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 Bear*, 2022 SKCA 131**

Jackson Tholl Kalmakoff, 2022-11-16 (CA22131)

Criminal Law - Evidence - Circumstantial Evidence
Criminal Law - Appeal - Conviction

The appellant appealed his convictions for robbery and dangerous operation of a conveyance. The evidence at trial was entirely circumstantial. The trial judge decided guilt was the only reasonable inference that could be drawn from the evidence. The Court of Appeal considered whether the trial judge erred by failing to apply the proper legal principles governing the assessment of circumstantial evidence and drawing inferences the evidence did not support. HELD: The appeal was dismissed. Where the Crown's case was circumstantial, the trier of fact must be satisfied beyond a reasonable doubt that the accused's guilt was the only reasonable inference to be drawn from the evidence. Alternative theories consistent with innocence must be enough to raise a reasonable doubt. The trial judge correctly instructed herself and carefully analyzed the evidence. The appeal court reviewed the trial judge's reasons as a whole and did

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not consider whether the appeal court would have reached the same conclusion but whether it was unreasonable for the trial judge to conclude that the evidence excluded all reasonable alternatives to guilt. No direct evidence supported the appellant's alternative theories. There was no basis for the appeal court to interfere with the trial judge's decision.

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***Piett v Canada Revenue Agency*, 2022 SKCA 141**

Barrington-Foote, 2022-12-08 (CA22141)

Civil Procedure - Class Action - Application to Strike - Stay of Proceedings - Abuse of Process
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Class Action - Certification
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Class Action - Certification - Appeal
Class Actions - Certification - Parties

The applicant applied for leave to appeal a decision denying certification and substitution of representative plaintiff for a proposed class action lawsuit. The action related to a failed tax shelter scheme that resulted in claimed donation credits being disallowed by the Canada Revenue Agency. The designated judge refused to certify the action because it was an abuse of process and should be struck in its entirety. The designated judge also decided neither the representative plaintiff nor the proposed substitute were suitable. An Ontario class action was a preferable proceeding. The applicant's proposed grounds of appeal included that it was not plain and obvious there was no reasonable cause of action against the Canada Revenue Agency, and alleged errors in interpreting legislation, refusing substitution of the representative plaintiff and finding the Ontario action was preferable. The Court of Appeal chambers judge considered whether the proposed appeal was of sufficient merit and importance to warrant the attention of the Court of Appeal.
HELD: The application for leave to appeal was denied. The designated judge had decided the action was for the improper purpose of profiting from the class members the representative plaintiff purported to represent, and thus the action was an abuse of process.
The proposed grounds of appeal did not directly address the abuse of process issue. The proposed grounds of appeal did raise issues related to the foundation for the designated judge's finding that the action was an abuse of process. However, the conclusion that the action should be struck as an abuse of process would stand regardless of the applicant's success on

Criminal Law - Interception of Private Communications - Admissibility

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Physicians and Surgeons - Medical Malpractice

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the proposed grounds of appeal. The appeal was therefore moot and leave denied.

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***Richardson v Richardson*, 2022 SKCA 142**

Richards Schwann McCreary, 2022-12-09 (CA22142)

Civil Procedure - *Court of Appeal Rules*, Rule 46.2(1)
Family Law - Vexatious Litigant
Practice - Vexatious Litigant Application

The Registrar of the Court of Appeal requested that the court consider whether a litigant was a vexatious litigant, pursuant to Rule 46.2(1) of *The Court of Appeal Rules*. The litigant had commenced three separate appeals related to family law proceedings. The appeals named various respondents, including entities not named in the proceedings appealed from. Many applications, affidavits, and other lengthy materials were filed or attempted to be filed in relation to each appeal. The Court of Appeal considered: 1) what approach to Rule 46.2 was appropriate; 2) did the litigant's conduct warrant an order restraining his access to the court; and 3) what remedial order was appropriate?
HELD: The court determined the litigant was a vexatious litigant and made a detailed remedial order. 1) The registrar's ability to initiate a vexatious litigant inquiry under Rule 46.2 was new. A vexatious claim is malicious or motivated for reasons other than to enforce a true legal claim. A frivolous proceeding is obviously groundless and cannot succeed. The registrar's new authority to initiate a vexatious litigant inquiry ought to be used sparingly where a litigant acts abusively but no person has stepped forward with a Rule 46.2 application. The court takes the same approach whether the inquiry is initiated by the registrar or a litigant. The court considers the number of appeals to determine the same issue, whether appeals are without right of appeal or without merit, whether appeals were an abuse of court process, whether appeals were brought for an improper purpose, whether grounds were repeated from one appeal to another, whether accusations of malfeasance were made against lawyers or others, and whether the appellant had refused to pay costs. 2) The litigant habitually, persistently, and without reasonable cause commenced frivolous or vexatious proceedings as per Rule 46.2(1). All of the litigant's appeals had been without merit and based on unfounded allegations. The proceedings and materials filed overlapped and were unnecessarily extensive. The litigant ignored prior court decisions. He habitually made unsubstantiated allegations of malfeasance against anyone who acted contrary to his perceived interests, including judges, court officials, government officials and lawyers. As demonstrated by threatening emails sent by the litigant, he started proceedings for the purpose

Residential Tenancies Act, Section 72 - Appeal

Statutes - Interpretation - *Administration of Estates Act*, Section 50.5

Statutes - Interpretation - *Cities Act*, Section 165(3.1)

Statutes - Interpretation - *Class Actions Act*, Section 6(1)

Statutes - Interpretation - *Competition Act*, Section 36, Section 45, Section 52

Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 49(1)(a) and (b), Section 72

Statutes - Interpretation - *Saskatchewan Medical Care Insurance Act*, Sections 49 to 49.21

Statutes - Interpretation - *Ticket Sales Act*

Torts - Negligence - Duty of Care - Standard of Care

Torts - Negligence - Elements

Wills and Estates - Appeal

Wills and Estates - Executor - Removal

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Wills and Estates - Trust

of intimidating and harassing individuals. The court also noted the litigant used litigation proxies. 3) The court has inherent authority to make orders necessary to protect the proper administration of justice and prevent abuse of its process. A remedial order should be tailored to the particular problems posed by the vexatious litigant. The remedial order must preserve the litigant's right to advance his legitimate interests and prevent meritless proceedings and prevent the court and other litigants from dealing with unnecessary filings and proceedings, prevent the use of litigation proxies and protect the registry staff from threatening and abusive behaviour.

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***Geran v Geran Estate*, 2022 SKCA 143**

Barrington-Foote Tholl Kalmakoff, 2022-12-13 (CA22143)

Wills and Estates - Appeal
Wills and Estates - Executor - Removal
Wills and Estates - Executors - Conflicts of Interest
Wills and Estates - Trust
Statutes - Interpretation - *Administration of Estates Act*, Section 50.5

The appellant was one of four adult children of a man who died intestate. Two of the man's other children were co-administrators of the estate. One co-administrator had applied to the court to approve the sale of their father's house. The remaining co-administrator and the other siblings opposed the sale and applied to remove the co-administrator who had applied to approve the sale. The chambers judge approved the sale and dismissed the application to remove the co-administrator from her role. The appellant appealed. The sale was put on hold by the appeal, and the offer for sale had lapsed. The court considered whether the chambers judge erred: 1) in finding the application to approve the sale was properly brought pursuant to s. 50.5 of *The Administration of Estates Act*; 2) in identifying and applying the correct legal test when deciding to approve the sale of the house; and 3) in failing to find the co-administrator had breached her fiduciary duty and in not removing and replacing her as co-administrator.
HELD: The appeal was allowed, with one judge dissenting, although not regarding the majority's interpretation of s. 50.5 of *The Administration of Estates Act*. 1) One co-administrator alone was not entitled to apply pursuant to s. 50.5 of *The Administration of Estates Act* for the order that the house be sold. The term "the administrator" in s. 50.5 means all co-executors or co-administrators together when there are two or more of them. The interpretation was supported by the historical development of the law, statutory interpretation, and the common law principle requiring co-trustees to act jointly. Where co-administrators cannot agree,

Case Name

Drover v Avenue Living Communities Ltd.

Dupmeier v Saskatchewan Veterinary Medical Association

Geran v Geran Estate

Labre v ICR Property Management Inc.

Lorencz v Talukdar

Midtown Plaza Inc. v Saskatoon (City)

Patel v Joint Medical Professional Review Committee

Piett v Canada Revenue Agency

R v Bear

R v C.B.L.

R v Fox

Richardson v Richardson

VC Stonework Ltd. v Rally Motors Ltd.

Watch v Live Nation Entertainment Inc.

legislation provides for an application to the court for advice and direction. 2) The chambers judge erred in identifying the legal considerations applicable to the judge's exercise of discretion. The considerations that would apply to an application under s. 50.5(4) of the Act did not apply because a single co-administrator cannot apply under that section. A duly appointed executor or administrator has substantial freedom because they have the right and obligation to carry out their duties within the limits of their appointment. When personal representatives must act jointly, a decision by one of them does not constitute attract judicial restraint because it is not an act within the limits of their authority. Courts have discretionary authority to break a deadlock between trustees in some circumstances, but not in the circumstances of this case. The sale offer had expired and therefore there was no sale the court could approve. The court would not have approved the sale in any event. The evidence did not demonstrate refusing to approve the proposed sale would result in manifest prejudice to the beneficiaries. 3) The co-administrator was a fiduciary and a trustee and as such, had the duties of faithfulness, loyalty and fidelity. The co-administrator threatened one of the beneficiaries with loss of his interim distribution as a pressure tactic to try to collect a debt owed to the co-administrator personally. This action put her own interests in conflict with her duties as co-administrator and was a breach of her duties. The chambers judge erred by not deciding whether the co-administrator had breached her fiduciary duties. This was a necessary consideration to decide whether she should be replaced. Whether the co-administrator had endangered estate property or sought to settle the estate in a timely way was not the correct test. The other three beneficiaries agreed that the co-administrator should be removed and replaced. The co-administrator was originally appointed based on consent of the beneficiaries. The main concern in deciding whether to remove a personal representative is the welfare of the beneficiaries. The evidence before the court contained conflicting allegations between the co-administrator and the remainder of her siblings. The majority granted the application to remove the co-administrator and appoint her sister in her stead.

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***Midtown Plaza Inc. v Saskatoon (City)*, 2022 SKCA 145**

Richards, 2022-12-16 (CA22145)

Municipal Law - Appeal - Property Taxes - Assessments
Municipal Law - Assessment Appeal
Municipal Law - Property Assessment
Municipal Law - Property Tax Assessment
Municipal Law - Property Taxes - Appeal

Municipal Law - Tax Assessment - Appeal
Statutes - Interpretation - *Cities Act*, Section 165(3.1)

The applicants applied for leave to appeal three separate decisions of the Assessment Appeals Committee of the Saskatchewan Municipal Board. Each applicant proposed issues related to whether the assessed values of properties for 2021 should reflect the effect of the COVID-19 pandemic on their businesses. The Court of Appeal chambers judge considered whether the proposed questions were of sufficient merit and importance.
HELD: Leave was granted in relation to one proposed ground of appeal. The phrase "facts, conditions and circumstances" in s. 165(3.1) of *The Cities Act* has consistently been interpreted to refer to the characteristics of the property, and not to market or economic conditions. The property owners' approach would be difficult to operationalize, inject uncertainty, not fit with a four-year assessment cycle system, and not account for the effect of regulations. The question of whether vacant theatre space that could not be used as a theatre can be valued as theatre space does raise an issue of sufficient merit and importance, and thus leave was granted on the proposed question whether the committee erred in law by failing to give any effect to the agreement precluding the space from being used as a theatre. Other proposed questions were purely questions of fact or were not matters of sufficient importance to the law of property assessment or the assessment regime overall.

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***R v C.B.L.*, 2022 SKKB 225**

Elson, 2022-10-14 (KB22218)

Criminal Law - Sexual Assault - Elements of Offence - Consent
Criminal Law - Sexual Exploitation - Elements of Offence - Position of Trust
Criminal Law - Reasonable Doubt

The accused was tried before a judge of the Court of King's Bench on charges that he sexually exploited and sexually assaulted the complainant, his niece. It was uncontested that she was 16 years of age and the accused 52, at the time of the activity which formed the basis of the charges; they lived in the same house, along with her mother; the accused was the brother of the complainant's deceased father; and the sexual activity in question consisted of three instances of sexual intercourse in the space of an hour while the two were alone in the house. The substantive evidence at trial consisted of the testimony of the complainant alone; the accused did not testify. The trial judge recognized that in this particular case, his primary task was one of applying found facts to the law, and less one of assessing credibility of testimony to make findings of fact.
HELD: The trial judge found the accused guilty of both counts in the indictment. At the outset of his analysis, and with the assistance of governing judicial authority, he reviewed: the standard of proof in criminal proceedings, that being proof beyond a reasonable doubt; the elements of the offence of sexual exploitation, and in particular the element of proof that the accused was in a position of trust and authority towards the complainant; and the elements of sexual assault, in particular the two aspects of the meaning of consent, being, first, as an element of the *actus reus* which the Crown must negative, and second, as an element of the *mens rea*,

whether the accused had established an “air of reality” from the evidence capable of supporting his assertion that he honestly believed the complainant had communicated consent to the sexual activity. With respect to the sexual exploitation charge, in considering whether the accused was in a position of trust and authority towards the complainant, the trial judge acknowledged that the evidence did not disclose a relationship between the two that one would expect between an uncle and niece, but on the contrary, the evidence was that they had little to do with each other. Nonetheless, the trial judge was satisfied that the accused was in a position of trust towards the complainant because “his status as her older uncle created an expectation that he would not expose her to harm or, more importantly, cause harm to her”. As concerned the sexual assault charge, he appreciated that, as espoused in *R v Ewanchuk*, [1999] 1 SCR 330 (*Ewanchuk*), lack of consent as part of the *actus reus* is proven when the Crown establishes beyond a reasonable doubt on the evidence that on a “purely subjective basis” the complainant was not consenting to the sexual activity. In this case, the trial judge was satisfied beyond a reasonable doubt that the complainant did not subjectively consent to the sexual activity, and that in testifying that she was “going along” with the sexual acts, the overall circumstances, including the age difference and the uncle/niece relationship led him to find that by saying she was “going along with it” she meant she was “overwhelmed” by a situation over which she felt she had no control. As to the *mens rea* requirement of the charge of sexual assault, though the accused did not take the stand, the trial judge understood from defence counsel’s cross examination of the complainant and submissions that he was advancing the defence of mistaken belief in consent alternatively to actual consent. The trial judge, again with reference to *Ewanchuk*, rejected this submission as concerned the second and third incidents of sexual activity, appreciating that the state of the law was such that consent cannot be obtained by silence or inaction on the part of a complainant; and to avail himself of the defence of mistaken belief in consent, the accused must show an air of reality to his claim that he honestly believed the complainant had “communicated consent” to the sexual activity, which the trial judge stated the accused did not establish, except with respect to the first of the three sexual acts when the complainant took off her own clothes and lay naked on the bed. As to the other two sexual acts, the complainant had said or done nothing that could have raised an air of reality to a mistaken but an honest belief in consent, with the result that the accused was reckless as to whether he had obtained her consent, and therefore was guilty of sexual assault in relation to the second and third sexual acts.

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***VC Stonework Ltd. v Rally Motors Ltd.*, 2022 SKKB 228**

Elson, 2022-10-18 (KB22230)

Builders' Lien - Application to Dismiss
Builders' Lien - Procedure - Extension of Time, Section 55(2)

The defendants applied to dismiss the plaintiff’s action and discharge the lien claim because the plaintiff did not set the claim down for trial within the two-year time limit stipulated in s. 55(1) of *The Builders' Lien Act*, SS 1984-85-86, c B-7.1. The plaintiff applied to extend the time for setting the action down for trial. The two-year time limit had expired. The court considered: did the plaintiff meet the burden of demonstrating a reasonable explanation for not having met the time limit?
HELD: The defendant’s application was allowed to the extent it pertained to the plaintiff’s claim for a remedy under *The Builders' Lien Act*. The plaintiff could continue to pursue its action for breach of contract. Given the extraordinary nature of the remedies

granted by *The Builders' Lien Act*, strict compliance with that Act is required. There was at least an eight-month explained delay and possibly a 10- to 12-month delay. This was a modest lien claim that could have been pursued and set down for trial within two years.

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***R v Fox*, 2022 SKKB 235**

Rothery, 2022-10-25 (KB22226)

Constitutional Law - *Charter of Rights*, Section 7, Section 8, Section 11(d), Section 24(1)
Courts and Judges - Judicial Comity
Courts and Judges - *Stare Decisis*
Criminal Law - Obstruction of Justice
Criminal Law - Interception of Private Communications - Admissibility
Procedure - Solicitor-Client Privilege

The accused, a lawyer, was charged with obstruction of justice for counselling her client to destroy or remove "potential evidence in a criminal proceeding" during an intercepted telephone conversation with him on her cell phone. In a pre-trial application pursuant to ss. 24(1) and 24(2) of the *Charter* to the King's Bench's judge trying the case, the accused sought to exclude two minutes and 25 seconds of "Session 803" (the subject conversation) from the upcoming trial. She claimed her right to privacy pursuant to s. 8 of the *Charter* was breached and by s. 24(2), the subject conversation must be excluded from the trial. She also argued that inclusion of the subject conversation would result in an unfair trial and, as the right to a fair trial was not only protected by the common law, since the implementation of s. 11(d) of the *Charter* "transform[ed] this high duty of the judge at common law to a constitutional imperative," this allowed for exclusion of evidence under s. 24(1) of the *Charter* without proof of a specific *Charter* breach: *R v Harrer*, [1995] 3 SCR 562. The parties did not dispute the facts material to the application: the Authorization to Intercept Communications and Related Orders and Warrants granted October 9, 2019 (authorization) providing judicial authorization for the intercept contained specific provisions requiring a communication "reasonably believed" by the interception monitor to be protected by solicitor-client privilege to be "blocked" from view; the entire intercepted conversation, which was of a duration of six minutes and 50 seconds, was blocked in this way; the authorization also contained a clause permitting the Crown to make an *ex parte* application to the authorizing court for a "determination whether access will be allowed to any of the communications"; the Crown made such an application, which resulted in a ruling by judge of the Court of King's Bench (chambers judge) that the subject conversation was not protected by solicitor-client privilege because there were reasonable grounds to believe the communication was made "in order to facilitate the commission of a crime or fraud [such that it was] not… confidential either, regardless of whether or not the lawyer… [was] acting in good faith" (see: *Descôteaux v Mierzwinski*, [1982] 1 SCR 860); the remainder of the intercepted conversation, which lasted four minutes and 15 seconds, was declared by the chambers judge to be protected by solicitor-client privilege, and he ordered that this portion be sealed from view in the criminal proceedings.
HELD: The trial judge dismissed the accused's s. 8 *Charter* motion for a number of reasons but primarily because of her finding that the accused did not have standing to bring the motion, since solicitor-client privilege was a right of her client and not her right to

assert. She allowed the application with respect to ss. 7, 11(d) and 24(1) of the *Charter*, agreeing with the accused that the ruling of the chambers judge to seal the remainder of the intercepted conversation for being cloaked with solicitor-client privilege barred her from accessing it in her defence, thus rendering the trial fundamentally unfair; she would be unable to fully defend herself because, since the chambers judge ruled the remainder of the intercepted conversation was not subject to the facilitating the commission of a crime exception to solicitor-client privilege, so too might be the subject portion. The Crown submitted that the decision of the chambers judge to seal the remainder of the intercepted conversation was unreasonable, and that she, as trial judge, could revisit the decision and unseal the remainder of the intercepted conversation. In response, the trial judge stated that she considered herself bound by the chambers judge's decision by horizontal *stare decisis* and comity and would not do so.

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***Patel v Joint Medical Professional Review Committee*, 2022 SKKB 245**

Robertson, 2022-11-10 (KB22229)

Administrative Law - Physicians and Surgeons - Reassessment of Billings - Statutory Appeal
Statutes - Interpretation - *Saskatchewan Medical Care Insurance Act*, Sections 49 to 49.21

This matter was a statutory appeal by a physician, R.P., as permitted by s. 49.21 of *The Saskatchewan Medical Services Act* (SMSA), to a judge of the Court of King's Bench (appeal judge) to overturn a final order made by the Joint Medical Professional Review Committee, constituted pursuant to s. 49.2 of the SMSA (committee) and made up of physicians with expertise in the physician's area of practice, which ordered R.P. to repay to the Minister of Health a percentage of his billings "by reason of… [his] departure from a pattern of medical practice acceptable to the committee." The statutorily mandated process allowed R.P. to fully respond to the committee's findings in regard to his billing practice at a hearing and by written submissions, of which he availed himself with the assistance of counsel. The committee ordered R.P. to repay $396,596.20 for a 15-month period from the date written notice of the investigation by the committee was served on him and he was ordered to pay a further $50,000.00. The appeal was taken on several grounds that the chambers judge categorized as follows: 1) bias; 2) reverse onus; 3) frequency of patient attendance and use of extrapolation; 4) inadequate documentation; and 5) the additional amount of $50,000.00.
HELD: The appeal judge dismissed all grounds of appeal. In doing so, he quoted and considered extensive materials from the record before the committee, the final order and the written submissions of R.P., and also guided himself on matters of law by reference to numerous cogent cases. He first reiterated the standard of appeal he was to apply, one of deference to the committee's findings of fact: given its specialized knowledge in matters pertaining to patterns of medical practice, its findings were not to be disturbed except in cases of palpable and overriding error. R.P. advanced the argument that the decision of the committee was tainted by an apprehension of bias. The appeal judge noted that this allegation was based on what R.P. alleged were disparaging remarks made about him by one of the temporary members of the committee, but not related to the subject review. The appeal judge was aware that the committee member had recused himself and was not "disqualified" as alleged by R.P., and as he had no part in the determinations of the committee, no reasonable apprehension of bias was made out. The appeal judge also dealt with R.P.'s submission that the committee had prejudged the case by making "preliminary findings" against him. He pointed out that the SMSA itself required such preliminary findings before asking R.P. to respond, that such a step was a legislated requirement and

following it could not therefore be seen as bias. Lastly, with respect to bias, R.P. suggested that by writing a letter to the College of Physicians and Surgeons during the investigation in which the committee expressed its concern that R.P. was potentially delivering "substandard" care to his patients, the committee had shown bias. The appeal judge was satisfied this correspondence did not show bias. He accepted the explanation of the committee that it was under a duty to report its concerns as soon as possible and could not wait the one or two years to the conclusion of the investigation to do so, and professional standards and billing practices were separate issues to standard of service. As to the reverse onus argument, the appeal judge observed that the SMSA placed the onus on R.P. to demonstrate that he had met the billing requirements, quoting from the final order that "the physician [is] to demonstrate that he/she has appropriately met the Physician Payment Schedule requirements in order to bill and receive payment for medically required services through the publicly funded system." Next, the appeal judge examined R.P.'s ground that the committee arbitrarily decided his "billings departed from a pattern of medical practice acceptable to the Committee," concluding that the SMSA gave the committee the discretion to "take into account anything that it consider[ed] relevant, including a statistical… comparison" and that a statistical methodology "of extrapolation from sample data" had long been accepted by the courts, and its validity needed not be justified anew in each case. The appeal judge went on to state further that the thorough and extensive reasons given by the committee in the final order demonstrated that it carefully assessed the relevant evidence, including that of R.P., and "turned its mind" to the appropriate areas of analysis. The appeal judge was able to quickly dispense with R.P.'s submissions that the committee had wrongly reassessed him for inadequate documentation of his billed services and for imposition of the additional $50,000.00, stating, first, that the prescribed "Documentation Requirements for the Purposes of Billing" clearly showed the inadequacy of R.P.'s billing records; and as to the $50,000.00 additional amount, he found that its imposition was not arbitrary since the courts viewed this type of charge as a fine intended to have a deterrent effect, justified in that R.P. had failed to implement earlier recommendations by the committee to assist him in conforming to an appropriate pattern of practice.

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***Dupmeier v Saskatchewan Veterinary Medical Association*, 2022 SKKB 252**

Keene, 2022-11-23 (KB22240)

Administrative Law - Application to Lift Stay of Disciplinary Decision
Civil Procedure - Appeal - Application to Dismiss for Want of Prosecution
Civil Procedure - Pleadings - Application to Strike
Civil Procedure - *Queen's Bench Rules*, Rule 4-44(a)

The applicant, Saskatchewan Veterinary Medical Association (SVMA), applied to a judge of the Court of King's Bench (chambers judge) to dismiss the statutory appeal of a veterinarian, T.D., who had appealed a decision of its Discipline Committee imposing a fine and costs against him. SVMA also applied to strike portions of an affidavit filed by T.D. in the application to dismiss. From the court record, the chambers judge catalogued the many interlocutory applications brought by both parties since the originating application was filed at court with a first return date of June 22, 2021. He noted that the interlocutory motions included: a request by T.D. to cross-examine counsel for SVMA on his affidavit; a request by T.D. that a law firm representing SVMA be directed to withdraw; a request by SVMA to strike portions of an affidavit of T.D.; and a further request by T.D. to cross-examine a deponent

for SVMA on his affidavit. He noted further that these motions remained unresolved on December 21, 2021, and it was he who had adjourned them to a special chambers date of January 28, 2022, over which he would preside; on the adjourned date, he heard only the application of SVMA to strike portions of the affidavit of T.D., ordering the balance of the applications be adjourned to a special hearing to be arranged by counsel for the parties in consultation with the local registrar; he rendered a decision on the application to strike parts of T.D.'s affidavit on February 4, 2022; and the parties had not arranged with the local registrar to set a special hearing date by October 27, 2022, when SVMA filed an application to have T.D.'s appeal dismissed for delay pursuant to Rule 4-44(a) of *The Queen's Bench Rules (*Rules), which T.D. countered with an application that he be allowed to adduce fresh evidence.
HELD: The chambers judge first dealt with SVMA's application to strike portions of T.D.'s affidavit, ruling he would not do so because, though these paragraphs were not specifically of assistance in advancing the fresh evidence request, they did generally provide context to "the complexity of the relationship between the parties" and "washe[d] over the Rule 4-44(a) application." He then moved on to the primary matter, whether to dismiss the appeal for inordinate delay on the part of T.D. In doing so, he took detailed guidance from *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 (ICC), recognizing that this decision formed the basis for Rule 4-44(a), and following the guidance of the court in ICC ruled that the appeal should not be dismissed, as the delay was not inordinate or inexcusable. He first determined that the period of time in issue was the eight-month interval between January 28, 2022, when he directed the setting of a special hearing date to be arranged with the registrar, and November 28, 2022, the date of this judgment. He then conducted his ICC analysis in accordance with the affidavit evidence, the court record and the factors enumerated in ICC and referenced in Rule 4-44(a), these being an inordinate and inexcusable delay that T.D. was unable to surmount by an appeal to the interests of justice. The chambers judge concluded that: the delay of eight months was not inordinate when compared to other cases where the time periods involved years and not months; was excusable because the case was a very active one, and had not languished, though the parties should have set it down for a special hearing much sooner; and, in all the circumstances, he was of the view that had he found an inordinate and inexcusable delay, he would nonetheless, after considering the non-exhaustive list of factors listed in ICC, have permitted the appeal to proceed, concluding that T.D. had discharged his burden to show it was in the interests of justice that the appeal be heard. SVMA also requested that the chambers judge lift the automatic stay of its order upon the taking of the appeal under s. 29 of *The Veterinarians Act*, which he declined to do because lifting the stay would require T.D. to pay the fine and costs totalling $85,000.00 with no means to pay this amount, as he would be suspended from his practice.

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***Drover v Avenue Living Communities Ltd.*, 2022 SKKB 254**

Mitchell, 2022-11-23 (KB22242)

Landlord and Tenant - Appeal - *Residential Tenancies Act*
Residential Tenancies Act, Section 72 - Appeal

C.D. appealed a decision rendered by a hearing officer following a hearing under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 (Act), reported at 2022 SKORT 2837, which found her liable to the respondent, Avenue Living Communities Ltd. (Avenue) for $1,625 in rental arrears. At the outset of the hearing, C.D. asked for an adjournment of the hearing. She argued that

she had not been properly served with a summons. The hearing officer declined to grant the adjournment and found that C.D. "had an opportunity to present evidence related to this claim but chose not to." The issue for the court to determine was whether hearing officer's refusal to grant C.D.'s adjournment resulted in an error in law.
HELD: The court dismissed C.D.'s appeal. The court confirmed that s. 72(1) of the Act only permits appeals where there has been an error in law or jurisdiction: an appeal is not a rehearing or a "do-over." The court focused on whether the hearing officer had made an error in law in not granting an adjournment. The court referenced jurisprudence that establishes that a decision by an administrative tribunal to grant an adjournment is discretionary and is to be considered under the principles of natural justice. The court emphasized that there is no presumption that anyone who seeks an adjournment is entitled to it: *Wagg v Canada*, 2003 FCA 303. The court found that the hearing officer did not err in failing to grant C.D. an adjournment: she had been served as required by the Act, had at least eight days to prepare for the hearing, and she did not provide any reason on how she would be prejudiced in responding to Avenue's application if an adjournment was not granted. Given the court's finding that the hearing officer had exercised his discretion appropriately in refusing C.D.'s request for an adjournment, the appeal was dismissed.

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***Labre v ICR Property Management Inc.*, 2022 SKKB 256**

Currie, 2022-11-24 (KB22253)

Administrative Law - Natural Justice - Procedural Fairness
Administrative Law - Statutory Appeals - Scope of Evidence
Landlord and Tenant - Residential Tenancies - Hearing - Appeal
Statutes - Interpretation - *Residential Tenancies Act, 2006*, Section 49(1)(a) and (b), Section 72

The residential tenant, J.L., appealed the decision of a hearing officer appointed pursuant to *The Residential Tenancies Act, 2006* (RTA) dismissing his application for damages against his landlord, including aggravated damages, for his failure to maintain and repair the residential property as he was required to do under ss. 49(1)(a) and (b) of the RTA. J.L. brought the appeal before a judge of the Court of King's Bench (appeal judge) pursuant to s. 72 of the RTA, which limited his right of appeal to questions of law or jurisdiction. Specifically, J.L. alleged that the landlord failed to maintain and repair the building by allowing "inadequate building security… resulting in intruders "accessing the common areas, the presence of cockroaches in the building, problems with water taps in… [J.L.]'s unit, and disruptions in the building's water supply." The appellant swore an affidavit in which he set out oral evidence which the hearing officer did not mention in his reasons. The appeal judge accepted that he was first to rule on the admissibility of the appellant's affidavit, and second, on whether the appellant had raised a question of law.
HELD: The appeal judge ruled that as the hearing officer's reasons left gaps in the evidentiary record that the appellant's affidavit could fill, he would allow it in evidence. In doing so, he applied *Hartwig v Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, finding that, though the general rule was that only the record in the tribunal below constituted the evidence on appeal, he found that "this case falls within an exception to the general rule and [J.L.]'s affidavit is admissible on this appeal for the purpose of describing oral evidence that was adduced before the hearing officer." He also ruled that the appeal raised a question of law in that the hearing officer failed to give reasons that demonstrated he had fully engaged with the evidence in relation to the appellant's submissions. He

observed his written reasons did not specify which of the appellant's complaints about the landlord's maintenance and repair had been proven. These failings by the hearing officer amounted to errors of law because they breached the appellant's right to natural justice and procedural fairness. He also found the hearing officer erred in law by ignoring the statutory duty placed on the landlord by s. 49 of the RTA "to maintain a program of preventive maintenance in order to ensure that the building is in good repair" and by doing so erroneously placed a burden on the appellant to inform the landlord about maintenance and repair problems before he was liable to rectify them. The appellant also suggested the hearing officer erred by not awarding him aggravated damages for the landlord's "high-handed and oppressive conduct." The trial judge disagreed, since the appellant had not adduced evidence of a wrongful act against him by the landlord that would open the door to a consideration of aggravated damages, as required by judicial authority.

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***Lorencz v Talukdar*, 2022 SKKB 258**

Megaw, 2022-11-25 (KB22254)

Physicians and Surgeons - Medical Malpractice
Torts - Negligence - Duty of Care - Standard of Care
Torts - Negligence - Elements

The plaintiffs, who were the surviving family members of the deceased, J.L., brought an action pursuant to The Fatal Accidents Act against two family physicians, B. and T., for negligently causing the death of J.L. The action proceeded to trial before a judge of the King's Bench (trial judge). The trial judge summarized the undisputed facts, which included: J.L. suffered from undiagnosed cardiac disease which caused his death on February 5, 2005, as a result of complications from a heart attack on January 23, 2005; J.L. did not regularly attend on physicians and his medical history was scanty; on September 13, 2004, J.L. attended at T.'s medical clinic and was seen by T.'s locum, B., who wrote on his medical chart that J.L. "could not relax, was agitated, had sweaty palms, night sweats, and muscle twitching… etc.", diagnosed an anxiety condition, and "prescribed the anti-anxiety medication Ativan… [indicating] to [J.L.] that he should return to see [T.] in a few weeks"; B. did not question J.L. further about his presenting complaints or his medical history; on November 29, 2004, J.L. and his spouse, T.L., attended at T.'s clinic; T.L. stayed in the waiting room while J.L. attended on T.; T.'s entries on her medical chart were consistent with B.'s diagnosis of anxiety but she also wrote "Still pain + anxiety attack"; T. also had J.L. complete two documents collectively called the Burns Anxiety and Depression checklist (Burns forms) to assist in determining his level of anxiety and possible depression; the checklist was completed by J.L., who returned the completed Burns forms to T. on December 22, 2004, his last attendance with her before his death; on the Burns forms, J.L. had written "information regarding… [his] health condition, both physical and mental [and] in particular… further information concerning the issue of pain and where it was located… [and] some further history of the patient"; and T. tabulated the anxiety and depression score, but did not read the entries written by J.L. about his pain, its nature and location.The plaintiffs advanced the position that B. and T. were negligent in failing to appreciate the seriousness of his symptoms, in particular his pain, then not questioning him in

detail about the pain, and to take further steps such as consulting with a cardiologist and testing his heart with an ECG. The trial judge understood his primary task was to make a credibility and reliability assessment of the testimony of J.L.'s spouse, T.L., who testified that after his visit on B. on September 13, 2004, J.L. told her he had spoken to B. about "experiencing upper left arm pain and the latter neglected to record this information on the medical chart"; second, to assess and apply the balance of the evidence led by the plaintiffs and the defendant, including the expert opinion evidence; and to then determine whether the evidence as a whole satisfied him that each essential element of the tort of negligence had been proven by the plaintiffs on a balance of probabilities.

HELD: The trial judge dismissed the claim against both physicians. With respect to B., he was of the view the plaintiffs had failed to prove he did not meet the standard of care required of a family physician in the circumstances presented to him when J.T. attended on him; as to T., though he found T. did fail to meet the required standard of care, he ruled that the plaintiffs failed to prove the causation element of the tort with regard to her. Central to the claim against B. was the reliability of the testimony of T.L., who testified that J.L. told her after the September 13, 2004 appointment with B. that he told B. about the left arm pain. The trial judge appreciated the plaintiffs' argument that, though the proposed evidence was hearsay, it was nonetheless admissible to allow him to draw the inference that if J.L. told T.L. about the arm pain after leaving B.'s clinic, he must have told B. about the arm pain as well and B. had omitted to record the reference in his medical chart. Following the trial judge's assessment of this testimony, however, he was unconvinced of its reliability because in her complaint to the College and Physicians and Surgeons, made on January 5, 2005, in an affidavit sworn June 3, 2016, and during the questioning in the course of the action, T.L. failed to mention J.L.'s arm pain when each of these occasions called for it to be disclosed. He noted as well that T.L. raised the exchange between herself and J.L. for the first time on the stand at trial. Having dealt with this evidentiary matter, the trial judge turned his attention to the application of the evidence adduced at trial to the essential elements of negligence, which he listed as: first, the standard of care owed by B. and T. to J.L.; second, whether the plaintiffs had proven this standard was achieved in this case; and third, whether the substandard treatment caused J.L.'s death. In performing this analysis, he relied on numerous cases but especially *Hander v Kumar*, 2022 SKCA 33 and the cases considered in it. He stated further that the standard of care required of each of B. and T. to J.T. was that of an ordinary family physician "who possess[ed] a reasonable level of knowledge, competence and skill of professionals in Canada in that field… in similar circumstances"; second, in determining whether B. and T. had failed to achieve the required standard, he was aware that a lapse of judgment by the doctors and "an unfavourable outcome are not [standing alone] sufficient to prove negligence; and third, with respect to causation, he was to apply the "but-for" test, that is, have the plaintiffs proven that "but for the negligent act or omission of the defendant, the injury would not have occurred"? In considering whether B. had failed to live up to the required standard of care, he emphasized that J.L. had not told him about any pain he might have been feeling, and nothing in his presentation could have twigged B. that J.L. required urgent care for his heart; but as to T., he ruled to the contrary that she did possess specific information from her medical chart and the Burns forms which she negligently failed to look at, and if she had examined them she should have been led to question J.T. thoroughly about possible cardiac failure, which he said she was bound to do as a family physician in these circumstances. The trial judge then considered whether T.'s negligence caused J.L.'s death, and applied the but-for test as follows: but for T.'s negligence in failing to engage in a "deferential diagnosis" and fully question J.L. about his left arm pain and other symptoms, was J.L. prevented from taking steps to access proper cardiac treatment in time to save his life? In answering this question, he respectfully declined to accept the testimony of the plaintiff's cardiac specialist that proper cardiac treatment would have saved J.L.'s life because the specialist did not testify about whether J.L. could have been referred to a cardiac specialist between December 22, 2004, and his death on February 5, 2005. He remarked further that no cogent evidence had been adduced by the plaintiffs that would have permitted him to find on a balance of probabilities that J.L. could have been referred and treated effectively in the applicable time period before his untimely death.

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***Watch v Live Nation Entertainment Inc.*, 2022 SKKB 259**

Mitchell, 2022-11-25 (KB22246)

Civil Procedure - Class Action
Class Action - Certification
Statutes - Interpretation - *Class Actions Act*, Section 6(1)
Statutes - Interpretation - *Competition Act*, Section 36, Section 45, Section 52
Statutes - Interpretation - *Ticket Sales Act*

The prospective plaintiff applied to certify a proposed class action. The plaintiff claimed that fees on an event tickets website between 2015 and 2018 were deceptive and constituted breach of ss. 52 and 54 of the *Competition Act*, breach of contract, breach of *The Consumer Protection and Business Practices Act*, and unjust enrichment (primary market claim). The plaintiff also claimed the defendants were involved in a conspiracy and deceptive marketing practices related to ticket resales and claimed breach of s. 45 of the *Competition Act*, civil conspiracy, breach of contract, fraudulent concealment, unjust enrichment, and breach of *The Ticket Sales Act* (secondary market claim). The plaintiff proposed two classes. One class was anyone who purchased tickets from the primary market defendants from 2009 to present. The other class was anyone who purchased resale tickets from the defendants' resale platforms. The designated judge considered: 1) did the pleadings disclose reasonable causes of action; 2) was there an identifiable class; 3) what were the common issues; 4) was a class action the preferable procedure; and 5) was the plaintiff a suitable representative plaintiff?
HELD: Certain aspects of the claim were certified as a class action, with no order of costs. 1) Only claims based on breaches of provincial consumer protection legislation survived the "plain and obvious" test under s. 6(1)(a) of *The Class Actions Act*. In determining whether the pleadings disclosed a cause of action, the material facts pleaded were accepted as true, the pleadings were read generously, and the claim was only struck out if it was obvious the claim could not succeed. None of the claims under the *Competition Act* could succeed. To succeed with a claim under s. 45 of the *Competition Act*, the pleading of conspiracy must specify who the parties are and their relationship with one another, the agreement to conspire and its purpose, overt actions done to further the conspiracy and the damages resulting from the conspiracy. The pleadings were insufficiently specific, and the cause of action founded upon s. 45 of the *Competition Act* could not succeed and was struck. To succeed with a claim under ss. 36 and 52 of the *Competition Act*, the plaintiff must provide evidence that the defendant's alleged misconduct satisfied all elements of the underlying criminal offence of knowingly or recklessly making a false or misleading representation; the plaintiff suffering a loss; and a causal link between the criminal offence and the loss. The plaintiff pleaded no facts related to reliance on representations made by a defendant. The claim could not succeed and was struck. The plaintiff made a bald allegation and pled no material facts to support the allegation of violating s. 54 of the *Competition Act*, and accordingly this claim was struck. Sections 74.01 and 75.05 of the *Competition Act* did not apply to this type of application and were struck. The primary market claim under provincial consumer protection legislation was thin but not doomed to fail, and thus the plaintiff was granted leave to amend pleadings to identify the provisions of the provincial consumer protection statutes she relied upon. The provincial consumer protection claim was not

certified in relation to the secondary market claim. The claims based on *The Ticket Sales Act* did not plead facts that violated the legislation, and therefore these claims were doomed to fail and were struck. Waiver of tort was struck because it was not a viable independent cause of action. The unjust enrichment claim was struck because it did not plead facts to support the elements of enrichment, corresponding deprivation and absence of a juristic reason. The pleadings of the tort of civil conspiracy were vague, conclusory, and could not be supported on the affidavit evidence, and thus these claims were struck. 2) The prospective plaintiff must provide a definition of the proposed class that permits an objective determination whether an individual is a member, provide evidence the class exists, and establish a rational connection between the proposed class, the proposed cause of action and the proposed common issues. The proposed class included all residents in Canada who purchased tickets for events from the defendants from 2009 to present. The type of pricing at issue in the claim was used between 2015 to 2018. The judge limited the class to that period of time, and excluded individuals in Quebec or British Columbia, where overlapping class actions had been certified. 3) The plaintiff proposed 25 common issues. Only issues related to the provincial consumer protection legislation were considered. The judge certified two questions asking whether the defendants had engaged in contact contrary to *The Consumer Protection and Business Practices Act* or its equivalent in other provinces, and whether the defendants were liable to pay damages under that legislation or its equivalent in other provinces. The judge certified three additional questions related to punitive damages, joint and several liability, and interest. 4) Class action was the preferred procedure because of the cost to litigate an individual action in light of the modest amount of an individual claim. 5) The plaintiff was a suitable representative plaintiff. She had a claim similar to other members of the class and did not appear to have a conflicting interest. She had demonstrated willingness to represent the interests of the class. She had presented a methodology and proposed work plan.

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