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 Kamara*, 2023 SKCA 112**

Schwann Barrington-Foote Drennan, 2023-10-04 (CA23112)

Criminal Law - *Charter* Breach - Costs - Appeal

The Crown was previously ordered to pay costs to the respondent for breaching their s. 7 *Charter* rights when they failed to disclose information obtained from cell phones seized during the investigation that led to charges. The Crown appealed the costs order. The trial judge did not explain how the conduct qualified as a marked or unacceptable departure.
HELD: The appeal was allowed. The Crown's breach of the respondent's *Charter* rights did not rise the required standard.

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Caldwell Schwann Kalmakoff, 2023-12-13 (CA23135)

Civil Procedure - Appeal - Standard of Review
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The plaintiffs brought an action against a number of Canadian airlines for price fixing after the defendants had introduced mandatory baggage fees within days of one another in 2014. Before a class action had been certified pursuant to *The Class Actions Act*, SS 2001, c C-12.01 (CAA), the defendants brought an application for summary dismissal, based among other things on delay. The plaintiffs responded to the dismissal applications with their own motions, namely to certify the action under the CAA, amend the statement of claim, and for further disclosure. At King's Bench, the court ruled on the sequence or order in which the numerous applications would proceed, holding that the defendants' dismissal applications should be heard prior to the application for certification. The lower court had also ruled that an application to amend the statement of claim should be heard concurrently with the dismissal applications. The plaintiffs appealed the sequencing decision.
HELD: The court upheld the lower court's decision on all issues. It reviewed the case law in a number of Canadian jurisdictions, then turned to the specific wording of Saskatchewan's CAA on the issue of standard of review. By the clear wording of s. 44 and the absence of any provision in the CAA that statutorily mandates a certification-first rule, it concluded that the Court of King's Bench has the discretion to determine the sequence in which applications and motions in prospective class action proceedings are heard relative to the certification application. Accordingly, its decision attracts appellate deference. Further, the judge did not err in identifying and applying all the circumstances to the test before her regarding the issue of sequencing: accordingly, there was no palpable and overriding error on this issue and appellate intervention was not warranted. On the issue of adequate reasons, the court found that the lower court's reasons were sufficient to permit a reader to understand what was decided and why, in a fashion that allowed for meaningful appellate review. Finally, the court considered the award of costs below, and concluded that this order both fell within the permissible discretion and was grounded by sufficient reasons.

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***Canadian Mortgage Servicing Corporation v Korf*, 2024 SKCA 1**

Leurer Tholl Kalmakoff, 2024-01-03 (CA24001)

Contract Law - Interpretation - Appeal
Banks and Banking - Loans - Guarantee

The respondent was the sole director, officer and shareholder of a real estate holding corporation. In 2014, the corporation obtained secure loan funding to refinance a portfolio of commercial, industrial and multi-family apartment buildings in Saskatchewan. The corporation obtained a loan from the lender (appellant) by way of a commitment letter. To secure the loan, the corporation granted a mortgage in favour of the lender over title to the real estate properties, in addition to a security agreement and other security. The respondent signed a directors' resolution acknowledging he was the president, sole director and sole duly appointed signing officer for the corporation. The loan matured but was extended by an extension agreement executed by the parties, which included a provision to keep all terms of the commitment letter and security documents in full force and effect. The respondent signed the extension agreement on behalf of the corporation in his personal capacity as guarantor. The corporation fell into arrears and did not meet the lender's conditions for a further extension. The parties entered into negotiations and executed forbearance agreements. The forbearance agreements stipulated, among other things, that the terms and conditions in the security continued to be in full force and effect. The respondent was not individually named as a party in the forbearance agreements. The corporation encountered financial difficulty and the lender commenced a summary judgment application. The lender argued that even though the forbearance agreements were styled as between the corporation and the respondent, the agreements suspended or reset the running of the limitation period against the respondent under the guarantee because they were collateral agreements with continuing obligations imposed on the respondent as contemplated by the guarantee. The chambers judge dismissed the claim and concluded that the appellant's action was time-barred. The chambers judge held that the respondent was not a party to any agreements that he did not sign as guarantor, and that the forbearance agreement did not reset the limitation period regarding the guarantee. In addition, the chambers judge found that despite the respondent's status as sole shareholder, this was not a situation where the corporate veil should be pierced to attribute the actions of the

Residential Tenancies Act, Section 72(1) - Appeal

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corporation to the sole shareholder. The lender appealed the decision of the chambers judge to dismiss the action. The Court of Appeal (court) considered whether the chambers judge erred in concluding that the forbearance agreements did not suspend or reset the limitation period with respect to the appellant's claim against the respondent under the guarantee.

HELD: The court allowed the appeal andgranted summary judgment in favour of the appellant. The court found that the chambers judge erred in law by failing to consider a relevant term of the guarantee. The guarantee included a term that the guarantor guaranteed to the lender the due payment and performance by the borrower "according to the terms of the commitment letter, the security or any agreement collateral thereto." The fact that the respondent was not a party in his personal capacity to the forbearance agreements did not affect his personal liability under the guarantee. The court noted that guarantees are contractual in nature, so the normal rules of contractual interpretation applied: the contract must be read as a whole, and the words used in it must be given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53). The goal when interpreting a guarantee was to discover the parties' objective intention, which included considering the commercial purpose of the agreement. Here, the focus of the chambers judge should have been to determine what the provisions of the guarantee said about the respondent's legal liability with respect to the limitation period. The only conclusion that could have been drawn from the guarantee and associated documents, bearing in mind the commercial purpose of the guarantee, was that the forbearance agreements were agreements "collateral to" both the security and commitment letter. Therefore, the forbearance agreements reset the limitation period for the guarantee, giving rise to a new cause of action against the respondent when the forbearance agreements expired and the corporation failed to satisfy the loan. The forbearance agreement left no doubt that it was referring to each and every aspect of the same transaction that was the subject of the commitment letter and guarantee, and that it was an agreement collateral to the commitment letter and the security. The guarantee also extended the respondent's obligation so that it continued to exist even if the lender granted an extension or other accommodation to the corporation.

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***Swan v Swan*, 2024 SKCA 2**

Schwann Tholl Drennan, 2024-01-04 (CA24002)

Family Law - Appeal - Division of Property - Deduction of Farm Losses

The parties separated after eight years of marriage. After they were married, they relocated to a small town so the appellant could be closer to his parents and work on the family farm. The respondent discontinued university. They lived rent-free in a farmhouse owned by the appellant's parents. When the parties' first child was born, they agreed that the respondent would stop working outside the home. After the separation, they agreed on a temporary arrangement for childcare with the respondent having two-thirds of the parenting time. A trial was held to decide parenting, support, and property division. The trial judge determined a parenting arrangement where the mother would have the children for nine days, then the father would have them for five days. The appellant father argued that the trial judge erred by not ordering shared parenting and in determining the parties' incomes, as well as the quantum and duration of spousal support. He took issue with the two years the trial judge had taken to render the decision and applied to adduce fresh evidence regarding communication and parenting flexibility problems. The Court of Appeal (court) considered: 1) should new evidence be admitted on appeal; 2) did the trial judge err in making the parenting order; 3) did the trial judge err in his calculation of the appellant's income; 4) did the trial judge err in not computing additional income to the respondent; 5) did the trial judge err in his determination of the quantum and duration of spousal support; and 6) did the delay in rendering the trial decision have any effect on this appeal?

HELD: The court dismissed the appeal. 1) The application to adduce fresh evidence was dismissed. The Supreme Court of Canada recently reiterated the *Palmer* test for the acceptance of evidence in a family law appeal (*R v Palmer*, 1979 CanLII 8, [1980] 1 SCR 759). Factors to consider included: whether the evidence could have been obtained for the trial through due diligence; whether the evidence was relevant; whether the evidence was credible; and whether it could have affected the result at trial (*Barendregt v Grebliunas*, 2022 SCC 22). The due diligence aspect was easily met, because all of the evidence sought to be tendered had occurred after the trial concluded. However, the court found that none of the evidence was relevant to a decisive or potentially decisive issue. There was nothing alleged by the appellant that could have changed any of the results. None of the evidence affected the circumstances of the children in any substantial way that would relate to a determination of their best interests. 2) The court found no palpable and overriding error in the trial judge's findings regarding the parents' roles post-separation. The trial judge went through each of the s. 16(3) *Divorce Act* factors in detail, finding that the particular circumstances were best served by a parenting arrangement of nine days with the mother and five days with the father, plus equally shared holidays. The court noted that

allowing the appeal regarding parenting would involve the court re-examining the factors and substituting its own views of what was in the children's best interests for those of the trial judge. The standard of review did not permit the court to do so, and there was no merit in the appeal related to parenting arrangements. 3) There was no palpable and overriding error regarding the trial judge's calculations of the appellant's income. The appellant argued that at least a portion of his farm losses should have been deducted from his income. The court noted that in Saskatchewan, the deduction of farm losses for the purpose of calculating income for support purposes is examined using a flexible approach. There is a burden on the payor farmer to establish that applying farm losses to reduce his income for support purposes is reasonable in the circumstances. The trial judge found that the appellant offered no satisfactory explanation for his recurring farm losses and little information regarding the reasonableness of any of his claimed expenses. The trial judge referred to the relevant principles to determine that it was not reasonable to deduct farm losses against income for the purposes of support. 4) The court found that the appellant failed to identify any factors indicating that the trial judge did not understand the relevant principles or that he applied them in a way that would permit the court to interfere in calculating the income of the respondent. The appellant argued that the trial judge erred in the exercise of his discretion when he declined to impute additional income to the respondent over and above her most recent statement of employment income. The appellant argued that the respondent was earning less than she was capable of earning. The trial judge found that the evidence fell far short of establishing that the respondent was intentionally underemployed. 5) The court found that there was no error in the trial judge's decision to set the duration of spousal support at nine years. The range of support generated by the *Guidelines* was four to 12 years. The respondent had a strong compensatory and non-compensatory basis for entitlement: she gave up her university pursuits to move to a small town near the appellant's parents to facilitate his employment, worked in low-level positions prior to the birth of their first child, and became a stay-at-home mother by mutual agreement for several years. 6) While two years passed from the trial to when the trial judge rendered his decision, there was no basis for appellate intervention. The court noted that if major, unanticipated developments occur within a family, it is open to the parties to apply to reopen the trial to bring relevant new evidence to the attention of the judge who heard the trial. While there were situations where a trial judge, on his or her own motion, might seek updated information from the parties, this was not one of those cases. Nothing was revealed in the affidavits in the appellant's fresh evidence application that would constitute such a development.

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***R v Pelletier*, 2023 SKKB 227**

Tochor, 2023-10-30 (KB23214)

Criminal Law - Appeal - Standard of Review
Criminal Law - Evidence - Admissibility - Out of Court Statement
Criminal Law - Evidence - Witness
Criminal Law - Impaired Driving
Criminal Law - *Voir Dire* - Evidence - Admissibility

The accused was convicted in Provincial Court of impaired driving contrary to s. 320.14(1)(a) of the *Criminal Code*, and appealed

both his conviction and sentence. The original sentence was a one-year driving prohibition and a fine of $1,200 plus the victim fine surcharge. No argument was made on sentence and the court treated the sentence appeal as abandoned. There were two relevant components of the trial: a voluntariness *voir dire* and argument on the merits of the offence. This is because neither party called evidence in the trial proper beyond the evidence taken in the *voir dire*. The *voir dire* was held to determine the admissibility of statements allegedly made by the accused to the investigating officer. The traffic stop and roadside interaction were both videotaped, so the Crown proposed to conduct a blended *voir dire* in order to avoid having to play the video to the court twice. Ultimately, defence counsel waived voluntariness of the alleged statements. Prior to argument the parties and trial judge agreed that any concerns about accuracy or completeness of the alleged statement could be determined by the trial judge in the trial proper. This left two issues to consider on appeal: 1) whether some exculpatory statements made by the accused in evidence during the *voir dire* were admissible at the trial, and 2) did the trial judge commit a palpable and overriding error when he concluded on the facts that the accused's ability to operate a motor vehicle was impaired by alcohol?
HELD: First addressing the standard of review, the court applied the standard of correctness on questions of law, as set out in *R v Helm*, 2011 SKQB 32 (*Helm*). On questions of fact, the standard of review is reasonableness, as also set out in *Helm*. Because the evidence heard in the *voir dire* included exculpatory statements by the accused about the reasons for his poor driving, defence argued that those statements ought to have been considered as evidence of alternate explanations for impaired behaviour. Because the accused did not testify directly as to this alternate explanation, the trial court held that the rule against admitting self-serving out-of-court statements by an accused prevailed. On appeal, the court held that if the accused desired to advance such exculpatory evidence, it ought to have been given under oath. On the issue of impairment, the court affirmed the trial judge's approach, which was to consider the totality of the evidence. Finally, the accused argued that the trial judge erred by not considering plausible, reasonable explanations for his symptoms of impairment, based on *R v McKenzie*, 2020 SKQB 206 (*McKenzie*). In *McKenzie*, the appellate court reviewed the observed symptoms of impairment and concluded that the trial judge had failed to consider plausible alternative explanations for those symptoms. Noting that *McKenzie* was expressly overruled on this point at the Court of Appeal, the court held that the proper approach was to consider whether it was unreasonable for the trial judge to have concluded as they did, in this case to reject the alternate explanations for the impaired behaviour. Appeal dismissed.

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***Toronto-Dominion Bank v Pouliot*, 2023 SKKB 229**

Danyliuk, 2023-10-31 (KB23232)

Mortgage - Foreclosure - Application for Judicial Sale - Order Nisi

The plaintiff applied for an order nisi for sale by real estate listing and requested a provision that the selling officer be a member of the law firm representing the plaintiff. The court determined whether it would exercise its discretion to grant the provision requested.
HELD: The court declined to appoint a selling officer from the same law firm as the plaintiff's counsel. King's Bench judges have the

discretion to grant the provision requested, but given the potential for conflicts of interest, the mortgagee must demonstrate to the court that there are compelling reasons to make the appointment (*The Toronto-Dominion Bank v Sader*, 2021 SKCA 154). The court noted that such appointments are usually the exception. The court considered the potential for legal or ethical conflicts of interest in this case. Here, there was no evidence referencing the potential for conflicts, or how to deal with them. The court expected actual evidence as to the safeguards the law firm proposed to put in place to avoid conflicts.

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***J.W.K. v J.M.*, 2023 SKKB 238**

Scherman, 2023-11-03 (KB23228)

Family Law - Access and Custody
Family Law - Best Interests of Child
Family Law - Child Custody and Access - Variation
Family Law - Parenting Time - Best Interests of Child - *Children's Law Act, 2020*

The parties were parents of a child who was subject to an existing King's Bench parenting order and sought a new order from this court to govern parenting and child support moving forward. There was an issue as to whether the existing order was an interim order. The court stated that the issue necessarily involved an interpretation of the fiat of Brown J. If it were an interim order, the test for variation would require compelling circumstances. If not, the standard of proof differs. The court applied *Seidel v Seidel*, 2021 SKCA 92 which reiterated the settled principle that the courts should generally not vary, on an interim basis, fundamental parenting arrangements unless the affected child faces risk of harm or there are other compelling reasons.
HELD: The previous order was intended to operate in the short term until certain circumstances came to pass. Accordingly, it was not an "interim order", and the court undertook a full assessment of the child's best interests without the restrictive standard of proof required by variation proceedings. Alternatively, if it were an interim order, the court concluded that variation was nevertheless justified based on compelling reasons: specifically, that the delay before trial would be lengthy, that the child's circumstances had recently changed significantly, and that there was a need for judicial direction as to how to move forward. The court applied *The Children's Law Act, 2020*, SS 2020, c 2 as the parents had not been in a marital relationship. After dismissing allegations of harassment and coercive behaviour by one parent, the court made a full assessment of the child's best interests using a forward-looking child-centric analysis. On this basis, a shared parenting structure was ordered, including providing additional parenting time to the father when the child would otherwise have been in daycare. Communication using the "OurFamilyWizard" application was also ordered.

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***Mosiuk v Black*, 2023 SKKB 251**

Layh, 2023-11-27 (KB23233)

Civil Procedure - Dismissal - Delay
Civil Procedure - Dismissal for Want of Prosecution

After two failed striking applications, the plaintiffs brought a third under Rule 4-44(a) of *The King's Bench Rules* based on delay. On April 4, 2022, Clackson J. held that there had been inordinate and inexcusable delay by the plaintiffs, but in the interests of justice he declined to strike the claim. On October 31, 2023, Megaw J. adjourned the second application to strike in order to permit defence counsel a fulsome opportunity to respond. Costs of the application were awarded to the defendants. This third application was brought on November 14, 2023. The court considered the fact findings on the previous unsuccessful striking applications as forming part of the factual and legal foundation of the current application.
HELD: The third component of the test had been satisfied in this instance, that the plaintiff's claim should not now be allowed to proceed in the interests of justice. The court dismissed the claim. The defendants were also successful on costs.

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***R v Lynch*, 2023 SKKB 260**

Bergbusch, 2023-12-01 (KB23264)

Criminal Law - Assault - Sexual Assault
Criminal Law - Sexual Assault - Elements of Offence

The accused was charged with assault and sexual assault contrary to ss. 266 and 271 of the *Criminal Code*. The allegations were from 1988. At the time, the complainant was a 17-year-old prospect of the Regina Pats hockey team, and the accused was the assistant coach. The Crown called the complainant and a witness who was the complainant's girlfriend at the time to testify. The complainant testified he received a call from the accused, asking whether he would like to teach at the Pats' first annual summer hockey school for minor players. He testified that he was excited about the invitation because it showed that the team was interested in him. The complainant testified that since he was from out of town and unfamiliar with driving in Regina, he met the accused at a gas station so he could follow the accused in his car. The plan was for the complainant to stay overnight at the accused's apartment before checking into a hotel the night after. He testified that they went to purchase beer, with the accused pressuring the complainant to drink beer with him at the apartment, and to take his clothes off and go out on the balcony. The complainant described the layout of the apartment. When the complainant took a shower to try to sober up, the accused entered the bathroom, pressured the complainant to touch the accused's penis, and then the accused masturbated the complainant to the point that the complainant ejaculated. The complainant testified that he did not consent to any of this touching of a sexual nature. The next day,

the complainant testified that the accused punched him several times without his consent and hit him in the testicles with a ring of keys when they were at the rink. The complainant was not challenged on cross-examination about the details of his account of what took place at the apartment. The accused testified that he was away in Calgary at the time the complainant alleged the incident occurred and did not participate in the Pats hockey school. The accused denied that the complainant stayed with him at his apartment and denied the complainant's account of what took place that evening. The girlfriend testified that when the complainant returned from Regina, his demeanour changed. He was clingy, and there was a cloud about him. After some prompting, the complainant told her what had happened in Regina. The witness's testimony was admissible for the limited purpose of establishing that she observed a change in the complainant's demeanour from when he left for the hockey school and when he came back. The court determined whether the accused was guilty of sexual assault and assault.
HELD: The court found the accused guilty of sexual assault and assault. After reviewing the whole of the evidence, the court did not have a reasonable doubt of the accused's guilt based on the evidence it accepted. The court did not believe the accused's evidence. The court set out the elements of both sexual assault and assault. The actus reus of sexual assault has three elements: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent (*R v Ewanchuk*, [1999] 1 SCR 330). The first two elements are determined objectively, and the third element is determined subjectively. The *mens rea* of sexual assault includes: (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting or was reckless or wilfully blind as to the absence of consent. For assault, the elements are the intentional application or force, directly or indirectly, without consent. There is no consent to an assault where the complainant submits or does not resist by reason of the exercise of authority. Apart from agreeing that he met the complainant at a gas station before hockey school, the accused denied all of the events central to the complainant's allegations. The court followed *W.(D.)* to analyze the evidence of the accused. The court did not find the accused to be a credible or a reliable witness. The court pointed out inconsistencies in the accused's evidence, finding that the accused was evasive and combative at times. The complainant testified in a straightforward manner, acknowledging that he did not have a clear memory of all the events. The court found it completely understandable that the complainant would have a vivid, clear memory of the out-of-the ordinary events of his first trip to Regina. The court found that the complainant's actions after the event were consistent with him experiencing trauma. His girlfriend observed a change in his demeanour, and he abandoned his pursuit of a position with the Pats, returning instead to his home team. The court found that the accused was in a position of authority in relation to the complainant when the sexual assault and assaults occurred.

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Bell v Angus Holdings Ltd., **2023 SKKB 258**

Bardai, 2023-12-04 (KB23241)

Business Corporations Act - Oppression Remedy
Statutes - Interpretation - *Business Corporations Act, 2021*, Section 18-4

The applicant sought an oppression remedy under section 18-4 of *The Business Corporations Act, 2021* (Act). The main issue was

whether the applicant was entitled to have some or all of her shares in Angus Holdings Ltd. (the company) redeemed, but she also sought disclosure of financial information from the respondent corporations and amalgamated corporations. The applicant, along with her brother and others, were shareholders in the company. The brother was also named as a respondent. The brother controlled the voting shares, and the applicant held non-voting preferred shares. The company was initially set up by the parents of the applicant as part of a complex corporate structure. Since 2005, the company redeemed a portion of the applicant's' non-voting preferred shares, resulting in payments to her of between $30,000 and $87,000 per year. When those redemptions stopped, the applicant sought to have all of her shares redeemed, or a portion of her shares redeemed annually as they always had been. The court determined whether the applicant was entitled to an oppression remedy.
HELD: The court determined that a trial was needed on the oppression remedy issue but ordered the disclosure of financial information. To be successful in an application for an oppression remedy, the applicant had to establish three things: (i) that she was a complainant within the meaning of s. 18-1 of the Act; (ii) that her reasonable expectations had been breached; and (iii) that the breach of her reasonable expectations amounted to oppression, unfair prejudice or unfair disregard of her interests (*BCE Inc. v 1976 Debentureholders*, 2008 SCC 69; *Sieminska v Boldt*, 2013 SKCA 136). Not every breach of a reasonable expectation will result in a remedy. The conduct must be oppressive, unfairly prejudicial or unfairly disregard the applicant's interests. There was no question that the applicant was a complainant, because she was the registered owner of a security in the corporation – the Class "F" preferred non-voting shares. The definition of complainant was broad and included the holder of a security of a corporation or any of its affiliates. The court noted that there was animosity between the parties, complicated by an elaborate corporate structure and difficult family dynamic. Given the highly contested evidence, the court could not determine whether the expectations of the applicant were reasonable, nor whether her expectations were breached by behaviour that was oppressive, unfairly prejudicial or unfairly disregarded her interests. A trial was required to determine the reasonable expectations of the applicant, whether such expectations were breached, and if there was a breach, whether the breach was a result of conduct that was oppressive, unfairly prejudicial or unfairly disregarded the applicant's interests, and if so, what the appropriate remedy might be. The court ordered specific financial documents be produced because they were relevant to the determination of the triable issue of whether the applicant had been oppressed and the appropriate remedy.

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***Lucier v Saskatoon Real Estate Services Inc.*, 2023 SKKB 259**

Danyliuk, 2023-12-04 (KB23263)

Residential Tenancies Act, Section 72(1) - Appeal
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 68

The court heard a statutory appeal on an issue of law brought by the tenant under s. 72(1) of *The Residential Tenancies Act, 2006* (RTA). The landlord sought an order for possession under the emergency provisions of ss. 68 and 70 out of a concern that the electrical service had been disconnected, and without electricity the thermostat did not function and constantly blew hot air. The hearing officer found that s. 68 did not apply but considered the matter as a breach of the tenancy agreement under s. 58 instead.

The hearing officer concluded that the tenancy agreement required the tenant to provide electricity to the suite but did not determine an affirmative duty to pay for the electrical service. The court determined: 1) the standard of review; 2) whether the hearing officer erred in law in his consideration of ss. 58 and 68 of the RTA; 3) whether the hearing officer erred by failing to consider s. 70(6) for what was “just and equitable” in the circumstances; and 4) whether the hearing officer erred in law by failing to provide sufficient reasons.
HELD: The court allowed the appeal. The decision of the hearing officer was quashed, and any order or writ of possession issued pursuant to that decision was also quashed. The court remitted the matter to the Office of Residential Tenancies for a new hearing with a different hearing officer. 1) The appeal had to raise an issue of law or jurisdiction and was an appeal of record. 2) The hearing officer erred in law in his consideration of ss. 58 and 68 of the RTA. From a purposive reading of s. 68, the court found that this was an emergency provision to be used in exceptional circumstances. The court found that the decision under appeal did not identify an emergency within the ambit of the legislation, and the hearing officer expressly found that the criteria in s. 68 had not been met. The court noted that strict adherence to the statute was required; it was an error to apply s. 68 here. There would have been minimal prejudice to the landlord to have dismissed the application and referred the landlord back to the standard process under s. 58. While this ended the appeal, the court considered the other main ground. 3) The court found that there was nothing in the hearing officer’s decision to indicate he gave any consideration to the equities at all. This was an error, and the decision could not stand on this ground either. 4) There was also merit to the argument that the hearing officer provided insufficient reasons. The court could not determine the hearing officer’s path of reasoning.

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***Allison v Janssen-Ortho Inc.*, 2023 SKKB 283**

Klatt, 2023-12-22 (KB23262)

Civil Procedure - *King’s Bench Rules*, Rule 4-44
Civil Procedure - Pleadings - Application to Strike Statement of Claim - Want of Prosecution - Delay

The plaintiffs filed the statement of claim in 2010, alleging that the antibiotics manufactured by the defendants caused adverse side effects. The claim was grounded in negligence, breach of competition, consumer protection and trade practices legislation, and breach of warranty. Very little had happened to advance the litigation. The court considered the defendants’ application to have the claim struck for delay under Rule 4-44 of *The King’s Bench Rules*.
HELD: The court struck the plaintiffs’ claim for delay. On application pursuant to Rule 4-44(a), the court may dismiss all or any part of a claim if the court is satisfied that the delay is inordinate and inexcusable and that it was not in the interests of justice that the claim proceed. The court applied the framework in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48. The court reviewed the chronology of the steps taken in the case. The statement of claim was filed in December 2010, amended in November 2011, and then nothing happened until 2013 when the plaintiffs unsuccessfully applied for an *ex parte* order appointing a judge to hear the certification application. Service defects delayed renewed efforts to obtain an order appointing a judge. Nothing happened for almost five years until the plaintiffs filed an application validating service of the amended statement of claim on one of

the defendants. The application for certification was not filed until October 2020. The court acknowledged that whether a delay is inordinate will depend on the nature of the litigation, but the fact that this was a proposed class action alone was not a reason to excuse long periods of little or no activity. The court concluded that the delay was inordinate. The court considered the nature of the claim, due diligence with which the claim had been prosecuted by the plaintiff, and the specific reasons offered for the delay to determine that the delay was inexcusable. The plaintiffs argued that they were “waiting for the science [behind the claim] to settle.” In the court’s view, this excuse was not borne out in the evidence. It was not in the interests of justice to permit the claim to proceed. The defendants demonstrated that they would suffer actual prejudice because of the inordinate passage of time. The court found that the length of the inexcusable delay was at least seven years. The absence of any acceptable explanation from the plaintiffs weighed heavily against permitting the claim to proceed.

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***Cook v Risling*, 2024 SKKB 1**

Smith, 2024-01-02 (KB24001)

Civil Procedure - *King's Bench Rules*, Rule 7-9
Civil Procedure - Pleadings - Application to Strike

The plaintiff alleged that the water provided by the defendant was not sufficiently pressurized, and that the lack of pressurization impacted water quality. The plaintiff argued that according to the regulations, there must be a minimum water pressure of 14 PSI. The defendants sought an order for summary judgment dismissing the plaintiff’s claim. The parties believed that there had been a contract signed in 2008 in which the defendant agreed to supply water to the plaintiff, but neither party produced a copy of the contract. The court considered the application for summary judgment.
HELD: The court dismissed the plaintiff’s claim for specific remedies involving the issues of PSI and water quality, granting the defendant’s request for summary judgment in part. However, the court allowed the balance of the claim that did not involve these issues to proceed. The court cited the affidavit evidence of a Water Security Agency (WSA) environmental project officer from *Cook v Water Security Agency*, 2023 SKKB 268 (*Cook*) which concluded that there was no minimum water pressure requirement for the type of water distribution system used by the plaintiff. The court adopted the conclusions respecting the regulatory framework of the WSA employee set out in *Cook*. The plaintiff did not produce any contract indicating that the defendant was obligated to provide a specified PSI, and there was no evidence pointing to a negative effect on water quality.

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***May v Saskatchewan Power Corporation*, 2024 SKKB 4**

Kuski Bassett, 2024-01-10 (KB24002)

Civil Procedure - Amendment to Pleadings
Civil Procedure - *King's Bench Rules*, Rule 3-72

More than six years after pleadings closed, the plaintiff applied for leave to amend her statement of claim in a wrongful dismissal action. She sought to include claims for moral damages, solicitor-client costs, and to plead more particulars of the defendant's alleged bad faith conduct. The defendants argued that the amendments were improper pleadings brought too late in the proceeding and were prejudicial. The court determined whether the amendments: 1) were prejudicial; 2) contained opinion, argument or other information that was immaterial, redundant or unnecessarily lengthy; and 3) sought to relitigate an issue that had already been decided.
HELD: The plaintiff was granted leave to amend the claim for some of her proposed amendments. Some proposed amendments were impermissible recitations of evidence, but none of the proposed amendments sought to relitigate an issue that had already been decided. The chambers judge had discretion under Rule 3-72 of *The King's Bench Rules* to allow amendments to pleadings. Parties can make amendments necessary to determine the real questions in issue. The Rule permitted amendments as late as trial if they would not cause non-compensable prejudice to the opposing party. 1) The amendments relating to the defendant's bad faith, moral damages, and solicitor-client costs did not raise new issues that would unduly expand the scope of the litigation. These amendments were allowed. She had included these claims in her 2016 reply, so the defendants had notice that the plaintiff was seeking this relief. The defendants did not provide any evidence of prejudice they might suffer if the amendments were allowed. 2) The court was satisfied that the proposed amendments in several of the paragraphs fulfilled the purpose and function of pleadings, which was to provide the defendants with fair notice of the allegations so they could defend and direct their evidence appropriately. The plaintiff's claim for moral damages had to be pleaded with specific misconduct of the defendant to support the relief. However, the proposed amendments that were replete with descriptions of evidence, including specific dates, discussions, correspondence, and/or proceedings in relation to the bad faith conduct in the litigation process, were not allowed. These proposed amendments went well beyond setting out the essential facts and were improperly pleaded. 3) The proposed amendments did not invite the court to re-decide whether a letter was protected by settlement privilege, and the court allowed the amendments. There was no order of costs.

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***R v McGillis*, 2023 SKPC 55**

Lang, 2023-11-29 (PC23055)

Criminal Law - Breach of Undertaking

Criminal Law - Offences Against Person - Assault - Sexual Assault
Criminal Law - Sentencing - Conditional Sentence Order

The accused was convicted at trial of breach of a non-contact undertaking contrary to s. 145(4)(a) of the *Criminal Code* and a sexual assault on the same victim on August 3, 2022 contrary to s. 271 of the *Criminal Code*. The offender and complainant had been in an on again and off again relationship and had two children together. At the time of the offence, the offender was on a non-contact release condition and he and the complainant were consensually staying together in her home. After a lengthy drinking binge together, the complainant went to bed and woke up to the offender manually fondling and penetrating her genital area. She immediately told him to stop, and he complied. The issue was an appropriate sentence.
HELD: In light of recent amendments to s. 742.1 of the *Criminal Code*, a conditional sentence order (CSO) is a lawful sentence for a significant sexual assault under s. 271. The court considered the two Saskatchewan court of appeal cases of *R v Bear*, 2022 SKCA 69 (*Bear*) and *R v Merasty*, 2023 SKCA 33 (*Merasty*) as well as the general principles on availability of a CSO set out by the Supreme Court of Canada in *R v Proulx*, 2000 SCC 5 (*Proulx*). The court further considered the Indigenous backgrounds of both the offender and victim (per *Gladue*) in assessing whether a CSO was available for a penetrative sexual assault. In the unique circumstances of this case, the court ordered a 20-month CSO followed by probation. The court applied *Bear* and *Merasty* regarding the range for this type of sexual assault and concluded that a sentence below the three-year starting point was warranted. Secondly, it applied *Proulx* along with s. 742.1 in concluding that a CSO was a permissible sentence in the circumstances. The offender had no previous criminal record, and there were many other mitigating factors including substantial *Gladue* factors. The offender had been on electronic monitoring and other strict conditions without breach for almost fifteen months prior to sentencing. A 20-month CSO was imposed with substantial conditions followed by 12 months of probation.

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***R v Cote*, 2023 SKPC 59**

Kovatch, 2023-12-11 (PC23058)

Criminal Law - Manslaughter - Sentencing
Criminal Law - Sentencing - Manslaughter - Range

The offender was convicted of manslaughter, contrary to s. 236(b) of the *Criminal Code*, after entering a guilty plea. Following the completion of a pre-sentence report (PSR), the matter came back before the court for sentencing. On the morning of October 12, 2022, both the offender and the victim were inmates at the Regina Provincial Correctional Centre. After hearing that the victim planned to kill him, the offender “sucker punched” the victim in the back of the head, causing him to fall and strike his head on the ground. He died from a brain hemorrhage. Counsel agreed that the general range for sentences in manslaughter cases is four years to 12 years.
HELD: The court concluded that the incident involved a surprise attack from behind that placed the victim at risk of serious personal injury, making this a mid-range manslaughter case. The court considered the case of *R v Laberge*, 1995 ABCA 196 (*Laberge*),

which explains the wide range of sentences for manslaughter, extending from near accidents at one extreme to near murder at the other. It also applied the factors outlined in *Laberge* to assess a degree of moral culpability to place the incident along that spectrum. A sentence of 6.5 years less time served was imposed.

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