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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***Evans v General Motors of Canada Company*, 2023 SKCA 86**

Schwann Kalmakoff Drennan, 2023-08-09 (CA23086)

Civil Procedure - Class Actions - Certification - Appeal
Civil Procedure - Appeal - Application to Adduce Fresh Evidence
Civil Procedure - *Court of Appeal Rules*, Rule 59(1)

The applicant applied for leave to adduce evidence to aid in her response to an appeal by the appellant, General Motors of Canada Company and General Motors LLC. The appellant appealed from a decision made by a Queen's Bench judge to certify the applicant's claim as a multi-jurisdictional class action.
HELD: The Court of Appeal (court) dismissed the application for leave to adduce evidence. The applicant argued that the principles governing an application to adduce evidence on an appeal from an interlocutory motion (in this case, a certification ruling) should be relaxed. The court noted that a similar argument was raised and rejected in *MacInnis v Bayer Inc.*, 2023 SKCA 37. When the court considers an appeal from a certification ruling, it exercises appellate jurisdiction and not original jurisdiction. A party

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is expected to put its best foot forward the first time around. An appeal is not an extension or continuation of the certification hearing. The court applied the *Palmer* criteria, recently reaffirmed in *Barendregt v Grebliunas*, 2022 SCC 22, when considering whether to admit the proposed evidence (seven affidavits) on appeal. The four criteria are: a) the evidence could not have been obtained by due diligence; b) the evidence is relevant; c) the evidence is credible (reasonably capable of belief); and d) the evidence is such that, if believed, it could have affected the result at trial. The proposed affidavit evidence did not meet the test, because it could have been obtained by the exercise of due diligence and adduced during the certification application. While this conclusion disposed of the application, the court considered the opposing party's argument that the proposed evidence lacked credibility, primarily because it was untested by cross-examination. There was no way for the court to assess the credibility prong of the *Palmer* test.

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***R v J.G.*, 2023 SKCA 92**

Leurer Tholl McCreary, 2023-08-10 (CA22092)

Criminal Law - Conviction Appeal - Sexual Assault - Complainant's Capacity to Consent
Statutes - Interpretation - *Criminal Code*, Section 150.1, Section 271

The appellant was convicted after a trial of sexually assaulting the complainant and was sentenced to 32 months of incarceration. At the time of the offence, the appellant was 21 and the complainant was 15. The complainant and her friend shared drinks together, and then went to a bar despite being underage. The appellant and complainant interacted at the bar, and then went to a house party to continue socializing and drinking. They had never met before this evening. At the end of the evening, the appellant had vaginal and anal intercourse with the complainant, who reported the incident to police. The appellant admitted to having sexual intercourse with the complainant but argued that it was consensual. He argued that he believed the complainant was 19 years old because they met at a bar. The issues at trial centered around the consent of the complainant. It was undisputed that the complainant was under 16 and the appellant was more than five years older than her. Section 150.1 of the *Criminal Code* applied. The complainant testified that she was very intoxicated, so capacity to consent was an issue as well under s 273.1(2)(b). J.S. lived at the house

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and testified that she was sober during the evening in question. At around midnight, she opened a door to an adjacent room where the complainant and appellant were and turned on the light. She observed the appellant and complainant "making out" and that the complainant was on top of the appellant, kissing him. The Court of Appeal (court) considered whether the complainant communicated her actual consent to sexual intercourse.
HELD: The court allowed the appeal, set aside the conviction, and ordered a new trial. The court found that the trial judge overlooked J.S.'s testimony on what she observed. The court stated that while J.S.'s observations that the complainant was on top of the appellant while kissing him and "making out" did not indicate that the complainant consented to sexual intercourse, J.S.'s evidence could be interpreted as evidence that the complainant was actively participating in consensual sexual activity with the appellant at the point when J.S. turned on the light in the room. The trial judge did not take this aspect of J.S.'s evidence into account at all. J.S.'s observations were material and had to be accounted for by the trial judge in his fact finding. The trial judge's finding that there was no consent throughout the sexual interactions was inconsistent with what J.S. described seeing on the couch. It was incumbent on the trial judge to address J.S.'s evidence.

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***Patel v Saskatchewan Health Authority*, 2023 SKCA 93**

Richards Caldwell Tholl, 2023-08-11 (CA23093)

Civil Procedure - *Court of Appeal Rules*, Rule 46.2(1) - Vexatious Litigant

The Saskatchewan Health Authority (SHA) applied for an order that Dr. Patel be prohibited from commencing proceedings at the Court of Appeal (court) without leave. The SHA applied under Rule 46.2(1) of *The Court of Appeal Rules* on the basis that Dr. Patel commenced frivolous or vexatious proceedings. The application was granted by Kalmakoff J.A. in chambers. The order prohibited Dr. Patel from commencing any proceedings in the court without leave of the court and directed registry staff to reject "any document" he attempted to file in contravention of the order. Dr. Patel applied to have the order discharged or varied.
HELD: The court dismissed the application but narrowed the scope of the order. The

court was not persuaded that Kalmakoff J.A. lacked the jurisdiction to make the order or that he erred in making the vexatious litigant order. However, the scope of the vexatious litigant order was adjusted to match the nature of the vexatious conduct in issue. Dr. Patel would be prohibited from commencing any proceeding in any way related to the dispute over the Saskatchewan Health Authority's suspension of his surgical privileges.

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***A.C. Forestry Ltd. v Big River First Nation*, 2023 SKCA 96**

Richards Jackson Drennan, 2023-08-18 (CA23096)

Civil Procedure - Partial Summary Judgment
Civil Procedure - *Queen's Bench Rules*, Rules 7-2, 7-5
Practice - Application for Summary Judgment - Disposition Without Trial

The appellant corporation appealed a decision granting partial summary judgment to the plaintiff. The appellant is a forestry corporation with three equal shareholders, each of which is a First Nation community. A royalty agreement established a process for the distribution of royalties generated from the sale of the timber allocation. The agreement stated royalties were to be used for disbursement to the three First Nation communities, "unless directed to do so by" the board of directors, and made reference to distribution on a per capita basis, or in other words, according to the number of members of each community. From 2010 to 2020, timber royalties were divided and paid to each First Nation community on a per capita basis. In 2020, the royalty distribution changed to pay royalties in equal one-third shares. One of the shareholders, the respondent First Nation with the largest number of members, did not agree to the change and commenced an action against the appellant corporation. The First Nation filed originating applications seeking confirmation that the payments were to be made on a per capita basis and not on an equal one-third basis. The corporation applied to summarily dismiss the action and for a declaration that the royalty agreement was unenforceable and void *ab initio*. The First Nation did not formally apply for summary judgment but requested a determination that it was entitled to a per capita distribution. Neither party sought partial summary judgment. The chambers judge dismissed the application for summary dismissal, and determined the royalty agreement was a valid agreement. Therefore, that issue did not require a trial, but enforceability of the agreement could not be determined

in the summary dismissal application. The Court of Appeal considered whether the chambers judge erred in granting the respondent partial summary judgment.

HELD: The appeal was granted. The chambers judge erred by granting the respondent First Nation partial summary judgment. Procedural irregularities may have caused some of the confusion on this file. Partial summary judgment is an important remedy in the judicial toolbox but should be used rarely and cautiously. If used imprudently, partial summary judgment can cause delay, increase expenses, and increase the danger of inconsistent findings at a trial made on a more complete record. The key factors in determining whether partial summary judgment should be granted are: whether there is a risk of duplicative or inconsistent findings at trial; whether making a partial order is advisable in the context of the litigation as a whole; and whether there will be any saving of costs or time. A court ought to assess whether better evidence will be available at trial and whether a trial will be necessary despite the partial summary judgment ruling. An appellant of a partial summary judgment must demonstrate an error in judgment that had a material impact on the decision under appeal. In this case, the chambers judge's reasons did not address whether it was an appropriate case to grant partial summary judgment in the respondent First Nation's favour in the context of an application brought by the appellant corporation. The issues of validity and enforceability of the royalty agreement are intertwined and rely on the same evidence. A final decision on validity at this stage would risk possible inconsistent findings on key fact issues. Summary judgment on the validity issue provided minimal time or economic efficiency, as the action would need to proceed to trial on the key issue of whether the royalty agreement bound the corporation to distribute royalties per capita. The corporation failed to establish there was no genuine issue for trial at the summary judgment application, and the chambers judge ought to have left all issues for trial.

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***Michel v Saskatchewan*, 2023 SKCA 97**

Kalmakoff, 2023-08-23 (CA23097)

Civil Procedure - Appeal - Leave to Appeal
Civil Procedure - Amendment to Statement of Claim

Peter Ballantyne Cree Nation (PBCN) and the Attorney General of Canada (Canada) sought leave to appeal against a case management judge's decision which allowed the Government of Saskatchewan (Saskatchewan) and SaskPower to make amendments to their respective statements of defence and third-party claims. The long-standing dispute between the parties involved the flooding of land for a dam in 1942. The dam is owned by Saskatchewan and operated by SaskPower. PBCN commenced an action against Saskatchewan, SaskPower and Canada in 2004, alleging trespass and other causes of action. In 2019, Saskatchewan and SaskPower successfully applied for summary judgment for the trespass claim on the basis that it had been transferred to Saskatchewan and was not reserve land. This decision was reversed on appeal. Previous appeals to the Court of Appeal (court) found that it was an error in law to hold that the land was not a reserve at the relevant time, that the consent to flooding of the land by Canada did not give Saskatchewan or SaskPower an interest in the land, and that Saskatchewan and SaskPower did not have a defence based on proprietary estoppel. The court determined whether the case management judge had erred in allowing Saskatchewan and SaskPower to make amendments.

HELD: The court denied leave to appeal. The court was not satisfied that the overall benefit to the litigation of permitting the appeal to proceed would be sufficient to justify the expense and delay that would result. In addition, the court was not convinced that the "importance" criterion under the test in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 (*Rothmans*) weighed in favour of leave to appeal being granted. The authority to grant leave is discretionary. The test as to whether leave to appeal should be granted involved two considerations: merit and importance. The applicant must establish that the appeal is: a) of sufficient merit to warrant the attention of the court; and b) of sufficient importance to the proceedings before the court, the field of practice, the state of the law, or the administration of justice generally, to warrant determination by the court (*Rothmans*). The court noted that PBCN and Canada would have the opportunity to raise their arguments regarding the merits of the amended pleadings with the support of the evidentiary record if and when the matter proceeded to trial or another summary judgment application. The proposed appeals were not the best way to get to the bottom of the legal issues.

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Silzer v George Taylor Housing Co-operative Ltd., **2023 SKKB 125**

Bergbusch, 2023-06-16 (KB23132)

Equity - Oppression Remedy
Statutes - Interpretation - *Co-operatives Act, 1996*, Section 190, Section 193

The applicants were members of a housing cooperative. They applied under ss. 190 and 193 of *The Co-operatives Act, 1996*, SS 1996, c C-37.3 (Act) for relief from alleged oppressive conduct by the respondent cooperative and two of its directors. The applicants argued that they were entitled to relocate from one suite to another. The suite they wanted was occupied by a recently admitted member even though the applicants had previously expressed an interest in that suite. The applicants contended that the respondent's failure to give effect to their interest in that suite when it became vacant was oppressive, unfairly prejudicial, and unfairly disregarded their interests as members. The applicant sought an order that would effectively evict the new occupant in favour of the applicants. The court decided: 1) whether the application for intervenor status should be granted; 2) whether the applicants' application for relief under the oppression remedy could be decided summarily; 3) whether the applicants had a reasonable expectation they would be permitted to move into the suite; 4) if so, whether that reasonable expectation was violated by the respondent in a manner that was oppressive of or unfairly prejudicial to them, or unfairly disregarded their interests; and 5) if so, what remedy was appropriate.
HELD: The applicants' oppression remedy request for relief was dismissed with costs. 1) Intervenor status was granted under Rule 2-12 of *The Queen's Bench Rules*. The new occupant of the suite had a sufficient interest in the outcome of the proceeding to be granted intervenor status, since the relief sought by the applicants would dispossess the new occupant of her home. 2) The court was satisfied that the case could be decided summarily because there were no material questions of fact or issues of credibility in dispute that would require a full trial or the trial of an issue. Oppression is an equitable remedy, intended to ensure fairness. The court had broad jurisdiction to enforce not simply what is legal, but what is fair. *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 (*BCE*) is the leading Canadian authority on the oppression remedy. The analytical framework in that case was the context of

business corporations, but the court noted that this approach applied to applications for relief from oppression involving a housing co-operative as well. Judges should use a two-pronged approach when addressing the oppression remedy. First, a judge should consider whether the complainant has established the breach of a reasonable expectation. Second, the judge should determine if the conduct in issue amounts to oppression, unfair prejudice, or unfair disregard of the complainant's interests. While the focus is often on the conduct of directors and the impact of their actions on specific stakeholders, directors are required to act in the best interests of the corporation and do not owe a duty to stakeholders. Under the "business judgment rule" judges should defer to directors' business decisions as long as they "lie within a range of reasonable alternatives." The claimant must identify the expectations that he or she claims were violated and show that those expectations were reasonably held. If a reasonable expectation was violated, the complainant must still show that the impugned conduct was oppressive, unfairly prejudicial, or unfairly disregarded the complainant's interests. Even if reasonable, not every unmet expectation gives rise to an oppression remedy claim. 3) The court considered the context of a housing cooperative to determine the applicants' reasonable expectations. The applicants argued that the vote of members on the cooperative's policy regarding suite transfers was not called with sufficient notice, contrary to the bylaws. In addition, they argued that the cooperative did not follow its policy regarding member moves, thereby failing to give effect to their stated interest in moving into the suite. The court did not accept either argument. There was no objective basis for the expectation that a revision to the policy concerning member moves required member approval at a meeting. It was also not reasonable for the applicants to expect that they would be permitted to move into the suite once they indicated their interest in the unit. This was not reasonable, because it was not supported by the cooperative's past practice. The policy was that a single person would only be offered a two-bedroom unit if no couples were on the waiting list. The policy did not address internal transfers between suites at all. The fact that it was a housing cooperative was relevant because it operated at cost and had to incur expenses every time a unit changed occupants. The directors' business judgment was entitled to deference. The directors canvassed the members' views through an advisory vote, and a solid majority of the members opposed internal moves. Looking at the matter objectively, the court concluded that the applicants did not have a reasonable expectation that they would be permitted to move into the suite. 4) The court went on to assess the second prong of the oppression test even though the first prong was not met. Oppression is conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted (*BCE*). The cooperative's decision not to allocate the suite to the applicant bore none of those hallmarks. The applicants were not unfairly prejudiced by the board's decision not to allocate the suite to them. 5) The remedy suggested by the applicants would have the effect of unhousing the current occupant of the suite. An order dispossessing the current occupant of her suite would not be an appropriate remedy in this case. The applicants also sought the removal of the directors – this was an exceptional remedy, rarely granted unless it was clearly necessary. This was not an appropriate case for removal.

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***R v Thauberger*, 2023 SKKB 158**

McMurtry, 2023-07-27 (KB23149)

Criminal Law - Murder - Second Degree
Criminal Law - Indignity to Human Remains
Statutes - Interpretation - *Criminal Code*, Section 229, Section 235

The accused was charged with first degree murder and offering an indignity to human remains. The deceased was the accused's brother, Patrick (the victim). The court determined whether the Crown had proven beyond a reasonable doubt that the accused murdered the victim, and whether that murder was planned and deliberate. The accused made statements to an undercover police officer revealing that he had murdered the victim in 1997 and had planned the murder. At trial, the accused testified that the death was an accident. The court heard testimony from the accused's former wife, Barbara, who was living with the accused at the time. She ran a daycare out of her basement. She testified that she saw the victim and another brother, Jim, arrive at her house in the morning, and later that she heard a tremendous crash coming from upstairs when she was having lunch in the basement with the children. She testified that she heard her brother-in-law say, "no, no, no" in a pleading tone. She ran up the stairs, but the door leading to the kitchen was locked. The accused told her to go back downstairs. She returned to the children. She stayed downstairs after the children had left. The accused later appeared at the top of the stairs and asked her to help him move "him". She testified that she refused. She said that the accused was dressed in rubber boots and a plaid jacket, as though he was going to the farm. Barbara heard vehicles moving in the driveway, and then saw the accused drag a rolled-up carpet from the top of the stairs outside and heard the carpet thudding as it was dragged down the outside steps. She later asked the accused how he could have done what he did. He replied "I'm proud of what I did… I put down a sick dog". She said the accused told her that he ran over the victim with a tractor. She testified that years later, the accused told her that if he ever went to jail because of her, he would kill her and if he could not do it, he had people who could. She testified that she never spoke of her knowledge of the death, except to a priest. She testified that she was afraid of the accused. She first spoke to the police in 2020 when she was under arrest for assisting the accused in committing the murder. The court found that Barbara's evidence was compelling and believable. She was clearly terrified of the accused. The court also heard from the accused's other brother, Jim. Jim testified that the victim was living in Alberta at the time of the events, was divorced with no children, and had been working as a psychologist. Jim dropped his brother off at the accused's house, stayed to chat for a bit, and then left for work. Jim never saw the victim again. He heard from his brother's friends and lawyer that his brother had not returned home. The accused told Jim that he dropped the victim off at the bus depot, and that the accused had called him the same night or the next morning. The family never heard from the victim again, and in 2014 the court declared him deceased. Jim was appointed the administrator of the estate. Jim learned that the victim owned farmland outright, not jointly with the accused. He also learned that the accused was the sole beneficiary of both the victim's pension plan and life insurance plan, and that the accused had been paying the premiums of that insurance policy between the victim's disappearance and the court's declaration in 2014. The court also heard about a covert police investigation with the goal of locating the victim's remains and excluding or confirming the accused as the person responsible for the disappearance and presumed murder. The

police considered the accused to be a person of interest because of his business relationship with the victim. The police began their investigation with authorized wiretaps wherein they learned that the accused had promised money to a third party to harm another person. The police used this situation to get closer to the accused. The accused told an undercover officer about his experience being interviewed by police over the years about the death of the victim, and never telling them anything. The accused and undercover officer planned to make someone "disappear". The accused told the undercover officer that he hit the victim over the head with a hammer while the victim was standing in front of the table in the kitchen reading a contract. The accused said negotiations over their farm business had not been going well for a couple of years. The accused told the officer he waited until dark, wrapped the body in a blanket, and then left the body in a slough at his farm with rocks on top. The accused drove the undercover officer to the slough. After they left, police dug in the same area and found dismembered human remains. DNA testing identified the remains as likely the partial remains of the victim. The accused testified on his own behalf. He denied that the victim was becoming a difficult business partner at the relevant time. He testified that the victim followed him up the stairs because they were trying to locate a business contract, but that the victim fell backwards down the stairs with his head twisted to one side. The accused didn't see the victim fall. He did not call the ambulance or police because he felt he would be wrongfully convicted and go to jail, so he was forced to cover up the victim's death. On cross-examination, the accused testified that he backed up to the slough and pulled the body into it. He said his hired man buried the body, and that he could not remember his name.
HELD: The court found the accused guilty of second degree murder and indecently offering an indignity to human remains. The court had no doubt that the accused intentionally caused the death of the victim but could not be sufficiently certain that the death was planned and deliberate. The court found that the accused was upset that his brother was selling land the accused believed was his. The negotiations did not go well. Barbara heard a crash and heard the victim say "no, no, no". The elements of first degree murder are: a) the accused committed an unlawful act; b) the unlawful act caused the death; c) the accused had the intent required for murder; and d) the murder was both planned and deliberate. The court did not believe the evidence of the accused that the deceased fell down the stairs accidentally. When speaking with the undercover officer, the accused did not repeat his initial story that the victim disappeared after being dropped off at the bus station. The accused's testimony was inconsistent with all the other evidence. The court found the accused guilty of indecently offering an indignity to human remains. The court found that there was no air of reality to the accused's testimony that the hired man, name unknown, to buried the body. The act of leaving the body in a slough, intending it to be buried there, satisfied all elements of the charge of offering an indignity to human remains.

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***Forester v Fayant*, 2023 SKKB 161**

Rothery, 2023-08-02 (KB23152)

Family Law - Division of Family Property - Bankruptcy

The applicant had obtained a judgment for an equalization payment under *The Family Property Act* (FPA) from her former common

law partner and an order of costs against him. Three weeks later, he made an assignment in bankruptcy. The trustee in bankruptcy allowed the applicant's claim and a claim by the respondent, the bankrupt's mother. The applicant argued that the bankrupt transferred title to an acreage to the respondent at undervalue, as defined by s. 96 of the *Bankruptcy and Insolvency Act* (BIA). The applicant applied under s. 38 of the BIA at her own expense for a declaration under s. 96 that the respondent pay the applicant the difference between the value of the consideration given to the bankrupt by the respondent and the value of the land transferred from the bankrupt to the respondent. The court determined: 1) whether the judgment awarded to the applicant in the FPA action was ascertainable such that the judgment might be a claim provable in bankruptcy; and 2) whether the plaintiff proved all the requirements of s. 96 of the BIA.
HELD: The court found that the transfer of the land from the bankrupt to the respondent was a transfer at undervalue and granted judgment in favour of the applicant. The court referred to the trial judge's findings on the value of the land at the time of the transfer. 1) Legal counsel for the respondent argued that because the terms of the court's judgment in the FPA action could not be ascertained until the property was sold, the judgment was not a claim provable in bankruptcy. The court rejected this argument. The applicant had stepped into the shoes of the trustee to prosecute the action under s. 96 of the BIA and was therefore authorized to determine whether the land was transferred at undervalue. Any claim the bankrupt might have resulting from the sale of the family home would vest in the trustee. 2) The applicant was entitled to judgment against the respondent for the difference between the value of consideration received by the bankrupt and the value given by the bankrupt. The applicant was also entitled to costs of this application. For the applicant to be successful in the s. 96 application, she had to prove that the bankrupt intended to defraud, defeat or delay her claim as a creditor. For the court to assess whether the transfer constituted a transfer at undervalue, the court had to determine the value of the land at the time of the transfer to the respondent, as well as the consideration the bankrupt received from the respondent. The court here pointed to the findings of the trial judge, who concluded that the bankrupt transferred the land to the respondent so that the applicant could not benefit from its increased value. The bankrupt told the respondent not to cooperate in the FPA action. The bankrupt also declared his intent, under oath, before the trial judge. Counsel for the applicant also submitted that the appointment of a receiver to sell the land to satisfy the judgment would be appropriate. The court declined to entertain this relief, because it was not an interlocutory application, and the respondent had no notice of the application.

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***Canadian Western Bank v Goshen Professional Care Inc.*, 2023 SKKB 162**

Bergbusch, 2023-08-02 (KB23153)

Bankruptcy and Insolvency - Appointment of Receiver - Appointment of Interim Receiver
Statutes - Interpretation - *Bankruptcy and Insolvency Act*, Section 47, Section 243

The respondent corporation operated a care home. The applicant provided a loan to the respondent. As security for the loan, the respondent executed a general security agreement (GSA) over all or substantially all of the property of the respondent, a collateral mortgage, and a general assignment of leases and rents. The respondent agreed that the applicant would be entitled to appoint a receiver over its real and personal property in the event of default. The applicant had requested information about the respondent's

financial situation, but the respondent did not provide the requested information. Further requests for additional information elicited partial responses. The care home lost eligibility to receive public funding for residents and was transitioning to a privately funded long-term care facility. The applicant notified the respondent that it would formally demand repayment. The defendant made the monthly payments of principal and interest to the applicant after the applicant demanded payment of the loan in full. The applicant applied for an order appointing a receiver-manager of the assets, properties, and undertakings (property) of the respondent. In the alternative, the applicant sought an order appointing an interim receiver of the respondent's property. The respondent was opposed and took the position that it was diligently seeking an alternate lender and that the applicant would be repaid in full once new financing was in place. The court determined whether it should adjourn the applicant's application or appoint either a receiver-manager or an interim receiver.

HELD: The court granted the interim receivership order. The order was required so that the applicant could review the respondent's income, liabilities, and business plans and ensure that its security was adequately preserved. The court was not satisfied that it was just and convenient to appoint a receiver under s. 243 of the BIA. The court set out the law around the appointment of receivers and interim receivers under the BIA. Before making a s. 243 order appointing a receiver, the court had to find that the respondent met the definition of an "insolvent person" in s. 2 of the BIA. If that condition was met, the court had to decide whether it was just and convenient to appoint a receiver. Factors to be considered by the court included: whether irreparable harm might be caused if no order was made; whether the security holder's position would be prejudiced if no receivership order was made; whether it was necessary to apprehend or stop waste of the debtor's assets; whether it was necessary to preserve and protect property pending a judicial resolution of matters outstanding; and the balance of convenience between the parties. Here, the applicant did not need to show irreparable harm, given that the respondent agreed to the appointment of a receiver in the GSA and the mortgage (*Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228). To appoint an interim receiver under s. 47, the court had to be satisfied that: a) notice of intention to enforce security was about to be sent or was sent; and b) the appointment was necessary for the protection of the debtor's estate or the creditor's interests. The notable difference was that the test for appointment of an interim receiver was whether it was "necessary" to do so, and not whether it was "just and convenient." Evidence of dissipation of assets was not necessary, and the court's authority in appointing an interim receiver under s. 47 was more limited than the receivership regime under s. 243. Given the large overdue debt due and owing to the applicant, the court concluded that the respondent was an insolvent person within the meaning of the BIA. The applicant relied on its contractual right to appoint a receiver, the respondent's repeated failure to provide requested information regarding its finances, a concern about possible waste, and a loss of confidence in the respondent's management of the care home due primarily to the respondent's failure to respond promptly or adequately to the applicant's requests for information. The court was not satisfied that it was just and convenient to appoint a s. 243 receiver, because there was insufficient evidence that the applicant had the expertise to manage the care home. The care home was more valuable as a going concern than if it were to cease business operations. It was not necessary for the applicant to have operational control of the care home for it to investigate the financial situation of the care home. The respondent was also taking steps to find alternate financing. The applicant satisfied the requirements for the appointment of a s. 47 interim receiver. The applicant provided notice of its intention to enforce its security, and it established that the appointment of an interim receiver was necessary for the protection of the debtor's estate and the creditor's interests. The respondent's failure to disclose financial information made it impossible for the applicant to determine whether its security was at risk. It was appropriate to appoint an interim receiver to preserve the property on a temporary basis so the applicant could ascertain the true state of the respondent's finances and business plan while allowing the respondent to operate the business and continue with its efforts to secure alternate financing.

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***Nguyen v Neway Driving School Ltd.*, 2023 SKKB 163**

Layh, 2023-08-08 (KB23154)

Small Claims - Appeal - Fresh Evidence

In a small claims court trial, the plaintiff sued the defendant, alleging it failed to satisfactorily provide training at its truck driving course. The plaintiff sought $26,750 representing a refund of the deposit paid to the defendant, and loss of income he could have earned had he received the appropriate training. He alleged that the defendant breached its training contract by terminating his training program. The defendants argued that they terminated the training program because the plaintiff was abusive and argumentative. The defendants counterclaimed for the value of the instructional hours provided prior to termination. The trial judge agreed with the defendants and awarded damages for services rendered to the date of termination, less the plaintiff's deposit, resulting in a judgment of just over $8,000. The plaintiff appealed. The court noted that the grounds of appeal cited no errors of law, and at best, alleged certain questions of fact. The court found that the only discernible issue before the court was whether the appellant should be permitted to adduce new evidence that the appellant's signature was forged on the driving school application. The appellant sought to present new expert evidence of forgery.

HELD: The court dismissed the application to adduce new evidence. Rule 14-3 of *The Queen's Bench Rules* addressed the court's ability to hear new evidence on appeal. However, s. 45 of *The Small Claims Act, 2016* stated that an appeal under it was to take the form of an appeal on the record. In *Memorial Gardens (Saskatchewan) Ltd. v Cooney*, [1997] SJ No 674 (QL) (Sask KB), the court noted that an appeal court should be reticent to rely on new evidence in an appeal from small claims court. The court added that the law on admitting new evidence applied to small claims appeals, and involved four tests: a) the new evidence could not by due diligence have been adduced at trial; b) the new evidence is relevant in that it bears upon a potentially decisive issue in the trial; c) the evidence is reasonably capable of belief; d) the new evidence, if believed, could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The court found that the evidence could have been adduced at trial. The appellant could have engaged a handwriting expert at trial if he thought his signature on the application form was forged. There was ample time to consider an expert's report. The report was also not relevant to a decisive issue in the trial. The parties conducted themselves as though the application form were valid. The trial judge also made a factual finding regarding the authenticity of the document and the lack of logic in this argument. The evidence was not reasonably capable of belief, as it did not meet the expert evidence certification requirement in Rule 5-37. Even if the court directed a new trial to admit the report, the trial result was unlikely to change.

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***Tremblay v Anderson*, 2023 SKKB 164**

Robertson, 2023-08-08 (KB23155)

Civil Procedure - Costs
Civil Procedure - Costs - Double Costs
Civil Procedure - Costs - Offer to Settle

The court determined whether costs should be awarded to the defendant. The court had issued a previous judgment dismissing the plaintiff's claim after trial but reserved its decision on costs. A formal offer to settle had been filed and rejected. A summary of the underlying facts was not included. Four issues related to costs were decided: 1) whether costs should be awarded; 2) whether column 1 or column 2 costs should be awarded; 3) whether double costs should be awarded on the basis of the formal offer to settle; and 4) whether second counsel costs should be included in the award of costs.
HELD: The court exercised its discretion and awarded column 2 costs to the defendant. The court awarded double costs and allowed second counsel costs. The court noted that although the judgment was under appeal, Rule 15(4) of the *Court of Appeal Rules* provided that an appeal of a judgment does not stay the assessment of costs under that judgment. 1) Costs were awarded. 2) Column two costs were appropriate in this case. Generally, the successful party is entitled to an award of costs. Schedule I "B" of the tariff of costs provides for fees payable to lawyers under three columns based on the complexity of the matter, with column one being the least complex, and column 3 being the most complex. The party seeking costs has the onus of justifying an award of costs on either of the higher columns (*1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200 [*Choubal*]). The following factors should be considered when determining which column applies: complexity of the case, importance of the case, the duration and conduct of the proceedings, the urgency of the matter, the amount in issue, whether experts were involved, parity and expectations, access to justice, discretion and reasonableness, and any other relevant matter (*Choubal*). The court analyzed each factor to find that column 2 costs were appropriate. The matter was legally complex. There was a joint book of 136 exhibits filed in two binders, with six additional exhibits entered at trial. The statement of claim identified, and counsel argued, liability based upon five separate causes of action. The case had limited significance beyond the parties. The trial took four and a half days, with objections to evidence which required rulings, and lengthy written closing arguments filed with the court. There was no urgency, the amount at issue was unknown, and the plaintiff called an expert witness. A voir dire was required to qualify the witness. There were no comparable cases with cost awards cited. Access to justice was not a concern in this case. The court, in exercising its discretion, found that an award of column 2 costs was fair and reasonable in all the circumstances. 3) The court awarded double costs. Rule 4-31(2) of *The Queen's Bench Rules* provides for a double costs award where an offer to settle is declined and that offer would have been a more favourable result for the unsuccessful party. Here, the defendant's lawyers filed an offer to settle served on the plaintiff's counsel, which was not accepted. After a trial, the court dismissed the plaintiff's claim. The court found that as a result, the defendant was entitled to double costs as claimed in the draft bill of costs. 4) The court was satisfied that second counsel costs were appropriate because the presence of second counsel was reasonably necessary given the number of exhibits and issues in play. Both parties were represented by two counsel.

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***R v D.L.K.*, 2023 SKKB 183 (Not yet published on CanLII)**

Danyliuk, 2023-08-29 (KB23173)

Criminal Law - Release Conditions - Amendment
Statutes - Interpretation - *Criminal Code*, Section 523

The accused, D.L.K., applied pursuant to s. 523 of the *Criminal Code* to have his release conditions amended. D.L.K. was facing a seven-count indictment including three charges of sexual assault; two charges of assault; one charge of inviting a young person to touch him for a sexual purpose and one charge of making sexually explicit material available to a young person. All the complainants were foster children living D.L.K.'s home. At the show cause hearing 18 months before this application, D.L.K. had agreed to a 24-hour curfew, enrollment in an electronic monitoring program, and to attend at his door for random visitation by probation or peace officers. D.L.K. had been employed as a long-haul truck driver since 2013 but since his release had only driven within Saskatoon. D.L.K. was represented by Legal Aid duty counsel upon his arrest; since then, in his attempts to prepare for his preliminary hearing, one lawyer he retained had been suspended by the Law Society of Saskatchewan and the next was appointed a Provincial Court judge. He had begun the process of hiring another lawyer when the Crown preferred a direct indictment. The court noted that there had been no allegations that D.L.K. had violated any of his conditions, and the electronic monitoring program supervisor had written a letter to update the Judicial Interim Release Report indicating that D.L.K. had been compliant with his conditions. The defence argued that D.L.K. needed to earn money to retain his new lawyer, who was the fourth lawyer he needed to instruct through no fault of his own. The defence advanced that 523(2)(c)(iii) gave the court jurisdiction to amend the conditions. The Crown's position was that it opposed D.L.K.'s release in the first instance and it opposed any amendment to release conditions now. Further, the Crown argued that D.L.K. had no right to a hearing at this stage pursuant to section 523(2)(a) because his trial had not started yet.
HELD: The court considered section 523 in detail with a plain language, purposive approach and made the following observations. 1) Unlike ss. 520 and 525, this section authorized that an application be brought "at any time without limitation." 2) The provision directed that, if the trial of the accused had already begun, it was the trial judge who ought to hear any application for interim release or amendment or expungement of conditions: in this situation, the court found that any judge was authorized to hear the application. 3) The entirety of the section should be borne in mind and the section should be considered in the larger context of Part XVI. 4) Paragraph 523(2)(c) referred to "consent of the prosecutor and the accused". It was important to note that this consent meant consent to the hearing itself and not its outcome; more importantly, the court stated, "s. 523(2)(c) intersects with s. 523(1.2). Where a direct indictment is preferred (1.2) applies to preserve any release order previously made." However, the end of subsection (2) empowered the court to amend, expunge, or substitute any previous release order. In light of all these findings, the court rejected the Crown's arguments as pertaining to s. 523(2)(a). This was a situation in which s. 523(2)(c) was relevant. The court found assistance in *R v Smith*, 2003 SKCA 8 as well as *R v Aucoin*, 2006 ABQB 895 (*Aucoin*). Even in the absence of Crown consent, the court would still have had jurisdiction to hear this application: "a party can only move unilaterally if the prior Part XVI order they seek to vacate would otherwise have been given continued effect by s. 523(1.1)" (*Aucoin* at para 37). In terms of the court's reasons for

granting D.L.K.'s application, 1) there had been significant change since the show cause hearing. Initially, the Crown had brought 13 counts on an Information, but their indictment listed only seven counts and the Crown had adduced no evidence to establish that the risk of having D.L.K. in the community remained the same. 2) D.L.K. had engaged his fourth lawyer in this matter and the circumstances necessitating this had nothing to do with his actions or choices. 3) The evidence satisfied the court that D.L.K. needed to earn more money to retain his counsel. 4) D.L.K. had not breached his conditions over the past 18 months. 5) D.L.K. had no previous criminal record. 6) "[T]he modern law of bail favour[ed]… interim release." 7) D.L.K. was still "cloaked in the presumption of innocence" and the court did not want this principle to go unheeded. The court granted the amendments D.L.K. had sought.

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***A.A.O. v O.A.A.*, 2023 SKKB 175**

Smith, 2023-08-18 (KB23168)

Family Law - Child Support
Family Law - Spousal Support - Quantum and Duration
Statutes - Interpretation - Federal Child Support Guidelines, Section 18

The parties, "Anna" and "Larry" (both pseudonyms), married in January 2009 and formally separated in October 2018. They were the parents of two children, aged 12 and eight years. They had resolved almost all issues but required the assistance of the court to determine Larry's income for the purposes of the *Federal Child Support Guidelines* (*Guidelines*). The family had lived in the U.K. where Anna worked as a chemical engineer. Larry was a psychiatrist, and he worked in many positions over the years but had been unable to find permanent work in or near London. They agreed to move to Canada, initially moving to Regina. Anna did not regard Regina as a suitable place to live permanently as her employment options were limited there and it had been her understanding that the family would eventually relocate to Calgary. In 2018, the parties separated, and Larry began paying Anna $8,500.00 per month on his own initiative. Anna retained counsel in 2019 and sought an order for child and spousal support among other forms of relief. In September 2020, Larry was ordered to pay Anna $7,740.37 in child support and $7,500.00 in spousal support per month commencing January 1, 2020 (see: 2020 SKQB 248). Anna sought further support in 2022 and Larry was ordered to pay a further $2,500 per month, though the court declined to characterize the payment for the time being (see: A.A.O. v O.A.A. [Unreported], SaskQB, DIV-RG-00058-2019, Brown J.). Anna's position was that Larry had damaged her career by keeping her from seeking work in Alberta and maintaining her engineering accreditation and sought ongoing indeterminate spousal support as well as a retroactive award of spousal and child support. Larry's position was that he had provided Anna with generous support since their separation, and he wished for the court to set an end date for his spousal support payments. Both parties hired an accountant to provide expert evidence, and both parties' counsel instructed the accountant to determine the amount of income Larry had available to pay spousal and child support. Both accountants were mindful of section 18 of the *Guidelines*, as Larry employed two corporations in his business. Each accountant employed a similar methodology to arrive at the figure in question. Anna's accountant assessed Larry's Guideline income at a significantly higher amount than Larry's accountant.

HELD: The court found that both accountants seemed “credible, reliable and reasonable” and appreciated their efforts, but found the results of Larry’s expert slightly preferable. Because notices of assessment were not available for 2022, both accountants had only considered the evidence up to 2021. However, as Larry did have the relevant data, the court took Larry’s 2022 line 150 income into account and calculated his three-year average income, as contemplated by the *Guidelines*, to adjust the amount up, inviting Anna to challenge the 2022 information if she took issue with it. The justice seized himself of that as well as any other applications arising from this decision. Turning to the question of whether to order retroactive payments, the court considered the payments Larry had been making since separation and the circumstances of Anna and the children and could find no compelling reason to make such order. Pursuant to the *Guidelines*, the court ordered Larry to pay $9,017.00 per month and 70% of section 7 expenses. The parties were to exchange income tax returns, including corporate tax returns, each year for as long as support remained payable. The court reviewed extensive case law on compensatory spousal support. The court noted that, given the disparity between the parties’ incomes, the *Spousal Support Advisory Guidelines* recommended a monthly amount between $14,398 and $17,639. However, given that Anna bore responsibility to become self-sufficient, the amount of child support Larry would be paying was considerable, and Anna had received a significant property settlement, the court found that $11,000 per month would be appropriate. The court characterized the additional $2,500.00 Brown J. had ordered as spousal support as well. The court ordered that the spousal support payments continue for another seven years. No costs were awarded.

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***R v Repo*, 2023 SKPC 46**

Agnew, 2023-08-21 (PC23044)

Regulatory Offences - Public Health Orders - COVID-19
Human Rights - Freedom of Expression - Freedom of Assembly - Limitations

The self-represented accused, M.R., acknowledged that she had participated in a gathering of more than ten people at Vimy Memorial in Saskatoon on April 24, 2021, contrary to the public health order (PHO) in force at that time. She considered this an act of civil disobedience. Although she initially gave notice that she would challenge the ticket she was issued pursuant to the *Charter of Rights*, *Canadian Bill of Rights* and Saskatchewan Bill of Rights, being Part II or ss 4-8 of *The Saskatchewan Human Rights Code, 2018* (SKBR), she eventually decided to proceed on the basis that her SKBR rights alone were breached. M.R. argued that the PHO violated her rights under sections 4 (freedom of conscience), 5 (freedom of expression), and 6 (peaceable assembly) of the SKBR. M.R. further argued that she was a victim of unequal treatment by the Saskatoon Police Service (SPS).
HELD: The court had already ruled against the availability of remedies under the SKBR in the context of PHO tickets in *R v Drebit*, 2023 SKPC 8 (*Drebit*), and noted that *Drebit* had been followed in *R v Knoll*, 2023 SKPC 29 pursuant to *R v Sullivan*, 2022 SCC 19 (*Sullivan*). *Sullivan* set out three “narrow circumstances” wherein a trial court would be permitted to deviate from a binding decision of a court of coordinate jurisdiction as follows: “1. The rationale of an earlier decision has been undermined by subsequent appellate decisions; 2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.” None of these circumstances existed in this case. One of the Crown

counsel suggested that s 52 of *The Saskatchewan Human Rights Code, 2018* (with the heading Act takes precedence unless expressly excluded) might allow an accused to use breaches of the SKBR as a defence. The court conceded that this argument might have merit but reaffirmed that the court was bound to follow precedent. M.R. argued that the rights conferred by the SKBR were unrestricted. Because the *Charter* stated in its first section that it guarantees rights and freedoms subject to reasonable limits prescribed by law, and the SKBR had no such language, M.R. argued, the latter did not have the same limitations. The court indicated to M.R. that in the caselaw she advanced in favour of her argument, the defendants' rights were ultimately restricted by the law. Therefore, her position was logically incoherent. If rights under the SKBR could only be exercised in accordance with the law, M.R. could not rely on the SKBR as her defence for breaking the law. Moving on to the argument that there were numerous in-person gatherings at the material time and the SPS failed to ticket attendees at these other gatherings, the court found four problems. First, M.R. did not provide evidence to prove that the SPS was enforcing the PHO unevenly. Her allegations were largely based on hearsay. Second, although M.R. alleged she knew of gatherings people had attended without consequence, she did not provide much information about when and where these meetings took place or offer evidence that no tickets were issued or that police were not present. Third, the police enjoy some discretion in terms of deciding whom to charge and when to do so, and without any evidence as to how the police made their decisions in this case, it would not be possible to override the court's deference toward that exercise of discretion. Finally, it was not a defence to point out that others had conducted themselves the same way as M.R. and had not been ticketed. M.R. was found guilty of the ticket offence.

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