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. 9 **May 1, 2024**

Subject Index

Administrative Law - Municipal Bylaw - *Ultra Vires*

Barristers and Solicitors - Duty to Client - Conflict of Interest

Barristers and Solicitors - Solicitor/Client Privilege

Civil Procedure - Interlocutory Injunction

Civil Procedure - *King's Bench Rules*, Rule 3-49(1)(a)

Code of Professional Conduct, Rule 3.4 - Conflict of Interest

***R v Ukabam*, 2024 SKCA 15**

Richards Schwann Barrington-Foote, 2024-02-16 (CA24015)

Criminal Law - Evidence - Similar Fact Evidence - Admissibility
Criminal Law - Sexual Assault - Acquittal - Appeal

The Crown appealed a decision of a Court of Queen's Bench judge (trial judge) which acquitted S.U. (the respondent) of seven counts of sexual assault against five different women (see: 2022 SKQB 128). The charges arose out of actions of an allegedly sexual nature performed by the respondent in his professional capacity as a gastroenterologist during various medical examinations or procedures. In its appeal from acquittal, the Crown argued that the trial judge made three fundamental errors that individually or collectively had an impact on the verdict: 1) the trial judge's fact-finding process was flawed when he instructed himself that he was not permitted to use common sense or take judicial notice of the idea that a woman can differentiate the sensation between the sensation of vaginal and anal penetration; 2) the trial judge erred in

Constitutional Law - *Charter of Rights*, Section 7 - Disclosure - Full Answer and Defence - Stay of Proceedings

Constitutional Law - *Charter of Rights*, Section 7, Section 8, Section 11(d), Section 24(2)

Constitutional Law - Validity of Legislation

Courts - Judges - Disqualification - Bias

Courts - Judges - Duties

Criminal Law - Adjournment

Criminal Law - Evidence - Similar Fact Evidence - Admissibility

Criminal Law - Obstruction of Justice - Acquittal - Appeal

Criminal Law - Private Communications - Wiretap

Criminal Law - Resisting Arrest

Criminal Law - Resisting Arrest - Arrest Without Warrant

Criminal Law - Sentencing - Aboriginal Offenders

Criminal Law - Sentencing - Manslaughter

Criminal Law - Sentencing - Parole Eligibility

Criminal Law - Sentencing - Sentencing Principles

Criminal Law - Sexual Assault - Acquittal - Appeal

his similar fact evidence analysis – most notably, his alleged failure to consider the probative value of the evidence and that it did not have to be free of reliability concerns in order for it to be admitted; and 3) the trial judge erred in admitting and relying on expert evidence about memory formation and retention. 4) Lastly, the court conducted an analysis to determine whether the alleged errors committed by the trial judge had any material bearing on the acquittal.
HELD: The court held that since the case before it was a Crown appeal from an acquittal pursuant to s. 676(1)(a) of the *Criminal Code* and was limited to questions of law alone, an allegation of error must be traced to a question of law and not to a question of fact (*R v Chung*, 2020 SCC 8) [2020] 1 SCR 405). Errors of law are reviewed by an appellate court on a standard of correctness (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235). It is an error of law for a trial judge to make a finding of fact for which there is no supporting evidence (*R v J.M.H.*, 2011 SCC 45, [2011] 3 SCR 197 [*J.M.H.*]). Credibility and reliability findings involve questions of fact, not law. As such, assessments of credibility are subject to a highly deferential standard of review (*R v Wolff*, 2019 SKCA 103, 380 CCC (3d) 223). However, relying on myths, stereotypes, or unfounded inferences to ground an assessment of credibility or reliability is an error of law and are therefore reviewed on the standard of correctness (*R v Murillo*, 2023 SKCA 78, 89 CR (7th) 129). The admissibility of evidence is a question of law and is therefore reviewed on appeal on the standard of correctness. This includes the question of whether the trial judge applied the proper legal test to decide the evidentiary issue. However, a determination of the admissibility of similar fact evidence turns on a balancing of the probative value of such evidence against its prejudicial effects. This process engages the exercise of discretion, which courts have repeatedly said is entitled to substantial deference (*R v Handy*, 2002 SCC 56, [2002] 2 SCR 908 [*Handy*]; *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33; *R v Arp*, [1998] 3 SCR 339). The court also stated that absent an error in principle or a material misapprehension of the evidence, appellate courts owe a measure of deference to a trial judge's decision to admit or reject expert evidence (*R v D.D.*, 2000 SCC 43, [2000] 2 SCR 275; *R v R.D.*, 2014 ONCA 302, 312 CCC (3d) 363; *R v Chung*, 2018 SKCA 70). 1) The court was not persuaded by any of the Crown's various arguments under its first ground of appeal, including those suggesting that the trial judge improperly relied on assumptions and stereotypes in his reasoning. The trial judge was required, as a matter of law, to be guided by the principle of reasonable doubt and to carefully assess the Crown's case to determine if, based on the admissible evidence, it had proven the charges against the respondent beyond a reasonable doubt. The court interpreted this part of the trial judge's decision to reflect an understanding of those bedrock principles. 2) The court concluded that the trial judge did err in his assessment of the Crown's application to admit similar fact evidence. Under this ground of appeal, the Crown advanced the following arguments: A) the trial judge made an error with respect to issue identification. The court stated that it was satisfied from the trial judge's reasons that he grasped the purpose underpinning the Crown's application. The trial judge understood but ultimately did not agree that it was to show the improbability of coincidence. The court saw no error with the trial judge's issue identification in that regard; B) In its written argument, the Crown asserted that

Criminal Law - Stay of Proceedings - Judicial Stay - Non-Disclosure

Criminal Law - Weapons - Carrying a Concealed Weapon

Family Law - Child Support - Appeal

Family Law - Child Support - Determination of Income - Imputing Income

Family Law - Child Support - Intentional Underemployment

Injunction - Interlocutory - Appeal

Injunction - Interlocutory Injunction - Requirements

Insurance - Contract - Interpretation

Insurance - Designation of Beneficiary

Insurance - Property Insurance

Interim Injunction - Appeal

Municipal Law - Bylaws - Validity

Municipal Law - Bylaws - Validity - Bad Faith

Municipal Law - Property Tax

Practice and Procedure - Small Claims - Default Judgment - Setting Aside

Statutes - Interpretation - C*hild and Family Services Act*, Section 14(4), Section 17(4)(b)

the trial judge "put the cart before the horse" in determining the weight he should have assigned to the evidence of each complainant before he assessed admissibility of the similar fact evidence." By proceeding in this fashion, the Crown said that the trial judge erred by instructing himself to make a final reliability assessment without considering whether the reliability of each complainant might be enhanced by the admission of similar fact evidence. In the Crown's view, the logical progression of this approach caused the trial judge to ignore the probative value of the similar fact evidence in making his reliability findings. The Crown asserted that the trial judge confused threshold admissibility of the proposed similar fact evidence with the weight he would assign to it if it were admitted. The court held that the failure to consider whether the proposed similar fact evidence was reasonably capable of belief at the admissibility stage reflected an error of law. The trial judge failed to correctly identify and thus failed to apply the law on this point. However, the mere fact that he erred in this way was not enough to answer the question as to whether it had a material bearing on the acquittal. C) The Crown also asserted that the trial judge erred in his admissibility analysis by requiring the complainants' respective testimonies to bear a striking similarity to each other for that evidence to be regarded as cogent and probative. The Crown said that the fact that the complainants saw the respondent at different times, had different medical histories, presented with different medical issues, or were allegedly assaulted in somewhat different ways, was a too-exacting threshold. The trial judge's conclusion on this point, the Crown submitted, did not accord with the jurisprudence that has evolved in doctor-patient cases. The court held that the trial judge failed to appreciate that it was not necessary that the time, place and nature of the alleged sexual touching be highly similar for it to be admissible as similar fact evidence. Further, the court stated that in determining the probative value of the similar fact evidence, it found that the trial judge focused too narrowly on the dissimilarity of the history and detail of each allegation, rather than directing his mind to the similarity of the surrounding circumstances and the Crown's allegation that the respondent had imported sexual conduct into his practice. That was a legal error that played a role in the trial judge's conclusion that he would not grant the Crown's application to admit the similar fact evidence of any of the complainants. D) Although the trial judge instructed himself to consider the probative value and prejudicial effect of the proposed evidence, the Crown alleged his analysis was bereft of anything more than superficial and conclusory statements. The Crown said that the trial judge failed to appreciate that the value of the proposed evidence lay in the objective improbability that all five women had misinterpreted what they had felt and that something akin to a striking similarity of the alleged actions was not required. The court held that the trial judge performed an analysis of the reliability of the proposed similar fact evidence that went beyond what was required at the threshold stage. The trial judge instructed himself that unreliable evidence cannot be used to support other unreliable evidence. If the trial judge meant that evidence so unreliable that it is not even reasonably capable of belief cannot be used this way, he would be correct. However, if the trial judge meant that evidence containing some reliability concerns could never be admitted as similar fact evidence, that would be an error of law. The court concluded that the trial judge did, in fact, err

Statutes - Interpretation - *Criminal Code*, Section 495(1)(a)

Statutes - Interpretation - *Criminal Code*, Section 745

Statutes - Interpretation - *Public Health Act, 1994*, Section 38, Section 45, Section 46

Statutes - Interpretation - *Small Claims Act, 2016*, Section 42

Trusts and Trustees - Trust Agreement – Interpretation

Cases by Name

3sHealth v Canadian Union of Public Employees

Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.

GSI Global Shelters Developments Ltd. v Last Mountain Valley (Rural Municipality No. 250)

Koop v Edwards

Korf v Canadian Mortgage Servicing Corporation

Mann v AgraCity Crop & Nutrition Ltd.

Mann v Mann

Patel v Van Olst

R v Fox

in such a way. E) As to the prejudice component of the test, the Crown alleged that the trial judge never engaged with this issue beyond identifying it in the most generic terms and in a conclusory fashion. The error, according to the Crown, lay in the trial judge's failure to acknowledge that prejudice was unlikely to exist because this was a judge-alone trial, that he had already heard the evidence and that he failed to explain his reasons in this regard. The court held that the trial judge's reasoning did not constitute a conclusory statement. On the contrary, the trial judge explained why he thought the applicable test should apply. Further, the court stated that the issue with the trial judge's reasoning was not the manner in which he weighed the probative value of the evidence against the potential prejudice, a decision that is reviewable on a deferential standard, but the errors relating to reliability and similarity that led him to conclude that, on a balance of probabilities, prejudice precluded the use of this evidence as similar fact evidence. However, the Crown's argument was ultimately rejected as it found that the trial judge was alert to the legal principles that govern the admissibility question, and the need to balance probative value and prejudice. The Crown's focus on the trial judge's conclusion ignored the need for appellate courts to take a functional and contextual reading of a trial judge's reasons. F) Lastly, on this ground of appeal, the Crown asserted that the trial judge relied on the unsupported theory of what it calls "unconscious collusion" to discount the probative value of the similar fact evidence. The Crown made two arguments in relation to this ground of appeal. First, unintentional or unconscious collusion is not the same thing as collusion within the meaning of *Handy*. Second, the trial judge's assessment of the complainant's testimony on this point was tainted by factual error because there was no evidence that the complainants were aware of the details of each other's allegations before they came forward to the police, only that there had been complaints about conduct of a sexual nature. The Crown said their original complaint could not have been altered in any meaningful way. Ultimately, the court was not persuaded by the Crown's arguments. While it was fair to say the Supreme Court in *Handy* focused its attention on the impact of collusion, it did so in the context of the application of the law to the facts of that case. Setting aside the specific facts in *Handy*, the court did not take the Supreme Court to have placed hard boundaries around the idea of what constitutes collusion for the purposes of a similar fact evidence application. Its approach, rather, focused on the effect of the alleged collusion on the proposed evidence. The court then stated the question is whether the probative value of the similar fact evidence was impaired because, as in the particulars of that case, the collusion rebutted the premise on which admissibility depended – being the improbability of coincidence where there is an air of reality to the allegations of collusion. The Crown is required to satisfy the trial judge, on a balance of probabilities, that the evidence of similar facts is not tainted with collusion. Nor was the court persuaded by the Crown's second argument, that the trial judge's conclusion was driven by his improper assessment of the complainant's evidence. The court stated that while the assessment of evidence may in an instance such as this give rise to an error of law, the Crown had not offered any explanation for how this alleged factual error constituted an error of law within the meaning of *J.M.H.*, nor was the court able to discern one. The Crown's right of appeal

R v Friesen

R v Maurer

R v Miller

R v Picken

R v Traverse

R v Ukabam

R v Walls

Radius Credit Union Limited v Saskatchewan Government Insurance

Yeung v Bui-Yeung

Zagime Anishinabek Child and Family Wellness v Welter

Disclaimer: All submissions to Saskatchewan courts must conform to the *Citation Guide for the Courts of Saskatchewan*. Please note that the citations contained in our databases may differ in style from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

from acquittal under s. 676(1)(a) of the *Criminal Code* is restricted to questions of law. The Crown's failure to trace the alleged factual errors to a question of law was determined to be fatal to its argument. 3) On this last ground of appeal, the court noted that the respondent sought to have S.R. qualified to provide expert opinion evidence on memory and the effects of drugs on memory. However, the Crown asserted that the trial judge erred by qualifying S.R. to provide an opinion about memory and reconsolidation when he did not possess sufficient or any expertise in such matters. In summary, the court did not give effect to the Crown's argument with respect to the expert evidence. The points raised on appeal were determined to be little more than a veiled attempt to have the court substitute its own decision for that of the trial judge. The court stated that it was open to the trial judge to conclude that S.R.'s evidence about memory and memory reconsolidation was necessary and that it would assist him in his assessment of the complainant's reliability. That decision was found to be entitled to deference on appeal. Lastly, the court determined that there was no failure by the trial judge at the gatekeeper stage. At the gatekeeper stage, the trial judge exercises a residual discretion to exclude expert evidence after having considered whether the benefit of admitting the evidence outweigh its potential risks (*R v Abbey*, 2017 ONCA 40, 350 CCC (3d) 102). The Crown alleged the trial judge failed to fulfill his gatekeeping role. The court refused to give effect to the Crown's argument and said the trial judge instructed himself to weigh the probative value of the proposed evidence against its prejudicial effect in the trial decision. Nothing turned on the fact that the trial judge did not characterize this part of his analysis as constituting the exercise of his final gatekeeper function or structure his reasons so that the balancing exercise was his final consideration in the admissibility analysis. 4) The court concluded that while the errors made by the trial judge had an impact on his decision not to admit the similar fact evidence, the Crown has not established that those errors might reasonably be thought to have had a material bearing on the acquittal. Even if the trial judge had admitted the cross-count similar fact evidence, it would not have been sufficient to have enabled him to conclude that the Crown had proven any of the offences beyond a reasonable doubt. The Crown's appeal was dismissed.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Maurer*, 2024 SKCA 20**

Caldwell Schwann Drennan, 2024-02-28 (CA24020)

Criminal Law - Resisting Arrest
Criminal Law - Resisting Arrest - Arrest Without Warrant
Criminal Law - Weapons - Carrying a Concealed Weapon
Statutes - Interpretation - *Criminal Code*, Section 495(1)(a)

The appellant appealed to the Court of Appeal against convictions entered after trial in Provincial Court on charges that he resisted arrest, wounded a law enforcement animal, and carried concealed weapons. In the appeal hearing, the appellant confirmed that he had abandoned the appeal against the sentences for the convictions as he had served the imposed sentences.
HELD: The appeal was dismissed. (1) The trial judge did not err in finding that the police had reasonable grounds to believe that Mr. Maurer had committed an indictable offence. The police had a specific, detailed complaint and other information alleging a sexual assault had occurred and implicating Mr. Maurer. The police also had a first-hand opportunity to assess the complainant's credibility and reliability of her allegation while Mr. Maurer had declined to cooperate with the investigation into the complaint. While the evidence adduced in the sexual assault trial could lead to inferences other than Mr. Maurer's guilt, said evidence did not assist in the evaluation of the lawfulness of his arrest. (2) The trial judge did not err in finding that the police used reasonable force in arresting Mr. Maurer. The police are entitled to use as much force as necessary to effect their lawful purpose under Section 25 of the *Criminal Code*. Mr. Maurer fleeing from the uniformed police officers who had identified themselves and advised him that he was under arrest gave the police sufficient reason to deploy a law enforcement animal to effect his arrest.

© The Law Society of Saskatchewan Libraries Back to top

Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd., **2024 SKCA 22**

Leurer Tholl Kalmakoff, 2024-03-05 (CA24022)

Civil Procedure - Interlocutory Injunction
Injunction - Interlocutory - Appeal
Injunction - Interlocutory Injunction - Requirements
Interim Injunction - Appeal

The two appeals in this case were connected to ongoing, multi-fronted litigation between the parties. In this instance, the two appeals were against interim orders made by the Court of Queen's Bench judge supervising the ongoing litigation between the parties. The appellant appealed against an injunction setting out the terms relating to the sale of "memberships" in the appellant organization pending the resolution of more fundamental matters in dispute (first membership injunction). The appellant also appealed against an injunction clarifying and expanding upon the first membership injunction (second membership injunction). The appellant sought to substitute these injunctions with an injunction on the terms it requested when the applications leading to the first membership injunction first came before the chambers judge.
HELD: The appeals were dismissed. (1) The chambers judge did not err by applying the wrong test for the grant or refusal of an injunction. The chambers judge in his decision referred to the legal test for a mandatory injunction, which a part of the appellant's application could be read as seeking. Nevertheless, assuming the chambers judge wrongly considered the appellant's application through the lens of a mandatory injunction, such mistake was of no consequence as the chambers judge granted the key relief sought by the appellant in terms nearly identical to those the appellant requested. Furthermore, the appellant's request was denied by the chambers judge on the basis that the judge was unconvinced that the appellant would suffer irreparable harm if such relief were refused. The outcome of the appellant's application was not impacted by the chambers judge using the strong prima facie test. (2) The chambers judge did not err by failing to recognize that a membership organization has the exclusive right to the control

of its membership fee. The cases relied upon by the appellant related to entities that were constituted differently and the legal principles applicable to those other types of organizations did not give rise to the right claimed by the appellant. (3) The trial judge did not err by failing to act as a conservator or fiduciary between the parties. (4) The trial judge did not err in law by failing to decide a point of controversy between the parties. The appellant's statement of claim did not contain an express request for an order or declaration pertaining to ownership of membership lists or intellectual property and there was no basis for the chambers judge to have made a final determination of parties' rights on this controversial issue. (5) The chambers judge's finding that the appellant did not provide detailed financial information to support its positions regarding membership pricing was not a palpable and overriding error, as the evidence provided did not contain the lengthy explanation and interpretation required to understand the financial information. New evidence sought to be adduced by the appellant did not satisfy the legal test required for an appellate court admitting evidence not before the court whose judgment is under appeal. (6) The chambers judge acted judicially. (7) The first membership injunction did not create an injustice. The chambers judge did the best that could be done, in the face of a heavily controverted record, to outline an equitable business arrangement pending final resolution of the matter through trial, summary judgment or settlement. The chambers judge also accounted for the possibility of amending or changing the decision. (8) With respect to the second membership injunction, the arguments by the appellant misidentified the fundamental issue. The appellant's submissions centred around relitigating the grant of the first membership injunction.

© The Law Society of Saskatchewan Libraries Back to top

***Mann v AgraCity Crop & Nutrition Ltd.*, 2024 SKCA 23**

Leurer Tholl Kalmakoff, 2024-03-05 (CA24023)

Civil Procedure - Interlocutory Injunction
Injunction - Interlocutory - Appeal
Injunction - Interlocutory Injunction - Requirements
Interim Injunction - Appeal

The appeal was in relation to multi-fronted litigation involving the parties, of which most parts remained ongoing. A chambers order was made at the beginning of the litigation preserving the status quo of the business arrangement between the respondents and Farmers of North America (the Danyliuk order). In early 2020, the appellant applied for orders that, if granted, would have interpreted or varied the order. The 2020 application was dismissed.
HELD: The appeal was dismissed. (1) The chambers judge did not mischaracterize the relief sought by the appellant. The purpose of an appellate court is to review the way the court interprets a court order by applying a correctness standard of review. The Danyliuk order was properly understood as directing the maintenance of the respondent's ordinary course of business as of the date of the order and there was no room to "interpret" or "clarify" it to mean something else. (2) The chambers judge did not err by not making a finding regarding the operating protocol between Farmers of North America and the respondents. The arguments made by the appellant sought a different order without attempting to pass such amendment through the applicable test when a variation is requested.

© The Law Society of Saskatchewan Libraries
Back to top

***Mann v Mann*, [2024 SKCA 24]**

Leurer Tholl Kalmakoff, 2024-03-05 (CA24024)

Civil Procedure - Interlocutory Injunction
Injunction - Interlocutory - Appeal
Injunction - Interlocutory Injunction - Requirements
Interim Injunction - Appeal

The appeal was against the dismissal of an application to prevent the respondents from independently participating in the Ag in Motion agricultural trade show in 2022 pursuant to a 2019 Court of King's Bench Order to carry on the ordinary course of business. The appeal was moot, but the parties requested that the appeal be decided because the issue of the respondent's independent participation in trade shows was likely to arise again in the context of their ongoing relationship.
HELD: The appeal was dismissed. (1) The chambers judge did not misconstrue the nature of the application by treating the application as one seeking an interlocutory injunction. The essence of the relief the appellants were seeking precisely fit the description of an interlocutory injunction as the request was only intended to preserve the status quo arrangements between the parties pending the resolution of the substance of their dispute. The chambers judge was not wrong to judge the matter before him on that basis. (2) The chambers judge properly applied the injunction test. An appellate court will only interfere with a decision concerning the grant or refusal of an interlocutory injunction if the decision involves an error of principle, the disregard or misapprehension of a material fact, a failure to act judicially or a result that is so plainly wrong as to amount to an injustice. In this case, the chambers judge dismissed the application because he was not convinced the applicants would suffer irreparable harm, not because there was no serious issue to be tried. There was also no basis for finding that the chambers judge disregarded or misapprehended any material facts in relation to the issue of irreparable harm and the applicable standard of review prevented the Court of Appeal from second-guessing the findings made by the chambers judge on irreparable harm.

© The Law Society of Saskatchewan Libraries
Back to top

***R v Fox*, [2024 SKCA 26]**

Leurer Caldwell Tholl, 2024-03-08 (CA24026)

Barristers and Solicitors - Solicitor/Client Privilege
Constitutional Law - *Charter of Rights*, Section 7, Section 8, Section 11(d), Section 24(2)
Criminal Law - Obstruction of Justice - Acquittal - Appeal
Criminal Law - Private Communications - Wiretap

The respondent was a criminal defence lawyer. Her client was A.Y. The police were investigating A.Y., his associate, and others for drug trafficking. Police had been authorized to intercept private communications, and there was a protocol in place to ensure that phone conversations subject to solicitor-client privilege were not monitored. Live monitoring was not permitted for any calls from a lawyer, but these calls could be recorded and accessed only upon an order by a judge. When A.Y.'s associate was arrested for drug trafficking, she exercised her right to counsel by calling the respondent from the police station in an unmonitored call. The respondent then called A.Y. The Court of Appeal (court) quoted a transcript of the first portion of the call. The respondent told A.Y. that his associate had just been arrested, and that the associate had been under surveillance. The respondent told A.Y. "you should know what that means" and that the police would either have or be working toward a search warrant "for whatever places [the associate] had been frequenting." After the call, A.Y. called several people asking them to retrieve cash from his house, and to ensure that his firearms were properly stored. The police never sought a search warrant for A.Y.'s home. The provincial Crown interpreted the respondent's words as an attempt to warn A.Y. that the police might be conducting searches related to him, and that she was counseling her client to remove or destroy evidence of criminal conduct. The respondent was charged with obstruction of justice contrary to s. 139(2) of the *Criminal Code* (*Code*). Two officers and a civilian employee were actively listening to the phone call to A.Y. pursuant to the authorization. The officers realized it was a lawyer calling, so they immediately stopped listening and classified the call as privileged once it ended, locking all access to the recording. The civilian employee, working at a different location, kept listening to over half of the conversation before stopping. The federal Crown applied ex parte to a Queen's Bench judge to have the call released. The reviewing judge found that the first portion of the call was not subject to solicitor-client privilege and released it to the Crown but found that the second portion was privileged. The reviewing judge did not release reasons for his determination and sealed them. None of the parties applied to have the reasons unsealed or to appeal the reviewing judge's categorization of the call. During the voir dire, the respondent applied to exclude the first portion of the call on the basis that the monitoring of the conversation breached s. 8 of the *Charter*, did not comply with the authorization, and violated solicitor-client privilege. The trial judge excluded the evidence of the conversation pursuant to ss. 7, 11(d), and 24(1) of the *Charter*, but dismissed the s. 8 argument. The trial judge determined that the unavailability of the solicitor-client privileged portion of the phone call impaired the respondent's right to make full answer and defence to the point that the rest of the call also had to be excluded. The ss. 7 and 11(d) issue had been raised by the trial judge. The Crown called no evidence, and the respondent was acquitted. The Crown appealed from the acquittal, arguing that the trial judge improperly intervened in the proceedings, misunderstood the fiat of the judge who released the first portion of the call, erred by not requiring the respondent to first apply to have her client's privilege set aside, misinterpreted s. 189(6) of the *Code*, and failed to realize that there was no evidence to support a finding that the respondent's right to a fair trial was at risk. On appeal, the respondent opposed the Crown's arguments, and argued that the trial judge erred in not finding a s. 8 *Charter* breach. The court determined the following issues: 1) was there improper intervention by the trial judge; 2) was the ss. 7 and 11(d) *Charter* application premature; 3) what was the effect of s. 189(6) of the *Code*; 4) was the Crown impermissibly appealing findings of fact regarding prejudice to the respondent's ability to make full answer and defence; 5) did the trial judge err in finding a ss. 7 and 11(d) *Charter* breach and excluding the evidence; 6) did the trial judge err in failing to find a s. 8 *Charter* breach; and 7) did the trial judge err in not also excluding the first portion of the call from evidence, based on s. 8 and s. 24(2) of the *Charter*?

HELD: Tholl J.A. and Caldwell J.A. dismissed the appeal. Leurer CJS would have allowed it and provided dissenting reasons. 1) The court concluded that while it was debatable whether the trial judge should have raised the ss. 7 and 11(d) issues on her own initiative, there was no possible remedy in the specific circumstances of this case (as the respondent was acquitted, and the Crown sought a new trial) that would arise out of resolving this narrow legal question in the Crown's favour. The Crown did not suggest that a new trial would be justified on this basis alone or that the respondent should be prohibited from raising the ss. 7 and 11(d) issues if

a new trial were ordered. When a party is represented by counsel, a trial judge should be hesitant to raise new *Charter* issues that the respondent did not put forward. Here, the Crown did not object to the new issue being raised or addressed, nor did it ask for an adjournment to call further evidence or to prepare additional arguments. The Crown orally argued the new issue at the voir dire and filed a written brief in which it addressed the new issue in detail. The Crown did not set out additional arguments it would have made but was prevented from making. 2) In this unusual case, it was not an error for the trial judge to have the respondent wait until the conclusion of the Crown's case to apply for a remedy. The trial judge also did not err by not requiring the respondent to first apply to set aside the solicitor-client privilege that had already been attributed to the second part of the phone call. 3) The respondent argued that s. 189(6) of the *Code* prohibited the admission into evidence of any solicitor-client communications obtained through a wiretap, subject only to the exception of consent. The court only made obiter comments on this point, having already found that the respondent was not required to apply to set aside the privilege and that the second portion of the call remained privileged. In short, s. 189(6) may be subject to exceptions, but this discussion would be explored in a future case. 4) The trial judge found actual prejudice existed in the respondent's ability to make full answer and defence and determined that the respondent was unable to have a fair trial as a result. The court noted that a finding of prejudice, even inferred prejudice, was a finding of fact. There was no room for appellate interference with the finding that the respondent would suffer actual prejudice to her right to a fair trial.

5) The trial judge did not err by finding a violation of ss. 7 and 11(d) of the *Charter*, nor did she err by excluding the evidence. The trial judge found that there was prejudice to the respondent's ability to make full answer and defence. This was a question of law. The trial judge found that the respondent would suffer significant prejudice by not being able to access the second portion. The court found that the finding of significant prejudice mandated a finding that ss. 7 and 11(d) would be violated in the trial proper. The only option open to the trial judge was to exclude the evidence. The court stressed that this was a highly unusual situation and a unique set of facts. 6) The court found that the civilian monitor's continued listening in on the conversation when it was clear that the call was with a lawyer was contrary to the terms of the authorization and was an obvious breach of the respondent's s. 8 rights. While the evidence was excluded by the trial judge under ss. 7 and 11(d), the respondent was entitled to argue that the exclusion of evidence and the acquittal should be upheld on a different basis because she raised the arguments at the voir dire, and there was an appropriate record. Section 8 of the *Charter* involves the right to not be subject to unreasonable search and seizure by the police or other agents of the state. A search is reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable. The interception of private telephone communications by the police constitutes a search and seizure for the purposes of s. 8. During the call, the respondent identified the law firm she was calling from. This was sufficient for the police officers to terminate the call. The trial judge labeled the failure to terminate monitoring, even once it was obvious that the speaker was a lawyer, as nothing more than "mere inadvertence", concluding that there was no s. 8 violation. For a search to be lawful, it must be authorized by law. The authorization here granted legal authority to listen to phone conversations of A.Y., but it explicitly stated that it did not include any calls for which the monitor reasonably believed one of the parties was a lawyer. Once there was an objective basis to determine that she was a lawyer, the continued scrutiny of the phone call with A.Y. was no longer authorized by law. The court found that the way the search was carried out was not reasonable. An agent of the state listening to a private phone call between a lawyer in client in direct contravention of the authorization was an unreasonable search and was a violation of s. 8 of the *Charter*. Strict adherence to the authorization was required. 7) The court concluded that the first portion of the call should be excluded from evidence under s. 24(2) of the *Charter*. The evidence was obtained through a serious breach of the respondent's *Charter* rights, had a significant impact on the respondent's *Charter*-protected rights, and its admission would bring the administration of justice into disrepute. The court analyzed the "obtained in a manner" portion of the s. 24(2) analysis. Given the s. 8 breach, the court determined next whether the first part of the phone call should be excluded under s. 24(2) of the *Charter*. For there to be a remedy under s. 24(2), there must be a connection between the s. 8 breach and the obtaining of the evidence (*R v*

Goldhart, [1996] 2 SCR 463). Whether s. 24(2) is engaged depends on the nature of the connection between the *Charter* violation and the evidence that is sought to be excluded. Courts take a purposive approach, and a strict causal relationship between the breach and subsequent discovery of evidence is not required. The court referred to *R v Tim*, 2022 SCC 12 for a summary of the law for when evidence can be said to have been obtained in a manner that has breached a respondent's *Charter* rights. The court found that while there was no causal link between the civilian monitor's actions and the obtaining of the first portion, the temporal connection and contextual factors were neither remote nor tenuous. The monitor was part of the team listening to communications from which evidence was obtained, and she improperly listened to the conversation that was sought to be excluded. The court found that the process of gathering the evidence was directly tainted by these actions. The court then conducted a *Grant* analysis and considered the seriousness of the *Charter*-infringing conduct; the impact of the violation on the *Charter*-protected interests of the respondent; and society's interest in having the charges adjudicated on their merits. The court held that the breach was highly serious. The law was settled that private phone calls between any individuals could not be monitored by the police without legal authority. There was no indication that this breach of the authorization resulted in a reprimand or any corrective action, so the court noted there could be systemic concerns as well. The court found that there was a substantial incursion on the respondent's expectation of privacy for any of her phone calls to be listened to by the police. The evidence was reliable, but not particularly strong to prove the attempt to obstruct justice charge.
DISSENT: Leurer CJS would have allowed the Crown's appeal and directed a new trial, finding that the trial judge erred in concluding the respondent's right to a fair trial would be compromised by the admission of the non-privileged parts of the call. The non-privileged parts of the conversation should have been admitted into evidence. While Leurer CJS found that there had been a s. 8 breach, he concluded that the evidence should not be excluded under s. 24(2) because its admission would not bring the administration of justice into disrepute. Three issues were determined in the dissenting decision: A) whether the trial judge erred when she found that the admission of the evidence of the non-privileged parts of the call would result in a violation of the respondent's right to a fair trial; B) whether the trial judge erred by finding that the respondent's right to be free from unreasonable search and seizure was not violated; and C) if there was a *Charter* violation, whether the evidence should be excluded under s. 24(2). A) The judge erred by finding that the respondent's right to a fair hearing would be violated by the admission of the non-privileged parts of the call. The judge's conclusion was based on the finding that the respondent was unable to access the privileged part of the call. This was an error, because neither the right to a fair hearing, nor a client's right to confidentially communicate with his or her lawyer and the associated rule of evidence, was absolute. The respondent's status as a lawyer did not prevent the operation of the innocence at stake exception to solicitor-client privilege. B) Leurer CJS agreed that the respondent's s. 8 rights were violated when the monitor continued to listen to a privileged conversation but found that the admission of the evidence would not bring the administration of justice into disrepute and should not be excluded under 24(2). Even if it could be argued that the civilian monitor did not breach the terms of the authorization because she lacked the subjective understanding that she was listening to a call with a lawyer, it was impossible to conclude that the monitoring was carried out reasonably. Leurer CJS applied Tim to find that the recording of the call was obtained in a manner that infringed the respondent's s. 8 *Charter* rights. Leurer CJS supported the view that any violation of wiretap terms relating to the protection of solicitor-client privilege during a police investigation was inherently serious but noted that not every breach of a wiretap authorization was so serious that it merited the exclusion of evidence on that basis alone. Good faith tended to support admission, but bad faith tended to support the exclusion of the evidence. Leurer CJS was satisfied that the monitor's actions could not be characterized as being in bad faith, as a result of the judge's finding of fact that she acted inadvertently, but they could not be characterized as good faith either. The evidence did not support a pattern of systemic indifference to the protection of solicitor-client privilege. While the s. 8 breach was serious, it was an isolated occurrence, and limited to the actions of one state actor. The existence of the recording did not depend on the monitor's actions.

The impact of the *Charter* breach on the respondent's *Charter*-protected interests was not trivial, but it was also not high. In this case, the evidence was both reliable and crucial to the prosecution's case, which favoured admission. The seriousness of the underlying charge of obstruction of justice also favoured admission. C) The admission of the evidence of the call would not bring the administration of justice into disrepute. The evidence should not be excluded under s. 24(2) of the *Charter*. The respondent also did not demonstrate that the administration of justice would be brought into disrepute if the evidence were admitted.

© The Law Society of Saskatchewan Libraries

Back to top

***Korf v Canadian Mortgage Servicing Corporation*, 2024 SKCA 28**

Leurer Tholl Kalmakoff, 2024-03-12 (CA24028)

Courts - Judges - Disqualification - Bias
Courts - Judges - Duties

The appellant, the sole shareholder and officer of Korf Properties Ltd. (KPL), had obtained loan financing from the respondent's predecessor and provided a personal guarantee for the loan. KPL defaulted on the loan, leading the respondent to commence an action against the appellant under the guarantee. The action was dismissed by the chambers judge as being statute-barred but the decision was overturned on appeal. The appellant applied for a re-hearing based on an alleged reasonable apprehension of bias due to one of the judges' previous association with the firm representing the respondent.
HELD: The application was dismissed. (1) Establishing a reasonable apprehension of bias requires the party making the allegations to demonstrate that a reasonable and informed person, with knowledge of all the relevant circumstances and viewing the matter realistically, would conclude that it is more likely than not that the judge did not decide the matter fairly. The evidence in the instant case did not demonstrate a real likelihood or probability of bias (2) There is a presumption under the Canadian Judicial Council's (CJC) *Ethical Principles for Judges* that judges will carry out their oath of office and will recognize situations that may give rise to a conflict and disclose information about such potential conflict to the parties when appropriate or necessary. The evidence in this case did not establish a real likelihood or probability of bias required to overcome the presumption of judicial impartiality. (3) Based on existing jurisprudence, a reasonable apprehension of bias does not arise from the mere fact that a judge was a partner in a law firm at a point in time when the firm acted for a party that later appeared before the judge. There is no absolute rule under the CJC requiring recusal in such cases, and such inquiry as to whether recusal is necessary is dependent on the circumstances of the specific case. (4) Even if the evidence was sufficient to establish a reasonable apprehension of bias, a re-hearing was not justified. Demonstrating a reasonable apprehension of bias with respect to one judge on an appellate panel does not infect the entire panel with an apprehension of bias unless the impugned judge authored the decision or cast a deciding vote when other panel members were deadlocked. (5) The applicant in this case did not identify how the appeal decision was in error.

© The Law Society of Saskatchewan Libraries

Back to top

***GSI Global Shelters Developments Ltd. v Last Mountain Valley (Rural Municipality No. 250)*, 2024 SKCA 30**

Caldwell Kalmakoff Drennan, 2024-03-13 (CA24030)

Administrative Law - Municipal Bylaw - *Ultra Vires*
Municipal Law - Bylaws - Validity
Municipal Law - Bylaws - Validity - Bad Faith
Municipal Law - Property Tax

GSI Global Shelters Development Ltd. (GSI) appealed against the Court of King's Bench's decision to dismiss GSI's judicial review application to quash the imposition of a minimum tax amount through a bylaw in the Rural Municipality of Last Mountain Valley No. 250 (RM). At the Court of King's Bench, GSI argued the imposition of a minimum tax by the RM was *ultra vires* under *The Municipalities Act*, unfair, unreasonable, and was enacted in bad faith. GSI relied on s. 358(1) to quash the RM's bylaw. The RM, relying on s. 360 of *The Municipalities Act*, argued the bylaw was enacted in good faith. The RM justified the bylaw through financial analysis and some residents' inquiries. The Court of King's Bench chambers judge applied the standard of reasonableness to the judicial review and dismissed it, ruling that the bylaw was reasonable and complied with the rationale and scope of The Municipalities Act. At the appeal level, GSI argued that the chambers judge misinterpreted and misapplied s. 360 of *The Municipalities Act* and, therefore, made an error in fact, in law, and in principle that the bylaw in question was passed in good faith. GSI also asked the court to intervene and declare the bylaw *ultra vires*. The issues the court was to decide were whether the chambers judge: 1) correctly interpreted s. 360 of *The Municipalities Act*; 2) erred in the application of s. 360 by finding that the bylaw was in good faith; 3) selected the correct standard for judicial review of the bylaw; and 4) erred in the application of the standard of reasonableness in this case.
HELD: The court dismissed GSI's appeal, upholding the lower court's decision. The appeal was dismissed with costs of $2,500 payable to the RM. The chambers judge's interpretation of s. 360 of *The Municipalities Act* was proper, and applying the reasonableness standard of review was correct. There was no basis for the court to intervene and quash the bylaw either. 1) The chambers judge's interpretation of s. 360 of the Act is reviewable by the court on the standard of correctness. *The Legislation Act*, SS 2019, c L-10.2, s 2-10(1) directs a holistic approach to questions of statutory interpretation. This means reading the words of an Act in its entirety, considering their grammatical and ordinary sense, and considering the Act's objectives and the intentions of the Legislature. The court applied these principles to the wording of s. 360, concluding that the chambers judge's interpretation was correct. Section 360 protects a bylaw, which is passed in good faith, from litigation on the grounds of reasonableness. However, this litigation immunity does not preclude the *ultra vires* (beyond the powers) review or challenge. 2) GSI had the onus to establish that the RM lacked good faith in passing the bylaws, such as by arbitrary imposition or with an improper purpose or motives. The evidentiary burden in that regard is "something overwhelming." The chambers judge stated that GSI had failed to point to evidence that showed a lack of good faith in this respect. The court confirmed that GSI did not satisfy its evidentiary burden and merely presented statements that were unsupported by evidence. On the other hand, the RM provided evidence that justified passing the bylaw, such as consultation with residents and financial information. Therefore, the court upheld the chambers judge's decision to dismiss GSI's argument that the RM targeted GSI for tax purposes. 3) In the absence of a prescribed choice of the standard of review by the Legislature, the presumption of reasonableness review as established by *Vavilov* applies. GSI failed to show any of the exceptions to the presumption of reasonableness review. Therefore, the Court of Appeal upheld the chambers judge's selection of

the reasonableness standard of review. 4) The chambers judge correctly applied the standard of reasonableness in judicial review of the bylaw. The court confirmed that the bylaw fell within the reasonable range of outcomes and complied with the scope of *The Municipalities Act*. GSI argued that the bylaw was patently unreasonable based on improper purposes and disproportionate effect. This argument failed because it was grounded in "unreasonableness," which is barred by s. 360 of the Act. The court also reviewed the GSI's argument under the *ultra vires* ground, which is not barred by s. 360. Such allegations would mean no reasonable body could have adopted such a bylaw. *Vires* refers to the lawfulness of legislation that is made by elected officials and if the law is within the law-making powers of the enacting body. It also involves asking if the enacted law was a reasonable exercise of the authority of the enacting body. For example, in this case, the question was whether the RM unreasonably exercised its authority to pass a bylaw that is completely unrelated to or inconsistent with the purpose of *The Municipalities Act* because the Legislature could not have intended to give the RM the authority to pass such a bylaw. The court concluded that the RM had the authority to increase the minimum tax amount as it was within its authority under ss. 283, 289, and 290 of *The Municipalities Act*. Furthermore, the taxes imposed by the RM did not have to be tied to a specific service the RM provided. The RM also had the power to impose disproportionate tax amounts under the Act. The RM acted within its reasonable authority.

© The Law Society of Saskatchewan Libraries

Back to top

***Yeung v Bui-Yeung*, 2024 SKCA 35**

Caldwell Schwann Barrington-Foote, 2024-03-22 (CA24035)

Family Law - Child Support - Appeal
Family Law - Child Support - Determination of Income - Imputing Income
Family Law - Child Support - Intentional Underemployment

The appellant brought this appeal under *The Inter-jurisdictional Support Orders Act* asking the Court of Appeal (court) to vary the decision of the King's Bench judge regarding imputation of income, current owing and future obligations for child support, and finding of intentional unemployment. The grounds were that the chambers judge erred in: a) considering the appellant's affidavits; b) finding the appellant to be intentionally unemployed; c) determination of imputed income; d) failing to expunge the arrears; e) determination of the amount of "go-forward" child support.
HELD: The appeal was partially allowed for imputed income and go-forward child support recalculated by the court. a) The appellant alleged the material he was supposed to file with the court was not filed by the registrar's office. The court records showed that the court had received the documents, but the appellant did not provide the full documents the court asked of him. All documents he provided to the court had been before the chambers judge: therefore, this ground of appeal failed. b) The appellant further argued that the chambers judge erred in considering the time it takes for a startup business to become profitable when imputing income. However, he did not provide the court with evidence about his decision to continue with a business that had not been profitable for seven years, and how, in light of this financial loss, he was able to manage to financially support his current family. The absence of evidence by the appellant led the chambers judge to conclude that he was intentionally under-employed. The court did not find merit to this part of the appeal. c) The court stated that imputing income to a parent who is intentionally underemployed is discretionary.

However, the exercise of this discretion must be based on evidence. While it is well established in law that the calculation and imputing of income in such situations is naturally imprecise, the court still must use a rational basis for the imputed income. Here, the chambers judge used the minimum wage from British Columbia, the province of residence of the appellant, to impute income with a steady yearly increase in the amount. Using the minimum wage for imputing income was correct, but the annual steady increase was not explained by the judge or supported by evidence. This part of the calculation amounted to an arbitrary calculation such that the court partially allowed the appeal and recalculated the amount for imputed income. This redetermination of the imputed income also called for redetermination in the go-forward amount of child support for the youngest child. d) Lastly, an application for expunging arrears has a high bar and the applicant must provide sufficient evidence for the court to be able to consider whether to exercise its discretion. The appellant did not provide evidence of whether he met the criteria for expunging his arrears. The law required the applicant to provide financial information and an explanation about delay or inability to pay, among other factors. The court concluded that the appellant failed to meet the high bar for such applications and the chambers judge's decision was correct and properly applied the factors from *Ross v Vermette*, 2007 SKQB 272, and *Colucci v Colucci*, 2021 SCC 24, in this regard.

© The Law Society of Saskatchewan Libraries

Back to top

***Zagime Anishinabek Child and Family Wellness v Welter*, 2024 SKKB 11**

Stahl, 2024-01-25 (KB24027)

Barristers and Solicitors - Duty to Client - Conflict of Interest
Code of Professional Conduct, Rule 3.4 - Conflict of Interest
Statutes - Interpretation - *Child and Family Services Act*, Section 14(4), Section 17(4)(b)

Zagime Anishinabek Child and Family Wellness (ZACFW) (the applicant) sought a protection hearing regarding a child under ss. 14(4) and 17(4)(b) of *The Child and Family Services Act* (CFSA), the inherent jurisdiction of the applicant, and *An Act respecting First Nations, Inuit and Métis children, youth and families*. The child's mother was a member of the Zagime Anishinabek First Nations (ZAFN), and her father immigrated to Canada from Sudan. The child was born in 2017. The mother voluntarily placed the child with the paternal aunt and uncle in 2018, with a written agreement signed by the parties. In 2022, the mother moved back to ZAFN to reside with her parents and her three older children, and advised the aunt that she wanted the youngest to move there as well. The aunt was opposed. The court referred to an interim parenting order for the child where the father and mother had alternating parenting time on weekends, with the child in the care of her aunt at all other times. The applicant had previously sought a protection hearing for the child, which was struck by the court. The court noted that the maternal grandmother sat on Zagime Anishinabek Council (council). The council signed a resolution to declare its authority over child and family services, specifying that the child in these proceedings was to be cared for under the supervision of the applicant. Counsel for the applicant also represented the mother of the child and ZAFN in the proceedings. Here, the court determined whether counsel's representation of three of the parties resulted in a conflict of interest.

HELD: Counsel was in a conflict of interest, and the court disqualified counsel from acting for any of the parties in this matter and any related matters. The court had a separate and supervisory role over court proceedings to ensure no conflict existed to protect the proper administration of justice. The court applied *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39 for the bright line as to whether or not the legal interests of one client were adverse to those of another, and for a lawyer's duty to avoid conflicts. The relationship between lawyer and client is a fiduciary one, and the lawyer must avoid situations where a conflict or potential for conflict exists. There was no evidence that the parties were reasonably informed of the conflict, that there was independent legal advice regarding counsel's multiple representation of the parties, or that any of the parties signed a waiver or agreement indicating their awareness that counsel was representing the three parties.

© The Law Society of Saskatchewan Libraries
Back to top

***Patel v Van Olst*, 2024 SKKB 12**

Tochor, 2024-01-26 (KB24014)

Courts - Judges - Disqualification - Bias
Courts - Judges - Duties

This case involved an application for recusal and disqualification of the presiding judge. The applicant sought the recusal of the judge on three grounds, and this was the ruling on the third ground. The applicant had extensive involvement with the court in different proceedings that were somewhat interrelated, based on the removal of his medical practice privileges by a health authority. The third ground of his application for recusal alleged bias or reasonable apprehension of bias because the current judge had discussions with another judge presiding over another application of the applicant. The applicant alleged the current judge was not able to adjudicate the applicant's matter impartially anymore. The issues to be determined were: 1) was there any admissible evidence of bias; and 2) did the applicant make the application at the earliest opportunity?
HELD: The application was dismissed as the answers to both questions were negative. Determination of a matter by an impartial judge is a fundamental principle of our judicial system and the right of every party in a case. There is a presumption that each judge will carry their duty according to their oath of office. Therefore, the threshold for finding a real or perceived bias is set at a high level. The party alleging bias has the burden of proof to establish the bias. The legal test for such applications is "whether a reasonable and right-minded person, thinking on the question and having the required information, viewing it in a realistic and practical manner, would conclude that it was more likely than not that judge, consciously or unconsciously, would not fairly make the decision." The test considers the "judge's state of mind viewed from the objective perspective of the reasonable person." Furthermore, the apprehension must be substantial and realistic. The legal framework asks for factual analysis and specific circumstances of each case. The applicant relied on an excerpt from a letter from a lawyer stating that a conversation between the two judges happened. This information did not support an allegation of bias because the letter was not admissible evidence that a conversation occurred, as the statement was not sworn. There was no convincing evidence as to why the lawyer could not provide an affidavit in that regard. Furthermore, even taken as a fact, the information that two judges had a conversation about a court file is not evidence of

improper conduct or an attempt to influence a judge. Lastly, the applicant did not bring his application at the earliest opportunity as required by the law as he waited for four months since his first concern about this issue before bringing this application. The application was, therefore, dismissed.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Picken*, 2024 SKKB 14**

Popescul, 2024-01-26 (KB24013)

Criminal Law - Sentencing - Parole Eligibility
Statutes - Interpretation - *Criminal Code*, Section 745

A jury found the offender guilty of second degree murder contrary to s. 235(1) of the *Criminal Code*. The offender broke into the victim's home and stabbed him numerous times. The offender faced the mandatory sentence of life imprisonment. The court determined whether parole eligibility should be increased beyond the 10-year minimum. The Crown took the position that the offender was ineligible for parole for 17 years, while defence argued for the minimum of 10 years.
HELD: The court directed that the offender serve 12 years of his life sentence before becoming eligible for parole. The court considered s. 745.4 and the purposes and principles of sentencing in ss. 718, 718.1 and 718.2. The court considered the offender's character, criminal record, the nature of the offence committed, the circumstances surrounding the offence and the recommendations of the jury. The court was particularly concerned that the stabbing happened in the victim's home and that a knife was used.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Friesen*, 2024 SKKB 20**

Megaw, 2024-02-06 (KB24017)

Constitutional Law - Validity of Legislation
Statutes - Interpretation - *Public Health Act, 1994*, Section 38, Section 45, Section 46

This decision consolidated appeals of ten cases from the Provincial Court where the appellants were convicted of contravening public health orders under the provisions of *The Public Health Act, 1994* during the COVID-19 pandemic. As the basis of conviction and appeal in these cases was the same, the Court of King's Bench (court) ruled on them as one group. The convictions arose from the appellants gathering in groups larger than the allowed size during the time the public health orders restricted social gatherings. The court relied on the principles of legislative interpretation to examine the public health orders, considering the objectives of the

Act for the protection of public health. The sole issue to be decided was whether there had been legislative authority to implement the public health orders.
HELD: The appeals were dismissed. The standard of review on these appeals was correctness as they involved questions of law. *The Public Health Act, 1994* is a statute that protects the health of all people in Saskatchewan, and the Act should be interpreted in a manner allowing for the effective achievement of its health-related objectives. Section 38 of the Act allowed for the issue of public health orders as an effort to control communicable diseases and prevent their spread for the protection of the entire population. The nature of the COVID-19 pandemic put multiple people at risk. Therefore, it was valid for the public health order to be enacted and applied to multiple people in order to control the pandemic. The court also ruled that section 45 of the Act allows for the limitation and control of the size of gatherings. This interpretation is warranted to achieve the objectives of the Act, especially in the case of COVID-19 and its associated health risks. The other part of the appeal was the issue of delegation of issuing public health orders from the minister to the chief medical health officer. Citing *The Legislation Act*, ss. 2-34 and 2-35, the court affirmed that the minister had the power to delegate the issuing of public health orders. The appellants also raised arguments against the later amendments to the regulations of the Act that introduced measures to provide further control on curbing the spread of COVID-19, such as face-covering measures, being *ultra vires* (beyond the power of) its enabling statute, and therefore, being of no force. The judicial review of regulations is restricted to the grounds that they are inconsistent with the purpose of the enabling statute or conditions precedents of that statute have not been met. Regulations benefit from the presumption of validity. This presumption places the burden of proof on the challenger and favours a broad interpretative approach so that, where possible, the regulation is interpreted as *intra vires*. The judicial review of regulations does not involve assessing policy matters such as necessity, effectiveness, or any political, economic, social, or partisan considerations. The court concluded that s. 46 of *The Public Health Act, 1994* protected the validity of the regulations and supported the new regulations being within the scope of legislation as intended to protect the health of Saskatchewan residents against COVID-19. The appellants further argued the regulations constituted improper sub-delegations from the Lieutenant Governor in Council to the minister. The court upheld the reasoning of the Provincial Court on this issue, stating that s.46 of the Act is broad and allows for the delegation of the power to make regulations dealing with COVID-19 health issues.

© The Law Society of Saskatchewan Libraries

Back to top

***Radius Credit Union Limited v Saskatchewan Government Insurance*, 2024 SKKB 28**

Keene, 2024-02-23 (KB24022)

Insurance - Contract - Interpretation
Insurance - Designation of Beneficiary
Insurance - Property Insurance

The plaintiff credit union sued the defendant, SGI, for unpaid insurance proceeds under a contract of insurance between West Park Condo and SGI for damages in two of the condo units on which the plaintiff was the mortgagee. The defendant applied for summary judgment dismissing the claim. The court allowed hearing the matter by way of summary judgment because the issues and the facts were neither complex nor contested, and both parties agreed to this procedure. The court had to rule on whether the defendant had

any obligation to pay insurance proceeds to the plaintiff.
HELD: The defendant did not have a contractual, statutory, or equitable obligation to pay insurance proceeds to the plaintiff. The application was dismissed. The plaintiff had obtained title to the two condo units through foreclosure. The plaintiff had been unaware that the units had suffered water damage, spent large sums of money on the repairs, and requested the defendant pay the loss and damages. The defendant refused to pay, stating that the plaintiff was not entitled to claim insurance proceeds under the insurance policy. The insurance policy was made between the condo and defendant, not the previous owners of the units and/or the plaintiff. Furthermore, the defendant had already issued insurance proceeds to a third party upon submission of a claim for loss by the condo. The parties agreed that the agent for the condo had absconded. The court ruled on this matter by reviewing the plaintiff's obligations in three areas: contract, statute, and equity. The court found that there was no evidence of a contractual relationship between the plaintiff and the defendant requiring the defendant to pay any insurance proceeds. The insurance contract did not name the plaintiff as being entitled to receive any insurance proceeds, nor did the terms of the insurance policy. There was no statutory obligation for the defendant to pay the plaintiff any insurance money. The insurance policy stated that the provincial legislation under which the condo corporation was constituted dictated the applicable laws. *The Condominium Property Act* in section 66 places the obligation on the condo to obtain and apply any insurance proceeds accordingly. Therefore, the defendant had no legal obligation under the statute to pay the plaintiff any insurance proceeds. Furthermore, the court commented that statutory breaches are not recognized as a tort, and the only available remedy would be to sue the party for negligence, which the plaintiff had not done in this case. The plaintiff argued that the mortgage clause in the policy entitled it to an insurance policy, citing the *National Bank of Greece (Canada) v Katsikonouris*, 1990 CanLII 92, [1990] 2 SCR 1029 (WL), which states standard mortgage clauses are a fundamental element in a property insurance contract. The court dismissed this argument because the insurance policy clearly stated in its mortgage clause that coverage for a mortgagee applied only if the mortgagee was shown as a loss payable on the front page of the policy, which the plaintiff was not, and this was the fact that made the current case distinguishable from the cited Supreme Court of Canada case. The plaintiff also argued that it had an equitable assignment of the policy or an equitable lien on the insurance proceeds. The court dismissed this argument because such equitable remedy requires the mortgagor to be entitled under the policy, which was not the case here, as the condo was the insured and not the previous owners. Also, the policy's terms did not contain a direction to pay loss payable to the mortgagee because the standard mortgage clause did not apply to the plaintiff. The application was dismissed and costs were made payable to the defendant.

© The Law Society of Saskatchewan Libraries

Back to top

***3sHealth v Canadian Union of Public Employees*, 2024 SKKB 31**

Robertson, 2024-02-29 (KB24025)

Civil Procedure - *King's Bench Rules*, Rule 3-49(1)(a)
Trusts and Trustees - Trust Agreement - Interpretation

The applicant represented employers who contributed to the Saskatchewan Healthcare Employees' Pension Plan (the trust). The respondents represented current and former employees who were both contributors to and beneficiaries of the trust. The parties were signatories to the trust agreement. The applicant filed an originating application under Rule 3-49(1)(a) of *The King's*

Bench Rules in which it sought the court's opinion on a matter affecting the rights of a person with respect to the administration of a trust. The court determined the proper interpretation of the notice requirements under the trust agreement, including: 1) whether article 10.05(a) limited service of the meeting notice to the third anniversary of January 1, 2004; 2) whether the article required the meeting notice propose a contribution rate increase; and 3) whether the article required the mediation notice be given by a member of a partner committee.
HELD: The court answered each question in the negative. The court found that both the meeting notice and mediation notice were effective. The court directed the parties proceed to mediation and grievance arbitration if necessary. 1) The wording of the agreements stated that either party could notify the other under the section "as of January 1, 2004, and on each third anniversary of that date". The court focused on the meaning of the words "as of". The applicants argued that the words "as of" before "January 1, 2004" meant that a meeting notice could only be provided on that single day, reoccurring every three years thereafter. The court disagreed. The date was a deadline for notice, allowing either party to give notice at any time on or before the date. 2) The court rejected the applicant's argument that the article limited any proposal to one which would increase the rate on contributions to the plan. The proposal referred to contribution rates and was sufficient and effective. 3) The mediation notice was also sufficient and effective. There was nothing in the article requiring that the written notice requiring mediation be personally authored or delivered by a member of the union partner committee.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Traverse*, 2024 SKKB 39**

Tochor, 2024-02-29 (KB24024)

Criminal Law - Sentencing - Aboriginal Offenders
Criminal Law - Sentencing - Manslaughter
Criminal Law - Sentencing - Sentencing Principles

This was a sentencing decision in a manslaughter case. On June 12, 2021, a constable of the Indian Head RCMP was investigating a stolen vehicle report. The offender was driving a truck when the RCMP officer stopped him. The officer asked the offender to step outside the car, which he refused to do. The officer reached inside the truck to take away the keys. At the same time, the offender started to drive away and ran over the RCMP officer. The offender pled guilty to manslaughter and theft of a motor vehicle. The Crown asked for a sentence of life in prison, but the defence lawyer asked for 16 years' imprisonment.
HELD: The court sentenced the offender to 18 years' imprisonment. This duration of imprisonment was appropriate for the offence of manslaughter. A remand credit of 993 days applied, which left the sentence going forward for 5,084 days. The offender was prohibited from possessing any weapon and ordered to provide a DNA sample. As for the theft of motor vehicle offence, the sentence was 18 months, concurrent with the manslaughter sentence. The victim surcharge was waived for both counts based on the offender's financial situation. The judge applied the general sentencing principles and the general sentencing range for manslaughter in this case while considering the degree of moral culpability, aggravating and mitigating factors to determine a fit sentence. Section 718 of the *Criminal Code* (*Code*) states that the purpose of sentencing is to protect society and contribute to the

respect of the law. Sentencing, therefore, must be proportionate to the offence's gravity and the offender's degree of responsibility. To achieve this objective, the judge must follow sentencing principles such as aggravating and mitigating circumstances of the case. Further, the *Code* directs judges that a sentence must be similar to sentences imposed on similar cases with similar circumstances. Such principles emphasize that sentencing is an individualized process through assessing all applicable general principles as applicable to the existing circumstances by considering all the relevant factors from the *Code* and case law. If a matter involves an Aboriginal offender, particular attention must be given to their circumstances. The Supreme Court of Canada cases, *Ipeelee* and *Gladue*, stated that sentencing should be restorative in nature with the hope of addressing the issue of the over-representation of First Nations people in the prison system. Though the *Ipeelee* and *Gladue* considerations might require a different, sometimes lesser, sentence, case law specifies that they are not an automatic reduction of the sentence because a judge must still consider all other relevant factors in a case. After analyzing and considering all the facts of a matter, the judge then turns to the range of sentencing for the same offence with similar circumstances. The Court of Appeal in Saskatchewan has expressed that the general sentencing range for manslaughter is between four and 12 years; however, this does not mean that the judge is prohibited from providing a sentence outside of the range if the circumstances warrant it. In this case, the judge analyzed the moral culpability of the offender. The legal test for this consideration is “what the unlawful act itself involved” rather than the offender's mental state. This question guides the court to consider if the unlawful act puts the victim at risk of or causes bodily injury, serious bodily injury, or life-threatening injury. Then, the court should consider and apply mitigating and aggravating factors to the analysis of moral culpability. For the manslaughter offence here, the judge had to consider the nature and quality of the unlawful act, the method in which it was committed, and the degree of planning and deliberation. The judge stated that the nature and quality of the acts of the offender in refusing to exit the truck at the request of the RCMP officer and attempting to drive away was serious, especially since the offender knew or ought to have known that running away while the officer was trying to remove the car keys would have caused risks to the officer. However, the circumstances did not show that the offender knew or ought to have known that his actions would likely cause or risk causing life-threatening injuries. Therefore, this unlawful act that resulted in death was closer to the moderate range rather than the most serious (such as stabbing or shooting). The method of committing the unlawful act, attempting to drive away, also fell within the moderate range. The degree of planning and deliberation involved in this unlawful act was on the less serious side, as the facts of the case showed the matter was impulsive or reactive. However, the offender's unlawful acts fell within the category of actions likely to cause serious bodily injury. After this analysis, the judge turned to considering the aggravating and mitigating factors. The judge considered it mitigating that the offender entering a guilty plea, showed remorse, and had *Gladue* factors. The criminal record of the offender, the impact of the offence on the victim, an offence of this nature against a police officer, and denunciation and deterrence of offences that result in the death of police officers were all aggravating factors. The judge concluded that the aggravating factors outweighed the mitigating factors, compelling the judge to issue a sentence above the usual sentencing range.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Walls*, 2024 SKKB 57**

Robertson, 2024-04-02 (KB24045)

Criminal Law - Adjournment

Criminal Law - Stay of Proceedings - Judicial Stay - Non-Disclosure

The accused filed applications seeking an accounting of the complainant's medical records provided to police and the Crown. The accused also applied for an indefinite adjournment of the trial. The accused argued only the application for adjournment of the trial, stating that the application relating to medical records was not ready to proceed. The sole issue for determination was whether the trial should be adjourned to allow the application with respect to medical records to be heard at a later date.
HELD: The application was dismissed. The public interest is served by timely justice and judges have an active role to counter delay in proceedings. The courts also have both inherent and statutory jurisdiction to control their own process and Parliament has also shown the intention to support this trial management authority in different sections of the *Criminal Code*. In this instance, the court was not satisfied that an adjournment was required for the accused to have a fair trial. Both counsel had confirmed being ready for trial at the pre-trial conference and that no other applications were planned. The defence counsel acknowledged that the application with respect to medical records was not ready and would not be ready for some time. Hearing the application would imply that the trial would not proceed and frustrate the community's right to timely justice.

© The Law Society of Saskatchewan Libraries

Back to top

***Koop v Edwards*, 2024 SKPC 13**

Agnew, 2024-03-05 (PC24009)

Practice and Procedure - Small Claims - Default Judgment - Setting Aside
Statutes - Interpretation - *Small Claims Act, 2016*, Section 42

The defendant, who was absent during the trial, applied to set aside the decision of the trial judge against him pursuant to s. 42 of *The Small Claims Act, 2016* (Act), alleging he had reasonable justification for his absence and that he had valid defences to produce.
HELD: The court declined to grant the defendant's application for a s. 42 summons. The decision whether to allow the application to proceed is a judicial one. This means that the Act requires the applicant to apply to the court under s. 42, and a judge must issue a summons (see Form A of the *Regulations* to the Act). Such applications are almost always issued, except in a case such as this, which presented one of the few exceptions to the rule. First, only a default judgment (when the defendant did not appear) qualifies for a s. 42 application. This was not the case here, as a proper trial was held. Therefore, this court does not have the power to hear the case again with further evidence and change the outcome. "The matter is *res judicata*, and this Court is *functus officio*" and s. 42 was "not available for a non-appearing defendant following a trial where a jointly liable co-defendant has appeared" (para 8). Secondly, if the s. 42 application were allowed, it would cause inconvenience to the other parties and the justice system. It would also set a precedent for non-appearing parties dissatisfied with the trial's outcome to request a do-over. This is not the purpose of s. 42 of the Act.

© The Law Society of Saskatchewan Libraries

Back to top

***R v Miller*, 2024 SKPC 14**

Daunt, 2024-03-14 (PC24010)

Constitutional Law - *Charter of Rights*, Section 7 - Disclosure - Full Answer and Defence - Stay of Proceedings

J.M. faced impaired driving charges arising from a motor vehicle accident in Prince Albert. The defence alleged a breach of J.M.'s s. 7 *Charter* right to disclosure because the Crown failed to obtain and disclose the WatchGuard video from Prince Albert Police Service. The defence applied for a stay of proceedings as a remedy for the breach under s. 24(1) of the *Charter*. The Crown conceded a violation of s. 7 *Charter* rights.
HELD: A conditional stay of proceedings was ordered, and the Crown could recommence proceedings if the conditions were met. Though the Crown conceded there had been a breach, it argued that its impacts were minimal and did not affect the fairness of the trial. The defence argued that J.M. suffered prejudice and continued to suffer as a result of the breach because of the automatic suspension of driving privileges when the charges were laid, the stigma of the charges, and stress. Section 24(1) of the *Charter* gives discretion to the court to grant an appropriate remedy in such cases. The court applied the legal test for a stay of proceedings from the Supreme Court of Canada case *R v Babos* (2014 SCC 16 at para 32) (*Babos*). The *Babos* criteria ask the court to consider prejudice to the accused's rights to a fair trial, lack of alternative applicable remedies for the issue at hand, and balancing the interests in favour of granting a stay versus the interests of society and the integrity of the justice system. The court stated that the lack of video disclosure affected J.M.'s ability to make a full answer and defence. Moreover, the administrative driving suspension was a further prejudice. Non-disclosure of the video meant the defence lacked evidence to prepare for a fair trial. Therefore, this issue could be remedied by adjourning the trial and disclosing the video. The adjournment also answered the balancing factor of *Babos*, ensuring the defence could prepare for the trial, the interests of society were met for this serious impaired driving charge, and the integrity of the justice system was preserved.

© The Law Society of Saskatchewan Libraries

Back to top