



The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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The appellant was found guilty of sexual assault and invitation to sexual touching and was sentenced by a judge of the Court of King's Bench to seven years on each count to be served concurrently. The judge also ordered that that the appellant comply with the *Sex Offender Information Registration Act* (SOIRA) for life. The appellant was the victim's stepfather. The victim was six years of age when the abuse began and eight when they reported what happened. The Court of Appeal (court) considered the appellant's appeal of both the conviction and sentence.

HELD: The court dismissed the appellant's conviction appeal, but allowed the sentence appeal, reducing the SOIRA order from life to 20 years. The court found that the seven-year sentence for sexual assault was consistent with the parity principle, but that the seven-year concurrent sentence for the single incident of invitation to sexual touching was manifestly excessive. The

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court substituted a sentence of two years for that offence, to be served concurrently. The court also granted the appellant's appeal of the lifetime SOIRA order. In *R v Ndhlovu*, 2022 SCC 38, the Supreme Court of Canada (SCC) concluded that ss. 490.012 and 490.013(2.1) of the *Criminal Code* violated s. 7 of the *Charter* and could not be justified under s. 1. These provisions were declared of no force and effect; the declaration of invalidity was immediate and applied retroactively. The SCC held that offenders subject to a lifetime order pursuant to s. 490.013(2.1) could apply for an order under s. 24(1) of the *Charter* to change the length of their registration.

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***101052035 Saskatchewan Ltd. v New Horizon First Nations Administration Inc.*, [2024 SKKB 60](#)**

Popescul, 2024-04-09 (KB24048)

Practice and Procedure - Case Management

Both parties were involved in legal disputes over several applications and remedies related to an originating application and a request for the appointment of an arbitrator. Counsel for the respondent filed an amended request for a case management order with respect to existing applications pursuant to Rule 4-5 of *The King's Bench Rules*. The request was opposed by the applicant's counsel on the basis that it was neither warranted nor appropriate. HELD: The request was granted. (1) It is not necessary to bring a separate application specifically requesting exercise of the court's discretion for the court to permit the use of Rule 4-5 of *The King's Bench Rules*. It is sufficient to simply acknowledge in the case management request that resort to Rule 4-5 of *The King's Bench Rules* is being asked for and the requesting party is asking the court to exercise its discretion. This should be accompanied by brief reasons why it is appropriate for the court to exercise its discretion. (2) There is no requirement for counsel requesting case management to establish a triable issue to engage Rule 4-5 of *The King's Bench Rules*. The decision of the court in *Hildebrand v Hattum*, 2021 SKQB 136, establishing the need for a triable issue is inapplicable in this case as counsel was not requesting "additional processes". Seeking the assistance of the court to streamline process by appointing a dedicated case management judge was a sensible approach given the multiplicity of existing applications and actions.

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Cases by Name

***Yashcheshen v Canada (Attorney General)*, [2024 SKKB 63](#)**

*101052035 Saskatchewan Ltd. v
New Horizon First Nations
Administration Inc.*

Bergbusch, 2024-04-10 (KB24051)

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*Saskatoon Housing Authority v
Payne*

The plaintiff initiated legal action against several defendants, alleging various wrongdoings including false accusations of criminal harassment, defamation, and intentional infliction of mental suffering. The plaintiff subsequently discontinued her claim against all defendants except one and applied for orders striking an affidavit in support of that defendant's application as well as their statement of defence. During the hearing, the plaintiff advised the court that she had abandoned an application to strike the defendant's affidavit of documents.

Shire v Brady

HELD: The statement of claim was struck. (1) Much of the content of the affidavit's witness constituted hearsay, sometimes double or triple hearsay. The affidavit was also rife with argument and opinion, which were essentially a rehash of the plaintiff's arguments. As a result, the affidavit was inadmissible. (2) The claim as a whole was riddled with immaterial and redundant allegations. Rules 13-8 and 1-3 of *The King's Bench Rules* require parties in preparing pleadings to identify the real issues in dispute to facilitate the quickest and most efficient means of resolving the claim at the least expense. While the court gave the claim a generous reading, the claim was so replete with irrelevant allegations that it could not stand.

*Yashcheshen v Canada (Attorney
General)*

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***Saskatoon Housing Authority v Payne*, [2024 SKKB 93](#)**

Currie, 2024-05-22 (KB24091)

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 - Appeal - Possession Order - *Residential Tenancies Act*

Landlord and Tenant - Possession

The respondent was a tenant of the first applicant. By a decision dated November 20, 2023, issued under *The Residential Tenancies Act, 2006*, a hearing officer ordered that possession of the rental premises be granted to the respondent. The respondent filed an appeal with the Court of King's Bench and with the notice of Appeal, filed the following: a "without notice" application for an

order directing the local registrar to accept the filing of the notice of appeal in the absence of a certificate of payment of rent, and granting an interim stay of the order for possession; an application for an order dispensing with the certificate requirement; an application for an order declaring as unconstitutional statutory provisions establishing the certificate requirement; and an application for judicial review of the hearing officer's decision. A judge of the Court of King's Bench granted the "without notice" application. The matter was brought before a second judge of the Court of King's Bench, who directed that the matters be adjourned to a later date for full argument and ordered that the possession order be suspended until the court determined the applications. The applicant filed an application for an order setting aside the entirety of the "without notice" order, while the second applicant – the Attorney General of Saskatchewan – filed an application seeking to set aside the portion of the "without notice" order directing the local registrar to accept the filing of the notice of appeal in the absence of a certificate of payment of rent.

HELD: The application was dismissed. The court determined that the "without notice" order was only a stopgap measure to accommodate the progress of the litigation to the point where issues could be determined. The "without notice" order did not determine any issue and was only a practical order of interim effect that served to move the litigation along – and it did so without prejudicing the applicants. The court also determined that the portion of the "without notice" order staying operation of the possession order had not been in force since January 4, 2024, since the second judge ordered suspension of the possession order. Furthermore, the court was not prepared to set aside the formal "without notice" order on the basis that it was issued without including the endorsement required by Rule 10-3(5) of *The King's Bench Rules*. The court considered that while the rule was not followed, no prejudice arose from that failure.

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***R v Wangler*, [2024 SKKB 106](#)**

Scherman, 2024-05-29 (KB24104)

Criminal Law - Sentencing

Criminal Law - Sentencing - Weapons

Criminal Law - Weapons

The accused was charged with one count of trafficking in restricted weapons. A blended voir dire to address the issues of the voluntariness of the accused's statement and compliance with the accused's Charter rights resulted in a finding of voluntariness and no breach of *Charter* rights. The accused subsequently pled guilty to one count of trafficking in restricted firearms. The Crown sought an incarceration term of 4.5 to 5.5 years. The defence sought a conditional sentence of two years less a day to be served in the community.

HELD: The accused was sentenced to three years' incarceration. The court also issued ancillary orders, including prohibiting the accused from possessing any prohibited firearm or ammunition for life. (1) The Supreme Court in *R v Hills*, 2023 SCC 2 held that a two-stage inquiry was to be adopted in which: (a) at stage one, the court first determines a fit and proportionate sentence for an offence in question having regard to the sentencing objectives and principles stated in the *Criminal Code*; and (b) at stage two, the

court decides whether a stated mandatory minimum requires a sentence that is grossly disproportionate when compared to the fit and proportionate sentence determined at stage one. The stage one analysis determines what would be the appropriate sentence for the offender given: (a) the gravity of the offence charged; (b) the circumstances and facts surrounding the offence in question; and (c) the degree of responsibility and the personal circumstances of the offender. In this case, the evidence demonstrated that the accused knew he was committing the crime of trafficking in restricted weapons and that it was possible, indeed perhaps probable, that the handguns he trafficked in were on their way to criminals. There were multiple handguns involved, which was an aggravating factor. The circumstances in which the accused trafficked the handguns to a person he barely knew for money, and on other occasions trafficked in three other firearms, also moved the gravity of his offence to well above the lower end of the spectrum for the offence charged. The accused's responsibility for his crime of trafficking in firearms was also significant. While the court had regard to the facts that the accused pleaded guilty, was remorseful, appeared to be at little or no risk of offending and was well along the path of rehabilitation, the appropriate sentence for the accused for the offences he committed, in the circumstances he did, and in light of his personal circumstances, was three years of imprisonment in a federal penitentiary. (2) The court declined to consider the constitutional challenge. The court does not need to determine *Charter* challenges to the constitutionality of minimum sentences if the court finds that the appropriate sentence for the offender's offence was equal to or exceeded the mandatory minimum sentence set in the *Criminal Code*. The court's finding that the appropriate penalty was equal to or more than the mandatory minimum sentence made the constitutional challenge moot.

***Shire v Brady*, [2024 SKKB 111](#)**

McMurtry, 2024-06-05 (KB24109)

Contract Law - Waiver - Acquiescence - Option to Purchase

The applicant leased land with his then-wife for a term of twenty years and entered into a mortgage. They separated. The applicant assumed the obligations under the mortgage. He agreed to sell the chattels and lease to the ex-wife's father (respondent) through an agreement for sale. One of the terms allowed the applicant to exercise an option to purchase the chattels and lease back from the respondent by a specific date, but the applicant was unable to exercise the option to purchase in time. The applicant continued to rent the property according to a tenancy agreement. The parties executed an option to purchase, with a clause which terminated the option to purchase if the applicant was in default of the tenancy agreement. Text messages between the parties demonstrated how the respondent allowed the applicant to miss rent payments on several occasions. In 2023, the respondent then stated he wanted to sell the property, and told the applicant to either buy the property by submitting an option to purchase, or to move out by a certain date. The parties continued to discuss the sale of the property past the move-out date. The applicant sought a declaration that an option to purchase real estate was valid and binding on the respondent, an order for specific performance under ss. 10-15 and 10-16 of *The King's Bench Act* (KBA), and an order under s. 9-2 of the KBA granting a certificate of pending litigation. The respondent argued that the applicant breached the terms of the tenancy agreement by failing to pay rent on the first day of each month, rendering the option to purchase invalid. The court determined whether the respondent and/or his estate acquiesced in the

applicant's breach of the tenancy agreement or waived its terms.

HELD: The court granted the relief sought by the applicant, with costs. The court found that the respondent had full knowledge of his rights under the tenancy agreement and option to purchase, and he unequivocally and consciously intended to abandon those rights. The court cited *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, [1994] 2 SCR 490 for the legal principles of waiver. Waiver occurs when one party to a contract takes steps amounting to foregoing reliance on some known right or defect in the performance of the other party. The evidence must demonstrate that the party waiving had (i) a full knowledge of rights; and (ii) an unequivocal and conscious intention to abandon them. Waiver can be retracted if reasonable notice is given to the party in whose favour it operates. The court granted the certificate of pending litigation because the matter concerned an interest in land.

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***Russell Estate, Re (Bankruptcy)*, [2024 SKKB 119](#)**

Shalashniy, 2024-06-20 (KB24114)

Bankruptcy and Insolvency - Estate - Discharge

Statutes - Interpretation - *Bankruptcy and Insolvency Act*, Section 172, Section 173

The deceased passed away intestate, and three years later a bankruptcy order was granted against his estate following an application by Farm Credit Canada (FCC). A trustee in bankruptcy had been appointed by the court to conduct the bankruptcy in the absence of an administrator. The circumstances of the bankruptcy were unique: the estate was petitioned into bankruptcy by a major creditor with seemingly plenty of money in the estate to satisfy creditor claims. The trustee recommended that the discharge of the estate be refused. The registrar in bankruptcy determined whether the estate of the deceased bankrupt should be discharged from bankruptcy.

HELD: The court used its discretion to refuse discharge of the estate and ruled out the options of a conditional or suspended discharge. The court set out sections 172 and 173 of the *Bankruptcy and Insolvency Act*. The court had wide discretion to grant, refuse, suspend, or attach conditions to an absolute discharge of a bankrupt. The court could not grant an absolute discharge because the deceased had on a previous occasion been bankrupt and was discharged in the early 1990s. Here, the rehabilitation of the deceased bankrupt was not the main objective. Instead, cleaning up the affairs of an estate to provide an equitable distribution to creditors was of primary importance. The court gave significant weight to the trustee's submissions regarding the number of outstanding important tasks, including determining what to do with several unrealized assets, evaluating and reviewing claims of creditors and potential creditors, and reviewing, filing and paying tax debts to the Canada Revenue Agency. Given the number of outstanding tasks, the court would not grant an absolute discharge of the estate even were it permitted to do so.

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***R v J.W.W.*, [2024 SKKB 125](#)**

Tochor, 2024-07-05 (KB24123)

Criminal Law - Assault - Assault Causing Bodily Harm
Criminal Law - Assault - Sexual Assault
Criminal Law - Assault - Sexual Assault - Consent
Criminal Law - Assault - Touching for a Sexual Purpose

The accused was charged with sexual assault and assault causing bodily harm. The complainant and the accused had been in a spousal relationship for about eight years but were living in separate homes in August 2016 because the accused was subject to a court order prohibiting him from having any contact with the complainant. At trial, the accused and complainant presented differing versions of the events on the day in question.

HELD: The accused was found guilty. (1) The court believed the testimony of the complainant over the testimony of the accused. In *R v W.(D.)*, (1991) 1 SCR 742, the Court set out the following test in cases of conflicting testimony: “(a) First, if you believe the evidence of the accused, obviously you must acquit; (b) Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit; and (c) Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.” In this case, the court determined that, after considering the evidence of the accused and the evidence called on his behalf, the testimony of the accused was not credible nor plausible. The court also determined that the evidence of the accused did not leave it in a state of reasonable doubt. With respect to the complainant, the court found that photographs in evidence supported the complainant’s testimony. The evidence of the complainant’s mother and the attending police officers also supported the testimony of the complainant in two key respects: observations of bruising and of the complainant’s demeanour. (2) The court determined that the requisite elements of sexual assault had been proven beyond reasonable doubt. The court was satisfied beyond a reasonable doubt that the accused’s direction to the complainant to provide oral sex and the subsequent intercourse was touching and was sexual in nature. Based on the complainant’s testimony and in light of all the evidence, the court was also satisfied that the complainant did not consent to the sexual activity. With regards to the *mens rea*, the court was satisfied beyond reasonable doubt that the accused knew the complainant did not consent. The dynamics of the relationship between the accused and the complainant left the court with no doubt that the accused knew he could impose his will on the complainant in the circumstances. (3) The court determined that the elements of assault causing bodily harm had been established. The offence of assault causing bodily harm comprises of four elements: (a) the accused intentionally applied force to the complainant; (b) the complainant did not consent to the use of force against her; (c) the accused knew the complainant did not consent; and (d) the force applied caused bodily harm to the complainant. In this case, the court was satisfied that the accused applied force to the complainant when he put his arm around her neck and “choked” her, that the complainant did not consent to the force applied, and the accused knew the complainant did not consent.