The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court. Published on the 1st and 15th of every month.

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***R v Morris*, 2024 SKCA 36**

Jackson Caldwell McCreary, 2024-03-28 (CA24036)

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This appeal concerned the adequacy of a jury charge during trial when the accused alleged automatism based on intoxication coupled with mental disorder. The accused was charged with three offences: sexual assault, robbery, and attempt to commit robbery. The offences happened on the same day within a period of 30 minutes. The accused admitted committing the acts but claimed he was not responsible for his actions because he was severely intoxicated by alcohol and medicine coupled with mental disorders. At the time of trial, s. 33.1 of the *Criminal Code* prevented an accused from relying on intoxication-based automatism for offences that included an element of assault or interference with the bodily integrity of another person. The Court of King's Bench decided that while s. 33.1 is unconstitutional, it is saved by the operation

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of s. 1 of the *Charter*. After the time of trial, the Supreme Court of Canada in *R v Brown*, 2022 SCC 18, 472 DLR (4th) 459 (*Brown*), and *R v Sullivan*, 2022 SCC 19, 472 DLR (4th) 521 (*Sullivan*) ruled that s.33.1 of the *Criminal Code* was unconstitutional and was not saved by s. 1 of the *Charter*. This decision of the Supreme Court effectively reversed the trial decisions respecting s. 33.1 matters. On appeal, the accused submitted that he was entitled to a new trial because of *Brown* and *Sullivan*, at least for the sexual assault charges. The Court of Appeal (court) considered the following three broad issues: 1) Did the trial judge charge the jury regarding the defence of automatism concerning the specific intent offences (the robbery charges)? 2) Was the trial judge required to leave automatism with the jury? 3) What was the appropriate remedy if the trial judge erred in law in not leaving automatism with the jury? HELD: The appeal was allowed. The jury should have had the opportunity to consider the defence of automatism. The court ordered a new trial on all charges. Automatism is a state of impairment wherein an individual lacks voluntary control over his or her actions. The Supreme Court in *R v Stone*, 1999 CanLII 688 (SCC), [1999] 2 SCR 290, provided a two-step process that must be followed when dealing with claims of automatism. First, the trial judge must determine whether the accused satisfies the evidentiary burden for this defence. Second, if the answer is 'yes', then the trial judge must determine whether the alleged condition is a mental or non-mental disorder automatism. Extreme intoxication akin to automatism is the highest form of intoxication and results in losing voluntary control of actions. In this appeal, the defence raised issues with the instructions to the jury regarding automatism from extreme intoxication. 1) The court concluded that the jury was not charged with respect to extreme intoxication akin to automatism. The trial judge did not find an air of reality to the defence and gave no oral or written reasons for such a finding. As a result, she did not charge the jury with instructions regarding this defence. The Supreme Court in *R v Abdullahi*, 2023 SCC 19, 483 DLR (4th) 1, established that the approach for the appellate court to review a jury charge turns to whether the jury was "properly equipped to answer the questions before it." The appellate court should examine whether the jury was accurately and sufficiently instructed to decide the matter and analyze the circumstances of the trial that could inform such analysis. The appellate court, therefore, should have regard to what was said and not said in the judge's instructions. The concept of "a properly equipped jury" refers to the "overall understanding of a given issue in the mind of the jury" as well as an "accurate understanding of the law" that is needed to decide the case. Regarding "sufficiency," the appellate court should inquire whether an instruction was required, and whether that instruction was given with sufficient details. The circumstances of each trial determine if an instruction is required and if it is obligatory or contingent. If an instruction is required, the failure to provide one means that the charge was insufficient, constituting an error of law. Furthermore, a particular instruction should be sufficiently detailed, and the content of the charge should be on the point in question. The assessment of evidence, the closing arguments of counsel, and the lack of objection by defence counsel are factors helpful to reviewing a jury instruction. Here, the court reviewed all the instances that the trial

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judge used the word "automatism" and found that it was obvious the jury charge did not follow the Canadian Judicial Council's *Model Jury Instructions* for the defence of automatism. The absence of elements such as the definition of automatism, its effects on a person at the time of commission of the act, the law about automatism, the burden of proof, and how to deal with the evidence about automatism established that the jury was not properly equipped to address this defence in this case. 2) The trial judge found no air of reality to the defence of automatism. The question of error in law for not instructing the jury on this defence was tied to the question of whether the trial judge erred in not finding an air of reality for this defence. The Supreme Court in *R v Cinous*, 2002 SCC 29, [2002] 2 SCR 3, provided the test for when a defence should be put before a jury. It is the trial judge's duty to determine whether the evidence is such that, if believed, a properly charged and reasonable jury could have acquitted the accused. This test does not require the judge to determine the credibility and weight of the evidence because the evidence supporting the defence is assumed to be true. The trial judge's role is to test the "air of reality," which is an evidentiary burden rather than a persuasive one. Therefore, if there is direct evidence of every element of a defence, the trial judge must put the defence before the jury. The Supreme Court in *R v Fontaine*, 2004 SCC 27, [2004] 1 SCR 702 (*Fontaine*) considered the "air of reality" test in the context of automatism. *Fontaine* made it clear that the trial judge does not assess the likelihood of the success of the alleged automatism defence or weigh the evidence to determine whether it establishes automatism on the balance of probabilities. Either of these two determinations by a trial judge would amount to an error in law. Instead, the trial judge's role is to determine "whether the evidence regarding automatism was such that, if believed, a reasonable jury, properly charged, could reasonably have concluded that the defence had been established on a balance of probabilities." The evidence must be put before a jury if it meets this standard. In the absence of direct evidence, the trial judge should engage in limited weighing of the circumstantial evidence to find if the circumstantial evidence is reasonably capable of supporting the legal test for air of reality and charging the jury. In the current case, the accused and his counsel claimed the defence of automatism and provided evidence supporting that claim, such as witnesses. The court held that automatism should have been left with the jury. 3) The appeal was allowed with respect to all three convictions, and the court found the only adequate remedy was a new trial.

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***3sHealth, Saskatchewan Health-Care Association (SAHO) v Canadian Union of Public Employees*, 2024 SKCA 39**

Jackson, 2024-04-05 (CA24039)

Civil Procedure - Appeal - Stay Pending Appeal - *Court of Appeal Rules*, Rule 15

Criminal Law - Self-Represented Accused - Duty of Trial Judge - Appeal

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This was an application for a stay of a King's Bench Chambers decision (*3sHealth v Canadian Union of Public Employees*, 2024 SKKB 31) pending resolution of the appeal. The main issue between the parties was disagreement on the interpretation of a trust agreement under *The Pension Benefits Act*. The trust agreement governed the relationship between the parties and provided a mechanism for compulsory mediation and arbitration in certain circumstances.
HELD: The King's Bench decision was stayed pending resolution of the appeal. The general framework for Rule 15 of *The Court of Appeal Rules* involved an assessment of the strength of the appeal and a consideration of irreparable harm and balance of convenience. The court found that the balance of convenience weighed in favour of imposing a stay. The court found that whatever the outcome of the appeal, the interpretation of the trust agreement would have significant implications for the parties and should be resolved before the commencement of arbitration.

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***R v Criece*, 2024 SKCA 41**

Schwann Barrington-Foote Drennan, 2024-04-17 (CA24041)

Criminal Law - Assault - Arson
Criminal Law - Appeal - Sentence - Fitness of Sentence
Criminal Law - Self-Represented Accused - Duty of Trial Judge - Appeal
Criminal Law - Uttering Threats

The appellant was convicted after trial of several offences including arson and uttering threats. The appellant, who was self-represented at his trial and sentencing hearing, appealed his conviction and sought leave to appeal the sentence. The appellant contended that his trial was unfair, as the trial judge failed to discharge the obligation imposed on judges to assist a self-represented accused. The appellant also sought as an alternative a reduction of his sentence for arson and that his sentence for uttering threats be made concurrent.
HELD: (1) The appeal against the convictions was dismissed as the trial judge did not fail to comply with his obligations to assist a self-represented person. A trial judge, in aiding a self-represented accused, must be careful to maintain neutrality and not present the accused's case for him. Furthermore, it is not enough to demonstrate that a trial judge has failed to provide assistance; such failure must also be proven to have resulted in trial unfairness and a miscarriage of justice. In this case, while the trial judge did not provide adequate assistance in certain respects, the trial judge's minor missteps did not result in trial unfairness or a

Forfeiture - Seizure of Criminal Property

Insurance - Duty to Defend

Insurance - Policy Limits - Professional Liability

King's Bench Rules, Rule 13-30 - Admissible Affidavit Evidence

Labour Law - *Charter of Rights* - Corporate Employer

Labour Law - Collective Agreement - Classification of Employees

Labour Law - Labour Relations Board - Certification Order - Judicial Review

Labour Law - Labour Relations Board - Judicial Review - Appeal

Landlord and Tenant - Appeal - Grounds - Error of Law/Findings of Fact

Landlord and Tenant - Appeal - Residential Tenancies

Landlord and Tenant - *Residential Tenancies Act* - Director of Office of Residential Tenancies - Order - Appeal

Landlord and Tenant - *Residential Tenancies Act, 2006* - Order for Possession - Appeal

Mental Health - Patient Detention

Occupations and Professions - Accountants - Disciplinary Hearing - Appeal

miscarriage of justice, whether considered separately or cumulatively. (2) The leave to appeal sentence was granted and the appellant's sentence appeal was partly allowed. With respect to the sentence for uttering threats, the trial judge had the option of imposing a concurrent sentence but was not required to do so. The applicable standard of review did not permit the appellate court to substitute its decision in this respect for that of the trial judge. With respect to the sentence for arson, the trial judge did not err in considering the location of the fire as an aggravating factor, as there was evidence to support his findings of fact in this respect. However, the trial judge failed to consider the application of the gap principle in evaluating the applicant's criminal record as an aggravating factor. Given the lack of evidence as to the appellant's circumstances, other than the evidence that he had been a good and helpful neighbour, failing to apply the gap principle was an error. This error in principle impacted the sentence. The court quashed the existing sentence, substituting a sentence of four years less credit for pre-sentence custody.

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***Kelly Panteluk Construction Ltd. v Lloyd's Underwriters*, 2024 SKCA 42**

Caldwell Kalmakoff Drennan, 2024-04-18 (CA24042)

Insurance - Duty to Defend
Insurance - Policy Limits - Professional Liability

The appellant appealed against the summary dismissal of its application that the respondent insurance-underwriter syndicates had a duty to defend it under a course-of-construction, wrap-up, liability insurance policy. The appellant had entered a construction with Canadian Pacific Railway Company (CP Rail) to construct an earthen embankment for a railway line located in southern Saskatchewan. When the project was nearing completion, the embankment collapsed, causing damage to it and the land, for which CP Rail sued the appellant and others. The respondent declined to provide coverage, citing a "Project Damage Exclusion" and an "Operations Exclusion" under the insurance policy. The chambers judge had determined that the initial coverage for loss or damage was excluded by the Operations Exclusion and the Project Damage Exclusion.
HELD: The appeal was dismissed. (1) The trial judge did not err in making findings of fact to determine the respondents' duty to defend the appellants in the CP Rail action, rather than assume the facts alleged in the pleadings were true. While a court tasked with determining whether a duty to defend exists should not make specific findings of fact, such a prescription is not absolute. In this case, the nature of the application put before the judge required that the

Practice - Application for Summary Judgment - Disposition Without Trial

Practice - Disclosure of Documents - Solicitor-Client Privilege

Practice - Discovery - Documents - Application for Production

Practice - Evidence - Cross-examination on Affidavit

Practice - Judgments and Orders - Abuse of Process

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Professions and Occupations - Lawyers - Fees - Taxation

Real Property - *Land Titles Act*

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Statutes - Interpretation - *Mental Health Services Act*, Section 16(1)(b)

Statutes - Interpretation - *Residential Tenancies Act, 200*6, Section 76

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

judge make findings of fact to determine the respondents' duty to defend. (2) The chambers judge did not misapprehend the pleadings in support of his conclusion that the foundation soils were an "integral part" of the embankment construction. The judge's interpretation of the substance of the pleadings in the CP Rail Action was subject to the palpable and overriding standard of review on appeal. In this instance, the judge's finding regarding the foundation soil forming part of the embankment based on CP Rail's pleadings was rational and not a palpable error. (3) The trial judge did not err in interpreting the CP Rail Action as alleging that the appellant was responsible for construction of the embankment and for monitoring the foundation soils. While the CP Rail Action could be read as claiming that another party was primarily liable to CP Rail for monitoring the foundation soils, the pleadings also identified the appellant as responsible for that activity and its supervision. (4) The chambers judge did not impermissibly place the onus on the appellant to establish that a policy exclusion did not apply, instead of requiring the respondents to establish that it applied to all pleaded claims. The fullness of the judge's analysis showed that he found the respondent to have discharged its evidential and persuasive burdens by establishing that the claims against the appellant were excluded from coverage. (5) The chambers judge did not err by failing to interpret the relevant exclusions in the policy in accordance with the accepted rules of policy interpretation. The chambers judge's finding that there was no cogent basis to conclude otherwise than that the foundation of the embankment was part of the embankment itself was undisturbed. As a result, there was no rationale that would justify overturning his interpretation of the Operations Exclusion as excluding coverage for damage to the foundation soils. (6) The chambers judge was plainly aware of and correctly applied the relevant insurance law principles.

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***KDM Constructors LP v The International Union of Operating Engineers, Local 870*, 2024 SKCA 43**

Schwann McCreary Drennan, 2024-04-23 (CA24043)

Labour Law - *Charter of Rights* - Corporate Employer
Labour Law - Collective Agreement - Classification of Employees
Labour Law - Labour Relations Board - Judicial Review - Appeal
Labour Law - Labour Relations Board - Certification Order - Judicial Review

The appellant employer appealed the decision of the Court of King's Bench upholding the decision of the Saskatchewan Labour Relations Board (board) in dismissing the challenges the employer brought against the certification process by the union. In 2020, the union filed a

Cases by Name

101050457 Saskatchewan Ltd. v Regina (City)

3sHealth, Saskatchewan Health-Care Association (SAHO) v Canadian Union of Public Employees

Canadian Imperial Bank of Commerce v Crawford

Director under The Seizure of Criminal Property Act, 2009 v Warnecke

Gareau v Blanchard

Goertzen v Goertzen

Heuck v Janz

Holmes v Jastek Master Builder 2004 Inc.

Husk v Kuffner

Kaushik v Board of the CPA Saskatchewan

KDM Constructors LP v The International Union of Operating Engineers, Local 870

Kelly Panteluk Construction Ltd. v Lloyd's Underwriters

Kraus, Re

Lince v Saskatchewan Human Rights Commission

Nodran Ltd. v Sundowner Farms Ltd.

certification application with the board to represent a craft bargaining unit of operating engineers under Part VI, Division 13 of *The Saskatchewan Employment Act* (SEA), which applies to the construction industry. The employer took the position that the nature of work by the operating engineers fell within the exceptions of maintenance work in SEA. The employer also argued that the relevant section of the SEA was unconstitutional because it violated its s. 2(d) *Charter* right to freedom of association. The board held that the work performed by the operating engineers was within the related SEA provisions, and the employer did not have a protected right to freedom of association as a corporate employer and was not entitled to opt out of the collective bargaining process. The employer initiated a judicial review of the board's decision at the Court of King's Bench, and the chambers judge dismissed the application. The employer appealed the dismissal to the Court of Appeal (court), arguing the chambers judge erred in finding the decisions of the board reasonable. The court considered the reasonableness of the analysis and conclusions of the board about the nature of the activities of the operating engineers and the correctness of *Charter* rights protections for the corporate employer. HELD: The board's decision that the work performed by the operating engineers was construction industry activity under the SEA was reasonable. The board and chambers judge correctly determined the question of law that *Charter* rights under s. 2(d) for freedom of association did not apply to the corporate employer. In an appeal from a judicial review by the Court of King's Bench, the court determines whether the chambers judge selected the appropriate standard of review and whether the judge correctly applied it. After identifying the proper standard of review, the court must step into the shoes of the chambers judge and review the board's decision according to that standard of review. There were two standards of review applicable in this appeal. The board's decision to determine the nature of the work was reviewable under the reasonableness standard. The review of the constitutional question and issues of procedural fairness by the board were reviewable under correctness. The court's jurisprudence in reasonableness review concerns the decision-maker's reasoning process and the outcome. This review determined "whether the decision in question is based on an internally coherent and rational chain of analysis that is defensible in relation to the relevant facts and the law." The board found that the work performed by the operating engineers was "construction industry" activity as defined by the SEA. The board properly interpreted and applied the key provisions of the SEA to distinguish between construction industry activities and maintenance work. The board also thoroughly analyzed the definition of these types of work by exploring the jurisprudence, reasoning that the union established the necessary relation between the work of the bargaining unit, the construction work component, and the other work activities in deciding the application for certification. The board also clearly established the chain of analysis for its decision by canvassing the definition of the type of work, exploration of jurisprudence for previous similar cases, examination of the context as applicable to the current matter and reviewing the relevant facts of this case. The court found that the board's interpretive approach and application of the consistent principles of its own jurisprudence was internally

R v Criece

R v Herman

R v Kular

R v Laprise

R v Morris

R v Repo

Smith v Dawgs Canada Distribution Ltd.

Standing Buffalo Dakota First Nation v Ron S. Maurice Professional Corporation

Xiao-Phillips v Law Society of Saskatchewan

coherent, rational and logical, showing the hallmarks of reasonableness. Therefore, the court decided that the board's decision was reasonable, justified, transparent and intelligible. The employer challenged the constitutionality of sections 6-69 and 6-70 of Part VI, Division 13 of the SEA for violating its right to freedom of association under s. 2(d) of the *Charter* and argued the board and chambers judge erred in law by finding otherwise. The employer further contended that the board contravened the rules of procedural fairness by not allowing it to advance evidence for its *Charter* argument. The court found no merit to the employer's appeal on this front because the board's process to hear and determine the *Charter* issue was fair. The court upheld the board's conclusion that evidence was not required to determine the preliminary issue of this *Charter* argument as it was a pure question of law. The employer needed to satisfy a threshold question of whether it had a right to free association. In the context of labour relations, resolving issues as expeditiously as possible is in the best interests of justice. The court further explained that the question of procedural fairness and what was owed to the employer was not the issue before the board. The sole issue to be determined was whether the employer had standing as a right holder under s. 2(d) of the *Charter* or could claim protection as a corporation under the *Charter*: purely questions of law. The corporate employer does not have a right to freedom of association pursuant to s. 2(d) of the *Charter* because it does not have an interest falling within the scope or the purposes of this provision. Interpreting s. 2(d) requires a purposive approach related to the inherent power imbalance between employees and employers in labour relations matters. The objective of this section in labour law is to promote the empowerment of vulnerable individuals relative to the superior powers of an employer. Therefore, the purpose of s. 2(d) of the *Charter* here is to guarantee freedom of association for the employees for the right to labour strikes. The court acknowledged that the s. 2(d) *Charter* right applies to corporations in a very limited way. A corporation must establish that it has an interest. The board correctly identified that s. 2(d) protections must be confined to human beings, not a corporate entity such as an employer. A corporation could only claim standing for this *Charter* right if it was for the benefit of the rights of a human being. In this case, the employer was claiming the *Charter* protection for itself as a corporate entity and using s. 2(d) as a sword rather than a shield, which did not meet the limited exceptions of allowing a corporation to claim *Charter* protection.

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***Xiao-Phillips v Law Society of Saskatchewan*, 2024 SKCA 44**

Leurer Jackson McCreary, 2024-04-25 (CA24044)

Appeal - Professions and Occupations - Lawyers - Discipline - Law Society
Barristers and Solicitors - Conduct Unbecoming - Vexatious and Frivolous Arguments and Positions
Professions and Occupations - Barristers and Solicitors - Discipline - Conduct Unbecoming - Appeal

A lawyer appealed from the Law Society of Saskatchewan's (LSS) disciplinary and penalty decisions, which found that the appellant had committed conduct unbecoming a lawyer that warranted suspension and costs. The LSS rendered its decisions for two of the three counts: 1) advancing vexatious and frivolous arguments before courts and tribunals and 2) failing to provide quality service expected of a competent lawyer. The lawyer brought this appeal claiming: a) that the hearing committee did not correctly interpret count 1, b) reversed the burden of proof, c) erred in law by relying on the conclusions from the court cases referred to in the complaint, d) displaced adjudicative integrity by copying and pasting material from the brief of law of the investigation committee, e) lack of proper standard of proof for conduct unbecoming, and erring in findings of conduct unbecoming, the context of allegations and the underlying facts, and f) erring in law by rejecting the joint penalty submissions.
HELD: The court applied the appellate standard of review in this appeal. Questions of law were subject to the correctness standard, and questions of fact and mixed fact and law were reviewable for palpable and overriding error. a) The lawyer argued that finding vexatious and frivolous arguments and positions requires a subjective state of mind (*mens rea*), meaning the culprit intentionally advanced those arguments knowing they were vexatious and frivolous. The question of whether such allegations require proof of *mens rea* is a question of law, reviewable on a correctness standard. The court dismissed this argument, stating that the line of jurisprudence from the Supreme Court of Canada and Saskatchewan courts does not require a subjective mental element for the conduct unbecoming offences. Advancing arguments and positions without reasonable or probable grounds (vexatious) or of little weight or importance (frivolous) can happen knowingly or unknowingly. Therefore, the presence of malice or intent is not a requirement for finding conduct unbecoming. The inquiry about such findings requires an analysis of the context and circumstances of the events to see if the vexatious and frivolous arguments and positions rise to the level of lack of professionalism and conduct unbecoming of a lawyer. For example, in *Barth v Saskatchewan (Social Services)*, 2021 SKCA 41, [2021] 12 WWR 460, the court provided a list of non-exhaustive factors or markers for identifying a vexatious litigant. The Supreme Court in *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772 (*Groia*) stated that a final determination of conduct unbecoming "depends on a consideration of the full constellation of circumstances." The court determined that the hearing committee did not err in its interpretation of count 1, as it provided a clear and cogent line of reasoning supported by explanations and examples from the jurisprudence to interpret the charges. b) The appellant argued that the hearing committee erred in law by placing the burden of disproving the allegations on him and accepting the decisions referred to in the complaint as establishing proof of the allegations. He contended that the investigation committee had the burden of proof to establish the charges against him. The court dismissed this part of the appeal, stating that the investigation committee properly gathered and presented evidence and the hearing committee properly considered and applied the applicable laws in this regard. The hearing committee provided an explanation of how it would consider and weigh the evidence provided in this matter and the limitations of evidence, such as the impossibility of cross-examining the judges who wrote the decisions that were tendered as evidence here. Furthermore, the hearing committee examined all the

records filed before it by the investigation committee. It also provided reasoning that some parts of the complaint were made out in evidence, and some were not. c) Relying on judicial decisions as evidence for the complaint in this case was permissible for a disciplinary tribunal because the law permits relying on findings of fact in previous proceedings that the lawyer participated in as evidence. In *Groia*, the Supreme Court confirmed the appropriateness of the law society disciplinary body's reliance on a judge's comments about a lawyer's conduct in professional misconduct matters because the presiding judges have an advantageous position to evaluate the lawyer's conduct relative to the law society. d) The appellant argued that the hearing committee's extensive copying and pasting of materials directly from the investigation committee's brief contravened its adjudicative integrity. The Supreme Court of Canada in *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 49, [2013] 2 SCR 357 confirmed that copying in reasons for judgments does not in itself form grounds for setting the decision aside. The test, as the Supreme Court laid it out, is if the incorporation of material from others would lead a reasonable person, aware of all the relevant facts, to believe that the decision-maker or judge had put his/her mind aside and did not make an independent decision based on the evidence and law. Only then would the presumption of judicial integrity be rebutted, and the decision set aside. In the current case, the court examined the decision of the hearing committee and determined that the copied materials demonstrated the factual background of the complaint and did not raise to a level suggesting the committee did not exercise its adjudicative obligations in making an independent decision. e) The court reasoned that the term "conduct unbecoming" in Saskatchewan must be given a liberal definition. Saskatchewan's statutory provisions in this regard differ from those in other jurisdictions, such as British Columbia. For example, in Saskatchewan, questions of professional misconduct and incompetence could become questions of conduct unbecoming. The reason for the liberal reading of this term is because the law in Saskatchewan gives deference to the benchers who are in the best position to determine issues of the profession. *The Legal Profession Act, 1990* has an expansive range of meanings for conduct unbecoming. This reading shows that moral turpitude or negligence is not a requirement for a finding of conduct unbecoming. The definition of conduct unbecoming is broad, so it can cast a wide range of potentially unethical conduct, and the degree of fault required to be established requires a case-by-case analysis depending on the particulars of the allegation and its context. f) The court upheld the decision not to accept the joint submission and to impose more serious consequences for the appellant. The court observed that the hearing committee properly used the principles of *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204 (*Anthony-Cook*) when it rejected the joint submission. The Supreme Court in *Anthony-Cook* stated that a joint submission could be set aside when the submission for the sentence was "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning" of the justice system. When assessing a joint submission, the judge should consider whether the decision could cause an informed and reasonable public to lose confidence in the justice system. The court did not pronounce on whether the *Anthony-Cook* test was appropriate in a disciplinary decision, such as this one, because both parties agreed to use this principle for this matter. However, the court upheld the outcome of the hearing committee's analysis for rejecting the joint submission because the proposed sentence did not accord with the gravity of the alleged charges against the appellant.

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***Goertzen v Goertzen*, 2024 SKCA 45**

Caldwell Schwann Drennan, 2024-04-26 (CA24045)

Family Law - Division of Family Property - Appeal - Unequal Division
Family Law - Division of Family Property - Spousal Support
Family Law - Division of Family Property - Unequal - Exemptions
Family Law - Divorce - Spousal Support
Family Law - Spousal Support - Income

The appellant challenged a Court of King's Bench decision resolving issues of family property division and spousal support. The appellant claimed the trial judge committed numerous errors of fact and law in his decision to divide the family property and family home equally and in his determination of income and the quantum of spousal support payable by the appellant.
HELD: The appeal was partly allowed. (1) The trial judge did not misapprehend the evidence in determining that the appellant being responsible for paying spousal support at the mid-point of the *Spousal Support Advisory Guidelines* was fair and equitable. Appellate courts are required to approach decisions about what constitutes a fair and equitable division of family property with a deferential stance. The appellant's argument was little more than a request for the court to remake the decision, something it was not entitled to do. Furthermore, the appellant failed to prove that the alleged inequity in dividing the family home equally amounted to an extraordinary circumstance precluding such division. (2) The trial judge did not err in choosing to value the parties' respective RRSPs on different dates. Section 2 of *The Family Property Act* confers trial judges with the discretion to determine the date on which family property is valued. An appellate court must approach such determination with deference, assessing the judge's exercise of discretion under the palpable and overriding error standard. The appellant in this case did not refer to any case law requiring the trial judge to value parties' RRSPs as of the same date, whereas there is ample jurisprudence where different dates have been used. (3) The trial judge balanced the equities in concluding that it would be unfair to allow an exemption for the appellant for the value of the RRSPs he had contributed to the marriage. Section 23(1) of *The Family Property Act* permits courts to exempt the value of premarital property from distribution where such property is owned by a spouse before the commencement of a spousal relationship. A decision to deny an exemption involves the exercise of judicial discretion, which is entitled to deference on appeal provided there is no error in principle, disregard for a material fact, failure to act judicially, and the result is not so plainly wrong as to amount to an injustice. No error was made in this regard. (4) The appellant did not identify any error of law in arguing that the trial judge erred by not taking his tax liability into account in dividing family property. Section 21 of *The Family Property Act* confers judicial discretion to deviate from an equal division of family property where equal division would be unfair or inequitable. Among the matters considered in exercising such discretion include tax liability that may be incurred because of the transfer or sale of family property. In this case, the appellant's request for a deduction of tax liability would only have succeeded if the court was satisfied that equal distribution was unfair and inequitable. (5) The trial judge did not misapprehend evidence in his determination disallowing a deduction for the full amount of the rent expense made by the appellant. Given the unusual financial relationship between the appellant and the purchaser of his hospital building and the position taken by the respondent at trial, the appellant had the burden to better explain and justify the reasonableness of the expense, which he failed to satisfy. (5) The trial judge erred in law in denying the appellant deductions for wages paid to his children. There was evidence adduced at trial to this effect that was not considered by the

trial judge. (6) The trial judge did not err by utilizing a three-year averaging approach in assessing the appellant's income for the years 2020 and 2021. Section 17 of the *Spousal Support Advisory Guidelines* permits an averaging approach to income assessment where the approach outlined under the Guidelines "would not be the fairest determination of that income". The conclusion by the trial judge regarding the reliability of the averaging approach in this instance was a finding of fact entitled to deference in the absence of palpable and overriding error. (7) The trial judge's conclusion regarding the quantum of spousal support was appropriate having consideration to all circumstances. Given the discretionary nature of such conclusion, there was no need for appellate intervention.

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Smith v Dawgs Canada Distribution Ltd., **2024 SKKB 33**

Scherman, 2024-02-09 (KB24060)

Contract - Breach of Contract
Contract - Breach of Contract - Damages
Contract - Breach of Fiduciary Duty - Breach of Trust
Contract - *Consensus ad Idem* - Meeting of the Minds
Contract Law - Valid Agreement - Breach of Contract

The plaintiff commenced the subject action against the defendants alleging, among other things, oppressive and prejudicial acts by the defendants that unfairly disregarded his interests and breach of an oral contract pursuant to which the plaintiff would have been provided a proportionate shareholding interest in any corporation created to carry on the agreed-upon business (Dawgs Clogs). The plaintiff sought various forms of relief including specific performance of the oral contract and, in the alternative, damages for breach of fiduciary duty and breach of contract. One of the defendants, Double Diamond Distribution Ltd. (DDD), counterclaimed, alleging that the plaintiff carried on a competing business and engaged in the tort of passing off. The matter proceeded to a pre-trial conference. The pre-trial conference report contained an order to issue bifurcating liability and damages to both claim and counterclaim. The bifurcation order was eventually issued on January 8, 2024. The bifurcation order put all issues of liability with regard to both the statement of claim and the counterclaim before the court for determination.
HELD: The court upheld the claim against two of the defendants, S.M. and DDD, and dismissed DDD's counterclaim. However, the court did not determine the issue of remedies and also dismissed the plaintiff's claim against the other defendants. (1) The court found that the three criteria for a valid contract from the perspective of an objective bystander had been proven on the balance of probabilities. A valid contract is only formed when three criteria are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms were sufficiently certain. An objective reading of the correspondence between August 10, 2005 through to the end of January 2006 showed communication between the plaintiff and S.M. supporting the inference that the plaintiff was part of the new business venture. The plaintiff was also actively involved in doing things for the benefit of the business venture. The evidence also established a clear and unequivocal communication respecting the contractual terms that a reasonable person would consider to be the offer by the

defendant and acceptance by the plaintiff that in return for the plaintiff's cash contribution to the first shipment of clogs and his other efforts to support Dawgs Clogs, he would receive a proportional shareholding interest in the corporation created by the defendant for the venture. (2) There was no evidence presented of any contractual agreement between the plaintiff and all other defendants other than DDD, nor or of breaches of fiduciary duty or oppressive conduct on their parts. There was also no evidence presented supporting nor claim made that S.M. was an agent acting on their behalf and that they as principals were bound by his agreements as their agent.

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***R v Laprise*, 2024 SKKB 34**

Elson, 2024-02-29 (KB24067)

The proceeding was a rehearing of an earlier sentencing proceeding that stretched from the fall of 2019 to 2020. In the first proceeding, the sentencing judge had designated the accused a dangerous offender with respect to two counts of robbery and imposed an indeterminate sentence. The sentencing judge also imposed sentences for five other counts for which the accused had either pled guilty or been found guilty at the conclusion of trial. The accused appealed the sentencing judge's decision, and his appeal was allowed. The matter was reheard between June and October 2023.
HELD: The accused was declared and designated a long-term offender and sentenced to an eight-year determinate sentence of imprisonment. The accused was also subject to a long-term supervision order for a period of 10 years to be commenced on the expiration of his prison term. (1) Under s. 753 of the *Criminal Code*, the court will designate an offender a dangerous offender if it is satisfied that the offence for which the offender is convicted is a serious personal injury offence and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing a pattern of repetitive behaviour, a pattern of persistent aggressive behaviour or any behaviour associated with the offence that is of such a brutal nature as to compel the conclusion that the offender's future behaviour is unlikely to be inhibited by normal standards of behavioural restraint. Where a court finds an offender to be a dangerous offender, the court will impose a sentence of detention for an indeterminate period unless satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public against the offender committing a serious personal injury offence. To establish a dangerous offender designation, the Crown must prove beyond reasonable doubt that: (a) the offender has been convicted of and is to be sentenced for a "serious personal injury offence"; (b) the predicate offence or offences are part of a broader pattern of violence; (c) the offender shows a high likelihood of recidivism; and (d) the violent conduct is intractable. In this case, while the first three elements were satisfied, there was evidence beyond speculation and expressions of hope that cast doubt on the Crown's assertion of intractability. There was a palpable change in the accused's perspective about a treatment program; a better understanding of his crime cycle combined with both remorse and acceptance of responsibility; the apparent ability and motivation to extricate himself from gang activity; circumstances under which the accused addressed his substance issues which was "typical of progress into abstinence"; the attenuation of the accused's anti-social personality disorder; the prospect that the reduction in risk attributable to the age effect might arise earlier than it would for some offenders; and a significant reduction in institutional incidents since 2019. The court also stated that the risk of the accused not complying with conditions did not by itself detract from a finding of reasonable doubt regarding intractability. (2) Under s.

753.1(1) of the *Criminal Code*, the Court may find an offender a long-term offender if it is satisfied that: it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted; there is a substantial risk that the offender will reoffend; and there is a reasonable possibility of eventual control of the risk in the community. Where someone is designated a long-term offender, s. 753.1(3) obliges the sentencing judge to: (a) impose a sentence for the predicate offence or offences, which sentence must be a minimum of two years' imprisonment; and (b) order that the offender be subject to long-term supervision for a period not exceeding 10 years. The accused in this case was not opposed to a long-term offender designation and the evidence satisfied the criteria for designating the accused a long-term offender.

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***R v Herman*, 2024 SKKB 40 (not yet available on CanLII)**

Labach, 2024-03-01 (KB24031)

Criminal Law - *Voir Dire* - Evidence - Admissibility
Criminal Law - Defence
Criminal Law - Defence - Third-Party Suspect

This matter involved a *voir dire* hearing to determine whether the accused should be allowed to present evidence that a third party committed the attempted murder. The accused was charged with attempting to murder two individuals. He pled not guilty, and the matters went to trial with a jury and a judge. The defence wanted to advance evidence before the jury about an alleged third-party suspect committing the attempted murder of one of the individuals. The Crown responded that a *voir dire* was needed to determine the admissibility of that evidence. The defence filed an application to elicit disposition evidence of the alleged third-party culprit as a third-party suspect defence. The intended evidence included the third party's criminal record, opportunity to commit the offence, and post-offence conduct. The court held the *voir dire* to determine if there was sufficient connection between the alleged third party and the crime and nature of the evidence.
HELD: The application was dismissed as there was no air of reality to this third-party suspect defence. An accused can adduce evidence that someone else committed the crime they are charged with. Though such evidence could be direct or circumstantial, the inferences must be reasonable and based on the evidence, not on speculation. The evidence for third-party suspect defence must be "relevant, material, and satisfy the applicable rule of admissibility." The evidence must show that the alleged third party is sufficiently connected to the crime. Sufficient connection could be established through motive, means, or propensity to commit the crime. The burden of proof is evidentiary and is on the accused. The accused need only satisfy the court that there is an air of reality to the defence of a third-party suspect. The question is, "Taking the evidence at its greatest strength, does the record contain a sufficient factual foundation for a properly instructed jury to effect the defence"? Here, the accused named a third party as a person who likely shot one of the victims, relying on the following events. The camera footage from the house placed the third party at the house during the time of the shooting and police arrival. The third party was in the bathroom when the police arrived, suggesting he was washing evidence off. A firearm that was supposedly used to shoot the victim was found two months later in a room that allegedly belonged to this third party. The individual's criminal record showed an extensive list of convictions dating back to 2009,

including multiple weapon-related convictions. The accused, then, argued that this individual “had the opportunity to commit the offence, that his post-offence conduct gives rise to a reasonable inference that he was disposing of evidence or hiding evidence, that his criminal record shows he has a propensity to commit firearms and violent offences.” He also argued that the prejudicial effect of this evidence did not outweigh its probative value and he should be allowed to present this evidence to the jury. The court rejected this argument because the accused failed to establish a sufficient connection between the third party and the attempted murder of the victim. The accused failed to provide evidence of any motive and instead relied on means and propensity for violence and firearms possession to establish the connection. The court reviewed the camera footage and could not find any reasonable scenario in which the alleged third-party individual could have an opportunity to commit the offence. Furthermore, the alleged post-offence conduct of going to the bathroom to wash off evidence was not a reasonable inference from the evidence before the court. As for the propensity, the court stated that “without the means to commit the offence, propensity is immaterial.” The court, however, analyzed the criminal record of this third party and could not find any relation between history and type of prior offences with either the victim or the current offence in this case. Furthermore, the finding of a shotgun in his room two months after the events of this case does not prove anything because there was no evidence before the court that the victim was shot by a shotgun. Therefore, the accused failed to establish the evidentiary burden to satisfy the court that there was a connection between this third party and the victim. There was no air of reality to the accused’s defence of a third-party suspect. The accused was precluded from presenting evidence before the jury in this trial.

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***Kaushik v Board of the CPA Saskatchewan*, 2024 SKKB 37**

Scherman, 2024-03-04 (KB24061)

Administrative Law - Boards and Tribunals - Authority - Duty of Fairness - Judicial Review
Administrative Law - Duty of Fairness - Breach
Administrative Law - Standard of Review - Correctness
Occupations and Professions - Accountants - Disciplinary Hearing - Appeal

The appellant was appealing a decision of the Board (the board) of the Institute of Chartered Professional Accountants of Saskatchewan (the institute) dismissing his appeals from a decision of the disciplinary committee of the institute that found the appellant to be in breach of the institute’s bylaws. Among the numerous grounds of appeal were an overarching breach of duty of fairness, the disciplinary committee refusing his request for adjournment of its hearing and failure of the board to consider the relevant facts.
HELD: The appeal was dismissed. (1) The appellant failed to establish bias or a denial of fair process in the Professional Conduct Committee (PCC) investigation of him, either through evidence of the same contained in the record or admissible affidavit evidence. The essential facts of the case justified the investigation and prosecution of the appellant for his failure to abide by the restrictions on his licence, which was the offence the PCC was investigating and prosecuting. (2) The appellant also failed to establish a denial of his right to procedural fairness and to a hearing before the disciplinary committee. Under Section 31(11) of *The Accounting*

Profession Act (the Act), where a registrant whose conduct is the subject of the hearing fails to attend, the discipline committee may, on proof of service of the notice of the hearing, proceed with the hearing in the registrant's absence. The disciplinary committee had the statutory right to proceed with the hearing in the appellant's absence. The appellant was also fully aware of the disciplinary committee's requirement that if seeking an adjournment, he was required to make an application for an adjournment and to support such an application with medical documentation to support his alleged reasons for being unable to attend. Furthermore, the appellant was also aware of and had been specifically informed of the statutory right of the disciplinary committee to proceed with the hearing in his absence. The appellant could have attended by Zoom or telephone to request an adjournment or participate in the hearing but failed to do so. (3) The board provided detailed reasons in its appeal decision and concluded that the appellant was afforded adequate notice of the hearing, and that the disciplinary committee was, pursuant to s. 31(11) of the Act, entitled to proceed in his absence. The board's reasons demonstrated the application of the correct test in law to determine whether there was a denial of a fair hearing or process and proceeded to consider the relevant factors. There was no error of law on the part of the board in its choice of the test to apply. (4) There was no basis for the court to conclude that there was palpable and overriding error in the findings of the disciplinary committee regarding professional misconduct or the award of costs against the appellant. There was also no palpable and overriding error with the board upholding that finding. There was a current practice restriction in effect that the appellant knowingly breached. The appellant's flagrant breach, at a minimum, caused harm to the standing of the profession, and was a failure to comply with an extant order of the PPC. With regards to costs, the disciplinary committee's cost and penalty decision reviewed appropriate legal authority on the factors to consider and noted that the PCC sought full indemnity. The decision also noted that the appellant made no representation as to costs and found the costs to be in order. The board reviewed the disciplinary committee's costs decisions and concluded that there was no error in law in the disciplinary committee's logic or process, no indication the disciplinary committee misdirected itself on the applicable law or made any error assessing the facts or overlooked material evidence or relevant considerations.

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***Standing Buffalo Dakota First Nation v Ron S. Maurice Professional Corporation*, 2024 SKKB 44**

Morrall, 2024-03-12 (KB24044)

Barristers and Solicitors - Fees - Taxation
Civil Procedure - Bifurcation of Issues
Civil Procedure - Costs - Solicitor and Client Costs
Civil Procedure - Cross-examination of Affidavit
Evidence - Similar Fact Evidence
Practice - Disclosure of Documents - Solicitor-Client Privilege
Practice - Discovery - Documents - Application for Production
Practice - Evidence - Cross-examination on Affidavit
Practice - Procedure - Costs
Professions and Occupations - Lawyers - Fees - Taxation

This decision made case management decisions in a claim by the plaintiff First Nation that invoices issued by their former lawyers, the defendants, were unfair and should be taxed. The court had previously dealt with a dispute related to the obligations of the defendant lawyers to provide files to their former client, the plaintiff First Nation. Before a hearing date to address the taxation of all invoices and a determination of the fairness of a contingency arrangement, the plaintiff and defendant had filed many applications. The case management judge considered: 1) should the plaintiff's originating application be amended pursuant to Rule 3-72; 2) could portions of cross-examination transcripts from other proceedings be used in this proceeding; 3) should the plaintiff's July 17 application be struck as an abuse of process; 4) should privileged documents be disclosed to the plaintiff; 5) should the defendants produce retainer agreements and invoices related to interested First Nations; 6) should the defendants be ordered to file and serve an affidavit of documents identifying files related to the interested First Nations; 7) was the plaintiff permitted to cross-examine a deponent; 8) should an affidavit of the defendants be struck or should counsel be allowed to cross-examine another deponent; 9) should another affidavit be struck; 10) should the defendant's abridgement of time application be granted and the defendants permitted to rely on evidence filed by the plaintiffs in another proceeding; 11) should the matters be bifurcated to separate the taxation of contingency and non-contingency matters; 12) costs issues; 13) which party should issue the orders made in this decision; and 14) next steps in the proceeding.

HELD: 1) The plaintiff was allowed to amend its originating application. The originating application had been amended before. Rule 3-72(1) of *The King's Bench Rules* sets out requirements for a party to amend its pleadings. The defendant did not consent to the amendment. The proposed amendment would assist in clarifying the issues between the parties and alerted the defendant to an argument the plaintiff intended to make. 2) The plaintiff sought to apply as evidence in a hearing that occurred in September 2023 excerpts of a cross-examination on affidavits in claims between two other First Nations and the same lawyer and law firm, as they provided probative, reliable, temporally connected and non-prejudicial similar fact evidence of the lawyer's billing practices. The defendants objected. The transcripts described billing practices of the law firm in relation to other First Nation clients, including where one lawyer billed for 25 hours on one day. The cross-examination contained no admissions or evidence that similar billing practices were employed in relation to the plaintiff. The fact someone acted in a certain manner before does not generally establish they will act in a certain manner again. Similar fact or propensity evidence is usually inadmissible. *The King's Bench Rules*, Rule 3-55 and Rule 6-5 govern the introduction of evidence from other proceedings and require five days' notice before a hearing. The plaintiff's application did not comply, but the defendants did not argue they were prejudiced by the delay. Noncompliance with the rules could be addressed through costs. In relation only to the September 2023 hearing, the plaintiff had not established the evidence was admissible because the excerpts did not provide sufficient context to provide a complete picture and the issues of fairness of billing practice were questions for the hearing judge or taxation office to decide. The case management judge did not decide whether this evidence would be heard by the hearing judge. 3) The defendants and a non-party First Nation applied to strike the plaintiff's discovery application as an abuse of process. Even if the plaintiff ignored a court order or made prolix arguments, their application could not be struck as an abuse of process unless it was plain and obvious there was no cause of action. The plaintiff's discovery application could not be struck on this basis. 4) The non-party First Nation claimed privilege over certain documents. The judge reviewed the documents. None would appear to assist the plaintiff in advancing its claim against the defendant, but the defendant might still be entitled to disclosure of the documents. If the plaintiff First Nation and the other First Nation were under a joint retainer, then all files under the joint retainer would be the property of all the First Nations under the joint retainer. The case management judge's determinations regarding the agreement argued to be a joint retainer were only for the purpose of determining if the asserted claim of privilege existed. Another court might come to a different conclusion after hearing more evidence. The agreement, reproduced in the decision, was to be signed by First Nations who agreed to retain the defendant law firm to seek a

negotiated settlement of a specific tribunal claim. The agreement dealt with joint pursuit of a settlement claim against the government. The agreement did not name the defendant lawyer. Band council resolutions provided to the court indicated the First Nation intended to retain the lawyer to negotiate on behalf of all joint claimants, but no document established that relationship with the law firm. There was insufficient evidence to conclude a joint retainer existed. As a result, the plaintiff was not entitled to the documents over which the non-party First Nation claimed privilege. The judge identified the documents that should be disclosed if a joint retainer is found to exist at a later point in the proceeding. 5) The plaintiff sought invoices and retainer agreements of other First Nations, to assess the fairness or reasonableness of the contingency fee agreement. Proportionality is important in taxation matters, as the taxation process should not cost more than was charged for the work on the invoices. It was clear and obvious that the plaintiff's disclosure request in relation to other First Nations was not required to reach a fair and just determination. Perfection is not required for taxation. Three of the First Nations had no relationship with the law firm during the relevant time. In the absence of sufficient evidence establishing a joint retainer, the law firm's invoices and retainer agreements with other clients were protected by solicitor-client privilege, thus the law firm was not required to produce them. Even if there was no solicitor-client privilege, the potential benefits of disclosure were outweighed by the costs and delay the disclosure would cause. The similar fact evidence was of little probative value. The number of billed hours connected to this argument was small. The disclosure process would be difficult. The law firm had the onus to justify the reasonableness of their bills. Counsel for the plaintiff was warned not to make unsubstantiated allegations of fraud or malfeasance in billing against another lawyer. 6) The law firm was not required to file an affidavit of documents identifying the contents of the lawyer's files related to other First Nation clients. Usually, originating applications omit potentially costly and time-consuming document discovery procedures. An affidavit of documents was not justified because the plaintiff had not yet thoroughly reviewed the documents the defendant had already produced, and perfect documentation is not required in a taxation process. 7) The judge denied the plaintiff's application to cross-examine a deponent whose evidence was contradicted by other evidence. Cross-examination of a deponent on his affidavit is discretionary and not routinely granted. It was not obvious how the evidence could be relevant. The defendant had the onus of establishing the invoices and time entries were reasonable. The plaintiff did not need to prove anything. The assessment officer was in the best position to determine if further evidence was needed, and the assessment officer might require the production of documents. 8) The plaintiff objected to an affidavit exhibited to another affidavit. This is not a best practice, as the exhibited affidavit would be considered hearsay when relied upon for the truth of its contents. The one-page exhibited affidavit essential outlined a non-party First Nation's position. The affidavit was not struck and leave to cross-examine the deponent was denied. 9) An affidavit appended an email exchange between counsel for the plaintiff and defendant. The plaintiff claimed it contained material protected by settlement privilege. The emails met two of the three basic conditions to establish settlement privilege: there was ongoing litigation, and the parties used the words "without prejudice." However, the email was a demand letter with no hint of a possibility of negotiation or exchange. Settlement privilege did not attach to the emails. 10) Given the ruling on settlement privilege, the defendants' application to rely on an affidavit filed by the plaintiff in another proceeding was not necessary to consider at this time. 11) The defendants' application to bifurcate hourly billing matters from the contingency matters was granted, although not in the form the defendant sought. The plaintiff opposed bifurcation. In Saskatchewan, a court may find a contingency fee agreement unfair and unreasonable and conduct an assessment on a *quantum meruit* basis under s. 64 of *The Legal Profession Act, 1990*. This section does not apply to invoices billed on an hourly rate. The relief was separate and distinct. The issues related to hourly rate and contingency invoices were not intertwined and could be bifurcated. There were different arguments for the court to consider in relation to contingency and hourly rate fees. The amount of contingency fees was potentially much higher than non-contingency fees. The taxation of the hourly billed invoices was less complex and could likely occur more quickly. There were many advantages and little, if any, prejudice to the plaintiff from bifurcation. 12) Costs were awarded to the successful party on most applications, with the column specified according

to the complexity of the matter. A non-party First Nation sought costs personally against the plaintiff's lawyer because the lawyer continued to promote an alleged falsehood that the First Nation had retained the defendant lawyers. Rule 11-24 addresses costs against a lawyer personally. The purpose is compensation, when the lawyer acted in bad faith and encouraged applications or material for the purpose of delay and abuse. A lawyer needed to be given prior notice of the allegations against him or her, the possible consequences, and an opportunity to make submissions on the issue of costs. The court ought only to look at the case and not at the lawyer's disciplinary or professional history. The lawyer here was given full opportunity to respond. The lawyer's conduct in continuing to involve a non-party First Nation in the litigation when little or no evidence connected it to the litigation was not malicious or motivated by personal gain or a desire to delay. The behaviour was quixotic, and perhaps negligent, but not bad faith. Unprofessional conduct was noted, but it did not rise to the level of needing a sanction of personal costs. Four instances of sanctionable conduct by the plaintiffs gave rise to enhanced costs. The plaintiff breached a court-ordered deadline, made a comment suggesting another lawyer was fraudulent with no evidence, made comments in a written brief criticizing another lawyer's professionalism and involving a non-party First Nation in the litigation despite the lack of evidence the First Nation had any legal interest at stake. This conduct was close to meriting solicitor-client costs. Specified enhanced costs were awarded to each of the respondents payable forthwith by the plaintiff. 13) The defendant law firm was responsible for taking out most of the orders, except the orders related to the privileged documents, which would be taken out by the relevant non-party First Nation. 14) The parties needed to set deadlines for filing affidavit materials and briefs for the eventual hearing.

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***R v Repo*, 2024 SKKB 46**

Scherman, 2024-03-20 (KB24035)

Appeal - Summary Conviction - Public Health Order

The appellant appealed her conviction of attending a public gathering of more than 10 people contrary to a public heath order (PHO) then in effect. The court considered the following issues: 1) whether the PHO created the offence the appellant was convicted of; 2) whether *The Saskatchewan Human Rights Code, 2018* (*Code*) provided the appellant with a defence to the charge; and 3) whether there was bias on the part of the Provincial Court Judge and unfairness in his conduct of the trial.
HELD: There was no basis to quash the conviction or the penalty. 1) The court found that the proper interpretation of the PHO was that it created the offence charged. The court was satisfied that the purpose and intent of the PHO was to prohibit both private and public gatherings subject to permitted limits or exceptions. The PHO permitted public gatherings of up to 10 people, but it did not expressly prohibit any conduct. The court resolved this drafting issue by using the purposive approach to statutory interpretation. 2) The court found that the Provincial Court Judge was correct in his interpretation and application of the *Code* and made no error of law in deciding that the appellant was guilty of the offence. 3) The court found nothing on the record to support the allegation of bias or trial unfairness.

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***Husk v Kuffner*, 2024 SKKB 49**

Bergbusch, 2024-03-22 (KB24036)

Landlord and Tenant - Appeal - Residential Tenancies
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 76

The applicant appealed from the decision of a hearing officer of the Office of Residential Tenancies (ORT) because he took issue with the hearing officer's determination of the amount owing on account of rent arrears. The applicant paid $1000 per month until the respondent reduced the monthly rent to $800. The applicant continued to pay the higher amount, except for two months when he paid nothing. When ownership of the property changed, the applicant stopped paying rent. At the hearing, the applicant gave several reasons for doing so, including a reason accepted by the hearing officer that he did not know whom to pay the rent to because of the change in ownership. The hearing officer did not order the applicant to vacate the property, he directed the applicant to pay the outstanding rent. The applicant requested clarification of the decision, disputing the amount of rent owing. In the clarification decision, the hearing officer described the applicant's evidence as "convoluted" and stated that there was no need for additional clarification. The court determined the following issues: 1) the scope of the appeal and the applicable standard of review; 2) whether the hearing officer erred in law by making findings of fact unsupported by any evidence or by mischaracterizing relevant evidence; and 3) the appropriate remedy.
HELD: The court held that the hearing officer made an error of law by disregarding or mischaracterizing relevant evidence and amended the hearing officer's decision on the amount of arrears. 1) Section 76 of *The Residential Tenancies Act, 2006* (Act) limited appeals to the Court of King's Bench to questions of law or jurisdiction. The court could only intervene if a hearing officer's finding of fact was the product of an error of law. 2) The factual error made by the hearing officer was so patent that it revealed an error of law. As a result of the applicant overpaying his rent for ten months of the year and skipping two months, he gradually built up a credit. The applicant included a handwritten table outlining his payments and his credit. The terms of the rental agreement and payments made by the applicant to the landlord were undisputed. The court found it was evident that the applicant owed the amount he argued during the hearing. 3) The hearing officer's decision regarding the rent arrears was set aside and the court amended the hearing officer's order by replacing the erroneous amount with the correct amount. The court found this would be more expedient than remitting the matter to the hearing officer when there could only be one outcome.

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***Nodran Ltd. v Sundowner Farms Ltd.*, 2024 SKKB 54**

Gerecke, 2024-03-27 (KB24058)

Civil Procedure - Summary Judgment

Corporate Law - Oppression
Corporation Law - Shareholder Remedies - Oppression
Practice - Application for Summary Judgment - Disposition Without Trial
Practice - Judgments and Orders - Abuse of Process

The application in this case was part of a longstanding dispute between the parties. The applicants sought liquidation of the respondents based on an allegation that their interests as shareholders in the respondent company had been oppressed by the other shareholders (new application). A similar application had been filed in 2007 (first application), which went through a pre-trial conference, document disclosure, questioning, and case management. The judge in the first application ordered a trial of essentially all the issues raised by the first application and made other orders regarding the conduct of the proceedings (Konkin fiat). These orders were not appealed. The respondents contended that the existence of the first application and the Konkin fiat was fatal to the new application.
HELD: The new application was dismissed. (1) The new application was deemed to be an abuse of process. Where two matters that are the same are commenced, the second one should not be permitted to continue (*Pelletier Estate v Uteck*, 2008 SKQB 218). In this instance, the two matters were found to be substantially similar such that the new application was an abuse of process. Both the new application and the first application featured oppression as the primary complaint. The remedy sought in both was liquidation. Ongoing oppression was also alleged by the applicant in the first application. To the extent that the circumstances in both applications diverged, this could be attributable to the passage of time (2) The court considered that ordering the appointment of a liquidator on the basis of uncontroverted examples of oppression as requested by the applicant would be an error. A court that orders an oppression remedy must approach the situation holistically. In this instance, such a holistic approach would engage the full background of the disputes between the parties and magnify the significance of the overlap with the first application. (3) The Konkin fiat ordered that the issues raised in the first application be determined at trial, an order that was not appealed. The Konkin fiat was also the outcome of an application based on the merits, and the factual basis of the conclusion made – that the controverted affidavit evidence did not lend itself to a summary determination so a trial would be needed – had not changed, nor had the law changed. The parties were therefore bound by the Konkin fiat. (4) The court also concluded that it could not make an order of liquidation in reliance on *Keho Holdings Ltd. v Noble*, 1987 ABCA 84 and the subsequent cases applying it. The authorities cited by the applicants were rejected as they did not involve the features that dominated the new application.

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***Lince v Saskatchewan Human Rights Commission*, 2024 SKKB 58**

Gerecke, 2024-04-03 (KB24047)

Administrative Law - Judicial Review
Saskatchewan Human Rights Code, 2018 - Dismissal of Complaint

The applicant sought judicial review of the dismissal of her complaint under *The Saskatchewan Human Rights Code, 2018* (*Code*).

The complaint was dismissed without a hearing because the commission determined that there was no reasonable prospect that the applicant could establish the alleged discrimination. The court determined the following issues: 1) whether the affidavit filed by the applicant with her application was admissible; 2) the applicable standard of review; 3) whether the commission's decision was rational, logical and internally coherent with transparent reasoning.
HELD: The court quashed the decision and remitted the applicant's complaint to the commission for reconsideration. 1) The court found that the applicant's affidavit should not be admitted on judicial review. This was not a situation where judicial review could not proceed without affidavit evidence. The commission investigated the complaint for 20 months before rendering a decision, and that body of evidence was before the court on review. 2) The standard of review was reasonableness. Whenever a court reviews an administrative decision, it is to start with the presumption that the reasonable standard will apply to all aspects of the review (*Vavilov*). 3) The court found that the decision was unreasonable because there was a lack of transparency in the explanation of the commission's reasoning. It was unreasonable for the decision to leave considerable doubt about whether the complaint was dismissed because it was not established prima facie, or because the defendant raised defences that were likely to succeed at a hearing. The role of the commission formed part of the context of what the court must consider in assessing the decision's reasonableness. The commission's role was to ensure that complaints with a societal impact would be pursued without financial barrier. In determining whether to take a complaint to a hearing, the commission considered the prospects of success and the broader implications of the alleged breach of the Code. *Vavilov* sets out two types of fundamental flaws that render a decision unreasonable: a) a failure of rationality internal to the reasoning process, which is the opposite of internally coherent reasoning; and b) when a decision is untenable in light of the relevant factual and legal constraints.

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***101050457 Saskatchewan Ltd. v Regina (City)*, 2024 SKKB 61**

Mitchell, 2024-04-10 (KB24050)

Civil Procedure - Affidavit Evidence
Class Action - Affidavit Evidence - Certification Application
King's Bench Rules, Rule 13-30 - Admissible Affidavit Evidence

The plaintiff (respondent) commenced a proposed class action against the defendants (applicants) alleging that Regina had knowingly permitted it and other businesses to operate on contaminated lands, resulting in damages. The applicants submitted that the affidavit by the proposed representative plaintiff failed to follow the requirements of Rule 13-30 and should be struck in its entirety with leave to file a new affidavit. The respondent argued that the information should be looked at holistically with the amended statement of claim. The court determined whether portions of the affidavit should be struck.
HELD: The court struck significant portions of the respondent's affidavit for being outside the personal knowledge of the affiant, for being opinion evidence, or for being legal argument. The court granted the respondent leave to amend the affidavit. Affidavit evidence based on an affiant's information and belief may be admitted on a certification application provided the source of the information is adequately disclosed and the information reliable.

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***R v Kular*, 2024 SKKB 62**

Robertson, 2024-04-12 (KB24052)

Criminal Law - Trial - *Ex Parte* - Appeal

After an ex parte trial (a trial in the absence of the accused or defence counsel), the appellant was convicted of the charges and was sentenced to a monetary fine and driving prohibition for a year. The appellant argued that an *ex parte* trial conviction was contrary to the law and evidence and was a miscarriage of justice. The appellant also wanted to introduce fresh evidence. The court considered: (1) admitting fresh evidence at the appeal level; (2) whether the trial judge erred in proceeding with the trial in the accused's absence, (3) whether the convictions were contrary to law or evidence, and (4) whether the convictions resulted in a miscarriage of justice.
HELD: The Court upheld the trial judge's decision and dismissed the appeal. The Court of King's Bench has jurisdiction to hear appeals under s. 813 of the *Criminal Code* (*Code*). Appeals under this section may be on questions of law, fact, or mixed law and fact. Because the trial judges are presumed to know the law (see *R v G.F.*, 2021 SCC 20 at paras 74 and 111, [2021] 1 SCR 801), a trial judge's finding of fact is entitled to appellate deference and the standard of review is palpable and overriding error. On the appeal level, the issue is whether there are reversible errors in the decision of the trial judge. The reasons must be sufficient in the context of the case for which they were given. The reviewing court will apply a functional and contextual reading of a trial judge's reasons on appeal. The question, then, becomes "whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review." The reasons must be factually and legally sufficient. (1) The appellant sought to admit as fresh evidence two affidavits explaining his personal circumstances and his narrative of the events leading to the charges and court proceedings. The *Code*, in ss. 683(1)(d), allows an appeal court to receive evidence, though appeals are usually heard on the record of the court from which the appeal is taken. The Supreme Court of Canada in *Palmer v The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, established a four-part test for fresh evidence at the appeal level. Firstly, though not applied strictly in the criminal law context, fresh evidence generally should not be admitted if, by due diligence, it could have been adduced at trial. Secondly, the evidence must be relevant and bear upon a decisive issue in the trial. Thirdly, the evidence must be credible and reasonably capable of belief. Lastly, the evidence must be such that, if believed, it could reasonably be expected to affect the results of the trial when taken with the other evidence adduced at the trial. The key consideration in such matters is the interest of justice regardless of when the evidence came into existence. In the current case, the application to admit fresh evidence failed on the first and fourth grounds of the test. The evidence of the appellant's personal circumstances was known at the time of trial and was not "fresh" evidence. The proposed evidence also would not affect the trial's result. (2) Sections 475, 598, 650(2), and 803(2) of the *Code* allow for *ex parte* trials. Section 803(2) applied in this case as it relates to the defendant's non-appearance. The court's records and evidence showed that the appellant was aware of the charges and court proceedings through his counsel. The trial date would be his 19th appearance. Furthermore, when his counsel withdrew from representation, he informed the appellant of the next trial date, the need to appear before the court, and the consequences of

non-appearance. The onus is on the accused to be present in order to exercise their rights. The relevant authorities in Saskatchewan establish that failure to appear before the court through inadvertence, negligence, forgetfulness or simple carelessness has never been sufficient to set aside a default conviction. An adjournment of the trial would cause an inordinate delay in the administration of justice. Such delay would also be contrary to ss. 11(b) of the *Charter*, the right of the community to timely justice. (3) A reviewing court has limited jurisdiction to set aside a conviction from the trial court. The appellate court can only set aside a conviction if an appellant can show that the verdict was unreasonable or was not supported by evidence, the lower court made an error of law, or there was a miscarriage of justice. Besides issues with the *ex parte* trial, the appellant did not point to any error of law or facts. However, the Court of King's Bench reviewed the transcript of the trial and found the trial proceeded properly. For example, the arresting officer testified, and he was questioned by the Crown prosecutor and the judge. The trial judge also provided cogent reasons for his decision to convict the accused. (4) The Court of King's Bench noted that it had taken six years for this matter to come to trial, there was a significant history of appearance and representation by defence counsel on behalf of the accused, and the accused knew of his trial date and consequences of non-appearance. The Court of King's Bench acknowledged the legal test for a miscarriage of justice by asking whether the trial was fair and whether anything happened during the trial that was so serious that it could destroy the public's confidence in the administration of justice. The court considered all the relevant circumstances, including the "fresh evidence", and concluded that the decision to proceed in the absence of the accused was reasonable and appropriate. Furthermore, the argument that the absence of defence counsel precluded a fair trial failed because, while helpful, having defence counsel is not a requirement for a fair trial.

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***Gareau v Blanchard*, 2024 SKKB 64**

Goebel, 2024-04-17 (KB24062)

Family Law - Division of Family Property - Division of Pension - Spousal Support
Family Law - Division of Family Property - Household Goods
Family Law - Division of Family Property - Spousal Relationship
Family Law - Division of Family Property - Spousal Support
Family Law - Division of Family Property - Unequal Distribution

The parties were casual acquaintances when they began an online friendship in 2007. Both petitioner and respondent were married with children. Before long, the relationship became sexual, and the petitioner eventually moved into the respondent's rental home in 2009. The parties got engaged in 2015. Despite a volatile relationship, the parties became more enmeshed financially and identified each other as spouse on their income tax returns for the 2015-2017 tax years. In 2019, the petitioner commenced proceedings against the respondent, seeking an unequal division of the family home and debts. The petitioner also sought spousal support. The respondent opposed any award of spousal support or division of family property, claiming the parties were never spouses as defined in *The Family Property Act, 1997* (the Act). The matter was subsequently directed to trial where the petitioner withdrew her application for spousal support but maintained her claim for a division of non-exempt family property. The petitioner claimed the

parties were in a spousal relationship from August 2009 until October 2017. In the alternative, the petitioner claimed the parties were in a spousal relationship from August 2011, when they began making plans to purchase a home together, until October 2017. HELD: The parties were considered spouses for the purposes of the Act. (1) Section 2 of the Act defines spouses as two persons who cohabited as spouses continuously for a period of not less than two years. A contextual and flexible approach is required to determine whether a relationship is "spousal" given that the indicia of a spousal relationship will exist in different degrees in different relationships and the weight to be accorded to each of the factors will vary widely depending on the facts. For the most part, the parties in this case behaved as a typical blended family and were socially engaged as a couple. The parties also acquired assets together. These findings were, for the most part, consistent with the evidence tendered by the parties and supporting witnesses. The court ultimately concluded that while the reliability of the petitioner's testimony was tested at times, there was sufficient evidence, when considered objectively, to conclude that the parties were in a spousal relationship. The court also rejected the respondent's attempt to characterize the relationship as friends-with-benefits as his evidence was internally inconsistent and his narrative was irreconcilable with what a practical and informed person would view as reasonable when considering all of the evidence before the court. (2) The court was persuaded that the parties cohabited as spouses continuously for a period of less than two years. The parties first shared a residence in August 2009 and last shared a residence in November 2017. During the time the parties did not share a residence for three periods of time (March-September 2010, approximately nine months in 2011 and a few months in 2013), they stayed in touch and maintained a sexual relationship. The court was satisfied that a relationship of sufficient permanence and commitment to constitute a spousal relationship existed in December 2011. While the relationship between the parties was unpredictable between August 2009 and fall of 2011, the parties deliberately chose to commit to the purchase of a shared home in fall of 2011 and from that point on, there were several deliberate decisions made to further confirm a relationship of permanence and commitment. (3) The court deemed the family home and the household goods to have been equally distributed. The court also deemed the vehicles in the respondent's possession to be valued at the mid-point between the amount set out in each party's property statement. The court accepted the position advanced by the petitioner on the vehicles in her possession. The court further agreed with the parties that the down payment made by the petitioner to the purchase of the family be credited back to the petitioner.

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***Canadian Imperial Bank of Commerce v Crawford*, 2024 SKKB 65**

Morrall, 2024-04-17 (KB24059)

Debtor and Creditor - Mortgage - Foreclosure
Real Property - *Land Titles Act*
Statutes - Interpretation - *Land Titles Act, 2000*, Section 109

By originating application (twice amended), the applicant sought to rectify its mortgage interest in a property in which the first respondents resided. The applicant had erroneously registered their mortgage on three of the four parcels of land at the civic address of the property and the second had subsequently registered a second mortgage on all four parcels. The applicant sought to

amend its registration to include all four parcels pursuant to s. 109(1)(a) of *The Land Titles Act, 2000* and backdate each registration to have priority of interest over the second respondents should the court subsequently grant a foreclosure with respect to the property. All parties consented to rectifying the applicant's mortgage interest to include all four parcels. However, the third respondent opposed backdating the registration, arguing that this was contrary to the spirit and intent of the Torrens land system. HELD: (1) The court granted the application for amendment to the registration. Rectification may be granted when a written instrument fails to correctly record the parties' agreement. When both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement, it is an error that may support a grant of rectification. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement. In this case, the court found that the applicants and the first respondents had made a mutual mistake in omitting to register the fourth parcel of land. It was also clear and undisputed that both parties intended the mortgage to apply to all parcels of land related to the civic address. The error was not caught until the applicants contemplated foreclosure proceedings. The error did not mislead either party and correcting the error would fairly and reasonably return the mortgage to the original intent of the parties. (2) The court dismissed the application to backdate the applicant's mortgage interest. A current or prospective holder of a registered interest is entitled to rely on the state of the register and is not affected by any other unregistered interest. Registration is conclusive proof of any interests, exceptions or reservations that may affect ownership or an interest in land. The purpose of registration is not a matter between a mortgagee and a mortgagor, but a matter between the mortgagee and the public with the establishment of a system of priority determining third-party interest. The integrity of the system demands certainty in order to create trust. Chipping away at the core principles of the Torrens Land System with esoteric exceptions undermines that trust. Furthermore, contrary to the applicant's arguments, there was no evidence that the registrar of titles did anything contrary to law or negligently.

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***Holmes v Jastek Master Builder 2004 Inc.*, 2024 SKKB 71**

Clackson, 2024-04-23 (KB24056)

Civil Procedure - King's Bench Rules - Summary Judgment
Contract - Agreement for Sale - Breach - Specific Performance
Contract - Breach of Contract - Damages
Contracts - Compensation - *Quantum Meruit*
Contracts - Damages - *Quantum Meruit*
Contracts - Interpretation - Breach - Damages
Contract Law - Repudiation
Damages - Punitive Damages

The plaintiffs in this case represented the class of persons who agreed to purchase residential condominium units to be constructed by the defendants. After applying for a building permit, the defendants advised the purchasers they would not be proceeding with construction of the condominium buildings, which led to a class action for specific performance of the purchase agreements and damages in lieu. In an unreported judgment, the Court of King's Bench found the defendants liable for breach of contract. The class members subsequently applied under Rules 7-2 and 7-5 of *The King's Bench Rules* for summary determination of the quantum of damages due to each of them as a result of the breach of contract and for punitive damages.

HELD: The defendant was liable for the sum of $3,264,000 in compensatory damages plus pre-judgment interest. The application for the court to exercise its discretion to award 6% simple pre-judgment interest to each claimant and the application for the award of punitive damages were both denied. (1) Summary judgment was deemed appropriate. In assessing an application for summary judgment, the court must decide whether there is a genuine issue requiring a trial based solely on the evidence before the court. There will be no genuine issue if the summary judgment process: allows the judge make the necessary findings of fact; allows the judge apply the law to the facts; and is a proportionate, more expeditious and less expensive means of achieving a just result than going to trial. In this case, it was unnecessary to resolve conflicting opinion evidence as to the value of the condominium units, which was the only true controversy in the evidence, to quantify each claimant's loss. There was also no conflict in the evidence relevant to the other points in issue. (2) In assessing damages, the aim must be to place the innocent party in the same position he would have occupied had the contract been performed. In a failed real estate transaction, the proper measure of damages is the difference between the contractual purchase price and the value of the property at the moment that performance under the contract is due. Where there is a repudiation prior to the date of performance and such repudiation is accepted, it only creates an obligation to engage in reasonable mitigation but does not define the date upon which to assess damages. The date upon which damages are to be assessed remains the date of closing. (3) Repudiation of a contract before performance is due does not terminate the contract unless the repudiation is accepted. Such acceptance must be clearly and unequivocally communicated and the party asserting the acceptance must prove it. In this instance, the defendant's letter purporting to terminate the agreement did not terminate the purchase agreement and did not define the date the agreements were breached. The evidence being relied upon by the defendant to demonstrate clear and unequivocal acceptance of repudiation was also insufficient for that purpose. As a result, the purchase agreements remained in full force and the failure to deliver possession of the condominium unit identified in each purchase agreement was a breach of purchase agreement entitling each claimant to damages. (4) The parties were under no obligation to mitigate their damages as the defendant failed to demonstrate that any of the claimants accepted their repudiation. (5) The defendant was entitled to the benefit of release provisions signed by two of the claimants. The evidence presented by the claimants in this respect fell short of the sort of evidence required to demonstrate an inequality in bargaining positions or improvidence, both of which are required for the terms of a release to be deemed unconscionable under common law. (6) The claimants were not entitled to punitive damages. Punitive damages are to be imposed only if there has been "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." In this case, while the facts demonstrated that the defendant acted intentionally to prevent financial loss, they did not show that the defendant engaged in high-handed, malicious, arbitrary or highly reprehensible misconduct that departed to a marked degree from ordinary standards of decent behaviour. Furthermore, the need for retribution, denunciation, and deterrence, which represent the purpose of punitive damages, were all sufficiently achieved by the award of compensatory damages. (7) The application for the court to exercise its discretion to award 6% simple pre-judgment interest to each claimant was not supported by any evidence. The percentage rate proposed also bore no relation to the contractual obligations undertaken by the defendant. In addition, the court already determined that punitive damages were unnecessary due to the sufficiency of compensatory damages. Awarding interest at a higher rate

because no punitive damages were awarded would fly in the face of the court's conclusion on punitive damages.

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***Director under The Seizure of Criminal Property Act, 2009 v Warnecke*, 2024 SKKB 73**

Robertson, 2024-04-25 (KB24057)

Forfeiture - Seizure of Criminal Property
Statutes - Interpretation - *Seizure of Criminal Property Act, 2009*

The application in this case was for forfeiture of cash property seized by the Regina Police Service from a marijuana dispensary business in 2018. The application was originally filed in 2020 but was put on hold pending resolution of criminal proceedings relating to the seizure of property and an application challenging the constitutionality of federal legislation. In an earlier judgment, the court had ruled that the cash property was proceeds and/or an instrument of unlawful activity. The issue in this case was whether the court should grant the application and order the forfeiture.
HELD: The application was granted. (1) The court determined that forfeiture would not be contrary to the interests of justice. The purposes of *The Seizure of Criminal Property Act, 2009* (the Act) are three-fold: to take the profit out of unlawful activity, to deter unlawful activity, and to fund public services for victims of crime and policing. In this case, the court was satisfied that forfeiture would serve the purposes of the Act. (2) Forfeiture was not unfair in the circumstances. The respondent had a high degree of culpability and chose to open and operate the business without a licence and with full knowledge of the illegality. (3) Forfeiture sent a message to business operators who heeded the public appeal and warning to close illegal dispensaries that they did the right thing.

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***Heuck v Janz*, 2024 SKKB 76**

Robertson, 2024-05-02 (KB24073)

Administrative Law - Appeal - Order of Office of Residential Tenancies - Questions of Law or Jurisdiction
Landlord and Tenant - Appeal - Grounds - Error of Law/Findings of Fact
Landlord and Tenant - *Residential Tenancies Act, 2006* - Order for Possession - Appeal
Landlord and Tenant - *Residential Tenancies Act* - Director of Office of Residential Tenancies - Order - Appeal

The appellant was appealing against a decision of the Office of Residential Tenancies (ORT) in February 2024 dismissing the appellant's application for possession of his rental property. The appellant argued that the hearing officer had erred in considering prior decisions, mischaracterized evidence and shown a lack of impartiality.

HELD: The appeal was dismissed. (1) The appellant's notice of appeal did not state grounds of appeal that raised questions of law or jurisdiction. Section 72 of *The Residential Tenancies Act, 2006* provides a right of appeal from a decision of a hearing officer to the Court of King's Bench on questions of law or jurisdiction only. In this case, the grounds of appeal as stated did not raise a question of law or jurisdiction. (2) The hearing officer did not make an error in considering prior decisions of the ORT. Provided an application to the ORT is decided on the evidence presented at the hearing, there is no error of law or jurisdiction in considering the history of the case. In this case, the record of prior applications was relevant to whether the reason put forward by the appellant on his application for possession was genuine. The hearing officer found that the application for possession was a disguised attempt to evict the respondents, rather than to meet the needs of the appellant and his family to occupy the apartment. This finding was supported by evidence and argument at the hearing. (3) Assuming the hearing officer misinterpreted the appellant's statement in response to the hearing officer's question regarding the implausibility of three adults living in a one-bedroom suite, the key point was that the hearing officer did not believe the appellant in respect of the true reason for seeking to evict the respondents. It was open to the hearing officer to decide between conflicting evidence and prefer that of the respondents, keeping in mind that the burden of proof of possession was on the appellant as applicant. (4) There was no evidence to displace the presumption of impartiality on the part of the hearing officer. On the contrary, the hearing officer went out of his way to assist the appellant in presenting his case.

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***Kraus, Re*, 2024 SKPC 18**

Anand, 2024-04-22 (PC24011)

Constitutional Law - *Charter of Rights*, Section 2 - Freedom of Expression
Mental Health - Patient Detention
Statutes - Interpretation - *Mental Health Services Act*, Section 16(1)(b)

The applicant was taken, against her will, to a mental health centre for a psychiatric examination based on a court-issued mental health warrant. The warrant was based on information laid before a Provincial Court judge by a member of the public. The applicant was thereafter conveyed for a mental health assessment. The physician who examined her refused to issue a certificate for her compulsory admission to a mental health centre and she was released. The applicant, who contended that the informant who initiated the warrant process falsely swore or affirmed the information, sought a copy of the information provided to the court. HELD: The application was granted. The term "warrant" in s. 16(1)(b) of *The Mental Health Services Act* (the Act) should be interpreted to include information sworn to or affirmed to obtain the warrant. Applying the modern principle of statutory interpretation, words used in a statute remain significantly important in the interpretation of such statute. Interpreting the term "warrant" in Section 16(1)(b) of the Act to include the information sworn or affirmed to obtain the warrant best achieves the purpose of the Act, which is to ensure mental health services are provided to those who need them. Excluding the disclosure of the information to obtain a warrant from the ambit of Section 16(1) of the Act would run contrary to section 19(3) of the Act and permit easy abuse of the legislation. (2) The policy reasons for interpreting section 16(1)(b) of the Act to preclude disclosure of the information to obtain such warrant are not compelling. Judges' warrants are not the only method of obtaining involuntary psychiatry assessments. Furthermore,

where concerns of reprisal against the informant are significant and reasonable enough, an informant applying for a judge's mental health warrant can also apply for the law's protection in the guise of a peace bond. (3) Interpreting Section 16(1) of the Act to include disclosure of information filed with the court is the interpretation that best accords with the open-court principle rooted in the constitutionally-entrenched right of freedom of expression.

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