



The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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The litigation in this case concerned money that a non-party to the proceedings had fraudulently taken from the appellant and used to acquire cryptocurrency from the respondent. A Court of King's Bench chambers judge had granted summary judgment in favour of the respondent and had dismissed several related claims. The appellant argued that the chambers judge erred when granting summary judgment principally by rejecting relevant evidence and by determining that there was no genuine issue regarding trial.
HELD: The appeal was allowed. (1) The chambers judge erred by rejecting and overlooking evidence relevant to when the respondent learned that the funds may have been obtained by

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fraud. A judge assessing a party's request for leave to file an affidavit late should consider more than simply the fact that the affidavit was filed out of time. Judges should consider several factors, including the reasons for the delay, the extent or seriousness of the delay, the intrinsic worth of the evidence, any prejudice that might befall the opposing party by late admission of the affidavit into evidence, and how anticipated prejudice might be remedied or mitigated. The rejection of relevant and otherwise admissible evidence in the absence of any evidence of prejudice undermines the court's ability to fairly adjudicate the merits of the dispute and thereby damages the justness of the result. In this case, the information contained in the undertakings letter exhibited in the "Kroeker affidavit" rejected by the chambers judge was directly relevant to the issue of when the respondent first knew about the fraud. The chambers judge misapprehended the legal effect of the content of the Kroeker affidavit. While it was filed out of time and was sworn by an employee in the offices of the appellant's legal counsel, the interests of justice required its admission. (2) The chambers judge erred by failing to consider the exhibits that were attached to the Lloyd Affidavit, which were relevant to the issue of when the respondents first discovered the fraud. The chambers judge was therefore unable to apply the law to the facts in a manner that properly enabled him to answer the question of when the respondents first learned of the fraud.

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***Aalbers v Aalbers*, [2024 SKCA 83](#)**

Barrington-Foote Kalmakoff McCreary, 2024-08-28 (CA24083)

Guardianship - Dependent Adult - *Adult Guardianship and Co-decision-making Act*
Statutes - Interpretation - *Adult Guardianship and Co-decision-making Act*, Section 3

All parties in this case were members of a Saskatchewan farm family involved in a bitter, years-long family dispute that had spawned numerous legal proceedings. In this case, the appellant was appealing three aspects of a fiat issued by a chambers judge, alleging, among other things, that the chambers judge erred in denying the appellant's application to have the respondent examined by a psychologist to assess her capacity to make personal decisions. HELD: The appeal was dismissed. (1) The chambers judge erred by failing to address the appellant's application to conduct an inquiry pursuant to ss. 12 and 13 of *The Evidence Act* to determine whether the respondent had capacity to testify. In considering whether to order an assessment, either on motion or on its own initiative, a court must balance the affected

Criminal Law - Murder - Second Degree - Appeal

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Guardianship - Dependent Adult - *Adult Guardianship and Co-decision-making Act*

party's fundamental rights against the court's duty to protect the vulnerable. An assessment should only be ordered when a case has been made out, on reasonable grounds, and the court is satisfied that the intrusive measure is necessary to ensure that a potentially vulnerable person is protected. To this end, statements of objection must be taken into account by a judge, and they form part of the record that a judge must consider when deciding whether a hearing is required and at any hearing that is held. In this case, the chambers judge had to consider whether the threshold for conducting an assessment inquiry had been cleared and, if so, whether the respondent could swear an oath or should give her evidence other than by affidavit. Failure to do so was an error in law. (2) There was no extant application for personal guardianship. Under s. 5 of *The Adult Guardianship and Co-decision-making Regulations*, a guardianship application must include evidence of an assessment by the professionals listed under s. 5(2). The appellant's application did not include any of the assessments and the chambers judge accordingly could not have granted the assessment application. Secondly, the appellant's counsel had confirmed that the appellant could not pursue a guardianship application, as he had been convicted of a criminal offence. (3) The chambers judge did not err in refusing the application for access to the respondent. Under s. 27 of *The Adult Guardianship and Co-decision-making Act* (AGCA), a court may make an order providing for access to an adult by a person other than the personal decision-maker if the court is satisfied that it is in the best interests of the adult to make the order. This only applies after a personal decision-maker has been appointed and another person applies for an order for access. Interpreting s. 27 of the AGCA as authorizing an examination in the absence of sufficient evidence of incapacity and based on the best interests test would avoid the intent of the AGCA. (3) The chambers judge did not err by failing to grant an order for access to the respondent pursuant to the court's *parens patriae* power. The *parens patriae* jurisdiction must be exercised in accordance with its underlying principle which is the discretion to do what is necessary for the protection of the person for whose benefit it is exercised. Even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with unanticipated situations where it appears necessary to do so for the protection of those who fall within its ambit. In this case, the court was not persuaded that there was a gap that needed to be filled or that the situation represented an unanticipated situation.

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Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400, 2024 SKCA 84

Schwann McCreary Drennan, 2024-09-06 (CA24084)

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Administrative Law - Judicial Review - Appeal
Administrative Law – Judicial Review - Procedural Fairness - Appeal
Constitutional Law - *Charter of Rights* - Right to Interpreter
Employment Law - Termination of Employment - Arbitration
Labour Law - Arbitration Board - Judicial Review - Appeal

The appeal in this case arose from an employer's decision to dismiss one of his employees. The respondent had successfully grieved the termination before an arbitration board (board). The appellant had applied to the Court of King's Bench for judicial review of the arbitration award and the respondent had also sought judicial review of the remedy portion of the award. Both applications were dismissed by the Court of King's Bench. The appellant asserted that the chambers judge erred in his reasonableness analysis and failed to conclude that the appellant was denied procedural fairness as a result of the board's decision to use an uncertified, allegedly incompetent interpreter in the arbitration proceedings. The respondent also sought that the Court of Appeal substitute its own remedy for that of the chambers judge. HELD: The appeal and the respondent's application were dismissed. (1) The chambers judge did not err in finding that there was no breach of procedural fairness. Where the *Charter* right to an interpreter applied, such interpretation is required to be continuous, precise, competent, impartial and contemporaneous. Perfection is not the standard and a translation mistake will translate into a procedural fairness error only where an incorrect translation results in a decision or determinative finding that might have been different had the words been correctly translated. In this case, the court determined that the chambers judge properly addressed procedural fairness in connection with the standards required for interpretation services. Furthermore, in view of the admissible extrinsic evidence and the chambers judge's reasoning for his findings in that regard, the court was satisfied that those findings were not vitiated by palpable and overriding error. (2) The chambers judge did not err in his reasonableness assessment. A reasonableness review determines whether a decision is based on an internally coherent and rational chain of analysis that is defensible in relation to the relevant facts and the law. While the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic, it is the overarching logic that the reviewer must focus on. In this case, there was no evidence that the board failed to consider any of the controverted evidence; it simply did not agree with the appellant's preferred version of events. Given the board's factual findings and how the chambers judge dealt with the appellant's allegation of conflicting evidence, the court was satisfied that the chambers judge did not err in determining that the board's decision met the hallmarks of justification, transparency and intelligibility. (3) The board's interpretation of Article 8.01 of the collective bargaining agreement was not unreasonable. The chambers judge had acknowledged that Article 8.01 was susceptible to multiple interpretations, including both the one ascribed to it by the board and that proposed by the employer. Given the looseness and

Statutes - Interpretation - *Taxpayers' Fairness (CPR) Act*

Torts - Duty of Care

Cases by Name

4 Star Ventures (2012) Ltd. v 1983283 Ontario Inc. (Secure Digital Markets)

A.A.O. v O.A.A.

Aalbers v Aalbers

Abrametz v Allen

Basadinaa Property Management Ltd. v Acoose

Bourgault Industries Ltd. v Graham

Canadian Pacific Railway Company v Government of Saskatchewan

Clarke v Starr

Lillico v Royal Bank of Canada

Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400

R v Chipesia

R v Goodin

R v Marckoski

R v Wapass

Strand v Yemba

Swan v Swan

ambiguity in the language, the board's interpretation was not unreasonable. (4) The chambers judge did not err in accepting extrinsic evidence from both sides for the purpose of addressing the procedural fairness issue. Subject to limited exceptions, the evidentiary record on judicial review is restricted to that contained in the board or tribunal record. One of the exceptions to the rule is with respect to procedural defects not otherwise found in the record, which was applicable to the matter at hand. In this case, the factual findings made by the chambers judge related to his conclusion that the impugned evidence that did not fall within this exception was entitled to deference and those findings disclosed no palpable and overriding error. (5) The respondent did not bring an appeal nor did it cross-appeal on the remedy part of the decision. As a result, its argument was not properly before the court. Furthermore, the notice of appeal did not contemplate or take issue with the board or chambers judge's decisions regarding remedy.

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***R v Wapass*, [2024 SKCA 85](#)**

Kalmakoff McCreary Bardai, 2024-09-06 (CA24085)

Criminal Law - Murder - Second Degree - Appeal

Criminal Law - Murder - Second Degree - Charge to Jury - Circumstantial Evidence - Appeal

Criminal Law - Murder - Second Degree - Charge to Jury - Reasonable Doubt - Appeal

The appellant appealed against his conviction for second degree murder. The appellant contended that the jury verdict was inherently unreasonable and that the trial judge's instructions to the jury were deficient in two respects: first, in her directions on the presumption of innocence and second, in her instruction on circumstantial evidence. The appellant sought that the verdict be set aside or that a conviction of manslaughter be substituted in place of the conviction for second degree murder.

HELD: The appeal was dismissed. (1) The trial judge did not err in her instruction to the jury on circumstantial evidence. The key terms of instructing a jury on circumstantial evidence are to convey: (a) what circumstantial evidence is and, in particular, how it differs from direct evidence; (b) that the jury may consider both direct and circumstantial evidence in reaching a verdict; (c) that inferences do not have to arise from proven facts but can arise from the totality of the evidence (including the absence of evidence) so that if there is a reasonable inference to be drawn other than guilt, the Crown will not have met its burden to prove the elements of the offence beyond a reasonable doubt; and (d) that the jury is not to reach a verdict of guilt based on circumstantial evidence unless it is satisfied beyond a reasonable

doubt that the accused's guilt is the only reasonable conclusion to be drawn from the whole of the evidence. In this case, the trial judge explained what circumstantial evidence was and told the jury. While the trial judge misspoke when she suggested that an inference is a conclusion flowing from facts that are accepted as proven, this misstep was corrected almost immediately after when she referred to the need to draw conclusions from the evidence as a whole. When the totality of the trial judge's explanation of circumstantial evidence was examined and read in the context of the charge as a whole, it was clear that it provided the jury with the tools necessary to decide the case and an accurate understanding of the law. (2) The trial judge did not err in her instruction on reasonable doubt. A jury instruction must tell the jury that a reasonable doubt: (a) is based upon reason and common sense; (b) is logically connected to the evidence or absence of evidence; (c) does not require proof to an absolute certainty; (d) is not an imaginary or frivolous doubt; and (e) requires more than proof that the accused is guilty. A jury instruction should also not describe a reasonable doubt as: (a) being an ordinary concept or standard; (b) requiring proof to a moral certainty; or (c) being a serious or haunting doubt. In this case, an examination of the totality of the directions given by the trial judge to the jury reveals that she gave a charge that was consistent with the requirements of law. In brief, she set out that a reasonable doubt is based on common sense, is connected to the evidence or absence of evidence, does not require mathematical certainty, is not an imaginary or frivolous doubt and requires more than establishing probable doubt. While the trial judge misspoke during her closing instruction, this did not undermine the instructions as a whole and the misstep was corrected by the balance of the instruction which met the requirements set out by the Supreme Court in *R v Lifchus*, [1997] 3 SCR 320. (3) The jury's verdict was not unreasonable. The test for determining whether a jury verdict is unreasonable is whether it is one that a properly instructed jury acting judicially could reasonably have rendered. When circumstantial evidence is in issue, the test can be stated more specifically as "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence". In this case, the jury, acting judicially, could be reasonably satisfied, to the exclusion of other reasonable conclusions, that the appellant was the person who caused the victim's death by repeatedly striking him in the head, and that he acted with the intent necessary to be guilty of second-degree murder. The fact that there were repeated strikes to the victim's head also led to the conclusion that the jury, acting judicially, could be reasonably satisfied, to the exclusion of other reasonable conclusions, that, by delivering those strikes, the appellant intended to cause the victim bodily harm that he knew would probably be fatal, and that he was reckless as to whether the victim would live or die.

***R v Chipesia*, [2024 SKKB 143](#)**

Wempe, 2024-08-08 (KB24138)

Constitutional Law - *Charter of Rights*, Section 2(a)

Constitutional Law - *Charter of Rights*, Section 7

Statutes - Interpretation - *Public Health Act*, 1994, Section 45(2)

The appellant was appealing a summary conviction for attending a large outdoor gathering in contravention of a public health order (PHO). At Provincial Court, the appellant's notice of constitutional question only raised ss. 7 and 2(a) of the *Canadian Charter of*

Rights and Freedoms, and at her trial she only argued that the PHO violated s. 2(a) of the *Charter*. On appeal, the appellant argued that the PHO violated ss. 2(a)-(d) of the *Charter*, *The Saskatchewan Human Rights Code* (SHRC) and s. 176 of the *Criminal Code*. HELD: The appeal was dismissed. (1) This was not an exceptional case where the appellant could raise new arguments. To permit the raising of a new issue, including a *Charter* challenge, for the first time on appeal: (a) there must be a sufficient evidentiary record to resolve the issue; (b) it must not be an instance in which the accused failed to raise the issue at trial for tactical reasons; and (c) the court must be satisfied that no miscarriage of justice would result from the refusal to raise such new issue on appeal. In this case, there was no evidentiary record to allow the court to resolve the issue and allowing the arguments without a factual basis or evidence from the trial would put the respondents at significant prejudice. The new *Charter* arguments were also arguments which the appellant strategically chose not to proceed with after she severed her trial from the other co-accused and filed her own notice of constitutional question, which weighed against allowing those arguments to be raised on appeal. (2) The appellant did not provide notice under *The Constitutional Questions Act, 2012* (CQA). Under ss. 13 and 13.1 of the CQA, notice must be served on the Attorney General of Canada and the Attorney General of Saskatchewan. In this case, there was no evidence that the Attorney General of Canada was ever served. Further, the appellant's memorandum of argument did not provide any of the information required for a notice under s. 15(3) of the CQA aside from identifying provisions of the Charter, the Criminal Code and the SHRC. (3) The appellant's arguments had no likelihood of success. The appellant's new argument that the PHO violated the SHRC had been dismissed in numerous other cases. The PHO at issue in the appeal was also constitutionally valid based on the decision of the court in *R v Grandel*, 2024 SKCA 53. There was no conflict between the PHO and s. 176 of the Criminal Code. (3) Section 2(a) of the *Charter* was not engaged. To establish a breach of s. 2(a) of the Charter, the appellant must prove on a balance of probabilities: (a) that she sincerely believed in a practice or belief that had a nexus with religion; and (b) that the impugned state conduct interfered, in a manner that was non-trivial or not insubstantial, with her ability to act in accordance with that practice or belief. In this case, the trial judge made a factual finding that the rally was not a religious gathering and had no nexus to a religious practice. There was no palpable and overriding error in these findings of fact. There was no evidence as to how the PHO which prohibited the political rally she attended violated her freedom of religion. (4) The sentence was of an appropriate range and a fit sentence in the circumstances.

***Basadinaa Property Management Ltd. v Acoose*, [2024 SKKB 145](#)**

Layh, 2024-08-14 (KB24140)

Civil Procedure - Summary Judgment
Landlord and Tenant - Writ of Possession

The applicants/appellants entered into a lease agreement with the respondent. The respondent subsequently ceased paying rent and eviction proceedings commenced against the respondent. The Office of Residential Tenancies refused to determine the application, citing lack of jurisdiction to make orders affecting rental property on a First Nation. The applicants/appellant appealed the decision and filed an originating application at the Court of King's Bench for a writ of possession.

HELD: The Court of King's Bench issued a writ of possession and issued summary judgment of \$18,200 for unpaid rent. The appeal was adjourned to September 3, 2024, to determine mootness. (1) In matters that are not subject to *The Residential Tenancies Act*, 2006, Rule 10-28 of *The King's Bench Rules* permits a landlord to seek a writ of possession. The remedy is available to a landlord under a lease agreement that has been breached. In this case, the respondent had refused to pay rent over an extended period of time. The landlord was entitled to a writ of possession. (2) The applicant/appellant was entitled to summary judgment. Rule 3-49(1)(j) of *The King's Bench Rules* provides latitude to determine any matter where it is unlikely that there will be any material facts in dispute. In this case, the facts in the application were non-contentious. The necessary parties were also before the court and had been heard.

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***Clarke v Starr*, [2024 SKKB 148](#)**

Haaf, 2024-08-15 (KB24143)

Family Law - Custody and Access - Interim

Family Law - Custody and Access - Mobility Rights

The petitioner in this matter sought to have his son relocated to live with him. This was opposed by his caregiver. The application was refused. Prior to trial, counsel for the petitioner requested that the trial be vacated, stating that there was implied consent by operation of statute. Counsel argued that the service of the notice of relocation and the respondent's lack of response allowed the petitioner to retain his son and vacate the trial. Trial dates were subsequently adjourned sine die.

HELD: The request was dismissed. (1) The service of the notice of relocation with the lack of response did not effectively decide the matter. First, the notice of relocation only sought a temporary, interim relocation. The application for relocation had also been dismissed previously. Thirdly, neither the timing nor the use of the notice of relocation was appropriate. Finally, the notice of relocation referred to orders under the *Divorce Act* and there was no order under the *Divorce Act* concerning the child in question. (2) There was no application for parenting time before the court. When the court grants a chambers date or leave to file an application out of a judicial case conference, this does not create an application before the court. Without an application, a court cannot make a substantive order for parenting time.

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***Lillico v Royal Bank of Canada*, [2024 SKKB 154](#)**

Wempe, 2024-08-30 (KB24148)

Civil Procedure - Summary Judgment

The plaintiffs alleged that Horizon Mechanical Ltd. committed fraud against them and that the Royal Bank of Canada (RBC) owed them a duty of care as a secured creditor of Horizon Mechanical. They asserted that RBC's failure to act upon this duty caused them to suffer damages, specifically related to the registration of RBC's security interest in equipment in Saskatchewan's Personal Property Registry (PPR). RBC applied for summary dismissal of the claim, arguing that it owed no duty of care to the plaintiffs, as it did not know about fraud committed by Horizon Mechanical. RBC contended that its actions, particularly registering its security interest, were proper and not linked to the alleged fraud. The court had to decide whether summary judgment was the appropriate procedure for this dispute, whether the plaintiffs and respondents should be provided with an opportunity for cross-examination, whether RBC owed a duty of care to the plaintiffs, and if so, whether the plaintiffs suffered any damages.

HELD: The court granted RBC's application for summary judgment and dismissed the plaintiffs' claim. The court found that the matter could be resolved fairly and justly by granting summary judgment. RBC acted appropriately in registering its interest in Saskatchewan, and no duty of care was owed to the plaintiffs regarding the third-party company's alleged fraud. There is no automatic or inherent right to cross-examine an affiant on their affidavit, and a party making such a request must show the cross-examination would assist in resolving the matter and not cause injustice; this remedy is discretionary, and the courts must review such requests on a case-by-case basis. The court reviewed the circumstances of this case and denied the plaintiff's request for cross-examination on the affidavit because it would not assist the court in resolving the issues on the summary judgment application. The court found that the summary judgment procedure was appropriate in this case, and it could reach a fair and just determination on the merits and affidavits filed without the need for trial. The court applied the legal test for duty of care from the Supreme Court of Canada case *Kamloops (City) v Nielsen*, [1984] 2 SCR 2, to determine whether a duty of care existed between RBC and the plaintiffs. A bank does not owe a duty of care to third parties unless it has actual knowledge of fraud or acts with recklessness or willful blindness. Furthermore, for a duty of care to exist, the parties should have a sufficiently proximate relationship. The court found no proximity between RBC and the plaintiffs and found that RBC had no direct involvement in the alleged fraud. The court also found that RBC's actions in registering its security interest in Saskatchewan were in its ordinary course of business and did not constitute negligence or breach of duty of care. The court granted RBC's application for summary judgment, dismissed the plaintiff's claim, and ordered costs of \$2000 to be paid by the plaintiffs to RBC.

***Swan v Swan*, [2024 SKKB 152](#)**

Goebel, 2024-08-27 (KB24146)

Family Law - Child Custody and Access - Shared Parenting - Variation

Family Law - Child Support - Variation

Family Law - Child Support - Variation - Change in Circumstances

Family Law - Custody - Access - Variation

The parties were married in 2009 and had two children. They went through a lengthy court process, resulting in a detailed judgment in 2022. The father appealed that judgment to the Court of Appeal in 2024 but was unsuccessful. The father brought this application to vary the parenting arrangements and reduce the child support amount, alleging that a material change in circumstances had happened. The court had to decide whether a material change in circumstances had taken place that would require varying the parenting arrangement and reducing the father's support obligations.

HELD: The Court of King's Bench dismissed the father's application and awarded costs against him. However, due to an increase in the mother's income, the court adjusted the proportional share of section 7 expenses for the mother. The court ordered the parties to exchange their financial information annually and encouraged them to participate in alternative dispute resolution and counselling to resolve their ongoing conflicts. The court also prohibited the parties from involving their children in parental conflicts. The father claimed his financial abilities were diminished and insufficient to comply with the support orders. The court rejected his argument and deemed his application an attempt to relitigate issues previously decided at trial and dismissed by the Court of Appeal. The father also claimed a material change in parenting because the children were older now, he had more time to parent them, and the mother of the children moved to an acreage requiring the children to take the school bus. The court also rejected this claim, stating that mere passage of time or minor changes such as moving to a new home are insufficient to meet the material change threshold. Furthermore, the court noted that the Court of Appeal had already heard and dismissed this claim. The court further emphasized the need for stability and predictability for children. A material change in circumstances means a change in the condition, means, needs or circumstances of the child or the parent's ability to meet the child's needs. The change must materially affect the children and cannot have been foreseen or contemplated by the judge who made the initial order. The burden of proof is on the party seeking to change the current order and that party must show that the change has materially altered the child's circumstances. The court relied on a series of cases to establish this legal framework, including *Gordon v Goertz*, [1996] 2 SCR 27, and *A.M. v Ministry of Social Services*, 2020 SKCA 114. The Court also cautioned the parties against involving the children in family conflicts and reminded the parties of their legal duties under section 7.2 of the *Divorce Act* to protect the children from family disputes. Engaging the children in parental conflict and conversation can constitute abuse of the children and warrant court intervention and variation of parenting orders (see: *Inglis v Inglis*, 2022 SKCA 82).

***Bourgault Industries Ltd. v Graham*, [2024 SKKB 153](#)**

Morrall, 2024-08-28 (KB24147)

Civil Procedure - Affidavit Evidence - Cross-examination
Civil Procedure - Costs
Civil Procedure - Statement of Claim - Application to Strike
Practice - Disclosure and Production of Documents

The parties were involved in lengthy and complex court proceedings. The plaintiff alleged violation of duty of good faith, breach of

confidentiality, civil conspiracy, interference with economic relations, and unjust enrichment. The defendants counterclaimed for wrongful dismissal, loss of ownership interests, and restitution for their work. Four applications were before the court. The legal issues consisted of procedural matters such as requests for disclosure and applications to strike certain claims. The court had to decide the following matters. 1) should the court order the production of records sought by the plaintiff; 2) should the defendant be cross-examined on his affidavit of documents; 3) should parts of the defendant's counterclaim be struck; 4) should references to Buffalo AG in the plaintiff's amended claim be struck; 5) should the records sought by the defendant be produced; and 6) what amount of costs, including "costs thrown away," should be awarded?

HELD: 1) The plaintiff's application for documents was adjourned *sine die* until after the questioning phase. 2) The request for cross-examination of the defendant was denied. 3) The application to strike the defendant's counterclaim was denied. 4) The application to strike references to Buffalo AG was denied, but the plaintiff was ordered to amend its claim to provide more specifics. 5) The defendant's request for documents was partially allowed. 6) The plaintiff should pay \$2000 in costs and \$2000 in costs thrown away to the defendant. Parties to civil actions should disclose to the other parties to the litigation all relevant documents in their possession unless privilege or recognized exceptions exist (*The King's Bench Rules*, Part 5; *Bell v Insulation Applicators Ltd.*, 2023 SKCA 128). The party seeking information and documents must prove whether these requested documents exist or existed in the past. In situations like the present case, where a party claims records do not exist, the nuances can be hashed out in the questioning phase and later during the trial (See *Dearborn v Dearborn*, 2019 SKQB 192). Since the plaintiff's request for cross-examination of the defendant was on the same issue, the court rejected the application because questioning would be the appropriate procedure rather than cross-examination on an affidavit. The court relied on *Wallace v Canadian National Railway*, 2009 SKQB 178, as the legal test for allowing cross-examination in interim applications and whether it assists in resolving the issues before the court. The court dismissed the plaintiff's application to strike the defendant's application, saying that while the plaintiff raised valid concerns, the counterclaim could not be struck at this stage. The court found that even though the counterclaim was disputed, it was not plainly frivolous or vexatious, and it could proceed to trial so its merits could be tested (See Rule 7-9(2)(b) to (e) of *The King's Bench Rules*). The court ordered the plaintiff to amend its claim against Buffalo Ag to provide further information regarding the tort of civil conspiracy through unlawful conduct. The court found some of the pleaded facts supported the elements of civil conspiracy in the plaintiff's claim, which warranted an amendment instead of striking the claim. In this fashion, the defendant would also have a chance to furnish a proper defence after the elements of civil conspiracy were appropriately pleaded. The defendant's request for disclosure of certain documents was partially allowed. The court ordered the plaintiff to produce the documents that were relevant and proportional to the issues of business damages and reputation. However, the court did not allow the disclosure of the rest of the documents that were in possession of non-party corporations because that would mean piercing the corporate veil, which is a statutory protection for corporations (See *AgMotion Trading Canada, Inc. v McDermitt*, 2018 SKQB 100). The court relied on the definitions and legal framework of "costs thrown away" from *Richardson Pioneer Limited v Stadnyk*, 2023 SKKB 265, to determine that the defendant incurred unnecessary costs due to the plaintiff's legal actions. The court also awarded regular costs to the defendants for their mixed success in this application.

Canadian Pacific Railway Company v Government of Saskatchewan, [2024 SKKB 157](#)

Kilback (*ex officio*), 2024-09-05 (KB24149)

Constitutional Law - *Ultra Vires* Legislation

Statutes - Interpretation - *Constitution Act, 1982*

Statutes - Interpretation - *Taxpayers' Fairness (CPR) Act*

In the summer of 2022, Parliament and the Legislative Assembly of Saskatchewan enacted legislation to retroactively amend the Constitution of Canada and extinguish the constitutional cause of action advanced by Canadian Pacific Railway Company (CPRC) against the Government of Saskatchewan in this action. The parties disagreed on whether the Constitution could be retroactively amended to eliminate an existing constitutional cause of action. The core issue in the litigation was whether the plaintiff was exempt from certain taxes based on a contract formed in 1880 between the government of the Dominion of Canada and a railway syndicate that would later become CPRC.

HELD: The appeal was dismissed. (1) Section 43 of the *Constitution Act 1982* confers a power to retroactively amend the Constitution of Canada. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies. The power to enact retroactive amendments existed before patriation of the Constitution in 1982 and was not diminished after patriation. Patriation and the enactment of part V of the Constitution did not diminish the substantive power to retroactively amend the Constitution previously held by the Parliament of the United Kingdom until 1982. That power of amendment is now jointly possessed by Parliament and the provincial legislatures. This conclusion is consistent with the objective of continuity of constitutional principles, including the exercise of sovereign power, from the United Kingdom to Canada, expressed in the preamble of the *Constitution Act 1867*. It is also supported by the principle of parliamentary sovereignty. Furthermore, express language is not necessary for s. 43 to confer a power of retroactive amendment. Since Parliament and the legislatures acting individually have the same sovereign power as the Parliament of the United Kingdom to enact retroactive laws in the absence of express authorizing language in the Constitution, they do not lose that sovereign power when acting together under s. 43 because it does not expressly confer the power to enact a retroactive amendment. Thirdly, the unwritten principles of constitutionalism and the rule of law do not require reading in a restriction on the power of retroactive amendment because any amendment made pursuant to s. 43 requires express approval by a process that embodies these unwritten principles and has constitutional legitimacy. (2) Section 43 of the *Constitution Act* includes the power to enact a constitutional amendment which has the effect of abolishing an existing constitutional cause of action. This is so for two reasons. First, the unwritten principle of constitutionalism does not require an existing constitutional cause of action to be enforceable. Secondly, a constitutional amendment can retroactively correct a constitutional infirmity in levying taxes. The rule of law does not prohibit retroactive legislation and legislatures can decide how and when their laws will apply. As a result, it may be open to them to correct a constitutional infirmity retroactively. In this case, the constitutional infirmity in levying taxes contrary to the constitutional restriction under s. 24 of the *Saskatchewan Act* was such as could be corrected through a retroactive constitutional amendment to effectively deny a claim to recovery of *ultra vires* taxes. (3) *The Taxpayers' Fairness (CPR) Act* (TFA) was not *ultra vires* the Saskatchewan legislature. On the date that the TFA came into force, s. 24 of the *Saskatchewan Act* was no longer in force. Since there was no temporal overlap, there was no operational conflict that

raised a paramountcy or parliamentary supremacy concern. The *Budget Implementation Act, 2022* (BIA) came into force a month before the TFA and deemed clause 16 of the 1880 contract to be of no force and effect as of August 29, 1966. As a result, there was no temporal overlap between the TFA and the *Canadian Pacific Railway Act* (1881 (UK), 44 Vict, c 1) as it related to clause 16. (4) Sections 174-176 of the BIA did not retroactively alter the meaning or effect of s. 24 of the Saskatchewan Act. First, s. 24 is best understood as a static incorporation by reference provision, not an ambulatory one. Secondly, s. 24 could only be changed by constitutional amendment.

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***Abrametz v Allen*, [2024 SKKB 159](#)**

Mitchell, 2024-09-06 (KB24150)

Civil Procedure - Limitation Period

Limitations - Statutory Limitation Periods

Practice - Pleadings - Statement of Claim - Application to Strike - Statute-barred - Limitation Period

The Law Society of Saskatchewan (LSS) and members of one of its hearing panels were the applicants in this case. The applicants sought to dismiss the respondent's application under Rule 7-9 of *The King's Bench Rules*, alleging the proceedings were commenced after the two-year limitation period set out in *The Limitations Act*. The court had to decide whether the limitation period to commence an action for the alleged claim had expired.

HELD: The court granted the applicants' request and dismissed the respondent's claim. The respondent's claim was statute-barred under *The Limitations Act* and was dismissed in its entirety. The court also awarded costs against the respondent payable to the applicant. The respondent claimed that the LSS had breached his privacy by sending a letter to the Canada Revenue Agency. The Court of King's Bench examined the relevant dates of the alleged incidents and claims and noted that the respondent's knowledge of the incident was formed in 2016. He commenced his court proceeding against the LSS in 2021. His claim was brought well outside the two-year limitation period and was statute-barred under s. 5 of *The Limitations Act*.

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***A.A.O. v O.A.A.*, [2024 SKKB 161](#)**

Smith, 2024-09-09 (KB24151)

Family Law - Costs - Expert Witness Fees

Family Law - Costs - Offer to Settle

The parties began dating in 2005 and were married and began cohabiting in 2009. The parties separated in 2018. The parties were able to settle, by agreement, issues related to family property before trial. However, a trial was necessary to address the issue of settling the respondent's income and the precise metrics of spousal support. The respondent had served two former offers to settle on the petitioner and both were rejected. Both parties sought to recover accountants' fees in excess of the basic award.

HELD: Costs of \$60,000 were awarded to the respondent. (1) The court has discretion respecting the costs of and incidental to a proceeding or step in a proceeding and may make any direction or order respecting costs that it considers appropriate. In order to recover costs charged by expert witnesses, a party must establish a number of factors, including the fact that the costs were not disproportionate to the economic value of the issue at risk and that such costs are equitable for the unsuccessful to be "saddled" with them. In this case, there had been considerable funds passing between the parties and increasing the amount exponentially would not serve the interests of equity and justice. The awarded figure was to cover most, but not all, of the respondent's costs of securing the services of KPMG LLP.

***R v Marckoski*, 2024 SKKB 162 (not yet available on CanLII)**

Wildeman, 2024-09-10 (KB24152)

Charter of Rights, Section 8, Section 9 - Search and Seizure - Search Incidental to Arrest

Charter of Rights - Search and Seizure

Charter of Rights - Search and Seizure - Evidence - Exclusion

Constitutional Law - *Charter of Rights*, Section 8 - Search and Seizure - Search Warrant

On November 30, 2022, the police received information that the applicant, who had a warrant for his arrest, was found at a particular address in Moose Jaw (the residence). The police obtained a warrant to enter the dwelling to arrest and apprehend the applicant. The applicant was arrested outside the home pursuant to a tactical plan that contemplated officers surrounding the residence and calling out as many individuals as possible. The police subsequently conducted a clearing search, during which they observed a firearm in plain view and seized it to render it safe. The police thereafter obtained another warrant to conduct a search for evidence relating to firearm offences. In executing the warrant, the police seized multiple exhibits, which led to charges against the applicant under the *Controlled Drugs and Substances Act* and the *Criminal Code*. The applicant sought to have the evidence excluded on the grounds that the search violated his *Charter* rights.

HELD: The application was dismissed. (1) The applicant had a reasonable expectation of privacy. The jurisprudence is clear that individuals have a strong privacy interest in a private dwelling. While a houseguest's expectation of privacy may be qualified by the knowledge that their host could invite others, including the state, it may still be objectively reasonable for a guest present on private property to expect that the state will not enter uninvited. In this case, the evidence in the voir dire was that police believed the applicant did not reside at the residence, but there was no evidence that the applicant was, in fact, only a houseguest. (2) The search was authorized by law and conducted reasonably. The police power to search incident to an arrest does not require a

warrant or independent reasonable and probable grounds to conduct the search. Rather, the authority to conduct a search incident to arrest arises from the common law and must meet three requirements: (a) the arrest itself must be lawful; (b) the search must be an incident of that arrest; and (c) the manner in which it is conducted must be reasonable. Where the police search an area within the arrested person's physical control, the common law standard applies without modification. However, when the police search areas of the home outside the arrested person's physical control, the police must have reason to suspect there is a safety risk to police, the accused or the public that would be addressed by a search. In this case, the clearing search was both physically and temporally proximate to the arrest. In light of the totality of the circumstances, the police also had objectively reasonable grounds to believe this was a high-risk arrest that raised significant concern for officer and public safety. Given the nature of the risk to officers of turning their backs on the residence with suspected occupants with access to a firearm, a clearing search of the residence was reasonable in the circumstances. The search was also conducted reasonably in the circumstances. The search took place right after the arrest and involved a visual scan of the residence to ensure no one else was present.

***R v Goodin*, [2024 SKKB 164](#)**

Mitchell, 2024-09-11 (KB24153)

Default Conviction - Setting Aside

Regulatory Offence - Appeal - *Traffic Safety Act*

The appellant was appealing a default conviction for failing to pay a fine or appear in traffic safety court for a traffic offence. The appellant filed an application to set aside a deemed conviction, which was dismissed.

HELD: The appeal was dismissed. (1) The appellant's explanation for failure to appear for his trial was not persuasive enough to warrant setting aside the default conviction and ordering a new trial. A default conviction can only be set aside if it is shown that: (a) the verdict is unreasonable or cannot be supported by the evidence; (b) the lower court committed an error of law; or (c) there was a miscarriage of justice. A failure to appear for trial occasioned by inadvertence, negligence, forgetfulness, or simple carelessness is not sufficient to set aside a default conviction on appeal. In this case, the justice of the peace found that the appellant did not satisfy this test. The appellant's failure to appear was due to his own mistake and an incorrect assumption that traffic court would not be in session on October 2, 2023. The error in this case was solely that of the appellant.

***Strand v Yemba*, [2024 SKPC 31](#)**

Demong, 2024-08-22 (PC24025)

Contracts - Breach - Misrepresentation

Real Estate - Sale of House - *Caveat Emptor*

Real Estate - Sale of House - Misrepresentation

Real Estate - Sale of House - Misrepresentation - Failure to Disclose

This was a claim for damages arising from an allegation that the defendant sellers of a residential property negligently or fraudulently misrepresented the condition of their property to induce the plaintiff to purchase the home. The plaintiff alleged that she purchased residential property from the defendants in spring of 2021. Thereafter, she noticed water damage and, upon subsequent investigation, discovered ongoing water leakage and damage beneath for an extended period of time. The plaintiff argued that the damages constituted latent defects known to the defendants and maintained that the defendants failed to alert her to these defects when they negligently or fraudulently misrepresented the condition of the home in a property condition disclosure statement (PCDS) they signed.

HELD: The claim was successful, and the plaintiff was awarded damages of \$26,399.41. 10 percent of the damages was also awarded as costs to the plaintiff. (1) If a defect is plainly visible, or could, upon a reasonable inspection, be ascertained, then the seller has no obligation to alert the purchaser of this defect. However, if the seller is aware of a latent defect, they are obligated to put the buyer on notice of that defect. If a seller conceals a defect that they are aware of, and a buyer is dissuaded from further investigation by virtue of that concealment, then fraud has been committed that can either vitiate a contract of purchase or lead to an action for damages. In this case, an analysis of the evidence showed that the defendants jointly and severally knew of the existence of the leaking under the kitchen cabinet and its longstanding duration. On that basis, the court was satisfied that the defendants were deceitful when they misrepresented the knowledge of the existence of this leaking in the PCDS. The court was further satisfied that the defendants chose to answer the questions in the PCDS the way they did in order to induce a potential purchaser to accept the answers as honestly made, and in order to sell their home. The court was further satisfied that the plaintiff relied on the answers given by the defendants in the PCDS when she chose to purchase the home and in consequence suffered a loss. (2) There was no reason to challenge or second-guess the plaintiff's expert witness evidence regarding causation, the cost of repair, or the betterment factor. The plaintiff's expert witness was not cross-examined on any aspect of the evidence and no evidence was tendered challenging any aspect of his testimony. (3) The defendants' attempt to fraudulently misrepresent the condition of the home, combined with their less than forthright testimony, their failure to make full disclosure of very relevant evidence, and the delay and additional expense of adjourning the trial for no apparent reason, mitigated in favour of a larger costs award.