales process. The secured creditor plaintiff supported the proposed sale, noting the ongoing and accruing interest costs on the mortgage. The plaintiff noted that having the assets sold would prevent further deficiencies that the guarantor may be liable for. The sale did not adversely affect any of the other creditors. While the receiver did not advertise on the open market, it pursued a fair sale process.

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***R v Bernier*, 2023 SKPC 35**

Hinds, 2023-05-25 (PC23034)

Criminal Law - Evidence - Identity of Accused - Sufficiency
Statutes - Interpretation - *Canada Evidence Act*, Sections 31.1 to 31.8
Statutes - Interpretation - *Public Health Act, 1994*, Section 61

Eleven individuals were charged with failure to comply with a public health order by being in a private outdoor gathering of more than 10 people, contrary to contrary to section 61 of *The Public Health Act, 1994*. Questions regarding the constitutionality of the legislation were previously decided by the court and could not be re-litigated. The court considered whether the Crown had proven beyond a reasonable doubt that: (1) the public health order was in place; and (2) the accused persons failed to comply with the public health order by attending a gathering of more than 10 people.
HELD: Two accused did not appear at trial. The court entered default judgments and imposed a $2,800 fine against each of these individuals. The Crown entered a stay of proceedings in relation to two other accused. The remaining seven accused were found guilty. (1) The public health order was in place. The Crown filed a certified copy of the health minister's order delegating powers to the chief medical health officer and a certified copy of the public health order. (2) An agreed statement of facts established beyond a reasonable doubt that four of the accused failed to comply with the public health order by attending a planned public protest. The Crown entered digital photos and video. Sections 31.1 to 31.8 of the *Canada Evidence Act*, ss. 31.1 to 31.8 create a framework for the admission of all forms of electronic document. Authentication requires the introduction of some evidence to establish that the document is what it purports to be. Authentication is not onerous and may be established by direct and circumstantial evidence. At common law, the best evidence rule requires the proponent of a record to produce the original record or the next best available record. The concept of "original" is ill-suited to electronic documents. Police witnesses testified that the videos and photographs

accurately depicted what they saw on the date in question. The photos and videos met the requirements of the Act and there was no suggestion the documents were altered. The presumption of integrity applied. The identity of three accused persons was at issue. The judge accepted the recognition opinion evidence of police witnesses and relied on video evidence to conclude that the individuals were present at the gathering and not simply passing through the area.

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