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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***Baildon (Rural Municipality) v Gronvold*, 2024 SKCA 73**

Leurer Caldwell Barrington-Foote Kalmakoff Drennan, 2024-07-25 (CA24073)

Employment Law - Appeal
Employment Law - Discrimination
Human Rights - Discrimination - Physical Disability

The respondent had suffered a concussion in a non-workplace accident that required her to be absent from her employment as administrator of the appellant. The respondent tried to return to work on a gradual basis but was unsuccessful. The appellant thereafter advertised for a full-time administrator after the respondent had been absent from work for about 17 months and filled the position around the time the respondent advised she could try to return to work. The respondent subsequently filed a discrimination complaint with the Saskatchewan Human Rights Commission alleging that the appellant had discriminated against her on the basis of disability by refusing to accommodate her to the point of undue hardship. The Court of Queen's Bench concluded that the respondent established a *prima facie* case of employment discrimination and

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the appellant failed in their duty to accommodate the respondent's disability.
HELD: The appeal was allowed. (1) The trial judge erred in law and made palpable and overriding errors of fact and of mixed fact and law when she concluded that: (a) the respondent had discharged her burden of establishing a *prima facie* case of discrimination in employment; and (b) the appellant had failed to accommodate the respondent's disability to the point of undue hardship. To demonstrate *prima facie* discrimination by an employer, an employee must establish three facts on a balance of probabilities: (i) that they have a characteristic that is protected from discrimination; (ii) that they have experienced an adverse impact with respect to employment or a term or condition of employment; and (iii) that the protected characteristic was a factor in the adverse impact. Once the employee has discharged their onus, the burden shifts to the employer to refute the allegation or justify its impugned conduct or practice within the framework of exemptions available under the *Saskatchewan Human Rights Code, 2018* (Code). In this case, the trial judge erred in her approach to the law regarding adverse treatment, leading her to improperly find that the treatment the respondent had received from the appellant before the decision was taken to deny her return to work on a graduated basis had resulted from the appellant's decision not to continue to employ the respondent. Notably, to reach the conclusion regarding adverse treatment, the trial judge had to effectively backdate the appellant's decision not to continue to employ the respondent. This was improper as it contradicted the common law, statute law and the agreed facts. The trial judge also placed inordinate weight on the respondent's testimony about the conduct of the appellant's reeve at meetings held between the parties in 2015 in concluding that the respondent had suffered adverse treatment by the appellant through the period prior to the cessation of her employment. With regard to the disability and impact factor, the trial judge plainly erred when she stated that the respondent's disability was the only factor at play in the appellant's decision not to allow her to return to work on a gradual basis. The respondent's continued absence from work, the uncertainty as to the scope of her return to work part-time (or on a gradual basis), and her seeming inability to provide the appellant with information about how her disability would interfere with the performance of her duties or about what modifications to her duties were required to address her disability were the principal and controlling factors that led to the cessation of her employment. (2) The trial judge's stark finding that there was no evidence of accommodation or of attempts to accommodate was palpably in error and the erroneous finding overrode her bottom-line conclusion that the appellant had contravened s. 16(1) of the Code by failing to accommodate the respondent to the point of undue hardship. This finding contradicted facts to which the parties had agreed, facts alleged in the complaint, and facts alleged in the hearing application filed by the Chief Commissioner, as well as the testimony of the respondent and the appellant's witnesses. These facts established that the appellant had granted the respondent a 21-month medical leave of absence and had made other attempts to accommodate the respondent's disability. The respondent in this case had proposed a loose and open-ended return-to-work plan, with no measure of certainty as to whether or if she could fulfil the functions of a municipal administrator or when or even if she would ever be able to

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return to work on a full-time basis. In the circumstances of the case, the scope of the respondent's responsibilities and statutory duties warranted her participation in the assessment proposed by the appellant to determine her capabilities ad to assist the appellant in ascertaining suitable accommodation for her disability. The obligation was heightened because she had quickly abandoned her two prior attempts to work on a gradual basis for medical reasons and the proposal in July of 2016 was not substantively dissimilar to those earlier proposals. As such, the respondent's refusal to participate in the assessment effectively thwarted the accommodation process and ended the appellant's duty to accommodate.

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***Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity*, 2024 SKCA 74**

Leurer Caldwell Schwann, 2024-07-26 (CA24074)

Civil Procedure - Intervenor Status
Civil Procedure - Parties - Intervenor

The appeal arose from an action commenced by the respondent against the appellant which as first constituted concerned a constitutional challenge of a government policy. After the commencement of the action, the legislature passed *The Education (Parents' Bill of Rights) Amendment Act, 2023*, SS 2023, c 46, which included a section that was declared to operate notwithstanding Sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The invocation of the clause prompted competing applications by the parties at the Court of King's Bench. The appellant's application to have the entirety of the respondent's application dismissed on the ground that the Court of King's Bench no longer had jurisdiction over the dispute was dismissed by the Court of King's Bench. The appellants appealed this dismissal with the Attorney General for New Brunswick, the Attorney General of Alberta and ten organizations applying for leave to intervene in the appeal. The respondents only opposed the request to intervene by Our Duty Canada (ODC).
HELD: The court granted leave to the Attorney General for New Brunswick, Attorney General of Alberta and nine other organizations. The application by ODC to intervene was dismissed. (1) In considering an application to intervene, appellate courts will consider (a) whether the intervention will unduly delay the proceedings; (b) possible prejudice to the parties if intervention is granted; (c) whether the intervention will widen the *lis* between the parties; (d) the extent to which the position of the intervener is already represented and protected by one of the parties; and (e) whether the intervention will transform the court into a political arena. An appellate court

will also consider whether the intervention motion was unduly delayed and possible prejudice to the prospective intervener if intervention is denied. In this case, the focus of the appeal was on the interpretation and application of s. 33 of the *Charter*. New Brunswick and Alberta therefore had direct interest in the subject matter and outcome of the appeal. The nine other organizations also outlined in their respective applications the perspective that they would bring in connection with the issues in the appeal. ODC's application to intervene did not, however, indicate the nature of its interest in the constitutional issues raised by the appellant in this appeal. The issues upon which ODC proposed to offer submissions all pertained to the underlying merits of the dispute between the parties. The court was satisfied that the parties would be able to inform the court about these issues. As a result, ODC's intervention would serve no proper purpose.

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***Pillar Properties Real Estate Corp. v Saskatoon (City)*, 2024 SKCA 75**

Caldwell Tholl Drennan, 2024-07-30 (CA24075)

Administrative Law - *Municipal Board Act* - Assessment Appeals
Municipal Law - Assessment Appeals
Municipal Law - Assessments
Municipal Law - Property Tax Assessment

The appellant was an owner of a parcel of land in Saskatoon. Dissatisfied with the assessment of property for tax purposes in 2022, the appellant appealed to the Board of Revision for the City of Saskatoon (the board). The board's decision was appealed by both parties to the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board asserting that the board did not have the power to remit the matter to the assessor. The committee allowed portions of each appeal, determined that the board decision was a nullity and reinstated the original assessment. The appellant appealed this decision asserting that the committee erred in law by nullifying the board decision and conducting a first instance review. The appellant also asserted that the committee erred by finding that the board was required to follow the board's and committee's decisions from the previous year regarding the same property.
HELD: The appeal was allowed. (1) The court determined that the committee had erred in its approach to previous decisions of the board and the committee. An appeal from an assessment in any given tax year is a fresh appeal. Secondly, the outcome of a previous year's appeal is not determinative of the current year's appeal or binding on a board of revision or committee in its deliberations regarding the current year. Third, in Saskatchewan, a four-year cycle is utilized for property assessment. While a taxpayer is permitted to appeal every year, it may be that, from a tactical and practical standpoint, absent some jurisprudential change, it will be difficult to succeed if the same argument is made on virtually the same evidence in a subsequent year. In such a case, the previous year's board of revision or committee decision is not binding, it would be persuasive. Fourth, a previous year's

decision, if it involves the same property and issues, will likely have some precedential value and should not be ignored. Fifth, the persuasive value or authoritative force of a previous year's board of revision or Committee decision on the same property is not narrowly limited to issues of assessment law or practice. In the matter at hand, the Committee erred by treating the 2021 board decision and the 2021 committee decision as determinative of the 2022 appeal.

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***Walker v Saskatchewan Penitentiary*, 2024 SKKB 112**

Meschishnick, 2024-06-10 (KB24110)

Criminal Law - Prison and Prisoners - Jurisdiction - Remedies - *Habeas Corpus*

The applicant was a federal inmate serving a sentence for first degree murder. He was transferred between several institutions and was placed in segregated intervention units instead of general population due to alleged close ties with security threat groups (STGs). Saskatchewan Penitentiary concluded there was a concern for the applicant's safety. The applicant disputed this and argued that flawed decision making by another institution – concluding that he was associated with gangs and could not be integrated into the general population ranges – prevented him from being housed in certain ranges or populations. He argued that there were a variety of flaws underpinning the decisions to move him and change his security classification, which affected subsequent Correctional Service Canada (CSC) decisions. The applicant challenged the legality of these transfers. The court analyzed the scope of habeas corpus and the jurisdictional limitations of the court in those applications. The court considered the transfer of the applicant to a medium security health care unit (HCU) and then a transfer to the segregated intervention unit (SIU) to determine whether the earlier CSC decisions were relevant to determining the lawfulness of the HCU or SIU moves. The court also addressed the applicant's request to have other personnel from Saskatchewan Penitentiary subpoenaed to testify.
HELD: The court dismissed the applicant's *habeas corpus* application and dismissed the application to subpoena the witnesses because the question was moot. The application to determine that the HCU move was an unlawful restriction on the applicant's liberty was dismissed as being moot. The application to find the SIU move unlawful was dismissed. The court found that the applicant's real concern was to correct his record to show that he was not a "check-in", i.e., that he had not provided information to the administration. The court held that this was not a grievance that could be addressed in a habeas corpus application because the court was without jurisdiction to direct Saskatchewan Penitentiary to change what it recorded in the applicant's file, or even to direct it to respond to the applicant's request for a correction. The court was limited to determining if the SIU move was reasonable or unreasonable. The court found that the SIU move was necessary and therefore reasonable. *Habeas corpus* is a crucial remedy in the pursuit of ss. 7 (the right to liberty) and 9 (the right not to be arbitrarily detained or imprisoned) of the *Charter*. Its fundamental purpose is to determine the lawfulness of a decision that deprives an inmate of liberty. The elements of a successful application for *habeas corpus* are: i) a deprivation of liberty; and ii) a legitimate ground upon which to question its legality. Then the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.

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***Sekerbank T.A.S. v Arslan*, 2024 SKKB 115**

Layh, 2024-06-18 (KB24111)

Civil Procedure - Setting Aside Discontinuance
Civil Procedure - Addition of Plaintiff

In 2013, the plaintiff began an action alleging that the defendant fraudulently conveyed several million dollars' worth of shares to another defendant, who became the trustee of a family trust held for the benefit of the defendant's family members. At the same time, the plaintiff sought a preservation order under s. 5 of *The Enforcement of Money Judgments Act*, prohibiting the defendant trustee from disposing of the shares. The parties consented to a preservation order, and the court granted it. For several years after, the defendants brought several applications to have the preservation order set aside, resulting in several reported decisions. During a March 2024 case conference, a consent order was filed in which the parties consented to the discontinuance of the 2013 action. Here, another Turkish bank (YK Bank) applied to be added as a plaintiff to the original 2013 action. Implicit in YK Bank's application to be added as a plaintiff in the 2013 action was its concern that if it issued its own statement of claim alleging fraudulent conveyance of the shares, it would be statute-barred. YK Bank argued that the notice of discontinuance was an abuse of process and requested that it be set aside. The court determined: 1) whether the court should use its inherent powers to set aside the consent notice of discontinuance of the 2013 action, noting that if the answer was "no," then YK Bank's application would fail immediately; and 2) if the court set aside the consent notice of discontinuance, whether YK Bank could be added as a plaintiff according to the joinder rules of *The King's Bench Rules* or by reference to s. 20 of *The Limitations Act*.
HELD: The court found no reason to set aside the notice of discontinuance filed by consent between the plaintiff and the defendants. YK Bank's application to be added as a plaintiff could not succeed. It was clear from the case law that YK Bank could not be added as a plaintiff to a discontinued action unless the discontinuance were withdrawn or det aside. YK Bank was unable to provide any case law where a non-party to an action successfully set aside a notice of discontinuance that was filed with the consent of the litigants. The court added that Rule 4-49(8) of *The King's Bench Rules* specifically contemplated the finality of two parties agreeing to discontinue an action.

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***Stubbings v Holizki*, 2024 SKKB 117**

Layh, 2024-06-19 (KB24112)

Wills and Estates - Minutes of Settlement - Enforcement

Two daughters disagreed about the estate of their deceased mother. The mother divided her estate equally between the daughters,

appointing the defendant as her power of attorney and co-executor of the will. The plaintiff alleged that the defendant misused her authority under the power of attorney by changing the deceased's accounts into joint accounts with right of survivorship in the defendant's favour, as well as changing the designated beneficiary of certain TFSAs into the defendant's name. The parties signed minutes of settlement during a mandatory mediation session. The defendant offered to pay settlement funds from her share of the estate upon the plaintiff signing the release. The plaintiff accepted. Here, the defendant applied to the court to enforce the signed minutes of settlement, arguing that the terms of the minutes remained unsatisfied. She argued that she should have received a blanket release to permit her to explore the possibility that the deceased held accounts outside of the seven financial institutions in Yorkton. The court determined whether executed minutes of settlement had been satisfied, and whether the court should enter the terms of settlement as a judgment of the court.
HELD: The minutes were satisfied, and the court issued the order. The court did not accept the applicant's argument that the minutes were unenforceable because she was not provided with a blanket release applicable to all banks. The defendant offered no evidence that remotely suggested that the deceased held bank accounts outside of Yorkton. Both parties were represented by experienced legal counsel, and the defendant had ample time to seek clarification of any terms of the minutes before signing them.

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***Inglis v Inglis*, 2024 SKKB 131**

Megaw, 2024-07-17 (KB24124)

Civil Procedure - Costs - Solicitor and Client Costs
Family Law - Best Interests of Child
Family Law - Child Custody and Access - Primary Residence
Family Law - Child Custody and Access - Shared Parenting

The parties were married on November 16, 2012 and separated in late 2019. After separation, the petitioner moved to Regina and the parenting arrangement saw the children living with the petitioner in Regina half-time and with the respondent half-time. The children attended a francophone school for one-half of the school year while in the petitioner's care and were homeschooled by the respondent when in his care. The parties were conducting parenting arrangement pursuant to interim orders of the court including orders directing that the children not be removed from the province of Saskatchewan without the other party's consent and specific orders requiring the respondent to complete his parenting time in Gainsborough, the site of the former family home, instead of Belmont, where the respondent chose to parent the children. These orders were not complied with by the respondent. The petitioner sought to have the children attend school full-time while continuing their education in French by their relocation to Prince Albert. The respondent did not oppose this but sought to continue the shared parenting regime with him home-schooling the children every second week.
HELD: The court determined that the parties should continue to jointly make decisions concerning the children, but the petitioner would have the ability to make a decision on a medical issue regarding the children if the parties were unable to agree after

consultation. The court further determined that the children should be in the primary care of the petitioner if the respondent continued to reside in Belmont. The court also determined that the entire terms of the agreement as entered into by the parties would be enforced and the mutual fund amount should be divided equally between the parties. The court further ordered that the family home be sold, and the net sale proceeds be divided between the parties. The petitioner's application for solicitor-client costs was dismissed. (1) The determination of an appropriate parenting arrangement must be completed from a child-centric perspective with solely the children's best interests being the focus of the inquiry. The factors to be considered include: (a) the child's needs, given the child's age and stage of development, such as the child's need for stability; (b) the nature and strength of the child's relationship with their parents and other important people in their lives; (c) the willingness to support the development and maintenance of the child's relationship with the other spouse; (d) the history of care of the child; (e) the child's views and preferences; (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including indigenous upbringing and heritage; (g) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child; (h) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child. The court concluded that the children's need for stability supported them being involved in a consistent and regularized education program and consideration of this factor would favour a parenting program whereby the children were primarily resident with the petitioner. There was also concern that the respondent was not accepting of steps being taken by the petitioner regarding the health of one of the children who had been identified as registering on the autism spectrum. This concern appeared to militate in favour of the children primarily residing in one home to ensure their medical needs were attended to consistently. The relocation from Regina to Prince Albert was also determined to be in the best interests of the children in the circumstances and given the lack of objection by the parties. (2) The court determined that each party, with respect to the actual assets dealt with, had received an appropriate division of the funds referred to. The mutual fund of the respondent was also family property and the respondent's claim to exemption had not been established on the evidence as he had failed to satisfy his onus of proof in showing both that a portion of the mutual fund was indeed acquired prior to the date of marriage or the fair market value of that share. (3) The court determined that solicitor-client costs were not appropriate. Solicitor-client costs are awarded in rare and exceptional cases only. Such costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible. In this case, while the respondent was deemed wrong to disobey a clear court order, the court was unable to conclude that his behaviour in this regard was scandalous, outrageous or reprehensible.

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***H & R Block Canada, Inc. v Anwar & Anwar Consulting Inc.*, 2024 SKKB 132**

Rothery, 2024-07-18 (KB24126)

Bankruptcy - Interim Receiver

The applicant sought the appointment of an interim receiver of all the assets of the respondent. At the application hearing, the respondent sought a two-week adjournment to consult legal counsel. Because of the urgency of its application and the fact that the evidence confirmed the respondent had already sought counsel in June 2024, the application was denied.
HELD: The application to appoint an interim receiver was granted. (1) In exercising discretion for the appointment of a receiver or

interim receiver, the court considers a broad range of considerations including: whether irreparable harm might result if the order is not made, the risk to the security holder taking into consideration the size of the debtor's equity in the collateral, the nature of the property or collateral, the need to protect or safeguard the debtor's assets while litigation takes place, the conduct of the parties, the impact of the order on the parties, the cost of the receivership to both parties, and the balance of convenience as between the parties. In this case, the applicants had been receiving hundreds of inquiries and complaints from clients who were not being serviced by the debtors and whose income tax returns remained outstanding. The client files that the respondents were refusing to return to the applicant also consisted of personal information of individuals governed by privacy law and the respondent's ongoing use of the client's personal information was in violation of privacy law. An appointment of an interim receiver was necessary to prevent the applicants from suffering irreparable harm. The appointment of an interim receiver would not also prejudice the respondents as their franchise agreements were terminated and they had no right to operate the business

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***Scotia Mortgage Corporation v Keep*, 2024 SKKB 133**

Robertson, 2024-07-18 (KB24125)

Civil Procedure - Costs - Solicitor and Client Costs
Foreclosure - Costs - Solicitor-Client Costs
Mortgages - Foreclosure - Judicial Sale

The decision in this case addressed an application for assessment of costs following judicial sale. The plaintiff argued for a more expansive and generous approach to the assessment of costs, identifying solicitor-client costs in the amount of $7,964.47 and property management costs in the amount of $11,736.56.
HELD: The court awarded the applicant property management costs of $8,000 and legal fees of $5,000. (1) The court considered that there was nothing in the mortgage proceedings to justify any increase from the standard legal fee of $5,000. The standard amount of legal fees applies to a normal or routine foreclosure proceeding and is intended to cover all legal services involved in post-leave foreclosure proceedings. In this case, the court determined that the foreclosure proceeding was as straightforward as could be. The plaintiff's counsel appeared by telephone for most court appearances, reducing the time required for that necessary function. The court also determined that the legal fees related to the amended statement of claim should be disallowed as the plaintiffs were to pay the cost of correcting the plaintiff's lawyer's mistake. (2) With respect to the property management costs, the court agreed that the plaintiff was entitled to recover the reasonable costs of maintaining the mortgage property so as to retain its value. However, there was a prohibition of recovery of any inspection fees under s. 7 of *The Limitation of Civil Rights Act* and existing caselaw. The amount claimed was also reduced due to the three-month delay in proceedings resulting from the plaintiff's amended statement of claim, the inclusion of inspection fees and questionable snow removal charges.

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***R v McLaughlin*, 2024 SKPC 22 (not yet available on CanLII)**

Lang, 2024-07-24 (PC24023)

Criminal Law - Assault - Sexual Assault
Criminal Law - Defence - Extreme Intoxication akin to Automatism
Criminal Law - Defences - Drunkenness
Criminal Law - Defence - Intoxication

The accused was charged with sexual assault. The defence did not concede that the activities of the accused on the day of the alleged sexual assault constituted sexual assault, but argued that regardless, the accused should not be found guilty on the defence of "self-induced extreme intoxication akin to automatism".
HELD: The accused was found guilty. (1) The court held that the accused did not prove automatism on a balance of probabilities. To satisfy the evidentiary burden in cases involving claims of automatism, the trial judge must conclude that there was evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. Relevant factors in this regard include the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime and whether the alleged trigger of the automatism is also the victim of the automatistic violence. In this case, the court determined that the accused's testimony and those of his supporting witnesses were not credible. The testimony of the expert for the defence was also found not to be credible. The medical evidence, both on scene when the Emergency Medical Team (EMT) tested the accused and at the hospital, upon initial assessment, found the accused to be alert and oriented to time, person and place and found all his vital signs to be relatively normal. There was also nothing in the accused's medical history to suggest that he had ever been in an automatistic state previously. At the time of the trial, the accused and his wife were having difficulties in their marriage that may have included some sexual tensions. This was a possible motive for his actions on the evening in question. (2) The Crown proved the elements of the offence beyond reasonable doubt. In a criminal prosecution, the Crown bears the burden of proving all the elements of the offence beyond a reasonable doubt. This burden must be discharged through the use of credible and reliable evidence. In this case, the Crown presented very credible evidence of the complainant. The complainant was found to be a credible and reliable witness and her testimony was corroborated to some degree by the testimony of the second EMT.

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