The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court. Published on the 1st and 15th of every month.

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***R v Singh*, 2022 SKCA 104**

Richards Schwann Leurer, 2022-09-20 (CA22104)

Appeal - Leave to Appeal - Summary Conviction Appeal
Criminal Law - Application to Adduce Fresh Evidence - Appeal

This matter was an application for leave to appeal and an appeal by the Crown to the Court of Appeal (court) pursuant to s. 830 of the *Criminal Code* (Code) from a decision of a judge of the Court of Queen's Bench in his capacity as a summary conviction appeal court judge (appeal judge) under s. 813 of the Code who allowed an application by the respondent, G.S., to adduce fresh evidence in the form of a police vehicle dashcam video and ordered a new trial so the dashcam video could be considered as part of the evidence at trial (see: 2021 SKQB 55). The

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Criminal Law - Break and Enter with Intent to Commit Indictable Offence - Sentencing - Appeal

Crown argued that the appeal judge erred in law in his application of the test for admitting fresh evidence formulated in *R v Palmer*, [1980] 1 SCR 759 (*Palmer*) and also erred in concluding that to convict without the dashcam video evidence was a miscarriage of justice.
HELD: The court agreed that the Crown's application for leave to appeal raised a pure question of law, granted leave, and allowed the appeal, which resulted in the reinstatement of the conviction entered at trial. It found that the appeal judge erred in law in his application of the due diligence requirement of the *Palmer* test in that he wrongly reasoned that though the dashcam video had been disclosed to G.S. and was readily at hand for him to introduce in evidence, he should not have been faulted for not adducing it at trial because, being self-represented in the latter stages of the trial, he "did not know what to do" with the video evidence. The court did not agree with the appeal judge that G.S. did not know what to do with the dashcam video because at the point in the trial when the dashcam video should have been entered in evidence, that is, during the cross-examination of the investigating officer, he had counsel, and counsel chose not to introduce the dashcam video in evidence. The court concluded from its review of the trial proceedings that counsel had made a tactical decision not to present this evidence because it would have contradicted G.S.'s testimony and adversely affected his credibility. The court "from an overall perspective" found the appeal judge was incorrect in finding a miscarriage of justice had occurred during the trial.

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***R v Aalbers*, 2022 SKCA 105**

Richards Caldwell Schwann, 2022-09-27 (CA22105)

Criminal Law - Break and Enter with Intent to Commit Indictable Offence - Sentencing - Appeal

Following the granting of leave by a judge of the Court of Appeal (court), the offender, J.A., appealed the sentence imposed on him by a judge of the Court of Queen's Bench (25 October 2021, Estevan, CRM 6 of 2020) for breaking and entering, with his son, A.D.M., a garage attached to the home of another son, A.A. and A.A.'s spouse, B.A. during which J.A. assaulted B.A. He entered guilty pleas to these offences. The court recognized that the facts on sentencing were restricted to those in an agreed statement of facts consisting of a description of events captured on surveillance video, also part of the evidence, which included that: A.A. and B.A. had possession of a draw bar pin, the property of J.A. and A.D.A., without which a piece of farm machinery could not be moved; A.A. and B.A. chased J.A. and A.D.A. into the garage in an attempt to get the draw bar pin from A.A. and B.A., who barred the garage from entry; after besieging the windows and "foot door" of the garage, J.A. and A.D.A. were able to

Criminal Law - Reasonable Doubt - Circumstantial Evidence

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force their way in, and were confronted by A.A. holding a crowbar with which he struck J.A.; B.A. came into possession of the crowbar; J.A. wrestled it away from her, pushed her into a corner and attempted to grab her cell phone; meanwhile, A.D.A. and A.A. grappled with each other; A.D.A. punched A.A.; J.A. joined A.D.A. in assaulting A.A., who fell to the floor; J.A. held A.A. down and A.D.A. punched him in the face and head; B.A. once again had the crowbar and hit J.A. with it in the ribs, which ended J.A.'s participation in the assault on A.A.; J.A. saw A.D.A. take up a steel grate, and yelled "No"; A.D.A. struck A.A. on the head with it causing him to be concussed; since the incident, B.A. suffered ongoing back pain and emotional distress; and the offences occurred in the context of an acrimonious dispute concerning farmland. For his involvement in the break and enter J.A. was sentenced to 18 months' custody, 12 months' imprisonment concurrent with respect to the assault on B.A. and a lengthy term of probation. J.A. sought a suspended sentence for both offences. J.A.'s grounds of appeal were that the sentencing judge made "numerous errors of principle" and that the sentence was demonstrably unfit.

HELD: The court dismissed the appeal, agreeing with the sentencing judge that the break and enter was to be characterized as a home invasion as defined by ss. 2 ("dwelling-house") and 348.1 of the *Criminal Code* (Code), and as such subject to the enhanced sentencing range of 4 to 15 years established by a line of authority starting with *R v Pelly*, 2017 SKCA (SentDig) 26 and culminating most recently with *R v MacLeod*, 2018 SKCA 1, and as such a non-custodial sentence on the facts in this case was not a fit sentence. The court also found in accordance with *R v Friesen*, 2020 SCC 9 and *R v Lacasse*, 2015 SCC 64, that the sentencing judge made no errors in principle, which it stated, included "errors of law, a failure to consider a relevant factor, or the erroneous consideration of an aggravating or mitigating factor" and that the weighing and balancing of relevant factors was within the purview of the sentencing judge exclusively, unless a factor was over-emphasized or not given sufficient weight. With respect to the error in principle ground of appeal, J.A. argued that the sentencing judge erred in a number of ways: by not giving adequate weight to provocation as a mitigating factor; by conflating the facts of A.D.A.'s more serious offending with those applicable to the less serious facts pertinent to J.A.'s offending; by not properly applying *Campeau* to determine what aggravating factors are applicable to the home invasion in this case (see: *R v Campeau*, 2009 SKCA 3); and by not correctly assessing the mitigating factors relevant to J.A. As to the matter of the mitigating effect of provocation, the court reviewed the relevant cases and concluded that provocation could be a relevant mitigating factor on sentencing but was not to be equated with the true defence of provocation in murder cases, and in this case the sentencing judge did weigh this factor under the rubric of impulsivity. The court also disagreed with J.A. that the sentencing judge sentenced him as though he had pled guilty to the more serious charges stayed by the Crown or for which A.D.A. had been sentenced, remarking that the sentencing judge did not stray outside the four corners of the agreed-upon facts and the accompanying video, from which he was able to glean all the facts and circumstances applicable to J.A.'s offending. With respect to the four *Campeau*

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factors, the court pointed out that these were not an exhaustive list, and could not be such, since to close off consideration of all relevant factors would be an error in law. As to the *Campeau* factors, the Court went on to look at J.A.'s motive in committing the offences, commenting that the sentencing judge was "sensitive to the overall circumstances" that led J.A. to do what he did in trying to retrieve the pin. The court looked at the significance of the fact that the break and enter occurred in an attached garage, and not the dwelling area, finding that the sentencing judge was correct in giving the distinction no weight as a mitigating factor; that A.D.A. was more violent than J.A., reiterating that the sentencing judge was alive to the different levels of violence between J.A. and A.D.A; that the sentencing judge was correct in determining on a plain reading of s.718.2(a)(ii) of the Code that the offender's "family" was not restricted to victims of domestic violence, but included any members of his family, such as A.A. and B.A., so that violence against them was to be treated as an aggravating factor; and lastly, with respect to the *Campeau* factors, the court considered the sentencing judge's treatment of the effect of J.A.'s offending on the victims B.A. and A.A. affirming that the sentencing judge was correct in finding that J.A. was an active party to the home invasion so that, though A.D.A. was more violent than J.A. was, the overall effect of the home invasion on A.A. and B.A. was rightfully considered as an aggravating factor in his sentencing. The court next focused on the ground raised by J.A. that the sentence was demonstrably unfit, which it understood engaged the principle of parity contained in s.718.2(b), requiring it to compare similar cases with the circumstances of the case at hand. Following its review of the case law dealing with home invasions, the court was satisfied that the sentencing judge properly applied parity and was conscious that he was sentencing J.A. below the normal range to take into account his age and otherwise good character, and that he appreciated the primary goal of sentencing for home invasions was denunciation and deterrence, generally achieved through a penitentiary sentence of imprisonment, and which could not be achieved in this case by a suspended sentence as requested by J.A.

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***R v M.J.*, 2022 SKCA 106**

Ottenbreit Barrington-Foote Tholl, 2022-09-28 (CA22106)

Criminal Law - Reasonable Doubt - Credibility
Criminal Law - Reasonable Doubt - Circumstantial Evidence

M.J. appealed his convictions for making child pornography and related charges to the Court of Appeal (court), alleging that the Provincial Court Judge (trial judge) committed reviewable errors in that he "misapprehended or failed to give effect to material evidence and erred in his assessment of M.J.'s credibility, resulting in an unreasonable verdict pursuant to s.686(1)(a)(i) of the

Criminal Code or a miscarriage of justice pursuant to s. 686(1)(a)(iii)" and in that "he erred in law in his identification and application of the test in *R v W.(D).*, [1991] 1 SCR 742" (*W. (D.)*). The court was cognizant that the task of the trial judge was to determine whether the Crown had proven beyond a reasonable doubt that M.J., who denied making the child pornography, was guilty of the charges in light of all of the evidence, including: the testimony of M.J.'s girlfriend B.D., who testified she found child pornography on M.J.'s old iPhone he kept in a drawer in his home office; when she confronted M.J. he admitted to taking the video; forensic evidence that the four clips of child pornography on the iPhone were taken between August of 2016 and May of 2017, two were taken 17 minutes apart on one day and two others on two subsequent days; these depicted the victim naked from taking a shower and were taken through a hole in the bathroom door; forensic evidence of numerous bookmarked pornography sites on the iPhone; the testimony of the victim that, following the divorce of her mother and M.J., she stayed at the Saskatchewan residence, where she had lived prior to the divorce and where M.J. continued to reside, on approximately six occasions starting in March of 2016 and continuing for one year; testimony from M.J. in direct contradiction of B.D.'s evidence in which he stated that he stopped using the iPhone in 2015, had lost track of it, and someone else must have used it to take the child porn videos and access pornographic sites; and testimony with respect to opportunity for others in the home to have taken the videos including the "frequent presence" of others in the home.

HELD: The court denied M.J.'s appeal, though it agreed with him that the trial judge "erred in the course of his assessment of M.J.'s credibility, including in his identification and application of the principles reflected in *W. (D.)*," ruling that the errors were not material because his pathway to finding M.J. guilty of the charges beyond a reasonable doubt bypassed his faulty assessment of witness credibility. As to the matter of the *W. (D.)* analysis, the court observed that the trial judge made two fundamental errors by misstating the second and third steps of the analytical process when he reasoned that "if I disbelieve [M.J.] or if I'm not sure whether I believe him, I must assess all of the evidence to determine whether the Crown has proven its case against the accused beyond a reasonable doubt." The court explained that the trial judge's first error was not acquitting M.J. if he was not sure if he believed him, as he would then have had a reasonable doubt in his guilt; and his second error was in self-directing himself that he was to assess "all of the evidence" after being stymied about whether he should believe M.J. when the case law required him to consider all of the evidence in assessing his credibility. The court recognized with reference to binding judicial authority that a trial judge does not fall into error by misstating a legal test if his reasoning demonstrated that he in fact applied that test correctly, but went on to say that in this case, the trial judge's "reasoning disclose[d] legal errors, in particular, by failing to consider M.J.'s evidence "in the context of all the evidence," but only in the context of two "narrow and discreet issues," being what the trial judge called the nonsensical proposition that B.D. would search a phone belonging to M.J. "she had never seen him using" and M.J.'s testimony that he did not remember creating the bookmarks to the pornographic sites, which he said "did not make sense." In relation to these two issues, the court pointed out that there was evidence which could have led the trial judge to find B.D. had other reasons to look at M.J.'s iPhone if he had considered it, and that in relation to the porn site bookmarks, the trial judge erred by engaging in speculative reasoning that persons in general do not forget accessing porn sites. Having reviewed the trial judge's credibility assessment and finding it wanting, the court explained that it would nonetheless uphold the conviction because "the trial judge did not rely on the results of his credibility analysis" in arriving at his guilty verdict but instead relied on uncontroverted circumstantial evidence that M.J. took the videos on his iPhone, upon which it was open for him to convict.

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***R v Goforth*, 2022 SKCA 107**

Caldwell Leurer Barrington-Foote, 2022-10-05 (CA22107)

Criminal Law - Sentencing - Appeal - Manslaughter
Criminal Law - Sentencing - Unlawfully Causing Bodily Harm - Appeal

K.E.G. was convicted by a jury of manslaughter and unlawfully causing bodily harm (see: 2016 SKQB 75). The evidence upon which the jury rendered guilty verdicts involved the death by starvation of a child and the near death of a second child within nine months of their entering the foster care of K.E.G. and his spouse. The trial judge sentenced K.E.G. to 15 years' imprisonment for his lesser role in the offences. Both K.E.G. and his spouse appealed their convictions and sentence (see: 2021 SKCA 20). The Court of Appeal (court) overturned the conviction of K.E.G. on the basis that the trial judge's jury charge was defective and may have led the jury to confuse the elements of the offences. Having overturned the conviction, the court was not required to consider the sentence appeal. The Crown appealed to the Supreme Court, which restored K.E.G.'s convictions in 2022 SCC 25 and remitted the matter of K.E.G.'s sentence appeal to the court. The Crown argued that given the result of the conviction appeal to the Supreme Court, K.E.G.'s moral culpability was not lessened; whereas K.E.G. argued that his moral culpability was lessened because of his "diminutive role" in the crimes so that his sentence was disproportionate to "the sentences imposed on other offenders in similar circumstances."
HELD: The court dismissed the sentence appeal, stating that "we are not persuaded that the trial judge erred in law or in principle or that the sentence she imposed is demonstrably unfit in the circumstances."

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***Saskatchewan Government Insurance v Huber*, 2022 SKCA 122**

Kalmakoff McCreary Rothery (ad hoc), 2022-10-26 (CA22122)

Administrative Law - Motor Vehicle Accident - Rehabilitation Benefits - Appeal
Regulations - Interpretation - *Personal Injury Benefits Regulations*, Section 12
Statutes - Interpretation - *Automobile Accident Insurance Act,* Section 112(1)

Pursuant to s. 194(1) of *The Automobile Accident Insurance Act* (AAIA), Saskatchewan Government Insurance (SGI) appealed to the Court of Appeal (court) following the granting of leave by a judge of that court from the decision of the Automobile Insurance Commission (commission) to reinstate R.H.'s rehabilitation benefits, which SGI had terminated. SGI was of the view that "any ongoing pain and decline in functioning… [R.H.] experienced… was no longer causally related to the injuries he had suffered in the MVA [motor vehicle accident] but, rather, the result of a pre-existing degenerative condition." The background facts relevant to the appeal were not in issue. R.H. was involved in a MVA in which he sustained whiplash injuries to his cervical, thoracic, and lumbar spine which worsened his pre-existing condition. Over the course of one year, R.H. accessed treatment approved by SGI under the AAIA from medical practitioners including physiotherapists, a chiropractor, and his family doctor. R.H. had reached "maximum

medical improvement" as that term is defined in s.12 of the Personal Injury Benefits Regulations (regulations), and though empowered by s. 12(3)(b) of the regulations to reinstate rehabilitative measures "to address a decline in the insured's physical or mental ability to function," SGI chose not to do so because it took the position that any decline in his ability to function was due to the pre-existing condition and not the motor vehicle accident. The court noted that the commission found as a fact in overturning SGI's decision that R.H.'s decline "had been caused by a combination of the injuries suffered in the MVA and his pre-existing condition." SGI was given leave to "examine" if the commission erred in law in its fact-finding process; in failing "to properly apply the crumbling skull doctrine"; in arbitrarily apportioning liability; and by concluding R.H. relapsed without "considering the statutory definition of that term."

HELD: The court first confirmed that the standard which was to govern it in reviewing the commission's decision was one of correctness, since s.194 of the AAIA allowed appeals from commission decisions from questions of law alone following leave being obtained. It was cognizant that material errors by the commission in a finding of fact could amount to an error of law if "it is (a) based on no evidence, (b) made on the basis of irrelevant evidence or in disregard of relevant evidence, or (c) based on an irrational inference of fact." The court first focused its attention on whether the commission had erred in these ways in its fact-finding process, concluding that it had not, and that SGI's arguments did not rise above "an invitation to [the] court to reweigh the evidence, which it appreciated was beyond its jurisdiction to do. In particular, the court noted that though SGI had presented evidence from medical experts that the decline in R.H.'s functioning was entirely due to his pre-existing condition, the commission chose to rely on the evidence of R.H.'s physiotherapist and family doctor, who had provided ongoing personal, hands-on care to him for his degenerative condition prior to and following the MVA and resultant injuries. The court commented that the commission was entitled to prefer these witnesses to the witnesses called by SGI. The court also rejected SGI's argument that the commission ignored the plain evidence of R.H.'s family doctor to the effect that R.H. had not regressed after attaining "maximum medical improvement," expressing that SGI was overstating the doctor's opinion, and the commission was correct in finding only that he was simply declining to provide an opinion on that point. The court also found no merit in SGI's position that the commission erred in law in ruling that it could not have properly concluded that R.H. had "relapsed" when it failed to consider the statutory definition of the word. In response, the court stated that there was no need for the commission to have done so because the term was not used in the AAIA with respect to rehabilitation benefits such as those in issue on appeal. As well, the court rejected SGI's assertion that the commission erred in law by "fail[ing] to properly apply the crumbling skull doctrine." It noted, after canvassing the case law, that the determination of the applicability of the crumbling skull doctrine was a finding of fact that the commission was entitled to make on the evidence it accepted, in particular that of the physiotherapist and the family doctor to the effect that R.H.'s" ongoing difficulties and decline in function were caused by the MVA and other pre-existing conditions." The court also agreed with the commission that as the relapse was caused by a combination of R.H.'s pre-existing condition and the injuries from the MVA, SGI was not liable to pay for the costs of treatment related to the pre-existing condition, though the commission was duty-bound to apportion SGI's costs as best it could, and it apportioned them at 50%. The court disagreed with SGI that the commission erred in law in that it "arbitrarily apportioned its liability", relying on the governing case law that in crumbling skull scenarios, calculating an exact apportionment of damages is usually impossible and an estimate "grounded on the evidence" is normally the only method available.

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***Abdulhussein v Rezz Investments Ltd.*, 2022 SKCA 123**

Caldwell Kalmakoff McCreary, 2022-10-26 (CA22123)

Civil Procedure - Questioning - Non-compliance with Undertakings - Appeal
Civil Procedure - Striking Pleadings for Non-compliance with Undertakings - Appeal
Civil Procedure - *Queen's Bench Rules*, Rule 5-36

S.B., 1215972 Alberta Ltd.,1432416 Alberta Ltd. and A.A. (appellants) appealed to the Court of Appeal (court) the decision of a judge of the Queen's Bench Court (case management judge) striking their statement of defence, as allowed by Rule 5-36 of the *Queen's Bench Rules* (Rules), for failing to fulfill undertakings they made at a questioning held early in 2019 (see: QBG 925/13, Saskatoon, 6 July 2021) (striking decision). The court proceedings and affidavit evidence revealed that: the questioning was held in early 2019, and the appellants (defendants in the action) undertook to comply with 66 undertakings, many of which required the appellants to request documents in the hands of third parties including the Canada Revenue Agency; very little progress was made by the appellants in satisfying the undertakings; the respondents (plaintiffs in the action) applied to the case management judge for an order setting a deadline for the "appellants to fulfill them," which was allowed, resulting in a deadline of November 27, 2020; a second deadline was set for January 22, 2021; at that time 48 of the 66 undertakings remained unfulfilled; at this point, the respondents applied under Rule 5-36(4) "for an order striking the appellants' pleadings pursuant to Rules 5-36(2)(b) and 5-36(3)(b)"; during the course of the application to strike, a "last chance fiat" was made adjourning the application to strike without fixed date (*sine die*) (See: QB 925/13, Saskatoon, 3 March 2021); in the last chance fiat, the case management judge stated "We are very, very, very near to the point where the defendants' pleadings will be struck out" and set the last chance deadline for April 12, 2021; the appellants produced some documents after the last chance deadline; the respondents placed the Rule 5-36 application back before the case management judge, being of the view that undertakings were still outstanding; at the continuation of the Rule 5-36 application, the parties argued about whether the undertakings had or had not been satisfied; in the striking decision, the case management judge provided his reasons for striking out the appellants' statement of defence, stating to the effect that the appellants had flouted prior orders to comply with undertakings, failed to contact third parties to request documents until the last minute and did not secure third party documents, causing some of these to be lost in a seeming attempt at spoliation, and in two and one-half years, they took no meaningful steps towards compliance with the undertakings. The appellants' grounds of appeal were that the case management judge committed reviewable errors by misinterpreting what was required of them to comply with the undertakings; by finding that the respondents were prejudiced because of the loss of documents when it had not been shown that they would have assisted with the respondent's case; and that the striking of the statement of defence was too "draconian" a remedy.
HELD: The court dismissed the appeal. It first confirmed that the standard of review applicable to discretionary decisions was applicable in this case, and that "this Court may not interfere with the Striking Decision unless we are convinced that the judge made a palpable and overriding error in his assessment of the facts, failed to correctly identify the legal criteria that governed the exercise of his discretion under Rule 5-36, or misapplied those criteria (see *Kot v Kot*, 2021 SKCA 4)." In applying this standard, the court did not hesitate to conclude that a reading of the striking decision showed the case management judge was aware that the appellants had only undertaken to ask for third party documents and not to produce them, but he noted that he had correctly concluded that the appellants had done neither with any urgency. The court was of the view that the debate about whether the appellants had complied with the undertakings was a "red herring" in any event because the case management judge struck the statement of defence for another reason, namely that the long delay of two and one-half years was largely the fault of the lackadaisical attitude of the appellants towards their obligations as litigants. The court also disagreed with the appellants that the

case management judge was wrong in ruling that the respondents were prejudiced by the loss of documents, observing that they did suffer prejudice because they would never know if the documents might have assisted their case. As to the striking out remedy being overly harsh, the court referred to *Prestige Commercial Interiors (1992) Ltd. v Graham Construction and Engineering Inc.*, 2008 SKCA 27 which stands for the proposition that Rule 5-36 is akin to a contempt of court proceeding and is to be imposed only for a "deliberate and flagrant breach" of the rule. The court expressed that in his reasons, the chambers judge "properly understood the type of conduct that could attract the remedy in Rule 5-36," and specifically enunciated the conduct of the appellants that was of that type.

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***Curry v Athabasca Resources Inc.*, 2022 SKKB 221**

Elson, 2022-09-30 (KB22215)

Contract Law - Formation of Contract - Consensus ad Idem
Contract Law - Offer and Acceptance - Silence as Acceptance
Unjust Enrichment - Elements

The parties to an action brought by the plaintiff, C.C., a geologist who had been under contract to provide "exploration geology services" to the corporate defendants, collectively referred to as Athabasca/Ruby, whose principal was D.Z., and who were in the business of "pursuing investment in Saskatchewan natural resource products" and "taking over oil leases," consented to resolve the cause of action by summary judgment pursuant to Rule 7-2 of *The Queen's Bench Rules* without a trial and on affidavit evidence. The judge of the Court of Queen's Bench (judge) agreed with the parties that this manner of proceeding was in accordance with the case law governing summary judgments and that he was "comfortable making the findings of fact necessary to determine whether there is liability under the one remaining cause of action asserted by the plaintiff," breach of contract. C.C. alleged that his initial contractual relationship with Athabasca/Ruby, which commenced in 2005 and required him to analyze geological samples for a fee of $60.00 per hour and report on his findings to D.Z., evolved in 2006 when he assumed sole responsibility for "all of Athabasca/Ruby's exploration activities, including all oil and gas prospecting work." D.Z. denied that C.C.'s role had evolved as suggested. The judge made findings of fact from the affidavit evidence, which consisted primarily of email exchanges between C.C. and D.Z. and included the following facts: D.Z. knew that C.C. took on greater responsibilities in 2006, and should be compensated in some manner for that, inviting C.C. "to suggest a small monthly fee for you to keep going and add hourly charge for particular work"; on January 3, 2006, C.C. responded to her proposal writing that the $60.00 fee should continue and that in addition he would have "a 1.0% production and performance over-ride attached to all production from lands that we successfully acquire and develop;" he then wrote "Let me know if this fits with your plans;" D.Z. did not reply to C.C.'s request for a response and C.C. continued to submit invoices to Athabasca/Ruby at $60.00 an hour without additional compensation; the "production and performance over-ride" referred to by C.C. was known in the oil industry under the acronym "GORR" (for "gross overriding royalty"), a form of royalty payable only when or if a mineral interest generates income; C.C. and D.Z. spoke no more about the matter of the GORR until October 17, 2006, or 8 months after C.C. proposed it; C.C. and D.Z. had a face-to-face discussion about the GORR which left C.C. with the impression that D.Z. was backing out of the GORR, to which he believed she had already agreed; on

October 18, 2006, D.Z. presented a letter to C.C. entitled “counter-proposal” in which she offered C.C. additional compensation in the form of shares in Ruby; though he had not obtained legal advice about his position, C.C. maintained that the fact he had delivered to D.Z. the email containing his proposal that he be compensated by way of a GORR of 1.0% and that he continued to do the “land selecting and evaluation” constituted a binding contract; and C.C. claimed that Athabasca/Ruby was liable for breach of contract in the amount of $400,000.00.
HELD: The judge allowed the defendant’s application for summary judgement and dismissed C.C.’s cause of action in contract. First, after reviewing *Garland v Consumers’ Gas Co.*, 2004 SCC 25, he disposed of C.C.’s unjust enrichment claims on the basis that the “previous contractual arrangement between the parties – one for which the parties were contemplating a change for greater consideration,” fell into one of the closed categories of “juristic reasons,” namely the existence of a contract that justified the enrichment. As to the cause of action in contract, his analysis centered around the principle enunciated in *Saint John Tug Boat Co. v Irving Refining Ltd.*, [1964] SCR 614 and followed in more than 150 cases, that in certain circumstances unequivocal conduct including silence can satisfy the fundamental element of contract creation, namely, a meeting of the minds or *consensus ad idem*; but in this case, due to the pre-existing contract, the fact that C.C. continued to provide services and continued to be paid as before for eight months following his proposal, combined with D.Z.’s silence, could not be said to rise to the level of clear conduct evidencing an acceptance by D.Z of C.C.’s request to be paid additional compensation by way of a GORR, and in the result, C.C. had failed to prove the existence of the new contract.

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***Lombard v Semaganis*, 2022 SKKB 224**

Currie, 2022-10-11 (KB22217)

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Civil Procedure - *Queen’s Bench Rules*, Rule 7-9(2)(a), Rule 7-9(2)(b)
Tort - Defamation - Elements

The defendants, SWL, lawyers in a partnership, (the law firm) and their lawyer, F.B., were sued in defamation by a former partner of the law firm, A.L. (the defamation action). SWL had brought an action against A.L. alleging that when she was a partner with the law firm, A.L had wrongly converted legal fees to her own use to which the former partnership was entitled (the partnership action). In her statement of claim in the defamation action, A.L. claimed the pleadings in the partnership action defamed her. The law firm brought an application to a judge of the Court of King’s Bench (chambers judge) pursuant to Rules 7-9(2)(a) and 7-9(2)(b) of *The Queen’s Bench Rules* to strike certain portions of the statement of claim in the defamation action on the ground that they disclosed no reasonable cause of action against it and were frivolous and vexatious; F.B. brought a similar application with respect to the claim as a whole. The record and proceedings of the court and the pleadings themselves formed the evidentiary basis for the applications.
HELD: The chambers judge allowed the applications with costs in the amount of $3,000.00 to F.B. and costs in the amount of

$3,000.00 in favour of the law firm in any event of the cause. With reference to the relevant case law, the chambers judge reiterated the rule that all pleadings and proceedings in an action, including those in a defamation action where malice was pleaded, were protected by an absolute privilege for public policy reasons related to the interests of justice. He cited a number of authorities including *Royal Crown Academic School Inc. v Wu*, 2017 ONSC 7295, in which the court stated in relation to defamation actions, "where absolute privilege applies no action can be brought regardless of whether the words were written or spoken maliciously, without justification or excuse, or negligently." He then concluded that as the case law was clear that defamatory words claimed to be published in court proceedings, including pleadings, were absolutely barred by privilege, the statement of claim as against F.B. and the portions of the statement of claim contested by the law firm did not disclose a reasonable cause of action, and since they obviously had no chance of success, were also ruled to be frivolous and vexatious; so that to allow the claim against F.B. and the challenged portions of the claim against the law firm to proceed would be an abuse of the process of the court. The chambers judge appreciated that he had the option to consider allowing corrective amendments to rectify the deficiencies in the statement of claim, which included A.L.'s failure to plead particulars of the defamatory words, to whom the words were published, and where and when they were published, but chose not to do so in this case because A.L. acknowledged she did not know these details and so was unable to plead facts which could bring the action out from under the absolute privilege barring her claim from proceeding.

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***Wappel v SaskEnergy Incorporated*, 2022 SKKB 230**

Layh, 2022-10-19 (KB22219)

Contracts - Contracts of Employment - Wrongful Dismissal
Civil Procedure - Pleadings - Application to Strike Statement of Claim - Want of Prosecution - Delay
Civil Procedure - Queen's Bench Rules, Rule 4-44

SaskEnergy Incorporated (SEI) brought an application for undue delay in prosecuting an action before a judge of the Court of King's Bench (chambers judge) pursuant to Rule 4-44 of *The Queen's Bench Rules* to strike the wrongful dismissal claim brought by M.W., a former in-house counsel of SEI who was dismissed from her employment for cause on May 30, 2014. The facts in the matter were not in issue. The chambers judge recognized his task in deciding whether M.S.'s statement of claim should be struck was to apply these facts or account for their lack in accordance with the legal framework established by *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48, 350 Sask R 160 (*ICC*).
HELD: The chambers judge allowed the application and ordered M.W.'s claim be struck for delay in its prosecution. In conducting his analysis, he followed the three-step process mandated by *ICC*. As to the first step, whether the delay was "inordinate," the chambers judge observed that M.W. issued the statement of claim on May 26, 2016 and was notified by her counsel of SEI's application to strike on April 27, 2022, at which point her action, which he said was generally recognized as being relatively straightforward and not uncommon, had not moved beyond the pleading stage. The chambers judge was satisfied this period of time was inordinately long. Moving on to the second part of the test, whether the inordinate delay was excusable, the chambers judge reviewed M.W.'s excuses: on October 20, 2014, her psychiatrist reported she was suffering from major depression; she was preoccupied with Law Society discipline proceedings from July 2014 to June 2016; she assisted her sister with support and

assistance during her cancer treatments in 2019 and 2020; and because of the COVID-19 pandemic, she did not want to attend meetings. In considering these, the chambers judge first noted that M.W. had not adequately fleshed out the specifics of these excuses, as a result of which he was unable to assess their merit; that he could not tell how her depression may have effected her ability to advance the action from May, 2016; that the evidence revealed that the discipline proceedings were concluded in July, 2016, and so should not have interfered with progressing the action; and led him to wonder how she could have dealt with the strain of discipline proceedings but not rudimentary matters such as filing an affidavit of documents; that he was sympathetic to M.W. and her sister in her illness but commented that many people are challenged by illness, and M.W. failed to adduce evidence which allowed him to assess how her sister's illness was relevant to the application; and lastly, he could not see how the COVID-19 pandemic was a barrier to managing the action since video-conferences and electronic methods of exchanging documents were a solution to avoiding personal contact. Having determined that M.W. had not satisfied him that she had met her onus to show the delay was not unreasonable, he focused on the third test of the *ICC* analysis, whether the interests of justice required that M.W.'s action be allowed to proceed, which he answered in the negative, and in doing so considered that the passage of time since her dismissal on May 14, 2014 prejudiced SEI in that essential witnesses who were personally involved in M.W.'s firing had left SEI; that M.W. waited too long to commence her action in that she issued the statement of claim on the eve of the two-year limitation period, and waited six months to serve it; that the trial of the action was far into the future; that SEI attempted to move the litigation forward but to no effect; that the reasons M.W. offered for the delay did not weigh in her favour in the balancing exercise of the third step; and that as this action did not engage important societal concerns, no public interest was at stake in striking M.W.'s claim for want of prosecution.

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***Bank of Montreal v Bacsu*, 2022 SKKB 240**

Popescul, 2022-11-03 (KB22227)

Civil Procedure - Application to Renew a Money Judgment
Civil Procedure - *Queen's Bench Rules*, Rule 1-6, Rule 10-12
Debtor-Creditor - Money Judgment
Statutes - Interpretation - *Limitations Act*, Section 7.1

The court record in this matter revealed that the Bank of Montreal (BMO) obtained a default money judgment (judgment) on December 13, 2011, against D.B., its debtor under a promissory note for an outstanding amount owing of $14,853.79. It filed an application to renew the judgement at the Court of Queen's Bench (court) pursuant to Rule 10-12 of *The Queen's Bench Rules* on November 24, 2021, 20 days before its 10-year expiry date on December 13, 2021. After numerous adjournments at the request of the BMO to effect service of the application to renew the judgment on D.B., which was effected five months after the expiry of the judgment, on May 13, 2022, the application to renew was heard on August 23, 2022 by a judge of the court (chambers judge). In order to determine if he was empowered to renew the judgment on these facts, the chambers judge understood he was

required to consider whether the BMO's application under Rule 10-12 was statute-barred by operation of s.7.1 of *The Limitations Act* (LA) or whether the curative provisions of Rule 1-6 could be invoked to allow him to renew the judgment.
HELD: The chambers judge dismissed the application with leave given to the BMO to file further materials addressing why the application was not served on D.B. prior to the expiration period for service; and evidence relevant to why it would be appropriate for the court to cure the "procedural irregularity relating to service." Before the court was also a minor issue of the interest rate due and owing by D.B. The main issue before the chambers judge, however, was an interpretative one: what was meant by the phrase "no proceeding shall be commenced after 10 years from the date of the judgment or order" in s.7.1 of the LA as it applied to Rule 10-12, and the phrase "the judgment creditor… at any time before proceedings under the judgment would be barred by *The Limitations Act*, [shall] serve on the judgment debtor a notice of application." He appreciated that he was to decide whether filing the application to renew the judgment commenced a proceeding or whether Rule 10-12 prevailed, requiring that the application be served on the debtor 20 days before the expiry of the 10-year limitation period, failing which the proceeding to renew the judgment would be statute-barred. He was aware that if filing of the application and service of the application on D.M. needed to be done before the expiry of the 10-year limitation period, service beyond the 20 days prior to the application would be a complete statutory bar to the application, not a procedural irregularity fixable under Rule 1-6 in the appropriate circumstances. He concluded after reviewing s. 2-10 of The Legislation Act and its "modern approach" to statutory interpretation, which he noted emphasized a "fair, large and liberal interpretation that best ensures the attainment of [the objects of an Act]," that applying to renew a judgment under Rule 10-12 was in effect commencing a proceeding under s.7.1 of the LA, so that the filing of the application on November 24, 2021 stopped the clock before the 10-year period elapsed. Following from that, the chambers judge accepted that the failure to serve D.B. with the application and materials before December 13, 2021, was a procedural irregularity curable by Rule 1-6, though BMO had an onus to show why Rule 1-6 should be exercised in its favour.

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