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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***Mann v Mann*, 2023 SKCA 100**

Caldwell Leurer Tholl, 2023-08-28 (CA23100)

Corporate Law - *Business Corporations Act* - Oppression Remedy - Order of Sale - Appeal
Statutes - Interpretation - *Business Corporations Act*, Section 234

The appeal arose out of two applications under s. 234 of The Business Corporations Act, RSS 1978, c B-10 (SBCA), since repealed by *The Business Corporations Act, 2021*, SS 2021, c 6 (SBCA 2021) concerning AgraCity Crop & Nutrition Ltd. (AgraCity) and Farms and Families of North America Inc., which did business as Farmers of North America (FNA). Brothers James and Jason were equal shareholders in AgraCity, and both were directors and officers, with Jason responsible for day-to-day management. James was

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the sole registered shareholder of FNA and its operating mind. Jason had no formal role in FNA but claimed an ownership stake in it. The brothers had been in a state of deadlock for years, unable to work together on any functional level. James and Jason each served applications on each other under s. 234 of the SBCA naming the other as the respondent. James alleged he had been oppressed in how Jason conducted AgraCity's affairs and asked for an order removing Jason as director and officer of AgraCity and an order appointing a receiver. James argued that he had a reasonable expectation that he would equally manage AgraCity's operations and that it would be operated in a reasonably prudent manner. Jason alleged that James acted oppressively as director of AgraCity and asked to be declared a 50 percent owner of FNA. He asked for an order directing the sale of James's interests in AgraCity. The chambers judge dismissed James's application but found that James had oppressed Jason. The chambers judge ordered a sale of AgraCity. James appealed from the dismissal of his own application. The Court of Appeal (court) analyzed: 1) the chambers judge's finding that James did not have a reasonable expectation to participate equally with Jason in the day-to-day management of AgraCity; 2) the chambers judge's finding that there was insufficient evidence of fraud or financial misconduct to grant a remedy; and 3) whether the chambers judge erred in finding oppression.
HELD: The court allowed the appeal in part, directing that the disputed issues be remitted to the Court of King's Bench for a trial. While the chambers judge did not err in refusing to order an investigation or appoint a receiver, he erred in making critical findings of fact relating to James' and Jason's reasonable expectations concerning the management of AgraCity given the evidence before him. The court did not uphold the order for sale. 1) There were unresolved conflicts in the affidavit evidence on the reasonable expectation of participating equally in the management of the business. Based on the record, it was not possible for the chambers judge to have determined James's reasonable expectations regarding his participation in the management of AgraCity. As a result, it was an error for the chambers judge to make a final determination about the parties' reasonable expectations in relation to the management of AgraCity. 2) There was no legal error in the chamber judge's conclusion or analysis that there was insufficient evidence of fraud or financial misconduct to warrant the appointment of a receiver or to order an investigation. The chambers judge carefully analyzed affidavit evidence to find that no wrongdoing had occurred in relation to the business or affairs of AgraCity. 3) The chambers judge erred in law when he found, in the face of the unresolved conflicts in the affidavit evidence, that James had oppressed Jason by preferring the interests of FNA over the interests of AgraCity. The court considered the relevance of a deadlock. The court determined whether, even if the chambers judge erred in finding oppression in the face of conflicting evidence, the order

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for sale should nonetheless be upheld because of the existence of deadlock in the companies. The court did note that an order of sale could be justified given the deadlock under s. 207 of the SBCA (now s. 16-6 of the SBCA 2021). This section permits a court to order the liquidation and dissolution of a corporation or any of its affiliations where oppression or unfairly prejudicial activities have taken place, and the court is satisfied that it is just and equitable for the corporation to be liquidated and dissolved. The court referred to case law where such orders were appropriate under s. 207 and there was a deadlock in management. However, Jason did not bring an application under s. 207 of the SBCA, and the chambers judge did not consider that section when making the order he did. As a result, the court could not uphold the order for sale of AgraCity based on s. 207.

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***Aecon Mining Construction Services, a division of Aecon Construction Group Inc. v K+S Potash Canada GP*,**
2023 SKCA 102

Richards Schwann Leurer Kalmakoff Drennan, 2023-08-31 (CA23102)

Practice and Procedure - Appeal - Leave to Appeal - Right of Appeal - Interlocutory and Final Decisions

The background to the appeal was an action to recover amounts owing under a contract. The plaintiff alleged that the respondent breached contractual obligations. The respondent disputed the amounts owing and denied that it engaged in bad faith conduct by inducing the plaintiff to complete the work without intending to pay for the increased cost of the work. During questioning, the plaintiff claimed that it uncovered additional evidence supporting an inference that the respondent induced the plaintiff to accelerate its work but to refrain from paying the plaintiff for the increased costs of that acceleration with the goal of concealing the project's cost overruns from the public. The plaintiff then applied to amend its statement of claim to add another defendant, and to add causes of action in conspiracy and inducing breach of contract. The chambers judge allowed the amendments as proposed but did not allow the addition of unlawful means conspiracy based on misrepresentations to the public, on the basis that the amendment did not disclose a reasonable cause of action. The plaintiff sought leave to appeal this decision.

Statutes - Interpretation - *Marriage Act, 2021*

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Mann v Mann (2023 SKCA 100)

Mann v Mann (2023 SKCA 104)

Noureldin v Mohr

R v Iron

R v Kidder

R v Poitras

The plaintiff took the position that because the chambers decision was final, it had a right of appeal. However, due to uncertainty in the case law as to whether an order denying an amendment to a statement of claim was interlocutory or final, it also filed an application for leave to appeal. The respondents opposed the application, arguing that the chambers judge's decision was interlocutory and leave to appeal was required. The Court of Appeal (court) noted that it was not always apparent whether an order was final or interlocutory, and whether leave to appeal was required. The court provided a procedural framework to clarify this area of the law.
HELD: The plaintiff's application for leave to appeal was dismissed because it had a right of appeal. The court concluded that the chambers decision to reject the amendment was clearly a final decision, because it conclusively determined the issue in the respondent's favour. The plaintiff did not need to obtain leave to appeal because it had a right of appeal. The court provided a set of procedures to follow where there is uncertainty about whether leave to appeal is required. In the majority of cases, it will be straightforward to determine whether leave is required: a notice of appeal should be filed when established precedent makes it clear that the King's Bench decision in issue is final. An application for leave to appeal should be filed when it is clear that the decision in issue is interlocutory. If there is genuine uncertainty over whether the decision is final or interlocutory, a prospective appellant can either: a) file a notice of appeal and deal with the question of leave if it is raised; or b) seek leave to appeal conditional on a finding that leave is required, while also filing an application for a determination of whether leave is required. If the appellant files a notice of appeal, the respondent may apply to the court to have the appeal struck out on the basis that leave is required. The court itself may also raise this issue. If the court determines that leave to appeal is required, it may grant leave *nunc pro tunc* if doing so is appropriate and possible. If the appellant applies for leave to appeal, it may make the application for leave conditional on a finding that leave is required and include an application asking the chambers judge to decide whether leave is necessary. However, the prospective appellant must not file a "request for directions" as a substitute for doing proper legal research on the issue – there must be an analysis referring to the relevant authorities examining the question of whether the decision is interlocutory or final. Prospective appellants should not file both a notice of appeal and an application for leave to appeal in situations where the court has the authority to extend the time for filing a notice of appeal.

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Tress v FCA US LLC

***Mann v Mann*, 2023 SKCA 104**

Schwann Kalmakoff Drennan, 2023-09-07 (CA23104)

Business Corporations - Appeal - Disqualification of Lawyer - Conflict of Interest

The background to this appeal involved complex and ongoing litigation between brothers James and Jason Mann and their corporate entities. James and Jason are equal shareholders in AgraCity, and both are directors and officers of that corporation: Jason is the president, and James is the secretary-treasurer. Here, James brought an application to disqualify counsel from representing AgraCity, and an order that AgraCity be limited to retaining counsel through its board of directors. James took the position that counsel had received confidential information related to a solicitor-client relationship, and that there was a risk that this information could be prejudicial in the present litigation. James also argued that he should be entitled to a say in who represents AgraCity in the ongoing litigation because he was on the board of directors. The chambers judge refused to grant the application for relief, finding that such an order would require both brothers to agree on counsel for AgraCity, which would be untenable because the brothers were unable to agree practically anything. The chambers judge outlined the legal principles in *MacDonald Estate v Martin*, [1990] 3 SCR 1235 (*MacDonald Estate*) for whether a conflict of interest existed. The chambers judge found that although counsel and the law firm had been engaged by James in his personal capacity and as external corporate counsel in the past, the representation was related to matters that had been resolved years before the current dispute. The chambers judge also determined that James did not meet the onus of demonstrating that the present retainer was sufficiently related to any previous retainer to give rise to a conflict of interest. The court determined whether the chambers judge erred: 1) in determining that Jason did not require the approval of AgraCity's board of directors to retain and instruct legal counsel; 2) in finding that counsel and the law firm should not be disqualified from acting for the corporation on the basis of a conflict of interest; and 3) in awarding costs to Jason and the law firm.

HELD: The court dismissed the appeal in its entirety. 1) The chambers judge did not err by determining that Jason did not require approval to retain and instruct legal counsel. The court stated that it is well-accepted in Canadian law that the directors of a corporation can delegate certain aspects of their authority to other corporate officers or to a managing director. Matters that can be delegated depend on statute and the corporate bylaws. AgraCity was incorporated under the laws of Saskatchewan. There was nothing in the legislative provisions that explicitly stated that the authority to manage the business and affairs of a corporation could only be exercised by the board of directors as a whole. All directors need not agree on everything. AgraCity's bylaws explicitly

provided that its president “shall be charged with the general supervision of the business and affairs of the corporation” and that “except when the board has appointed a general manager or managing director, the president shall also have the powers and be charged with the duties of that office.” There was no evidence that AgraCity had appointed a general manager or managing director, so Jason, as president, filled those roles. The bylaws gave Jason, as president of AgraCity, all the authority he needed to unilaterally engage counsel on behalf of the corporation. 2) There was no error in the finding that there was no conflict of interest that would disqualify counsel or the law firm retained by the corporation. The chambers judge outlined the proper legal test and concluded that any matter in which counsel or the law firm had acted for James had concluded years before the current dispute. Any confidential information the law firm may have received from a previous solicitor-client relationship was not relevant to the present retainer. The court set out the governing principles surrounding the duty of loyalty to a lawyer’s clients. The duty of loyalty involves: a) a duty to avoid conflicting interests; b) a duty of commitment to the client’s cause; and c) a duty of candour. For former clients, the lawyer’s main duty is to refrain from misusing confidential information. A lawyer cannot act in a matter in which he or she may use confidential information from a former client to the detriment of that client. The test in *MacDonald Estate* applies when there is an allegation of a conflict of interest: a) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand; and b) was there a risk that it would be used to the prejudice of the client? A lawyer who possesses relevant confidential information is automatically disqualified from acting against a former client, and if the lawyer’s new retainer is “sufficiently related” to previous matters, there is a rebuttable presumption that the lawyer possesses confidential information with a risk of prejudice. Here, the onus was on James to show that the two retainers were sufficiently related to give rise to a conflict. While the fact that a lawyer has an understanding of a former client’s strengths and weaknesses was a factor to be considered under the MacDonald Estate test, the mere possibility that a lawyer had gained insight into a former client’s general litigation philosophy was not enough to establish a sufficient relation between the two retainers. A bald assertion was not enough. 3) The chambers judge did not err in awarding fixed costs in the amount of $2,000 to Jason and the law firm. The court noted that cost awards are discretionary and are only set aside on appeal if there was an error in principle or if the costs award was plainly wrong. There was no suggestion that the chambers judge erred in principle or that the award was plainly wrong, so the court dismissed this ground of appeal.

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***The College of Physicians and Surgeons of Saskatchewan v Leontowicz*, 2023 SKCA 110**

Richards Schwann Leurer, 2023-09-29 (CA23110)

Administrative Law - Appeal - Professional Misconduct
Professional Misconduct - Off-Duty Conduct - Conduct Unbecoming

The Court of Appeal (court) determined the extent to which a professional regulatory body could discipline a member of its profession for off-duty conduct. The College of Physicians and Surgeons of Saskatchewan (college) charged the respondent with one count of professional misconduct arising from an off-duty sexual encounter with a woman who was not his patient. The defendant was in his fourth year of medical school at the time. The Discipline Hearing Committee (committee) accepted the complainant’s evidence, finding that the defendant had unprotected sex with the complainant without her consent and hit her with

such force as to cause injury to her face. The committee found the defendant guilty of unbecoming, improper, unprofessional, or discreditable conduct under s. 46(o) of *The Medical Profession Act, 1981*. The defendant was not charged criminally. The council of the college (council) issued a reprimand and suspended the defendant's license indefinitely, leaving open the future possibility of re-applying. Later, the council ordered that the defendant pay full indemnity costs of the hearing and investigation in the amount of $96,577.10. The defendant appealed these decisions to the Court of Queen's Bench, where the judge quashed the committee's decision and dismissed the charge against the defendant. The judge stated that had it been necessary to decide the issue on penalty and costs imposed by the council, he would have set both aside and remitted the issue to the council for reconsideration. The college appealed the judge's decision to the court. The court determined: 1) whether the judge failed to treat the committee decision with deference; 2) whether the judged erred in his application of the standard of review by finding that the committee failed to apply or misapplied the criteria governing the exercise of its discretion; and 3) whether the council erred in its decision on penalty and costs.

HELD: The court allowed the college's appeal, set aside the judge's decision to quash the professional misconduct finding, and restored the committee's determination that the defendant was guilty of unbecoming, improper, unprofessional or discreditable conduct. The court set aside the council's decision on penalty and costs, remitting those matters back to the council for reconsideration. 1) The judge understood the proper legal framework for reviewing the committee's decision. The committee was not owed an enhanced level of deference. The matter before the judge was a statutory appeal, so the committee's determination that the defendant's behaviour constituted professional misconduct was a discretionary decision that had to be assessed by the judge in accordance with the standard of review for those sorts of decisions (*Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 [*Strom*]). The court noted that, although discretionary in nature, the committee decision was still subject to judicial oversight; its discretion was not unfettered. Where the legislation allows for a statutory appeal to be taken, the legislature could be understood to have intended that the normal appellate standards of review apply (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). 2) The judge identified the correct standard of review, but erred in his application of the standard of review because he substituted his own conclusion on whether there was a nexus between the defendant's sexual encounter with the complainant and his ability to practice medicine safely. The court found that the judge erred in his conclusion that because the defendant's actions fell outside of the definition of "sexual misconduct" contained in the regulatory bylaws, the actions were removed from the scope of professional misconduct. Off-duty sexual misconduct is not specified as being misconduct under the regulatory bylaws, but that did not preclude a discipline hearing committee from finding that the conduct was nonetheless unbecoming. The wording in the bylaws was intended to grant broad discretion to determine on a case-by-case basis whether conduct was unbecoming, improper, unprofessional or discreditable. The court noted the generally accepted proposition that professional regulatory bodies have the authority to investigate and discipline members of their profession for conduct that arises outside of their professional duties but added that it was difficult to set out and apply principles that differentiate off-duty conduct that is unprofessional and subject to discipline and conduct not subject to discipline. Off-duty conduct may be professional misconduct "if there is a sufficient nexus or relationship of the appropriate kind between the personal conduct and the profession to engage the regulator's obligation to promote and protect the public interest" (*Strom*). The test in *Strom* was whether the impugned conduct was such that it would have a "sufficiently negative impact on the ability of the professional to carry out their professional duties or on the profession to constitute misconduct." This involved a contextual analysis. Direct evidence was not required at law to support a finding of loss of public confidence in the defendant's abilities as a doctor or to cast the profession in a negative light as a result of his behaviour. The court held that the judge erred by placing too much weight on the brevity of the committee's reasons and the lack of direct evidence of a connection to the professional setting, and too little weight on the nature of the conduct and how it related to the

profession itself. 3) The court set aside the council's decisions on penalty and costs and remitted those issues to the council for reconsideration. The court set out the principles applicable to the decision-making process for costs in a professional regulatory setting: a) absent a legislative provision to the contrary, costs are not obligatory, they are at the discretion of the regulatory body; b) the purpose of a costs award is not to indemnify the opposing party, but to have the sanctioned member bear the costs of disciplinary proceedings as an aspect of the burden of being a member; and c) a costs award should not be punitive, nor should it be "so prohibitive as to prevent a member from defending his or her right to practice in the chosen profession, or from being able to dispute misconduct charges." Here, the court found that the costs decision failed to apply the principles underlying the imposition of costs. The council's failure to consider any other factors beyond deterrence amounted to a failure to consider all the factors relevant to the exercise of discretion in this case. The council had to at least engage in a meaningful consideration of the factors that were relevant to the defendant and the situation at hand in determining an appropriate penalty for him. Contrary to what the council said, there was evidence of attempts at rehabilitation. The court also found that the council did not consider the financial blow the defendant would face with a large costs award. The defendant provided evidence about his considerable debt load and inability to begin a residency program because of the charges. The council did not assess the defendant's argument as to what the appropriate amount of costs should be in light of the relevant legal principles.

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***Heck v Meszaros*, 2023 SKKB 147**

Megaw, 2023-07-06 (KB23165)

Civil Procedure - *Queen's Bench Rules*, Rule 11-26
Family Law - Child Custody and Access - Variation
Family Law - Contempt
Family Law - Custody and Access - Conduct of Parent
Statutes - Interpretation - *Children's Law Act, 2020*, Section 44

The petitioner mother and the respondent father made cross applications to vary existing parenting and child support orders. At least four prior decisions addressed parenting issues between the parties. The children were now 15 and 12 years old. Both children indicated they did not want to engage with their father. The father sought a finding that the mother was in contempt of court because he could not exercise parenting time. The mother sought to vary orders to reflect that she had full-time care of the two children and to increase the income imputed to the respondent and decrease her income. The court considered: 1) how would the judge meet with the children who were estranged from their father; 2) was the mother in contempt of the court's previous judgment by not providing the father with parenting time with the younger child; 3) should the family be ordered to return to counselling; 4) should the parenting order be varied; and 5) should the current child support be varied?
HELD: 1) The court noted that the engagement of qualified relationship repair and counselling had accomplished nothing. With the consent of both parties, the judge decided it was appropriate to meet directly with the teenage children. The children deserved to have a voice in what was going on, but not necessarily a choice in the ultimate result. The judge met with the children and a court staff-person and recorded the hour-long conversation. The exact nature of the conversation was not disclosed to the parents or in

the decision. 2) The contempt application was dismissed. Contempt of court in the family context is regulated by rule 11-26 of The Queen's Bench Rules and *The Children's Law Act, 2020*, at s. 44. Courts are reluctant to impose the significant power of contempt in a family law setting. The judge was unable to find that the mother's actions deliberately avoided the court order. The mother drove the child to the father's home and the child refused to exit the vehicle. Although the father asserted the mother was interfering with his parenting time, there was no evidence to support the assertion. Even if the mother could do more, it was not contempt. 3) Both the mother and father could do better to repair the children's relationship with the father. The children both expressed their own reasons for stopping all contact with their father. The specific counselling service the father proposed was located in another city, and there was no reasonable prospect of success. The children ought to have ongoing counselling in the city where they lived. The children were willing to receive and respond to a weekly text message from their father asking for their news of the week. This weekly text exchange was ordered. The mother had a responsibility to ensure the children were interacting in a real and substantive way with their father. 4) The parties indicated they were both seeking to have the children return to a shared parenting regime. The children had decided to live solely with the mother. The children's decision was a material change in circumstances, but varying the parenting order was not in the best interests of these children because it would remove an incentive to look for alternate ways to keep a connection alive with the father. 5) The mother sought to vary the current child support order on the basis that the children reside with her full-time. She had declared bankruptcy, and the respondent's income should be imputed at $180,000 per year. The mother's filed materials did not allow for a full review of the child support and the application to vary support was dismissed.

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***R v Kidder*, 2023 SKKB 185**

Elson, 2023-07-17 (KB23174)

Criminal Law - *Controlled Drugs and Substances Act* - Possession for the Purposes of Trafficking
Criminal Law - Sentencing - Parity - Sentencing Range - *Gladue* Factors
Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 5(2)
Statutes - Interpretation - *Criminal Code*, Section 355(a), Section 117.01(1), Section 718.2(b)

The court provided written reasons for sentencing following an oral decision. The offender pled guilty to four counts: possession of cocaine for the purpose of trafficking; possession of methamphetamine for the purpose of trafficking; possession of proceeds valued at over five thousand dollars, knowing that they were the proceeds of trafficking in a controlled substance; and possession of shotgun shells while prohibited. Confidential information led police to believe that two people were trafficking cocaine and methamphetamine. Eventually, they became aware of the offender's involvement. Surveillance was conducted at the offender's apartment building, with police observing the offender meeting with people and delivering or receiving items in duffel bags. The offender met with other people around the city. On one trip, the offender parked his vehicle beside an undercover surveillance officer, who observed the offender with a three-inch thick stack of $50 bills. One of the other people involved was arrested on other matters but continued the drug operations involving the offender via phone calls from the penitentiary. Officers removed garbage from the bin outside the offender's address and found baggies with residue that tested positive for cocaine. The offender was

arrested, and officers executed search warrants for the offender's apartment and vehicles observed during the investigation. The court noted the paucity of published Saskatchewan authorities for offences related to methamphetamine trafficking at the level of the offender's involvement. The court determined what an appropriate sentence would be for this offender.
HELD: The court imposed a global sentence of five years' imprisonment. This was based on the offender's involvement in the trafficking. Crown and defense counsel focused on the principle of parity, reflected in s. 718.2(b) of the *Criminal Code*, and an appropriate sentence for methamphetamine trafficking. The offender had a criminal record. The court heard the offender's personal circumstances by way of a pre-sentence report. The offender was 43 years old. He had an abusive father. He had dropped out of high school and sustained a serious workplace injury at 19. After his workers' compensation benefits and pain medications were cut off, he turned to illicit drugs to cope. The offender was a status member of Sturgeon Lake Cree Nation but did not appear to have a strong connection to his Indigenous heritage. His mother had been part of the "60's scoop." Crown counsel argued that a global sentence of six years' imprisonment was appropriate on the methamphetamine count, with four years' concurrent on the cocaine count, four years' concurrent on the proceeds of crime count, and two years' concurrent on the weapons/ammunition breach. Crown counsel relied on an unreported 2017 sentencing judgment which set out a six to 10-year sentencing range for an active high-level wholesaler of methamphetamine. Defence counsel questioned the rigid application of this sentencing range, and pointed to the circumstances of the offender to argue that a fit and just sentence would be 56 months' imprisonment less credit for pre-sentence custody. The court provided a detailed history of the use of methamphetamines, and the placement of methamphetamine into the category of illicit drugs. The court reproduced a community impact statement for methamphetamine offences, prepared by Health Canada, which outlined the significant adverse effects associated with methamphetamine use. The court also reproduced portions of Saskatchewan decisions discussing the impact of crystal methamphetamine on communities. After a review of the jurisprudence, the court found that the blameworthiness of an offender's conduct in trafficking illicit drugs depends on the extent of the offender's involvement. The nature and level of the offender's operation amounts to a significant aggravating factor. Here, the offender was more of an "underling" in the wholesale operation. The court was not convinced that the offender's Indigenous background lessened the moral blameworthiness of the offender's behaviour.

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***Noureldin v Mohr*, 2023 SKKB 166**

Brown, 2023-08-09 (KB23157)

Family Law - Change of Child's Last Name - Dispensing with Consent
Statutes - Interpretation - *Change of Name Act, 1995*, Section 9

The parties had resolved almost all disputes arising from the breakdown of their marriage except for the last name of their daughter. The applicant (respondent) applied for an order that the daughter's name be changed to a hyphenated name that included the applicant's surname. The applicant applied under s. 9 of *The Change of Name Act, 1995*, SS 1995, c C-6.1 dispensing with the respondent's (petitioner's) consent. The court decided whether the daughter's last name should be changed to include both parents' names despite the respondent's opposition.

HELD: The court ordered that consent of the respondent be dispensed with and found that it was in the best interests of the daughter to have a hyphenated last name. The court ordered costs in the amount of $500. The court undertook the best interests of the child analysis in this situation (Vanderlinde v Bohn, 2003 SKQB 503; Tarry v Rincker, 2013 SKCA 98). The applicant had to show that there was a reasonable basis for changing the registered surname of the child. The court had to determine whether dispensing with the other legal custodian's consent was in the best interests of the child. The respondent opposed the name change primarily because of his cultural beliefs. The court found that given the child's young age, these beliefs were not part of the child's best interests. This was not a situation where the applicant wanted to add the name of a new partner to the last name of the child. The applicant wanted the child to have the applicant's own last name. Sharing a last name signifies a tie between the child and her parents, which the court noted can be important when the family is no longer one combined unit.

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***S.S. v H.K.*, 2023 SKKB 169**

Zuk, 2023-08-10 (KB23162)

Family Law - Annulment of Marriage
Statutes - Interpretation - *Marriage Act, 2021*

The co-petitioner applied for a judgment granting an annulment of the parties' marriage. The parties had a civil marriage ceremony and ceased cohabiting as spouses approximately four months later. The grounds for the annulment were an alleged invalid registration of marriage because of the marriage commissioner's failure to follow the procedural timelines and witness provisions set out in The Marriage Act, 2021. The parties stated that the witnesses were not present when the parties signed the registration of marriage. The court considered: should the application for annulment be granted?
HELD: The application for judgment in an uncontested family law proceeding seeking annulment of the marriage was dismissed with leave to proceed by notice of application for judgment. The court had authority to annul a marriage. There is no legislation about granting annulments. Annulments are governed by the common law. An action and trial or summary trial is the appropriate procedure for an annulment, rather than the application the parties filed. Important evidence about the marriage ceremony was missing. *The Marriage Act, 2021* is silent on the validity of a marriage performed contrary to the provisions of the Act. It is unlikely the legislature intended to make a marriage entered into in good faith void or voidable because of procedural non-compliance with the Act.

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***R v Iron*, 2023 SKKB 170**

Hildebrandt, 2023-08-17 (KB23160)

Criminal Law - Robbery with Violence - Identity
Statutes - Interpretation - *Criminal Code*, Section 344(1)(b)

The accused was charged with robbery of a clothing store. The accused was wearing a hat and sunglasses when he entered the store, tried items on, refused to pay for the items, and punched the store owner twice before fleeing while still wearing the items, including a puffer jacket and shirt. A recognition *voir dire* was conducted during the trial on the witness police officer's past dealings with the accused. The court ruled that the officer's opinion that the individual in photos and video was the accused was admissible. When he left the store, the accused was described as wearing a stolen puffer jacket and stolen shirt, fingerless gloves, sunglasses and a hat, distinctive beige shoes, and clutching a box. The officer located surveillance camera footage that had captured the accused matching that description.
HELD: The accused was guilty of robbery. According to the court, there was "no doubt" that the individual in the photos and video was the one who committed the robbery at the store. The Crown was required to prove each of the elements of robbery beyond a reasonable doubt. The evidence established that the accused intentionally took property which belonged to the clothing store and to which he had no right. The owner of the store testified that the accused hit him twice, satisfying the element of personal violence during the theft. The court was mindful of the frailties of witness identification, and in particular, the challenges of cross-racial identification (*R v Kytwayhat*, 2021 SKCA 67). There were three civilian witnesses and one police officer who identified the accused as the person who robbed the store. The court was satisfied that the Crown had proven the elements beyond a reasonable doubt.

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***Saskatchewan (Ministry of Agriculture) v Carry the Kettle First Nation*, 2023 SKKB 172**

Mitchell, 2023-08-17 (KB23163)

Aboriginal Law - Duty to Consult - Application for Judicial Review
Civil Procedure - Application to Strike - *Queen's Bench Rules*, Rule 7-9(b), Rule 7-9(e)

The applicant (Saskatchewan) applied to strike out the originating application of the respondent, Carry the Kettle Nakoda Nation (CTKNN), in its entirety. The applicant relied on Rules 7-9(2)(b) (scandalous, frivolous or vexatious) and (e) (abuse of process) and the court's inherent jurisdiction to control its own processes and direct a stay of proceedings where appropriate. The originating application sought judicial review of decisions taken by the Minister of Agriculture to lease lands over which CTKNN claimed a Treaty right, alleging that Saskatchewan had failed in its duty to consult. The applicant argued that the originating application was vexatious and an abuse of the court's process because a separate action filed in 2017 raised the same issues. The respondents admitted there was some overlap in the issues, but that there were fundamental differences in the proceedings. The court determined whether to strike the originating application in its entirety.
HELD: The court dismissed the applicant's application to strike and allowed the originating application to proceed to a hearing. The

court was not convinced that permitting the originating application to proceed was vexatious or an abuse of process. While there was some overlap in the two matters, the central issues and remedies claimed were different. Whether commenced by way of an originating application or statement of claim, an application for judicial review was more about the Crown's dealings with an Aboriginal group than the substantive outcome of those dealings. The court indicated what was meant by the terms "abuse of process", "frivolous", and "vexatious". A pleading is scandalous if it includes degrading charges or baseless allegations of misconduct or bad faith. A pleading is frivolous if it is plain or obvious that the claim it advances is groundless and cannot succeed. Vexatious pleadings are commenced for an ulterior motive other than to enforce a true legal claim. The concept of abuse of process is broader: it is a discretionary tool to prevent the administration of justice from being misused. One factor to consider is whether a party is attempting to relitigate an issue that has already been decided or is currently being decided in another forum.

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***R v Poitras*, 2023 SKKB 174**

McMurtry, 2023-08-18 (KB23161)

Criminal Law - Robbery with a Firearm - Pointing Firearm - Robbery of Convenience Store
Criminal Law - Sentencing - *Gladue* Factors
Criminal Law - Sentencing - Sentencing Principles - Fundamental Principle - Proportionality

In 2021, the court found the offender guilty of six charges relating to the robbery of a convenience store which occurred in 2019. The offender pled guilty to seven other charges relating to another robbery of the same store. The charges included: with intent to commit an indictable offence, having his face covered; occupying a motor vehicle knowing there was a firearm in it; using a firearm to rob a convenience store; handling a firearm in a careless manner; possessing a firearm while prohibited; pointing a firearm; using a firearm to rob a convenience store; possessing a firearm without a licence; breaking and entering to steal a firearm; possessing a firearm while prohibited; pointing a firearm; and failing to attend court. The offender did not attend for sentencing in 2021. Here, the offender attended court for sentencing, and the court provided a sentencing decision.
HELD: The court ordered a sentence of seven years' incarceration. The time going forward was reduced to five years and one month with remand credit. The sentences ran consecutively because of the short period between the robberies. The court ordered three years' incarceration for using a firearm to rob the convenience store, three years consecutive for the second robbery on the same store, six months consecutive for possessing a firearm while prohibited, and six months consecutive for failing to attend court. All other charges received concurrent sentences. The Crown sought a sentence of 14.5 years but agreed that the totality principle warranted a reduction in sentence to 13 years. Defence sought a global sentence of 5.5 years. The court set out the relevant sentencing provisions in the *Criminal Code*, beginning at s. 718. The court indicated that the principle of proportionality was central to the sentencing process and related to the degree of responsibility of the offender (*R v Nasogaluak*, 2010 SCC 6; *R v Ratt*, 2021 SKCA 7). All the victims in the robberies were Indigenous, so the court considered s. 718.04. The court also discussed s. 718.2(e), which required sentencing judges to consider all available sanctions other than imprisonment that were reasonable in the circumstances, while paying particular attention to the circumstances of Indigenous offenders (*R v Charles*, 2021 SKCA 114). The

court considered s. 718.3, given the number of offences, and s. 719 for the appropriate calculation of remand time. The sentencing range for robbery was set out in *R v Johnson*, 2021 SKCA 17 and *R v Kirklon*, 2015 SKCA 67 (*Kirklon*). Three years' incarceration was the low end of the range for robberies of persons in vulnerable jobs, like convenience store clerks, while the range in *Kirklon* was between five and seven years for commercial robberies, like robberies of pharmacies. The offender had a minimal criminal record. The use of a firearm in both robberies was both aggravating and the subject of discrete charges. The firearms were loaded and pointed at four different people. The victims involved were vulnerable convenience store clerks. The relevant mitigating factors for sentencing were the offender's Indigenous background and *Gladue* factors, the lack of violence in his criminal record, and the fact that the offender took appropriate responsibility for his role in the offences. The offender left his home at a very young age because of his parents' abuse of alcohol and violence towards him. The offender became a father in his early teens. He left school to work and support his family but began abusing substances. His brother was murdered a month before the first robbery. The offender's parents and grandparents attended residential schools.

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***Director under The Seizure of Criminal Property Act, 2009 v Dano*, 2023 SKKB 168**

Tochor, 2023-08-09 (KB23158)

Statutes - Interpretation - *Seizure of Criminal Property Act, 2009*, Section 6

The applicant director applied, without notice, for orders under s. 6 of *The Seizure of Criminal Property Act, 2009* requiring two financial institutions to provide information about the bank accounts of a person. The Court considered: does the court have jurisdiction under s. 6 of the Act to make the order on an application without notice?
HELD: The application was dismissed, with leave to re-apply with notice to the named person and financial institutions. Section 6 of *The Seizure of Criminal Property Act, 2009* provides general authority for the director to investigate and inventory property, and to seize and remove evidence of property that is proceeds of unlawful activity. It does not specifically authorize compelling financial institutions to provide an individual's banking information. The judge was not satisfied the court had jurisdiction and, in light of the uncertainty, refused to grant the order without the benefit of submissions from the respondents. Amendments to the Act assented to in 2022 were not yet in force.

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***A.M. v Hagen*, 2023 SKKB 176**

Popescul, 2023-08-21 (KB23164)

Civil Procedure - *Queen's Bench Rules*, Rule 4-44, Rule 7-2

Civil Procedure - *Queen's Bench Rules* - Want of Prosecution - Summary Dismissal
Statutes - Interpretation - *Police Act, 1990*, Section 10(3)

The plaintiff commenced an action against the defendants both in her own right and as litigation guardian for her two minor children in 2010. The claim related to the tragic death of her husband, C.M., in 2008. The claim alleged that the daughter of the plaintiff and C.M. was the victim of sexual assaults. Two individuals were charged, but the Crown later declined to proceed with charges against one of the accused. C.M. was agitated by this decision. He armed himself with an axe and went to where he thought the accused was. Police were dispatched, and C.M. fled but was later located. Police used pepper spray, restraints and handcuffs to gain control of C.M., but he died during the interaction with police. The evidence before the court was that the officers acted in good faith. The defendants applied for an order striking the claim for want of prosecution under Rule 4-44 of *The Queen's Bench Rules*. In the alternative, they sought summary judgment dismissing the claim. The court set out in detail the lengthy history of the claim. During the hearing, the plaintiff declined to make submissions. The court determined whether the claim should be struck for want of prosecution, or whether it should be summarily dismissed.

HELD: The court struck the plaintiff's claim for want of prosecution under Rule 4-44(a). The delay was inordinate and inexcusable, and it was not in the interests of justice to permit the matter to proceed. Alternatively, the defendants' application for summary judgment was granted, and the claim was summarily dismissed. It had been over 13 years since the claim was commenced with "most, if not all" of the progress made attributed to the defendants' efforts. 1) The court set out the leading authority on Rule 4-44 (*International Capital Corp. v Robinson Twigg & Ketilson*, 2010 SKCA 48) and the three-step approach for determining whether a claim should be struck for want of prosecution: a) whether there was inordinate delay; b) the reasons for delay, to determine whether the delay was excusable; and c) if the delay was both inordinate and inexcusable, there must be a consideration of whether it was in the interests of justice that the case proceed to trial notwithstanding delay. The court found that the last meaningful step taken in this matter was in November 2019, when parties engaged in settlement discussions at a pre-trial conference. The court found that over three and a half years had elapsed since the last meaningful step was taken in this action. The delay of nearly 13 years from the time the matter was commenced to the present day was found to be inordinate. The court found that this relatively straightforward negligence claim would not be expected to take this long to proceed to trial. After establishing inordinate delay, the court determined whether there was a reasonable excuse for the delay. The burden was on the plaintiff to show why the inordinate delay should be excused. The court found that the plaintiff failed in her obligation to move the case along and delayed every stage of the proceedings. The plaintiff did not offer any excuse to explain or justify the delay, so there was no basis for any conclusion other than that the delay was inexcusable. The court then considered whether it was in the interests of justice for the claim to proceed despite the inordinate and inexcusable delay. The court considered all the relevant factors to find that it was not in the interests of justice to permit the claim to proceed. Here, since the commencement of the claim, the defendants had repeatedly attempted to move the matter forward, despite ongoing delay by the plaintiff. The court noted that the defendants had been solely responsible for pushing the matter forward, with the plaintiff having done "virtually nothing" without ongoing and repeated attempts by the defendants to advance the action. 2) The evidence before the court established that the defendants acted in good faith, so s. 10(3) of *The Police Act, 1990* applied. There was no genuine issue requiring a trial, and the defendants' request for summary judgment was granted. The court may grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. The court set out the "roadmap" for summary judgment in *Tchozewski v Lamontagne*, 2014 SKQB 71. The burden was on the defendants to establish there was no genuine issue, and then the onus shifted to the plaintiff to establish that there was a genuine issue. The defendants relied on s. 10(3) of *The Police Act, 1990* which provides a complete defence to civil liability as long as the police officers involved in

the incident were acting in the good faith exercise of their duties when the conduct giving rise to loss or damage occurred. Courts in Saskatchewan have held that in the absence of any evidence of bad faith, police officers are afforded protection under s. 10(3) of *The Police Act, 1990*. The question of whether the conduct of a police defendant was justified or lawful was not relevant to the analysis of the applicability of s. 10(3).

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***Tress v FCA US LLC*, 2023 SKKB 186**

Tochor, 2023-09-06 (KB23175)

Civil Procedure - Class Action - Certification

The plaintiff, a resident of British Columbia, sought certification of his lawsuit as a class action against the manufacturer of his eco-friendly 2015 Dodge Ram truck, because it was fitted with a device designed to defeat regulatory emissions tests. The plaintiff stated he would not have purchased this vehicle had he known about the device, and that the existence of the device in his vehicle caused him and others to suffer economic loss. The defendants argued that there was no evidence of compensable harm, and that the plaintiff was not a proper representative plaintiff because he was not a resident of Saskatchewan. The court determined whether the action could be certified as a class action in Saskatchewan.
HELD: The court dismissed the application for certification. The court found that a class action was not a preferable procedure for this action and that the plaintiff was not a proper representative plaintiff. The court set out the statutory requirements for certification as set out in s. 6 of *The Class Actions Act*. Each requirement had to be established prior to certification of an action, and the failure to meet any of the requirements was fatal. The plaintiff failed to meet the statutory requirement that a class action was a preferable procedure for the resolution of the common issues, because he did not provide evidence of compensable harm. There was no evidence that the plaintiff paid a premium price for his vehicle. There was no evidence of any person incurring even nominal damages due to the vehicle recall and repair. There was no minimum evidentiary basis for compensable harm, and accordingly a class action was not a preferable procedure in accordance with s. 6(1)(d) of the Act. There was also no evidence that the plaintiff was a resident of Saskatchewan when the claim was commenced, as required by s. 4(1) of the Act.

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