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.

Volume 26, No. 7 **April 1, 2024**

Subject Index

***R v Ozipko*, 2024 SKCA 9**

Leurer McCreary Drennan, 2024-02-07 (CA24009)

Administrative Law - Appeal - Saskatchewan Review Board
Criminal Law - Not Criminally Responsible - Murder - Attempted Murder

A Court of Queen's Bench judge found the accused to be not criminally responsible by reason of mental disorder for the offences of murder and attempted murder. He was detained and treated in hospital. After annual reviews and a finding that he no longer posed a significant risk to public safety, the Saskatchewan Review Board (board) transitioned him to the community on certain conditions, and he was granted an absolute discharge. The Crown appealed the decision to grant an absolute discharge, arguing that the board applied the wrong legal test to determine whether there was a significant threat to public safety.
HELD: The Court of Appeal (court) dismissed the Crown's appeal from the board's decision to grant an absolute discharge. Given the individualized risk assessment set out in the jurisprudence and the evidence that the accused had stabilized in the community and was voluntarily engaging with risk

management strategies, it was open to the board to conclude that the high bar for significant risk had not been met.

 Back to top

***Standing Buffalo Dakota First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)*, 2024 SKCA 14**

Leurer Caldwell Tholl, 2024-02-15 (CA24014)

Civil Procedure - Pleadings - Statement of Claim - Striking Out - Appeal
Statutes - Interpretation - *Legal Profession Act, 1990*, Section 30

The parties entered into a contingency fee and retainer agreement. The law firm (respondent) was incorporated and registered as a professional corporation in Alberta. Some of the lawyers were licensed in Saskatchewan. Two-and-a-half years after the retainer agreement was executed, the appellant passed a band council resolution calling for the termination of its relationship with the respondent. According to the respondent, a significant amount of fees and disbursements remained unpaid. The appellant filed an originating application seeking relief related to its outstanding accounts with the respondent. The first paragraph requested a declaration that the contingency fee agreement be declared null and void based on s. 30 of *The Legal Profession Act, 1990* (LPA). The main argument was that because the law firm was an Alberta professional corporation and not licensed or permitted to practice law in Saskatchewan under the LPA, it was prohibited under s. 30 from doing so, rendering the retainer agreement an illegal contract. The chambers judge struck this paragraph of the appellant's claim for failing to disclose a reasonable cause of action, holding that the prohibition under s. 30 applied only to individuals, not corporations. The appellant sought to have the claim reinstated, arguing that the chambers judge misinterpreted the section. The Court of Appeal (court): 1) began with an interpretation of s. 30 of the LPA; and 2) determined whether the chambers judge erred when he found that the paragraph failed to disclose a reasonable cause of action.
HELD: The Court of Appeal (court) upheld the chambers judge's order striking the paragraph for failing to disclose a reasonable cause of action, identified the errors in the chambers judge's interpretation of section 30 of the LPA, and set aside the order of costs. 1) Section 30 contains what appears to be a blanket prohibition on the practise of law in Saskatchewan by anyone who is not a member of the Law Society holding a licence to do so, with exceptions set out in s. 31. The court agreed that corporations cannot become members of the Law Society, but the chambers judge came to the wrong conclusion that s. 30 of the LPA does not apply to corporations on the basis that only individuals are able to engage in the conduct the section describes. The court held that the word "person" in s. 30 refers to

Interpretation - *University of Saskatchewan Student Academic Misconduct Regulations* - Directory or Mandatory

Regulatory Offence - *Traffic Safety Act* - Speeding

Statutes - Interpretation - *Legal Profession Act, 1990*, Section 30

Statutes - Interpretation - *Saskatchewan Human Rights Code, 2018*, Section 35(4)

Statutes - Interpretation - *Traffic Safety Act*, Section 199(1)(b)

Cases by Name

Custer v Saskatchewan Government Insurance

Ernst & Young Inc. v Koroluk

J.R., Re

R v Bone

R v C.L.

R v Ozipko

R v Wurtz

Saskatchewan Human Rights Commission v Saskatchewan Power Corporation

both natural persons and corporations. The court held that when the words of the LPA were read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the LPA, the objects of that Act and the intention of the Legislature, s. 30 unambiguously prohibited "persons other than members who hold a licence" from practicing law in Saskatchewan, and that includes corporations. Section 30(1) bars corporations from practising law in Saskatchewan given the membership and licensing requirements for lawyers under the LPA and Law Society of Saskatchewan Rules (RLSS). The plaintiff's claim was framed around the allegation that the law firm was an Alberta professional legal corporation (PLC). The court concluded that a PLC does not practice law, because a PLC is something less than the equivalent of a typical business corporation under *The Business Corporations Act, 2021*. Lawyers practice law through PLCs, which merely carry on the business of providing the legal services that are performed by lawyers and for which lawyers remain personally and professionally liable. *The Professional Corporations Act* (PCA) strips away the corporate veil, making the lawyer directly and personally liable for his or her conduct and performance of legal services. Only individuals may become authorized by the Law Society to practice law in Saskatchewan; PLCs do not practice law when a licensed lawyer performs the legal services that the PLC provides. 2) The chambers judge correctly determined that the pleadings did not establish the essential elements of the claim. It could not be established under the pleadings that the retainer agreement was an illegal contract. The first paragraph alleged that the retainer agreement was an illegal contract because its performance by the respondent violated the statutory prohibition on unlicensed persons practicing law, given that it was an Alberta PLC and not licensed or authorized to practice law in Saskatchewan. It was uncontroverted that the respondent did not hold a permit under the PCA and the RLSS, but it was also uncontroverted that the lawyers performing services did hold a licence to practise law in Saskatchewan. There was no suggestion in the pleadings or on appeal that any of the lawyers who performed legal services for the plaintiff were not licensed or authorized to practise law in Saskatchewan. The court concluded that no unauthorized practise of law occurs when legal services are performed by lawyers who are authorized to practice law in Saskatchewan. Leurer CJS concurred with the other judges that the appeal should be dismissed but provided different reasons for reaching the same conclusion. Leurer CJS determined: 1) whether s. 30 of the LPA was restricted to individuals; 2) whether s. 30 was rendered inapplicable when a corporation used a licensed lawyer to provide professional services; and 3) if s. 30 applied to corporations, whether it was plain and obvious that the plaintiff could not succeed in the first paragraph of its originating application.
HELD: Section 30 applied to all persons, both individuals and corporations. The application of s. 30 to a corporation could not be avoided by employing a licensed lawyer to provide legal services on its behalf. The first paragraph of the originating application as drafted should be struck because it was plain and obvious that s. 30 could not preclude the recovery of all amounts claimed by the respondents. The appellant was entitled to pursue the argument that s. 30 stood in the way of recovery for some parts of the respondent's legal fees. 1) Leurer CJS agreed that the chambers judge erred in his interpretation of s. 30 when he held that it applied only to individuals and not to corporations. The Legislature provided an unqualified definition of "person" as including a corporation (s. 2-29 of *The Legislation Act*). The LPA used the word "individual" when it referred to a natural person. 2) Leurer CJS did not view the LPA or

Sran v University of Saskatchewan Academic Misconduct Appeal Board

Standing Buffalo Dakota First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)

PCA as meaning that s. 30 did not apply when a corporation used a licensed lawyer to provide professional services. He held that the LPA and PCA worked together to regulate corporations when they provide legal services in Saskatchewan. Professional corporations that were permitted under the PCA could not be found in violation of s. 30 of the LPA. The PCA had no application to the Alberta professional corporation, as it was not incorporated under Saskatchewan's legislation. It was not qualified to be a professional corporation under Saskatchewan law. 3) It was plain and obvious that the plaintiff could not succeed in the first paragraph of its originating application. The first paragraph had to be struck. Based on the pleaded facts and documents referred to in the originating application, the respondent provided at least some professional services that would not be contrary to s. 30.

Back to top

***Saskatchewan Human Rights Commission v Saskatchewan Power Corporation*, 2024 SKCA 13**

Leurer Barrington-Foote Tholl, 2024-02-13 (CA24013)

Administrative Law - Appeal - Boards and Tribunals - Human Rights Commission
Statutes - Interpretation - *Saskatchewan Human Rights Code, 2018*, Section 35(4)

An employee filed a complaint with the Saskatchewan Human Rights Commission (commission) that SaskPower discriminated against him on the basis of disability and failed to accommodate him. The commission applied to the Court of Queen's Bench seeking a hearing of the complaint, alleging that SaskPower had engaged in systemic discrimination of disabled employees. SaskPower successfully applied to have those allegations struck. The chambers judge found that such evidence could be called only if SaskPower admitted liability or if an adjudication had determined that discrimination occurred. The commission appealed from that finding.

HELD: The Court of Appeal (court) allowed the appeal, set aside the order striking the paragraph, and remitted the matter to the Court of King's Bench. The jurisprudence highlighted the need for a broad and liberal approach to be applied to the interpretation of human rights legislation. Section 35(4)(a) of *The Saskatchewan Human Rights Code, 2018* (*Code*) permitted the commission to call evidence of "a pattern or practice of resistance to or disregard or denial of any of the rights secured" by the *Code*. Under common law, propensity evidence is inadmissible if it is sought to be used to suggest that an accused's bad character or prior bad acts make them more likely to have committed the crime. Here, the court preferred to use the term pattern or practice evidence and held that the common law principle that pattern or practice evidence is presumptively inadmissible had been unambiguously displaced by s. 35(4) of the *Code*. The court found that the chambers judge erred in narrowing the scope of the evidence that could be tendered under s. 35(4) of the *Code*. Such evidence was presumptively admissible. The commission should not have been summarily prevented from making its allegations and attempting to tender evidence to prove those allegations.

Back to top

***R v Wurtz*, 2024 SKCA 16**

Leurer McCreary Drennan, 2024-02-22 (CA24016)

Common Law - Presumption of Regularity
Regulatory Offence - *Traffic Safety Act* - Speeding
Statutes - Interpretation - *Traffic Safety Act*, Section 199(1)(b)

The appellant was charged with driving a vehicle at a speed greater than the maximum speed indicated by a properly erected sign, contrary to s. 199(1)(b) of *The Traffic Safety Act* (TSA). The Crown called the police officer who issued the speeding ticket. The officer testified that he estimated the speed of the vehicle at approximately 65 kilometres per hour (km/h), and then activated his radar unit to record a speed of 67 km/h. The officer testified that the posted speed limit was 50 km/h and described the sign. During the trial, the officer could not identify the appellant as the person to whom he issued the ticket. However, the officer testified that when he issued the ticket, he followed his usual practice of checking the driver's licence and the driver. A Justice of the Peace (trial justice) found the appellant not guilty, concluding that the Crown failed to prove both the identity of the individual ticketed for speeding, and that the posted speed limit sign was an "official sign" authorized by the relevant minister of the Crown, as required by the TSA. The Crown appealed the trial justice's decision to the Court of King's Bench. The summary conviction appeal judge entered a guilty verdict in place of the acquittal, finding that the trial justice erred by determining that in-dock identification was required to prove identity, and by failing to apply the presumption of regularity. The Court of Appeal (court) allowed the appellant's appeal on the following questions of law: 1) was in-dock identification of an accused required to establish identity at trial; and 2) could the Crown rely on the presumption of regularity to establish the elements of an offence?
HELD: The court dismissed the appeal. 1) In-dock identification was not required to prove the driver's identity. The Crown was required to prove the identity of the person who had committed the crime and could do so through direct or circumstantial evidence. The circumstantial evidence in this case was sufficient to establish that the appellant was the driver of the vehicle that was stopped by the police officer. 2) The presumption of regularity is the legal doctrine that creates a presumption that bypasses proof regarding the accuracy and creation of documents and the correctness of actions of public officials. The Crown was entitled to rely on the presumption of regularity to establish that the traffic sign here was an official sign under the TSA. The court agreed that the trial justice erred by failing to apply the presumption of regularity to determine that the Crown had proven that the traffic sign was an "official sign."

 Back to top

***Custer v Saskatchewan Government Insurance*, 2024 SKCA 18**

Barrington-Foote Tholl McCreary, 2024-02-27 (CA24018)

Automobile Accident Insurance Act - Appeal - Income Replacement Benefits

The appellant was involved in a motor vehicle accident in 1999 and was injured. At the time, he was working at a remote resort doing various maintenance tasks for 24 hours per day during the week. He was paid $7.00 per hour and the employer provided meals, lodging and housekeeping services. He had his own permanent residence while not at work. He applied for injury benefits with SGI, but the court noted it was unclear when this happened. In 2019, SGI determined that the appellant was entitled to an income replacement benefit (IRB) on his base rate of employment of $7.00 per hour. He was paid that IRB less advances and a deduction for a period of absence from 1999 to the present, indexed annually for inflation. The court noted there was no explanation for the 20-year gap between the accident and SGI's decision. The appellant argued that he was also entitled to the per hour value of room and board. SGI disagreed. The appellant filed a statement of claim with the Court of Queen's bench, appealing SGI's decision not to include the cash value of room and board. The Court of Queen's Bench chambers judge concluded that the room and board allowance paid to the plaintiff was not a benefit under s. 20(d)(vii) of the *Personal Injury Benefits Regulations* authorized by *The Automobile Accident Insurance Act* (*Regulations*). The plaintiff appealed to the Court of Appeal (court), arguing that the chambers judge erred in law by failing to apply the relevant jurisprudence. The respondent argued that room and board was properly categorized as a reimbursement for an expense and was not a benefit under the Regulations. The court determined the meaning of "benefit" in s. 20(d)(vii) of the *Regulations*, and whether it may include room and board provided by an employer to an employee. HELD: The court dismissed the appeal. The chambers judge was correct in his interpretation of s. 20(d)(vii) and the relevant jurisprudence to find that this was not compensation or a benefit received from employment and that there was no income loss to be indemnified, as the allowance for sustenance was revenue neutral.

 Back to top

***Ernst & Young Inc. v Koroluk*, 2024 SKCA 19**

Barrington-Foote Tholl McCreary, 2024-02-27 (CA24019)

Civil Procedure - Appeal - Service - Validating Service
Civil Procedure - *King's Bench Rules*, Rule 12-1

The plaintiff in a prospective class action amended his statement of claim to include the defendant (appellant) but took no steps to serve it on the new defendant. Around 14 months after the amendment, counsel for the appellant learned of the amendment, wrote to plaintiff's counsel, and stated that it considered the claim to have been abandoned. Plaintiff's counsel did not reply but applied

after a further 16 months to have receipt of the amended statement of claim validated as constituting service under Rule 12-1 of *The King's Bench Rules*. The application was granted. The appellant appealed. The Court of Appeal (court) determined: 1) whether service could be validated under Rule 12-1 where the plaintiff made no efforts to serve the appellant; 2) whether mere notice was sufficient to validate service under Rule 12-1; and 3) whether the chambers judge otherwise erred in determining that service should be validated under Rule 12-1.
HELD: The court allowed the appeal and set aside the order validating service. 1) The court noted that Rule 12-1 could not remedy a plaintiff's non-compliance with service requirements imposed by statute. The court held that a plaintiff's attempt at service was an important consideration for a Rule 12-1 application to validate service, and that a complete lack of any attempt at service would justify the denial of the application absent exceptional circumstances. Here, it was uncontroverted that the plaintiff made no effort to serve the appellant with the amended statement of claim. 2) The court found that the mere fact that a defendant had obtained a copy of an unserved statement of claim, without examining the surrounding circumstances, was an insufficient basis for an order validating service. 3) The court found that the chambers judge erred by not considering the totality of the circumstances and by misinterpreting Rule 12-1. The chambers judge considered only the fact of the appellant's knowledge of the claim and prejudice. The context here was over two and a half years passing between the issuance of the amended statement of claim and the Rule 12-1 application. The mere presence of the document in the hands of the appellant in these circumstances was not enough to validate irregular service.

Back to top

***R v Bone*, 2024 SKCA 21**

Schwann McCreary Drennan, 2024-03-05 (CA24021)

Criminal Law - Assault - Sexual Interference - Conviction - Appeal
Appeal - Grounds - Misapprehension of Evidence
Appeal - Grounds - Propensity Reasoning

The appellant, T.W.B., had been accused by both his granddaughter, A.W., and one of A.W.'s friends (the complainant) of having touched them in a sexual manner. T.W.B. stood trial on charges of sexual assault and sexual interference relating to both girls, but the Crown stayed the charges relating to A.W. at the end of its case. He was convicted of both sexual interference and sexual assault, but the court stayed the latter conviction. Initially, T.W.B. appealed both his conviction and sentence of 12 months' imprisonment followed by 18 months of probation and registration under SOIRA, but at the appeal hearing, he abandoned the sentence appeal. His grounds of appeal included that the trial judge had misapprehended the evidence such that it materially affected her determination of credibility, leading to incorrect findings of fact; erred in law in assessing his credibility; and "engaged in propensity reasoning." The court summarized the alleged errors of the trial judge as follows: "(a) misapprehending or misstating the evidence; (b) making material errors in her assessment of the witnesses' credibility; (c) misapplying the test for assessing credibility as set out in *W.(D.)*; (d) failing to provide sufficient reasons for her finding relating to witnesses' credibility; (e) engaging in propensity

reasoning; and/or (f) coming to a verdict that was not reasonably supported by the evidence."
HELD: The court dismissed the appeal. (a) For a trial judge's misapprehension of the evidence to meet the standard of appellate intervention, the misapprehension must relate to an important factor in the decision. T.W.B. argued that the trial judge misunderstood the significance of the discrepancies in the complainant's testimony on different occasions regarding the duration of the alleged touching. The court did not agree, finding the trial judge had acknowledged in her reasons that on this one point, the complainant's evidence might not be reliable. T.W.B. alleged several other instances of alleged misapprehension, but the court found that the trial judge addressed the evidence appropriately in her reasons, and they could find no error. (b) T.W.B. took exception to some of the comments the trial judge had made about his testimony in her reasons, arguing these showed she had improperly based her findings of his credibility on "perceived inconsistencies." The court found that many of these remarks were *obiter* or otherwise not central, i.e., they did not form the basis of the trial judge's conclusions regarding his credibility. The court agreed with T.W.B. that the trial judge had improperly taken notice of the effects of withdrawal from alcohol: she wrote that she did not believe T.W.B. could have stopped drinking as abruptly as he claimed, and this indeed affected her assessment of his credibility. However, it was only one among many other considerations, and the court found the trial judge had made no palpable or overriding error. (c) The trial judge had applied *W.(D.)* correctly. i) She had instructed herself with respect to the importance of credibility and reliability in trying sexual assault cases. She was detailed in her reasons as to why she disagreed with T.W.B.'s arguments. ii) She was satisfied that the complainant had been consistent in her account that there had been multiple offences. T.W.B. argued that she had only alleged it happened once in a police interview, but the officer had taken inadequate notes. iii) She did not accept T.W.B.'s arguments about the demeanour of the complainant's mother, whose testimony was emotional. The trial judge found this understandable and was not surprised by inconsistencies in her version of events, since she had not been a witness to the offences. iv) The trial judge outlined various inconsistencies in T.W.B.'s evidence in her reasons. (d) The reasons were sufficient. It was not the role of the court to scrutinize lower courts' reasons for error. (e) T.W.B. argued the trial judge had engaged in propensity reasoning when the complainant had alleged that T.W.B. assaulted her on several occasions, not just the one in the indictment, and the trial judge accepted this as evidence of his bad character. The court found that most evidence of T.W.B.'s history of physical contact with the children (in the form of hugging and tickling) had been proffered by the defence. The complainant had testified that she did not believe the offences had happened by accident, as T.W.B. argued, because "[i]t happened way too many times" to be accidental. The significance of this evidence was not, as T.W.B. suggested, to persuade the trial judge he was likelier to be guilty because of his past behaviour: it was in response to his defence that the offences had been accidental. The complainant's testimony and the whole of the evidence informed the trial judge's decision, and no evidence showed she was prejudiced by his alleged prior acts. (f) The court reiterated the standard of review, citing *R v Biniaris*, 2000 SCC 15: "The reasonableness of a verdict is a question of law" as well as *R v Owston*, 2023 SKCA 101. An appellate court must defer to a trial judge's findings of fact in assessing the reasonableness of a decision. The court stated, "intervention is permissible on the basis that a credibility-based verdict is unreasonable if a trial judge's "assessments of credibility cannot be supported on any reasonable view of the evidence" and referred to *R v Burke*, [1996] 1 SCR 474. T.W.B. had not met this high threshold.

Back to top

***R v C.L.*, 2024 SKCA 25**

Schwann Tholl Kalmakoff, 2024-03-06 (CA24025)

Criminal Law - Sexual Assault - Sexual Interference - Conviction - Appeal
Criminal Law - Evidence - "Common Sense" Assumptions

The appellant, C.L., was convicted after trial of sexual assault, contrary to s. 271 of the *Criminal Code*, and sexual interference, contrary to s. 151. Pursuant to *R v Kienapple*, the trial judge stayed the sexual assault charge. C.L. appealed his conviction, arguing the trial judge erred: a) by relying on impermissible assumptions and stereotypes to reach her decision; b) drawing inferences from bad character evidence to find guilt; c) failing to address important defences he had advanced in her reasons; and d) applying an uneven level of scrutiny to his evidence and the complainant's. The complainant described the events that gave rise to the charges as follows: C.L, her stepfather, had taken her to Saskatoon to buy a bathing suit. She alleged he had abruptly opened the changing room door to hand her another bathing suit while she was in the midst of trying one on. While they drove home to the small town where they lived, the complainant alleged that C.L. had talked about sexual subjects that made her uncomfortable. Once home, she alleged that C.L. had hugged her for a very long time, again making her uncomfortable. Later that evening, she alleged that he had followed her to her bedroom, showed her "how to pose like an Instagram model;" "spooned" with her while she was watching a movie; and finally felt her breasts and buttocks and penetrated her anus and vagina with his fingers and possibly with his penis. C.L., testifying in his own defence, denied that he had said anything inappropriate on the ride home, explaining that he had raised the subject of the importance of safe sex; that he had hugged the complainant; that he had shown her how to pose for Instagram; or that he had penetrated her vagina or anus. The trial judge found the complainant's evidence detailed and compelling, whereas she found that C.L.'s testimony was "selective, self-serving, and lacked credibility."
HELD: The court found that the trial judge had made unfounded "common sense" assumptions regarding the complainant's evidence that led to her finding of guilt, as C.L. asserted in his first ground of appeal. His appeal must be allowed. A trial judge's credibility findings are findings of facts, not law, and thus entitled to deference on appeal; however, where such findings are based on a wrong legal principle or irrelevant considerations, there is a reversible error of law. The court quoted from *R v JC*, 2021 ONCA 131 (*JC*), for discussion of "two overlapping rules about prohibited forms of reasoning in connection with the plausibility of human behaviour" (the court). The first "prohibits judges from using "common sense" or human experience to introduce new considerations, ***not arising from evidence***, into the decision-making process, including considerations about human behaviour" (*JC*, para 61, emphasis the court's). Secondly, "…it is an error of law to rely on stereotypes or… assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility" (*JC*, para 63). The court found that the trial judge had not relied on any evidence led at trial to conclude in her reasons that it was "inconceivable that a 14-year-old making false allegations would have the wherewithal to tie them to an otherwise ordinary day nine months in the past." It was also an error to assume that a discussion between a parent figure and a teen about safe sex would never take on a "jocular tenor." The Crown argued it was appropriate for the trial judge to take "a common sense approach" in considering a child's testimony; however, the court found that the jurisprudence did not support the conclusion that all children were incapable of lying. The Crown suggested that the trial judge's findings of credibility were not reversible on appeal. The court found that the Crown would be correct if the trial judge

had found, based on the evidence, that this specific complainant was incapable of lying; however, the finding per her reasons was that it was inconceivable for any 14-year-old to tell sophisticated lies, and this statement went far beyond what the evidence showed. Finally, the Crown argued that the trial judge's finding was not material to C.L.'s conviction. The court found it was clear that the trial judge engaged in generalization about 14-year-olds and this reasoning recurred in her reasons; that her commentary on that subject was not incidental to her ruling; and that it led her to dismiss C.L.'s defence that the complainant had fabricated evidence. The court set aside C.L.'s conviction and ordered a new trial.

Back to top

***Sran v University of Saskatchewan Academic Misconduct Appeal Board*, 2024 SKCA 32**

Leurer Tholl Drennan, 2024-03-20 (CA24032)

Administrative Law - Judicial Review - Standard of Review - Reasonableness
Administrative Law - Jurisdiction - Undue Delay - Prejudice - Procedural Fairness
Interpretation - University of Saskatchewan Student Academic Misconduct Regulations - Directory or Mandatory

H.S. and J.W. (the appellants) were medical students at the University of Saskatchewan who had been found guilty of academic misconduct by the University of Saskatchewan College of Medicine Hearing Board (board). They argued that it took over seven months to hear their matter, and s. VII.A.3 of the university's *Regulations on Student Academic Misconduct* (the regulation) prescribed that their hearing should have been heard within 60 days of receipt of the complaint. They made the same argument on appeal to the University of Saskatchewan Academic Misconduct Appeal Board (appeal board) and, when the appeal board upheld the board, applied for judicial review of this decision at the Court of Queen's Bench (see: 2021 SKQB 291). The appellants argued that the Queen's Bench judge (chambers judge) erred: 1) in interpreting the regulation as directory rather than mandatory; and 2) finding, therefore, that the delay in the board's hearing was not a breach of procedural fairness. The court summarized the questions it must determine as whether: A) the chambers judge identified the correct standard of review for the appeal board's finding that the regulation was directory; B) the appeal board erred in its interpretation of the regulation; C) the chambers judge erred in concluding that the board's hearing process was fair.
HELD: A) The initial question to be decided was whether the chambers judge applied the appropriate standard of review. Both parties took the position that correctness was the proper standard. The chambers judge concluded that correctness was the standard to adopt upon considering *Akpan v The University of Saskatchewan Council*, 2021 SKCA 129 (*Akpan*) and cases following it. The court rejected the appellants' argument that correctness was the proper standard given that the appeal board decision hinged on statutory interpretation. *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) affirmed that reasonableness is the correct standard for most questions arising on judicial review, "including… when a decision maker interprets its enabling statute." The Supreme Court also stated it "would cease to recognize jurisdictional questions as a distinct category attracting correctness review." The court conceded that *Akpan* might seem to direct a correctness review but indicated that *Akpan* dealt with two different issues: the first concerned a breach of procedural fairness and the second, consideration of whether the chambers judge erred with

respect to how the College of Nursing assessed an allegedly plagiarized paper and how the student defended himself. The latter question not being one of procedure, it attracted a reasonableness standard. In the court's view, the instant case did not present a reason to depart from the reasonableness standard dictated by *Vavilov*, so the chambers judge had erred. B) At this stage, the court "stepped into the shoes" of the chambers judge to consider whether the appeal board erred in its interpretation and cited *Danychuk v University of Regina*, 2022 SKCA 146 (*Danychuk*), for insight into the reasonableness standard. Quoting *Vavilov*, *Danychuk* emphasizes that the decision must not only be justifiable: the decision maker's reasons must justify the outcome of the decision. While the regulation was not legislation, the same principles of interpretation applied (see: s. 2-10 of *The Legislation Act*). The court agreed with the appellants that the regulation's language, stating a hearing "will" occur within 60 days, can be seen as imposing an obligation. The appeal board also granted this, having considered the contrasting language of other parts of the *Regulations on Student Academic Misconduct*, but nonetheless found that it did not justify interpreting the regulation as setting a mandatory deadline. The appeal board considered the *Regulations* as a whole, their object and intention, and the crucial importance of academic integrity and was "wary of excusing potential academic misconduct by a strict application of what would essentially be a "scheduling issue" or a technical breach" (the court, para 47). The appeal board's conclusion was reasonable. C) The appellants framed their third ground around the board's hearing process, but it was the appeal board's decision that was under judicial review. Pursuant to the *Regulations*, the University Secretary had permitted the appeal to the appeal board on the question of jurisdiction. The appeal board did make observations on the issues of delay and procedural fairness in their decision, however, pointing out that the students did not present evidence of prejudice. The court cited *Akpan* for the point that even where a provision is determined to be directory and not mandatory, relief may still be available in cases of non-compliance. The appellants had relied on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*) before both the board and the appeal board to argue that they had a "legitimate expectation" that their matter would be heard in a timely manner. The university argued that there had been a hearing, the panel had posed questions, and the students had had a chance to rebut presentations, and thus they had had a fair hearing. The court explained that *Baker* did not apply to the question considered by the board and the appeal board. Both boards were to consider whether the delay was undue in the context of *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44. The board did so, found the delay was not undue and the appellants had not demonstrated that they suffered prejudice, and the appeal board affirmed this. There were legitimate reasons for the delay, including lockdowns during the COVID-19 pandemic and adjournments allowing the parties to retain counsel and counsel to inform themselves. The appeal was dismissed, with one set of costs jointly and severally payable by the appellants.

Back to top

***J.R., Re*, 2024 SKKB 21**

Brown, 2024-02-13 (KB24016)

Child Protection - Application to Dispense with Service

The Ministry of Social Services (ministry) applied for an order dispensing with service on the father of J.R., a child found in need of protection, pursuant to s. 77 of *The Child and Family Services Act* (CFSA).
HELD: The court found that it did not have adequate evidence before it to grant the order. The ministry had only filed evidence that the mother, B., had not disclosed the identity of J.R.'s father to them and that there is no father indicated on J.R.'s birth certificate. The court appreciated that it is often difficult for the ministry to effect service on parties to child protection matters but noted that subsection 77(10) of the CFSA directs "reasonable diligence" be used "to ascertain the existence of all persons to whom notice should be given." In this case, that diligence entailed, at the very least, that the ministry ask B. follow-up questions, such as why she was not aware who the father was, or whether she indeed knew who the father was but felt it was in her and J.R.'s best interests not to have contact with him. The ministry had not lost contact with B. and ought to discuss the question of J.R.'s father with her to provide the court with more information to determine whether "it is reasonable to conclude his identity is not ascertainable" (para 15). Whatever his circumstances, the father had a right to participate in the proceedings, and service on him could not be dispensed with so lightly.

 Back to top