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***Olkowski v Nano-Green Biorefineries Inc.*, 2024 SKCA 11**

Schwann Tholl Drennan, 2024-02-12 (CA24011)

Appeal - *Limitations Act* - Discoverability of Claim
Limitation of Actions - Torts - Defamation

The appellant, A.O., appealed the decision of a judge in the Court of King's Bench (chambers judge) that his defamation claim against the respondents, NGBI and B.K., was statute-barred. A.O. is a retired research scientist who had been a professor with the University of Saskatchewan (university). B.K. is a director and president and CEO of NGBI, an Alberta-based corporation. In February 2011, A.O. and NGBI entered into a licensing agreement respecting a concept of technology based on catalysis assisted transformation that had been developed by A.O. The relationship between the parties deteriorated in part due to A.O.'s concern that NGBI was not in a financial position to commercialize the technology. In October 2014, A.O. initiated a claim against the respondents in the Alberta Court of King's Bench that the licensing agreement was unconscionable and unenforceable. Apart from the

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Alberta litigation, the respondents had sent a letter dated April 26, 2017, to the university alleging that A.O. had breached the university's Responsible Conduct of Research Policy (complaint letter) in connection with his handling of the licensing issue. The complaint letter triggered a misconduct hearing before the university's Hearing Board and a subsequent hearing before the university's Appeal Board, which ultimately dismissed the misconduct allegations against A.O. In June 2021, A.O. made a claim against the respondents in Saskatchewan alleging that they had defamed him by submitting the complaint letter to the university (SK action). On March 16, 2022, A.O. amended the SK action to include two further instances of alleged defamation: (a) an email dated March 23, 2018, from B.K. to the university's Industry Liaison Office (ILO) requesting documents for the respondent's use in the misconduct hearings (document request) and (b) an NGBI shareholder report, dated December 18, 2019, which named A.O. and referenced the misconduct proceedings (shareholder report). The respondents filed a statement of defense in response to the SK action and sought to have it summarily dismissed in the Court of King's Bench. The respondents applied to the Court of King's Bench for an order (a) pursuant to Rule 7-1(1) and 7-1(3) of the King's Bench Rules declaring that A.O.'s allegations of defamation arising out of the complaint letter and document request were statute-barred, (b) in the alternative, summarily dismissing the claim pursuant to Rule 7-2, and (c) and in the further alternative, the SK action be struck pursuant to Rule 7-9(2)(a) for disclosing no reasonable claim. On the latter two points, the respondents had argued that the three publications put in issue by A.O. were not defamatory or, alternatively, were subject to witness immunity. In support of that application, B.K. swore an affidavit on November 24, 2021, setting out the general history of the litigation in Alberta and Saskatchewan as between the parties as well as in the university hearing process. B.K. also deposed to the timing and circumstances of the complaint letter but did not make specific reference to the document request. A.O. swore an affidavit in response to B.K.'s affidavit on December 6, 2021, in which he averred to the reasons he had commenced the SK action when he did as well as his application to have the respondents held in contempt of court in the Alberta action for having used documents that had been obtained in the university hearing process. In the context of the limitations application specifically, A.O. deposed to when he had become aware of the respondent's document request. He averred that he first received notice of it when it was appended as an exhibit to the affidavit of B.K. sworn May 19, 2021, filed in the Alberta proceeding. The respondents filed no further evidence in support of their application or in reply to the affidavit of A.O. The chambers judge began his analysis of the limitations issue in relation to the complaint letter and the document request by orienting himself to ss. 5 and 6 of *The Limitations Act*. Section 5 of the Act sets out the two-year limitation period for claims while s. 6(1) states that a claim

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is deemed to be discovered on the day the claimant knew or ought to have known (a) that the injury, loss or damage had occurred; (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim; (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it. Section 6(2) states that a claimant is presumed to have known about the matters referred to in 6(1)(a) to (d) on the day that the act or omission occurred unless the contrary is proved. The chambers judge concluded that a suit based on the complaint letter was statute-barred and went on to consider whether a claim based on the document request was also barred. After determining which aspects of A.O.'s claim were statute-barred, the chambers judge went on to determine that the allegations concerning the shareholder report would proceed to trial. The matter before the appeal court was limited only to a consideration of whether the chambers judge erred in striking A.O.'s defamation claim in connection with the document request. The Court of Appeal reframed A.O.'s arguments into 3 sub-issues: 1) A.O. asserted that the chambers judge misapprehended material evidence or drew an inference from it that was not supported by it. A.O. pointed to the uncontroverted affidavit evidence that the document request did not come to his attention until May 19, 2021. Since A.O. had commenced the action on March 16, 2022, he contended that it was brought within the general two-year limitation period. 2) A.O. asserted that the chambers judge's misapprehension of that same body of evidence led him to erroneously conclude that the respondents had not wilfully concealed the document request from him. 3) A.O. argued that the chambers judge failed to recognize that the respondents bore an evidentiary burden of proof to demonstrate that there was no genuine issue requiring trial as applicants in a summary judgment application (see *Michel v Saskatchewan*, 2021 SKCA 126 at para 102, citing *Canada (Attorney General) v Lameman*, 2008 SCC 14, 2008 1 SCR 372).

HELD: The Court of Appeal agreed with A.O.'s primary submission that the chambers judge made an inference not supported by the evidence which led him to erroneously conclude that A.O. had not met his burden under s. 6(2). This constituted an error in law warranting appellate intervention. By operation of s. 18 of the Act, once the respondents had raised a limitations defence, the burden fell on A.O. to prove that it had not expired. Pursuant to s. 6(2), he was presumed to have known of the matters set out under s. 6(1) as of the date of the document request, including (a) that an injury, loss or damage had occurred as a result of the document request; (b) that the injury, loss or damage appeared to have been caused by or contributed to by the document request; (c) that the act (document request) that is the subject of the claim appeared to be that of the person (the respondents) against whom the claim was made; and (d) that, having regard to the nature of the injury, loss or damage, a

R v Bachorcik

R v Hook

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Yantai Huahai International Trade Co. Ltd. v Yang

proceeding would be an appropriate remedy. In order to rebut the presumption set out in s. 6(2), A.O. was required to establish, on a balance of probabilities, that on the day the document request was made, March 23, 2018, he did not know of at least one of the elements itemized under s. 6(1). A.O. also had to establish that the claim was not discoverable within the limitation period through the exercise of due diligence. A.O.'s affidavit was the only evidence before the chambers judge dealing with his knowledge of the document request. A.O. averred that he did not know and could not have known of the document request until he received it in the Alberta proceeding when it was appended to B.K.'s May of 2021 affidavit. The respondents filed no evidence to challenge that part of A.O.'s evidence, nor was he cross-examined on his affidavit. Although the chambers judge was permitted to draw common sense inferences from the evidence to determine whether A.O. had discharged his burden under s. 6(2), his inferences had to be grounded in at least some evidence before the court (*Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc.*, 2019 SKCA 22 at paras 36-37, [2019] 4 WWR 393, citing *Canadian Broadcasting Corporation v Whatcott*, 2016 SKCA 17, 395 DLR (4th) 278). It is an error in law to draw an inference not anchored in the evidence (*R v KBW*, 2022 SKCA 8 at para 31). The unchallenged evidence before the chambers judge was that A.O. did not know of the document request or any loss or damage occurring due to the document request until May of 2021. The evidence did not support an inference that A.O. knew or ought to have known of any of the factors in s. 6(1) of the Act at the time that the document request was first made in March of 2018. On that basis, given that the inference drawn by the chambers judge was fundamental to the legal conclusion he reached, the Court of Appeal decided that the chambers judge did err in finding that A.O. had not discharged his burden pursuant to s. 6(2) of the Act. Given that determination, the Court of Appeal did not find it necessary to consider A.O.'s other two arguments but did offer the following observations. First, the appeal court was not persuaded that the chambers judge erred in determining that A.O. had failed to demonstrate that the respondents had wilfully concealed the document request., triggering the application of s. 17 of the Act. Second, the Court of Appeal was also unconvinced that the chambers judge reversed the evidentiary burden or failed to recognize the appropriate burden. Ultimately, A.O.'s appeal was allowed, the chambers judge's determination respecting the document request aspect of A.O.'s claim was set aside, and the balance of the respondent's application was remitted to the Court of King's Bench for determination.

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***R v Pelletier*, 2024 SKCA 12**

Richards Schwann Barrington-Foote, 2024-02-12 (CA24012)

Criminal Law - Appeal - Conviction - Aggravated Assault
Criminal Law - Firearms Offences - Possession of Firearm - Conviction - Appeal
Criminal Law - Evidence - Statement - *Res Gestae* - Spontaneous Utterance Exception
Criminal Law - Evidence - Hearsay - Excited Utterance Exception

The appellant, N.P., appealed a decision of a judge in provincial court (trial judge) convicting him of aggravated assault and two firearms offences. The alleged victim of the assault, K.S., was not present at trial, so two of K.S.'s out-of-court statements were key to the Crown's case. In one, K.S. had asked a civilian bystander to call the police for assistance. The second statement was made to a police officer, and in it, K.S. identified N.P. as the perpetrator of the assault. The trial judge admitted both statements under the spontaneous utterances exception to the hearsay rule. N.P. appealed the trial judge's decision to the Court of Appeal and argued that the conviction for aggravated assault should be set aside because the out-of-court statements were not properly admitted into evidence. N.P. also submitted that the weapons convictions should be overturned as the trial judge mishandled the assessment of the relevant circumstantial evidence. The Court of Appeal determined that the trial judge erred by admitting the out-of-court statements and that, absent those statements, there was insufficient evidence to support a conviction. As a result, N.P.'s appeal was allowed, his convictions were quashed, and acquittals were entered in relation to the charges of which he was convicted. The trial judge conducted a *voir dire* to determine whether the two statements in issue should be admitted into evidence. After admitting them, he proceeded with the trial proper. The relevant parts of the evidence produced during the *voir dire* and at trial are as follows. J.A., a civilian bystander, testified at the *voir dire*. J.A. lived at a residence near where the alleged assault took place. At 3:45 pm on August 25, 2019, J.A. walked out of her back entrance. She saw the alleged victim, K.S., walk from her backyard area, which is common with the other rowed houses in the residential development. K.S. was drenched in blood and asked if J.A. could call the police for assistance and that he had just been assaulted. J.A. did not have her phone on her person, so she directed K.S. to some of her friends across the alleyway. J.A. returned to her home a while later, and she observed a man coming from one of the nearby residences and saying, "If I see that fucker, he's dead" or "I am going to shoot him." She testified that the man could have been N.P. but she was not certain. J.A. observed the man walk across the alley and go behind one of the other nearby residences. J.A. also said that approximately 30 minutes after she had encountered the second man, she had left her home in her car when she saw several police cars speeding past. Wanting to see where they were going, she followed and observed K.S. sitting outside a nearby gas station. J.A. informed the police of what she had seen. T.G., a police officer, also testified at the *voir dire*. T.G. was on patrol on August 25, 2019, and was dispatched to the gas station at 4:01 pm. T.G. encountered K.S. at the gas station and said K.S. had wounds on his head indicative of blunt force trauma and that his clothes were drenched in blood. However, T.G. later admitted during cross-examination that K.S. was not wearing a shirt. T.G. also estimated that K.S.'s wounds had been sustained only minutes before he had encountered him. T.G. had asked K.S. what had happened, to which K.S. replied that N.P. had struck him multiple times with a handgun. K.S. was described as being frantic, but coherent enough to explain what had happened to him. K.S. was

rushed to the hospital where he received medical attention. He did not make a statement upon leaving the hospital, but he did make one a couple of days later in which he indicated that he was very intoxicated at the time of the incident and that he did not remember who assaulted him. A.H., another police officer who was on the scene on August 25, 2019, made her way back to the duplexes where the alleged assault took place, and observed N.P. hiding in a narrow walkway that separated residences. After some time, N.P. came out and was arrested. A .22 calibre handgun and ammunition were found on the walkway where N.P. had been observed hiding. Testing had determined DNA samples from three different people were present on the handgun, none of whom were identified. There was also blood found on the side of the handgun, which was determined to belong to K.S. The police also found a red sweater with blood on it on the walkway, and a pile of clothes in the backyard shed of a nearby residence. Neither the sweater nor the other items were sent for testing. N.P. appeared to have blood on his body and on his clothes. A swab was taken from his nose but not from his clothes. A second swab was also taken from his hands but was not sent for testing. The police attended a nearby residence where the alleged assault took place and knocked for 20 minutes but no one answered. The backdoor was breached with a door ram, and the police called out. An intoxicated woman was found to be home with her children. The police were ultimately permitted to enter. One of the police officers in attendance at that time testified that there was blood everywhere inside of the residence. A swab was taken from blood found on the floor near the back door but was also not sent for testing. K.S. could not be located to testify at the trial. The Crown sought to have his statements made to J.A. and the police admitted pursuant to the excited utterances exception to the hearsay rule and the principled exception to that rule. Following the *voir dire*, the trial judge admitted the statements on the basis of the spontaneous utterances exception, but declined to admit them on the principled exception to the hearsay rule as the requirement for procedural reliability had not been met. At the conclusion of the trial, N.P. was found guilty of aggravated assault, possession of a prohibited firearm with readily accessible ammunition without being the holder of an authorization or the registration certificate, contrary to s. 95(1) of the *Criminal Code* (*Code*), and of being in possession of a firearm while being prohibited from doing so, contrary to s. 117.01(1) of the *Code.* On appeal, N.P. contended that the trial judge erred in admitting the out-of-court statements made by K.S., and the firearms convictions should be set aside because the trial judge failed to employ the proper approach when dealing with a prosecution based on circumstantial evidence. N.P. sought acquittals for all three charges.

HELD: The Court of Appeal held that although the trial judge identified the correct analytical framework for the admittance of spontaneous utterances, he committed an error of law by failing to apply it to the evidence. The trial judge did not find when the assault had occurred, despite the timeline being at issue. The trial judge's assessment of the timeline issue was found to be brief and incomplete. Although the trial judge referred to J.A.'s testimony that she encountered K.S. at approximately 3:45 pm, he did not reconcile this conclusion with the evidence that J.A. encountered the second man approximately 30 minutes later and that she also encountered K.S. at the gas station approximately 30 minutes after that. Rather, having summarized the evidence and referred to an overview by Hinds PCJ in *R v Badger*, 2019 SKPC 43 (affirmed 2021 SKCA 118, 406 CCC (3d) 459, affirmed 2022 SCC 20, 468 DLR (4th) 607) of the law pertaining to spontaneous utterances, the trial judge simply found that the statements made to J.A. were contemporaneous and that the statements made to the police were contextually contemporaneous. The appeal court also found it significant that there was no evidence that K.S. was in a state of panic because he was being pursued and believed that he was in imminent danger. This was consistent with J.A.'s testimony that she did not encounter the second man until approximately 30 minutes after she had been approached by K.S. Rather, J.A. described a relatively polite interaction with K.S. when he approached

her and asked her to call the police as he had been assaulted. Having failed to properly deal with the evidence as to the timeline and to determine when K.S. had been assaulted, the trial judge also failed to address the evidence as to whether he was emotionally overpowered when he spoke to J.A. Rather having concluded that the traumatic event was contemporaneous with that encounter, he assumed that K.S.'s mind had been dominated by that event and that what he had said was uttered under emotional intensity. The appeal court concluded that the trial judge, when considering the admission of K.S.'s statement to J.A., failed to apply the legal test relating to the contemporaneity requirement. The appeal court also determined that the trial judge erred by failing to consider the evidence bearing on the question of whether K.S. was emotionally overpowered. The appeal court further determined that the trial judge's erring by admitting the statement made to J.A. also meant he erred in admitting the statements made to the police for a hearsay purpose. This was because the failure to determine a timeline was equally significant in assessing whether the second statement was contemporaneous and whether K.S. was still emotionally overpowered when he made it. In addition, and as in relation to K.S.'s statement made to J.A., it was determined that the trial judge erred by failing to consider the evidence as to how the traumatic event that led to K.S.'s injuries continued to dominate his thoughts such that his utterances to the police were an instinctual reaction to that event, which also constituted an error in law. As a result, the trial judge erred by admitting the out-of-court statements, and as those statements were determinative in relation to each of the offences at issue, the conviction appeal was allowed.

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***Graves v Nagy*, 2024 SKCA 17**

Leurer Barrington-Foote Tholl, 2024-02-22 (CA24017)

Wills and Estates - Removal of Executor - Delay - Conflict - Appeal

The appellants, J.G. and D.N., appealed a decision rendered by a judge of the Court of King's Bench (chambers judge) who granted the respondent's application to remove them as executors of B.M.T.N.'s estate. The chambers judge refused the remainder of the relief specified in the respondent's application, including that the respondent, K.N., replace the appellants as executor and that the respondents provide a full and complete accounting within 30 days, finding in a fiat dated December 21, 2022 that he saw no value specifying further powers while the removal of the current executors was under appeal. The appellants appealed the judgment, alleging that the chambers judge had committed various errors of law and mixed fact and law. The respondent cross-appealed the denial of her application to replace the appellants as executor and for associated relief. B.M.T.N. died on November 13, 2012. B.M.T.N.'s will appointed the appellants as co-executors of her estate and named seven of her children as beneficiaries., including J.G. and the respondent, K.N. D.N. was not named as a beneficiary, but became a pro-rata beneficiary in 2017 upon the death of his brother. Although B.M.T.N. died on November 13, 2012, the executors did not apply for probate until February 2, 2021, more than eight years later. The statement of assets attached to the application for probate listed two quarter sections of land valued at $382,800, a bank account containing $11,738.22, and $1,000 in miscellaneous personal property. At that time, D.N., who had lived

in the house located on estate land for his entire life, continued to live there rent-free as he had since B.M.T.N.'s death. The farmland was rented out to a tenant, as it had been since 2013. The rental income was not deposited in an estate bank account. D.N. deposed that it was used to pay taxes and that the remainder was used to improve and maintain the land. J.G. deposed that the reason for the delay in applying for probate was the result of erroneous advice given to her by a bank employee that probate was not necessary as there was only a small amount of money in B.M.T.N.'s bank account. She also said that none of the beneficiaries had inquired about or were eager to finalize the estate until the respondent made inquiries about doing so in 2019. J.G. told the respondent that she could not do anything until at least the fall of 2019 as she had been diagnosed with cancer. J.G. did not take any steps toward finalization until October 2020, when their sister decided it was time to deal with the estate. On appeal, the respondent's evidence as to when she made inquiries about the progress of the estate differed from J.G.'s. The respondent stated that she had texted the appellants on April 23, 2019 to inquire about estate progress. She said that she did not receive a reply until the summer of 2019, when J.G. told her that she would not initiate estate proceedings until the fall of 2019. The respondent also averred that she had asked on many prior occasions about the rent that was being paid for the farmland and had been told by J.G. that D.N. was collecting it and depositing the amount after taxes into an estate bank account. J.G. did not meet with estate counsel until November 5, 2020. Letters probate finally issued on April 16, 2021. The appellants submitted that the chambers judge committed four palpable and overriding errors: a) by removing the executors for delay; b) by removing J.G. for conflict of interest; c) by substituting the intention of the beneficiaries for that of the testator; and d) by removing the executor when the estate was nearing completion. e) In her cross-appeal, the respondent submitted that the chambers judge erred in mixed fact and law by failing to give directions regarding the replacement of the executors once the appellants were removed and by failing to provide further directions regarding various estate affairs.

HELD: a) The appeal court held that the chambers judge did not order that the executors be removed solely on the basis of delay. Rather, delay was one of the factors that were considered. The chambers judge took account of the fact that the executors did not apply for probate for eight years and that throughout that period, they did not keep proper records or file tax returns and permitted D.N. to continue in possession of the estate land without paying rent. The appeal court held that the chambers judge was entitled to do so and that his conclusion that the delays constituted a breach of duty was well justified and did not turn on his determination as to the effect of s. 14.1 of *The Administration of Estates Act*. The appeal court also found that the chambers judge made the point that the summary accounting provided by estate counsel and by the executors fell far short of the expectations set out in Rule 16-52 of *The Queen's Bench Rules*. He did so despite the fact that Rule 16-52 was not yet engaged as it relates to an accounting by an executor in the circumstances specified in Rules 16-49, 16-50, and 16-51, none of which had yet arisen. However, the appeal court did not take this observation to mean that the chambers judge erroneously found that the executors had breached Rule 16-49 or 16-50. Rather, the appeal court understood this aspect of the chambers judge's reasons as making the point that the executors had purported to provide an accounting because they had been asked to do so and had demonstrated that they lacked the ability or willingness to do so. This was relevant to both past and potential future delay. b) The appeal court held that it was clear from the chambers judge's reasoning that he was not concerned solely with the conflict that D.N. faced because he had received a benefit. He also concluded that the failure to file taxes might cause losses to the estate and a dispute over who should bear that loss. Further, the appeal court held that the judgment as a whole demonstrated that the chambers judge attributed the responsibility for failing to address the ongoing benefit to D.N. as well as the broader failure by the executors to comply with their duties in relation to estate income and expenses to both executors. Those issues seemed to create conflicts between interests of both executors and the beneficiaries. c) The appeal court held that it was clear not only from the reasoning of the chambers judge but from the decision

as a whole that he was aware of the need to take account of the choice made by the testator and also to the second part of the two-part test specified by s. 14.1; that is, he had to be satisfied that the removal of the executors would be in the best interests of the beneficiaries. The appeal court held that the chambers judge did not err in the manner alleged under this ground of appeal. d) The appeal court held that although the executors cast this ground of appeal as an allegation that the chambers judge erred in law, this was based largely on their allegations of palpable and overriding errors of fact or mixed fact and law that had not been made out. The appeal court did not agree that there was no evidence that the past failures by the executors to comply with their duties would cease to continue, nor did the fact that the estate land had been sold mean there was little to be done to settle the estate. Rather, the chambers judge was aware that executors should not be removed to punish them for past misconduct. His decision turned on the problem he foresaw in completing the administration of the estate based on what the executors had done and failed to do both before and after they had been pressed to complete the administration. e) Concerning the cross-appeal made by the respondent, the appeal court did not find it necessary to determine whether an error had been committed, as the chambers judge adjourned the remainder of the relief specified in the respondent's application. Those matters remained outstanding and were remitted to the Court of King's Bench for final determination.

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***R v Zatrepalek*, 2024 SKCA 27**

Barrington-Foote Tholl Drennan, 2024-03-08 (CA24027)

Criminal Law - Appeal - Grounds - Unreasonable/Unsafe Verdict
Criminal Law - Appeal - Reasons for Judgment

The appellant appealed his conviction after a trial at the Provincial Court. He was charged with possession, distribution, and accessing child pornography contrary to sections 163.1(3), (4), and (4.1) of the *Criminal Code*. The appellant claimed that the trial judge erred by failing to consider his evidence, relying on assumptions not grounded in evidence, taking judicial notice of facts not in evidence, reversing the burden of proof, misapprehending the evidence, and failing to apply the framework of *R v Villaroman*, 2016 SCC 33 (a case in circumstantial evidence) (*Villaroman*).
HELD: The Court of Appeal (court) granted the appeal, stating the trial judge erred and rendered an unreasonable verdict. The matter was sent for a new trial. The court reframed the appellant's arguments into the following points: that the trial judge 1) failed to consider and make findings on the appellant's evidence; 2) reversed the burden of proof by relying on inferences and assumptions not grounded in evidence; 3) misapprehended the evidence and took improper judicial notice; and 4) rendered an unreasonable verdict. 1) The appellant's testimony was the only direct evidence before the court at trial. He denied the allegations. The court found that the trial judge failed to address the whole of the appellant's evidence in a meaningful way. There were no indications of what aspects of the appellant's evidence the trial judge accepted or rejected. The trial judge made no finding of the appellant's credibility or reliability. An error in credibility assessment or failure to make a credibility finding with respect to the testimony of an accused can constitute an error. Failure to consider the whole of the testimony of the appellant was against the Supreme Court's instructions in

Villaroman. The trial judge should have considered reasonable inferences arising from the whole of the evidence, not just evidence provided by the Crown. 2) The improper application of the burden of proof by a trial judge is reviewable on a standard of correctness. “[T]he question is whether the reasons, read as a whole, demonstrate that there was no misapprehension as to the correct burden and standard of proof” (the court at para 27). At trial, the appellant argued that a hacker accessed his computer and downloaded/uploaded child pornography content. As a witness, the detective constable at trial could not rule out this possibility. The trial judge stated that it did not make sense that a hacker who could not be caught would care to do anything the appellant alleged. This line of reasoning used a third-party framework that attracted appellate intervention (See *R v Gauthier*, 2021 ONCA 216). The trial judge made an error by stating what a hacker would or would not do and that the appellant should have been able to catch the hacker. The trial judge’s reasons were not grounded in proper common sense assumptions or inferences derived from the evidence. Using these ungrounded assumptions shifted the burden to the appellant to prove or disprove the hacker theory. This contradicted the principle that an accused is not required to prove anything. It is the Crown’s duty to prove guilt beyond a reasonable doubt, and requiring the accused to do the same is to reverse the burden. 3) To succeed in the argument that the trial judge misapprehended the evidence, leading to a miscarriage of justice, the appellant had to show that the trial judge misapprehended the evidence and that his misapprehension was material and essential to his reasoning. The misapprehension must be material and go to the substance of the trial judge's reasoning. Such an error renders a trial unfair. The appellant argued that the trial judge misapprehended the evidence by failing to consider and give effect to relevant evidence and by misconstruing the substance of other evidence. The court found that the trial judge failed to consider the evidence that could provide a plausible alternative to guilt in this case. It is an error in law not to consider evidence relevant to the ultimate issue at trial. 4) The appellant argued that an acquittal was warranted because the trial judge's verdict was not supported by the evidence, making it an unreasonable verdict. Alternatively, he argued that the verdict was vitiated by irrational and illogical reasoning, warranting a new trial. For the first argument, the court had to ask whether, considering all of the evidence and lack of evidence, the only logical conclusion for the trial judge was the guilt of the accused beyond a reasonable doubt. An answer to this question by the appellate court requires re-examination, reweighing, and consideration of the evidence. Looking at the evidence, the court could not conclude that a trial judge would be able to determine that the evidence excluded all reasonable alternatives to the guilt of the accused. Furthermore, the numerous errors the trial judge made in this case amounted to fundamental flaws in the reasoning process and affected the verdict. The record before the court showed that there was evidence capable of supporting a conviction, which meant the proper remedy was to send the case back for a new trial.

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***Soldan v Plus Industries Inc.*, 2024 SKCA 29**

Caldwell Tholl Kalmakoff, 2024-03-13 (CA24029)

Administrative Law - Appeal - Boards and Tribunals - Human Rights Commission
Civil Procedure - Pleadings - Application to Strike Statement of Claim - Abuse of Process

Employment Law - Appeal
Practice - Judgments and Orders - *Res Judicata* - Issue Estoppel

This was an appeal and cross-appeal application. The appellant brought an appeal on the lower court's decision to dismiss her action against her former employee based on *res judicata*, as the Saskatchewan Human Rights Commission (SHRC) had already addressed those matters. Plus Industries, the employer, brought a cross-appeal from the decision of the King's Bench, allowing part of the appellant's claim to survive regarding allegations of defamation. The appellant had been employed at Plus Industries Inc. She went on medical leave and was subsequently laid off because her employer claimed she had abandoned her job. Disagreement arose between the parties. The appellant filed a complaint with the SHRC in 2018, alleging she was discriminated against based on her disability. The matter was sent to mediation. The employer offered compensation at mediation, which the appellant refused to accept. The SHRC's chief commissioner determined the offer was fair and reasonable. The complaint was dismissed, and the appellant did not seek judicial review of this decision. Instead, the appellant started an action at the Court of King's Bench against the employer for wrongful dismissal and damages. Plus Industries filed a defence stating the claim was barred on the basis it had already been resolved through the SHRC. The Court of King's Bench rejected parts of the appellant's claim that had already been dealt with at the SHRC level but allowed the defamation parts because they were based on conduct after the submissions were made to the SHRC. The issues the court was to decide were: 1) Should additional evidence be permitted on the appeal; 2) did the chambers judge make an error in striking portions of the claim; and 3) did the chambers judge make an error in allowing parts of the claim to survive?
HELD: The court dismissed the appeal and allowed the cross-appeal. It would not admit new evidence and found the chambers judge had not erred in his findings. The court applied the standard of correctness to review the lower court's decision. The chambers judge's statements about the applicable law regarding the doctrine of *res judicata*, the adjudicative powers of the SHRC, and the issue of estoppel raised questions of law. A review of a decision about questions of law invites the standard of correctness. 1) The court has the discretion to permit new evidence at the appeal level. The Supreme Court of Canada in *Barendregt v Grebliunas*, 2022 SCC 22, provided the test for the exercise of this discretion. The test states that new evidence should be relevant and credible, could not have been obtained for the trial, and the evidence is such that it could have affected the results of the trial. The court did not permit the appellant's affidavit because its material predated the King's Bench proceedings, and none of the new material could have affected the result. 2) The appellant appealed that since the SHRC is not an administrative tribunal, the chambers judge could not dismiss her claim on the basis that it was already heard and decided. She submitted that the prerequisite for a finding of *res judicata* is that the claim was previously heard by a court or tribunal with adjudication authority. The court stated that even though the SHRC does not adjudicate complaint cases (if a hearing is needed, cases are sent to the court of King's Bench), the chief commissioner's other decision-making power might have the same attribute as an adjudicative tribunal. For example, setting the complaint for mediation, receiving evidence, determining the fairness of an offer, and dismissing invalid complaints might be similar to decisions of an adjudicative tribunal. The SHRC's process bears many of the hallmarks of an adjudicative decision. Therefore, the nature of the decision-maker and the decision should satisfy the conditions of a judicial decision. The appeal on this ground was dismissed because pursuing an action that has already been decided amounts to an abuse of process. 3) The employer cross-appealed because the chambers judge allowed parts of the appellant's claim to survive. The employer argued that those parts did not plead the tort of defamation and that the necessary details for this tort were missing from the claim. The court agreed with this argument. However, the court stated that the appellant should not be deprived of her ability to apply to the Court of King's Bench to amend her statement of claim and plead defamation. This was because the alleged facts for this issue were about the conduct that happened after the submissions to the SHRC.

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***Director under the Seizure of Criminal Property Act, 2009 v A.R.*, 2023 SKKB 262**

Wildeman, 2023-11-06 (KB23265)

Evidence - Judicial Notice - Expert Evidence - Admissibility

The RCMP seized $67,480 on or about June 17, 2021, as a result of an investigation into the activities of A.R. and J.F. The Director under *The Seizure of Criminal Property Act, 2009* (director) applied for an order forfeiting the seized monies to the Crown in right of Saskatchewan pursuant to ss. 3 and 7 of the Act. The director submitted that the seized monies were connected to the trafficking of contraband cigarettes. The director did not seek to admit expert evidence in her application but argued that certain behaviour or factors are consistent with unlawful activity, such as: a) the use of a rental vehicle during the late hours of the evening; b) travel from a source point for drugs to a source destination for drugs; c) the presence of multiple cellular phones in the vehicle; d) the quantity and manner in which cash was bundled and stored; and e) the meaning of certain terms that are used in relation to contraband cigarettes. The director's application raised the issue of whether she might rely upon factual findings related to the behaviour and practices consistent with drug trafficking in other cases to argue the facts of this case.
HELD: The court was not persuaded that it could conclude that certain practices or behaviours were consistent with unlawful activity, namely, the trafficking of contraband cigarettes, without expert evidence to support such assertions. In her submissions, the director sought to rely on the decision of *Saskatchewan (Seizure of Criminal Property Act, Director) v Kotyk*, 2013 SKCA 140, 427 Sask R 193 (*Kotyk*) to support the assertion that the court can use common sense to find that certain factors are consistent with unlawful activity. However, the court found that the Court of Appeal's decision in *Kotyk* did not address whether it was permissible to adopt expert evidence referenced by the court in other cases. Further, *Kotyk* did not address whether it was permissible to take notice of facts, including behaviours and practices that are consistent with unlawful activity, that are found by the court in other cases and apply them to the present case before it. As a cautionary note, the court cited the warning given by Lord Denning in *Qualcast (Wolverhampton) Ltd. v Haynes*, [1959] AC 743 (HL), where he cautioned against turning a question of fact into a proposition of law.

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***J.L. v Shewchuk*, 2023 SKKB 253**

Popescul, 2023-11-27 (KB23266)

Causes of Action
Torts - Negligence - Duty of Care - Elements

The defendants made an application to strike out the plaintiff's statement of claim pursuant to Rule 7-9(2)(a) of The King's Bench Rules on the basis that it did not disclose a reasonable cause of action. The plaintiff and T.T. were the parents of a young child. The two separated and issues arose with respect to parenting and decision-making. T.T. was represented by S.S., one of the defendants and a licensed lawyer. According to the plaintiff's claim, S.S. practiced law with the defendants. The plaintiff was self-represented during the family law proceedings. Ultimately, a trial was held, and a decision was rendered with respect to the family law matter on February 8, 2023. On October 26, 2022, the plaintiff initiated the claim against the defendants. The essence of the claim against S.S. related to the way she represented her client. The plaintiff alleged that S.S.: demonstrated legal malpractice, wilfully prepared false accusations, offered false evidence, misstated facts, relied on a false or deceptive action, knowingly asserted a fact as true when its truth could not be supported by the evidence, was negligent, was unethical, bullied and coerced her client, was defamatory towards the plaintiff, was not courteous and civil and did not act in good faith, showed discrimination towards the plaintiff, and withheld important evidence. The plaintiff claimed damages in the sum of $266,271 in the action against the defendants.
HELD: The court found that the plaintiff had not based his claim on a legally recognized cause of action. In order to be valid, the plaintiff must have based his claim on a legally recognized cause of action arising from tort, contract, statute, or the like. The court stated that the plaintiff had not pointed to or relied upon a contract, statute, or any other recognizable cause of action to found his claim, with the possible exception of tort. However, it was affirmed by the court that the law is well settled that a lawyer owes no legal duty to the party opposite. The court cited *Lawrence v Sandilands*, 2003 BCSC 211, in which the court explained that the only party to whom a lawyer owes a duty of care is to his or her client. Further, in *Babatunde v Bank of Canada*, 2017 SKQB 62, the court stated that a lawyer owes no duty of care to the party opposite, as he or she must be able to act fearlessly on behalf of a client without the threat of liability stemming therefrom. Accordingly, the court struck the claim against S.S. as she did not owe a duty of care to the plaintiff. Further, apart from not owing the plaintiff a duty of care, the plaintiff's action was found to disclose no reasonable claim because S.S. was a lawyer conducting litigation and was protected by the doctrine of absolute privilege. Since there was found to be no viable claim against S.S., there was found to be no vicarious liability claim that carried forward against the other defendants as well.

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***R v Hook*, 2023 SKKB 267**

Robertson, 2023-12-13 (KB23244)

Criminal Law - Publication Ban - Access to Information - Right of Access - Openness of the Court

The Crown applied to ban the publication of information that might reveal the identity of several witnesses in the murder trial. The court partially granted the ban to cover only one of the witnesses. The accused took no position regarding the Crown's application. The Regina Leader Post, a local newspaper, opposed the Crown's application based on the open court principle. The issues for the court to determine were: 1) what was the proper way to make an application for a publication ban; 2) what test applied to such

applications; and 3) should a publication ban be made for this case?
HELD: Court proceedings are open to the public, subject to exceptions. This principle is rooted in the constitutional guarantee of freedom of expression as a central feature of a liberal democracy. The media are the eyes and ears of the public, and their involvement in open court helps make the justice system fair and accountable. The framework of the open court principle and publication bans are provided under the *Charter*, section 486.5 of the *Criminal Code*, and the Court of King's Bench Practice Directive #3 regarding restricting media reporting or public access, all of which shall be read together in any relevant circumstances. Section 486.5(4) and (5) requires the applicant, here the Crown, to provide a written application with the grounds for the ban. The Crown, in this case, did not produce the proper written application. The statutory test for publication ban requires the court to consider the enumerated factors in section 486.5 and ensure the applicant has satisfied its burden of proof, on a balance of probabilities, that the ban is necessary for the proper administration of justice. The common law test, as reformulated by the Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, asks the applicant to show the court that the open court principle poses a serious risk to an important public interest; the requested publication ban prevents the risk because the alternative measures will not work to do so; and the benefits of the ban outweigh its negative effects. The courts have an inherent jurisdiction and statutory authority to limit the presumption of openness. If the court invokes its inherent jurisdiction, it shall use the common law test. When the court invokes its statutory authority, it shall apply the prescribed statutory test. The current case dealt with an application under s.486.5 of the *Criminal Code*. Therefore, the statutory test applied. Applying the statutory factors, the court ordered that the publication ban be dismissed except for the ban on publishing the name of J.T., who is a serving prisoner.

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***Yantai Huahai International Trade Co. Ltd. v Yang*, 2024 SKKB 24**

Bergbusch, 2024-02-16 (KB24021)

Judgments and Orders - Foreign Judgments - Registration

The applicant sought to register a foreign judgment against the respondent from China in Saskatchewan pursuant to *The Enforcement of Foreign Judgments Act* (EFJA). The applicant had sued the respondent in China and obtained a default judgment there. The respondent had not had notice of those proceedings and was not able to participate and defend himself.
HELD: The foreign judgment could not be registered and enforced because the respondent had not been given notice in time to defend it, contrary to principles of fairness and natural justice. If a judgment creditor wishes to enforce a foreign judgment in Saskatchewan, he may apply to the Court of King's Bench for an order authorizing the judgment registration. Once the foreign judgment is registered, it becomes enforceable as if it were a judgment of the enforcing court. Registration procedures under the EFJA are provided in Rules 3-49(3) and 10-51 of The King's Bench Rules. Furthermore, s. 12 of the EFJA prescribes the notice requirements and the grounds for registration. Saskatchewan courts do not examine the merits of the foreign judgment because that would be similar to adjudicating the matter. Instead, the enforcing court should consider whether the obligations resulting from the foreign judgment can be enforced in Saskatchewan. Here, the applicant met the conditions of s.12 of the EFJA. In turn, the respondent had to demonstrate, on a balance of probabilities, why the foreign judgment should not be registered in Saskatchewan.

The Court of King's Bench concluded that, on a balance of probabilities, the respondent did not receive notice of the foreign proceedings and was not able to defend himself. Lack of effective notice and a chance to defend in the proceeding raises procedural fairness and natural justice concerns. Therefore, the foreign judgment could not be registered in Saskatchewan.

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***Melville (City) v Keller*, 2024 SKKB 25**

Dawson, 2024-02-20 (KB24020)

Property - Discharge of Interest
Real Property - Expropriation
Real Property - Land Titles - Miscellaneous Interest

The City of Melville (Melville) brought an application asking the court to declare that Melville had an easement on the respondent's former land. The issue arose when Melville entered the respondent's lands for sewage system work. The respondent claimed Melville damaged the land, and Melville claimed they had an easement to enter and do work on the land. The title deed for the land showed a CNV caveat registered for Melville. The respondent applied to ISC to lapse this interest. Melville then applied to the court to register an easement on the land, claiming there was an easement agreement from 1962 with the previous land owner for entering and working on a sewage system. Melville could not produce a copy of the agreement and instead relied on historical and secondary source evidence to support its claim. In the meantime, the respondent sold the land to a new owner. Melville alleged that the respondent did not have standing to lapse the CNV caveat anymore. Furthermore, Melville reached an easement agreement with the new owners. However, Melville claimed the issue of the 1962 easement was not moot: Melville needed the recognition of the easement to date back to 1962 as the contrary would cause significant liability to it. The respondent stated that the new owner's agreement to a new easement and recognition of the 1962 alleged easement did not bind him. The court needed to decide whether: 1) the respondent continued to have standing to lapse the CNV caveat registered by Melville after selling the land to a new owner; and 2) declaratory relief should be granted to recognize Melville had a historical valid easement and/or ISC should be ordered to register it.
HELD: The respondent had standing to lapse the CNV caveat because he still had a registered miscellaneous interest in the land. Melville's application was dismissed because such an order would be prejudicial to the respondent, especially in light of the lack of evidence for Melville's claim. *The Land Titles Act* and its Regulations provide the mechanism for registering and lapsing interests in land. The respondent registered an interest in land, a profit-sharing agreement for gravel with a company. There appeared to be discrepancies in the language of the Regulations versus the Act about who could apply to lapse an interest. Melville advanced this argument, which failed. Ultimately, the Court decided that the respondent's interest gave him standing to pursue the lapse application under s.50 of the Act as a person with a registrable interest. The Act and the Regulations state that a registered owner, an interest holder, or a person with a registrable interest may seek to lapse a caveat. The respondent continued to hold a miscellaneous interest and continued to have standing to lapse the caveat. 2) Melville relied on *Moore v Mollard*, 1986 CanLII 3565

(Sask QB) (*Moore*) as authority for a declaratory order. The court dismissed the argument, finding distinguishable differences between Moore's and Melville's cases. Unlike in *Moore*, Melville and the respondent did not agree about an easement's existence. Furthermore, Melville could not produce any evidence of the terms and scope of the alleged easement. Melville also failed to produce evidence of maintenance and intention of the easement and any work on the land in that regard. Lastly, such a declaratory order would prejudice the respondent and the new owners. The registered caveat did not reflect the nature and scope of the alleged easement, and rectifying an alleged historical error would prejudice him as a *bona fide* purchaser who purchased the land, believing the land was free from the alleged easement. The respondent obtained his rights to the land in good faith and for value. This engaged the principle of indefeasibility. Once a title is transferred, the registrar cannot rectify the title.

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***Saskatoon Twin Charities Inc. v Service Employees International Union-West*, 2024 SKKB 26**

Elson, 2024-02-22 (KB24028)

Administrative Law - Judicial Review - Labour Relations Board
Labour Law - Judicial Review - Labour Relations Board
Civil Procedure - Stay of Proceedings

This was an interim application as part of a judicial review of the Saskatchewan Labour Relations Board's (board) decision. The employer, Saskatoon Twin Charities, asked the court to preserve a current stay of proceeding pending the outcome of the judicial review application. The employer wanted to preserve the employees' unopened ballots, while the board had ordered they be destroyed. In 2019, the board issued a certification order for an employee bargaining unit. The bargaining agent was SEIU-West (union). The parties' collective bargaining efforts did not reach an agreement. Disputes arose about the employer's responsibility to provide the union with specific employee information. In 2023, M.A.B., a member of the bargaining unit and the union, brought a decertification application. The union replied and brought an unfair labour practice application against the employer, alleging that the employer bargained in bad faith by refusing to disclose employee information and increasing wages despite the statutory freeze period. The board conducted a representation vote, and the ballots have remained sealed since. The board heard the parties' applications and ordered, among other things, the dismissal of the decertification application and the destruction of the ballots. The board reasoned that the employer's unfair labour practices impaired the employees' capacity to decide the representation question freely and independently, therefore warranting the destruction of the ballots.
HELD: The court ordered the continued stay of the proceedings and preservation of the unopened ballots after providing the relevant laws and their application to this matter. The applicable principle to a stay of proceedings application pending a judicial review is the same as an application for an interlocutory injunction. The Supreme Court of Canada in *RJR-MacDonald,* [1994] 1 SCR 311, provided a three-element test in the context of an application for a stay of proceedings: 1) the existence of a serious question, 2) irreparable harm if a stay is denied, and 3) the balance of convenience. The reviewing courts should take a holistic approach when considering these three elements. The Court of Appeal in *Potash Corporation of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 in paras 25-26, provided the appropriate holistic approach to these three elements. In the

current case, the judicial review application met the low threshold of a serious issue to be tried. The court found that the employer successfully established irreparable harm because the destruction of the ballots would make it impossible to determine the employees' level of support for the union at the time of the decertification application. Destruction of the ballots could also create a palpable level of harm to the representation vote process that was central to the justice and equity of this situation. Therefore, the balance of convenience leant toward preserving the status quo because there was no harm in preserving the unopened ballots pending the possibility they might be counted at the outcome of the judicial review application.

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***Service Employees International Union-West v Saskatchewan Labour Relations Board*, 2024 SKKB 27**

Rothery, 2024-02-22 (KB24029)

Administrative Law - Judicial Review - Labour Relations Board
Civil Procedure - Stay of Proceedings
Labour Law - Judicial Review - Labour Relations Board

The SEIU (union) applied for a judicial review of the Saskatchewan Labour Relations Board's (board) decision. The current case was an interim application seeking a stay of the board's decision until the conclusion of the judicial review matter. The court was to decide whether a stay of the decision of the board should be ordered pending the outcome of the judicial review application, pursuant to Rule 3-60(2) of *The King's Bench Rules*.
HELD: The application for a stay of the board decision was dismissed. The Supreme Court of Canada in *RJR-MacDonald v Canada*, [1994] 1 SCR 311 provided three criteria to be met as to whether a stay of proceedings should be granted: 1) there is a serious question to be tried, 2) irreparable harm will result if the stay is denied, and 3) the balance of convenience and the public's interest. The threshold for the "serious question" part is low. The "irreparable harm" part refers to the nature of the harm rather than its magnitude. The "balance of convenience" refers to determining which of the parties would suffer the greater harm from granting or refusing the stay of proceedings, which invites an examination of the factors of each case and also includes an examination of the public interest. A judicial review application meets the low threshold of a serious question to be tried. The union argued that the decision of the board had caused turmoil among employees of the Saskatchewan Health Authority (SHA) after it acquired a few health facilities. The court found that the union met the second part of the test for irreparable harm because there was evidence of negative impacts on the supplemental income of two employees and the negative effects of the new shorter family leave system. In the third part of the test, the court noted that SHA would suffer great inconvenience if a stay order were granted because it would result in operational and resource hardship. This hardship would negatively affect the public's interest in health, which is of compelling importance. Therefore, the interests of the public for access to health care outweighed the perceived harm that a few employees might experience if a stay of proceedings were not granted.

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***Innovation Credit Union v Brudor Holdings Ltd.*, 2024 SKKB 38**

Bergbusch, 2024-03-05 (KB24019)

Mortgages - Foreclosure - Order *Nisi* - Judicial Sale
Mortgages - Judicial Sale - Upset Price

Innovation Credit Union, the plaintiff, applied to vary the upset price of an order nisi for the sale of a property and an order confirming the proposed sale of the property in question. The plaintiff loaned funds to the individual defendant. The corporate defendants provided a guarantee for that loan and registered mortgage interests on a property in favour of Innovation Credit Union. Innovation Credit Union demanded payment from the guarantors when the individual defendant defaulted on the loan payments. In April 2023, the court rendered an order nisi for the sale of the property that was put as a guarantee with an upset price. The last viable offer was below the upset price, and after a few months, the property was listed for sale. Furthermore, the real estate officer found defects in the property, resulting in a reduced price. The plaintiff came back to the Court of King's Bench to vary the order *nisi* to reflect these changes and to seek remedy for the loan.
HELD: The court varied the order *nisi* to reflect a lower upset price in light of the defects in the property and hardships in selling it. The court approved the proposed sale. Varying an order nisi for sale is discretionary. Judicial sale of a mortgaged land in proceedings by a mortgagee is an equitable remedy. *The Limitation of Civil Rights Act*, section 5 requires the court to set an upset price or reserve bid when ordering a judicial sale. The amount should be reasonable and reflect the property's fair market value. The court must protect the mortgagor's interests to ensure the property is sold at its real value. The court may also order a second order *nisi* if circumstances permit. However, a second judicial sale may be refused if the mortgagee had the right to bid at the first sale and no other acceptable bids were received, because this would work against the mortgagor's interests. The court should also consider a delay in the foreclosure or sale process if the mortgagee conducted it. Furthermore, confirming a proposed sale that does not conform to the terms of the order requires compelling reasons. The plaintiff successfully established that the circumstances would allow for varying the order and confirming the proposal for sale. The plaintiff pursued the mortgage action and the sale processes promptly and appropriately. The property's structural defects were discovered after the fact. The offer received was a true representation of the property's market value. The plaintiff had justifiable reasons not to exercise its right to bid first, such as adverse tax consequences. The plaintiff conceded that the deficiency judgment be calculated based on the original order *nisi* price rather than the new lower price, which would prevent any prejudice to the mortgagor and guarantors. This concession protected the interests of the mortgagor.

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***R v Bachorcik*, 2024 SKPC 9**

Hinds, 2024-01-19 (PC24004)

Criminal Law - Sentencing - Firearms Offences

The offender entered a guilty plea to the charge that on or about March 20, 2023, he possessed a prohibited firearm and ammunition without a license, contrary to s. 95(b) of the *Criminal Code*. The Crown took the position that the offender should be sentenced to a term of four to four and a half years in prison. Defence counsel urged the court to impose a 16-month conditional sentence order. On March 20, 2023, the police were dispatched to the Best Western in Estevan. The general manager told police that the offender and C.B. were staying in room 101 and that the cleaning staff had observed C.B. holding methamphetamine in the room. While speaking to the hotel manager, the police had observed the offender and C.B. exit the room accompanied by three children. The offender and C.B. were arrested for methamphetamine and searched incident to the arrest. The police searched C.B. and found a backpack containing a notebook with records consistent with drug trafficking, 1.4 grams of methamphetamine inside a small black bag, 1.8 grams of fentanyl inside a dime bag, 0.6 grams of fentanyl inside a contact case, 0.2 grams of fentanyl inside a contact case, and an iPhone. In the notebook, it was indicated that C.B. had sold the offender 3.5 grams of methamphetamine and that the offender owed C.B. $80 for the transaction as an IOU. On the following page, it was also indicated that C.B. had sold the offender 3.5 grams of methamphetamine and 0.2 grams of fentanyl, and that he owed C.B. a further $130 from the transaction as an IOU. On the same page, C.B. had written that she had done another transaction with an individual named Sheldon, who was not involved in the matter before the court. Lastly, on page five on the first tab of the notebook, C.B. indicated that the offender owed her an additional $225 for drugs he had acquired from her a few days prior to their arrest. The police seized a number of items from the offender, including three 12GA shotgun shells, 3.4 grams of methamphetamine, 0.1 grams of fentanyl, a bottle of premix rooting powder, a Samsung cell phone, and keys for a Nissan Altima. The police were granted a search warrant for the hotel room and the Nissan. In the hotel room, they found 8.4 grams of methamphetamine located in a tin on the bed. Police also searched the Nissan and seized a 12GA, break action, multi-barreled side by side shotgun (the sawed-off shotgun). The sawed-off shotgun was found in the trunk of the Nissan in the rear spare tire compartment. It was disassembled into three pieces, wrapped in bubble wrap and duct taped. The offender told police that he checked into room 101 with C.B. and her children, that the Nissan was his vehicle, that he wrapped the sawed-off shotgun in bubble wrap and put it in the rear spare tire compartment of the Nissan, that he bought the sawed-off shotgun and modified it by cutting off the barrel, and after modifying the sawed-off shotgun, he test fired it to make sure it worked. On or about July 18, 2023, the Estevan Police Service was granted a search warrant for the Samsung cellphone, which was then searched. A picture of the offender holding the sawed-off shotgun was recovered from the cell phone. The sawed-off shotgun was examined, and it was determined that the three pieces of the sawed-off shotgun could be assembled in less than 30 seconds. The sawed-off shotgun functioned correctly during testing and could fire the three 12GA shotgun shells seized from the offender by police. During the sentencing hearing, the offender testified that he was familiar with firearms and that he took a hunter safety course when he was 15, that he obtained a restricted firearms license when he was in his early 20s, that he began possessing firearms in his mid-20s, and that he renewed his restricted firearms license in his 30s. The offender also testified that he had owned approximately 25 firearms during his lifetime, that he had a total of three firearms leading up to the incident, but that he had surrendered two of them to Swift Current police after a shouting match with his girlfriend, C.B., which also occurred in Swift Current where they lived together. At the time of sentencing, the offender was 39 years old and had a prior criminal record consisting of 16 prior convictions, one of which was for careless use of firearm, weapon, or prohibited device or ammunition contrary to s. 86(1) of the *Criminal Code*. Some of the offender's other convictions included possession of a Schedule I substance and a Schedule III

substance, for which he received fines. The offender had also been convicted of several motor vehicle related offences and several other non-firearm related offences. The sole issue before the court concerned the appropriate sentence for the offender.
HELD: The offender was ultimately sentenced to a term of incarceration of 2.8 years, less time served in remand. There were several aggravating and mitigating factors. Although the court found that the offender was engaged in a true criminal activity in relation to the firearm offence, it was not convinced that his possession of the firearm was linked to other criminal activity, such as C.B. trafficking in drugs. Other than the record of the sale of drugs to the offender in the notebook belonging to C.B., there was no evidence to suggest that the offender was part of C.B.'s drug trafficking operation. As such, the drug trafficking component was not found to be an aggravating factor. However, due to the offender's age, his somewhat lengthy criminal record, and the fact that there was no diminished moral culpability, nor any significant efforts at rehabilitation, a sentence of 1,025 days, or 2.8 years, was found to be appropriate under the circumstances.

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***R v S.S.*, 2024 SKPC 6**

Kovatch, 2024-02-02 (PC24006)

Criminal Law - Assault - Sexual Assault
Criminal Law - Overcoming Resistance by Choking, Strangulation or Suffocation

The accused, S.S., was charged with two counts under the *Youth Criminal Justice Act*: that (1) between May 31, 2021, and June 4, 2021, he committed a sexual assault on E.D., contrary to s. 271 of the *Criminal Code*; and (2) between May 31, 2021, and June 4, 2021, he attempted to choke E.D. with his hand with intent to enable himself to commit the indictable offence of sexual assault, contrary to s. 246 of the *Criminal Code*. The Crown proceeded by indictment on both counts. At the time of the incident, E.D. was 14 years old. She stated that the incident occurred in early June of 2021. She also recalled that she had met the accused through mutual friends a few months prior to the incident and that they had communicated over Snapchat several times. In the days leading up to the incident, both the accused and E.D. agreed to get together. Arrangements were made for E.D. and a friend to go to the accused's home in White City and swim in the swimming pool in the accused's yard. However, on the day of the incident, E.D.'s friend refused to accompany her to the accused's home, so she decided to go alone. She texted the accused, who then picked her up and drove her back to his home. E.D. testified that she believed the accused's parents would be home, but she later discovered that no one else was there. She believed she arrived at the accused's home at 4:30 pm. They talked and watched TV for a while in the accused's bedroom, and then at approximately 5:00 pm, they decided that they would go to the swimming pool. The accused left to change elsewhere while E.D. remained in the bedroom and changed into her bathing suit. Shortly after this, the accused returned. They went and swam in the pool until approximately 5:45 pm. They both returned to the bedroom. The accused went to change elsewhere while E.D. remained in the bedroom and changed back into her street clothes. After about five minutes, the accused returned to the bedroom. At that moment, E.D. stated that she did not feel uncomfortable or that she should leave. The accused then stood up in front of her and pushed her back on to the bed. The accused then sat on her and began to choke her. The accused

grabbed her neck and began to push on it. As he pushed her back, E.D. told the accused that she did not want to do anything. The accused continued to hold her down. E.D. tried to get up, but she could not. The accused then laid on top of her and put one hand on her neck and held her hands above her head with the other. The accused then let go of her hands and began to take her shorts off. At this point, she was frozen. She had told the accused at least twice that she did not want to have sex. During examination-in-chief, E.D. stated that her top and bra were still on, and she even described the type of bra she had worn. She testified that the accused remained on top of her and had vaginal intercourse with her. E.D. did not say for how long the accused had intercourse with her nor did she say if he had ejaculated. Under cross-examination, E.D. denied that intercourse began with her on top. She also denied that the accused vaginally penetrated her from behind. She denied that she had asked about or got the condom out. In fact, she could not recall if the accused had even worn a condom. She denied that he ejaculated on her back and then returned to clean her off. Defence counsel cross-examined E.D. at length about how she did not say no, did not protest, and did not immediately report the incident. Defence counsel also questioned her about being frozen and stated “It is in vogue now” for her to say she was frozen. It was also suggested by defence counsel to E.D. that she later decided she was raped. E.D. denied this. E.D. was also confronted about various aspects about which the accused would later testify. She adamantly denied that any of those actions took place. Defence counsel also suggested to E.D. that she decided to report a rape because she was worried about her reputation. This was also denied. The accused testified that he was 19 years old at the time of trial and that he was 17 when the incident took place. He is approximately 5”6 or 5”7 and goes to Greenall High School in Balgonie. He testified that he had met E.D. at the residence of an unrelated third party a few months before the incident and that they had communicated often over Snapchat. He also stated that they had occasionally seen each other and met at school. He stated that they had seven text message conversations, three of which were longer. He said they had started to become closer to one another. Two days prior to the incident, he testified that they had arrangements to hang out at his place and go swimming. He stated that there was no discussion of anyone else joining them. He picked her up at school, and it was her idea. He stated that no one else was at his home once they arrived. He said that they were in his room “breaking the ice and chilling.” He asked her about going swimming. She changed in his room while he changed elsewhere. He got towels and they went out to the pool area. He stated that they were in the pool for approximately 30 to 45 minutes playing volleyball. There was no physical contact in the pool. After some time, the accused asked E.D. if she wanted to get out, which she said that she did. They both returned into the house and changed back into their clothes. He said that he asked her if she wanted to come and sit next to him, which she said that she did. He said that they began cuddling, and he moved to kiss her. He said she then grabbed him and began to kiss him. She then asked if he had a condom, to which he indicated that he did. He told her to grab the condom that was under his pillow. He did not indicate when or if he put the condom on. At first, she was on top of him, and they changed positions several times. He asked if he could ejaculate on her back, and she said yes. After he ejaculated on her back, he left briefly to get tissues to clean her off. Once the intercourse was finished, the accused said he offered her a drink, they spoke for about five to 10 minutes, then she decided that she had to go. He offered her a ride, but she said she was fine and left. The accused admitted to holding her hand, but said he never held her wrists. He also asked if she wanted to take her pants off, to which she said yes. He helped to take her pants off. He stated that she took off her shirt, and that he helped to take her bra off. Altogether, the accused said that the sexual encounter lasted about 30-40 minutes. Under cross-examination, the accused could not remember if the alleged incident had happened on a school day, or what day of the week it had occurred on. He could not remember anything he had done on that day prior to the incident. The accused admitted that during the sexual intercourse, he was

on top of her, and he put his hand on her neck, close to her jaw. He said that he put some pressure on her neck, and that he used his left hand to hold her right hand. He said that their hands were about shoulder height and that at no time were her hands above her head. However, he later said that her hands could have gone above her head for a bit. He agreed with counsel that the date of the incident was the first time they had socialized. He stated that they had seen each other at school and that he knew she was 14 years old. Counsel suggested that during the summer of 2021, she was between grades eight and nine. The accused agreed with this and then agreed that they did not see each other or hang out at school at all. Later, the accused agreed with Crown counsel that they were in fact in different schools during the school year prior to the incident. The accused also agreed with counsel that he had very little recollection of anything that had happened that day. He stated that he had no expectation of having sex that day, but expected they might kiss. He also said that it was not usual for him to have a condom under his pillow, but it was there because a friend of his had planned to use it to have sex on his bed a few weeks prior. He denied placing the condom there in anticipation of sex with E.D. He said that when she got on top of him, this surprised him as he was still kissing her and getting in the mood for intercourse. He described that for about 30-40 minutes during the sexual intercourse, they effortlessly and seamlessly changed positions. There was moaning and kissing throughout, and he said it was pretty good sex. After it was done, he grabbed tissues to clean her off. There was no goodbye kiss. He said E.D. did not want a ride and she left to go be with her friends. He denied that he pushed her down and again indicated that she wanted to have sex. He also denied that he choked her to prevent her from getting up. Defence counsel advised that the Crown would refer to *R v Van Deventer*, 2021 SKCA 163, 407 CCC (3d) 291 (*Van Deventer*) and stated that *Van Deventer* did not and could not alter the law as set down in *R v W.(D.),* [1991] 1 SCR 742 [*W. (D.)*]. He stated that the court could not simply choose whom to believe and encouraged the court to look at the accused's evidence and apply the steps used in the *W.(D.)* decision. By doing this, the defence argued the court should have a reasonable doubt which should then result in an acquittal. The Crown, referring to *Van Deventer*, argued that the court should not simply look at the accused's evidence and ask if there is a reasonable doubt. Rather, the court should look at the totality of the evidence and compare and contrast the evidence of the two parties. The Crown contended that the court should use common sense and judgment in examining the evidence. By doing this, the Crown argued there was nothing in the accused's evidence that could be accepted or relied upon. Further, the Crown stated that the accused's evidence was nothing more than male sexual fantasy and that the court was entitled to rely upon the evidence of the complainant and conclude that the charge has been proved beyond a reasonable doubt.

HELD: The court held that in early June of 2021, the accused and complainant had sexual intercourse at the accused's home after the complainant had gone there to go swimming. However, beyond this, there was nothing else in the accused's testimony that the court could deem to be plausible or accept as fact. E.D. testified that she had turned 14 years old a month or less prior to the incident. The accused was 17 and a half years old at the time of the incident. In early June of 2021, the accused was three and a half years older than the complainant. In his evidence, the accused said that they had had several encounters at school. Later, he completely backtracked from this statement and agreed with Crown counsel that until June 2021, the complainant was in grade eight and not in high school. They were in entirely different schools up until the incident and did not have meetings at school. In fact, until the complainant had gone to the accused's home in June of 2021, they had only that initial meeting at a mutual friend's and a number of conversations on Snapchat. Regarding the date of the incident, the accused almost had no recollection of the events prior to the incident. In contrast, the complainant had a good recollection of being at school and the arrangement to get together. She recalled that she had initially arranged for a friend to accompany her to the accused's home but that her friend had later changed their mind. Once at the accused's home, they both recalled that they were in the accused's room for a number of minutes while they

watched television and engaged in small talk in an attempt to break the ice. They then decided to go swimming, which lasted for approximately 30 to 45 minutes. They both agreed that nothing happened in the pool or until they were both back in the house and changed. There had been no kissing, groping or physical contact up until that point. From that point on, the evidence of the complainant and the accused differed dramatically. In the end, after considering the totality of the evidence, the court found that E.D.'s evidence was plausible and believable and accepted it as fact. The court found that the accused's evidence was not only implausible, but fantastical. The court rejected the accused's version that E.D., a 14-year-old young woman, not only consented but initiated the sexual encounter with someone she hardly knew. The court rejected the accused's evidence that she consented to and enjoyed being choked. The court rejected the accused's evidence that they had a lengthy and consensual sexual encounter in various positions. Finally, the court rejected the accused's evidence that after the sexual encounter, she quickly left to be with friends and began walking "nowhere". The court accepted the complainant's evidence and concluded that the sexual assault charge had been proven beyond a reasonable doubt. Turning to the choking charge, the court stated that both parties testified that there was choking and found that the choking took place as part of the sexual encounter, and that it occurred to overcome any resistance to the sexual intercourse. The accused was ultimately convicted of both charges.

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***R v Mills*, 2024 SKPC 11**

Evanchuk, 2024-02-06 (PC24008)

Criminal Law - Impaired Driving - Sentencing

The offender pled guilty to a charge of driving with a blood alcohol level at or above 80 mg, and while doing so, causing bodily harm to S.S., contrary to s. 320.14(2) of the *Criminal Code*. The Crown elected to proceed on the charge by way of summary conviction. The offender argued that her age and lack of previous driving offences, along with her personal circumstances, including *Gladue* factors, made a community-based disposition appropriate. The Crown submitted that due to the serious nature of the injuries suffered by S.S. and the elevated BAC readings, the court ought to impose a carceral sentence of 12 months. The offender had been consuming alcoholic beverages on the evening of August 20 and early hours of August 21, 2023. She had been transporting the victim, S.S., along with members of the offender's family in the offender's van. According to the offender, she had been consuming alcoholic beverages at a bar in the south end of Regina. She had planned on being the designated driver for her friends that evening but ended up drinking to the extent that she blacked out and has no memory of the accident. The offender's vehicle made a wide left turn at the intersection heading northbound and it was observed to accelerate at a high rate of speed. The van collided with a meridian, causing serious damage to the van. The damage from the collision was limited to the van and the passengers therein. The offender was transported to RPS to provide a breath sample. The offender gave two breath samples, both of which read 230 mg. The offender was then arrested for the subject charge. The victim, S.S., suffered painful physiological and neurological effects as well as anxiety. She was required to attend physiotherapy to regain mobility, and continued to have lingering aftereffects of concussion, including dizziness and headaches. The sole issue before the court was to determine a fit and appropriate sentence for the offender.

HELD: The offender was sentenced to an 18-month conditional sentence order. She was a 60-years-old Métis woman with a lack of

criminal history. There were a number of aggravating and mitigating factors. Aggravating factors included: (1) the high BAC readings; (2) the severity of the injuries suffered by the victim and the overall effect of the incident on her health and financial situation; and (3) the nature of the driving was objectively dangerous in the circumstances. Mitigating factors included (1) the offender's guilty plea and sincere expression of remorse; (2) her age and lack of criminal history; (3) her supports in the community and likelihood of rehabilitation; and (4) the existence of Gladue factors and history of substance abuse in her family. The offence was not statutorily precluded from being eligible for a conditional sentence. The court was also satisfied that based on the particular circumstances of the offender, such as her age, supports in the community and lack of criminal history, the risk that the offender would reoffend was found to be minimal.

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